

PUNITIVE DAMAGES AND ERISA: AN ANOMALOUS EFFECT OF ERISA'S PREEMPTION OF COMMON LAW ACTIONS

This Note examines the effect of The Employee Retirement Income Security Act of 1974 (ERISA)¹ on punitive damage claims² connected with employee pensions and benefits. The readiness of federal courts to

1. Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001 *et seq.*).

ERISA § 2 [29 U.S.C. § 1001] sets forth the goals and policies behind the statute:

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . [and] that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered.

[Congress will protect] the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting . . . of financial and other information . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

[Congress will further protect] the interests of participants by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

See also Foreword to 1 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (1976) [hereinafter ERISA LEGISLATIVE HISTORY]:

Today, more than 30 million American workers are relying on private pension and welfare plans as a major source of economic security in old age. The assets of private pension arrangements . . . [are] one of the largest sources of private capital in the economy. . . .

But for the most part, this phenomenal growth was largely unregulated. While the absence of substantive requirements helped promote growth of the private system, the resulting plans set up difficult and sometimes insurmountable obstacles to plan participants.

Passage of this legislation is the end product of years of study and development by the Committee on Labor and Public Welfare. . . .

[ERISA] responded to the recommendations of the Senate study and to the objectives of a broad consensus for comprehensive reform. The new rules reflect a careful balance of incentives and controls designed by Congress to improve the equitable character of private plans while encouraging their future growth and development.

(statement by Chairman Williams, at iii).

For a brief overview of the statute, see G. BOREN, QUALIFIED DEFERRED COMPENSATION PLANS § 1:04 (1983).

2. Punitive damage claims arise in various contexts related to ERISA. They have been included with civil actions brought under section 502(a) [29 U.S.C. § 1132(a)], and they have been included with common law claims brought in conjunction with ERISA claims. *See infra* notes 25-42 and accompanying text.

Although this Note focuses on punitive damages, the issues and arguments often apply as well to "extracontractual" damages, which are awarded for injuries beyond the denial of employee benefits.

preempt state common law actions with ERISA and the courts' hesitancy to permit punitive damage claims in ERISA civil actions have had a significant effect on causes of action which traditionally included punitive damages.³

Part I reviews the applicable statutory provisions and their historical development, discusses various judicial treatments of punitive damage claims, and explains the effect of *Massachusetts Mutual Life Insurance Co. v. Russell*.⁴ Part II analyzes ERISA preemption of state statutory and common law as it affects claims for punitive damages. Part III dis-

See infra notes 33-38, 49-60 and accompanying text (discussing the *Russell* case involving extracontractual and punitive damages).

3. Section 514 [29 U.S.C. § 1144] (*see infra* Part II.A) provides for the broad preemption of state laws that "relate" to "employee benefit plans". The Supreme Court recently interpreted this preemption to include many actions (e.g. fraud, breach of contract, breach of fiduciary duty, or intentional infliction of emotional distress) upon a finding that the action related to an "employee benefit plan." *See infra* notes 49-60, 86-99 and accompanying text. The end result of ERISA, therefore, is that it preempts common law actions which formerly provided punitive damages. In some sense, this leads to the peculiar result that ERISA might protect the defendants whom Congress intended to punish. Accordingly, this Note will explain the interrelation of the issues of preemption, common law actions, and punitive damages.

ERISA § 3(1)-(3) [29 U.S.C. § 1002(1)-(3)] defines "employee benefit plans" in terms of "welfare plans" and "pension plans":

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. § 186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or
 (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
 regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. . . .

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

4. 105 S.Ct. 3085 (1985). The term "*Russell*" as used in this Note collectively refers to the Ninth Circuit's decision at 722 F.2d 482 (*see infra* notes 33-38) and the Supreme Court's decision at 105 S.Ct. 3085. (*see infra*, Part I.C.)

cusses various arguments regarding the issue of punitive damages under ERISA and proposes solutions based on the effect of ERISA's preemption of traditional common law causes of action.

I. HISTORY

A. *The ERISA Civil Actions*

ERISA section 502(a)⁵ outlines four main classes of plaintiffs: "participants",⁶ "beneficiaries",⁷ "fiduciaries",⁸ and the "Secretary".⁹ In addition, section 502(d)¹⁰ authorizes the employee benefit plan to sue and be sued.¹¹ Sections 502(e) and (f)¹² confer federal court jurisdiction and nationwide service of process, while section 502(g)¹³ provides for the discretionary award of attorney fees and costs.

5. 29 U.S.C. § 1132(a). Section 502(a) provides as follows:

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary— . . .

(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, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan. . . .

For an overview of the ERISA civil enforcement scheme, see generally G. BOREN, *QUALIFIED DEFERRED COMPENSATION PLANS* §§ 16:11-:20 (1983).

6. Section 3(7) [29 U.S.C. § 1002(7)] defines a "participant" as:

any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

7. Section 3(8) [29 U.S.C. § 1002(8)] defines a "beneficiary" as "a person designated by a participant or by the terms of an employee benefit plan who is or may become entitled to a benefit thereunder."

8. Section 3(21) [29 U.S.C. § 1002(21)] defines a "fiduciary" as "anyone who exercises any discretionary authority or control in the management and administration of the plan and its assets or who renders investment advice for compensation."

9. The "Secretary" is the Secretary of Labor. § 3(13) [29 U.S.C. § 1002(13)]. In addition, §§ 502(h) [29 U.S.C. § 1132(h)] and 504 [29 U.S.C. § 1134] respectively give the Secretary authority to intervene in civil actions brought by others to investigate past and suspected ERISA violations.

10. 29 U.S.C. § 1132(d).

11. For an interpretation of § 502(d) [29 U.S.C. § 1132(d)], see *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889 (2nd Cir. 1983) (holding that § 502(d) gave the plan ability to sue as an entity, but did not confer federal jurisdiction on the plan's ERISA action).

12. 29 U.S.C. § 1132(e), (f).

13. 29 U.S.C. § 1132(g).

Private ERISA actions seeking punitive damages have primarily arisen under subsections (1), (2), or (3) of section 502(a).¹⁴ Section 502 (a)(1)¹⁵ provides two types of relief: an action against the “administrator”¹⁶ personally¹⁷ for failure to furnish information; and an action to recover benefits due, to enforce rights, and to clarify future rights pursuant to the terms of the plan.¹⁸ Section 502(a)(2),¹⁹ which provides relief pursuant to section 409,²⁰ defines the defendant as a fiduciary with respect to the plan, and describes the liability for breach of the fiduciary duty.²¹ Fi-

14. 29 U.S.C. § 1132(a) (1)-(3). *But see, e.g.,* Bittner v. Sadoff & Rudoy Indus., 490 F. Supp. 534 (E.D. Wis. 1979) (action under § 510 [29 U.S.C. § 1140] by employee against employer for retaliatory firing of the employee after employee made claim for benefits).

15. 29 U.S.C. § 1132(a)(1).

16. Section 3(16) [29 U.S.C. § 1002(16)] defines “administrator” as follows:

(A) The term “administrator” means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term “plan sponsor” means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employees organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

17. ERISA § 502(a)(1)(A) [29 U.S.C. § 1132(a)(1)(A)] refers to relief under subsection (c) [29 U.S.C. § 1132(c)]:

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court’s discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

18. ERISA § 502(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)].

19. 29 U.S.C. § 1109.

20. ERISA § 409(a) [29 U.S.C. § 1109(a)] provides as follows:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed . . . by this title 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 the use of such assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . .

21. The fiduciary’s duty is defined in ERISA § 404(a)(1) [29 U.S.C. § 1104(a)(1)]:

[A] fiduciary shall discharge his duties . . . solely in the interest of the participants and beneficiaries and:

(A) for the exclusive purposes of . . . providing benefits to participants and their beneficiaries and . . . 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;

nally, section 502(a)(3)²² provides general relief. It refers to injunctive and "other appropriate equitable relief" for participants, beneficiaries, and fiduciaries, and describes no particular defendant.²³

Because section 502 does not specifically mention punitive damages, courts have had to construe the statute to decide such claims. The results have not been consistent. The following discussion outlines the judicial treatment of punitive damages under ERISA. First, the constructions prior to the Supreme Court's decision in *Russell*;²⁴ next, the Supreme Court's analysis in *Russell*; and finally, the post-*Russell* interpretations.

