

SHOULD NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN A FIDUCIARY BREACH BE LIABLE FOR DAMAGES UNDER ERISA?

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)¹ largely to prevent pension plan administrators from misusing plan assets.² Pension plans in the United States had over \$300 billion in assets in 1974³ when Congress enacted ERISA to protect “the interests of participants in employee benefit plans and their beneficiaries.”⁴ To prevent future abuse, Congress imposed strict fiduciary obligations on those exercising discretion over or having responsibility with respect to the management, handling, or disposition of plan assets.⁵

Today, nearly twenty years after Congress enacted ERISA, plan administrators continue to misuse plan assets.⁶ ERISA authorizes suits in federal court by participants, beneficiaries, and the Secretary of Labor to prevent and remedy breaches of plan fiduciaries’ duties.⁷ However, the remedies provided are not always sufficient because the plan cannot al-

1. 29 U.S.C. § 1001-1461 (1988).

2. 29 U.S.C. § 1001(b) (1988).

3. BUREAU OF THE CENSUS, U.S. DEP’T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 332 (1981).

4. 29 U.S.C. § 1001(b) (1988).

5. 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams, Chairman, Senate Committee on Labor and Public Welfare) (“[T]he legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.”), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186. *See also* Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (1985) (reviewing ERISA’s legislative history).

6. *See, e.g.*, H.R. CONF. REP. NO. 386, 101st Cong., 1st Sess. 432 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3035 (noting that although the Department of Labor only has resources to investigate 3000 plans each year out of the approximately 5.5 million plans that it oversees, the Department finds fiduciary violations in one-fourth of the plans reviewed). *See also* Thornton v. Evans, 692 F.2d 1064, 1065 (7th Cir. 1982) (describing fiduciary breaches as “a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons”).

7. 29 U.S.C. § 1132 (1988 & Supp. III 1991). *See infra* notes 56 and 59 for the text of § 1132(a), (f). *See also* 29 U.S.C. § 1001(b) (1988) (noting that ERISA provides “remedies, sanctions, and ready access to the Federal courts” to prevent and remedy breaches by fiduciaries of their duties). Courts have held that when beneficiaries or participants sue a plan fiduciary for breaching a fiduciary duty, the proceeds collected from the judgment accrue to the plan. *See, e.g.*, Russell, 473 U.S. at 140.

ways collect the full amount of the judgment against the fiduciary. In situations in which the plan cannot fully recover its losses from the fiduciary and a non-fiduciary has knowingly aided in the breach of fiduciary duties, plans have attempted to recover damages from the participating non-fiduciaries.⁸ ERISA does not expressly make a non-fiduciary liable for knowingly aiding a fiduciary in the breach of the fiduciary's duty.⁹ Consequently, when a non-fiduciary knowingly aided in a fiduciary's breach, courts struggled within the confines of ERISA's plain language as they attempted to implement Congress' intent to protect the interests that participants and beneficiaries have in over \$3.4 trillion worth of pension plan assets.¹⁰

The courts uniformly have agreed that ERISA does not expressly grant participants and beneficiaries standing to bring suit against non-fiduciaries for knowingly participating in a fiduciary's breach.¹¹ Some

8. See, e.g., *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir. 1992) (holding a non-fiduciary jointly and severally liable with the fiduciary for damages resulting from knowing participation in the fiduciary's breach of duty); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (holding non-fiduciary liable); *Lowen v. Tower Asset Management*, 829 F.2d 1209, 1220-21 (2d Cir. 1987) (holding non-fiduciary corporations liable for acting with the fiduciary to cause prohibited investments of plan assets); *Fink v. National Sav. & Trust*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum) (approving non-fiduciary liability under ERISA); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982) (holding non-fiduciary liable); *Dole v. Compton*, 753 F. Supp. 563, 568 (E.D. Pa. 1990) (holding non-fiduciary liable for knowingly aiding in fiduciary breach); *Foltz v. U.S. News & World Report*, 627 F. Supp. 1143, 1168 (D.D.C. 1986) (holding liable non-fiduciary who participated in fiduciary breach of trust); *Brock v. Gerace*, 635 F. Supp. 563, 569 (D.N.J. 1986) (finding non-fiduciaries potentially liable for aiding in breach); *Donovan v. Daugherty*, 550 F. Supp. 390, 411 (S.D. Ala. 1982) (holding non-fiduciary liable for knowingly participating in breach of fiduciary duty); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-42 (W.D. Wis. 1979) (holding non-fiduciaries liable for knowingly participating in a fiduciary's breach). *But see* *Useden v. Acker*, 947 F.2d 1563, 1565 (11th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3843 (U.S. June 7, 1993) (No. 91-1944) (declining to impose liability on non-fiduciaries for acting in concert with fiduciaries who breached their fiduciary duties); *Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir. 1988) (declining to impose liability on a lawyer as a non-fiduciary for unjustly profiting from plan fiduciary's failure to disclose the payment from plan assets of unearned legal fees to the attorney).

9. *Diduck*, 974 F.2d at 279-80. The Second Circuit observed that "[u]nder its plain terms ERISA actions for breach of fiduciary duties lie only against the fiduciary who breaches such a duty, § 409, a co-fiduciary who knowingly participates in or conceals an act or omission of another fiduciary, § 405, or in actions by the Secretary of Labor, against a third person [a non-fiduciary] who knowingly participates in a breach of fiduciary responsibility, § 502(l)(1)." *Id.*

10. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 363 (1992). The pension plan asset level is for 1991. Although the pension plan asset level for 1974, see *supra* note 3 and accompanying text, is from the same government source, the government utilized different base years for the two computations. Consequently, for exact comparisons, the 1991 figure should be multiplied by a dollar deflator.

11. Because courts find no such express authority, most plaintiffs allege at least three alterna-

courts had fashioned a federal common law cause of action against non-fiduciaries for knowingly aiding in the breach of fiduciary duty.¹² Other courts had declined to hold non-fiduciaries liable because ERISA's plain language does not provide for actions by beneficiaries and participants against non-fiduciaries.¹³ The Supreme Court's decision in *Mertens v. Hewitt Associates*¹⁴ resolved the conflict among the circuits. In *Mertens*, the Court affirmed the Ninth Circuit's decision that non-fiduciaries who knowingly participate in a fiduciary's breach are not liable for damages.¹⁵

This Note considers whether non-fiduciaries who knowingly aid a fiduciary in the breach of his duties should be liable for damages under ERISA. Part I discusses the law of trusts, ERISA, and the Supreme Court's interpretation of ERISA's relationship to the common law of trusts.¹⁶ Part II evaluates the analysis of the circuit courts prior to the *Mertens* decision.¹⁷ Part III analyzes the Supreme Court's decision in *Mertens*.¹⁸ Part IV proposes a statutory amendment that would make non-fiduciaries jointly and severally liable for plan losses resulting from knowing participation in a fiduciary breach.¹⁹

tive theories of liability by characterizing those who knowingly participate in a fiduciary's breach as fiduciaries, parties in interest, or non-fiduciaries. See, e.g., *Nieto v. Ecker*, 845 F.2d 868, 870-71, 873 (9th Cir. 1988) (noting that participants alleged attorney was liable alternatively as a fiduciary, a party-in-interest, or a non-fiduciary). A discussion of how to distinguish between the three different characterizations is beyond the scope of this Note.

12. See, e.g., *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir. 1992); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541-42 (7th Cir. 1991); *Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). See also *Painters of Philadelphia District Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1153 n.9 (3d Cir. 1989) (noting that because the beneficiaries did not allege that the non-fiduciary had knowingly participated in the fiduciary's breach, they could not recover); *Fink v. National Sav. & Trust*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum) (approving non-fiduciary liability under ERISA).

13. See, e.g., *Mertens v. Hewitt Associates*, 948 F.2d 607, 612 (9th Cir. 1991), cert. granted, 113 S.Ct. 49 (1992); *Useden v. Acker*, 947 F.2d 1563, 1565 (11th Cir. 1991), petition for cert. filed, 60 U.S.L.W. 3843 (U.S. June 1, 1992) (No. 91-1944); *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988).

14. 113 S. Ct. 2063 (1993). See *infra* notes 156-224 and accompanying text.

15. *Mertens*, 113 S. Ct. at 2072.

16. See *infra* notes 20-90 and accompanying text.

17. See *infra* notes 91-155 and accompanying text.

18. See *infra* notes 156-224 and accompanying text.

19. See *infra* notes 225-40 and accompanying text.

I. THE LAW OF TRUSTS, ERISA, AND THE SUPREME COURT'S INTERPRETATION

Congress enacted ERISA to stop trustees from misusing plan assets through self-dealing, imprudent investing, and misappropriation—conduct which historically had prevented many employee benefit plan participants and beneficiaries from receiving their benefits.²⁰ Congress directed the federal judiciary to develop federal common law²¹ governing ERISA-regulated plans and protecting the interests of plan participants and beneficiaries in a manner consistent with both the traditional law of trusts and the “special nature and purposes of employee benefit plans.”²²

A. *The Law of Trusts*

Under common law, a trustee has a duty of loyalty that requires the trustee to act in good faith and solely in the beneficiary's interest.²³ In fulfilling the duty of loyalty, the trustee must exercise the care and skill of a reasonably prudent person and whatever additional skill the trustee may actually possess.²⁴ Courts require strict compliance with the duty of loyalty because of the fiduciary's confidence in the trustee and the fiduciary relationship.²⁵

20. See 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams, Chairman, Senate Committee on Labor and Public Welfare) (observing that state and federal laws before ERISA were ineffective in preventing or correcting the abuse of employee benefit plans), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186.

21. See 120 CONG. REC. 29,941 (1974) (remarks of Sen. Javits) (“[A] body of Federal substantive law will be developed by the courts to deal with issues involving the rights and obligations under private welfare and pension plans.”). See also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (holding that courts are to develop a “federal common law of rights and obligations under ERISA-regulated plans”).

