1994

ERISA: Extracontractual Damages Mandated For Benefit Claims Actions

George Lee Flint Jr
St. Mary's University School of Law, gflint@stmarytx.edu

ERISA: EXTRACONTRACTUAL DAMAGES MANDATED FOR BENEFIT CLAIMS ACTIONS

George Lee Flint, Jr.*

I. INTRODUCTION

Prior to the passage of the Employee Retirement Income Security Act of 1974 (ERISA)[1], participants[2] denied benefits from their private employee benefit plans sought recovery for those benefits in the courts, primarily under state contract law and, to a lesser extent, under state trust law.[3] State remedies, under both contract law and trust law, include compensation to participants for consequential and punitive damages caused by the failure of the plan to pay benefits, either through breach of contract or breach of the trustee's duty to pay.[4] Unfortunately, these pre-ERISA participants faced numerous jurisdictional[5] and procedural hindrances.[6] As a result, they seldom recovered their benefits, much less consequential and punitive damages.[7]

---

* Professor of Law, St. Mary's University School of Law, San Antonio, Texas; B.A., 1966, B.S., 1966, M.A. 1968, University of Texas at Austin; Nuc. E., 1969, Massachusetts Institute of Technology; Ph.D. (Physics), 1973, J.D., 1975, University of Texas at Austin. The author also practiced law in ERISA as a member of a law firm in Waco, Texas, and later at Exxon U.S.A. in Houston, Texas.

1. Pub. L. No. 93–406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

2. As used in this article, the word "participant" includes beneficiaries, if applicable.

3. *See, e.g.*, David Ziskind, *The Law of Employee Benefit Plans*, 1955 WASH. U. L.Q. 112, 117–25 (explaining that participants used contract law to recover denied benefits and used trust law supplementally to prevent mishandling of funds before participants had rights to draw on those funds); Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 916–24 (1970) (same); W.E. Shipley, Annotation, *Pension Plans—Rights of Employee*, 42 A.L.R.2d 461, 467–72 (1955) (using both contract and trust law to recover denied benefits). See *infra* notes 256–60, 273–81 and accompanying text for pre-ERISA benefits-due lawsuits under both contract law and trust law.

4. See *infra* notes 253–285 and accompanying text for remedies under state contract law and trust law, including the pre-ERISA benefits-due lawsuit.

5. The jurisdictional obstacles concerned such things as legal rules against suing nonresident trusts, *see, e.g.*, Miller v. Davis, 507 F.2d 308, 310–11 (6th Cir. 1974), and requiring service on all trustees. *See, e.g.*, Kane v. Lewis, 125 N.Y.S.2d 544, 546 (N.Y. App. Div. 1953).

Even benefits-due lawsuits under the Taft-Hartley Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–187 (1978)), commonly called the Labor Management Relations Act of 1947 (LMRA), an ERISA predecessor for union plans, met jurisdictional hurdles such as insufficient violations under the act. *See, e.g.*, Bass v.

Congress changed this unfavorable judicial climate for participants. Congress intended to provide the full range of legal and equitable remedies[8] for participants denied benefits. The full range clearly includes consequential and punitive damages otherwise available under contract law and trust law before ERISA's passage. To achieve this goal, Congress crafted three ERISA devices. First, Congress eliminated the state law hindrances through an ERISA preemption provision that eliminates all state law relating to employee benefit plans.[9] Second, Congress replaced that state law with standards for vested benefit preservation, funding adequacy, investment security, and fiduciary conduct required of all employee benefit plans.[10] Third, Congress reinforced the prior state law remedies with new federal ones under federal causes of action that may be tried in either federal or state court.[11] The ERISA remedies provision

International Bhd. of Boilermakers, Local No. 582, 630 F.2d 1058, 1066–67 (5th Cir. 1980). See *infra* notes 325–30 and accompanying text for discussion of the LMRA benefits-due lawsuit.

6. The procedural obstacles depended on the recovery theory used. Pursuant to state contract law, litigants developed three recovery theories. First, under the gratuity theory, courts treated the employer's promise to pay benefits as a gift in the future. The promise was unenforceable until the gift was actually made, effectively providing a block to the participant's recovery. Consequently, many plans had provisions stating that the participant acquired no enforceable contractual rights under the plan. *See, e.g.*, Menke v. Thompson, 140 F.2d 786, 790 (8th Cir. 1944); Fickling v. Pollard, 179 S.E. 582, 583 (Ga. Ct. App. 1935).

Second, under the deferred compensation theory, the participant's continued employment constituted consideration for the employer's promise to pay the benefit. The drawback to the deferred compensation theory was that, until ERISA, the employer could place sufficient conditions in the plan to defeat enforcement of the contract. The participant had no rights until he satisfied all conditions, including age and service. *See, e.g.*, Wallace v. Northern Ohio Traction & Light Co., 13 N.E.2d 139, 143 (Ohio Ct. App. 1937); David v. Veitscher Magnesitwerke Actien Gesellschaft, 35 A.2d 346, 349 (Pa. 1944). The deferred compensation theory was by far the most popular with litigating participants. *See, e.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989) (describing pre-ERISA law as contractual).

Third, under the estoppel theory, the court held that the participant's right to the benefit arose because of his reliance on the promise in continuing his work with that employer. Unfortunately, this too has seldom led to recovery of the benefit because the reliance must be reasonable. Employers frequently made statements destroying that reasonable reliance. *See, e.g.*, Hughes v. Encyclopedia Britannica, Inc., 117 N.E.2d 880, 882–83 (Ill. App. Ct. 1954) (cert. denied).

Under the trust theory, the courts treated the establishment of the plan as also establishing a trust for the payment of the benefits to the participants. Unfortunately, many employers never actually paid monies to any trust prior to LMRA's requirements to do so for multi-employer plans. *See* Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. § 186(c)(5) (1978). The result was failure of the participants to recover benefits under a trust theory since there was no trust res. *See, e.g.*, Lewis v. Jackson & Squire, Inc., 86 F. Supp. 354, 359–60 (W.D. Ark. 1949), *appeal dismissed*, 181 F.2d 1011 (8th Cir. 1950); Gearns v. Commercial Cable Co., 42 N.Y.S.2d 81, 82–83 (App. Div. 1943), *aff'd*, 56 N.E.2d 67 (N.Y. 1944). As a result, many cases adopting the trust approach were LMRA cases.

7. Another obstacle to participants receiving consequential and punitive damages was that court recognition of these contractual and trust remedies for denied benefits occurred only recently. *See* Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2069 n.7 (1993) (punitive damages under trust law developed recently); *see also infra* notes 168–71 and accompanying text for the recent development of recovery of consequential and punitive damages under contract law.

8. See *infra* note 240 and accompanying text for the congressional statement.

9. Employee Retirement Income Security Act of 1974, § 514, 29 U.S.C. § 1144 (1985).

10. H.R. REP. NO. 533, 93d Cong., 2d Sess. 5–8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643–46. *See* Employee Retirement Income Security Act of 1974, §§ 201–11, 301–06, & 401–14, 29 U.S.C. §§ 1051–61, 1081–86, & 1101–14 (1985).

provides, among other remedies, for both the traditional contract law remedies and traditional trust law remedies.[12]

There is, however, a serious threat to this goal of providing the full range of legal and equitable remedies. The federal courts have created some doubt as to whether ERISA's remedies provision permits recovery of consequential and punitive damages that otherwise may be recoverable under both state contract law and trust law.[13] Courts refer to these consequential and punitive damages caused by failing to adhere to the employee benefit plan's terms as extracontractual damages.[14] These generally fall into three types: financial losses, such as payment of income taxes and lost earnings generated by the failure,[15] nonfinancial losses, such as emotional distress and reputational injury caused by the failure,[16] and punitive damages for seriously egregious misconduct.[17]

Since ERISA preempts state law relating to employee-benefit plans, including contract and trust actions that might otherwise permit recovery of extracontractual damages in certain situations,[18] courts confronting the issue have endeavored to find authorization for such remedies in the specific language of ERISA's remedies provision, section 502(a).[19] Unfortunately, the federal courts have clouded the meaning of that language as it applies to the participants in a benefits-due lawsuit.[20]

This Article begins by explaining the problem confronting the participant in the benefits-due lawsuit under the relevant ERISA remedies provision, sec-

---

11. Employee Retirement Income Security Act of 1974, § 502(a) & (e), 29 U.S.C. § 1132(a) & (e) (participants may bring civil actions against employers and fiduciaries in various situations in federal court; the benefits-due lawsuit may also be brought in state court).

12. See *infra* notes 200–06 and accompanying text.

13. See *infra* notes 67–140 and accompanying text for the federal court decisions confronting the issue as to whether consequential and punitive damages are recoverable in an ERISA action.

14. *See, e.g.*, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 137–38 (1985); *see also*, 1A ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 5A.26, at 5A–155 (1993) (using the term "extracontractual damages" for consequential and punitive damages under contract law for insurance contracts).

15. *See, e.g.*, Warren v. Society Nat'l Bank, 905 F.2d 975, 976 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991) (remanded to determine recovery for adverse income tax consequences and lost interest for failure to pay in accordance with instructions).

16. *See, e.g.*, McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 820 (11th Cir.), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991) (denying recovery for emotional distress and reputational injury for failure to timely process a claim).

17. *See, e.g.*, Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618, 619 (7th Cir. 1987) (denying recovery of punitive damages for refusing to pay benefits until participant restored monies taken from the sponsoring employer).

In *Kleinhans* the employer devised an unwritten bad-boy forfeiture clause substitute. ERISA outlawed bad-boy forfeiture clauses in employee benefit plans. Employee Retirement Income Security Act of 1974, § 203(a)(2), 29 U.S.C. § 1053(a)(2) (1985) (requiring minimum vesting, foreclosing most bad-boy forfeitures); *see generally* Gary V. Lawson & Roberta Casper Walson, *Forfeitures-for-Cause "Bad Boy" Clauses: Is There Any Life Left After ERISA—Confusion in the Arena?*, 60 TAXES 827 (1982).

18. See *infra* notes 249–85 and accompanying text for state remedies under contract law and trust law.

19. Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132 (a) (1985). See *infra* note 72 and accompanying text for the express language requirement and note 21 for congressional rejection of the express language requirement.

20. *See infra* notes 67–140 and accompanying text.

tion 502(a). The Article then reviews the various approaches to the problem taken by the federal and state appellate courts. Finally, the Article outlines the analysis appellate courts should conduct to determine whether extracontractual damages are permissible under ERISA.

This Article asserts that ERISA provides participants recovery for extracontractual damages in certain situations, just as if the benefits-due lawsuit were brought under either contract law or trust law. If all the circuit courts would recognize this reasoning, there would be no need for congressional action to correct the judicial oversight.[21]

II. THE PROBLEM

Few would argue that participants in ERISA sometimes suffer losses beyond the amount otherwise specified in the plan and that the deterrent of personal liability for extracontractual damages would reduce the likelihood of these losses.[22]

A. Employee Benefit Programs in General

ERISA generally applies to two types of employee benefit programs: pension plans and welfare plans.[23] These employee benefit programs generally involve four parties: (1) the employer, who makes contributions to the plan and

---

21. Some litigators have requested Congress to amend ERISA's preemption provision to permit the wrongful claims processing lawsuit under state law. *See, e.g.*, H.R. REP. NO. 1023, 102d Cong., 2d Sess. 1 (1992) (recommending passage of the Health Insurance Fairness Act of 1992, H.R. 1602 as amended, to exempt from ERISA preemption state laws allowing workers to sue insurance companies for compensatory and punitive damages regarding the administration of benefit plans or the processing of benefit claims). *See also* H.R. REP. NO. 247, 101st Cong., 1st Sess. 55–56 (1989) (The legislative history of ERISA indicates Congress intended courts, through federal common law, to develop "appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA," for improper claims processing. The Budget Committee reaffirmed the "authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically be mentioned in ERISA," by "drawing upon principles enunciated in state law, including such remedies as the awarding of punitive and/or compensatory damages against the person responsible for the failure to pay claims in a timely manner.").

22. *See, e.g.*, Lafoy v. HMO Colo., 988 F.2d 97, 101 (10th Cir. 1993) (noting that extracontractual relief is supportable on grounds of policy and justice); Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1338 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992) (by removing extracontractual damages under ERISA, "the courts are removing a historical disincentive to insurance company misbehavior"); Harsch v. Eisenberg, 956 F.2d 651, 658 (7th Cir.), *cert. denied sub nom.* Bihler v. Eisenberg, 113 S. Ct. 61 (1992) (same); Amos v. Blue Cross-Blue Shield of Ala., 868 F.2d 430, 433 (11th Cir.), *cert. denied*, 493 U.S. 855 (1989) (same). *See also infra* notes 286–98 and accompanying text for a discussion of the development of the tort action to handle the problem of the breach of the implied covenant of good faith and fair dealing.

23. Welfare plans provide medical, disability, death, severance, vacation or education benefits. Employee Retirement Income Security Act of 1974, § 3(1)(A), 29 U.S.C. §1002(1)(A) (1985). A pension plan provides retirement income or deferred income. *Id.* § 3(2), 29 U.S.C. § 1002(2). There are two types of pension plans: (1) the defined contribution plan for which the plan document specifies the annual contribution, *id.* § 3(34), 29 U.S.C. § 1002(34), and (2) the defined benefit plan, *id.* § 3(35), 29 U.S.C. § 1002(35), for which the plan document specifies the amount of the retirement benefit.

appoints both the plan administrator and trustee;[24] (2) the plan administrator, who administers the plan;[25] (3) the trustee, who invests the plan's funds;[26] and (4) the participant, who receives the benefits.[27] A single party may serve in more than one of the four roles. The employer, plan administrator, and trustee are all plan fiduciaries.[28]

There are usually four separate types of plan administrators: (1) an employer;[29] (2) a management employee, a committee of such persons, or a committee dominated by such persons;[30] (3) a service provider, such as an insurance company operating under an administrative contract with the plan;[31] and (4) a committee with an equal number of representatives from management and rank and file employees.[32]

Employee benefit programs divide into two types: single-employer plans in which the firm sponsors a plan only for its employees and multiple-employer plans in which several firms together sponsor one plan for all of their employees.[33] Most multiple-employer plans are maintained pursuant to a collective bargaining agreement with a union, and are designed to benefit the labor union members who have employees of the involved employers.[34]

---

24. *Id.* §§ 3(5) & (16)(A), 29 U.S.C. §§ 1002(5) & (16)(A).
25. *Id.* § 3(16)(A), 29 U.S.C. § 1002(16)(A).
26. *Id.* § 403(a), 29 U.S.C. § 1103(a).
27. *Id.* § 3(6)–(8), 29 U.S.C. § 1002(6)–(8). *See generally* Robert R. Frei & James G. Archer, *Taxation and Regulation of Pension Plans Under the Internal Revenue Code,* 1967 U. ILL. L.F. 691, 692–93 (discussing the four parties in context of their role in pension plans and relevant tax consequences).
28. Employee Retirement Income Security Act of 1974, §§ 3(21)(A) & 403(a), 29 U.S.C. §§ 1002(21)(A) & 1103(a) (1985); *see, e.g.,* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 323 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103 ("[F]iduciaries include officers and directors of a plan, members of a plan's investment committee and persons who select these individuals.").
29. *See, e.g.,* Employer Retirement Income Security Act of 1974, § 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii) (1985) (employer is plan administrator if none named).
30. *See, e.g.,* Varhola v. Doe, 820 F.2d 809, 812–13 (6th Cir. 1987) (committee of executive employees); Chilton v. Savannah Foods & Indus., 814 F.2d 620, 622 (11th Cir. 1987) (director of personnel); Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 535 (7th Cir. 1986), *cert. denied,* 479 U.S. 1094 (1987) (committee of management employees); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1093–94 (9th Cir. 1985) (director of personnel).
31. *See, e.g.,* McManus v. Travelers Health Network of Texas, 742 F. Supp. 377, 382 (W.D. Tex. 1990) (finding insurer with authority to deny or grant claims a fiduciary); Benvenuto v. Connecticut Gen. Life Ins. Co., 643 F. Supp. 87, 90–91 (D. N.J. 1986) (same); McLaughlin v. Connecticut Gen. Life Ins. Co., 565 F. Supp. 434, 441–42 (N.D. Cal. 1983) (stating that an insurer with authority to deny or grant claims is a fiduciary under ERISA); Schulist v. Blue Cross of Iowa, 553 F. Supp. 248, 252 (N.D. Ill. 1982) (same), *aff'd,* 717 F.2d 1127 (7th Cir. 1983); Eaton v. D'Amato, 581 F. Supp. 743, 745–46 (D.D.C. 1980) (stating service provider acting as claims administrator could be a fiduciary if it had ultimate responsibility for claims determinations).
32. *See, e.g.,* Labor Management Relations Act of 1947, § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B) (1978) (specifying membership of trustee for jointly administered union plan).
33. JOHN H. LANGBEIN & BRUCE WOLK, PENSION AND EMPLOYEE BENEFIT LAW 48 (1990).
34. Employee Retirement Income Security Act of 1974, § 3(37)(A), 29 U.S.C. § 1002(37)(A) (1985); EMPLOYEE BENEFITS RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 63–69 (4th ed. 1990).

Employee benefit programs that are not multi-employer plans ordinarily consist of two separate instruments, both of which govern the benefit program.[35] The plan instrument, which is in the form of a contract, defines the rights and duties of the employer, the plan administrator, and the third-party beneficiaries of the contract, namely the participants. It is executed by the employer and initial plan administrators.[36] A trust instrument, in the form of a trust document, defines the rights and duties of the employer and trustee with respect to the assets of the benefit program, and is executed by the employer and initial trustee.[37] Sometimes both instruments appear in the same document executed by the employer, the initial plan administrators, and the initial trustee.[38] Multi-employer plans also usually have two instruments: (1) the collective bargaining agreement (a contract); and (2) a trust document that establishes a board of trustees,[39] defines the board's duties, and covers the affairs of both the trust and the plan.[40]

Because of this dual nature of employee benefit plans, pre-ERISA law applied legal principles from both contract law and trust law.[41] This dual nature is the major difference between employee benefit plans and traditional trust law.[42] The participant's relation to the plan is contractual[43] with his benefits determined by the contractual plan and governed by the plan administrator who has interpretory discretion.[44] That plan administrator is also frequently related to the employer and likely to present biased decisions.[45]

This dual nature also causes failures to recover denied benefits when courts view the problem as a trust law question only. Wrongful denial of

---

35. *See, e.g,* Molumby v. Shapleigh Hardware Co., 395 S.W.2d 221, 223 (Mo. Ct. App. 1965) (plan and trust in separate instruments); *see also* John H. Langbein, *The Supreme Court Flunks Trusts,* 1990 SUP. CT. REV. 207, 223 (Gerhard Casper et al. eds., 1991) (pointing out that ERISA does not supplant either trust law or contract law relating to employee benefit programs).

36. *E.g.,* 5A JACOB RABKIN & MARK H. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS (MB) 13–1001 to 13–1021 (1991) (defined benefit program's plan instrument, Form 13.01, designed for use with a separate trust instrument).

37. *E.g., id.* at 13–1074 to 13–1083 (trust instrument for defined benefit program, Form 13.03(II), designed for use with a separate plan instrument).

38. *E.g., id* at 13–2045 to 13–2077 (profit-sharing plan and trust, so labeled, in one document, Form 13.13).

39. *See, e.g.,* Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. § 186(c)(5) (1978).

40. EMPLOYEE BENEFITS RESEARCH INSTITUTE, *supra* note 34, at 53–69. The Board typically hires a salaried plan administrator and staff or an outside administration firm to handle day-to-day matters. *Id.* So even multi-employer plans separate plan administration from asset management.

41. *See supra* note 3.

42. *See, e.g.,* H.R. REP. NO. 533, *supra* note 10, at 12–13, *reprinted in* 1974 U.S.C.C.A.N. at 4650–51 (recognizing that employee benefit law differs from trust law in not having an testamentary trust origin, having numerous beneficiaries, and requiring administration to the benefit of all participants).

43. See *infra* note 310 for Congressional adoption of the deferred wage theory.

44. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112–13 (1989) (discussing de novo review as applicable when the plan administrator lacks interpretory discretion).

45. *See* George Lee Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege,* 39 CATH. U. L. REV. 133, 167–79 (1990) (discussing the plan administrator's review rule in light of self-interest).

benefits, in addition to being a breach of contract, always involves a fiduciary breach.[46] Congressional intent was to incorporate trust law fiduciary standards through section 404(a).[47] Among those fiduciary standards of trust law are duties running to the beneficiaries in the payment of trust benefits.[48] Congress clearly indicated that this trust duty applied to employee benefit plans under ERISA.[49] Therefore, courts sometimes address only the trust law remedies for wrongful denial of benefits.[50]

B. The Need for a Damage Recovery

The need for the participant to recover extracontractual damages may arise in several ways. In the pension plan situation, for example, a participant may desire to make a tax-free rollover of his benefit from a profit-sharing plan to an individual retirement account (IRA), in accordance with the Internal Revenue Code.[51] In such cases, the participant directs the plan trustee to distribute the entire amount of his retirement benefit to the IRA trustee.[52] But rather than distribute the benefit during one calendar year, the trustee distributes the monies in two installments in two different calendar years to earn additional trustee fees. As a result, the participant is unable to rollover the second distribution, must pay income taxes on it, and loses the tax-free compounding the earnings would have generated during the time it was in the IRA.

In the welfare plan situation, a doctor and the participant consult with the plan administrator as to whether the cost of surgical sterilization reversal is

---

46. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 152 (1985) (concurring opinion). See *infra* note 95 and accompanying text for the view that such an action, if merely a delay in payment is involved, is not a breach of fiduciary duty. *But see* GEORGE G. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS & TRUSTEES, § 814, at 321–22 (2d rev. ed. 1981) (trustee liable for interest when unjustifiably delaying payment of income from trust); 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS, § 182, at 551 (4th ed. 1987) (same).