B. Pre-Russell Judicial Treatment of Punitive Damages

Before the Supreme Court decided *Russell*, the circuits split on the question whether ERISA provides punitive damages.²⁵ The Ninth Circuit's decision in *Russell v. Massachusetts Mutual Life Insurance Co.*²⁶ was the leading case holding that punitive damages were available. The Eighth Circuit's decision in *Dependahl v. Falstaff Brewing Corp.*²⁷ was the leading case holding that punitive damages were not available. The Eighth Circuit's decision in *Monson v. Century Manufacturing Corp.*²⁸ represented a third line of cases which allowed punitive damages under common law actions brought in addition to ERISA claims. Prior to *Russell*, therefore, a plaintiff possibly could receive punitive damage awards under section 502(a)(2)²⁹ based on the section 409(a)³⁰ fiduciary liability.

Section 409(a) provides three remedies for breach of the statutory fidu-

(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 title or title IV.

22. 29 U.S.C. § 1132(a)(3). See *supra* note 5 for pertinent parts of the subsection.

23. As the discussion below of the various cases demonstrates, there is a wide range of potential defendants under this provision: e.g., plan fiduciaries, plan administrators, plan insurers, as well as the plan and the employer.

24. 105 S.Ct. 3085 (1985).

25. Compare *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677, 680 (C.D. Cal. 1980) (punitive damages allowed under § 409); [29 U.S.C. § 1109] with *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir. 1981) (punitive damages not allowed with ERISA claims). See also *Russell*, 722 F.2d at 491 (listing cases with different results on the punitive damages issue).

26. 722 F.2d 482 (9th Cir. 1983).

27. 653 F.2d 1208 (8th Cir. 1981).

28. 739 F.2d 1293 (8th Cir. 1984).

29. 29 U.S.C. § 1132(a)(2).

30. 29 U.S.C. § 1109(a).

ciary duty.³¹ The first two remedies require the fiduciary to make good any losses to the plan and to restore any profits. The third remedy, a "catch-all" provision and the basis for punitive damages, specifies that the fiduciary "shall be subject to such other equitable and remedial relief as the court may deem appropriate."³²

Applying section 409(a), the Ninth Circuit in *Russell v. Massachusetts Mutual Life Insurance Co.*³³ held that a beneficiary or participant could bring a private action³⁴ against a fiduciary for any breach of the fiduciary's responsibilities, duties, or obligations under ERISA. Although the court found that ERISA preempted³⁵ several state actions which the plaintiff brought,³⁶ the court held that the section 409 fiduciary duties applied to the handling of claims and to the management of plan assets.³⁷ For any breach of these duties, the plaintiff beneficiary could recover all proximately caused damages, including extracontractual damages not limited to the amount of benefits lost, and punitive damages in appropriate circumstances.³⁸

31. See *supra* note 20 for full text of § 409(a).

32. § 409(a) [29 U.S.C. § 1109(a)].

33. 722 F.2d 482 (9th Cir. 1983).

34. The action was brought under §502(a)(2) [29 U.S.C. § 1132(a)(2)] and claimed relief available under the remedy in § 409(a) [29 U.S.C. § 1109(a)].

35. 722 F.2d at 487-88.

36. *Id.* at 484 (the plaintiff brought state actions for breach of fiduciary duty, breach of contract, and intentional infliction of emotional distress).

37. *Id.* at 488.

38. 722 F.2d at 489-92. The employer terminated the salary continuation benefits due but continued to pay long-term disability benefits. *Id.* at 487. The plaintiff claimed damages caused by the employer's improper handling of her claim and her wrongful termination. Thus, she claimed extracontractual damages outside the scope of § 502(a)(1) [29 U.S.C. § 1132(a)(1)]. The Ninth Circuit granted the requested relief, including damages for mental and emotional harm manifested by physical symptoms. 722 F.2d at 490. Finally, the court held that punitive damages are available "in only very limited circumstances [where the fiduciary] . . . acted with *actual malice or wanton indifference* to the rights of the participant or beneficiary." *Id.* at 492 (emphasis added).

The Ninth Circuit supported its reasoning in *Russell* with a line of district court decisions that permitted punitive damages under ERISA. See, e.g., *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982) (permitted punitive damages against plan fiduciaries under §§ 502(a)(2) and 409(a) [29 U.S.C. §§ 1132(a)(2) and 1109(a)]); *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623 (E.D. Wis. 1982) (claim for punitive damages under § 409(a) [29 U.S.C. § 1109(a)], along with claim for mental anguish against the employer as fiduciary); *Eaton v. D'Amato*, 581 F. Supp. 743 (D. D.C. 1980) (action by trustees against plan fiduciaries for punitive damages under § 409(a) [29 U.S.C. § 1109(a)]); *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534 (E.D. Wis. 1979) (punitive damages awarded under § 510 [29 U.S.C. § 1140] by employee against employer for retaliatory firing of the employee).

Later cases decided before the Supreme Court's reversal of *Russell* followed the Ninth Circuit's reasoning. See, e.g., *Kuntz v. Reese*, 760 F.2d 926 (9th Cir. 1985) (punitive damages under ERISA

*Dependahl v. Falstaff Brewing Corp.*³⁹ held that ERISA preempted a state common law claim for tortious interference with a contract.⁴⁰ The court, in refusing to allow punitive damages, reasoned that they were not appropriate with the particular cause of action and questioned whether ERISA provided for punitive damages in any case.⁴¹ *Dependahl* apparently chose to follow the line of district court cases that held punitive damages were not available under ERISA.⁴²

The third group of pre-*Russell* cases awarded punitive damages based on common law claims that accompanied ERISA claims. Contrary to its

held appropriate in certain cases); *Winterrowd v. David Freedman and Co., Inc.*, 724 F.2d 823 (9th Cir. 1984) (upholding punitive damages award in action by plan administrator against an employer for wanton and willful failure to make required contributions to a pension plan). Two later district court opinions, *Miner v. Int'l Typographical Union Negotiated Pension Plan*, 601 F. Supp. 1390, 1393 (D. Col. 1986) and *Gilliken v. Hughes*, 609 F. Supp. 178, 182 (D. Del. 1985), allowed punitive damage claims under ERISA to proceed, and followed *Russell* by limiting such damages to circumstances where the fiduciary acted with actual malice or wanton indifference to the rights of the beneficiaries.

39. 653 F.2d 1208 (8th Cir. 1981).

40. *Id.* at 1214-16.

41. *Id.* at 1216-17. *Dependahl* held that ERISA preempted the tort of interference with contract. In deciding to disallow the punitive damage action, the court focused as much on the nature of the tort as on the ERISA civil actions:

We do not think punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts. However, we need not decide this issue, because we find that punitive damages are inappropriate in this case under either 29 U.S.C. § 1132(a) or § 1140. . . . We believe that, as a matter of federal common law, an award of punitive damages is inappropriate to a claim of interference with employee benefit plans.

Id. at 1216 (emphasis added). The court further found that punitive damages were not necessary as an additional deterrent to breaches of employee benefit contracts. *Id.* at 1216. Although *Dependahl* never clearly articulated its position, later courts have cited this dicta for the principle that punitive damages are not proper under ERISA. See e.g., *Winterrowd v. David Freedman and Co, Inc.*, 724 F.2d 823, 826 (9th Cir. 1984) (explaining the *Dependahl* holding on punitive damages and stating that the Eighth Circuit's stance on punitive damages was dicta). Cf. *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421, 435-36 (E.D. Mo. 1984) (district court within the Eighth Circuit stated that it was unlikely that the Eighth Circuit would award punitive damages under ERISA, but that if it [the district court] were "writing on a clean slate," it would consider punitive damages for a wanton or malicious breach of fiduciary duty).