22. H.R. REP. NO. 533, 93rd Cong., 2d Sess. 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650 [hereinafter *House Report*]; S.R. REP. NO. 127, 93rd Cong., 2d Sess. 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865. Congress recognized that the trusts involved in employee benefit plans were different from typical testamentary and inter vivos trusts “both in purpose and in nature” because employee benefit plans are designed for large numbers of people. *House Report, supra*, at 4650. Therefore, Congress instructed courts to bear in mind the nature of employee benefit plans when developing federal common law. H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 302 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083.

23. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

24. *Id.* § 174.

25. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). In *Meinhard*, former Judge Cardozo described the fiduciary duty of complete, undivided loyalty as follows:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior Uncompromising rigidity

A trust beneficiary reasonably expects third persons not to participate knowingly in a fiduciary's breach.²⁶ Third persons have a corresponding duty not to participate knowingly in a fiduciary's breach and will be liable to the beneficiary for such conduct.²⁷ The common law's rationale for imposing liability on non-fiduciaries who knowingly aid a fiduciary's breach is that beneficiaries may not be able to obtain full relief unless courts can impose liability on the non-fiduciary.²⁸

The common law only holds a non-fiduciary liable for knowingly participating in the fiduciary's breach of duty.²⁹ A beneficiary must prove two elements to prevail in a suit against a non-fiduciary.³⁰ First, the beneficiary must show that the non-fiduciary's act or omission furthered or completed the fiduciary's breach of duty.³¹ Second, the beneficiary must prove that the non-fiduciary had actual or constructive knowledge that the transaction was a breach of the fiduciary's duty.³² If the beneficiary successfully proves that the third party knowingly participated in the fiduciary's breach, the third party is jointly and severally liable with the fiduciary to the beneficiary for the damage done to the trust res.³³

B. ERISA

Title I of ERISA protects employee benefit rights by imposing on fidu-

has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty. . . .

Id. at 546. Although *Meinhard* is often cited to explain the duty of loyalty owed by a trustee as a fiduciary, the case actually involved a fiduciary relationship between two joint venturers rather than between a trustee and a beneficiary.

26. GEORGE G. BOGERT & GEORGE T. BOGERT, *TRUSTS AND TRUSTEES* § 901 (2d ed. 1982) (stating that "the beneficiary as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust").

27. *Smith v. Ayer*, 101 U.S. 320, 327 (1879) ("The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property The doctrine pervades the whole law of trusts."); *RESTATEMENT (SECOND) OF TRUSTS* § 326 (1959) ("A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.").

28. For example, if the fiduciary does not have sufficient assets to satisfy the judgment, the beneficiary is left without relief. *See, e.g., Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987) (recognizing the necessity of imposing liability on non-fiduciaries under ERISA to prevent a fiduciary from shifting fiduciary obligations to one legal entity with no assets while channeling profits from self-dealing to a separate legal entity under the fiduciary's control).

29. *See* BOGERT & BOGERT, *supra* note 26, § 901.

30. *See* BOGERT & BOGERT, *supra* note 26, § 901.

31. *See* BOGERT & BOGERT, *supra* note 26, § 901.

32. *See* BOGERT & BOGERT, *supra* note 26, § 901. *See also Smith*, 101 U.S. at 325-26 (holding that constructive knowledge was sufficient to make third party liable for participation in the breach).

33. *RESTATEMENT (SECOND) OF TRUSTS*, *supra* note 27, § 326.

ciaries reporting and disclosure standards,³⁴ minimum participation and vesting standards,³⁵ funding standards,³⁶ and strict fiduciary standards.³⁷ The statute also authorizes criminal and civil penalties for violations of the Act.³⁸ Through ERISA's fiduciary standards, Congress intended to codify traditional trust law principles and apply them to employee benefit plans.³⁹ Recognizing the increasingly interstate nature of employee benefit plans, Congress also intended to bring uniformity to an area in which states had applied different rules of decision to the same fact patterns.⁴⁰ Congress increased the impact of ERISA's new, uniform fiduciary provisions by broadly preempting "any and all State laws" that "relate to" a plan regulated by ERISA⁴¹ and by granting federal courts exclusive jurisdiction over virtually all disputes involving employee benefit plans.⁴²

Section 3(21)(A) of ERISA defines a fiduciary as a person who exercises any discretionary authority or control over the management of a benefit plan, a plan's administration, or the disposition of a plan's assets, or as a person who renders investment advice for compensation.⁴³ Section 404(a) of ERISA imposes the common law duty of loyalty on em-

34. 29 U.S.C. §§ 1021-1031 (1988).

35. 29 U.S.C. §§ 1051-1061 (1988).

36. 29 U.S.C. §§ 1081-1086 (1988).

37. 29 U.S.C. §§ 1101-1114 (1988).

38. 29 U.S.C. §§ 1131-1145 (1988).

39. *House Report, supra* note 22, at 4649.

40. *House Report, supra* note 22, at 4650.

41. Section 514(a) of ERISA provides as follows:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (1988).

42. Section 502(e) of ERISA provides for federal jurisdiction, proper venue, and service of process:

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1132(e) (1988). Section 502(a)(1)(B) allows participants and beneficiaries to bring civil suits concerning individual benefits and rights. *See infra* note 59.

43. Section 3(21)(A) of ERISA provides as follows:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary au-

ployee benefit plan fiduciaries, requiring fiduciaries to perform their duties solely in the interests of plan participants and beneficiaries for the purpose of providing benefits and defraying administrative expenses.⁴⁴ Section 404(a) also applies a "prudent man" rule to fiduciary conduct and requires fiduciaries to diversify investments to minimize the risk of large losses.⁴⁵

Congress enacted section 406 of ERISA which prohibits transactions with parties in interest because it was concerned that fiduciaries were engaging in self-dealing and misappropriating plan funds.⁴⁶ Section 3(14) defines nine categories of people who are "parties in interest" to employee benefit plans.⁴⁷ The list includes the benefit plan's fiduciaries, counsel and employees, persons providing services to the plan, employers whose employees are covered by the plan, and employee organizations whose members are covered by the plan.⁴⁸ Many non-fiduciaries who knowingly participate in a fiduciary's breach are parties in interest.

ERISA's plain language provides remedies for breach of fiduciary du-

thority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A) (1988). The exception contained in subparagraph (B) states that investments in securities by investment companies registered under the Investment Company Act of 1940 (15 U.S.C. § 80a-1) do not by themselves make the investment company a fiduciary. 29 U.S.C. § 1002(21)(B) (1988). Section 1105(c)(1)(B) allows the fiduciary to designate persons other than named fiduciaries to carry out fiduciary responsibilities under the plan. 29 U.S.C. § 1105(c)(1)(B) (1988).

44. Section 404(a) provides, in pertinent part, as follows:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a)(1) (1988 & Supp. III 1991).

45. *Id.*

46. Subsection (a) of section 406 of ERISA prohibits transactions between the plan and a party in interest, subsection (b) forbids transactions between the plan and a fiduciary, and subsection (c) prevents a party in interest from transferring real or personal property to the plan. 29 U.S.C. § 1106 (1988).

47. 29 U.S.C. § 1002(14) (1988).

48. *Id.*

ties against a fiduciary who breaches a duty under section 409⁴⁹ and against a co-fiduciary who knowingly participates in or conceals another fiduciary's act or omission under section 405.⁵⁰ Section 409 of ERISA makes fiduciaries personally liable for plan losses resulting from their breach and requires the fiduciary to restore to the plan any profits made through the use of plan assets.⁵¹ It also authorizes courts to grant other appropriate equitable or remedial relief.⁵² In certain instances, section 405 of ERISA makes a fiduciary liable for a co-fiduciary's breach with respect to the same plan.⁵³ A party's liability for a breach of fiduciary duty under sections 409 and 405 depends on whether or not that party is a fiduciary under section 3(21). Consequently, most plaintiffs attempt to characterize as fiduciaries those who take part in a fiduciary breach.⁵⁴ Most plaintiffs will also allege alternatively that if some parties participating in the breach did not exercise enough discretionary control or responsibility to be deemed fiduciaries, the parties should be liable as non-fiduciaries for knowingly participating in the fiduciary's breach.⁵⁵

Congress amended ERISA in 1989, adding section 502(*l*), which contains ERISA's only explicit provision for non-fiduciary liability.⁵⁶ Sec-

49. 29 U.S.C. § 1109(a) (1988). See *infra* note 50.

50. 29 U.S.C. § 1105(a) (1988). A co-fiduciary is one who meets the definition of fiduciary in section 3(21). Because a plan usually has multiple fiduciaries, section 405 sets forth the circumstances under which one fiduciary will be liable for a breach committed by another one of the plan's fiduciaries. See *infra* note 53.

51. Section 409(a) of ERISA provides in pertinent part:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C.A. § 1109(a) (1988).

52. *Id.*

53. 29 U.S.C. § 1105(a) (1988). A co-fiduciary is liable for another fiduciary's breach in three situations. First, if the co-fiduciary knowingly participates in the breach or attempts to conceal another fiduciary's act or omission, the co-fiduciary is liable. *Id.* § 1105(a)(1). Second, if the co-fiduciary fails to fulfill fiduciary duties and this failure enables another fiduciary to breach a duty, the co-fiduciary is also liable. *Id.* § 1105(a)(2). Finally, a co-fiduciary is liable if the co-fiduciary has knowledge of another fiduciary's breach and does not make reasonable efforts under the circumstances to remedy the breach. *Id.* § 1105(a)(3).

54. See, e.g., *Useden v. Acker*, 947 F.2d 1563, 1565 (11th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3843 (U.S. June 7, 1993) (No. 91-1944); *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988).

55. See, e.g., *Useden*, 947 F.2d at 1579; *Nieto*, 845 F.2d at 873.

56. Originally, ERISA did not contain any express provisions for non-fiduciary liability. Section 502(*l*) of ERISA, 29 U.S.C. § 1132(*l*) (Supp. III 1991), was added by an amendment in the 1989

tion 502(I)(1) allows the Secretary of Labor to assess a civil penalty against a non-fiduciary who knowingly participates in a fiduciary breach.⁵⁷ The penalty may equal twenty percent of a judgment against a fiduciary or non-fiduciary who knowingly participated in the fiduciary's breach.⁵⁸

Section 502(a) of ERISA gives plan beneficiaries and participants standing to bring civil actions in federal court.⁵⁹ Subsection 502(a)(2)

Omnibus Budget Reconciliation Act, Pub. L. No. 101-239, § 2101, 103 Stat. 2123 (1989). Section 502(I) provides as follows:

- (1) In the case of —
 - (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
 - (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
- (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—
 - (A) pursuant to any settlement agreement with the Secretary, or
 - (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.
- (3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—
 - (A) the fiduciary or other person acted reasonably and in good faith, or
 - (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.
- (4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

29 U.S.C. § 1132(I) (Supp. III 1991).

57. *Id.* § 1132(I)(1).