47. *See, e.g.*, H.R. REP. NO. 533, *supra* note 10, at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to...fiduciaries certain principles developed in the evolution of the law of trusts.").

48. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 2 at 6 (1959) ("A trust...is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person...") & § 182 at 392 ("Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him..."); RESTATEMENT (SECOND) OF TRUSTS §§ 2 & 182 (1959); BOGERT & BOGERT, *supra* note 46, § 814, at 314; 2A SCOTT & FRATCHER, *supra* note 46, § 182, at 550.

49. H.R. CONF. REP. NO. 1280, *supra* note 28, at 301 n.1, *reprinted in* 1974 U.S.C.C.A.N. at 5081 & n.1 (procedures for delegating fiduciary duties include "allocation or delegation by fiduciaries of duties with respect to payment of benefits.").

50. See *infra* notes 90–136 and accompanying text for court cases treating the benefits-due lawsuit as a trust law action.

51. Internal Revenue Code of 1954, § 402(a)(5), 26 U.S.C. § 402(a)(5) (1988). The Code permits such transfers for the distribution of the entire balance in the account if it is rolled-over within sixty days of receipt. *Id.*, 26 U.S.C. § 402(a)(5)(C). It also provides for partial distributions if the partial distribution is more than 50% of the balance, is paid out within one taxable year, and is on account of a certain event, e.g., termination of employment with the sponsoring employer. *Id.*, 26 U.S.C. § 402(a)(5)(D)(i).

52. This situation is suggested by the facts of Warren v. Society Nat'l Bank, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

reimbursed under a medical plan.[53] After receiving advice that it is, the surgery is performed and bills are submitted to the plan. After a portion of the bills are paid, the plan's medical auditors determine that the surgery is not covered under the plan since the surgery is elective. This type of surgery is not, however, contained in the long list of elective surgeries excluded under the plan's terms. The plan administrator requests reimbursement of payments made and refuses to make further payments for bills submitted by the anesthesiologist and surgeon in an effort to reduce future insurance premiums and thereby earn the sponsoring employer's favor. The participant is unable to pay the bills himself, and as a result is denied credit and subjected to pressure from collection agencies.

These two participants might seek to be made whole again by recovery of their losses. The profit-sharing plan participant would seek to recover income taxes paid and lost future earnings. The medical plan participant would seek to recover damages for emotional distress, embarrassment, humiliation, and injury to financial reputation. These losses arose solely because a fiduciary of the plan failed to act as required under ERISA, solely in the interest of all participants.[54] Also, the trustee failed to follow instructions in order to generate fees for itself and the plan administrator incorrectly denied coverage to reduce future insurance premiums to curry its employer's favor.

C. The Need for a Loss Deterrent

If ERISA does not permit recovery of these consequential losses and the associated punitive damages, there would be no legal mechanism preventing fiduciaries, generally controlled by the sponsoring employer,[55] from acting as follows.

Fiduciaries of defined benefit plans[56] would delay all retirement payments from these plans until the retiree sues. This action might generate further plan income to reduce future employer contributions if the plan's earnings exceed the participant's allowable prejudgment interest.[57] Medical plan fiduciaries would challenge all medical plan payments, paying only to those

---

53. This situation is suggested by the facts of McRae v. Seafarers' Welfare Plan, 920 F.2d 819 (11th Cir.), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991).

54. Employee Retirement Income Security Act of 1974, § 404(a), 29 U.S.C. § 1104(a) (1985) (a fiduciary must discharge its duties solely in the interest of the participants and beneficiaries).

Fiduciaries often reason that, since payment to one beneficiary reduces the amount available for subsequent beneficiaries, wrongful payment violates this sole benefit duty. *See, e.g.*, LANGBEIN & WOLK, *supra* note 33, at 556, 574 (participants versus beneficiaries). This reason is often used to cover for wrongful denials.

55. *See supra* notes 29–32 and accompanying text for a description of plan administrators.

56. A defined benefit plan is one where the risk of investment loss is on the sponsoring employer, not the participant. LANGBEIN & WOLK, *supra* note 33, at 42.

57. Some states recognize two bases on which to award prejudgment interest on liquidated amounts: (1) an enabling statute and (2) general principles of equity. *E.g.*, Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480, 485 (Tex. 1978) (using TEX. REV. CIV. STAT. ANN. art. 5069–1.03 (Vernon 1987)), which presently provides for 6 percent, to compute the prejudgment interest under the equitable principle. *See infra* note 58 for cases allowing prejudgment interest on benefits due.

participants that take them to court, thereby reducing the cost of future premiums paid by the amount payable to those who fail to sue.

Without extracontractual damages, the only courtroom result for this behavior would be payment of the amount of benefit originally owed before the delay or challenge, plus possibly prejudgment interest and attorney's fees.[58] Thus, the sponsoring employer would gain the benefit of the fiduciary's delay or the payee's failure to pursue legal action, without penalty.[59]

D. Payors of Extracontractual Damages

If a participant recovered extracontractual damages from the fiduciary or the plan under ERISA, the economic burden would not fall on the plan and its beneficiaries. Instead, the loss would be shifted to the fiduciary or employer. If the plan paid the judgment, the fiduciary whose breach caused the loss is liable to reimburse the plan for any losses to the plan,[60] such as those generated by the judgment for extracontractual damages due to the breach of fiduciary duty.[61] If the fiduciary pays the judgment, the plan cannot reimburse the fiduciary because, under ERISA, the fiduciary is entitled to reimbursement only for reasonable expenses, properly and actually incurred,[62] not for a judgment of breaches of fiduciary duties.[63]

Fiduciaries may be indemnified by the employer. Department of Labor regulations, however, permit indemnity agreements only to the extent that insurance is available.[64] ERISA permits plans to purchase insurance for a fiduciary, if the insurer has recourse against the fiduciary for breach of fiduciary duty.[65] The employer is permitted to purchase insurance for the fiduciary without the recourse limitation.[66] Therefore, either the fiduciary or

---

58. Award of prejudgment interest and attorneys' fees in an ERISA action is discretionary with the court. *See, e.g.*, Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 696–97 (7th Cir. 1991) (award of prejudgment interest in an ERISA action not an abuse of discretion); Employee Retirement Income Security Act of 1974, § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1985) (an award of attorneys' fees in an ERISA action is in the court's discretion).

59. The temptation for such unethical conduct was the impetus to the development of the tort action for breach of the implied covenant of good faith and fair dealing in insurance contracts. *See infra* notes 286–92 and accompanying text.

60. Employee Retirement Income Security Act of 1974, § 409, 29 U.S.C. § 1109 (1985).

61. *See* Maxfield v. Central States, S.E. & S.W. Areas Health, Welfare & Pension Funds, 559 F. Supp. 158, 160 (N.D. Ill. 1982) (denying punitive damages because the plan will have to pay them). Generally, the fiduciary is the defendant and pays the judgment, including lost profits the plan may have accrued. *See, e.g.*, Warren v. Society Nat'l Bank, 905 F.2d 975, 976 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991); Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986).

62. Employee Retirement Income Security Act of 1974, § 408(c)(2), 29 U.S.C. § 1108(c)(2) (1994).

63. Section 409(a) makes a fiduciary personally liable for breaches of fiduciary duty while section 410(a) voids any agreement to relieve a fiduciary of that liability. Employee Retirement Income Security Act of 1974, §§ 409(a) & 410(a), 29 U.S.C. §§ 1109(a) & 1110(a) (1985).

64. 29 C.F.R. § 2509.75–4 (1990).

65. Employee Retirement Income Security Act of 1974, § 410(b), 29 U.S.C. § 1110(b) (1985).

66. *Id.* Some states permit an individual to insure against punitive damages. *See, e.g.*, Ridgeway v. Gulf Life Ins. Co., 578 F.2d 1026, 1029–30 (5th Cir. 1978) (Texas law); Fagot

the employer, and not the plan, will bear the cost of the judgment for extracontractual damages.

III. COURT DECISIONS

ERISA's remedies section, section 502(a), permits plan participants to bring civil actions in six situations: (1) for the civil penalty for failure to provide required information once requested, (2) for benefits due, to enforce rights, or to declare rights under the terms of the plan, (3) for appropriate relief for breach of fiduciary duty, (4) to enjoin violations of the plan or ERISA, (5) to obtain other appropriate equitable relief, and (6) to obtain relief for failure to provide annual benefit statements.[67] Only four of these are of

v. Ciravola, 445 F. Supp. 342, 344–45 (E.D. La. 1978) (Louisiana law); Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 488, 502 P.2d 522, 525 (1972); California Union Ins. Co. v. Arkansas Louisiana Gas Co., 572 S.W.2d 393, 395 (Ark. 1978); Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910, 913–14 (Ga. 1977); Abbie Uriquen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 511 P.2d 783, 789–90 (Idaho 1973); Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 228, 230 (Iowa 1981), *overruled by statute*, Parks v. City of Marshalltown, 440 N.W.2d 377, 379 (Iowa 1989); Continental Ins. Co. v. Hancock, 507 S.W.2d 146, 151–52 (Ky. Ct. App. 1973); First Nat'l Bank v. Fidelity & Deposit Co., 389 A.2d 359, 361–67 (Md. Ct. App. 1978); Anthony v. Frith, 394 So. 2d 867, 868 (Miss. 1981); Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1021–22 (Or. 1977); Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964); State v. Glens Falls Ins. Co., 404 A.2d 101, 105 (Vt. 1979); Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233–34 (W. Va. 1981).

In contrast, other states prohibit an individual from insuring against punitive damages. *See, e.g.*, Dorsey v. Honda Motor Co., 655 F.2d 650, 659 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) (Florida law); American Surety Co. v. Gold, 375 F.2d 523, 525–27 (10th Cir. 1966) (Kansas law); Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441–42 (5th Cir. 1962) (Virginia law); Grant v. North River Ins. Co., 453 F. Supp. 1361, 1370–71 (N.D. Ind. 1978); American Ins. Co. v. Saulnier, 242 F. Supp. 257, 261 (D.C. Conn. 1965); City Products Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494, 496 (Ct. App. 1979); Universal Indem. Ins. Co. v. Tenery, 39 P.2d 776, 779 (Colo. 1934); Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058, 1068 (Ill. App. Ct. 1981); Wojciak v. Northern Package Corp. 310 N.W.2d 675, 679–81 (Minn. 1981); Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964); Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co., 410 A.2d 696, 703–04 (N.J. Super. 1980); Parker v. Agricultural Ins. Co., 440 N.Y.S.2d 964, 966 (1981); Esmond v. Liscio, 224 A.2d 793, 799 (Pa. Super. Ct. 1966).

67. Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132(a) (1985):

> A civil action may be brought—
> (1) by a participant or beneficiary—
> (A) for the relief provided for in subsection (c) of this section [for denial of requested required information] 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...a participant [or] beneficiary...for appropriate relief under section 1109 of this title [for fiduciary breach];
> (3) by a participant [or] beneficiary...
> (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 equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
> (4) by...a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title [for failure to provide annual benefit statement].

Id.

interest for participants seeking extracontractual damages for denied benefits. They clearly are not seeking damages for information failures.

The remaining four actions appear to include, among other remedies, the pre-ERISA contract and trust law remedies. The action for benefits due, to enforce rights, or to declare rights under the terms of the plan resembles the contractual remedies for damages, specific performance, and declaratory judgment. The other three actions suggest the trust law actions for fiduciary breach, injunctions, and other trust law remedies besides an injunction granted by a court through its equity powers. Of these four actions, only the first and last are of interest for recovery of extra-contractual damages in a benefits-due lawsuit.

Several appellate courts have considered whether a participant may recover extracontractual damages under sections 502(a)(1)(B) of ERISA for benefits due, 502(a)(2) for breach of fiduciary duty, and 502(a)(3)(B) for other appropriate equitable relief as well as whether an implied action may be appropriate.

A. Benefits Due Actions

The difficulty with recovery of extracontractual damages under the benefits-due lawsuit arises because of some disparaging Supreme Court dicta. In *Massachusetts Mutual Life Insurance Co. v. Russell*,[68] a case dealing with a participant's remedies for a breach of fiduciary duty for improper and untimely claims processing under section 502(a)(2) of ERISA,[69] Justice Stevens, with respect to the benefits-due lawsuit, adopted the deletion myth and incorrectly suggested that congressional pronouncements concerning the full range of legal and equitable remedies referred to a pre-ERISA provision that had the word "legal" deleted in the final version.[70] As a result many subsequent courts have concluded, without examining the legislative history, that ERISA forecloses traditional contractual remedies permitting recovery of extracontractual damages in the benefits-due lawsuit.[71] Another part of the Supreme Court's dicta suggests that Congress did not intend to permit extracon-

---

68. 473 U.S. 134 (1985).

69. *Id.* at 137–38; *see* Employee Retirement Income Security Act of 1974, §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2) (1985).

70. *Russell*, 473 U.S. at 146:

> But that language [quoted *infra* in note 240 and accompanying text] appeared in committee reports describing a version of the bill before the debate on the floor and before the Senate-House Conference Committee had finalized the operative language. [footnoting the Senate bill] In the bill passed by the House of Representatives and ultimately adopted by the Conference Committee the reference to legal relief was deleted.

Id. Unlike the Senate bill, the House bill never had the word "legal" and the version used in the House report containing the "full range of legal and equitable remedies" language was virtually the same as the final version. See *infra* notes 212–35 and accompanying text for the actual legislative history concerning the pronouncement for the full range of legal remedies.

71. *See, e.g.*, Harsch v. Eisenberg, 956 F.2d 651, 654–55 (7th Cir. 1992), *cert. denied sub nom.*, Bihler v. Eisenberg, 113 S. Ct. 61 (1992) (relying on express statutory language to deny contractual financial losses such as interest expenses, higher taxes, and reduced billings); Reinking v. Philadelphia Am. Life Ins. Co., 910 F.2d 1210, 1219 (4th Cir. 1990) (same to deny contractual emotional distress).

tractual damages because there is no express language in ERISA providing for such damages in a benefits-due lawsuit.[72]

1. Federal Court Opinions

Despite the disparaging dicta for the benefits-due lawsuit, the federal courts have taken two views. The Sixth Circuit[73] allows recovery of extracontractual damages, provided the contractual requirements are met.[74] This suggests that the benefits-due lawsuit indeed deals with the contract law approach.

In contrast the Fourth,[75] Fifth,[76] and Seventh[77] Circuits deny recovery for extracontractual damages for the benefits-due lawsuit. These Circuits rely on Justice Stevens' dicta that section 502(a)(1)(B) of ERISA does not expressly provide for extracontractual damages[78] and on the fact that the statute created a complex scheme of remedies, indicating congressional intent to deny extracontractual damages.[79]

The Third Circuit has refused to rule on the issue, leaving one case to the lower court but suggesting it might be contractual[80] and recasting two other cases as breach of fiduciary duty.[81]

---

72. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985):

> Significantly, the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan—sec. 502(a)(1)(B)...—says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim.

Id. See infra notes 141–341 and accompanying text for the actual congressional intent.

73. Meade v. Pension Appeals and Review Comm., 966 F.2d 190, 194 (6th Cir. 1992).

In *Meade*, the participant, denied permanent disability benefits under a pension plan based on medical opinions, sought punitive damages in addition to retroactive pension monies. *Id.* at 192.

74. *Id.* at 194–95. *See infra* notes 253–55 and accompanying text for those contractual requirements.

75. Reinking v. Philadelphia Am. Life Ins. Co., 910 F.2d 1210, 1219–20 (4th Cir. 1990).

In *Reinking*, the participant, who was denied health care coverage for injuries sustained in an attempted suicide caused by severe mental depression, sought emotional distress damages. *Id.* at 1212, 1219.

76. Medina v. Anthem Life Ins. Co., 983 F.2d 29, 31–32 (5th Cir. 1993) (following the Seventh Circuit).

In *Medina*, the participant, initially denied dental coverage under a health plan, sought damages for pain and suffering and punitive damages. *Id.* at 30.

77. Harsch v. Eisenberg, 956 F.2d 651, 655–56 (7th Cir. 1992), *cert. denied sub. nom.*, Bihler v. Eisenberg, 113 S. Ct. 61 (1992) (following the Fourth Circuit); *see also* Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 825 (7th Cir. 1984) (no right to mental stress under section 501(a)(1)(B), providing no reason).

See infra note 120 for the *Harsch* facts.

78. *Harsch*, 956 F.2d at 655; *Reinking*, 910 F.2d at 1219. *See infra* note 139 for Justice Stevens' statement and *supra* note 21 and *infra* notes 172–94 and accompanying text for the view that the statement is incorrect.

79. *Harsch*, 956 F.2d at 656; *Reinking*, 910 F.2d at 1220.

80. Cox v. Keystone Carbon Co., 861 F.2d 390, 394 (3d Cir. 1988), *cert. denied*, 498 U.S. 811 (1990).

81. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 n.7 (3d Cir. 1990); McMahon v. McDowell, 794 F.2d 100, 109 (3d Cir.), *cert. denied*, 479 U.S. 971 (1986).

2. State Court Opinions

State courts, having concurrent jurisdiction, have also ruled on the benefits-due lawsuit.[82] Three state jurisdictions, North Carolina,[83] Ohio,[84] and Texas,[85] have followed the Fourth, Fifth, and Seventh Circuits in denying recovery. The reasoning of these three jurisdictions is that extracontractual damages are not available under the benefits-due lawsuit in federal court and hence can not be recovered in state court.[86]

In contrast other state courts have sought a loophole in this rationale, either through the ERISA insurance law exception to preemption,[87] or by failing to find that state law is preempted by ERISA,[88] or by determining that the damages sought are not extracontractual.[89]

---

82. Employee Retirement Income Security Act of 1974, § 502(g), 29 U.S.C. § 1132(g) (1985).

83. Overcash v. Blue Cross & Blue Shield of N.C., 381 S.E.2d 330, 340–41 (N.C. Ct. App. 1989).

In *Overcash*, the health plan denied coverage for private home duty nursing coverage to a participant who eventually died. The participant's heirs sued for compensatory (unspecified) and punitive damages. *Id.* at 333.

84. Richland Hospital, Inc. v. Ralyon, 516 N.E.2d 1236, 1240 (Ohio 1987).

In *Ralyon*, the participant in a health plan, who was denied benefits after verification of coverage, sought indemnification and punitive damages from the plan for bills due the doctors and hospital. *Id.* at 1237–38.

85. *See* Pan American Life Ins. Co. v. Erbauer Const. Corp., 791 S.W.2d 146, 158 (Tex. Civ. App. 1990) (dissenting opinion), *rev'd on other grounds*, 805 S.W.2d 395, *cert. denied*, 112 S. Ct. 86 (1991).

In *Erbauer*, the employer sought damages to its business due to the wrongful denial of benefits under an insured health plan. *Id.* at 144–49.

86. *Overcash*, 381 S.E.2d at 340; *Ralyon*, 516 N.E.2d at 1240; *Erbauer*, 791 S.W.2d at 158.

87. Goodrich v. General Telephone Co. of Cal., 241 Cal. Rptr. 640, 646 (Cal. Ct. App. 1987), *vacated*, 773 P.2d 450 (Cal. 1989) (damages for delay in disability plan; bad faith code provision fits insurance exception), *overruled by* Commercial Life Ins. Co. v. Superior Court, 764 P.2d 1059, 1064 (Cal. 1988), *cert denied sub. nom.*, Juliano v. Commercial Life Ins. Co., 490 U.S. 1075 (1989) (relying on Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987), which foreclosed state law actions for emotional distress and bad faith claims processing under ERISA).

ERISA's preemption provision does not exempt regulatory insurance, securities, and banking laws. Employee Retirement Income Security Act of 1974, § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1985). California codified its common law early on, *see, e.g.*, STEPHEN PRESSER & JAMAIL ZAINALDIN, LAW AND AMERICAN HISTORY 427 (1980) (California adopted all five Field Codes covering all the law by 1898), so its tort of breach of the implied covenant of good faith and fair dealing is codified in its insurance code. CAL. INS. CODE § 790.03(h) (Deering 1992).

88. Shofer v. Stuart Hack Co., 595 A.2d 1078, 1085 (Md. Ct. App. 1991), *cert. denied*, 112 S. Ct. 1174 (1992) (income tax losses in retirement plan against plan consultant). State action against professional malpractice by non-fiduciaries is not preempted by ERISA since these individuals cannot be sued under ERISA. *Id.* at 1083; *see* Mertens v. Hewitt Assoc., 113 S. Ct. 2063, 2067 (1993) (ERISA does not impose liability on non-fiduciaries for participating with fiduciaries in breaches of trust).

89. Shideler v. Connecticut General Life Ins. Co., 563 So. 2d 1082, 1085 (Fla. Ct. App. 1990), *review dismissed*, 569 So. 2d 1278 (prejudgment interest under life insurance plan). See *infra* note 257 for pre-ERISA allowance of prejudgment interest on liquidated amounts.

B. Fiduciary Breach Actions

The Supreme Court has foreclosed recovery of extracontractual damages by the participant through the action for breach of fiduciary duty under section 502(a)(2) of ERISA. In *Russell*,[90] a case involving improper and untimely processing of a benefit claim under a disability plan, Justice Stevens relied on the statutory construction rule of interpreting the statute as a whole[91] to determine that ERISA's breach of fiduciary duty provision, sections 409 and 502(a)(2),[92] permit recovery only by the plan, and not by the participant, although he may bring the lawsuit on behalf of the plan.[93] Justice Stevens found three statutory supports for his conclusion. The express statutory language of the fiduciary breach provision makes several references to recovery by the plan.[94] The ERISA requirement for timely handling of the claim (within sixty days under Department of Labor regulations) is not included within the sections on fiduciary duties and so a timely violation is not a breach of fiduciary duty.[95] The ERISA remedy provision, section 502(a), does not expressly refer to

---

90. 473 U.S. 134 (1985) (Powell, Rehnquist, O'Conner, and Burger joining the majority opinion of Justice Stevens).