42. See, e.g., *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D. Cal. 1976). But cf. *Miner v. Int'l Typographical Union Negotiated Pension Plan*, 601 F. Supp. 1390, 1391-93 (D. Col. 1986), where the court examined this line of cases and compared them to those cases which permitted punitive damages. The *Miner* court concluded, from the differences in the facts in the two lines of cases, that punitive damages were proper when the plaintiff showed "actual malice or wanton indifference" to the right of the beneficiaries and participants. *Id.* at 1393. This analysis, following the Ninth Circuit's *Russell* decision, suggests that the law in the two lines of cases was actually consistent, but that the facts of the cases may have caused the inconsistent results.

decision in *Dependahl*, the Eighth Circuit in *Monson v. Century Manufacturing Co.*⁴³ affirmed a punitive damage award based on a fraud claim brought along with ERISA claims. Employees brought the fraud claim against their employer for misrepresenting the amount of money the employer was contributing to a profit sharing plan.⁴⁴ The plaintiffs received compensatory damages under the fraud action and under ERISA for breach of fiduciary duty,⁴⁵ and additionally received punitive damages based on the conduct underlying the misrepresentations.⁴⁶

Unlike *Russell* and *Dependahl*, *Monson* did not address the preemption issue.⁴⁷ This result is similar to other cases where the preemption issue has arisen under claims that only indirectly relate to employee benefits. On these facts, some courts have held that ERISA does not preempt such common law actions and that punitive damages are proper.⁴⁸

C. Massachusetts Mutual Life Insurance Co. v. Russell

In *Massachusetts Mutual Life Insurance Co. v. Russell*⁴⁹ the Supreme Court reversed the Ninth Circuit, held that section 409⁵⁰ provides only for recovery of damages by the plan,⁵¹ and refused to imply a private

43. 739 F.2d 1293 (8th Cir. 1984).

44. *Id.* at 1300-03.

45. *Id.* at 1303.

46. *Id.* at 1305.

47. *But see* *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421, 435 (E.D. Mo. 1984), where the district court explained *Monson* by asserting that the fraud action arose under a profit sharing plan not covered by ERISA, while the ERISA claim arose under the ERISA governed employee pension plan. According to *Hollenbeck*, the district court's opinion in *Monson* clearly showed this distinction, although it is not apparent from the Eighth Circuit's opinion in *Monson*.

48. *See, e.g.*, *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983) (action for fraud with punitive damages claims based on alleged misrepresentations by the employer to the employee regarding the pension plan for the purpose of inducing employment); *Hepler v. CBS, Inc.*, 39 Wash. App. 838, 696 P.2d 596 (1985) (action for fraud with punitive damages, although unsuccessful, was not preempted). *Accord* *Provience v. Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981) (although no punitive damages claims asserted, actions for fraudulent misrepresentation of the nature of a benefits plan, refusal in bad faith to pay a legitimate claim, and intentional infliction of emotional distress all held not preempted by ERISA).

49. 105 S.Ct. 3085 (1985).

For an extensive discussion of the *Russell* case, see generally Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014 (1986).

50. 29 U.S.C. § 1109.

51. 105 S.Ct. at 3089-92. *See supra* note 3 for the ERISA definition of a "plan".

The Court reasoned that the language of § 409(a) [29 U.S.C. § 1109(a), *see supra* note 20], by explicitly naming the plan as the entity to which the breaching fiduciary would be liable by the first and second provisions of § 409(a), implicitly limited the liability under the third "catch-all" remedy

cause of action under that section.⁵² The Court expressly reserved the question of whether any other section of ERISA provided punitive or extracontractual damages.⁵³ Thus the Court left unanswered the questions whether section 502(a)(3) might provide such relief⁵⁴ and whether a plan could recover or pay punitive damages thereunder.⁵⁵

Writing for four members of the Court,⁵⁶ Justice Brennan concurred to emphasize the limited scope of the majority's holding.⁵⁷ He expressed his concern that future courts might apply the majority's broad dicta and erroneously restrict all fiduciary liability to the plan alone.⁵⁸ In regard to judicial construction of ERISA remedies, Brennan noted the difference between implying private causes of action in the provisions and construing the private causes of action explicitly provided.⁵⁹ He said the courts, in "fine tuning" the details of section 502(a) civil actions, should look to

to the plan as well. This holding overruled the prior decisions that had relied on the "catch-all" phrase of § 409(a) in order to award punitive damages in private actions. *See supra* notes 29-34 and accompanying text.

52. 105 S.Ct. at 3092-94. The Court rejected the plaintiff's alternative argument that the four-factor analysis in *Cort v. Ash*, 422 U.S. 66, 78 (1978), created an implied private cause of action for extracontractual damages. Although two of the four factors—plaintiff being a member of the statutorily protected class and lack of state law impediment because of ERISA's preemption—were in the plaintiff's favor, the Court held that the other two factors, legislative intent and legislative scheme, defeated the plaintiff's argument. The absence of clear legislative history supporting punitive damages under ERISA and the "carefully integrated civil enforcement provisions found in § 502(a)" convinced the Court that § 409(a) had no implied private cause of action. 105 S.Ct. at 3093.

53. 105 S.Ct. at 3089 n.5.

54. 29 U.S.C. § 1132(a)(3). While the "catch-all" remedy in § 409(a) states "other equitable or remedial relief," the § 502(a) remedy is "other appropriate equitable relief." *See supra* notes 5 and 20.

55. *See Sanchez, Punitive Damages Under ERISA*, 13 W. STATE U. L. REV. 413 (1986). *Cf. McMahon v. McDowell*, 794 F.2d 100 (3rd Cir. 1986) (action on behalf of plan for breach of fiduciary duty); *Hood v. Prudential Ins. Co. of Am.*, 460 So.2d 1227 (Ala. 1984) (punitive damages not recoverable against plan).

56. 105 S.Ct. at 3094-99 (Brennan, J., concurring, joined by Justices White, Marshall, and Blackmun).

57. *See supra* notes 53-55 and accompanying text.

58. 105 S.Ct. at 3095. In Brennan's opinion, § 404(a) [29 U.S.C. § 1104(a), *see supra* note 21] embodied Congress' intent to incorporate fiduciary standards of trust law into ERISA such that § 502(a)(3) [29 U.S.C. § 1132(a)(3)] would provide "appropriate equitable relief" directly to a beneficiary when a plan fiduciary breached the § 404(a) duties in claims administration and in the management of plan assets. 105 S.Ct. at 3095-97.

Brennan looked to the legislative history of ERISA and to the principles of trust law. 105 S.Ct. at 3096-97 & nn.6-10. *See infra* notes 110-112 and accompanying text.

59. 105 S.Ct. at 3097-99. Brennan disagreed with the majority's view "that Congress 'crafted' ERISA with 'carefully integrated' remedies so as to create an 'interlocking, interrelated, and interdependent remedial scheme' that courts should not 'fine-tune,'" *Id.* at 3097. Rather, he interpreted "other appropriate equitable relief" to mean that the courts had the duty to fill in the details and

traditional trust law principles and remedies to determine the range of remedies available to redress ERISA violations.⁶⁰

D. *Post-Russell Interpretations*

After *Russell*, the lower federal courts have consistently denied punitive damage claims under ERISA.⁶¹ Although plaintiffs have asserted their punitive damage claims under sections 502(a)(3) and 404(a)⁶² and although courts looked to trust law principles for answers to the punitive damage issue,⁶³ the decisions have consistently denied the claims.⁶⁴

define the range of appropriate remedies. Congress had anticipated that a body of federal common law would develop to define rights and obligations pertaining to ERISA. *Id.* at 3098 & nn.13-14.

60. In Brennan's opinion, the legislative history indicated that the scope of "other appropriate equitable relief" in § 502(a)(3), should parallel the extent to which previously developed trust and pension law provided the beneficiary with remedies above and beyond the benefits withheld. Because little federal law existed to guide the courts in trust law principles, they would have to incorporate state trust law remedies into federal rules of decision. 105 S.Ct. at 3098-99 & n.18.

Brennan did not answer the punitive damage question specifically, nor did he decide whether ERISA would ever provide extracontractual damages. However, he did say that courts should adopt trust law remedies as long as they not conflict with other ERISA provisions and "would best effectuate the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries." *Id.* at 3099 (emphasis added).