58. *Id.*

59. Section 502(a) of ERISA provides that

A civil action may be brought —

- (1) by a participant or beneficiary —
 - (A) for the relief provided for in subsection (c) of this section, or
 - (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
- (2) by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
- (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
- (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
- (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to

allows a participant or beneficiary to bring civil suit for "appropriate relief" under section 409.⁶⁰ Subsection 502(a)(3) is a catch-all provision⁶¹ that allows a participant or beneficiary to bring suit to enjoin any act or practice that violates any provision of subchapter I of ERISA or that violates the benefit plan's terms.⁶² Subsection 502(a)(3) also authorizes the court to grant beneficiaries and participants "other appropriate equitable relief."⁶³ The equitable relief may include an injunction to prevent a violation of fiduciary duty, a constructive trust, created to preserve plan assets, or removal of a fiduciary.⁶⁴

C. *The Supreme Court's Interpretation of ERISA's Relationship to the Law of Trusts*

In *Massachusetts Mutual Life Ins. Co. v. Russell*,⁶⁵ the Supreme Court limited fiduciary liability under ERISA to actions brought for the plan's benefit.⁶⁶ In *Russell*, an employee benefit plan beneficiary brought suit under section 502(a) against a plan fiduciary for the untimely processing of benefit claims.⁶⁷ The beneficiary sought extracontractual damages as the appropriate section 409(a) relief that section 502(a)(2) grants to participants and beneficiaries in suits against fiduciaries.⁶⁸ The Supreme

enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

29 U.S.C. § 1132(a) (1988 & Supp. III 1991).

60. 29 U.S.C. § 1132(a)(2) (1988). The "appropriate relief" under § 409 may include the recovery of damages, but the plain language of § 409 only applies to fiduciaries. See *supra* note 51 and accompanying text.

61. 29 U.S.C. § 1132(a)(3) (1988 & Supp. III 1991). The language of § 1132(a)(5) provides the same remedies in suits brought by the Secretary of Labor that § 1132(a)(3) provides in suits brought by participants or beneficiaries. See *supra* note 59.

62. 29 U.S.C. § 1132(a)(3) (1988 & Supp. III 1991).

63. *Id.*

64. S. REP. NO. 383, 93rd Cong., 2d Sess. 105-06 (1973), reprinted in 1974 U.S.C.C.A.N. 4890, 4989.

65. 473 U.S. 134 (1985).

66. *Id.* at 144. The Court found that any recovery for a violation of section 409(a) in a suit brought by a participant or beneficiary against a fiduciary inures to the benefit of the plan as a whole. *Id.* at 140. The Court cited the language of section 409(a), recognizing that the fiduciary relationship is "with respect to a plan" and that the potential personal liability a fiduciary faces is the responsibility "to make good to such plan any losses to the plan . . . and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." *Id.* at 139.

67. *Id.* at 137.

68. *Id.* at 138.

Court held that a fiduciary is not personally liable to a plan participant or beneficiary for extracontractual damages caused by improper or delinquent processing of benefit claims.⁶⁹

The plan beneficiary in *Russell* made two arguments for extracontractual damages.⁷⁰ The beneficiary argued that section 409(a) expressly provides for extracontractual damages,⁷¹ and asserted, alternatively, that the Court should imply a private right of action to recover such damages.⁷² The Court rejected the beneficiary's first argument by noting that all of the remedies in section 409(a) provide relief to the plan itself, not to an individual beneficiary, and that nothing in the text of section 409(a) supports an award of extracontractual damages to an individual beneficiary.⁷³

The Court then applied the four-factor analysis from *Cort v. Ash*⁷⁴ to the beneficiary's argument that a cause of action for extracontractual damages should be implied even if it is not expressly authorized by ERISA.⁷⁵

Under the *Cort* analysis, the judiciary must make four inquiries in order to decide whether or not a private remedy exists in a statute that does not expressly provide one.⁷⁶ First, is the plaintiff a member of "the class for whose especial benefit the statute was enacted?"⁷⁷ Second, is there any explicit or implicit indication of congressional intent to create or deny the remedy requested?⁷⁸ Third, is implying the requested remedy consistent with the purposes underlying the legislative scheme?⁷⁹ Finally, is the cause of action one that is traditionally relegated to state law, such that an implied cause of action based solely on federal law would be

69. *Id.* at 144.

70. *Russell*, 473 U.S. at 138.

71. *Id.*

72. *Id.*

73. *Id.* at 144. The Court observed that the beneficiary relied entirely on § 409(a) and expressly disclaimed any reliance on § 502(a)(3), which allows a beneficiary to "obtain other appropriate equitable relief." *Id.* at 139 n.5. Consequently, the Court did not consider whether any other provision might authorize recovery of extracontractual damages. *Id.* Similarly, the Court did not decide whether § 409(a) authorizes recovery of such damages from a fiduciary by a plan. *Id.* at 144 n.12.

74. 422 U.S. 66 (1975).

75. *Russell*, 473 U.S. at 145.

76. *Cort*, 422 U.S. at 78.

77. *Id.* (quoting *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

78. *Cort*, 422 U.S. at 78.

79. *Id.*

inappropriate?⁸⁰

The Court acknowledged that the first and fourth factors supported the beneficiary's claim because the beneficiary was a member of the class for whose benefit ERISA was enacted and also because ERISA broadly preempted state law, thus removing any state law barrier to implying a remedy.⁸¹ However, the Court found that the second and third factors, legislative intent and consistency with ERISA's statutory scheme, failed to support the beneficiary's claim for an implied remedy of extracontractual damages.⁸² The Court stated that the six civil enforcement provisions in section 502(a) and the accompanying legislative history strongly suggest that Congress did not inadvertently omit other remedies.⁸³ The Court explained that congressional intent is "the essential predicate for implication of a private remedy"⁸⁴ and without an inference of congressional intent, the *Cort* inquiry ends.⁸⁵ Therefore, the Court declined to imply a private cause of action.⁸⁶

However, in *Firestone Tire & Rubber Co. v. Bruch*,⁸⁷ the Court expressly authorized courts to develop a federal common law under ERISA that would rely on traditional principles of trust law.⁸⁸ In *Firestone*, the Court established the proper standard for judicial review of a participant's suit challenging a denial of benefits under section 502(a)(1)(B).⁸⁹ The Court recognized that ERISA's language parallels the language of traditional trust law in many places and that the legislative history behind ERISA's fiduciary provisions supports the codification and applica-

80. *Id.*

81. *Russell*, 473 U.S. at 145.

82. *Id.*

83. *Id.* at 145-46.

84. *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981)).

85. *Russell*, 473 U.S. at 145-48.

86. *Id.* at 148.

87. 489 U.S. 101 (1989).

88. *Id.* at 110.

89. *Id.* at 105. In *Firestone*, the Court addressed the proper standard for judicial review of benefit determinations by fiduciaries or plan administrators under ERISA. *Id.* It also refined the definition of the term "participant" in section 2(7) of ERISA. *Id.* at 105. The Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. The Court found that the term "participant" refers either to employees who are covered or reasonably expect to be covered by the plan, or to former employees whose benefits have vested or who reasonably expect to return to employment covered by the plan. *Id.* at 117.

tion of traditional trust principles to employee benefit plans.⁹⁰

The Supreme Court's opinions in *Russell* and *Firestone* are primary sources of guidance for lower courts that must construe ERISA's statutory language and create federal common law under ERISA to fill the statutory interstices. However, the *Russell* court followed ERISA's plain language, refusing to imply a private cause of action that would be analogous to the common law, while the court in *Firestone* incorporated a common-law standard. The two different approaches raise questions about how much of the law of trusts should be read into ERISA and into the federal common law developing under the statute.

II. CIRCUIT COURT DECISIONS PRIOR TO *MERTENS*

A. Courts Holding Non-Fiduciaries Liable

Courts that held non-fiduciaries liable for knowingly participating in a fiduciary's breach generally advanced two theories of liability. The first theory held the non-fiduciary liable under section 502(a)(3) of ERISA, which authorizes the court to provide "other" equitable relief for violation of a fiduciary's duties.⁹¹ Under the second theory, courts developed federal common law to fill ERISA's interstices, holding the non-fiduciary liable for knowingly participating in the fiduciary's breach.⁹²

*Freund v. Marshall & Ilsley Bank*⁹³ was the progenitor of decisions holding that plan participants and beneficiaries may sue non-fiduciaries in federal court for knowingly participating in a fiduciary's breach. The

90. *Id.* at 110. See *supra* notes 22, 39 and accompanying text.

91. See *infra* notes 93-107 and accompanying text. Section 502(a)(3) authorizes participant and beneficiary suits. The Secretary of Labor had advanced the same theory for suits brought under § 502(a)(5). See, e.g., *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-42 (W.D. Wis. 1979) (finding liability under §§ 502(a)(3) and (a)(5)).

92. See *infra* notes 115-30 and accompanying text. Additionally, the Seventh Circuit had advanced a third theory which held a non-fiduciary liable for conspiring with a fiduciary to breach the duties imposed by ERISA. See, e.g., *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); *Fremont v. McGraw-Edison Co.*, 606 F.2d 752, 759 (7th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980). Because these plaintiffs were not able to prove the elements of a conspiracy, the non-fiduciaries were not held liable. However, the Seventh Circuit had affirmed that in a civil action against a trustee, third parties who had aided or conspired with the trustee in a breach of fiduciary duty may have been liable "to the extent that they [had] profited from the breach." *Thornton*, 692 F.2d at 1078. Because non-fiduciaries were only liable to the extent of their profits from a breach and were not jointly and severally liable, the remedy may have been inadequate. If the non-fiduciaries' profits were less than the difference between the plan's loss and the amount the fiduciary could have contributed toward the judgment, the plan would not have been fully compensated for its loss.