The result in *Russell* is correct. Characterization of extracontractual damages as equitable or legal depends on the associated relief. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570–71 (1990) (an award of monetary relief not necessarily "legal" relief; monetary awards of restitution or incidental to injunctive relief have been characterized as equitable damages); Tull v. United States, 481 U.S. 412, 424 (1987) (same). Wrongful denial is a breach of fiduciary duty, *see supra* notes 46–50 and accompanying text, entitling the participant to the right to recover trust law equitable damages. *See infra* notes 272–85 and accompanying text for state trust law and *supra* note 47 and accompanying text for incorporation of state trust law into ERISA. The *Russell* court's suggestion that ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2)(1985), permits recovery of extracontractual damages by the plan, both consequential and punitive, as equitable damages, is correct. *See infra* note 279 and accompanying text. However, pre-ERISA trust law denied recovery of extracontractual damages as equitable damages (for breach of fiduciary duty) by participants. *See infra* notes 280–81 and accompanying text.

91. *E.g.*, Richards v. United States, 369 U.S. 1, 11 (1962). *See* 2A JABEZ SUTHERLAND, STATUTORY CONSTRUCTION, § 46.05, at 103–05 (Norman J. Singer, 5th ed. 1992).

92. Employee Retirement Income Security Act of 1974, § 409(a) & 502(a)(2), 29 U.S.C. § 1109(a) & 1132(a)(2) (1985):

> [A] fiduciary...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.

Id. at § 409(a), 29 U.S.C. § 1109(a).

The circuit court had relied on the phrase "such other...remedial relief" to permit recovery of extracontractual damages. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985); Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482, 490 (9th Cir. 1983).

93. *Russell*, 473 U.S. at 140.

94. *Id.*

95. *Id.* at 143. *See* Jay Conison, *Suits for Benefits under ERISA*, 54 U. PITT. L. REV. 1, 9–14 (1992) (arguing that ERISA's fiduciary duties run only to the plan). *See supra* notes 46–50 and accompanying text for the incorrectness of Justice Stevens' conclusion.

ERISA, however, requires the plan to comply with Department of Labor regulations. Employee Retirement Income Security Act of 1974, § 503, 29 U.S.C. § 1133 (1985). The Department of Labor regulations require processing the claim within sixty days. 29 C.F.R. § 2560.503–1(h)(1)(i) (1992).

compensation for delay in payment.[96] The Supreme Court, however, limited its opinion to actions under ERISA section 502(a)(2) brought by participants,[97] leaving open the possibility of recovery of extracontractual damages by the plan under section 502(a)(2) or by the participant under some other section of ERISA.

The circuit courts have followed *Russell,* with respect to lawsuits brought under section 502(a)(2) for breach of fiduciary duty by a participant seeking personal recovery.[98]

C. Other Appropriate Equitable Relief Actions

The Supreme Court recently foreclosed recovery of extracontractual damages by the participant through the action for other equitable relief under section 502(a)(3) of ERISA. In *Mertens v. Hewitt Associates,*[99] which involved an action against a non-fiduciary actuary for assisting the fiduciaries in reducing the employer's contributions so that its defined benefit plan failed, Justice Scalia provided only one reason for limiting "other equitable relief" to exclude compensatory and punitive damages. The Supreme Court recently so limited similar language in an unrelated statute.[100] Scalia next disposed of three

---

96. 473 U.S. at 144.

97. *Id.* at 139 n.5, 144 n.12.

98. Sanson v. General Motors Corp., 966 F.2d 618, 621–22 (11th Cir. 1992), *cert. denied,* 113 S. Ct. 1578 (1993) (employee unsuccessfully sued employer for misrepresenting benefits under retirement plan); Morales v. Pan Am. Life Ins. Co., 914 F.2d 83, 87 (5th Cir. 1990) (participant unsuccessfully sued for unjust enrichment in plan termination in which only those with benefits less than X received a lump-sum option); *see* Trenton v. Scott Paper Co., 832 F.2d 806, 810 (3d Cir. 1987), *cert. denied,* 485 U.S. 1022 (1988) (employees unsuccessfully sued to stop plan amendment as creating a top heavy plan under the ERISA portion of the Internal Revenue Code of 1954, § 416(g), 26 U.S.C. § 416(g) (1988)); Award Service Inc. v. Northern Cal. Retail Clerks Union & Food Employers Joint Pension Trust, 774 F.2d 1391, 1391 (9th Cir. 1985), *cert. denied,* 474 U.S. 1081 (1986) (employer unsuccessfully sued for recovery of mistakenly made contributions).

99. 113 S. Ct. 2063 (1993) (Blackmun, Kennedy, Souter, and Thomas joining the majority opinion of Justice Scalia).

The result in *Mertens v. Hewitt Associates* is correct. The characterization of the trust law remedy of beneficiaries against non-fiduciaries depends on the circumstances. *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570–71 (1990) (an award of monetary relief not necessarily 'legal' relief; monetary awards of restitution or incidental to injunctive relief have been characterized as equitable damages); Tull v. United States, 481 U.S. 412, 424 (1987) (same). For the beneficiary lawsuit against third parties, ownership of the trust res confers a legal nature on the otherwise equitable lawsuit. RESTATEMENT (SECOND) OF TRUSTS §§ 281, 282 (1959) (if beneficiary is in possession of the trust res, action against third party is legal; if not, it is equitable). In *Mertens* the terminated participants had already received their reduced pensions and hence were seeking the trust law legal damage remedy. *See infra* notes 272–85 and accompanying text for state trust law and *supra* note 47 and accompanying text for incorporation of state trust law into ERISA. Since the damage is not granted pursuant to a court of equity's equitable power, it is not "equitable". *See infra* note 201.

100. 113 S. Ct. at 2068 ("any other equitable relief as the court deems appropriate" in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e–5(g) (1981) precludes compensatory or punitive damages, United States v. Burke, 112 S. Ct. 1867, 1872 (1992)); *see* Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989) (Title VII limited to recovery of back pay, an equitable restitution remedy); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 374–75 (1979) (same; adopting lower court conclusions so holding).

Use of similar language in an unrelated statute is an acceptable statutory interpretative technique when both statutes apply to similar relationships. *See, e.g.,* Moragne v. State Marine arguments in favor of permitting the trust law damage remedy under "other equitable relief".[101] First, this language does not mean any relief that an equity court could grant because such a definition would not limit this language, since equity courts could also provide legal remedies, and ERISA provides those legal remedies elsewhere.[102] Second, ERISA's grant of remedial relief to the Department of Labor for "any amount ordered paid" under the same language of "other equitable relief" does not include compensatory and punitive damages since Department of Labor Regulations exclude monetary damages.[103] Third, this interpretation, providing fewer remedies than available under pre-ERISA

Lines, Inc., 398 U.S. 375, 390–91, 397–98 (1970) (using land-based wrongful death statutes to interpret scope of maritime wrongful death statute); Overstreet v. North Shore Corp., 318 U.S. 125, 128–29 (1943) (using one statute regulating interstate industries to interpret coverage of another such statute); 2B SUTHERLAND, *supra* note 91, § 53.03 at 223–34. The limit to this interpretative practice is that it operates only upon a showing of the same legislative policy for both statutes. Cox v. Roth, 348 U.S. 207, 209 (1955) (granting seamen under maritime wrongful death act same rights as railroad workers under land-based wrongful death act, else frustrates a unified congressional policy); Schneiderman v. United States, 320 U.S. 118, 133–34 n.12, 139 (1943) (using predecessor and successor statutes to interpret scope of a naturalization statute to revoke naturalization); 2B SUTHERLAND, *supra* note 91, § 53.05, at 238.

Title VII of the Civil Rights Act is the wrong *in pari materia* (on the same matter) statute. Justice Scalia should have discovered this fact had he applied any statutory construction techniques. (Scalia eschews legislative history as only indicative of what some members of Congress believed. *See* United States v. Hansen, 772 F.2d 940, 947–48 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).) The lower court opinions limiting Title VII remedies to certain equitable remedies and accepted by the Supreme Court as correct did so on the basis of (1) the principle of *ejusdem generis* (of the same kind) and finding no compensatory or punitive damage remedies listed, *e.g.*, Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 195 (1978) (noting that the only other listed remedies are injunction, mandamus, and restitution of back pay); Equal Employment Opportunity Comm'n v. Detroit Edison Co., 515 F.2d 301, 309 (6th Cir. 1975), *vacated for reconsideration*, 431 U.S. 951 (1977) (same), or (2) legislative history indicating a desire to stop discrimination with little concern for compensation, even attempting to limit restitution of back pay. *E.g.*, Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 836–38 (1973). Neither statutory construction technique applies to ERISA's remedies provision in the same way as it does to Title VII. The ERISA remedies provision lists some legal remedies and has a legislative history of providing for legal remedies. *See infra* notes 157–61, 236–332 and accompanying text. Hence, the congressional policies for the two statutes differ.

101. *See infra* notes 272–85 and accompanying text for an explanation of the trust law damage remedy.

102. *Mertens*, 113 S. Ct. at 2068–70. See *infra* notes 273–83 and accompanying text for a division of trust law damages remedies between legal damages and equitable damages, depending on whether the court of equity grants them pursuant to its legal powers or equitable powers.

103. 113 S. Ct. at 2070–71.

Under ERISA § 502(l), 29 U.S.C. § 1132(l) (1994), the Department of Labor can assess a civil penalty on any amount ordered by a court in an action under ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), granting the Department of Labor the right to an action similar to the participant's action under § 502(a)(3), 29 U.S.C. § 1132 (a)(3), and with the same term "other appropriate equitable relief." The argument is that § 502(l) recognizes a damage remedy under § 502(a)(5), or else there would be no "amount" on which to assess the penalty. But Department of Labor proposed regulations suggest that "amount" for equitable relief refers only to restitution payments to the plan. 55 Fed. Reg. 25,288, 25,289 & n.9 (1990).

This Department of Labor limitation has no bearing on whether "other appropriate relief" also includes trust law equitable damages. A plan might recover extracontractual damages under § 502(a)(2). *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 n.12 (1985). Section 502(a)(2) damages are also part of the amount ordered by the court under § 502(a)(5). Hence, this regulation is not an accurate indication of the meaning of "other equitable relief" since the Department of Labor envisions recovery of civil penalties for trust law equitable damages under different wording.

law, is not contrary to the policy of ERISA since vague policy statements can not overcome specific words in the statute.[104]

Before *Mertens*, the federal appellate courts took two approaches to answering the question of whether a participant may recover consequential damages under the rubric of "other appropriate equitable relief." One approach envisioned the trust law equitable damage remedy as encompassed by this language. The other approach limited this language to non-damage remedies.

1. The Trust Law Equitable Damage Remedy

The Third,[105] Fourth,[106] Fifth,[107] and Sixth[108] Circuits asserted that the trust law equitable damage remedy for extracontractual damages is included

---

104. 113 S. Ct. at 2071–72. *See infra* notes 240–42 and accompanying text for the erroneousness of this statement.

105. Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1298–99 (3d Cir. 1993) (adopting Brennan's theory for a beneficiary suing for COBRA benefits as a breach of fiduciary duty under § 502(a)(3)), *contra* Pane v. RCA Corp., 868 F.2d 631, 635 n.2 (3d Cir. 1989) (in dicta, citing § 502(a)(3) cases from the Seventh and Ninth Circuits).

106. Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). *See also* Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 60 n.2 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993) (in dicta, insurance company's misrepresentation about coverage when sponsoring employer stopped premium payment not so egregious to warrant recovery of extracontractual damages); U.S. Steel Mining Co. v. District 17, United Mine Workers of Am., 897 F.2d 149, 152 (4th Cir. 1990) (damages to sponsoring employer for improvidently granted injunction preventing plan termination not egregious enough to warrant recovery).

In *Powell*, the participant sought recovery for physical ailments, decline of her marriage, and deterioration of her mental health due to harassment for requiring unnecessary medical reports and failure to provide copies while paying disability payments. 780 F.2d at 420–21, 424. The Fourth Circuit quoted the trust law equitable damage remedy as requiring malice and fraud, which was absent and so the participant did not recover any monies. *Id.* at 424. As a result, *Powell* is generally cited along with the cases denying the trust equitable damage remedy. *E.g.*, Harsch v. Eisenberg, 956 F.2d 651, 657 (7th Cir. 1992), *cert. denied sub. nom.* Bihler v. Eisenberg, 113 S. Ct. 61 (1992); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 825 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988).

107. Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1336–37 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992). *Contra* Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1464–65 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) (for non-benefits due lawsuit, section 502(a)(3)(B) doesn't permit punitive damages, based on the erroneous conclusion that trust law doesn't permit punitive damages).

In *Corcoran*, the participant sought recovery of emotional injuries when an unborn child died after an employee disability plan determined that the hospitalization of the mother-participant was not necessary. 965 F.2d at 1322, 1324. The Fifth Circuit noted that both trust law and contract law permit extracontractual damages, but that no trust law cases permitted recovery for emotional injuries, and emotional injuries under contract law are awarded in the doctor-patient situation only when there is a specific agreement for a particular procedure or result. *Id.* at 1336–37.

108. Richards v. General Motors Corp., 991 F.2d 1227, 1231 (6th Cir. 1993); Warren v. Society Nat'l Bank, 905 F.2d 975, 982 (6th Cir. 1990); *contra* Varhola v. Doe, 820 F.2d 809, 817 (6th Cir. 1987) (denying punitive damages based on opinions from other circuits).

In *Richards*, the participant sought recovery for appreciated stock in a savings-stock purchase plan. 991 F.2d at 1230. The local plan administrator permitted the participant to back date (during each month) for a period of three years permitting the participant to await appreciation before making purchases. *Id.* Eventually the sponsoring employer discovered the practice, terminated the participant, and rescinded the back-dated transactions and employer matching contributions. *Id.*

See supra notes 51–52 and accompanying text for the *Warren* facts.

within the "other appropriate equitable relief" of section 502(a)(3)(B). Justice Brennan outlined the trust law equitable damage remedy argument in his concurring opinion in *Russell*.[109] Section 502(a)(3)(B) authorizes the participant to seek "redress" for "any act or practice which violates any provision of [ERISA] or the terms of the plan."[110] This section does not require the violation to necessarily be a breach of fiduciary duty, as was the case under sections 502(a)(2) and 409. So Justice Stevens's endeavor to show that untimely processing of the claim did not amount to a breach of fiduciary duty is irrelevant.[111] Whether untimely processing merely violates a Department of Labor regulation or is a breach of fiduciary duty, the participant can sue for redress under "other appropriate equitable relief" under section 502(a)(3)(B) for the violation.[112]

With respect to the remedy available under section 502(a)(3)(B), Justice Brennan reasoned as follows. Congress intended that section 404(a) of ERISA,[113] the fiduciary duty section, incorporate the fiduciary duties of trust law.[114] Trust law remedies are predominantly equitable in nature and so the remedies provision corresponding to violations of section 404(a) is section 502(a)(3).[115] These equitable trust law remedies include a provision for monetary damages.[116] Thus, "other appropriate equitable relief" includes the trust law equitable damage remedy.[117]

In *Varhola*, participants sought punitive damages for denial of shut-down pensions. 820 F.2d at 812. The initial employer had sold the assets of the plant to the sponsoring employer. *Id.* To insure sufficient experienced employees, the sponsoring employer made representations that the participants would receive shut-down pensions if they worked for the sponsoring employer, which they did. *Id.*

109. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (joined by Justices White, Blackmun, and Marshall).

110. *Id.* at 153–54. *See* Employee Retirement Income Security Act of 1974, § 502(a)(3)(A) & (B), 29 U.S.C. § 1132(a)(3)(A) & (B) (1985).

111. See *supra* note 95 and accompanying text for Justice Stevens's conclusion that untimely processing is not a breach of fiduciary duty. Justice Brennan concluded that untimely filing is a breach of fiduciary duty. 473 U.S. at 152; *see supra* notes 46–50 and accompanying text for Justice Brennan's argument.

112. 473 U.S. at 153–54.

113. Employee Retirement Income Security Act of 1974, § 404(a), 29 U.S.C. § 1104(a) (1985).

114. *Id. See* H.R. REP. NO. 533, *supra* note 10, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. at 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to...fiduciaries certain principles developed in the evolution of the law of trusts."); *id.* at 13, *reprinted in* 1974 U.S.C.C.A.N. at 4651 ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a...duty on every fiduciary...to act consistently with the principles of administering the trust for the exclusive purposes [in the interest of the participants]....").

115. Employee Retirement Income Security Act of 1974, § 404(a), 29 U.S.C. § 1104(a) (1985).

116. *Id.; see infra* notes 277–83 and accompanying text for the trust law equitable damage remedy.

117. Employee Retirement Income Security Act of 1974, § 404(a), 29 U.S.C. § 1104(a) (1985). Unfortunately, the trust law equitable damages remedy provides the participant no recovery for extracontractual damages; only the plan can recover them. *See infra* notes 281–83 and accompanying text.

2. Non-Damage Remedy

The First,[118] Second,[119] Seventh,[120] Eighth,[121] Ninth,[122] Tenth,[123] and Eleventh[124] Circuits hold that the trust law equitable damage remedy for extra-

---

118. Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 824 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988) (following the Ninth Circuit).

In *Drinkwater*, the participant sought consequential (unspecified) and punitive damages against the employer for bad faith and malicious conduct in misrepresenting his eligibility for higher benefits under a post-disability plan and interference with his attainment of vested retirement benefits. *Id.* at 823. After a seven year disability, his employer ordered him back to work under threat of forfeiture of all benefits since medical examiners failed to find any objective evidence of continued disability. *Id.* He returned, suffered a heart attack the first day, and was placed back on disability under the original disability plan due to a recurrence-of-disability provision. *Id.*

The *Drinkwater* opinion never specified what extracontractual damages Drinkwater sought, since under its non-recoverable conclusion this information is irrelevant. It suggests that some of the extracontractual damages were the difference between the benefits of the two plans from the date of the second disability. *Id.* at 824. But this would require the misrepresentation to have occurred, in which case the benefits would be directly payable under the second plan.

119. Lee v. Burkhart, 991 F.2d 1004, 1011 (2d Cir. 1993).

In *Lee*, the participants brought an action against the plan administrator, individually, for medical reimbursements since the plan itself was unfunded with the sponsoring employer in bankruptcy. *Id.* at 1006. Against this defendant these damages would be considered extracontractual. Liability against the plan administrator was based on representations that the plan administrator was the insurer of the plan, since the participants were never supplied summary plan descriptions informing them that the plan was self-insured. *Id.*

120. Harsch v. Eisenberg, 956 F.2d 651, 656–61 (7th Cir. 1992), *cert. denied, sub nom.* Bihler v. Eisenberg, 113 S. Ct. 61 (1992); Petrilli v. Drechsel, 910 F.2d 1441, 1448–49 (7th Cir. 1990); Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618, 626–27 (7th Cir. 1987) (adopting Ninth Circuit arguments, *see Harsch*, 956 F.2d at *657–58*). *See also* Tomczyk v. Blue Cross & Blue Shield United of Wis., 951 F.2d 771, 777 n.3 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2274 (1992) (in dicta, punitive damages not recoverable for bad faith denial of medical reimbursements); Forys v. United Food & Commercial Workers Int'l Union, 829 F.2d 603, 604 n.2 (7th Cir. 1987) (in dicta, emotional distress and punitive damages against union officials for failure to recover health benefits unavailable under section 503(a)(3)).

In *Harsch*, participants leaving a law firm received extremely delayed retirement plan payments, suffering credit interest expenses and additional taxes due to new tax laws. *Harsch*, 956 F.2d at 653–54.

In *Petrilli*, the participant discovered his job was to be eliminated, found other employment, and requested severance pay for involuntary termination allegedly permitted for other individuals. *Petrilli*, 910 F.2d at 1443–44. The participant only sought punitive damages. *Id.* at 1448.

In *Kleinhans*, the sponsoring employer delayed retirement payments two years in an attempt to force repayment of monies stolen from the employer. *Kleinhans*, 810 F.2d at 620–21. The only extracontractual damages the participant sought were punitive damages. *Id.* at 621.

121. Novak v. Andersen Corp., 962 F.2d 757, 760 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).

In *Novak*, the plan administrator of an employee stock ownership plan did not give a terminating participant notice that his distribution could be rolled-over tax free into an IRA as required by ERISA. *Id.* at 758; Internal Revenue Code of 1954, § 402(f), 26 U.S.C. § 402(f) (1988). The participant sued for the amount of the income taxes he otherwise would not have had to pay. *Id.*

The Eighth Circuit had previously ruled that punitive damages were inappropriate in an ERISA action. Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). In *Dependahl*, the sponsoring employer amended the severance pay plan to require fifteen years of service, contemplating mass firings, fired the plaintiff-participants, and offered to pay severance if the participants surrendered their rights under a life insurance plan, an offer they refused. *Id.* at 1211. This section 510 violation, *id.* at 1216, is enforceable under section 502(a)(3). Employee Retirement Income Security Act of 1974, §§ 502(a) & 510, 29 U.S.C. §§ 1132(a) & 1140 (1985). The reason supplied by the *Dependahl* court, however, was by analogy to federal labor law, which bans punitive damages for a union breach of the duty of fair representation. *Dependahl*, 653 F.2d at 1216 (citing International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48–52 (1979)). This is the wrong analogous body of law to follow. More appropriate would have been the LMRA cases, which involve the benefits-due lawsuit and do permit punitive damages but not as equitable damages. *See supra* notes 312–30 and accompanying text.

122. Johnson v. Dist. 2 Marine Eng. Beneficial Ass'n—Associated Maritime Officers, Medical Plan, 857 F.2d 514, 518 (9th Cir. 1988); Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986); Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1306–07 (9th Cir. 1986). *See also* Olson v. General Dynamics Corp., 960 F.2d 1418, 1424 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2968 (1992) (concurring opinion, extending *Russell's* bar of extracontractual damages to all plaintiffs); Award Service, Inc. v. Northern Cal. Retail Clerks Union, 774 F.2d 1391, 1391 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986) (in dicta, extending *Russell*'s bar of extracontractual damages to all remedies sought by a beneficiary; court implied a remedy for employers seeking a contribution refund).