61. At least four of the circuits have rejected punitive damage claims with rationales based on trust law, fiduciary duty principles, or equity principles. *Klemhans v. Lisle Savings Profit Trust*, 810 F.2d 618 (7th Cir. 1987); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456 (5th Cir. 1986) *cert. denied*, 107 S. Ct. 1298 (1987); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302 (9th Cir. 1986); *Powell v. Chesapeake and Potomac Tel. Co. Va.*, 780 F.2d 419 (4th cir. 1985), *cert. denied*, 106 S. Ct. 2892 (1986).

62. 29 U.S.C. §§ 1132 (a)(3) and 1104(a). *See supra* notes 5 and 21. *See, e.g., Simmons v. Prudential Ins. Co. of Am.*, 641 F. Supp. 675 (D. Col. 1986); *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143 (D.D.C. 1986).

63. Courts followed Brennan's advice by analyzing trust law in order to decide whether extracontractual damages are proper, but the conclusions drawn by the courts appear contrary to what Brennan had in mind. *See supra* note 60. *See, e.g., Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419, 424 (4th Cir. 1985) (trust law equitable remedies do not include extracontractual and punitive damages); *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1167 (D.D.C. 1986) ("equitable" remedies as suggested by trust law and § 502(a)(3) can include "damages," but only to the extent of benefits denied).

64. *Compare Unitis v. JFC Acquisition Co.*, 643 F. Supp. 454, 462 (N.D. Ill. 1986) (holding no punitive damages because no wanton or willful behavior alleged; but noting possibility that breach of fiduciary duty, as under trust law, could rise to level of independent tort) *and Schoenholtz v. Doniger*, 628 F. Supp. 1420, 1430-31 (S.D.N.Y. 1986) (fact finding of willful and intentional breaches of fiduciary duty, and punitive damages not precluded) *with Boesl v. Suburban Trust & Savings Bank*, 642 F. Supp. 1503, 1516 (N.D. Ill. 1986) (after *Russell* punitive damages probably never recoverable by beneficiary or participant).

Another question left unanswered by *Russell*—whether the plan itself could recover punitive dam-

Russell ended awards of punitive damages based on section 409. The implication of the post-*Russell* decisions is that a court probably will not award punitive damages under any section of ERISA. After *Russell*, the sole option that remained for the plaintiff who wished to make a claim for punitive damages was to bring a common law action. If the plaintiff could avoid ERISA preemption, then the *Russell* implications would be irrelevant to the success of the punitive damages claim. Accordingly, this discussion now turns to the preemption issue.

II. PREEMPTION

A. Section 514: Background

Section 514(a) states that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."⁶⁵ The Supreme Court has indicated that this broad provision preempts any state law that relates to employee benefit plans. In *Shaw v. Delta Air Lines, Inc.*⁶⁶ the Court reasoned that by using "relate to," Congress intended to preempt more than just state laws specifically affecting employee benefit plans.⁶⁷

Section 514(b),⁶⁸ however, exempts state insurance laws from the preemption of section 514(a). In *Metropolitan Life Insurance Co. v. Massa-*

ages—has also been answered by at least one court in the negative. *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986).

65. 29 U.S.C. § 1144(a). According to § 514(c)(1) [29 U.S.C. § 1144(c)(1)], "State law" includes all laws, decisions, rules, regulations, or other State action having effect of law, of any State. . . ."

See generally Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. R. 1313 (1984).

66. 103 S.Ct. 2890 (1983).

67. *Id.* at 2900. The Court refused to limit ERISA's preemption to state laws dealing specifically with employee benefits or state laws that conflict with ERISA provisions. See also *Alessi v. Raybestos Manhattan, Inc.*, 101 S.Ct. 1895 (1981).

68. Subsection (b) of § 514 [29 U.S.C. § 1144(b)] provides as follows:

(b) Construction and application. . . .

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities. (B) Neither an employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)], which is not exempt under section 4(b) [29 U.S.C. § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, or investment companies. . . .

Subsection (b)(2)(A) is the "savings" clause and subsection (b)(2)(B) is the "deemer" clause. The "savings" clause has the effect of "saving" insurance law from preemption by ERISA. The

achusetts,⁶⁹ the Supreme Court held that ERISA did not preempt a state statute regulating employee benefits when applied to an insurer from whom an employer purchased insurance as part of an employee benefits plan.⁷⁰ The Court acknowledged the difference in treatment arising under *Metropolitan Life* for insured and uninsured plans, but declared that Congress must resolve this problem.⁷¹ Courts extended this effect of the insurance "savings" clause to common law claims.⁷²

"deemer" clause "deems" employee benefit plans not to be insurance companies, thus, they fall outside the "savings" clause and normal ERISA preemption applies.

Moore v. Provident Life and Accident Ins. Co., 786 F.2d 922, 926-27 (9th Cir. 1986) set up a three step analysis for deciding whether ERISA preempts a cause of action against an insurance company. First, the court must decide whether the laws "relate" to an employee benefit plan; and, if so, ERISA possibly preempts the laws. Second, the court must decide whether the laws regulate insurance; and, if so, ERISA does not preempt them because of the "savings" clause. Finally, the court must decide whether the "deemer" clause prevents the defendant from being deemed an insurance company; and, if so, ERISA preempts the law even if it could have been found to have regulated insurance. This analysis caused the anomaly discussed *infra* at notes 71-72 and accompanying text.

69. 105 S.Ct. 2380 (1985).

70. *Id.* at 2389-93.

71. *Id.* at 2393. See also *Eversole v. Metropolitan Life Ins. Co.*, 500 F. Supp. 1162 (C.D. Cal. 1980).

The court in *Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311, 1312 n.2 (5th Cir. 1985), *rev'd*, 107 S.Ct. 1549 (1987), described the ways by which an employer could choose to fund an employee benefit plan:

[C]ongress authorized employers to create for their employees welfare benefit plans, including health and disability plans. . . . The employer may create or "fund" these plans in any one of three ways: (1) the employer absorbs the entire risk of loss, thereby becoming a self-insurer, (2) the employer purchases a group insurance policy from a commercial insurance company, or (3) the employer self-insures to a certain monetary amount and purchases from an insurance company a so-called "stop loss" policy to cover any claim over that amount.

770 F.2d at 1312 n.2. The employer in *Dedeaux* used the second method. For an example of an employer using the third method, see *Hutchinson v. Benton Casing Ser., Inc.*, 619 F. Supp. 831, 838 n.2. (S.D. Miss. 1985).

72. *Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5th Cir. 1985), *rev'd*, 107 S.Ct. 1549 (1987); *Simmons v. Prudential Ins. Co. of Am.*, 641 F. Supp. 675 (D. Col. 1986). Both *Dedeaux* and *Simmons* followed *Metropolitan Life Ins. Co. v. Mass.*, 105 S.Ct. 2380 (1985), and held that ERISA did not preempt the plaintiff's common law actions against the insurers of their employers' benefit plans.