93. 485 F. Supp. 629 (W.D. Wis. 1979).

Freund court held the non-fiduciaries jointly and severally liable with the fiduciaries under sections 409(a) and 502(a)(3) for damages to the plan resulting from the breach.⁹⁴

In *Freund*, the employee benefit plan's trustees and their relatives were the controlling shareholders in several companies whose employees were covered by the plan.⁹⁵ The trustees permitted virtually all of the plan's assets to be loaned back to the sponsoring companies in exchange for unsecured promissory notes.⁹⁶ By allowing the plan assets to be loaned back, the trustees violated their duty of prudence under section 404(a)(1)(B) and failed to diversify the plan's investments to minimize the risk of large losses as required by section 404(a)(1)(C).⁹⁷ Because the sponsoring companies were parties in interest under section 3(14)(C),⁹⁸ the loans were also prohibited transactions with parties in interest⁹⁹ in violation of section 406(a). The trustees and their relatives subsequently sold the sponsoring companies. Under the new owner, the sponsoring companies went bankrupt, causing the plan's unsecured notes to decrease in value by over \$450,000.¹⁰⁰

The court reasoned that although only fiduciaries can breach ERISA's fiduciary standards, both fiduciaries and non-fiduciaries who knowingly participate in the fiduciaries' breach may be held liable for damages.¹⁰¹ Therefore, the court imposed liability not only on the trustees for their breach of fiduciary duty under section 409(a),¹⁰² but also on the relatives, who were non-fiduciaries under ERISA.¹⁰³ Recognizing that Congress intended to apply traditional trust law to ERISA, the court cited the common law principle that non-fiduciaries who knowingly participate in a fiduciary's breach, either directly or through an agent, are liable in an action brought by the beneficiary.¹⁰⁴ The court stated that a non-fiduciary will be liable under common law if the non-fiduciary commits any act or omission which furthers or completes the fiduciary's breach and the

94. *Id.* at 644.

95. *Id.* at 639.

96. *Id.* at 636.

97. *Id.*

98. *See supra* notes 47-48 and accompanying text.

99. *Freund*, 485 F. Supp. at 637-38.

100. *Id.* at 642-44.

101. *Id.* at 641.

102. *Id.* at 643.

103. *Id.* at 641-42. The court held the relatives liable under section 502(a)(3), which authorizes the court to grant "other appropriate equitable relief." *Id.* at 641.

104. *Freund*, 485 F. Supp. at 642. *See supra* notes 26-29 and accompanying text.

non-fiduciary has actual or constructive knowledge that the transaction was a breach of trust.¹⁰⁵ The court found that the relatives participated in the loans that breached the trust and that the relatives had actual knowledge that the transaction was a breach of trust.¹⁰⁶ Consequently, the court held the relatives jointly and severally liable with the trustees for the plan's losses.¹⁰⁷ Since *Freund*, the Second, Fifth, Sixth, and Seventh Circuits adopted the *Freund* court's analysis of non-fiduciary liability.¹⁰⁸

After *Freund* was decided, Congress amended ERISA¹⁰⁹ by adding section 502(l), which allows the Secretary of Labor to assess penalties equal to twenty percent of the recovery from a fiduciary or a non-fiduciary against any party that knowingly participates in a fiduciary's breach.¹¹⁰ Also, as noted, the Supreme Court in *Russell*¹¹¹ and *Firestone*¹¹² further defined the applicability of trust law principles to ERISA. In *Diduck v. Kaszycki & Sons Contractors, Inc.*,¹¹³ the Second Circuit considered the *Freund* court's analysis in light of section 502(l) and *Russell*.¹¹⁴

In *Diduck*, the Second Circuit acknowledged that ERISA does not expressly give plan participants and beneficiaries a right of action against non-fiduciaries who knowingly participate in a fiduciary's breach.¹¹⁵

105. *Freund*, 485 F. Supp. at 642. See *supra* notes 25-32 and accompanying text.

106. *Freund*, 485 F. Supp. at 642. Although the court found that the relatives had actual knowledge that the transaction was a breach of trust, the court expressly recognized constructive knowledge as a sufficient basis for liability. *Id.* Other courts have also held that constructive knowledge is a basis for non-fiduciary liability. See, e.g., *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988).

107. *Freund*, 485 F. Supp. at 644.

108. See, e.g., *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir. 1992); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541-42 (7th Cir. 1991); *Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). See also *Painters of Philadelphia District Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1153 n.9 (3d Cir. 1989) (noting that the beneficiaries could not recover because they did not allege that the non-fiduciary had knowingly participated in the fiduciary's breach); *Fink v. National Sav. & Trust*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum) (approving non-fiduciary liability under ERISA).

109. The amendment was added in the 1989 Omnibus Budget Reconciliation Act, Pub. L. No. 101-239, § 2101, 103 Stat. 2123, (1989) (codified at 29 U.S.C. § 1132(l)(1) (Supp. III 1991)).

110. See *supra* notes 56-58 and accompanying text.

111. See *supra* notes 65-86 and accompanying text.

112. See *supra* notes 87-90 and accompanying text.

113. 974 F.2d 270 (2d Cir. 1992).

114. *Id.* at 279-81.

115. *Id.* at 279-80.

Next, the court decided that the legislative history behind section 502(l) indicated that the judiciary should continue to recognize a federal common law action under ERISA against non-fiduciaries who knowingly participate in a breach of fiduciary duty.¹¹⁶ To support its decision, the court cited language in the 1989 Budget Reconciliation Act Conference Report which directed courts to create legal and equitable remedies to protect participants and beneficiaries and to deter violations of the law.¹¹⁷ Prior to the amendment, courts had created a cause of action under ERISA and held non-fiduciaries who knowingly participated in a fiduciary's breach liable through an analogy to the law of trusts. In *Diduck*, the Second Circuit read the legislative history of section 502(l) as a mandate to continue filling the statute's interstices by incorporating traditional trust law into the federal common law.¹¹⁸ The Second Circuit noted that *Russell* limited courts' authority to fashion remedies, but concluded that applying *Russell*'s limiting language to the circumstances at hand would defeat the congressional mandate that courts should shape relief based on trust law principles when necessary to protect plan participants and beneficiaries.¹¹⁹

The *Diduck* court then focused on whether a federal common law cause of action under ERISA is necessary to protect plan participants and beneficiaries and to promote uniformity. The court also considered whether recognizing a federal common-law cause of action would be consistent with ERISA's scheme and further the Act's purposes.¹²⁰

The Second Circuit began by discussing the scope of ERISA's preemption of state-law actions under section 514(a).¹²¹ The court reasoned that ERISA most likely preempts any state-law cause of action against a non-fiduciary who knowingly participates in a fiduciary's breach because ERISA supersedes any and all state laws that "relate to" ERISA-regulated employee benefit plans¹²² and because Congress expected courts to develop a federal common law of rights and obligations under ERISA-

116. *Id.* at 280-81.

117. *Diduck*, 974 F.2d at 280. See H.R. CONF. REP. NO. 386, 101st Cong., 1st Sess. 433 (1989), reprinted in 1989 U.S.C.A.N. 3018, 3036 ("It remains the intent of Congress that the courts use their power of [sic] fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.").

118. *Diduck*, 974 F.2d at 280.

119. *Id.*

120. *Id.*

121. *Id.* at 280-81.

122. *Id.* at 280. See *supra* note 41 and accompanying text.

regulated plans.¹²³ Although Congress has the power to preempt state-law remedies without providing a corresponding federal remedy,¹²⁴ it is not likely that Congress intended to leave plan participants and beneficiaries without a remedy because ERISA's primary purpose was to protect the rights of plan participants and beneficiaries.¹²⁵ If Congress did not preempt state-law actions against non-fiduciaries, the congressional goal of uniformity in the laws governing employee benefit plans would be frustrated because the conduct and liability of non-fiduciaries would be determined by state law, while the conduct and liability of the fiduciary would be determined by federal law.¹²⁶ If Congress did preempt state-law actions by enacting section 502(a)(3), which provides for other appropriate equitable relief, Congress would have impeded its own goal of protecting the rights of plan participants and beneficiaries. The Second Circuit noted that an award of damages is necessary to protect the plan, however non-fiduciaries who knowingly participated in a fiduciary breach would not be liable for damages in state court due to preemption or in federal court due to section 502(a)(3)'s equitable relief limitation.¹²⁷

The *Diduck* court next considered whether creating a federal common-law cause of action for damages would be consistent with ERISA and its remedial objectives.¹²⁸ The court decided that allowing participants and beneficiaries to bring a cause of action for damages to protect the plan, rather than the extracontractual damages sought by the participant in *Russell* would further ERISA's goals of protecting the rights of participants and beneficiaries and promoting uniformity in the law gov-

123. *Diduck*, 974 F.2d at 280-81. See *supra* note 20 and accompanying text.

124. *Diduck*, 974 F.2d at 281 (citing *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)).

125. See *supra* notes 4-5, 20-22 and accompanying text. The Second Circuit acknowledged the analysis of certain courts that held that because preemption ultimately depends upon congressional purpose, if a federal common-law cause of action does not exist under ERISA, Congress could not have intended to preempt the corresponding state-law cause of action. *Diduck*, 974 F.2d at 281 (citing *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990); *Coleman v. General Elec. Co.*, 643 F. Supp. 1229, 1233-34 (E.D. Tenn. 1986), *aff'd mem.*, 822 F.2d 59 (6th Cir. 1987); *Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F. Supp. 926, 933-34 (W.D. Ark. 1990); *Munoz v. Prudential Ins. Co. of America*, 633 F. Supp. 564, 571 (D. Colo. 1986)). The critical problem with the reasoning in these cases is that it is unlikely that Congress would have purposefully preempted the state-law cause of action and not provided a corresponding federal cause of action. See *supra* note 123 and accompanying text.

126. *Diduck*, 974 F.2d at 281 (quoting *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1176 (D.D.C. 1986)).