In *Johnson*, the court refused to permit amendment of the petition to include extracontractual damages (loss on forced sale of house and other property) under section 502(a)(3)(B). *Johnson*, 857 F.2d at 515, 518. The participant had been denied by the trustees coverage for a liver transplant since it was an experimental procedure. *Id.* at 515. The trustees had already decided to amend the plan to specifically exclude liver transplants, but the amendment did not occur until after the participant's request. *Id.* at 515, 517.

In *Sokol*, a beneficiary sought lost interest earnings, medical expenses, and emotional distress (all in the amount of $6,000) against the plan administrator. *Sokol*, 803 F.2d at 534. The plan administrator had ordered distribution of the account contrary to written instructions accepted three years earlier. *Id.* at 533. To avoid adverse tax consequences, the beneficiary requested redeposit. *Id.* at 534. The plan administrator refused unless and until the beneficiary waived a breach of fiduciary duty lawsuit against him and agreed to pay administrative fees attributable to the beneficiary's portion of the plan. *Id.*

The *Sokol* facts show the senselessness of the Supreme Court's ruling that a plan might obtain extracontractual damages but the participant may not under section 502(a)(2). In *Sokol*, the plan obviously had segregated the beneficiary's account to charge it separate administrative fees. *Id.* So recovery by the plan of lost interest, an extracontractual damage, would be allocated to the segregated account and eventually distributed to the beneficiary.

In *Hancock* the court refused to allow discovery concerning motives for denying extended disability payments under a disability plan since such evidence relates solely to extracontractual damages (unspecified). *Hancock*, 787 F.2d at 1306. The plan administrator was faced with conflicting medical evidence as to the cause of the disability. *Id.* at 1307. The plan excluded disability for mental disorders not requiring institutionalization. *Id.*

Prior to the opinion in Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985), the Ninth Circuit permitted extracontractual damages in the benefits-due lawsuit. *E.g.*, Kuntz v. Reese, 760 F.2d 926, 938 (9th Cir. 1985), *withdrawn*, 785 F.2d 1410 (9th Cir. 1986), *cert. denied*, 479 U.S. 916 (1986) (punitive damages available in appropriate cases under ERISA § 409(a); misrepresentation of benefits); Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482, 490–92 (9th Cir. 1983), *rev'd*, 473 U.S. 134 (1985) (emotional distress and punitive damages based on a fiduciary breach); *see* Winterrowd v. David Freedman & Co., 724 F.2d 823, 826 (9th Cir. 1984) (punitive damages in a trustee lawsuit against employer for contributions under "other legal or equitable relief as the court deems appropriate" in ERISA § 502(g)(2)(E), 29 U.S.C. §1132(g)(2)(E)).

123. Lafoy v. HMO Colorado, 988 F.2d 97, 99–101 (10th Cir. 1993) (following the Seventh Circuit). *See also* Alexander v. Anheuser-Busch Co., 990 F.2d 536, 539–40 (10th Cir. 1993) (in dicta, following the First, Seventh, and Ninth Circuits).

In *Lafoy*, the participant in a health maintenance organization (HMO) suffered from multiple personality disorder. 988 F.2d at 99. Previously, the participant had been treated at a particular hospital by a particular psychiatrist and psychotherapist. On a subsequent attack, the HMO refused to authorize treatment at the first hospital so she was treated by new individuals at a second, but authorized, hospital. *Id.* She claimed that she suffered irreparable psychological injuries because she was not treated by her regular therapists. *Id.*

124. McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821–22 (11th Cir. 1991), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991); Amos v. Blue Cross-Blue Shield of Ala., 868 F.2d 430, 431 (11th Cir. 1989), *cert. denied*, 493 U.S. 855 (1989); United Steelworkers of Am. v. Connors Steel Co., 855 F.2d 1499, 1508–09 (11th Cir. 1988), *cert. denied sub nom.* H.K. Porter Co. v. United Steelworkers of Am., 109 S. Ct. 1568 (1989); Bishop v. Osborn Transp.,

contractual damages is not included within the "other appropriate equitable relief" of section 502(a)(3)(B). They support this conclusion with two arguments.

First, four reasonings used by the Supreme Court in *Russell* to foreclose consequential damages under section 502(a)(2) also apply to section 502(a)(3)(B). The Supreme Court has ruled that the phrase "equitable or remedial relief as the court may deem appropriate",[125] applicable to the breach of fiduciary action under section 502(a)(2), does not include extracontractual damages recoverable by a participant.[126] The phrase contained in section 502(a)(3)(B), "other appropriate equitable relief", is so similar that it means the same: no extracontractual damages.[127] The Supreme Court concluded that ERISA focuses on the integrity of the plan, and not on the direct protection of beneficiaries.[128] Nothing in the Supreme Court's opinion limits this conclusion

---

Inc., 838 F.2d 1173, 1174 (11th Cir. 1988), *cert. denied*, 488 U.S. 832 (1988) (following the Ninth Circuit). *See also* First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc., 960 F.2d 1546, 1552–53 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993) (service provider failed to obtain restitution [deemed equitable] from sponsoring employer for payment of benefit under health plan to ineligible employees).

See *supra* note 53 and accompanying text for the *McRae* facts.

In *Amos*, the participant sought consequential (unspecified) and punitive damages for bad faith refusal to pay health benefits. *Amos*, 868 F.2d at 430–31.

In *United Steelworkers*, participants sought damages for emotional distress, pain and suffering as well as punitive damages. *United Steelworkers*, 855 F.2d at 1508. The sponsoring employer had terminated health insurance and life insurance prior to bankruptcy despite continuation provisions in both the insurance policies and the collective bargaining agreement. *Id.* at 1501–02.

In *Bishop*, the participant sought punitive damages against an employer who altered the participant's date of discharge to avoid the participant's attainment of medical benefits. *Bishop*, 838 F.2d at 1173.

The Eleventh Circuit recently has expressed concern that the limitation spawned by the Ninth Circuit, limiting "other appropriate equitable relief" to traditional equitable remedies such as injunctions and declaratory relief may be over-restrictive. *First Nat'l Life*, 960 F.2d at 1553. The Eleventh Circuit at least permits restitution, claiming it is an equitable remedy. *Id.*; Blue Cross and Blue Shield of Ala. v. Weitz, 913 F.2d 1544, 1547 (11th Cir. 1990). Restitution had its origins both in equity and at law. *See* John B. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 175–85 (1959).

125. Employee Retirement Income Security Act of 1974, § 409(a), 29 U.S.C. § 1109(a) (1974).

126. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141–43 (1985).

127. Sokol v. Bernstein, 803 F.2d 532, 535 (9th Cir. 1986). *E.g.*, Board of Supervisors of Albemarle County v. Marshall, 214 S.E.2d 146, 150 (Va. 1975); Boriack v. Boriack, 541 S.W.2d 237, 240 (Tex. Civ. App. 1976, writ dismissed); *see* 2A SUTHERLAND, *supra* note 91, § 47.16, at 183–84 (similar words in a statute have the same meaning).

This interpretation of the Supreme Court's opinion is not correct. The Supreme Court expressly left open the possibility that this language included extracontractual damages under the breach of fiduciary duty remedy, provided it was sought by the plan and not the beneficiary. *Russell*, 473 U.S. at 144 n.12.

128. *Russell*, 473 U.S. at 142–43.

This conclusion again is incorrect. *E.g.*, Employee Retirement Income Security Act of 1974, 29 U.S.C. § 2(b), 29 U.S.C. § 1001(b) ("It is hereby declared to be the policy...to protect...the interests of participants...and their beneficiaries,...by establishing standards of conduct, responsibility, and obligation for fiduciaries...and by providing for appropriate remedies...."); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (refusing to interpret ERISA to provide less protection for participants than before ERISA); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (ERISA is to protect contractually defined benefits); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (an ERISA goal is to promote the interests of employees and their beneficiaries); 120 CONG. REC. 29,196 (1974), *reprinted in* 3 Senate Subcommittee on Labor of the Committee on Labor & Public Welfare, to the breach of fiduciary action and so it applies to section 502(a)(3)(B) actions.[129] The Supreme Court, in dicta, noted that extracontractual damages are not expressly provided for the benefits due lawsuit under section 502(a)(1)(B).[130] Section 502(a)(3)(B) also does not provide expressly for extracontractual damages, therefore they are unavailable under section 502(a)(3)(B).[131] The Supreme Court also determined that because the statutory remedy scheme is so well interlocked, interrelated, and interdependent that a court cannot read into the statute an additional remedy, such as extracontractual damages.[132] Nothing in the Supreme Court's opinion limits this determination to the breach of fiduciary duty action, so therefore, it applies to the section 502(a)(3)(B) action.[133]

Second, legislative history indicates that "other appropriate equitable relief" is limited to injunctions and declaratory relief.[134] The Senate Finance Committee report, when discussing the "appropriate equitable relief" available in a civil action, only mentions injunctions, constructive trusts, and removal.[135]

Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 4665 (1976) [hereinafter Legislative History] (statement of Rep. John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee and House sponsor of the original legislation, 1974 U.S.C.C.A.N. CVIII; Robert L. Aldisert, Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux*, 21 LOY. L.A.L. REV. 1343, 1355 (1988), that initially there was only one aim and "that was to give to a pension participant his entitlements under the contract of the pension plan"); 119 CONG. REC. 30,041 (1973), *reprinted in*, 3 Legislative History 4797 (statement of Sen. Lloyd Bentsen, member of the Senate Committee on Finance most active in sponsoring ERISA, Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374 n.21 (1980), that ERISA is directed to two goals: (1) safeguarding the pension rights of participants and (2) encouraging the establishment of plans).

129. *Sokol*, 803 F.2d at 536.

Again this interpretation of the Supreme Court's opinion is not correct. The Supreme Court expressly limited its opinion to the breach of fiduciary duty remedy. *Russell*, 473 U.S. at 139 n.5. Hence, it could afford to be overbroad in providing support, as long as its particular case, the breach of fiduciary remedy, was included. *See* KARL LLEWELLYN, THE BRAMBLE BUSH 72–76 (1960) (describing the maximum and minimum value of precedent).

130. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). See *infra* notes 172–94 and accompanying text for the fallaciousness of the express language requirement.

131. Sokol v. Bernstein, 803 F.2d 532, 536 (9th Cir. 1986).

132. *Russell*, 473 U.S. at 146. This of course says nothing about the meaning of the terms that are included in section 502(a).

133. *Sokol*, 803 F.2d at 536.

Again this interpretation of the Supreme Court's opinion is not correct. The Supreme Court expressly limited its opinion to the breach of fiduciary duty remedy. *Russell*, 473 U.S. at 139 n.5. Moreover, the concurring opinion indicates that the word "other...equitable relief" contained in section 502(a)(3)(B), after providing injunctive relief in section 502(a)(3)(A), declarative relief in section 502(a)(1)(B), and attorneys fees under section 502(g), can only be interpreted as authorizing federal courts to add to the remedial scheme through the directive to fashion federal common law. *Id.* at 155–56; *see* 120 CONG. REC. 29,942 (1974), *reprinted in*, 3 Legislative History, *supra* note 128, at 4771 (statement of Sen. Javits, ranking Republican on the Senate Committee on Labor and Public Welfare and co-sponsor of the original draft legislation, 1974 U.S.C.C.A.N. XCII; Theodore Paul Manno, *ERISA Preemption and the McCarran–Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 61 (1979), for the courts to develop a federal common law involving the rights and obligations under ERISA).

134. *Sokol*, 803 F.2d at 537–38.

135. S. REP. NO. 383, 93d Cong., 2d Sess. 105–06, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4989.

Use of this report concerning the remedy provision is extremely dangerous. The bill under consideration by the Senate had a differently-worded remedy provision than the house

Therefore, extracontractual damages are not included within section 502(a)(3)(B).[136]

D. Implied Remedies

The Supreme Court also ruled in *Russell* that the participant can not obtain extracontractual damages through an implied cause of action.[137] Justice Stevens found two supports for this conclusion. Legislative history calling for the full range of legal remedies referred to an earlier bill containing the word "legal", which was deleted in the final version.[138] The second support was the comprehensive legislative remedial scheme for participants, indicating Congress did not intend to authorize other non-expressed remedies.[139]

---

version and the Conference Committee version. *Compare* S. 4, 93d Cong., 1st Sess., § 603 (Jan. 4, 1973), quoted in note 214 *infra with* H.R. 2, 93d Cong., 1st Sess., §106(c) (Jan. 3, 1973), quoted in note 225 *infra and* Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132(a) (1985). The statements made with respect to a differently-worded and unsimilar section of a bill cannot possibly relate to the passed bill's section. Courts regard proposed amendments to a bill as an unreliable indication of congressional intent, *e.g.*, Andrews v. Hovey, 124 U.S. 694, 716 (1888) (argument founded on various phases of Patent Statute of 1870 in its passages through two houses of congress is very unsafe and unreliable as a basis for judicial action). The two recognized exceptions to this statutory construction rule are (1) for interpreting a passed amendment, *e.g.*, United States v. St. Paul M. & M.R. Co., 247 U.S. 310, 318 (1917) (committee reports, bill as introduced, changes made in frame of bill in course of its passage, and statements made by committee chairman in charge of it, may be considered if properly qualified, such as floor amendment to meet objection during debate of 1896 Land Patent Act since they are in the nature of supplementary reports to remove ambiguity); Blake v. National Banks, 90 U.S. (23 Wall.) 307, 317 (1874) (amendment to 1870 income tax bill/statute), and (2) for excluding an omission in the statute, *e.g.*, Carey v. Donohue, 240 U.S. 430, 436 (1916) (1903 Bankruptcy Act, House language stricken by Senate); Pennsylvania R.R. Co. v. International Coal Min. Co., 230 U.S. 184, 198–99 (1912) (1887 Interstate Commerce Act, Senate version, had the language, the passed version did not; thus, conclusively not in statute).

The ERISA legislative statement is not a case of omission and deletion, but one of an entirely differently–worded provision. The rule in that case is to follow the version in the house of origination, Steiner v. Mitchell, 350 U.S. 247, 254 (1956) (following Senate discussion of the Portal–to–Portal Act since the House version had no comparable provision). For ERISA that would be the House of Representatives, not the Senate.

The Eleventh Circuit would add restitution to the list. *See supra* note 124. *Contra* U.S. Steel Mining Co. v. District 17, United Mine Workers of Am., 897 F.2d 149, 153 (4th Cir. 1990); Mertens v. Hewitt Assocs., 948 F.2d 607, 612 (9th Cir. 1991), *aff'd*, 113 S. Ct. 2063 (1993).

136. Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986).

To reach this conclusion the *Sokol* court had to declare by *fiat* that language in the Conference Committee report on the breach of fiduciary remedy suggesting that "a fiduciary is to be subject to other appropriate relief (including removal) as ordered by a court", H.R. CONF. REP. NO. 1280, *supra* note 28, at 320, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5100, did not contemplate other than injunctive and declarative relief. *Sokol*, 803 F.2d at 537.

137. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985).

138. *Id.* at 146. See *infra* notes 212–35 and accompanying text for the error of this interpretation of the legislative history.

139. 473 U.S. at 146 ("The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."). The Supreme Court has since declared that section 502(a) provides the exclusive remedy for participants asserting improper claim processing, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987), but such remedies are not limited to those ERISA actions seeking pension benefits. Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478, 486 (1990).

The circuit courts have followed *Russell* and refused to imply a cause of action for other matters.[140]

The only express provision that might permit recovery of extracontractual damages, according to the Supreme Court, is the benefits-due lawsuit under section 502(a)(1)(B).

IV. LEGISLATIVE INTENT

To determine whether ERISA permits recovery of extracontractual damages, the courts must interpret the meaning of the ERISA remedies provision. The guiding principle for statutory interpretation is to inquire into legislative intent.[141] To determine legislative intent, courts employ two techniques: the analytical method, acting on the literal meaning of the words in the statute, and the teleological method, acting on the intended legislative remedy.[142] The method selected depends on the circumstances of the case and the desire to achieve a just result.[143] The Supreme Court has used both methods.[144] In the case of the benefits-due lawsuit under ERISA's remedies provision, both methods give the same result.

---

140. Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412, 1418 (9th Cir. 1991) (participants unsuccessfully sued for annuities after plan administrator terminated the practice); Williams v. Caterpillar, Inc., 944 F.2d 658, 665 (9th Cir. 1991) (participants unsuccessfully sued for misrepresentation concerning benefits); Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 692 (6th Cir. 1989), *cert. denied*, 495 U.S. 905 (1990) (beneficiary unsuccessfully sought death benefit under retirement plan); Bryant v. International Fruit Product Co., 886 F.2d 132, 135 (6th Cir. 1989) (participants challenged employer's retention of terminated plan's surplus); Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1411 (9th Cir. 1988) (participants sued for ill-gotten profits); Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 895 (D.C. Cir. 1987) (participants challenged amendments approved by the Internal Revenue Service).

141. *See, e.g.*, United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 55 (1942) (the all-important controlling factor in determining the meaning of a statute is legislative intent); United States v. Stone & Downer Co., 274 U.S. 225, 239 (1927) (same); Ebert v. Poston, 266 U.S. 548, 554 (1925) (same); Wisconsin Cent. R.R. v. Forsythe, 159 U.S. 46, 55 (1895) (same); Jones v. Guar. & Indem. Co., 101 U.S. 622, 626 (1879) (same); Raymond v. Thomas, 91 U.S. 712, 715 (1875) (same); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 395–96 (1867) (same); *see also* United States v. Cooper Corp., 312 U.S. 600, 605 (1941) (role of the court is to declare the legislative intent); United States v. Palmer, 16 U.S. (3 Wheat) 610, 630 (1818) (same); *see generally* 2A SUTHERLAND, *supra* note 91, § 45.05, at 22–23.

142. STANLEY A. DE SMITH, DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 86 (3rd ed. 1973); *see generally* 2A SUTHERLAND, *supra* note 91, §§ 45.07 at 31–32 (describing the two techniques as the objective "meaning" of Oliver Wendell Holmes, Jr., and subjective "intent") & 45.13, at 76–78. The key difference between the two methods is the use of legislative history to interpret statutes.

143. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION 521–35 (1960). *See generally* ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 60–85 (1986) (discussing principles and counterprinciples in contract law, such as the freedom to contract and fairness).

144. *Compare* Chung Fook v. White, 264 U.S. 443, 446 (1924) (if the language is plain and an injustice arises, the remedy lies with Congress and not the courts) *and* Caminetti v. United States, 242 U.S. 470, 485 (1917) (if the language is plain and unambiguous, the duty of interpretation does not arise and the court need not discuss the aids for resolving ambiguity) *with* Pierson v. Ray, 386 U.S. 547, 561 (1967) (teleological method; suggesting Sir Edward Coke's rule in Heydon's Case, 3 Co. Rep. 7a, 76 ENG. REP. 637, 639 (1584)) *and* Church of the Holy

In applying the analytical method, courts use only the statute itself and intrinsic aids such as section headings, preambles, titles, punctuation, context, grammar, and word choice.[145] Under the analytical method, the court determines a statute's meaning through its exact language, using intrinsic aids only if necessary.[146]

Under the teleological method, courts use external aids, such as other statutes, prior judicial and administrative decisions, historical context, and legislative history.[147] Legislative history is the Supreme Court's preferred extrinsic aid.[148] In contrast to the analytical method, a court examines the problem that the legislature set out to solve and the remedy it developed and then construes the statute in light of achieving those ends.[149]

Some courts combine the two methods by using the teleological method permitting use of extrinsic aids for two exceptions to the analytical method. The two exceptions occur when interpreting ambiguous language[150] and to prevent unjust or absurd results.[151] The Supreme Court primarily applies the plain meaning rule: in the absence of ambiguity in a statute's wording, the statute's explicit terms express the legislative intent.[152] Ambiguity is an imprecise word that permits a court to use the extrinsic aids when it chooses.[153]

Trinity v. United States, 143 U.S. 457, 459 (1892) (statutes should be sensibly construed so that the reason of the law prevails over its letter if an injustice or absurdity would result).

145. *See generally* CHARLES B. NUTTING ET AL., CASES AND MATERIALS ON LEGISLATION 471–508 (4th ed. 1969); 2A SUTHERLAND, *supra* note 91, § 45.14, at 79.

146. *See generally* HORAK, CASES AND MATERIALS ON LEGISLATION 271–76 (1940); NUTTING ET AL., *supra* note 145, at 408; 2A SUTHERLAND, *supra* note 91, § 46.01, at 81–83.

147. *See generally* HORAK, *supra* note 146, at 508–56; 2A SUTHERLAND, *supra* note 91, § 45.14, at 79.

148. *See, e.g.*, Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 9–10 (1976) (courts can and should consider legislative history even where the language of the statute is clear); *see also* United States v. Public Util. Comm'n of California, 345 U.S. 295, 315 (1953) (when the statute is ambiguous, may use legislative history); United States v. Missouri P.R.R., 278 U.S. 269, 278 (1928) (same).

149. *See generally* HORAK, *supra* note 146, at 268–71, 1059; NUTTING ET AL., *supra* note 145, at 408–09; 2A SUTHERLAND, *supra* note 91, § 45.09, at 42–44. The teleological method derives from Heydon's Case, 3 Co. Rep. 7a, 7b, 76 ENG. REP. 637, 638 (1584).

150. Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2594 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished"); Union Bank v. Wolas, 112 S. Ct. 527, 530 (1991) (when the statutory text is clear, the burden on a party proposing a statutory interpretation at odds with the text is exceptionally heavy); *see, e.g.*, HORAK, *supra* note 146, at 271–76; 2A SUTHERLAND, *supra* note 91, §§ 45.02, at 5–7 & 46.07, at 126–27.

151. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892); *see generally* NUTTING ET AL., *supra* note 145, at 408; 2A SUTHERLAND, *supra* note 91, §§ 45.12, at 61–63 (elevating reasonableness to the level of a technique) & 46.07, at 110.