The *Dedeaux* court rejected the defendant insurance company's assertion that ERISA preempted the plaintiff's common law claims for breach of contract, breach of fiduciary duty, and fraud. The insurance company unsuccessfully argued that Congress intended to establish national uniformity in handling ERISA plans by creating a broad preemption provision, that the "insured"/"uninsured" distinction caused inequitable results (see *supra* note 71), and that the court should distinguish "traditional" insurance laws from general laws affecting insurance. 770 F.2d at 1314-16. The court held that the clear language of the "savings" clause, and the Supreme Court's interpretation of it in *Metropolitan Life Ins. Co. v. Mass.*, required that the common law claims were not preempted even though that means that some actions created by ERISA § 502(a) [29 U.S.C. § 1132(a)] would be duplicated by state common law actions. 770 F.2d at 1316-17. This consequence, the court said,

Clearly section 514 preempts state statutes governing pensions and other employee benefits; this Note examines the degree to which ERISA preempts state common law. The extent to which ERISA actually did preempt common law actions was unclear prior to the Supreme Court's recent decision in *Pilot Life Insurance Co. v. Dedeaux*.⁷³ Even in general common law actions where the insurance "savings" clause has no effect, courts were not consistent in applying section 514. While some courts answered the preemption question in the affirmative,⁷⁴ other courts looked more closely at the facts and concluded that ERISA did not preempt the common law claim.⁷⁵

B. Common Law Actions Preempted by Section 514 Prior to Pilot Life

ERISA has preempted various common law causes of action and state statutes.⁷⁶ For example, courts have held that ERISA preempted contract law,⁷⁷ tort law,⁷⁸ and trust and fiduciary duty law.⁷⁹ Other courts,

was a concern for Congress. 770 F.2d at 1317. See also *Taylor v. General Motors Corp.*, 763 F.2d 216 (6th Cir. 1985), *rev'd sub nom.*, *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987) (holding improper the removal to federal court of common law action against insurer of an employee benefits plan; decided by Supreme Court in conjunction with *Dedeaux*). The Supreme Court's decisions on the appeals of the *Dedeaux* and *Taylor* case are discussed *infra* in Part II.C.

The *Simmons* case followed *Dedeaux* and *Metropolitan Life Ins. Co. v. Mass.* and held that the plaintiff's common law actions (breach of fair dealing and good faith, breach of insurance policy, defamation, and outrageous conduct) against the insurer survived preemption. 641 F. Supp. at 680. Accordingly, the plaintiff proceeded with the common law claims for compensatory and punitive damages. *Id.* at 683-86. The court dismissed the plaintiff's ERISA claims for extracontractual and punitive damages against the employer and plan administrator. *Id.* at 680-83.

Accord *Hood v. Prudential Ins. Co. of Am.*, 460 So.2d 1227 (Ala. 1984) (holding that "bad faith refusal to pay" claim against insurance company was not preempted by ERISA because of the insurance "savings" clause). Cf. *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922 (9th Cir. 1986) (action against insurance company not preempted because it was just the plan administrator and not an insurer).

73. 107 S.Ct. 1549 (1987).

74. See, e.g., *Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419 (4th Cir. 1985); *Russell v. Mass. Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983).

75. See e.g., *Providence v. Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981); *Cornell Mfg. Co., Inc. v. Mushlin*, 70 A.D.2d 123, 420 N.Y.S.2d 231 (1979); *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983); *Shaw v. Westinghouse Elec. Corp.*, 276 Pa. Super. 220, 419 A.2d 175 (1980); *Hepler v. CBS, Inc.*, 39 Wash. App. 838, 696 P.2d 596 (1985).

76. See e.g., *Metropolitan Life Ins. Co. v. Mass.*, 105 S.Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. 2890 (1983). *Contra* *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349 (9th Cir. 1986).

77. See, e.g., *Ahne v. Allis Chalmers Corp.*, 640 F. Supp. 912 (E.D. Wis. 1986); *Nolan v. Aetna Life Ins. Co.*, 588 F. Supp. 1375 (E.D. Mich. 1984).

78. See, e.g., *Russell v. Mass., Mutual Life Ins. Co.*, 772 F.2d 482 (9th Cir. 1983); *Dumac Forestry Servs., Inc. v. Int'l Bhd. of Elec. Workers*, 637 F. Supp. 529 (N.D.N.Y. 1986).

however, have reached contrary conclusions.⁸⁰

In attempting to define the preemption boundaries of ERISA over state law, courts utilized various tests. Some courts used a "direct relationship test": ERISA preempts common law actions "directly related" to employee benefit plans, but it does not preempt those claims that only "indirectly relate" thereto.⁸¹ Other courts have considered several factors including: the extent to which the law fell within the state's traditional domain, the extent to which the purpose or effect of the law impinged on employee benefit plans, the extent of the law's incompatibility with ERISA, and the extent to which the asserted rights arose under an employee benefit plan.⁸² The decisions after *Shaw v. Delta Air Lines*,

79. See, e.g., *Light v. Blue Cross and Blue Shield of Ala.*, 790 F.2d 1247 (5th Cir. 1986); *Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419 (4th Cir. 1985).

80. See *supra* note 75.

81. See *Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. 2890 (1983), where the Supreme Court stated the broad effect of ERISA's preemption, but noted that limits exist:

some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. . . . The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

Id. at 2901 n.21.

See also *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349 (9th Cir. 1986), where the court discussed at length the preemption issue. "[The law] is preempted if it both 'relates' to an ERISA plan and 'purports to regulate, directly or indirectly' ERISA plans." *Id.* at 1356. The court examined past preemption cases and concluded:

[S]tate laws that have been found to be preempted by section 514(a) because they "relate" to ERISA plans fall into four categories. First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan. The principle underlying all of these decisions would appear to be that the state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is "part of the administration of an employee benefit plan"; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans.

Id. at 1356-58 (citations omitted, quoting *Scott v. Gulf Oil Co.* 754 F.2d 1499, 1505 (4th Cir. 1985)).

82. E.g., *Cornell Mfg. Co., Inc. v. Mushlin*, 70 A.D.2d 123, 130-31, 420 N.Y.S.2d 231, 236 (1979).

See also *Benvenuto v. Conn. Gen. Life Ins. Co.*, 643 F. Supp. 87, 92 (D.N.J. 1986) (state's important interest in protecting its citizens cited for holding that ERISA did not preempt claim for intentional infliction of emotional distress, while the other common law claims were); *Providence v. Valley Clerks Trust Fund*, 509 F. Supp. 388, 391 (E.D. Cal. 1981) (in addition to the "direct/indirect" inquiry, the court noted the factors of whether the law was of "general application" and was a matter "of important state concern"); *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983) (following *Mushlin* and *Providence*).

Inc.,⁸³ however, gave only cursory scrutiny to the preemption issue and adopted the Supreme Court's broad language in *Delta* thereby preempting almost any common law action.⁸⁴ The one remaining preemption issue that courts addressed fully prior to *Pilot Life* was the effect of the insurance law "savings" and "deemer" clauses.⁸⁵

C. Pilot Life Insurance Co. v. Dedeaux

In two recent cases decided on the same day, *Metropolitan Life Insurance Co. v. Taylor*⁸⁶ and *Pilot Life Insurance Co. v. Dedeaux*,⁸⁷ the Supreme Court further expanded the scope of ERISA preemption.⁸⁸ In *Metropolitan Life* the Supreme Court held that a state law claim was removable to federal courts due to ERISA preemption if it obviously related to an employee benefit plan, even if the complaint purportedly stated only common law claims.⁸⁹ *Pilot Life* spoke directly to the questions of ERISA preemption of common law actions and the meaning of the insurance "savings" and "deemer" clauses.

The plaintiff in *Pilot Life*, alleging improper processing of his claim for employee benefits, originally brought state common law actions against the insurer because punitive damages would be unavailable with ERISA

83. 103 S.Ct. 2890 (1983).

84. See, e.g., *Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419 (4th Cir. 1985):

In this case, none of the state laws under which Powell claims relief have any intrinsic connection with employee benefit plans. The question is therefore whether state law *claims* which relate to the administration of an ERISA-governed plan, but which arise under general state *laws* which themselves have no impact on employee benefit plans, are within the scope of ERISA preemption. Given the "unparalleled breadth" of the preemption clause . . . and the broad remedial policy of ERISA, we hold that state laws, insofar as they are invoked by beneficiaries claiming relief for injuries arising out of the administration of employee benefit plans, "relate to" such plans and, absent an applicable exemption, are preempted by ERISA.

Id. at 421 (citation omitted).

See also *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 926-27 (9th Cir. 1986) (very limited discussion of the "relates to" part of the preemption issue with an insurance company defendant); *Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5th Cir. 1985), *rev'd.*, 107 S.Ct. 1549 (1987) (same).

It should be noted that *Shaw* and *Metropolitan Life Ins. Co. v. Mass.* dealt with the preemption of state statutes that directly affected employee benefits. Lower courts have cited the broad language in these cases to preempt common law causes of action.

85. See *supra* notes 68-72 and accompanying text.

86. 107 S.Ct. 1542 (1987).