127. *Id.* at 281.

128. *Id.*

erning employee benefit plans.¹²⁹ Consequently, the Second Circuit held that under ERISA, non-fiduciaries who knowingly participate in an ERISA fiduciary's breach of duty are jointly and severally liable with the fiduciary for the resulting damages.¹³⁰

B. Courts Not Holding Non-Fiduciaries Liable

In *Nieto v. Ecker*,¹³¹ the Ninth Circuit created a circuit split by holding that non-fiduciaries who knowingly participate in a fiduciary's breach are not liable under ERISA.¹³² In *Nieto*, plan participants sued a multi-employer plan, its trustees, and an attorney retained by the trustees to collect delinquent contributions from employers who owed the plan.¹³³ The participants contended that the attorney should be liable as a fiduciary under section 409(a), or alternatively, as a non-fiduciary who knowingly participated in a fiduciary breach under section 409(a).¹³⁴

Upon deciding that the attorney was not a fiduciary, the court inquired whether the attorney should be held liable as a non-fiduciary who knowingly participated in the fiduciary's breach.¹³⁵ The Ninth Circuit observed that the plain and unambiguous language of section 409(a) proved that the section only applied to fiduciaries.¹³⁶ Consequently, the court considered the section's legislative history irrelevant.¹³⁷

The Ninth Circuit then focused on the *Freund* court's analysis¹³⁸ and criticized it on two grounds. First, the *Nieto* court asserted that the leg-

129. *Id.*

130. *Id.* at 281. The court stated that the "well-settled" elements of the cause of action for knowingly participating in a fiduciary's breach are "1) breach by a fiduciary of a duty owed to the plaintiff, 2) defendant's knowing participation in the breach, and 3) damages." *Id.* at 281-82. See *supra* notes 30-32 and accompanying text for the elements of the common-law cause of action.

131. 845 F.2d 868 (9th Cir. 1988).

132. *Id.* at 871. See also *id.* at 874-75 (Wiggins, J., concurring) (criticizing the majority opinion for rejecting the analysis of the *Freund* line of cases and creating "a needless circuit conflict"). For a further analysis of *Nieto*, see generally, Kevin B. Bogucki et al., Case Comment, *ERISA—Nieto v. Ecker: The Propriety of Non-Fiduciary Liability Under Section 409*, 64 NOTRE DAME L. REV. 271 (1989); Julianne J. Knox, Comment, *Nieto v. Ecker: Incorporation of Non-Fiduciary Liability Under ERISA*, 73 MINN. L. REV. 1303 (1989).

133. *Nieto*, 845 F.2d at 870. The participants alleged that the attorney "had repeatedly failed to prosecute lawsuits to collect the delinquent contributions" and had collected fees for services never rendered. *Id.*

134. *Id.* at 870-71.

135. *Id.* at 871-73.

136. *Id.* at 871.

137. *Nieto*, 845 F.2d at 872 n.2.

138. See *supra* notes 93-107 for a discussion of the *Freund* decision.

islative history cited in *Freund* was too ambiguous to justify a cause of action not explicitly within the jurisdiction of federal courts.¹³⁹ Second, the Ninth Circuit argued that the *Freund* court mistakenly read the legislative history as authorizing courts to incorporate the entire body of traditional trust law into ERISA. Instead, the Ninth Circuit said the legislative history allowed courts to apply traditional trust law principles in adjudicating claims expressly authorized by ERISA.¹⁴⁰

The court in *Nieto* contended that *Russell* supported its interpretation of ERISA's remedial provisions. The Ninth Circuit recognized that the Supreme Court in *Russell* declined to imply a private cause of action against a fiduciary for extracontractual damages because Congress had already created a carefully integrated remedial scheme.¹⁴¹ Accordingly, the Ninth Circuit declined to imply a cause of action against a non-fiduciary.¹⁴²

The Ninth Circuit also considered and rejected the possibility of a cause of action for damages against a non-fiduciary under section 502(a)(3).¹⁴³ The court decided that permitting the recovery of damages under section 502(a)(3) would render section 409(a)'s damage provision superfluous and would thus violate a fundamental canon of statutory construction.¹⁴⁴ However, the court did recognize the potential availability of equitable relief, including the imposition of a constructive trust.¹⁴⁵

Three years later in *Useden v. Acker*,¹⁴⁶ the Eleventh Circuit agreed with the Ninth Circuit's conclusion that sections 409(a) and 502(a) do not impose liability on non-fiduciaries who knowingly participate in a fiduciary's breach.¹⁴⁷ However, the Eleventh Circuit disagreed with the Ninth Circuit's rationale because of the Supreme Court's opinion in *Firestone*.¹⁴⁸ The Eleventh Circuit recognized that by incorporating trust-law principles in its remedy, the *Firestone* court tempered its restrictive

139. *Nieto*, 845 F.2d at 871-72.

140. *Id.* at 872.

141. *Id.*

142. *Id.*

143. *Id.* at 873. See *supra* note 59 for the text of section 503(a)(3).

144. *Nieto*, 845 F.2d at 873. See *supra* note 51 for the text of section 409(a).

145. *Nieto*, 845 F.2d at 874.

146. 947 F.2d 1563 (11th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3843 (U.S. June 7, 1993) (No. 91-1944).

147. *Id.* at 1580, 1582. The court did not consider § 502(l)'s enactment or its legislative history.

148. *Id.* at 1580-81.

opinion in *Russell*.¹⁴⁹ Consequently, the *Useden* court interpreted ERISA as “a tailored law of trusts” that draws on traditional trust-law principles.¹⁵⁰ The Eleventh Circuit noted, however, that a particular trust-law principle should be incorporated into ERISA only if the statute’s text suggests that the principle was not deliberately omitted from the statute.¹⁵¹

The court examined ERISA’s text to determine if the drafters might have inadvertently failed to include a section providing for non-fiduciary liability.¹⁵² The court noted that Congress carefully tailored the remedial provisions of section 502(a) and deliberately authorized courts to provide appropriate equitable relief without restricting the types of defendants in sections 502(a)(3) and 502(a)(5).¹⁵³ The court also recognized that Congress expressly mentioned third parties in other parts of ERISA, but said nothing about non-fiduciary liability for monetary damages.¹⁵⁴ Ultimately, the Eleventh Circuit declined to impose liability for money damages on non-fiduciaries who knowingly participated in the fiduciary’s breach because it found that Congress had not accidentally omitted a section providing for non-fiduciary liability for damages.¹⁵⁵

III. *MERTENS V. HEWITT ASSOCIATES*

In *Mertens v. Hewitt Associates*¹⁵⁶ the Supreme Court resolved the dispute among the circuit courts. The Court affirmed the Ninth Circuit’s decision¹⁵⁷ and held that a non-fiduciary who knowingly participates in a breach of a fiduciary duty imposed by ERISA is not liable for the plan’s losses resulting from the breach.¹⁵⁸ The majority opinion, written by

149. *Id.*

150. *Useden*, 947 F.2d at 1581.

151. *Id.* Specifically, the court formulated the guiding principle that “a court should only incorporate a given trust law principle if the statute’s text negates an inference that the principle was omitted deliberately from the statute.” *Id.*

152. *Id.*

153. *Id.*

154. *Useden*, 947 F.2d at 1581-82.

155. *Id.* at 1582. The Eleventh Circuit noted that courts could not infer that the lawmakers’ silence on nonfiduciary liability was inadvertent: “in an area where they had already said so much out loud.” *Id.*

156. 113 S. Ct. 2063 (1993).

157. 948 F.2d 607 (9th Cir. 1991).

158. *Mertens*, 113 S. Ct. at 2065, 2072. Because the parties had focused on what forms of relief are available, the Court decided the case solely on that question. *Id.* at 2067-68. The Court based its holding on that narrow question, even though it was not clear that a remediable wrong had been

Justice Scalia,¹⁵⁹ concluded that when Congress drafted ERISA's remedial scheme, it had carefully omitted the common law's joint and several liability for non-fiduciaries who knowingly participated in a fiduciary breach.¹⁶⁰ The Court explained that Congress omitted joint and several liability in order to strike a balance between ERISA's primary goal of protecting employees¹⁶¹ and the secondary goal of controlling pension costs.¹⁶² Consequently, the Court did not attempt to adjust the balance struck by Congress.¹⁶³

In *Mertens*, the petitioners, participants in the Kaiser Steel Retirement Plan,¹⁶⁴ sued Hewitt Associates, the plan's actuaries, for acts and omissions that caused the plan to be underfunded, caused the Pension Benefit Guaranty Corporation to terminate the plan, and made the participants lose a substantial portion of their pensions.¹⁶⁵ The petitioners sought

alleged. *Id.* at 2067. Additionally, the respondents, Hewitt Associates, had expressly disclaimed reliance on the argument that the wrong alleged was legally remediable. *Id.*

159. Justice Scalia was joined in the opinion by Justices Blackmun, Kennedy, Souter, and Thomas. *Id.* at 2065.

160. *Id.* at 2072.

161. See *supra* notes 4-5, 20-22, 117 and accompanying text.

162. *Mertens*, 113 S. Ct. at 2072.

163. *Id.*

164. The Kaiser plan was an ERISA-qualified plan. *Id.* at 2065.

165. *Mertens*, 948 F.2d 607, 609 (9th Cir. 1991). Early in 1980, the Kaiser Steel Corporation restructured its business operations, virtually eliminating its steel-making operations. *Id.* at 609. As a result, many employees who were plan participants retired early. *Id.* Due to the significant increase in the number of participants taking early retirement, the plan's funding costs increased substantially. *Id.*

Hewitt Associates had developed actuarial assumptions for the plan based on Kaiser's corporate structure prior to the restructuring. *Id.* After the restructuring, Hewitt did not change the actuarial assumptions underlying the plan, rather, it delegated to Kaiser the responsibility for changing the assumptions. *Id.* Hewitt delegated the responsibility because Hewitt was also providing actuarial services to Kaiser. *Id.* Hewitt did not disclose its relationship with Kaiser and the potential conflict of interest to the plan's administrators because it did not want to jeopardize its lucrative professional relationship with Kaiser. *Id.*

If the actuarial assumptions had been changed to properly reflect the restructuring, Kaiser would have been required to make substantially higher contributions to the plan. *Id.* The plan was left severely underfunded because the actuarial assumptions were not changed. *Id.* The Pension Benefit Guaranty Corporation determined that the plan was severely underfunded and terminated the plan pursuant to 29 U.S.C. § 1322. *Id.* As a result, plan participants only received the benefits guaranteed by ERISA, which were substantially less than the benefits due under Kaiser's plan. *Id.* For example, petitioner *Mertens*' monthly pension was reduced from \$2,016.00 to \$521.00. *Id.* The petitioners brought suit on their own behalf and on behalf of the class of former Kaiser employees who participated in the plan.