152. *See*, Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482–83 (1990) (applying the plain-meaning rule to the ERISA preemption provision); FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (same); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48–50 (1987) (same); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741–42 (1985) (applying the plain-meaning rule to the savings clause of the ERISA preemption provision); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) (same); United States v. Turkette, 452 U.S. 576, 581 (1981) (if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive); Howe v. Smith, 452 U.S. 473, 485 (1981) (same); Maine v. Thiboutot, 448 U.S. 1, 6–8 (1980) (ordinarily it is not necessary to look beyond the words of a statute, into the legislative history, in order to ascertain the meaning of a statute); United States v. Apfelbaum, 445 U.S. 115, 122–23 (1980) (absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language). *But*

A. *Analytical Method*

Under the analytical method, the court's analysis begins with the statutory language itself. Under the plain meaning rule, the words are given their commonly attributed meaning.[154] The plain meaning in the absence of a statutory definition is usually obtained from the contemporary edition of a respected dictionary, for example, *Blacks' Law Dictionary* or *Webster's New International Dictionary.*[155]

For the benefits-due lawsuit under ERISA's remedies provision, the statutory language is in section 502(a)(1)(B):

> 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.[156]

1. Plain Meaning

The key term in the ERISA remedies provision's benefits-due lawsuit is "benefits". Since ERISA does not define "benefits",[157] a court must use standard legal dictionaries. These works reveal that "benefits" is a contract law term meaning the acquisition of legal rights to which one would not otherwise be

---

see Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 9–10 (1976) (courts should consider legislative history even if the language of the statue is clear). *See generally* Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts,* 75 COLUM. L. REV. 1299 (1975) (analyzing cases in which the Supreme Court only appeared to give weight to the rule and other cases where federal courts followed *Caminetti,* 242 U.S. 470, in its full rigor).

For criticism of the plain-meaning rule, see Richard Posner, *Legislation and Its Interpretation: A Primer,* 68 NEB. L. REV. 431, 442 (1989) (the rule is unnecessary; competent judges do not need grammar handbooks, incompetent judges are unable to apply them). *See generally* Michael R. Merz, *The Meaninglessness of the Plain Meaning Rule,* 4 U. DAYTON L. REV. 31 (1979).

153. *See* James J. White, *Promise Fulfilled and Principle Betrayed,* 1988 ANN. SURV. AM. L. 7, 21 (reconciling Karl Llewellyn's Uniform Commercial Code, article two, with Legal Realism by his intentionally using the imprecise words "unconscionable" and "good faith" to allow judges to derive an equitable result without torturing an accepted rule of law).

154. *See, e.g.,* Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) ("we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used"); Russello v. United States, 464 U.S. 16, 22 (1983) (when a statute does not define a term, the court must start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used); Diamond v. Diehr, 450 U.S. 175, 182 (1981) (in cases of statutory construction, begin with the language of the statute, and unless otherwise defined, words will be interpreted according to their ordinary, contemporary, common meaning); *see also* Jones v. Liberty Glass Co., 332 U.S. 524 (1947); Rosenman v. United States, 323 U.S. 658 (1945); Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1944); Levy v. M'Cartee, 31 U.S. (6 Pet.) 102, 108 (1832); *cf.* UNIF. STATUTORY CONSTRUCTION ACT § 2, 14 U.L.A. 513 (1980).

155. *See, e.g.,* Russello v. United States, 464 U.S. 16, 21 (1983) (using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976), RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1979), and BLACK'S LAW DICTIONARY (5th ed. 1979)); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 n.16 (1983) (using BLACK'S LAW DICTIONARY (5th ed. 1979) for the ERISA preemptive provision).

156. Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132(a) (1985).

157. Employee Retirement Income Security Act of 1974, § 302, 29 U.S.C. § 1002 (1985).

entitled.[158] These same legal dictionaries indicate that a contractual "legal right" provides the holder with a recovery in contractual damages for an injury to the right,[159] which includes extracontractual damages in certain circumstances.[160]

An examination of the full panoply of contractual remedies explains the structure of section 502(a)(1)(B). There are four contractual remedies: damages and restitution recoverable in a court of law, and specific performance and declaratory judgments, recoverable in a court of equity.[161] So "benefits due under the terms of [the] plan" refers to damages, including extracontractual damages, and restitution; "enforce ... rights under the terms of the plan" refers to specific performance; and "clarify ... rights to future benefits under the terms of the plan" refers to declaratory judgments.

a. Possible Ambiguity

There was one pre-ERISA attempt to limit the amount recoverable in a benefits-due lawsuit to the amount specified by the formula written in the plan, effectively foreclosing extracontractual damages which are not delineated in the plan.[162] Such a second meaning establishes an ambiguity opening up the possibility of using legislative history to interpret the statutory language. A court should reject this definition of "benefits", the amount specified by the plan formula, for the following reasons.

First, the Supreme Court has already rejected such a narrow interpretation of "benefits" in the ERISA remedies section, stating that "benefits" includes authorization for courts to award compensatory, mental anguish, and punitive damages.[163]

Second, the source of the plan-specified idea comes from a misstatement of the rule. The Pennsylvania Supreme Court in an 1888 case[164] stated that, since the participant sued only for his benefit, the measure of damages was the sum stipulated in the plan rather than the amount determined by the jury under the trial court's instruction to consider the interest of justice since that method was too uncertain.[165] The court made the limitation to prevent the participant from receiving benefits accruing subsequent to the commencement of the action, which a jury might grant in the interest of justice.[166] One encyclopediaist interpreted this case to mean that recovery is limited to the amount specified in the plan plus interest.[167] But this case did not involve a

---

158. BALLANTINE'S LAW DICTIONARY 131 (3d ed. 1969); BLACK'S LAW DICTIONARY 158 (6th 1990); *see, e.g.*, Woolum v. Sizemore, 102 S.W.2d 323, 324 (Ky. 1937); Luigart v. Federal Parquatry Mfg. Co., 238 S.W. 758, 760 (Ky. 1922); McDevitt v. Stokes, 192 S.W. 681, 682 (Ky. 1917); Harp. v. Hamilton, 177 S.W. 565, 567 (Tex. Civ. App. 1915, no writ); 17 AM. JUR. 2D *Contracts* § 128 (1991); 13 C.J. *Contracts* § 144 (1917).

159. BLACK'S LAW DICTIONARY 389 (6th ed. 1990); *see also* 1 DAN DOBBS, LAW OF REMEDIES 3 (2d ed. 1993); 5 ARTHUR CORBIN, CONTRACTS (1964), § 990, at 2.

160. See *infra* notes 253–55 and accompanying text.

161. *See* 5 CORBIN, *supra* note 159, § 990, at 3–4.

162. 56 C.J.S. *Master & Servant* § 169, at 837 & n.34 (1948); 39 C.J.S. *Master & Servant* § 373, at 253 (1925).

163. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 486 (1990).

164. Baltimore & Ohio Employees' Relief Ass'n v. Post, 15 A. 885, 890–91 (Pa. 1888).

165. *Id.*

166. *Id.*

167. See *supra* note 162.

participant suing for more than the amount specified in the plan, much less extracontractual damages.

Third, insurance law provides the actual applicable limitation rule. Insurance law developed similar to pension law. Pre-ERISA pension law even adopted insurance law principles.[168] There are pronouncements that insurers are only liable for the amount specified in the policy.[169] But the actual rule was the contractual rule of foreseeability. Early courts felt that consequential damages were too remote to be foreseeable as a matter of law.[170] In contrast, more recent courts feel that consequential damages might be foreseeable and that fact determination is to be made by a jury under contract law.[171]

b. Dispelling the Specificity Myth

Fiduciary organizations, fearing extracontractual damages[172] as if they desire to violate ERISA, have developed the specificity myth. The statutory specificity argument contends that the Supreme Court teaches that courts are not to imply remedies when there is a statute providing specific relief through a carefully crafted comprehensive scheme, such as ERISA section 502(a).[173]

---

168. Pre-ERISA pension law had adopted the construction against the draftsman rule for interpreting ambiguous plan language. *E.g.*, Forrish v. Kennedy, 105 A.2d 67, 70 (Pa. 1954) (trust approach); Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 879 (Ohio 1937) (contract approach).

169. *See, e.g.*, New Orleans Ins. Co. v. Piaggio, 83 U.S. 378, 386 (1872).

170. *E.g.*, Independent Grocery Co. v. Sun Ins. Co., 178 N.W. 582, 583 (Minn. 1920), *overruled by* Olson v. Rugolski, 277 N.W.2d 385, 388 (Minn. 1979).

171. *E.g.*, Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 579 (N.H. 1978).

172. *See, e.g,* Brief Amici Curiae in Support of Petitioners for Alaska Fishermen's Union Salmon Canners Pension Trust, et al, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9) (for multi-employer plans); Brief Amici Curiae in Support of Petitioners for American Council of Life Insurance and Health Insurance Association of America, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9) (for insurance companies).

173. *E.g.*, Reply Brief for Petitioners at 2, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9); *see, e.g.*, Middlesex County Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 14, 17–18 (1981) (private damage right under Federal Water Pollution Control Act of 1948 denied as contrary to legislative history); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 644–47 (1981) (contribution under the Clayton Anti-Trust Act of 1914 denied as contrary to legislative history); California v. Sierra Club, 451 U.S. 287, 297 (1981) (private damage right under Rivers and Harbors Appropriation Act of 1899 denied); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97 (1981) (contribution in favor of employers under Title VII denied); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 19–22 (1979) (private right under Investment Advisors Act limited as otherwise would be contra legislative history).

Some on the Supreme Court reject this view for ERISA's remedies section. *See Russell*, 473 U.S. at 155 (Brennan, J., concurring) (the legislative history demonstrates that courts are to develop federal common law in fashioning additional appropriate equitable relief). However, the *Russell* majority accepted the myth. *Russell*, 473 U.S. at 146–47 (Section 502(a) forms a comprehensive "enforcement scheme" that was "carefully integrated" and "crafted with...evident care."). And some lower courts have received the myth as dogma. *E.g.*, Sanson v. General Motors Corp., 966 F.2d 618, 622 (11th Cir. 1992) ("[S]ection 502 defines the specific circumstances upon which one may be granted legal or equitable relief."); Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987) ("[C]ivil actions under ERISA are limited only to those parties and actions Congress specifically enumerated in section [502]".).

It is quite evident, however, that section 502(a) is not so carefully crafted nor comprehensive.[174] First, section 502(a) has much duplication. A participant, beneficiary, or fiduciary may bring suit to enforce the terms of the plan under either section 502(a)(1)(B) or section 502(a)(3)(B)(ii) or to enjoin a breach of fiduciary duty under section 502(a)(2) or section 502(a)(3)(A).[175] Similarly, the Secretary of Labor may enjoin a breach of fiduciary duty under section 502(a)(2) or section 502(a)(5)(A).[176] Second, section 502(a) is incomplete. ERISA expressly permits plans to sue or be sued as an entity,[177] yet nothing in ERISA states what plans may sue or be sued about.[178] ERISA prohibits assignment of only pension benefits,[179] thus permitting assignment of welfare benefits,[180] but fails to specify any rules as to lawsuits by assignees.[181] ERISA ignores many plan related claims such as contribution among fiduciaries and restitution for mistaken contributions.[182]

The actual teaching of the Supreme Court is that there are five ways to establish remedies under a statute, all depending on the intent of Congress:[183] (1) expressly in the statute, (2) judicial interpretation when confronting an ambiguity, (3) adoption by federal common law,[184] (4) necessary to make entire

---

174. *See, e.g.*, Winstead v. J.C. Penney Co., 933 F.2d 576, 579–80 (7th Cir. 1991) (Posner, J.) (ERISA's remedies provision is detailed not because it is comprehensive, but because a number of specific problems were brought to Congress's attention and were covered while other problems were not and so were omitted); Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 18 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3014 (1992) (in designing the ERISA remedies provision, Congress did not focus its attention beyond the welfare of the plan's participants and beneficiaries).

175. *Compare* Employee Retirement Income Security Act of 1974, §§ 502(a)(1)(b) & 502(a)(2), 29 U.S.C. §§ 1132(a)(1)(b) & 1132(a)(2) (1985) *with id.*, §§ 502(a)(3)(B)(ii) & 502(a)(3)(A), 29 U.S.C. §§ 1132(a)(3)(B)(ii) & 1132(a)(3)(A).

176. *Compare* Employee Retirement Income Security Act of 1974, § 502(a)(2), 29 U.S.C. § 1132(a)(2) *with id.*, § 502(a)(5)(A), 29 U.S.C. §§ 1132(a)(5)(A).

177. *Id.*, § 502(d)(1), 29 U.S.C. § 1132(d)(1).

178. *See, e.g.*, Kentucky Laborers Dist. Council Health & Welfare Fund v. Hope, 861 F.2d 1003, 1005–06 (6th Cir. 1988) (plan sued to recover wrongfully paid benefits); Northeast Dep't ILGWU Health & Welfare Fund v. Teamster Local Union No. 229 Welfare Fund, 764 F.2d 147, 154–59 (3d Cir. 1985) (husband's plan sued wife's plan for declaration of liability for dual coverage of wife's medical expenses); Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) (plan sued insurer for breach of contract).

179. Employee Retirement Income Security Act of 1974, § 206(2)(1), 29 U.S.C. § 1056(d)(1) (1988).

180. *E.g.*, Misic v. Building Serv. Employees Health & Welfare Trust, 789 F.2d 1374, 1377 (9th Cir. 1986).

181. *E.g.*, Kennedy v. Connecticut Gen. Life Ins. Co., 924 F.2d 698, 699–700 (7th Cir. 1991) (insurance company assignee has standing to sue); Herman Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1289–90 (5th Cir. 1988) (same for hospital); *Misic*, 789 F.2d at 1378 (same for doctor).

182. *See, e.g.*, Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 18 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3014 (1992) (allowing contribution since ERISA is silent); Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund, 794 F.2d 221, 233–236 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986) (permitting restitution since ERISA is silent).

183. Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 90, 97 (1981).

184. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 34–36 (1983) (punitive damages for an implied action under section 1983 permitted as adopted by the common law prior to the statute's passage); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 647 (1981) (denied as Senate debates clearly excluded trying the cases under the common law); City of Newport v. Fast

the remedy in the statute,[185] and (5) implied if the intent can be fairly inferred.[186] Although perhaps *Russell* forecloses the implied action for extracontractual damages under employee benefit plans, the first three methods have been shown, in this Article, to establish this remedy.[187]

Closely connected to the statutory specificity argument is the idea that the Supreme Court will not allow punitive damages unless expressly provided for in the statute.[188] But the supporting cases[189] follow the same general rule, denying punitive damages because that remedy is available against the evildoer,[190] or available under state law,[191] or is contrary to legislative history.[192] When these elements are absent, the Supreme Court does indeed imply a remedy of punitive damages when Congress indicates it is adopting the common law and that common law, just as for ERISA,[193] permits recovery of punitive damages.[194]

Concerts, 453 U.S. 247, 266 (1981) (punitive damages against a municipality under Civil Rights Act of 1871 denied as common law adopted specifically by Congress and the common law denied punitive damages).

185. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415–25 (1975) (back pay in connection with injunction under Title VII implied).

186. *Northwest Airlines*, 451 U.S. at 90 (using the Cort v. Ash, 422 U.S. 566 (1975) criteria of statutory language, legislative history, purpose and structure of the remedial scheme, and absence of state remedies). *See, e.g.*, Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14, 17–18 (1981) (denied under *Cort* as legislative history specifically denied); California v. Sierra Club, 451 U.S. 287, 297 (1981) (denied under *Cort* as Congress silent); *Northwest Airlines*, 451 U.S. at 97 (same).

187. *See supra* notes 157–61 and accompanying text for express statutory provision for extracontractual damages, *infra* notes 312–32 and accompanying text for federal common law provision of extracontractual damages prior to ERISA's passage, and *supra* notes 162–71 and accompanying text for statutory interpretation for ambiguities as permitting extracontractual damages.

188. *E.g.*, Reply Brief for Petitioners at 2, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9)

189. *See, e.g.*, International Bhd. of Elect. Workers v. Foust, 442 U.S. 42, 48–53 (1979) (cannot get punitive damages against union for failure to represent union member against employer breach of collective bargaining agreement under Railway Act); Vaca v. Sipes, 386 U.S. 171, 195 (1967) (same under LMRA § 301, 29 U.S.C. § 185); Local 20, Teamsters, Union v. Morton, 377 U.S. 252, 260–61 (1964) (cannot obtain punitive damages in private damage action under LMRA § 303, 29 U.S.C. § 185, for unfair labor practice); International Union, United Automobile, Aircraft & Agricultural Implement Workers v. Russell, 356 U.S. 634, 646 (1958) (employee suing employer for malicious interference with lawful occupation cannot get punitive damages under LMRA § 303, 29 U.S.C. § 185); United Constr. Workers v. Laburnam Constr. Corp., 347 U.S. 656, 663–69 (1954) (same for tort of intimidating employees against union).

190. *E.g.*, *Foust*, 442 U.S. at 48–53 (following *Vaca*); *Vaca*, 386 U.S. at 195 (might recover against employer).

191. *E.g*, *Russell*, 356 U.S. at 646 (state action is available); *United Constr. Workers*, 347 U.S. at 663–69 (same)

192. *E.g.*, *Morton*, 377 U.S. at 260–61 (statutory language of "damages by him sustained" supported by legislative history referring to "actual damages" and "money which they have lost"; case of unfavorable legislative history).

193. *See infra* notes 240–52, 312–24 and accompanying text.

194. *E.g.*, Smith v. Wade, 461 U.S. 30, 34–38 (1983) (plaintiff can get punitive damages in § 1983 action for violation of 8th Amendment rights; although legislative history is silent on the issue, Congress adopted the common law and that common law permitted recovery of punitive damages).

2. Contractual Nature of the Statutory Scheme

This plain meaning interpretation of the benefits-due lawsuit portion of the ERISA remedies provision, encompassing standard contractual remedies, is reinforced by examining the analytical method's rule concerning the rest of the statute. ERISA specifically acknowledges the dual nature of employee benefit plans by employing a contractual part and a separate trust part.[195] ERISA clearly delineates one of the two instruments as the one governing operations[196] and names the plan fiduciary separate from the trust instrument.[197] ERISA also clearly delineates one of the two instruments as governing the program's assets.[198]

ERISA recognizes that a part of the employee benefit plan is contractual in nature. For that part one would expect to find an ERISA section providing for the contractual remedies for breaches. Since the contractual plan instrument defines the participant's benefits,[199] the benefits-due lawsuit should be the contractual action.

3. Placement of the Equitable Actions

Recognition that ERISA envisions two types of instruments governing employee plans, one a contract for which there are contractual remedies and one a trust, suggests that ERISA also provides for trust law remedies, formerly handled by courts of equity. Perusal of the ERISA remedies provision suggests that the trust law remedies provisions are in subsections 502(a)(2) for breach of fiduciary duty, 502(a)(3)(A) for injunctions, and 502(a)(3)(B) for other appropriate equitable relief. Since trust law also provides for two types of damage remedy, one for breach of trust and one for benefits immediately and unconditionally due,[200] one would expect that subsection 502(a)(2) provides for the trust law equitable damage remedy for breach of trust and 502(a)(1)(B)

---

195. *See* 26 C.F.R. § 601.201(o)(3)(xviii)(a) (1993) (make available to participants for determination letter "updated copy of the plan and the related trust agreement (if any)"); 29 C.F.R. § 2520.104b–1(b)(3) (1993) (make available to participants during reasonable time plan documents consisting of "plan description, latest annual report, and the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.").

196. Employee Retirement Income Security Act of 1974, § 402(a), 29 U.S.C. § 1102(a) (1988) ("Every employee benefit plan shall be established and maintained pursuant to a [plan instrument]" that shall provide for the operation and administration of the plan); *see id.* §§ 1015 & 2003(a), 26 U.S.C. §§ 414(g)(1) & 4974(d)(8)(C) (1988); *id.* §§ 3(16)(A)(i), 104(a)(1)(B), (2), (4), (6), 405(c)(1), 408(b)(8)(C) & 414(b)(2), 29 U.S.C. §§ 1002(16)(A)(i), 1024(a)(1)(B), (2), (4), (6), 1105(c)(1), 1108(b)(8)(C) & 1114(b)(2) (all referring to instrument under which benefit program is established, maintained or operated); *see also id.* § 404(a)(1)(D), 29 § 1104(a)(1)(D) (indicating that instruments of benefit program are plural).

197. *Id.* § 403(a), 29 U.S.C. § 1103(a).

198. *Id.* ("[T]rustee shall be...named in the trust instrument" and shall have authority to manage and control the plan's assets.); *see also id.* §§ 403(a), 405(a)(1), (c)(5) & 4223(b)(1), 29 U.S.C. § 1103(a), 1105(a)(1), (c)(5) & 1403(b)(1) (all referring to trust instrument); *id.* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (indicating that instruments of benefit program are plural); Internal Revenue Code of 1954, §§ 401(a)(2) & 501(c)(22)(D), 26 U.S.C. §§ 401(a)(2) & 501(c)(22)(D) (1988) (referring to employee benefit program's trust instrument).

199. *See supra* note 196.

200. *See infra* notes 273–83 and accompanying text.

provides for the trust law legal damage remedy for benefits immediately and unconditionally due.

The plain meaning rule confirms this view. The term "equitable relief" means that relief sought in a court through its equity powers.[201] One such relief would be trust law equitable damages for breach of trust.[202] Such damages, however, do not permit participants to recover extracontractual damages.[203] This suggests that the Supreme Court in *Russell* and *Mertens* has made a proper start.[204] Instead of dividing the ERISA remedies subsections into one for contractual remedies and several for the various trust law remedies as suggested above,[205] the Supreme Court divided it into several for non-monetary damage remedies,[206] leaving only a portion of a subsection, section 502(a)(1)(B)(ii), covering all monetary damage remedies whether arising under contract or trust principles.