87. 107 S.Ct. 1549 (1987).

88. For a discussion of the court of appeals decisions in these two cases, see *supra* note 72.

89. 107 S.Ct. at 1547-48.

claims.⁹⁰ The Fifth Circuit held that his bad faith claim and demand for punitive damages were “saved” from preemption because the defendant was an insurance company.⁹¹ The Supreme Court reversed and held that the law underlying this claim, the Mississippi law of bad faith, was not a law that “regulates insurance” for purposes of the ERISA savings clause.⁹²

The Court’s analysis in *Pilot Life* left virtually no room for arguing that a common law action should not be preempted by ERISA. The Court held that a cause of action relates to a plan if it has a “connection with or reference to” an employee benefit plan.⁹³ To answer the insurance law savings clause, the Court examined the law behind the cause of action with a two-part test.⁹⁴ First, a “common-sense view” of the language of the savings clause convinced the Court that the law of bad faith did not “regulate insurance.”⁹⁵ Second, the Court used case law from

90. See *infra* note 103.

91. See *supra* notes 71-72 and accompanying text.

92. 107 S.Ct. 1553-55.

93. 107 S.Ct. 1553 (following *Metropolitan Life*, 421 U.S. at 739, and *Shaw*, 463 U.S. at 97).

But cf. *Fort Halifax Packing Co., Inc. v. Coyne*, 107 S.Ct. 2211 (1987). In this case the Court, in a 5-4 decision, held that ERISA did not preempt a Maine statute requiring employers to pay severance pay to employees laid off due to plant closings. This decision affirmed the Maine Supreme Judicial Courts’ decision that the law was not preempted, but on different grounds. The Maine Court found that the law created an employee benefits plan, but because no employer created the plan, it did not fit the express language of ERISA §§ 3 and 4 [29 U.S.C. §§ 1002-1003] that referred to plans created by employers or employee organizations. *Director v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1059 (Me. 1986).

Writing for the majority, Justice Brennan disagreed with the Maine court and asserted that the law neither established nor required employers to maintain employee benefit plans. 107 S.Ct. at 2215. Instead, the Court held that this law related only to employee *benefits*, and not to “any employee benefit plan” as required by section 514. *Id.* The Court differentiated this case from previous cases involving state statutes requiring certain employee benefits on the ground that this law imposed no conflicting administrative obligations on employers. 107 S.Ct. at 2216-19.

Justice White wrote a dissenting opinion that was joined by Chief Justice Rehnquist and Justices O’Connor and Scalia. 107 S.Ct. at 2223-25. White argued that the statute clearly imposed a benefit plan on employers, that the fact that they did not have to set up any particular administrative procedures was irrelevant, and that the plan created by the statute was clearly preempted by ERISA § 514. *Id.*

This case is facially distinguishable from the focus of this Note because it did not deal with common law causes of action. The majority’s rationale, however, does present arguments against preemption: a plaintiff could argue that a common law claim may relate only to *benefits* and not the plan; in addition, one can argue that an employer need not set up any particular administrative scheme to handle potential tort claims. Applying this rationale to a common law claim would conflict with the holding in *Pilot Life*.

94. 107 S.Ct. at 1553.

95. 107 S.Ct. at 1554.

the McCarran-Ferguson Act⁹⁶ to decide that this state law was not one that affected the "business of insurance."⁹⁷ Thus, according to the *Pilot Life* analysis, the question of whether a common law claim is preempted is answered with a *factual* inquiry (the Court looked to the cause of action itself and the circumstances that gave rise to it), but the insurance savings clause exception to preemption is answered with a *legal* inquiry (the Court looked at the law behind the cause of action in the abstract). With such an analysis it is doubtful whether any common law cause of action could ever satisfy the ERISA savings clause.⁹⁸ Finally, the court justified its holding by referencing Congress' intent that ERISA have a wide and pervasive preemptive impact.⁹⁹

D. *The Effect on Punitive Damage Actions*

Before *Russell*, one court reasoned that ERISA should preempt a state law fraud action because the plaintiff could seek the same remedies, including punitive damages, under section 409.¹⁰⁰ After *Russell*, a court used Brennan's concurring opinion for the proposition that preemption did not completely foreclose the plaintiff's remedies.¹⁰¹ The reasoning in these two cases demonstrates the anomalous result that ERISA's preemption has had on punitive damage actions: The federal courts have brought many common law actions under ERISA's umbrella, but in do-

96. 15 U.S.C. § 1011 *et seq.*

97. 107 S.Ct. at 1554-55. This "business of insurance" test involved three inquiries: first, whether the practice transfers or spreads the policyholder's risk; second, whether it is an integral part of the insurer/insured relationship; and third, whether it is limited to insurance industry entities. *Id.* at 1553-54. The Court decided that the Mississippi law of bad faith may have met only the second factor, but that nevertheless the connection to the insurer/insured relationship was attenuated, at best. *Id.* at 1555.

98. Contrast this analysis with the one used by the Fifth Circuit below, where the court of appeals answered the savings clause question with a *factual* inquiry similar to the one used for the initial preemption question of whether the law relates to a benefit plan. *See supra* note 72. The Supreme Court's analysis allows any common law claim to be preempted if there is any connection in the claim to a plan, but the claim can be saved from preemption only if the legal basis of the claim concerns itself only with the "business of insurance" (i.e. never with employee benefit claims). Such a common law claim does not exist.

This discussion raises the possibility of using a *legal* inquiry for both questions. This would result in much less preemption, in the same way as the *Pilot Life* analysis results in very few claims satisfying the savings clause. Such an analysis would be unsatisfactory in light of Congress' desire that ERISA have a wide preemptive effect, but this type of analysis is essentially what this Note proposes in regard to the remedies available under ERISA. *Cf. supra* note 84.

99. 107 S.Ct. at 1555-58.

100. *Ogden v. Mich. Bell Tel. Co.*, 571 F. Supp. 520, 523 (E.D. Mich. 1983).

101. *Benvenuto v. Conn. Gen. Life Ins. Co.*, 643 F. Supp. 87, 93 (D.N.J. 1986).

ing so, the courts have stripped those actions of some of the remedies they had outside of ERISA.¹⁰²

As shown in Part 1, successful punitive damage claims under ERISA civil actions are very unlikely. As shown in this Part, ERISA preempts common law actions when the underlying facts relate to an employee benefits plan, thus denying traditionally available punitive damages.

Clearly, a prospective plaintiff who desires punitive damages will argue that ERISA should not preempt the state common law cause of action.¹⁰³ If the claim survives, the common law of the state may provide punitive damages. Therefore, although the Supreme Court in *Pilot Life* stated that any claim clearly relating to a plan was preempted, there can be situations where that relation is not clear, and the preemption issue could determine the availability of punitive damages.¹⁰⁴ Typically, a

102. In *Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419, 420 (4th Cir. 1985), ERISA preempted all of the plaintiff's state common law claims (for intentional infliction of emotional distress, breach of implied covenant of good faith and fair dealing, and breach of contract). The court found preemption because all of the claims related to fiduciary responsibility in the benefit plan administration. The plaintiff was left with only ERISA remedies. *Id.* at 422. Thus, her claims for extracontractual and punitive damages, acceptable remedies under the common law actions brought, became unavailable to her.

103. *See, e.g., Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5th Cir. 1985), *rev'd*, 107 S. Ct. 1549 (1987). The plaintiff in *Dedeaux* sought compensatory and punitive damages based on claims for breach of contract, breach of fiduciary duty, and fraud. The court commented that it was obvious why he made no ERISA claims: ERISA authorizes no punitive damages explicitly or implicitly. *Id.* at 1313 n.3.

See also *Ogden v. Mich. Bell Tel. Co.*, 571 F. Supp. 520 (E.D. Mich. 1983) where the plaintiffs admitted they brought the fraud action in order to insure that punitive damages would be available. *Id.* at 523 n.5.