The Court accepted the petitioners' allegations as true because the District Court for the Northern District of California had dismissed the suit for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.*

monetary damages as "other appropriate equitable relief" under section 502(a)(3).¹⁶⁶ The petitioners argued that the language of section 502(l)¹⁶⁷ enacted by the Omnibus Budget Reconciliation Act of 1989 supports the availability of monetary damages under section 502(a)(3).¹⁶⁸

The petitioners observed that section 502(l)(1) requires the Secretary of Labor to assess a civil penalty equal to twenty percent of the "applicable recovery amount" against a fiduciary who breaches or against any other person who knowingly participated in the breach.¹⁶⁹ The "applicable recovery amount" is defined in section 502(l)(2) as either the amount of a settlement agreement or of a judgment against a fiduciary or a non-fiduciary who knowingly participated in a fiduciary's breach.¹⁷⁰ The judgment used in section 502(l)(2) to compute the penalty is the judgment obtained by the Secretary of Labor under section 502(a)(2) or (a)(5).¹⁷¹

The petitioners argued that sections 502(l)(1) and (2) are clearly based on the assumption that judgments for damages always could be obtained against fiduciaries and non-fiduciaries.¹⁷² If judgments could not be obtained, the twenty percent penalty would have no basis.¹⁷³ Section 502(l)(2) incorporates the statutory authorization of judgments for damages by reference to sections 502(a)(2) and (a)(5). The clear inference from section 502(l)(2) is that sections 502(a)(2) and (a)(5) authorize suits to recover plan losses from non-fiduciaries.¹⁷⁴

166. *Mertens*, 113 S. Ct. at 2067. The petitioners' original complaint stated three causes of action: "breach of professional duties to the plan" under ERISA, transactions as a party in interest in violation of ERISA, and professional malpractice under California state law. *Mertens*, 948 F.2d at 609. The petitioners subsequently alleged that their first cause of action actually stated three claims under ERISA: breach of fiduciary duty, knowing participation in a breach of fiduciary duty, and non-fiduciary breach of actuarial duties. *Id.* See *supra* note 11 and accompanying text for a discussion of the typical plaintiff's claims. The Court granted certiorari on the question "whether ERISA authorizes suits for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." *Mertens*, 113 S. Ct. at 2066.

167. See *supra* note 55 and accompanying text.

168. Brief for Petitioner at 13-18, *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993) (No. 91-1671). Both the United States and the American Association of Retired Persons filed briefs as amici curiae in support of the participants' argument.

169. *Id.* at 14. See also *supra* notes 56-58 and accompanying text.

170. Brief for Petitioner at 14-15, *Mertens* (No. 91-1671). See also *supra* notes 56-58 and accompanying text.

171. Brief for Petitioner at 14-15, *Mertens* (No. 91-1671). See also *supra* notes 55-57 and accompanying text.

172. Brief for Petitioner at 15, *Mertens* (No. 91-1671).

173. *Id.*

174. *Id.* The petitioners argued that both sections 502(a)(2) and (a)(5) authorize suits for losses

The petitioners contended that participants and beneficiaries must be able to sue non-fiduciaries for losses under section 502(a)(3) because the Secretary of Labor may do so under section 502(a)(5).¹⁷⁵ Sections 502(a)(3) and (a)(5) provide the same remedies.¹⁷⁶ The relevant language in sections 502(a)(3) and (a)(5) is identical.¹⁷⁷ The primary distinction between the sections is that section 502(a)(3) authorizes participants and beneficiaries to sue under both ERISA and the terms of a specific plan, whereas section 502(a)(5) authorizes the Secretary of Labor to sue only under ERISA.¹⁷⁸ The petitioners argued, therefore, that non-fiduciaries must be liable under both sections 502(a)(3) and (a)(5).¹⁷⁹

The petitioners also argued that section 502(l)(3)(B) also clearly indicates that the phrase "appropriate equitable relief" in sections 502(a)(3) and (a)(5) includes the recovery of "all losses to the plan."¹⁸⁰ Under section 502(l)(3)(B), the Secretary of Labor may waive or reduce the civil penalty, if the penalty would prevent the fiduciary or non-fiduciary from restoring "all losses to the plan without severe financial hardship."¹⁸¹ The petitioners argued that the waiver provision would be meaningless if non-fiduciaries were not liable for "all losses to the plan."¹⁸²

The Court rejected the petitioners' arguments. Initially, the Court observed that non-fiduciaries are not liable for plan losses under section

against non-fiduciaries. *Id.* The petitioner contended that because the Secretary of Labor could bring suits against non-fiduciaries under section 502(a)(2), participants also must be able to bring suits. *Id.* However, as the Court noted, section 502(a)(2) refers to suits brought under section 409, which is expressly limited to fiduciaries. *Mertens*, 113 S. Ct. at 2067-68. See *infra* note 179 and accompanying text. The stronger argument is that because section 502(a)(2) is expressly limited to suits against fiduciaries, non-fiduciary liability must be found in section 502(a)(5).

175. Brief for Petitioner at 15, *Mertens* (No. 91-1671). The reason for excluding participants and beneficiaries from section 502(l) is obvious: the government, not private citizens, should be assessing a penalty payable to the government.

176. See *supra* notes 59, 61 and accompanying text.

177. Brief for Petitioners at 15, *Mertens* (No. 91-1671). See also *supra* notes 59, 61 and accompanying text.

178. See *supra* note 59 and accompanying text.

179. Brief for Petitioners at 15-17, *Mertens* (No. 91-1671).

180. Brief for Petitioner at 18, *Mertens* (No. 91-1671).

181. See *supra* note 56 and accompanying text.

182. Brief for Petitioner at 18, *Mertens* (No. 91-1671). Moreover, the Conference Report on section 502(l) echoed the earlier legislative history's mandate to the courts to formulate legal and equitable remedies to protect the interests of participants and beneficiaries. H.R. CONF. REP. NO. 386, 101st Cong., 1st Sess. 433, reprinted in 1989 U.S.C.C.A.N. 3018, 3036. See also *supra* note 117 and accompanying text. For earlier legislative history, see *supra* notes 5, 20-22 and accompanying text.

502(a)(2) because the section is expressly limited to fiduciaries.¹⁸³ The Court then discussed whether the petitioners could recover plan losses as “appropriate equitable relief” under section 502(a)(3).¹⁸⁴

The Court focused on whether section 502(a)(3)’s provision for “appropriate equitable relief” includes compensatory damages—monetary relief for plan losses resulting from the fiduciary’s alleged breach.¹⁸⁵ The Court noted that damages are typically not an equitable remedy.¹⁸⁶ The Court recognized that it had previously construed language contained in Title VII of the Civil Rights Act of 1964 similar to the language contained in section 502(a)(3) to preclude “compensatory or punitive damages.”¹⁸⁷ However, the Court recognized the possibility of reading the phrase “equitable relief” as either “equitable remedies” or as “whatever relief a common law court of equity could provide.”¹⁸⁸ Because of the different possible interpretations and because ERISA is rooted in the common law of trusts,¹⁸⁹ the Court continued to consider the relief available in a court of equity at common law.¹⁹⁰ The Court recognized that courts of equity traditionally had exclusive jurisdiction over virtually all actions for breach of trust and could “establish purely legal rights and grant legal remedies.”¹⁹¹

The Court concluded, however, that Congress intended the phrase “equitable relief” in section 502(a)(3) to mean the relief typically available in equity, such as injunction, mandamus, and restitution, rather than the relief available in a court of equity.¹⁹² The Court reasoned that if “equitable relief” meant any relief available in a court of equity, the relief would not be limited at all, and the modifier “equitable” would be superfluous.¹⁹³ The Court also observed that interpreting “equitable re-

183. *Mertens*, 113 S. Ct. at 2066-67. See *supra* note 174.

184. *Id.* at 2067.

185. *Id.* at 2068.

186. *Id.*

187. *Id.* (quoting *United States v. Burke*, 112 S. Ct. 1867, 1872 (1992)). Prior to the 1991 amendments, Title VII of the Civil Rights Act of 1964 provided for “any other equitable relief as the court deems appropriate.” *Id.*

188. *Id.*

189. See *supra* notes 39, 87-90 and accompanying text.

190. *Mertens*, 113 S. Ct. at 2068-70.

191. *Id.* at 2068 (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 181, at 257 (5th ed. 1941)).

192. *Id.* at 2069.