B. Teleological Method

Under the plain meaning method, a court must find an ambiguity in the words of the statute before it can examine extrinsic aids to interpretation.[207] Under the teleological method, the explicit words are not a barrier to the examination of extrinsic aids.[208] Since the Supreme Court in its two prior opinions dealing with ERISA's remedies section never mentioned the plain meaning rule, but immediately began using extrinsic aids, one can assume ERISA section 502(a) satisfies the ambiguity requirement. This would explain the diversity of the Circuit Court opinion on ERISA section 502(a).[209]

---

201. BLACK'S LAW DICTIONARY 538–39 (6th ed. 1990); 27 AM. JUR. 2D *Equity* § 177 (1966).

The Supreme Court has rejected a definition defining "equitable remedy" as whatever remedy a court of equity grants, *see* Brief for the United States at 12–13, Mertens v. Hewitt Assocs., 113 S. Ct. 2063 (1993) (No. 91-1671), since such a definition fails to limit damages recoverable as "equitable damages". *Mertens*, 113 S Ct. at 2069. An equity court can grant any amount of damages for cases within its jurisdiction, such as trust cases. *See* 1 JOHN N. POMEROY, EQUITY JURISPRUDENCE, § 181, at 257 (Symons ed., 5th ed. 1941). Rather than declare all "damages" as a legal remedy, however, the Supreme Court's approach is to declare "damages" as equitable when the equity court is exercising its equitable powers, such as for a trustee's breach. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570–71 (1990). Equitable damages therefore include at least restitution damages, *id.*, and damages incidental or intertwined with injunctive relief. Tull v. United States, 481 U.S. 412, 424 (1987).

202. *See infra* notes 277–83 and accompanying text.

203. *See infra* notes 281–83 and accompanying text.

204. *See supra* notes 90, 99 and accompanying text.

205. *See supra* note 67 and accompanying text.

206. "Enjoin" in ERISA section 502(a)(3)(A) means to require performance or desistance by injunction. BLACK'S LAW DICTIONARY 529 (6th ed. 1990); BALLANTINE'S LAW DICTIONARY 404 (3d ed. 1969). "Enforce" in ERISA sections 502(a)(1)(B)(ii) and 502(a)(3)(ii) means compel. BLACK'S LAW DICTIONARY 528 (6th ed. 1990).

207. *See supra* note 150 and accompanying text. The Supreme Court has adopted this rule with respect to legislative history, the primary extrinsic aid discussed in this Article. *See, e.g.*, Kuehner v. Irving Trust Co., 299 U.S. 445, 449 (1937) (legislative history cannot compel a construction at variance with the plain words of the statute); Fairport, P. & E.R.R. v. Meredith, 292 U.S. 589, 594–95 (1934) (if the statute is unambiguous, consideration of legislative history is not permissible); Wilbur v. United States, 284 U.S. 231, 237 (1931) (same).

208. *See supra* notes 147–49 and accompanying text.

209. *See supra* notes 73–89, 105–36 and accompanying text.

Moreover, pension law history[210] first saw "benefit" as limited to the plan-specified amount and later as full contractual damages, exhibiting the ambiguity of multiple definitional choices.[211] So for purposes of this subsection, this Article will assume that either an ambiguity exists or the teleological method otherwise applies.

1. Dispelling the Deletion Myth

In order to determine the congressional intent for the ERISA remedies section, it is helpful to understand how it evolved. Radically differently-worded bills, at least with respect to the remedies section, were introduced in the Senate and in the House. The Senate version of the remedies provision appeared in two bills: one before the Labor and Public Welfare Committee sponsored by Senator Harrison Williams[212] and one before the Finance Committee sponsored by Senator Lloyd Bentsen.[213]

The Labor and Public Welfare Committee's version, introduced on January 4, 1973, established two participant civil actions. One provided for "appropriate relief, legal or equitable, to redress or restrain" fiduciary breaches of duty and responsibilities, including following plan documents, and specifically mentioned removal.[214] The other action permitted a lawsuit for benefits.[215] This version, unchanged,[216] was the subject of the Committee's

---

210. *See supra* notes 164–71 and accompanying text.

211. BLACK'S LAW DICTIONARY 79 (6th ed. 1990); 2A SUTHERLAND, *supra* note 91, § 45.02, at 5–7.

212. 1 Legislative History, *supra* note 128, at 90–92.

213. 1 Legislative History, *supra* note 128, at 210.

214. 1 Legislative History, *supra* note 128, at 183 (§ 603 of S. 4, as of January 4, 1973):

> Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary, including but not limited to, the removal of a fiduciary who has failed to carry out his duties and the removal of any person who is serving in violation of the requirements of section 15(i) of the Welfare and Pension Plans Disclosure Act or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements of the Welfare and Pension Plans Disclosure Act or in violation of the document or documents governing the establishment or operation of the fund, may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pension Plans Disclosure Act in any court of competent jurisdiction, State or Federal....

Id.

215. 1 Legislative History, *supra* note 128, at 184 (§ 604 of S. 4, as of January 4, 1973):

> Suits by a participant or beneficiary entitled, or who may become entitled, to benefits from an employee benefit plan or fund, subject to the Welfare and Pension Plan Disclosure Act, as amended by this Act may be brought in any court of competent jurisdiction, State or Federal...against any such plan or fund to recover benefits due him required to be paid from such plan or fund pursuant to the document or documents governing the establishment or operation of the plan or fund, or to clarify his rights to future benefits under the terms of the plan.

Id.

216. For the fiduciary breach provision, only the section reference to the Welfare and Pension Plans Disclosure Act had changed. *Compare* S. 4, 93 Cong., 1st Sess., § 603 (April 18, 1973), *reprinted in* 1 Legislative History, *supra* note 128, at 579 *with* S. 4, 93 Cong., 1st Sess, § 603 (January 4, 1973), *reprinted in* 1 Legislative History, *supra* note 128, at 183. For the lawsuit for benefits, the language about entitlement was shortened. *Compare* S. 4, 93 Cong., 1st Sess., § 604 (April 18, 1973), *reprinted in* 1 Legislative History, *supra* note 128, at 580

report on April 18, 1973.[217] That report described both provisions as providing participants in the benefits-due lawsuit with the "full range of legal and equitable remedies available" and as removing the state jurisdictional and procedural hindrances to their lawsuit.[218] "Full range" should include extracontractual damages since they are a typical legal remedy and also a trust law legal damage remedy.

The Finance Committee's version had no civil enforcement provision when introduced on March 13, 1973.[219] By the time of the committee's report on August 21, 1973, however, the enforcement provision, with respect to fiduciary breach, resembled that of the Labor and Public Welfare Committee's version.[220] Consequently, the committee's report described the fiduciary breach remedies provisions in terms similar to those used by the Labor and Public Welfare Committee, namely participants could bring "civil actions for any appropriate legal or equitable relief" to redress fiduciary breaches.[221] "Any appropriate" relief should include extracontractual damages since historically participants recovered them.[222] With respect to the lawsuit for benefits, the Finance Committee's version provided that the suit would be before the Secretary of Labor.[223] The committee's report described this lawsuit as an alternative to existing lawsuits, such as state lawsuits permitting extracontractual damages.[224]

---

with S. 4, 93 Cong., 1st Sess, § 604 (January 4, 1973), *reprinted in* 1 Legislative History, *supra* note 128, at 184.

217. S. REP. NO. 127, 93 Cong., 1st Sess. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838.

218. *See infra* note 240 and accompanying text.

219. 1 Legislative History, *supra* note 128, at 230–272 (S. 1179).

220. 1 Legislative History, *supra* note 128, at 950 (§ 501(d) of S. 1179, as of August 21, 1973):

> Civil actions under this section may be brought
> (A) by the Secretary or a participant or beneficiary for appropriate relief, legal or equitable, to redress or prevent any violation of subsections (b) [prohibiting certain individuals from serving as fiduciaries] and (c) [specifying fiduciary duties], including the removal of a fiduciary who has violated subsection (c).

Id.

221. S. REP. NO. 93–383, 93 Cong., 1st Sess. 105 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4988:

> [P]articipants and beneficiaries of a plan may bring civil actions for any appropriate legal or equitable relief to redress or restrain a violation of fiduciary duties.

Id.

Since the committee's civil action was contained within the section of fiduciary standards, the committee's report described the remedies provision in terms of a fiduciary breach of duty, one of which was to act solely in the interests of the participants in accordance with the plan documents. *Id.* Listed as appropriate equitable action for the fiduciary breach were injunctions and removal. *Id.* at 106, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4989.

222. See *infra* notes 274–75 and accompanying text.

223. 1 Legislative History, *supra* note 128, at 988 (§ 602 of S. 1179, as of August 21, 1973):

> The Secretary of Labor is authorized to hear and decide disputes arising under qualified plans...between participants or their beneficiaries in such plans and administrators of such plans with respect to the present or future benefits of such participants or beneficiaries....

Id.

224. S. REP. NO. 383, 93 Cong., 1st Sess. 117 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 5000:

The House version of the remedies provision appeared in one bill before the Education and Labor Committee. That provision, introduced on January 3, 1973, provided for the benefits-due lawsuit and another action for "appropriate relief" from breaches of fiduciary duty.[225] This version, expanded to permit a participant lawsuit to enjoin statutory violations,[226] was the subject of the committee's report on October 2, 1973.[227] The House report described the provision in the exact same words as did the Senate Labor and Public Welfare Committee described theirs even though the remedies provision was different in language and structure from that of the Senate. The provision provided participants in the benefits-due lawsuit with the "full range of legal and equitable remedies available" and provided for removing the state jurisdictional and procedural hindrances to their lawsuit.[228] The structure of the version passed by the House appears to provide for contractual damages, including extracontractual damages, trust law legal damages, and declaratory judgments in subsection (1), trust remedies for fiduciary breach in subsection (2), and injunctive relief under contract and trust law in subsection (3), confirming the approach of the Supreme Court in *Russell* and *Mertens*.[229] This scheme includes all available legal and equitable remedies.

On March 4, 1974, the Senate passed its version of ERISA, with the remedies provision virtually identical to that reported on by the Senate Labor and Public Welfare Committee.[230] On March 6, 1974, the House passed their

---

> The procedures provided by this section of the bill are provided as alternatives to existing procedures that may be available to plan participants or beneficiaries.

Id.

225. 1 Legislative History, *supra* note 128, at 31 (§ 106(c) of H.R. 2, as of January 3, 1973):

> Civil action under this title may be brought—
> (1) by a participant or beneficiary—
> (A) for the relief provided for in section 106(b) [for informational requests], or
> (B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan:
> (2) by...a participant, beneficiary...for appropriate relief under section 111(d) [for fiduciary breach of duty]; or
> (3) by the Secretary, to enjoin any act or practice which appears to him to violate any provision of this title.

Id.

226. 2 Legislative History, *supra* note 128, at 2334 (§ 506(e) of H.R. 2, as of October 2, 1973; identical to prior § 106(c) with "title" replaced by "Act" and adding "or by a participant, beneficiary, or fiduciary" to the list of enjoiners in subsection (3)).

227. H.R. REP. NO. 533, *supra* note 10.

228. *Id.* at 17, *reprinted in* 1974 U.S.C.C.A.N. at 4655. See *infra* note 240 and accompanying text for the language.

229. See *supra* notes 90, 99 and accompanying text.

230. 3 Legislative History, *supra* note 128, at 3816 (§ 693 of H.R. 2, as passed by the Senate on March 4, 1974):

> Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary, including but not limited to, the removal of a fiduciary who has failed to carry out his duties and the removal of any person who is serving in violation of the requirements of section 15(h) of the Welfare And Pension Plans Disclosure Act or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements of the Welfare and Pension Plans Disclosure Act or in violation of the document or documents governing the establishment or operation of the fund, may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pension Plans Disclosure Act in any court of competent jurisdiction, State or Federal....

version of ERISA, with the remedies provision virtually identical to that reported on by the House Education and Labor Committee.[231] The summary of differences between the two bills prepared for the conference committee claimed that there was no difference between the two provisions but recommended that the conference committee take the language and structural approach of the House.[232] With respect to the final version that became ERISA, the House-Senate Conference Committee reported that the final version, as well as the prior Senate and House versions, all provided for the same remedies.[233]

Id.

3 Legislative History, *supra* note 128, at 3817–18 (§ 694 of H.R. 2, as passed by the Senate on March 4, 1974):

> Suits by a participant or beneficiary for benefits from an employee plan or fund, subject to the Welfare and Pension Plan Disclosure Act, may be brought in any court of competent jurisdiction, State or Federal...against any such plan or fund to recover benefits due him required to be paid from such plan or fund pursuant to the document or documents governing the establishment or operation of the plan or fund, or to clarify his rights to future benefits under the terms of the plan.

Id.

231. 3 Legislative History, *supra* note 128, at 4047 (§ 503(e) H.R. 2, as passed by the House on March 6, 1974):

> Civil action under this title may be brought—
> (1) by a participant or beneficiary—
> (A) for the relief provided for in subsection (b) of this section [for informational requests], or
> (B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;
> (2) by...a participant, beneficiary...for appropriate relief under section 111(d) [for fiduciary breach of duty]; or
> (3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which appears to him to violate any provision of this title.

Id.

232. 3 Legislative History, *supra* note 128, at 5273 (Summary of differences between the Senate version and the House version of H.R. 2 to provide for pension reform):

> *House bill.*—Civil actions may be brought by participants and beneficiaries:
> (1) to receive payments on account of a plan administrator's failure to furnish an annual report, etc.;
> (2) to recover benefits due under the plan;
> (3) to clarify rights to future benefits under the plan;
> (4) for relief from breach of fiduciary responsibility; and
> (5) to enjoin any act or practice which violates title I.
> *Senate amendment.*—
> (1) No comparable provision but see sec. 9(b) of the WPPDA,
> (2), (3), and (4) Similar to the House bill,
> (5) Participants and beneficiaries may bring suit to enjoin a fiduciary breach.
> *Staff comment.*—
> (1)–(4) The conferees may wish to adopt the approach of the House provisions,...

Id.

233. H. CONF. REP. NO. 93–1280, *supra* note 28, at 326–27, *reprinted in* 1974 U.S.C.C.A.N. at 5106–07:

> [U]nder the bill as passed by both the House and Senate, civil action may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility.
> Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility.

Id.

Those remedies included the full range of both legal and equitable remedies, including extracontractual damages under both contract and trust law.

Consequently, the version of legislative history adopted by the Supreme Court in *Russell*, depicting a deletion of legal remedies from the bill,[234] is pure fiction—caused either by vicious judicial and legal subterfuge or, more likely, gross judicial and legal malpractice on the part of a Supreme Court Justice failing to investigate a contending lawyer's adopted submission,[235] and a contending lawyer, failing to check the research of his lazy law clerk. The more accurate interpretation is not one of a deletion but one where both Houses thought they were passing bills, albeit with different language, that provided the same remedies and which included "the full range of legal and equitable remedies available."

The issue then is not one of whether extracontractual damages are permitted by ERISA, but where to fit them into the statute.

2. *Legislative History*

Examination of ERISA's legislative history reveals three items expressing a congressional intent to permit recovery of extracontractual damages as part of the benefits-due lawsuit.[236] First, Congress expressed an intention not only to preserve pre-ERISA state remedies, but to expand them. Those remedies were provided both by contractual law and trust law and permitted recovery of extracontractual damages.[237] Second, Congress devised a statutory scheme based on the recognition that participants' rights under employee benefits plans arise contractually and hence carry a right to recover extracontractual damages.[238] Third, Congress directed the courts to fashion a federal common law for pension remedies, which at that time already included a right to recover extracontractual damages, and subsequently clarified that this directive included recovery for extracontractual damages.[239]

a. Enhanced Legal and Equitable Remedies

When Congress passed ERISA, by removing the pre-ERISA hindrances it desired to expand not constrict, the remedies already available under state law

---

234. *See supra* note 70 and accompanying text.

235. *Compare* Brief for Petitioners at 19, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9) *and* Reply Brief for Petitioner at 3, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9) *with Russell*, 473 U.S. at 146.

236. Much of the argument developed in this subsection, B, 2, also applies to the right to jury trial and appears in George Lee Flint, Jr., *ERISA: Jury Trial Mandated For Benefit Claims Actions*, 25 LOY. L.A. L. REV. 361, 399–409 (1992). This article has modified the argument to apply it to extracontractual damages, to explain the incorrect deletion myth (ignored in the prior article due to its erroneousness), and to collapse the LMRA procedural ground into the new strand of legislative history for federal common law.

237. *See infra* notes 256–99 and accompanying text.

238. *See infra* notes 300–11 and accompanying text.

239. *See infra* notes 320–32 and accompanying text.

for benefits-due lawsuits. Committee reports in both houses clearly express this goal:

> The enforcement provisions have been designed specifically to provide...participants...with broad remedies....The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.[240]

Courts generally use committee reports to confirm statutory construction[241] or to determine the meaning of ambiguous language.[242]

The bills before Congress, considered by these reports, envisioned that state law would apply to the benefits-due lawsuit since that lawsuit was exempted from their preemption provisions.[243] Congress, therefore, originally envisioned that state law would apply to the benefits-due lawsuit and both houses ultimately passed bills with enforcement and preemption provisions that authorized benefits-due lawsuits governed by state law.[244] The Conference Committee, despite the inter-house agreement, broadened preemption to

---

240. H.R. REP. NO. 533, *supra* note 10, at 17, *reprinted in* 1974 U.S.C.C.A.N. at 4655; S. REP. NO. 127, 93d Cong., 2d Sess. 35, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 (same); *see* 120 CONG. REC. 29,196 (1976), *reprinted in* 3 Legislative History, *supra* note 128, at 4665 (Statement of Rep. John Dent that initially there was only one [ERISA] aim and "that was to give to a pension participant his entitlements under the contract of a pension plan"); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (refusing to interpret ERISA to provide less protection for participants than before ERISA); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (ERISA is to protect contractually defined benefits).

241. Commissioner v. Bilder, 369 U.S. 499, 502 (1962); McLean v. United States, 226 U.S. 374, 380 (1912); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 610 (1869), *overruled on other grounds;* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870).

242. Wright v. Vinton Mountain Trust Bank, 300 U.S. 440, 459 (1937); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929); Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

243. *See* 1 Legislative History, *supra* note 128, at 186 (§ 608 of S. 4, as of January 4, 1973):

> It is hereby declared to be the express intent of Congress that, except for actions authorized by section 604 of this title [the benefits-due lawsuit], the provisions of this Act or the Welfare and Pension Plan Disclosure Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plan Disclosure Act.

Id.

1 Legislative History, at 50–51 (§ 114 of H.R. 2, as of January 3, 1973):

> It is hereby declared to be the express intent of Congress that, except for actions authorized by [the provision for suits to recover benefits]...the provisions of this Act shall supersede any and all laws of the states and of political subdivisions thereof insofar as they may now or hereafter relate to the fiduciary, reporting and disclosure responsibilities of persons acting on behalf of employee benefit plans....

Id.

244. *See* 3 Legislative History, *supra* note 128, at 3820 (§ 699(a) of H.R. 2, as passed by the Senate on March 4, 1974) & 4057 (§ 514(a) of H.R. 2, as passed by the House on March 6, 1974).

remove the exception for the benefits-due lawsuit.[245] The Conference Report provides no reason for the change. Earlier Senate and House reports, however, criticized existing state law for the benefits-due lawsuits on the ground that "courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording."[246] Congress therefore desired to expand state law remedies for the benefits-due lawsuit by eliminating the strict construction rule favoring the employer which was used by some courts[247] and the eligibility dispute rule used by some courts in the trust law setting.[248]

Pre-ERISA state law provided two basic types of remedies because of the dual nature of employee benefit plans, one under contract law and the other under trust law, both providing for recovery of extracontractual damages under certain circumstances.[249] When Congress passes new legislation to solve a problem, courts presume it considered prior case law relating to the problem.[250] The congressional reference to increasing the legal and equitable remedies of benefits-due lawsuits in state courts by removing jurisdictional hurdles and overly technical rules acknowledges that state courts tried these cases under contract theory and trust theory, both with extracontractual damages available for recovery.[251] Congress therefore intended ERISA at least to preserve the right to recover extracontractual damages that the states had granted in the pre-ERISA benefits-due lawsuit. The drastic curtailment of this right engineered by the federal courts pursuant to *Russell* and *Mertens* violates this congressional directive and is contrary to the Supreme Court's directive not to lessen those pre-ERISA remedies.[252]

---

245. *See* Employee Retirement Income Security Act of 1974, § 406(a), 29 U.S.C. § 1144(a)(1985).

246. S. REP. NO. 127, *supra* note 240, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4842; H.R. REP. NO. 533, *supra* note 10, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.

247. *See, e.g.*, Menke v. Thompson, 140 F.2d 786, 791 (8th Cir. 1944) (Missouri law: since pension contract has none of the elements of an insurance contract, the plan can not be strictly construed against the employer); First Nat'l Bank of Birmingham v. Adams, 203 So. 2d 124, 129 (Ala. 1967) (under trust law, construe profit-sharing plan to give effect of intent of the settlor); McLemore v. Western Union Tel. Co., 171 P. 390, 390 (Or. 1918) (since pension contract has none of the elements of an insurance contract, the plan cannot be strictly construed against the employer); *see* Clark v. New England Tel. & Tel. Co., 118 N.E. 348, 350 (Mass. 1917) (specific terms of contract govern rights); *contra* Forrish v. Kennedy, 105 A.2d 67, 70 (Pa. 1954) (under trust law, construe in favor of employee); Conner v. Phoenix Steel Corp., 249 A.2d 866, 868 (Del. 1969) (same under contract law).

248. *See, e.g.*, Sichko v. Lewis, 191 F. Supp. 68, 69 (W.D. Pa. 1960) (trust law legal damages remedy inapplicable to a benefits-due lawsuit under LMRA since dispute over eligibility does not satisfy the immediate-and-unconditional requirement); Milberg v. Nagler, 191 N.Y.S.2d 821, 822–23 (Sup. Ct. 1959) (same).