104. *See* *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983). There the fraud claim alleged that the employer fraudulently induced the plaintiff's employment by making representations about the benefits plan. Although the state court there held that the claim was not preempted, it is now unlikely that other courts would hold the same, even though the conduct underlying such a claim concerns employer-employee relations and the connection to plan benefits and administration is only incidental. *See e.g., Haider v. Western-Southern Life Ins. Co.*, No. 86-1245(A) (E.D. Mo. Apr. 16, 1987) (order granting motion to dismiss common law fraud claim based on alleged misrepresentations of defendant employer made prior to employment to the plaintiff employee regarding benefits plaintiff would receive upon retirement). The court in *Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419 (4th Cir. 1985), held that the preemption issue depended on how close the action was to the administration of the plan. *See supra* note 84. This reasoning raises the possibility that a claim such as the one made in *Shaver* could have different results depending on whether or not the employer administers its own plan.

If a court reasons that preemption depends on the proximity of the culpable conduct to the administration of the plan, then the preemption question regarding a fraud claim against the employer could depend on whether or not the employer administers the plan. If the employer administers the plan, then the employer's fraudulent conduct is conceptually close to the plan and ERISA would preempt the cause of action. On the other hand, when a plaintiff brings the same claim against an

court decides the preemption issue as a preliminary matter, then later decides the punitive damages question as another matter. This approach effectively ignores the interrelation of the two issues.¹⁰⁵

This separate judicial development of the ERISA preemption and punitive damages issues has led to two anomalous results. First, the success of a punitive damage claim depends on the coincidences of the circumstances. Courts might reach opposite results in judging equally culpable conduct when one situation involves an employee benefits plan and the other situation does not.¹⁰⁶ This inconsistent judicial treatment of preemption might lead to forum shopping.¹⁰⁷ Secondly, the possibility that a common law claim may survive the preemption decision induces some plaintiffs to bring common law actions because of the limited remedies available under ERISA. As a result, such plaintiffs defeat the purpose of

employer who does not administer the plan, then the claim may be distant from the plan and not preempted. This leads to the conclusion that the employer who administers the employee benefit plan (the one who is more likely to have a conflict of interest and engage in self-dealing) is the defendant less likely to be subjected to a punitive damages award based on an action for fraudulent inducement of the employee. *See also Sanchez, Punitive Damages Under ERISA*, 13 W. STATE U.L. REV. 413, 432 (1986) (arguing that employers who administer their own employee benefit plans should be treated differently from other employers in regard to punitive damages).

105. *See, e.g., Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419 (4th Cir. 1985). The court's discussion on preemption, *id.* at 421-24, concluded that ERISA preempted all of the common law claims, one of which was intentional infliction of emotional distress. Then the court turned to the question of damages, *id.* at 424-25, and held that since the claims were entirely for extracontractual and punitive damages, neither of which were available under ERISA, the plaintiff's claims had been properly dismissed. Thus, the plaintiff was left without recourse to claim compensation for her alleged emotional distress. *See also Bone v. Association Management Serv., Inc.*, 632 F. Supp. 493 (S.D. Miss. 1986).

106. For example, ERISA will preempt an action for fraud involving an employee benefits plan leaving the plaintiff with only the ERISA remedies. The nature of the defendant's conduct becomes irrelevant because punitive damages are unavailable no matter how egregious the facts are. Similarly, employee benefits could be tangentially related to a common law claim that is not preempted. *See supra* note 104.

107. *Compare Russell v. Mass. Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983) (claim for intentional infliction of emotional distress preempted, ultimate result that punitive damages unavailable) with *Benvenuto v. Conn. Gen. Life Ins. Co.*, 643 F. Supp. 87, 92 (D.N.J. 1986) (claim for intentional infliction of emotional distress not preempted, but other common law actions preempted). Certainly, a plaintiff seeking punitive damages under a claim for intentional infliction of emotional distress would prefer the *Benvenuto* courthouse.

Although it is now highly unlikely that ERISA will not preempt a common law claim with any relation at all to an employee benefits plan, it still may not always be clear whether or not a plan is involved. The Court's recent holding in *Fort Halifax*, *see supra* note 93, presents plaintiffs with the argument that their common law claims related only to employee *benefits*, and not to benefits *plans*. Thus, the outcome of a punitive damage claim can still depend on a particular court's preemption determination, and different courts could still decide this question differently.

ERISA's comprehensive statutory scheme of civil actions.¹⁰⁸

E. Legislative History: What Preemption Did Congress Intend?

The legislative history of ERISA provides little guidance on the punitive damages issue. The drafters referred to the law of fiduciary duty¹⁰⁹ and trusts¹¹⁰ and expressed their intent that ERISA would provide a complete range of legal and equitable remedies,¹¹¹ however, the drafters made no specific reference to punitive damages.¹¹² Commentators and courts have based arguments for and against punitive damages on these references.¹¹³

The drafters intended to create a nationally uniform law for all aspects of employee pension and benefit plans¹¹⁴ and anticipated that a federal common law would develop around ERISA.¹¹⁵ Because the law is unclear on its face, the federal courts have had the responsibility of deciding

108. See *infra* note 114 and accompanying text.

109. Congress intended to impose "strict fiduciary obligations upon those who exercise management or control over the assets or administration of an employee pension or welfare plan, as well as the provision of adequate reporting and disclosure requirements." 120 CONG. REC. 29, 929 (1974) (statement of Sen. Williams), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 1, at 4734.

110. "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." H. R. REP. NO. 533, 93rd Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4649. "The principles of fiduciary conduct are adopted from existing trust law. . . . These salient principles place a twofold duty on every fiduciary: to act . . . as a prudent man . . . and to act consistently with the principles of administering the trust. . . ." H.R. REP. NO. 533, 93rd Cong., 1st Sess. 13 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4651.

111. "The intent of the Committee is to provide the full range of legal and equitable remedies available in both state federal courts and to remove obstacles which in the past . . . hampered effective enforcement of fiduciary responsibilities . . . or recovery of benefits due. . . ." S. REP. NO. 127, 93rd Cong., 1st Sess., 35 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4871.

112. See Stein, *Punitive Damages under ERISA: Are Participants Entitled to Awards?*, 36 LABOR L. J. 892, 899 (1985).

113. See, e.g., Brennan's concurrence in *Russell*, *supra* notes 56-60 and accompanying text. See also Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014, 1027-36 (1986); Stein, *Punitive Damages under ERISA: Are Participants Entitled to Awards?*, 36 LABOR L. J. 892, 897-99 (1985).

114. To avoid conflicting and inconsistent regulations throughout the country, some Congressmen believed that ERISA had to preempt the field completely. See 120 CONG. REC. 29, 942 (1974) (statements of Sen. Javits), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 1, at 4770-71. See also *Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. 2890, nn.18-20 (1983) (discussing the legislative history and showing that Congress opted for the most comprehensive preemption alternative).

115. "It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120

whether to award punitive damages under any of the ERISA civil actions in section 502(a).¹¹⁶

ERISA can potentially preempt a wide range of civil actions and preclude punitive damages awards.¹¹⁷ Whether the drafters intended such a result must be questioned. The concerns which gave rise to this federal legislation arose from the lack of vesting requirements, insufficient funding of pension plans, lack of reinsurance to cover company shut downs, lack of profitability provisions, and the need for fiduciary responsibility and disclosure by those administering plans.¹¹⁸ The drafters wished to increase the rights of employees by imposing strict fiduciary duties on employers and benefit plan administrators¹¹⁹ and by providing the employees with the civil remedies in section 502(a).¹²⁰ It is doubtful that these drafters intended for the federal common law to deny a traditional remedy (punitive damages) to employees under causes of action (e.g. fraud, infliction of emotional distress, etc.) that were available to them prior to the enactment of ERISA. Nor is it likely that the drafters intended for plaintiffs to resort to common law actions instead of the ERISA civil actions.

III. SOLUTIONS

A. Previous Arguments

In attempting to answer the question of punitive damages under ERISA, courts and commentators have employed various principles of statutory construction based on the language of section 502(a) itself,¹²¹ based

CONG. REC. 29, 942 (1974) (statement of Sen. Javits), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 1, at 4771.

116. 29 U.S.C. § 1132(a).

117. *See supra* notes 76-80 and accompanying text.