193. *Id.* In a footnote, the Court rejected the petitioners’ argument, which the dissent accepted, that the relief is limited because punitive damages are not available. *Id.* at 2069 n.7. The Court argued that punitive damages were not a major issue when ERISA was enacted in 1974 and that the petitioners and the dissenters were “projecting current attitudes upon the helpless past.” *Id.*

lief" as the relief available for a breach of trust at common law would give the phrase different meanings in different sections of ERISA.¹⁹⁴ Consequently, the Court concluded that the "equitable relief" available under section 502(a)(3) is limited to the relief typically available in equity.¹⁹⁵

The Court then addressed the petitioners' argument based on section 502(l).¹⁹⁶ The Court stated that the "equitable relief" available under section 502(a)(5) includes "restitution of ill-gotten plan assets or profits," which provides an "applicable recovery amount" for calculating the civil penalty.¹⁹⁷ The Court then observed that even if non-fiduciaries are not liable at all for knowing participation in a fiduciary's breach, the liability of co-fiduciaries makes some "other person" than the fiduciary liable under section 502(l)(1)(B).¹⁹⁸ Consequently, the Court found that section 502(l) could have meaning without any form of non-fiduciary liability.¹⁹⁹

The Court's final analysis addressed the petitioners' argument that non-fiduciaries should be liable in order to further ERISA's basic purpose.²⁰⁰ The Court concluded that even though ERISA may preempt actions previously available under state law, "vague notions of a statute's 'basic purpose'" are not sufficient to overcome specific textual language.²⁰¹ The Court stated that Congress had carefully considered the competing interests of protecting employees and containing pension costs and had balanced those interests in ERISA's enforcement provisions.²⁰²

194. *Id.* at 2069-70. The Court noted the distinction between "equitable" and "remedial" relief in § 409(a) and the distinction between "equitable" and "legal" relief in §§ 502(g)(2)(E) (the enforcement provisions of Title I), 104(a)(5)(C) (the filing and furnishing information provisions of Title I), 4003(e)(1) (the operations provisions for the Pension Benefit Guaranty Corporation), and 4301(a)(1) (the civil actions provisions for the PBGC). *Id.*

195. *Id.* at 2070.

196. *Id.* at 2070-72.

197. *Id.* at 2071. See *supra* notes 56-58 and accompanying text.

198. *Mertens*, 113 S. Ct. at 2071. See *supra* notes 50 and 53 and accompanying text.

199. *Mertens*, 113 S. Ct. at 2071. The Court cited the Secretary of Labor's initial interpretation of § 502(l) for additional support. *Id.* The Court observed that "the proposed regulation implementing § 502(l), to be codified at 29 C.F.R. § 2560.5021-1, states that when a court awards 'equitable relief'—as opposed to 'monetary damages'—a § 502(l) penalty will be assessed only if the award involves the transfer to the plan of money or property." *Id.* (citing 55 Fed. Reg. 25,288, 25,289 n.9 (1990)).

200. *Id.*

201. *Id.* The Court observed that this is particularly true in the context of "an enormously complex and detailed statute" such as ERISA. *Id.*

202. *Id.* at 2072.

Consequently, the Court refused to "attempt to adjust the balance . . . that the text adopted by Congress has struck."²⁰³

The Court reached the wrong result in *Mertens*. As Justice White's dissent highlights,²⁰⁴ the decision is incorrect in both its legal analysis and its policy conclusions. The petitioners sought a compensatory monetary award which would have traditionally been available in a court of equity against a non-fiduciary who knowingly participated in a fiduciary's breach.²⁰⁵ In construing ERISA, courts are guided by "principles of trust law."²⁰⁶ Yet, as Justice White observed, the Court in *Mertens* stripped ERISA trust beneficiaries of a traditional common-law remedy and reached the anomalous result of affording employees less protection under ERISA than under the common law.²⁰⁷

The Court misconstrued the phrase "equitable relief" in sections 502(a)(3) and (a)(5). Regardless of the Court's distinction between "equitable remedies" and "whatever relief a common law court of equity could provide,"²⁰⁸ the Court should have recognized the availability of a make-whole compensatory monetary award because such a remedy was a traditional "equitable remedy" available in a court of equity.²⁰⁹ Justice White's dissent accurately observed that the Court could have recognized the availability of the make-whole remedy and still distinguished between "equitable remedies" and the relief generally available in a court of equity by precluding the enforcement of penalties and the award of punitive damages.²¹⁰ Moreover, the Court's attempt to give the modifier "equitable" a consistent interpretation throughout the statute²¹¹ is far more strained than simply reading the phrase "appropriate equitable relief" as

203. *Id.*

204. *Id.* Justice White's dissent was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Stevens. *Id.*

205. *Id.* (White, J., dissenting). See *supra* notes 26-33 and accompanying text.

206. *Mertens*, 113 S. Ct. at 2072 (White, J., dissenting) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)). See *supra* notes 22, 87-90 and accompanying text.

207. *Mertens*, 113 S. Ct. at 2072.

208. See *supra* note 188 and accompanying text.

209. *Mertens*, 113 S. Ct. at 2074 (White, J., dissenting). See also *supra* notes 26-33, 204 and accompanying text.

210. *Id.* at 2076 (White, J., dissenting). The majority replied by stating that punitive damages were not an issue when ERISA was enacted. *Id.* at 2069 n.7. See *supra* note 193 and accompanying text. However, such a distinction is no more of an imposition of present attitudes on the "helpless past" than the majority's assumption that Congress weighed non-fiduciary liability against the need to contain the costs of plan administration when drafting ERISA. See *supra* notes 7, 202-03 and accompanying text.

211. See *supra* notes 192-95 and accompanying text.

a general description of the remedies available in equity under trust law.²¹² Because courts are guided by the principles of trust law, the Court should have followed these principles and recognized the availability of a make-whole compensatory monetary award.²¹³

The Court also failed to recognize the significance of section 502(*I*). Section 502(*I*)(1) provides that a civil penalty may be assessed against "any other person" who knowingly participates in a fiduciary breach.²¹⁴ The petitioners had inferred from the penalty provision that some "other person," in other words, a non-fiduciary, must necessarily be liable or else the section would be superfluous.²¹⁵ The Court eliminated the necessity of inferring non-fiduciary liability from section 502(*I*) because the Court reasoned that a co-fiduciary is an "other person" as described in section 502(*I*)(1).²¹⁶ However, the Court misunderstood co-fiduciary liability. Section 405 describes the three situations where a fiduciary (the co-fiduciary in section 405) is liable for another fiduciary's breach of fiduciary responsibility.²¹⁷ In fact, section 405(a)(1) specifically describes one of the situations as the knowing participation in another fiduciary's breach.²¹⁸ The co-fiduciary is liable under section 409(a) for knowingly participating in the other fiduciary's breach.²¹⁹ Consequently, the co-fiduciary is liable as a fiduciary and may have a penalty assessed under section 502(*I*)(1)(A) for a breach of fiduciary liability.²²⁰ Because the co-fiduciary is liable under section 502(*I*)(1)(A), either section 502(*I*)(1)(B)

212. *Mertens*, 113 S. Ct. at 2075 (White, J., dissenting). The dissent also appropriately recognized that the statutory provisions cited by the majority in establishing the significance of the modifier "equitable," see *supra* note 194, do not have an analogue in the common law of trusts. *Mertens*, 113 S. Ct. at 2075 (White, J., dissenting). The dissent correctly noted that, consequently, Congress reasonably would have referred to both equitable and legal remedies to direct the courts to fashion whatever form of relief is most appropriate, whether equitable or legal. *Id.*

The dissent also properly observed that the inferences drawn from Congress' varying phraseology are of minimal certainty. *Id.* at 2075 n.4. Just as Congress used the modifiers "legal" and "equitable" to describe the relief available under certain sections, it used the modifiers "legal" and "remedial" to describe the relief available under section 409(a). *Id.* "Remedial" typically means "intended as a remedy" and "relief" is a synonym for "remedy," yet Congress still used the redundant phrase "remedial relief" in section 409(a). *Id.* Such imprecision certainly undermines the strength of the inferences drawn from word choice.

213. See *supra* notes 26-33, 205 and accompanying text.

214. See *supra* notes 56-58 and accompanying text.

215. See *supra* notes 169-82 and accompanying text.

216. See *supra* note 198 and accompanying text.

217. See *supra* notes 50 and 53 and accompanying text.

218. See *supra* note 53 and accompanying text.

219. See *supra* note 51 and accompanying text.

220. See *supra* notes 56-58 and accompanying text.

and portions of sections 502(l)(2) and (3) are superfluous or some "other person," in other words, a non-fiduciary, is liable under section 502(l)(1)(B). The Court should have recognized the non-fiduciary liability underlying section 502(l) rather than rendering superfluous a carefully integrated civil penalty section.²²¹

The Court also improperly discounted the significance of ERISA's underlying policy. The purpose behind ERISA's enactment can hardly be characterized as "vague." Section 1(b) specifically states that ERISA's purpose is "to protect the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and access to the Federal courts."²²² The legislative history is replete with references to ERISA's purpose and the 93rd Congress' intent.²²³ Previously the Supreme Court had regularly recognized both ERISA's purpose and the federal courts' role in developing federal common law to fill the statutory interstices.²²⁴ Still, the Court in *Mertens* disregarded ERISA's fundamental purpose and accepted a strained interpretation of the statute that has left plan participants and beneficiaries with less protection than the common law provided.

IV. PROPOSAL

On June 11, 1993, Labor Secretary Robert Reich wrote a letter to Senate Labor and Human Resources Committee Chairman Edward Kennedy (D-Massachusetts) stating that the *Mertens* decision threatens the Department of Labor's enforcement efforts, including the litigation pending against the Executive Life Insurance Company.²²⁵ Secretary Reich

221. The Court's argument that the Secretary of Labor's proposed regulation supports its position, *see supra* note 199, is also flawed. The proposed regulation simply states that when a court awards equitable relief, a section 502(l) penalty will be assessed only if the award transfers money or property to the plan. Despite the Court's contention, the regulation's rationale involves pragmatics, not the distinction between legal and equitable remedies. A twenty percent penalty may be computed easily using the award of money or the property's fair market value as a basis. Computing a twenty percent penalty using an injunction or a writ of mandamus as a basis is considerably more difficult.

222. 29 U.S.C. § 1001(b) (1988). *See supra* notes 4-5, 20-22 and accompanying text.

223. *See supra* notes 4, 20-22 and accompanying text.

224. *See supra* notes 87-90 and accompanying text.