249. *See infra* notes 256–60, 274–75 and accompanying text.

250. *E.g.*, Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986); Carey v. Piphus, 435 U.S. 247, 255–56 (1978); District of Columbia v. Murphy, 314 U.S. 441, 453–54 (1941); Blake v. McKim, 103 U.S. 336, 339 (1880); 2B SUTHERLAND, *supra* note 91, § 50.01 at 89–91; *see* Communications Workers v. Beck, 487 U.S. 735, 759 (1988) (Congress presumed to know about labor union practices when passing labor laws).

251. See *infra* note 286 and accompanying text for congressional reference to pre-ERISA pension law as contractual.

252. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (refusing a party's interpretation of ERISA since it affords "less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted").

i. State Contract Law

State contract law provides three principles relating to extracontractual damages. First, contract law permits recovery of consequential damages to the extent they are foreseeable at the time the contract was made.[253] Second, contract law permits recovery for mental anguish (emotional distress) provided the fiduciary's action was reckless and wanton or the fiduciary had reason to know its breach would cause mental anguish other than that caused by sudden impoverishment.[254] Third, contract law also permits recovery of punitive damages when the conduct constituting the breach is also a tort for which punitive damages are recoverable.[255]

Pre-ERISA cases used all of these contractual principles to permit recovery of the various types of extracontractual damages. At the time of entering into the employment agreement, some pre-ERISA fact-finders determined that it is foreseeable that delays in payment of retirement benefits would cause adverse tax consequences[256] and lost investment income[257] and that refusal

---

253. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."); RESTATEMENT OF CONTRACTS § 330 (1932) ("In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made."); 5 CORBIN, *supra* note 159, § 1007, at 70 (stating the restatement second rule without the double negative); and 11 SAMUEL WILLISTON, A TREATISE ON THE LAW CONTRACTS (3d ed. 1968), § 1344, at 222.

254. RESTATEMENT OF CONTRACTS § 341 (1932) ("[D]amages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was...wanton or reckless breach of a contract to render...performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss."); 5 CORBIN, *supra* note 159, § 1076, at 429; and 11 WILLISTON, *supra* note 253, § 1341 at 215. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or...the contract or breach is of such a kind that serious emotional disturbance was a particularly likely result.").

255. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); 5 CORBIN, *supra* note 159, § 1077, at 438–39 (in some jurisdictions; after stating general rule of non-allowance); 11 WILLISTON, *supra* note 253, § 1340, at 210–12 (same); *see also* RESTATEMENT OF CONTRACTS § 342 (1932) ("Punitive damages are not recoverable for breach of contract." The comments, however, permit their recovery when they are incalculable, re-labelling them compensatory, or when they are damages for the associated tort. *See, id.* comments b and c.).

256. *See, e.g.*, Stopford v. Boonton Molding, 265 A.2d 657, 669–71 (N.J. 1970) (following the forseeability rule to deny the participant recovery of tax consequences when judgment requires a lump sum from a pension plan since the employee would have been taxed on the annuity amount when received and it was his choice to receive a lump sum judgment rather than an annuity under an election of remedy rule; jury trial).

257. *E.g.*, Int'l Union v. Anaconda Am. Brass Co., 475 F.2d 682, 685 (6th Cir. 1973) (in pension dispute under the LMRA, court is empowered to grant actual and consequential damages [but none sought with respect to the pension]); Food Fair Stores, Inc. v. Hevey, 338 A.2d 43, 44 (Md. Ct. App. 1975) (recovered interest on forfeited profit-sharing accounts from date of forfeiture).

Pre-ERISA cases followed the general rule of allowing discretionary prejudgment interest on liquidated claims from the date due. *E.g.*, Burroughs v. Board of Trustees of Pension Trust Fund for Operating Eng'rs, 398 F. Supp. 168, 175 (D.C. Cal. 1975), *aff'd*, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (under LMRA, participant gets denied benefit plus legal interest from due date); Becker v. Pension Fund, 229 N.W.2d 888, 893 (Mich. Ct. App. 1975) (failed to recover prejudgment interest for LMRA retirement benefit as did not request jury instruction); Ehrle v. Bank Building & Equip. Corp. of Am., 530 S.W.2d to pay medical reimbursements would cause damage to credit ratings.[258] Some pre-ERISA fact-finders even found that employees demand medical plans to give themselves peace of mind. This peace comes from avoiding the problems associated with nonpayment of medical bills, which includes mental anguish.[259] Some pre-ERISA fact-finders also found certain benefit denials reaching the egregious level to permit punitive damages.[260]

The appropriateness of the application of contract rules to the employee benefit plan becomes more evident when examining the most analogous non-employee-benefit contract, the insurance contract. Retirement plans are similar to two types of insurance contracts: (1) annuity policies, since ERISA requires retirement plans to provide benefits in the form of annuities, unless properly

---

482, 496–97 (Mo. Ct. App. 1975) (recovered prejudgment interest on disability pension); Hexter v. Powell, 475 S.W.2d 857, 861, 863 (Tex. Ct. App. 1971, writ ref'd n.r.e.) (recovered statutory interest on delinquent pension payments); Texas & N.O.R. Co. v. Jones, 103 S.W.2d 1043 (Tex. Ct. App. 1937, writ ref'd) (same); *see supra* note 57 about prejudgment interest. Prejudgment interest is a crude method of permitting recovery of lost investment on the sum owed.

Pre-ERISA cases also considered the effect of potential investment results when converting future annuity payments into a reduced present lump sum through present valuing. *E.g.*, Hoefel v. Atlas Tack Corp., 581 F.2d 1, 7 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) (when discounting a lump sum payment for denied annuity from an LMRA pension plan use competitive commercial annuity rate rather than the higher 8 percent the plan ordinarily makes since participants are not sophisticated investors); Minnesota Amusement Co. v. Larkin, 299 F.2d 142, 153 (8th Cir. 1962) (South Dakota law: when discounting a lump sum payment for denied annuity under a retirement agreement to pay a weekly annuity use reduced life span rather than higher mortality table life span since employee is in poor health; sitting without a jury); Hardy v. H.K. Porter Co., Inc., 417 F. Supp. 1175, 1185 (E.D. Pa. 1976) (Pennsylvania law: participant in a partial termination has right to lump sum benefit equivalent, using commercial annuity rates, to the annuity he could have expected under the pension plan; sitting without a jury); Smith v. Beall, 451 S.W.2d 195, 198–99 (Ark. 1970) (future plan disability payments must be reduced to their present value, based on life expectancy); Kroeger v. Stop & Shop Cos., 432 N.E.2d 566, 573 (Mass. Ct. App.), *review denied*, 440 N.E.2d 1175 (Mass. 1982) (using commercial annuity rate to discount lump sum payment of annuity under a pre-ERISA deferred compensation plan even though participant is sophisticated; sitting without a jury); Stopford v. Boonton Molding, 265 A.2d 657, 668 (N.J. 1970) (using commercial annuity rate to discount lump sum payment of annuity under a pension plan); *see also* Hagin v. De Geest, 185 N.W.2d 478, 484 (S.D. 1971) (trial court erred in not present valuing disability annuity in employment agreement, so judgment adjusted downward by using 6 percent; sitting without a jury). Present valuing a lump sum payment of future payments is a method of not permitting multiple recovery of lost investment income.

Although prejudgment interest and present valuing do not produce large investment recovery, application of these principles shows that general contract damage principles applied to the pre-ERISA benefits-due lawsuit, thus altering the recovery from the amount specified in the plan.

258. *E.g.*, McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136, 139–40 (C.D. Cal. 1975) (loss of credit reputation under pre-ERISA group medical plan; motion to dismiss).

259. *See, e.g.*, Strader v. Union Hall, Inc., 486 F. Supp. 159, 164 (N.D. Ill. 1980) (pre-ERISA group health policy tried after ERISA's passage; motion for summary judgment).

260. *E.g.*, Smith v. Beall, 451 S.W.2d 195, 198 (Ark. 1970) (permitting statutory penalty for wrongfully withheld disability payments under LMRA plan); Food Fair Stores, Inc. v. Hevey, 338 A.2d 43, 46–47 (Md. Ct. App. 1975) (trial court awarded punitive damages, appellate court denied them as no malice); Hexter v. Powell, 475 S.W.2d 857, 861, 863 (Tex. Civ. App. 1971, writ ref'd n.r.e.) (trial court awarded punitive damages, appellate court denied them as no actionable fraud); *see* Hindle v. Morrison Steel Co., 223 A.2d 193, 195 (N.J. 1966) (jury refused to award punitive damages on retirement fund award); Schultz v. Acme Folding Box Co., 383 N.Y.S.2d 637, 638 (App. Div. 1976) (reinstating petition with allegation for punitive damages for failure to pay pension benefit).

waived,[261] and (2) disability policies, since they also pay monthly benefits for life.[262] Many welfare plans, such as disability plans, life insurance plans, and health plans, are similar to the corresponding insurance contract, often being funded through those contracts.[263] For insurance contracts, courts follow the general contract principle of foreseeability before permitting consequential damages.[264] Insureds have recovered consequential damages for lost profits,[265] losses to credit reputation,[266] and replacement costs.[267] The analogous insurance policy cases also follow the basic contract foreseeability rule for a breach causing mental anguish with recovery depending upon the circumstances present in each case.[268] Some states follow a variant rule for contractual

261. Employee Retirement Income Security Act of 1974, § 205, 29 U.S.C. § 1105 (1985).

262. *See, e.g.*, Rev. Rul. 59-158, 1959-1 CUM. BULL. 34; Rev. Rul. 77-123, 1977-1 CUM. BULL. 28 (discussing requirements for disability provisions in retirement plans to meet the Internal Revenue Code's disability exclusion).

263. *See, e.g.*, 29 C.F.R. § 2520.103-4 (1992) (simplified reporting for plans so funded).

264. ALLAN WINDT, INSURANCE CLAIMS AND DISPUTES § 6.37, at 374 (2d ed. 1988).

265. *See, e.g.*, Salamey v. Aetna Cas. & Sur. Co., 741 F.2d 874, 877 (6th Cir. 1984) (Michigan law: fire); Earth Scientists (Petro Servs), Ltd. v. United States Fidelity & Guar. Co., 619 F. Supp 1465, 1474-75 (D. Kan. 1985) (Kansas law: casualty); Asher v. Reliance Ins. Co., 308 F. Supp. 847, 852 (N.D. Cal. 1970) (Alaska law: fire); Olson v. Rugloski, 277 N.W.2d 385, 388 (Minn. 1979) (casualty); Exum v. Ferguson, 637 P.2d 553, 555 (N.M. 1981) (casualty); Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 496 A.2d 339, 343 (N.H. 1985) (casualty); Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 579 (N.H. 1978) (fire).

266. *E.g.*, Holmes v. Nationwide Life Ins. Co., 258 S.E.2d 924, 927 (S.C. 1979) (loan interest under health policy, but limited to policy amount); *see* A & E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 677-78 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987) (fire); Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 496 A.2d 339, 343 (N.H. 1985) (casualty).

267. *E.g.*, Reichert v. General Ins. Co. of Am., 428 P.2d 860, 864-67 (Cal. 1967), *vacated as without standing*, 442 P.2d 377, 382 (Cal. 1968) (fire); Life Investors Ins. Co. of Am. v. Johnson, 422 So. 2d 32, 34 (Fla. App. 1982) (credit disability insurance; medical treatment, transportation expenses and long distance telephone calls); *see* Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1320-21 (D. N.J. 1990), *rev'd on other grounds*, 989 F.2d 635 (3d Cir. 1993) (surety bond, attorney's fees); Eureka Inv. Corp. v. Chicago Title Ins. Co., 530 F. Supp. 1110, 1123 (D.D.C. 1982), *aff'd*, 743 F.2d 932 (D.C. Cir. 1984) (title insurance, loan interest); Hochman v. American Family Ins. Co., 673 P.2d 1200, 1203 (Kan. App. 1984) (casualty, loan interest); Oliver's Sports Center, Inc. v. National Standard Ins. Co., 615 P.2d 291, 293 (Okla. 1980) (fire, attorney's fees).

268. *E.g.*, Eichenseer v. Reserve Life Ins. Co., 682 F. Supp. 1355, 1373 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *vacated on other grounds*, 499 U.S. 914 (1991) (Mississippi law; plaintiff recovered emotional distress damages caused by collection agencies for medical bills and by employer penalties for reduced work production; insurance company had decided not to reimburse for hospital bills due to a pre-existing condition without examining all records and doctor's supporting affidavit under a health insurance policy); Cassady v. United Ins. Co., 370 F. Supp. 388, 398 (W.D. Ark. 1974) (Arkansas law; no recovery for insurance company refusal to pay under a disability policy since insured not confined to the home, making visits to relatives; mistake in interpretation so act not wanton or reckless, and mental anxiety from post-disability change of life pattern not foreseeable as other than sudden impoverishment); Pendleton v. Aetna Life Ins. Co., 320 F. Supp. 425, 432 (E.D. La. 1970) (Georgia law: no recovery for insurance company decision to suspend payments under a disability policy to force setoff for previous overpayments; contract provision ambiguous so act not wanton and reckless, and anxiety for loss on post-disability investment not foreseeable at time of entering contract); Seaton v. State Farm Life Ins. Co., 254 N.W.2d 858, 862 (Mich. Ct. App. 1977) (insured may be entitled to award for mental anguish "where the suit involves a personal life insurance contract which entails matters of mental concern and solicitude"); Jarvis v. Prudential Ins. Co. of Am.,

emotional distress damages, some holding that a disability policy does satisfy the variant rule,[269] while others deny that such policies can satisfy the variant rule.[270] The analogous insurance policy cases follow the basic contract rule of awarding punitive damages when accompanied by a tort.[271]

ii. State Trust Law

State trust law provides far less relief with respect to extracontractual damages.[272] This is the expected result. Trust law cases generally deal with an independent trustee and in the employee benefit plan situation with a trustee following instructions from the plan administrator for payment of benefits due.

---

448 A.2d 407, 410 (N.H. 1982) (health policy; not generally available but cites cases that rely on 11 WILLISTON, *supra* note 253); *see* Palmer v. Pacific Indem. Co., 254 N.W.2d 52, 56 (Mich. Ct. App. 1977) (medical malpractice); Beck v. Farmers Ins. Exch., 701 P.2d 795, 802 (Utah 1985) (auto liability); Hayseed's Inc. v. State Farm Fire & Cas., 352 S.E.2d 73, 80 (W. Va. 1986) (fire).

269. *E.g.*, Crisci v. Security Ins. Co. of New Haven, 426 P.2d 173, 179 (Cal. 1967) (under RESTATEMENT (SECOND) OF CONTRACTS).

270. *E.g.*, Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50 (Mich. 1980), *rev'g*, 263 N.W.2d 258 (1978) (no recovery for insurance company refusal to pay under a disability policy unless documentation is supplied every month; disability policy is a commercial contract and so its breach is not likely to cause an emotional disturbance under the RESTATEMENT (SECOND) OF CONTRACTS); Stein, Hinkle, Dawe & Assocs. v. Continental Cas. Co., 313 N.W.2d 299, 305 (Mich. Ct. App. 1981) (architect's professional liability under the RESTATEMENT (SECOND) OF CONTRACTS); Rodgers v. Nationwide Mut. Ins. Co., 496 A.2d 811, 815–16 (Pa. Sup. Ct. 1985) (expressing doubt that auto liability policy breach fits likely-to-cause-an-emotional-disturbance requirement of RESTATEMENT (SECOND) OF CONTRACTS).

271. *E.g.*, Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247–48 (Miss. 1977) (life insurance; punitive damages awarded as defendant's action was without justification); Wright v. Public Sav. Life Ins. Co., 204 S.E.2d 57, 59 (S.C. 1974) (health insurance; punitive damages awarded as defendant's action was fraudulent); *see* Henderson v. United States Fidelity & Guar. Co., 620 F.2d 530, 536 (5th Cir. 1980), *cert. denied*, 449 U.S. 1034 (1980) (Mississippi law; auto insurance; punitive damages awarded as defendant committed a willful wrong); L.F. Pace & Sons, Inc. v. Travelers Indem. Co., 514 A.2d 766, 776 (Conn. Ct. App. 1986), *appeal denied*, 516 A.2d 886 (surety; punitive damages awarded as defendant refused to issue required certificate with intent to destroy insured); Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173, 180 (Ind. 1976) (fire insurance; punitive damages awarded as defendant's action amounted to fraud in the inducement and a bad faith attempt to commit conversion); Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 833–35 (Miss. 1979) (fire insurance; punitive damages awarded as defendant's action was an intentional wrong); Kirk v. Safeco Ins. Co., 273 N.E.2d 919, 921 (Ohio Com. Pl. 1970) (homeowners insurance; punitive damages received as defendant's action was willful, wanton, and malicious); Export Ins. Co. v. Herrera, 426 S.W.2d 895, 900 (Tex. Civ. App. 1968, writ ref'd n.r.e.) (aviation insurance; punitive damages received as defendant's action amounted to fraud); *see also* Norman's Heritage Real Estate Co. v. Aetna Cas. & Sur. Co., 727 F.2d 911, 916 (10th Cir. 1984) (Oklahoma law; business insurance; punitive damages denied as defendant did not have bad faith); Ledingham v. Blue Cross Plan, 330 N.E.2d 540, 548–49 (Ill. App. 1975), *rev'd on other grounds*, 356 N.E.2d 75 (1976) (health insurance; punitive damages denied since bad faith was lacking); Stephens v. Melson, 426 F. Supp. 1022, 1024 (D. Del. 1977) (auto insurance; punitive damages denied since bad faith was lacking).

272. This conclusion is the whole point of the dissenting opinion in Mertens v. Hewitt Assoc., 113 S. Ct. 2063, 2076–77 (1993). Justice White pointed out, correctly, that beneficiaries under pre-ERISA law recovered punitive damages under trust law only in connection with one of the two types of trust law damages when the immediate-and-unconditional requirement for trust law legal damages was satisfied. *Id.* Beneficiaries under pre-ERISA law did not receive punitive damages along with trust law equitable damages such as restitution. See *infra* note 285 & accompanying text for post-ERISA cases permitting punitive damages under both types of trust law damages.

However, there is an even more stringent limitation to trust law equitable damages. Trust law equitable damages do not permit beneficiaries to recover consequential damages, especially emotional distress damages. See *infra* notes 279–82 and accompanying text.

Contract law cases, in contrast, typically involve an interested plan administrator, much less deserving of judgment protection.

Trust law permits beneficiaries to pursue two theories to recover damages. The first is a legal action, but only for money immediately and unconditionally due the beneficiary.[273] Before ERISA's passage, participants in employee benefit plans sued under trust law for benefits due, provided the eligibility and amount due had already become fixed.[274] Under this trust law legal damage remedy, pre-ERISA beneficiaries sued for consequential damages.[275] Since many benefits-due lawsuits also involve disputes over eligibility, the trust law legal damage remedy frequently is not of much use.[276]

---

273. RESTATEMENT (SECOND) OF TRUSTS § 198 (1959) ("If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment."); RESTATEMENT OF TRUSTS § 198 (1935) (same); *see also* 3 SCOTT & FRATCHER, *supra* note 46, § 198, at 194–95.

274. *E.g.*, Pete v. United Mine Workers of Am. Welfare & Retirement Fund, 517 F.2d 1275, 1280, 1287–88 (D.C. Cir. 1975) (trust law legal damage remedy applied when participants were denied benefits under illegal LMRA plan provision and entitled participants to recover interest and attorney's fees); Dixon v. Northwestern Nat'l Bank of Minneapolis, 297 F. Supp. 485, 488 (D. Minn. 1969). Terminated participants had received worthless sponsoring employer stock from profit-sharing plan, purchased by trustee to reduce insolvent sponsoring employer's indebtedness to trustee. Under Minnesota law, participants sought compensatory [being the par value of the worthless stock received] and punitive damages under trust law's legal damages remedy. Dixon v. Northwestern Nat'l Bank of Minneapolis, 276 F. Supp. 96, 98, 104 (D. Minn. 1967). (reported opinion involved denial of a pre-trial motion to quash jury trial); Hellman v. Ploss, 359 N.Y.S.2d 823, 827 (App. Div. 1974), *appeal dism'd*, 330 N.E.2d 645 (N.Y. 1975) (trust law legal damages remedy applicable in a benefits-due lawsuit under LMRA since trustees have admitted eligibility and the amount due [being less than the sum provided by the plan formula]; application for removal to court with equitable jurisdiction granted); *see* Sichko v. Lewis, 191 F. Supp. 68, 69 (W.D. Pa. 1960) (trust law legal damages remedy [for amount of pension specified by the plan formula] inapplicable to a benefits-due lawsuit under LMRA since dispute over eligibility does not satisfy the immediate-and-unconditional requirement; motion to strike jury demand granted); Collins v. Storer Broadcasting Co., 120 S.E.2d 764, 769–70 (Ga. 1961) (demurrer affirmed for trust law legal damage remedy cause of action by terminated participant suing for benefit plus attorney's fees and "expenses on account of the bad faith and stubborn litigations" of the plan administrator); Milberg v. Nagler, 191 N.Y.S.2d 821, 822–23 (Sup. Ct. 1959) (trust law legal damages remedy [for amount specified by the plan formula] inapplicable to a benefits-due lawsuit under LMRA since dispute over eligibility does not satisfy the immediate-and-unconditional requirement; motion to dismiss from court without equitable jurisdiction granted).

275. *See, e.g.*, Pete v. United Mine Workers of Am. Welfare & Retirement Fund, 517 F.2d 1275, 1280, 1289 (D.C. Cir. 1975) (trust law legal damage remedy applied when participants denied benefits under illegal LMRA plan provision and entitled to recover interest and attorney's fees); Collins v. Storer Broadcasting Co., 120 S.E.2d 764, 769–70 (Ga. 1961) (demurrer affirmed for trust law legal damage remedy for terminated participant suing for benefit plus attorney's fees and "expenses on account of the bad faith and stubborn litigations" of the plan administrator).