118. *See* S. REP. NO. 127, 93rd Cong., 1st Sess. 8-11 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4844-47. *See also supra* note 1.

119. *See* S. REP. NO. 127, 93rd Cong., 1st Sess., 27-35 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4863-71.

120. 29 U.S.C. § 1132(a). *See supra* note 111.

121. 29 U.S.C. § 1132(a). *See supra* note 5. Some have argued that equity as referenced in § 502(a)(3) [29 U.S.C. § 502(a)(3)] traditionally has not included punitive damages; therefore, ERISA should not provide such relief either. *See e.g.*, *Powell v. Chesapeake and Potomac Tel. Co.* of Va., 780 F.2d 419, 424 (4th Cir. 1985); Note, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743, 751-54 (1985). *But see* Sanchez, *Punitive Damages Under ERISA*, 13 W. STATE. U. L. REV. 413, 420-22 (1986) (pointing out that equity does not entirely preclude punitive damages).

on other provisions of ERISA,¹²² based on ERISA's legislative history,¹²³ and based on analogies to other federal laws.¹²⁴ After the *Russell* decision¹²⁵ trust law principles have predictably received considerable attention.¹²⁶

B. Proposal: Look to the Preempted Law

The independent development of the punitive damages and preemption issues has denied employees remedies previously available for tortious conduct of employers. As a solution, this Note proposes that the court examine the underlying nature of any claim brought under ERISA, or in conjunction with ERISA claims, to answer the issue of punitive damages. The final determining factor for close cases would be the particular defendant's conduct.¹²⁷

122. Section 501 [29 U.S.C. § 1131] provides for criminal sanctions. Some argue that this deterrent precludes punitive damages. See, e.g., *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1169 n.54 (D.D.C. 1986); Note, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743, 756 (1985).

The fact that ERISA allows the court to award attorney fees and costs, see *supra* note 13, removes the need for punitive damages as a way for funding the litigation. See Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, CORNELL L. REV. 1014, 1033 n.135 (1986).

123. See, e.g., Brennan's concurrence in *Russell*, discussed *supra* at notes 56-60 and accompanying text.

124. One commentator has analogized to other federal laws in order to answer the question of whether punitive damages are proper under ERISA. See, Sanchez, *Punitive Damages Under ERISA*, 13 W. STATE U. L. REV. 413 (1986).

125. See *supra* notes 58-60 and accompanying text.

126. See *supra* notes 61-62. A commentator has explored the trust law relationship and concluded that courts may award extracontractual damages, but not punitive damages, under ERISA. See Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014 (1986).

Equity principles normally govern trust law. See A. SCOTT, THE LAW OF TRUSTS § 197 (3d ed. 1967). Therefore, assuming that equity and trust law principles govern, courts often conclude that the beneficiary or participant can recover no more than the benefits due. See, e.g., *Powell v. Chesapeake and Potomac Tel. Co. of Va.*, 780 F.2d 419, 424 (4th Cir. 1985). See also RESTATEMENT (SECOND) OF TRUSTS § 205 and comment a (1959) (trust law entitles beneficiary to the remedy that would put him in the position he would have been in, had there been no breach by the trustee). *But see* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 682, at 39-41 (rev. 2d ed. 1982) (consequential and punitive damages recoverable in suits for breach of trust involving malice or fraud); A. SCOTT, THE LAW OF TRUSTS § 205 (3d ed. 1967 and 1985 supp.) (punitive damages recoverable upon showing of willful, malicious, or wanton conduct).

127. See *supra* note 38. The Ninth Circuit in *Russell*, as well as the other courts that allowed punitive damages, required actual malice or wanton indifference to the beneficiary's rights before awarding punitive damages. In other words, the courts were in no way holding that punitive damages were always available under ERISA; rather, they were just allowing for them to exist in situations where they had always existed.

For example, when a claim is for denial of benefits, the action is in the nature of breach of contract for which a plaintiff traditionally has not and should not receive punitive damages.¹²⁸ On the other hand, claims based on misrepresentations by the employer¹²⁹ or outrageous conduct in the administration of an employee benefits plan¹³⁰ are traditional tort actions for fraud and infliction of emotional distress. Punitive damages are appropriate in such actions.¹³¹ Between these extremes are actions based on breach of fiduciary duty¹³² wherein it is unclear whether a punitive damage award is appropriate.¹³³ Regardless of the variations in the traditional common law remedies available under these different types of civil actions, ERISA preempts them all, precluding any punitive damages recovery. Consequently, ERISA effectively will alter the remedies available under a state common law cause of action when the particular claim happens to relate to an employee benefit plan.¹³⁴

A potential problem with this proposal is that each state has had its own common law; thus, punitive damages may be recoverable on a claim in one state but not in another state on the same claim.¹³⁵ The answer in ERISA actions would have to depend on the predominate view among the states with regard to the various types of ERISA claims. Realistically, this should not be a great problem, especially because Congress anticipated that a federal common law would develop in ERISA litigation.¹³⁶

128. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.4 at 818 (1973).

129. E.g., *Monson v. Century Mfg. Corp.*, 739 F.2d 1293 (8th Cir. 1984); *Shaver v. N.C. Monroe Consts. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983).

130. E.g., *Russell v. Mass. Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983).

131. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 9.2 at 607 (1973) (fraud actions); and *id.* § 7.3 at 528-31 (mental distress actions).

132. See e.g., *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922 (9th Cir. 1986).

133. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 at 211-12 (1973) (generally punitive damages are unavailable in equity), and *id.* § 10.4 at 684-85 (remedies for breach of fiduciary obligation); see also *supra* note 126.

134. See *supra* notes 105-06 and accompanying text.

135. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.4 at 12 (1973) (state law question determines whether, and under what circumstances, a court should award punitive damages).

136. See *supra* note 99. This, of course, conflicts with Congress' expressed concern to avoid inconsistent enforcement of employee benefits law among the states. See *supra* note 114. But realistically, the punitive damage determination must focus on the defendant's conduct; and if courts require the level of culpability that the Ninth Circuit's *Russell* holding required ("actual malice or wanton indifference"), then there is no danger of inconsistent applications of the law. See *supra* note 38.

C. Alternative: Limit Preemptive Effect

Another possible solution involves restricting the scope of ERISA's preemptive effect. The courts should not be so eager to preempt a common law cause of action with ERISA in cases where the plaintiff did not base the claim purely on plan administration. Congress meant for ERISA to govern the administration of employee benefit plans by imposing fiduciary standards on the management of plan assets, by providing injunctive relief to enforce those standards, by providing ready access to the federal court system, and by permitting participants and beneficiaries to recover benefits due them along with attorney fees and costs.¹³⁷ These features of ERISA provided relief to employees in areas where they previously had no recourse. There was no need to replace the common law causes of action that already existed. If the facts of a case support a claim for fraud or intentional infliction of emotional distress, then the courts should allow the employee or beneficiary to proceed and recover the appropriate relief, including punitive damages in proper situations.

It is appropriate for ERISA to preempt both a breach of contract claim, when the action is to recover benefits allegedly due the employee, and a breach of fiduciary duty claim, when it is based on alleged mismanagement of plan assets. However, the courts should not foreclose an employee from the traditional common law remedies when the employer makes misrepresentations regarding the employee benefit plan or when the plan administrator's conduct regarding the employee's claims for benefits is actionable under the tort of intentional infliction of emotional distress.

IV. CONCLUSION

The current judicial construction of ERISA indicates that punitive damage awards under ERISA are highly unlikely. Common law actions such as fraud or intentional infliction of emotional distress, for which punitive damages are normally available, could potentially bypass ERISA's restriction on punitive damages. ERISA will likely preempt such common law claims, thereby foreclosing punitive damages.

As a solution to the problem that punitive damage awards depend on the coincidence of the conduct underlying the cause of action and some remaining uncertainty of the preemption determination, this Note proposes either that courts allow punitive damages under ERISA, depending

137. See *supra* notes 5-14 and accompanying text.

on the conduct underlying the ERISA action, or, as an alternative, that courts limit preemption such that traditional common law actions remain available to an aggrieved employee or beneficiary along with all of the traditional remedies.

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