225. Meegan M. Reilly, *Senate Labor Committee Approves Reconciliation Amendment*, TAX NOTES, June 21, 1993, at 1653. In the 1980s, many employers cancelled their company pension plans and replaced them with insurance annuities issued by the Executive Life Insurance Company. Junk bonds provided over sixty percent of Executive Life's funding. In 1991, Executive Life was forced into bankruptcy. Consequently, thousands of pensioners who held Executive Life annuities lost substantial amounts of their pensions. Many of these pensioners have filed suits against the

explained that the *Mertens* decision may result in the dismissal of many pending cases involving serious breaches of fiduciary duty if the defendant non-fiduciaries can characterize the relief sought as compensation for losses rather than restitution of profits or transferred assets.²²⁶

On June 16, 1993, the Senate Committee on Labor and Human Resources responded to the Department of Labor's concerns by approving a budget reconciliation amendment introduced by Senator Howard Metzenbaum (D-Ohio).²²⁷ The amendment would overrule the *Mertens* decision and make non-fiduciaries who knowingly participate in a fiduciary breach liable to the plan and plan participants.²²⁸ Under the amendment, the Secretary of Labor, participants, beneficiaries, and fiduciaries could sue for equitable relief, including monetary damages.²²⁹ The amendment would expressly preclude punitive damages as a remedy.²³⁰ Opponents of the amendment convinced Senate leaders to remove the amendment from the budget reconciliation bill.²³¹ Instead, the amendment will be considered later this year through bipartisan legislation.²³²

Opponents of the amendment have argued that an amendment reversing *Mertens* will increase the cost of administering employee benefit plans because both fiduciaries and non-fiduciaries would raise their fees to cover the additional risk of liability.²³³ The opponents argue that the increased administrative costs will inhibit pension plan formation and cause some plans to terminate.²³⁴

The amendment's opponents correctly argue that the additional liabil-

fiduciaries and non-fiduciaries who invested plan funds in Executive Life despite knowing that Executive Life relied heavily on junk bonds. Because of the *Mertens* decision, courts will dismiss many of these suits leaving a lot of pensioners without a pension and without a remedy. See 139 CONG. REC. S8530-01 (daily ed. July 1, 1993) (statements of Sens. Kennedy and Dodd).

226. *Id.* Secretary Reich also observed that the *Mertens* decision eliminated the only remedy available to plan participants who lost tax benefits because a fiduciary ignored a plan provision requiring notice of IRS rollover requirements, or who lost wages due to discriminatory firings to prevent pension benefits from vesting. *Id.*

227. *Id.*; *Labor Letter, A Special News Report on People And Their Jobs in Offices, Fields, and Factories*, WALL ST. J., June 29, 1993, at A1 [hereinafter *Labor Letter*].

228. M. Reilly, *supra* note 225.

229. *Id.*

230. *Id.* See *supra* notes 193, 210 and accompanying text.

231. *Labor Letter, supra* note 227. Senator Orrin Hatch (R-Utah) and others had criticized the inclusion of the amendment in the budget reconciliation bill. M. Reilly, *supra* note 225.

232. 139 CONG. REC. S8530-01 (daily ed. July 1, 1993).

233. M. Reilly, *supra* note 225. The National Employee Benefits Institute, the ERISA Industry Committee, and Senator Christopher Dodd (D-Connecticut) are among the amendment's opponents who have raised these arguments. *Id.*

234. *Id.*

ity exposure will increase administrative costs because fiduciaries and non-fiduciaries will need to cover the additional exposure through additional liability insurance or self-insurance. However, the inferences opponents draw from the administrative cost increases are not persuasive. Although the cost of administering plans will increase, the majority of the plan's increased cost will be passed on incrementally to the pensioners.²³⁵ Consequently, the extent to which the amendment will inhibit the formation of new pension plans or cause existing plans to terminate is probably overstated by the amendment's opponents.²³⁶

More significantly, two important policies support making non-fiduci-

235. The argument that pension plan costs can be passed on to pensioners without significantly inhibiting the formation of new plans or drastically increasing the number of plans terminating is straightforward. Assume that pensions are a normal good, in other words, as price increases, demand decreases. Assume that demand is slightly inelastic, in other words, the decrease in the pensioners' demand for pensions is less than the increase in the pensions' price. Also assume that supply is slightly elastic, in other words, the decrease in the quantity of pensions provided is greater than the increase in the cost of pensions. Elementary economics teaches that under these conditions, the majority of the increased cost of the pensions will be passed on to the pensioners.

If the pensioners are risk averse, the utility gained from the security of insurance will exceed the costs of the insurance. Therefore, the pensioners will pay for the increased cost associated with insurance by accepting a slight reduction in pension proceeds.

A simple expected value example demonstrates the inelasticity of demand because pensioners' prefer insurance over the risk associated with no insurance. Assume that the value of the pension is \$100. Given that approximately one-fourth of the plans reviewed by the Secretary of Labor have fiduciary violations and that many of those violations result in serious losses for the plan participants, *see supra* note 6 and accompanying text, assume that a 25 percent chance exists that a fiduciary breach will result in a 75 percent reduction in the pension. *See supra* note 165 for an example of a 75 percent loss. Also assume that insuring the pension plan against losses due to non-fiduciary participation in the breach would cost 10 percent of the pension's value, so that in the example, the insurance costs \$10. The pensioners have two expected value equations.

$$\begin{aligned} E[U_1] &= \text{expected value of pension without insurance} \\ &= \text{probability of breach [value of pension after breach]} \\ &\quad + \text{probability of no breach [full value of pension]} \\ &= .25 [\$25] + .75 [\$100] = \$81.25 \\ E[U_2] &= \text{expected value of pension with insurance} \\ &= \text{probability of receiving full pension after insurance} \\ &\quad \times [\text{full value of pension less cost of insurance}] \\ &= 1.00 [\$100 - \$10] = 1.00 [\$90] = \$90.00 \end{aligned}$$

The rational, risk-averse pensioner would choose the higher expected value, $E[U_2] = \$90$. Choosing insurance makes sense for the average pensioner. The average pensioner would rather have the security of a slightly lower, but insured, pension than the insecurity of a slightly higher, but uninsured, pension. In other words, the value of the peace of mind provided by purchasing insurance exceeds the price of the insurance. Consequently, the majority of the increased costs associated with insuring against a fiduciary breach would be passed on to the pensioners. As a result, pension plan formation would not be dramatically inhibited, and few existing pension plans would be terminated.

236. *See supra* note 235.

aries jointly and severally liable for plan losses resulting from knowing participation in a fiduciary breach. First, making non-fiduciaries jointly and severally liable furthers ERISA's basic purpose: protecting the interests of plan participants and beneficiaries in plan benefits.²³⁷ If non-fiduciaries are not jointly and severally liable, many participants and beneficiaries will have substantially reduced pensions due to the breach and will be left without an adequate remedy.²³⁸ Such a result does not protect the interests of plan participants and beneficiaries. The only parties who benefit from the result are non-fiduciaries who were enriched by participating in a breach and are now enjoying their profits in the repose of the *Mertens* decision. The common law would not have granted non-fiduciaries who knowingly participated in a fiduciary breach any respite.²³⁹ Affording plan participants and beneficiaries less protection under ERISA than the common law provided is anomalous at best in light of ERISA's stated policy and legislative history.²⁴⁰

Second, making non-fiduciaries jointly and severally liable requires fiduciaries and non-fiduciaries to make good on the employers' promises: pensions for retired employees and their beneficiaries. Making non-fiduciaries jointly and severally liable may increase plan administration costs, but these costs are only the costs reasonably associated with fulfilling the promises made to the pensioners. Some employers have been able to minimize plan administration costs by not obtaining insurance and, consequently, to allocate to the pensioners the risk of loss due to breach. These employers have successfully forced unsuspecting pensioners to bear the risk of loss and, by effect, self-insure. The fact that some employers have shifted the risk of loss to unsuspecting pensioners in the past does not mean that the employers should be allowed to continue to allocate the risk of loss to the pensioners. Moreover, to continue allowing

237. See *supra* notes 4-5 and 19-21 and accompanying text. Although Justice Scalia minimizes the significance of "vague notions of a statute's 'basic purpose'" in the *Mertens* majority opinion, 113 S. Ct. at 2071, section 1(b) of ERISA plainly states that "[i]t is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (1988). In the Single-Employer Pension Plan Amendments Act of 1986, Congress further expressed the title's policy, which includes the desire "to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits." 29 U.S.C. 1001(b)(c)(3) (1988).

238. See *supra* notes 4-5, 20-22, 125, 225-26 and accompanying text.

239. See *supra* notes 26-33 and accompanying text for a discussion of non-fiduciary liability under the common law.

240. See *supra* notes 4-5 and 20-22 and accompanying text.

the risk to be allocated to the pensioners is to continue allowing employers to break their promises of providing pensions to employees. Employees who work for years, relying on the employers' promises of a pension should not be left without a remedy against those who knowingly participated in the acts or omissions that cost them their hard-earned pensions. To the extent that eliminating non-fiduciary liability eliminates the only make-whole remedy available to plan participants and beneficiaries, ERISA's purpose and enforcement scheme are undermined.

The following suggested amendment, which parallels the common law of trusts, would overrule *Mertens* and allow participants and beneficiaries to obtain judgments for damages against non-fiduciaries who knowingly participate in a fiduciary's breach. The proposal expressly allows participants and beneficiaries to bring suit on behalf of the plan to recover damages from non-fiduciaries who knowingly aid in the fiduciary's breach of duty. The amendment provides the plan with the best possible opportunity to be compensated for losses resulting from the breach by holding non-fiduciaries jointly and severally liable with the fiduciary. Section 409 of ERISA could be amended by adding subsection (c):

(c) Any person who knowingly aids a fiduciary with respect to a plan in the breach of any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each fiduciary breach and to restore to the plan any profits that such person made through use of assets of the plan and other relief the court may deem appropriate.

Congress should enact the proposed amendment to protect the interests of plan participants and beneficiaries in receiving their benefits.

CONCLUSION

Whether a non-fiduciary who knowingly participates in a fiduciary breach should be liable for damages under ERISA is an issue that directly affects the everyday lives of many pension plan participants and beneficiaries. If a plan is substantially undercompensated after a fiduciary's breach because the non-fiduciaries who knowingly participated in the breach are not liable, retirees will not receive their pensions, employees will not be covered adequately by medical insurance, and surviving spouses will not receive their life insurance proceeds. Congress should enact a suitable amendment that clearly holds non-fiduciaries liable to

protect plan participants and beneficiaries who have been left even more vulnerable by the Supreme Court's decision in *Mertens*.

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* The author gratefully acknowledges the helpful comments of Professor Peter Wiedenbeck of the Washington University School of Law on earlier drafts.