Since this action is one at law for money had and received, 3 SCOTT & FRATCHER, *supra* note 46, § 198, at 196–198, beneficiaries originally could not recover consequential damages. Although an action at law, the remedy for money had and received is equitable in nature and limited to avoid unjust enrichment. Stone v. White, 301 U.S. 532, 534 (1936). Originally the recovery was limited to the proceeds received by the trustee, *see* WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 173 (1893). More recently, beneficiaries can recover the amount due plus interest. RESTATEMENT OF RESTITUTION §§ 150 & 156 (1937). Beneficiaries have not recovered emotional distress damages. *See* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1336–37 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992) (could find no trust cases permitting emotional distress damages). The non-ERISA trust cases reveal that recovery under this rule is limited. Some beneficiaries recovered the amount

The second theory trust law provides is an equitable action for breach of trust.[277] One of the remedies for breach of trust is to put the beneficiary in the position he would have been in if the trustee had not committed the breach of trust.[278] Before ERISA's passage, participants in employee benefit plans sued in trust law equitable actions for damages on behalf of their plans, but not for consequential damages to themselves.[279] Under this provision non-retirement trusts before ERISA recovered consequential damages to make the trust whole,[280] while beneficiaries were denied their own consequential damages.[281]

---

due, plus court costs and attorney's fees. *E.g.*, Newlin v. Newlin, 52 N.E.2d 503, 506 (Ind. Ct. App. 1944) (attorney's fees); Fleishman v. Krause, Lindsay and Nahstoll, 495 P.2d 268, 269 (Or. 1972) (court costs). Other beneficiaries received the amount due and interest, which is a portion of the amount that would be due had the breach of fiduciary duty not occurred. *E.g.*, Estate of O'Donnell v. Shanahan, 132 N.E.2d 74, 77 (Ill. Ct. App. 1956) (amount of debt plus interest should have earned if properly invested); *see generally* 3 SCOTT & FRATCHER, *supra* note 46, § 198, at 196–198 (listing cases tried at law, but recovering only the amount of the debt plus, occasionally, interest).

276. See *supra* note 274 for cases denying the right to trust law legal damages when eligibility is contested in good faith.

277. RESTATEMENT (SECOND) OF TRUSTS § 199 (1959) ("The beneficiary of a trust can maintain a suit to compel the trustee to redress a breach of trust" labeled an equitable action); RESTATEMENT OF TRUSTS § 199 (1935) (same); *see also* 3 SCOTT & FRATCHER, *supra* note 46, § 199, at 203–04.

278. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a (1959); RESTATEMENT OF TRUSTS § 205 cmt. a (1935); BOGERT & BOGERT, *supra* note 46, § 701, at 198. This remedy is stated as an expression of contractual expectancy damages without the foreseeability or uncertainty limitations. *See* Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936).

Several commentators have suggested this trust law rule permits beneficiaries to recover consequential damages, but cite no trust cases so providing. *See* Charles M. Dyke, Note, *Warren v. Society National Bank: Fiduciary Duties and Recovery of Damages for Breach Under ERISA*, 41 DEPAUL L. REV. 515, 545 n.195 (1992); Diane M. Sumoski, Comment, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014, 1028 n.108 (1986).

279. *E.g.*, Vale v. Union Bank, 151 Cal. Rptr. 784, 790 (Cal. Dist. Ct. App. 1979) (trust law equitable damages case: pre-ERISA pension plan bank trustee demanded investment in bank's common fund or it would sell assets out at a loss); Werschkull v. United California Bank, 149 Cal. Rptr. 829, 842 (1978) (trust law equitable damages case: trustee diverted funds to second plan to reduce employer contribution to second fund).

280. *E.g.*, Wells Fargo Bank & Union Trust v. Talbot, 296 P.2d 848, 851, 853, 859 (Cal. Ct. App. 1956) (paid to trust income tax paid by trust plus investment interest caused by sale of stock without required consent; but not subsequent appreciation and income on the stock since the breach was not in the timing of the sale but selling without consent); *In re* Whitney's Estate, 11 P.2d 1107, 1113 (Cal. Ct. App. 1932) (paid to trust expense of audit upon misappropriation); *In re* Cook's Will, 40 A.2d 805, 809–10 (N.J. Eq. 1945) (paid to trust foreclosure, title examination, and recording fees and broker's commission on fruitless investment plus lost income for failure to collect on trust investment); Rothenberg v. Franklin Washington Trust Co., 39 A.2d 434, 435 (N.J. Eq. 1944) (paid to trust master's fees and disbursements when no other damage for improper investment); *see* Gillespie v. Seymour, 823 P.2d 782, 797 (Kan. 1991) (paid to trust income tax paid by trust plus substitute stock investment for making improper oil investment).

The distinction between consequential damages and non-consequential damages applicable to contracts, *see, e.g.*, U.C.C. § 2–715 (1993), is not as useful for trusts. The whole idea behind damages to a trust is to permit recovery of investment losses. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959). Any expense, whether a consequential damage or not, reduces investment principal and income permitting the trust to recover.

281. *E.g., In re* Wanamaker's Trust, 17 A.2d 380, 381 (Pa. 1941) (trustee not liable for counsel fees and income taxes paid by beneficiary on recovery of trust income awarded to beneficiary in one year); *In re* Comstock's Will, 17 N.W.2d 656, 664 (Minn. 1945) (same).

Since the trust law equitable damage remedy involves a trust recovery and not a beneficiary recovery for consequential damages, emotional distress damages cannot be recovered.[282] So the trust law equitable damage remedy is not of much use to participants attempting to recover extracontractual damages in the benefits-due lawsuit (as a breach of fiduciary duty) situation.[283]

If accompanied by tort culpability, pre-ERISA participants recovered punitive damages for themselves under the trust law legal damage remedy for willful, malicious, or wanton conduct or gross negligence with a culpable state of mind.[284] After ERISA's passage, participants not subject to ERISA also recovered punitive damages under the trust law equitable damage remedy.[285]

This result may make little sense in the employee benefit plan situation. ERISA requires adjustment of trust law to reflect employee benefit plan realities. *See infra* notes 303–04 and accompanying text. Many employee benefit plans have segregated accounts, and so the injury is directly to the participant and not some aggregate trust. *See supra* note 122.

282. *See* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1336–37 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992) (could find no trust cases permitting emotional distress damages).

283. See *supra* note 122 for the ability of the participant to recover through segregated accounts.

284. *E.g.*, Dixon v. Northwestern Nat'l Bank of Minneapolis, 297 F. Supp. 485, 488 (D. Minn. 1969) (trust law legal damages case: participants recovered punitive damages for investment in bankrupt sponsoring employer plus amount of investment loss); *see* Lefferdink v. Baker, 399 P.2d 935, 940 (Colo. 1965) (trust law legal damages case: punitive damages awarded by trial court to terminated participants denied since trustee acted in good faith).

Punitive damages in connection with trust law legal damages also have been recovered by beneficiaries under other types of trusts. *E.g.*, Rivero v. Thomas, 194 P.2d 533, 542 (Cal. Ct. App. 1948) (trust law legal damages case: punitive damages awarded to beneficiary for misappropriation); Sharts v. Douglas, 163 N.E. 109, 112 (Ind. Ct. App. 1928) (trust law legal damages case: punitive damages awarded to receiver of beneficiary for defrauding trust of trust property); First City Nat'l Bank of Paris v. Haynes, 614 S.W.2d 605, 609 (Tex. Civ. App. 1981, no writ) (trust law legal damages case: beneficiaries awarded punitive damages by trial court against bank trustee for allowing property to deteriorate denied as no gross negligence; noting standard is that of torts); Adam v. Harris, 564 S.W.2d 152, 156 (Tex. Civ. App. 1978, writ ref'd n.r.e.) (trust law legal damages case: punitive damages awarded beneficiaries for trustee failure to distribute on termination); *see* Fleishman v. Krause, Lindsay and Nahstoll, 495 P.2d 268, 269 (Or. 1972) (trust law legal damages case: suit for amount plus punitive damages remanded for trial at law); *see also* Wiemer v. Havana Nat'l Bank, 385 N.E.2d 340, 344 (Ill. Ct. App. 1979) (trust law legal damages case: punitive damages denied as no malicious intent).

285. *E.g.*, Werschkull v. United California Bank, 149 Cal. Rptr. 829, 835, 842 (Cal. Dist. Ct. App. 1978) (trust law equitable damages: participants of pre-ERISA employee benefit plan recovered punitive damages for diversion of funds to second plan to reduce employer contribution to second fund while fund recovered investment loss); *but see* Vale v. Union Bank, 151 Cal. Rptr. 784, 790 (Cal. Dist. Ct. App. 1979) (trust law equitable damages: pre-ERISA pension plan bank trustee demand for investment in bank's common fund or it would sell assets out at a loss constitutes sufficient egregiousness to award punitive damages to new trustees for trust as well as investment loss to plan).

Beneficiaries under other types of trusts after ERISA's passage have also recovered punitive damages in connection with trust law equitable damages. *E.g.*, Gillespie v. Seymour, 823 P.2d 782, 797 (Kan. 1991) (trust law equitable damages case: unclear whether beneficiaries or plan awarded punitive damages for improper oil investment); *but see* Gould v. Starr, 558 S.W.2d 755, 764, 771 (Mo. Ct. App. 1977), *cert. denied*, 436 U.S. 905 (1978), *appeal dism'd*, 610 S.W.2d 93 (Mo. Ct. App. 1980) (trust law equitable damages case: permitted new trustees for plan to recover punitive damages for trustee action in self-interest); *see also* Hoppe v. Hoppe, 370 So. 2d 374, 376 (Fla. Ct. App. 1978), *cert. denied*, 379 So. 2d 206 (Fla. 1979) (trust law equitable damages case: punitive damages denied as no malicious intent).

iii. Role of State Tort Law

Some states, mostly in the south and west, have a tort action for breach of the implied covenant of good faith and fair dealing.[286] This tort developed as a reaction to the early restrictive interpretation of the contractual foreseeability rule.[287] Early courts used the foreseeability rule to deny consequential damages[288] and emotional distress[289] and to deny punitive damages.[290] The result was to encourage outrageous and unethical conduct by insurers when dealing with valid claims since, without extracontractual damages at most they

---

286. Courts allow recovery by the insured (first-party liability, distinct from third-party liability) for breach of the covenant. *E.g.*, Chavers v. National Security Fire & Cas. Co., 405 So. 2d 1, 4 (Ala. 1981); State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152, 1155–56 (Alas. 1989); Nobel v. National Am. Life Ins. Co., 128 Ariz. 188, 189–90, 624 P.2d 866, 867–68 (1981); Findley v. Time Ins. Co., 573 S.W.2d 908, 909 (Ark. 1978); Crisci v. Security Ins. Co. of New Haven, 426 P.2d 173, 176–77 (Cal. 1965); Farmers Group, Inc. v. Trimble, 691 P.2d 1138, 1140–41 (Colo. 1984); Buckman v. People Exp., Inc., 530 A.2d 596, 599 (Conn. 1987); White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1017–18 (Idaho 1986); Ledingham v. Blue Cross Plan for Hospital Care of Hospital Service Corp., 330 N.E.2d 540, 549 (Ill. Ct. App. 1975), *rev'd on other grounds*, 356 N.E.2d 75 (Ill. 1976); Amsden v. Grimmel Mut. Reins. Co., 203 N.W.2d 252, 254 (Iowa 1972); Feathers v. State Farm Fire & Cas. Co., 667 S.W.2d 693, 696 (Ky. Ct. App. 1983); Britton v. Farmers Ins. Group, 721 P.2d 303, 306 (Mont. 1986); Braesch v. Union Ins. Co., 464 N.W.2d 769, 772–75 (Neb. 1991); United States Fidelity & Guar. Co. v. Peterson, 540 P.2d 1070, 1071 (Nev. 1975); Dailey v. Integon General Ins. Corp., 331 S.E.2d 148, 154 (N.C. Ct. App. 1985), *review denied*, 336 S.E.2d 399 (N.C. 1985); Corwin Chrysler-Plymouth Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 643 (N.D. 1979); Christian v. American Home Assur. Co., 577 P.2d 899, 904–05 (Okla. 1977); Gavin v. North Carolina Mut. Ins. Co., 217 S.E.2d 591, 594 (S.C. 1975); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987); Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376–77 (Wis. 1978).

See John Hancock Mut. Life Ins. Co. v. Poss, 267 S.E.2d 877, 883 (Ga. Ct. App. 1980) (no bad faith found); Kewin v. Massachusetts Mut. Life Ins. Co., 263 N.W.2d 258, 266 (Mich. Ct. App. 1977), *rev'd on other grounds*, 295 N.W.2d 50 (Mich. 1980) (pleadings do not support the tort); *see also* United Farm Bur. Fam. Life Ins. Co. v. Fultz, 375 N.E.2d 601, 606 (Ind. Ct. App. 1978) (by named beneficiary under life insurance, under contract law); Kaluza v. Home Ins. Co., 403 N.W.2d 230, 236 (Minn. 1987) (employee under worker's compensation); Southern Farm Bureau Cas. Ins. Co. v. Holland, 469 So. 2d 55, 59 (Miss. 1984) (same); Travelers Ins. Co. v. Montoya, 566 P.2d 105, 106 (N.M. Ct. App. 1977) (beneficiary under life insurance); DeMarco v. Federal Ins. Co., 472 N.Y.S.2d 464, 466 (App. Div. 1984) (employee under worker's compensation); Matter of Certification of a Question of Law from the United States Dist. Court, Dist. of S.D., Western Div., 399 N.W.2d 320, 322 (S.D. 1987) (same). *See generally* 16A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 8878.15, at 422 (1981); 1A LONG, *supra* note 14, § 5B.06, at 5B–65.

287. 1A LONG, *supra* note 14, § 5A.26, at 5A–156–59; *see also* Phyllis Savage, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 FORDHAM L. REV. 164, 167–68 (1976); John G. Halinka, *Damages for Mental Suffering Caused by Insurers: Recent Developments in the Law of Tort and Contract*, 48 NOTRE DAME L. REV. 1303, 1304 (1973).

288. *See, e.g.*, Independent Grocery Co. v. Sun Ins. Co., 178 N.W. 582, 583 (Minn. 1920) (depreciation of business considered too remote), *overruled by* Olson v. Rugloski, 277 N.W.2d 385, 388 (Minn. 1979).

289. *See, e.g.*, Clark v. Life & Cas. Ins. Co., 53 S.W.2d 968, 970 (Ky. Ct. App. 1932); *see also* Hass v. Pacific Mut. Life Ins. Co., 41 N.E.2d 263, 266 (Ohio Ct. App. 1941); Gross v. Connecticut Gen. Life Ins. Co., 390 S.W.2d 388, 390 (Tex. Civ. App. 1965, no writ).

290. *See, e.g.*, Scottish Union & Nat'l Ins. Co. v. Bejcy, 201 F.2d 163, 165 (6th Cir. 1953) (Michigan law); Blue Bird Taxi Corp. v. American Fidelity & Cas. Co., 26 F. Supp. 808, 810 (E.D.S.C. 1939); Leonard v. Firemen's Ins. Co., 111 S.E.2d 773, 775 (Ga. Ct. App. 1959); Independent Grocery Co. v. Sun Ins. Co., 178 N.W. 582, 583 (Minn. 1920), *overruled by* Olson v. Rugolski, 277 N.W.2d 385, 388 (Minn. 1979).

would be liable only for the amount specified in the policy.[291] To counter this trend, California and other states began the development of the tort for breach of the implied covenant of good faith and fair dealing.[292]

As an alternative to this tort, some states have enacted penalty statutes to cover insurer abuses with respect to claims.[293] Most states have a tort action for intentionally inflicting emotional distress,[294] applicable to improper processing of insurance claims.[295]

These torts have been applied in the pension area.[296] The Supreme Court, however, has ruled that ERISA's preemption provision[297] forecloses the state

---

291. *See* Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 87 (Ct. App. 1970).

292. *See, e.g.*, Crisci v. Security Ins. Co., 426 P.2d 175, 176–77 (Cal. 1967); Brown v. Guarantee Ins. Co., 319 P.2d 69, 71 (Cal. Ct. App. 1957).

293. *See, e.g.*, ARK. CODE ANN. § 22–79–208 (1992) (12 percent of the amount); GA. CODE ANN. § 33–4–6 (1992) (25 percent); LA. REV. STAT. ANN. § 22:658 (West Supp. 1993) (15 percent); MO. ANN. STAT. § 375.420 (Vernon 1991) (sliding scale to 10 percent).

294. Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939) (District of Columbia law); Peddycoart v. City of Birmingham, 392 So. 2d 536, 540 (Ala. 1980); Savage v. Boies, 77 Ariz. 355, 358, 272 P.2d 349, 351 (1954); M.B.M. Co. v. Counce, 596 S.W.2d 681, 687 (Ark. 1980); State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 284–85 (Cal. 1952); Rugg v. McCarty, 476 P.2d 753, 756 (Colo. 1970); Hiers v. Cohen, 329 A.2d 609, 611 (Conn. Super. Ct. 1973); Greer v. Medders, 336 S.E.2d 328, 329 (Ga. Ct. App. 1985); Ailetcher v. Beneficial Fin. Co., 632 P.2d 1071, 1074–75 (Haw. Ct. App. 1981); Gill v. Brown, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985); Knierim v. Izzo, 174 N.E.2d 157, 165 (Ill. 1961); Amsden v. Grinnell Mut. Reins. Co., 203 N.W.2d 252, 254 (Iowa 1972); Dawson v. Associates Fin. Serv. Co., 529 P.2d 104, 111 (Kan. 1974); Roshto v. Bajon, 335 So. 2d 486, 488 (La. Ct. App. 1976); Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979); Harris v. Jones, 380 A.2d 611, 614 (Md. 1977); George v. Jordan Marsh Co., 268 N.E.2d 915, 921 (Mass. 1971); Frishett v. State Farm Mut. Auto. Ins. Co., 143 N.W.2d 612, 613 (Mich. Ct. App. 1966); Venes v. Professional Serv. Bureau, Inc., 353 N.W.2d 671, 674 (Minn. Ct. App. 1984); Leonard v. Pioneer Finance Co., 568 S.W.2d 937, 940 (Mo. Ct. App. 1978); Proto v. Elliot, 722 P.2d 625, 627 (Mont. 1986); LaSalle Extension Univ. v. Fogarty, 253 N.W. 424, 426 (Neb. 1934); Star v. Rabello, 625 P.2d 90, 90–91 (Nev. 1981); Hume v. Bayer, 428 A.2d 966, 967 (N.J. Super. Ct. 1981); Mantz v. Follingstad, 505 P.2d 68, 75 (N.M. Ct. App. 1972); Fisher v. Maloney, 373 N.E.2d 1215, 1217 (N.Y. 1978); Stanback v. Stanback, 254 S.E.2d 611, 621–22 (N.C. 1979); Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 453 N.E.2d 666, 670–71 (Ohio 1983); Breedon v. League Servs. Corp., 575 P.2d 1374, 1377 (Okla. 1978); Rockhill v. Pollard, 485 P.2d 28, 31 (Or. 1971); Jones v. Nissenbaum, Rudolph & Seidner, 368 A.2d 770, 772–73 (Pa. Super. Ct. 1976); Ford v. Hutson, 276 S.E.2d 776, 778 (S.C. 1981); First Nat'l Bank of Jacksonville v. Bragdon, 167 N.W.2d 381, 382 (S.D. 1969); Medlin v. Allied Investment Co., 398 S.W.2d 270, 274 (Tenn. 1966); Tidelands Auto. Club v. Walters, 699 S.W. 2d 939, 944 (Tex. Civ. App. 1985, writ ref'd n.r.e.); Samms v. Eccles, 358 P.2d 344, 346–47 (Utah 1961); Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974); Grimsby v. Samson, 530 P.2d 291, 295 (Wash. 1975); Alsteen v. Gehl, 124 N.W.2d 312, 316 (Wis. 1963).

See generally 16A APPLEMAN & APPLEMAN, *supra* note 286, § 8878.55, at 449; 1A LONG, *supra* note 14, § 5B.20, at 5B–161.

295. Chavers v. National Security Fire & Cas. Co., 405 So. 2d 1, 7 (Ala. 1981); Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 254–55 (Iowa 1972).

296. *See, e.g.*, Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311, 1313 n.3 (5th Cir. 1985), *rev'd*, 481 U.S. 41 (1987); *see also* Martha E. Bellenger, Note, *The Extension of Bad Faith Breach of Contract to the Wrongful Denial of a Public Employee Disability Pension*, 4 WHITTIER L. REV. 627 (1982); *see generally* Thomas A. Diamond, *The Tort of Bad Faith Breach of Contract: When, If at all, Should it be Extended Beyond Insurance Transactions?*, 64 MARQ. L. REV. 425 (1981).

297. Employee Retirement Income Security Act of 1974 § 514, 29 U.S.C. § 1144 (1985): "[T]he 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...."

contract and tort actions for breach of the implied covenant of good faith and fair dealing and intentionally inflicting emotional distress.[298]

Under either the contract law approach or the trust law approach of ERISA's remedies provision, however, these torts, if accompanying the breach of contract or trust, would enable recovery of punitive damages.[299]

Pre-ERISA remedies law permitted recovery by participants of all types of extracontractual damages under contract law as well as some consequential (non-emotional distress) and punitive damages under the trust law legal damage remedy. At least the contract remedies for extracontractual damages, as well as the limited trust law legal damage remedy, should carry over under ERISA section 502(a)(1)(B)(i) in accordance with the congressional directive.

b. Statutory Scheme

A second strand of legislative history indicates that Congress fashioned ERISA to recognize both the contractual and trust-like nature of employee benefit plans.

Congress made clear that employee benefit programs did not consist solely of a trust document governed by trust law.[300] Congressional reports indicate that trust law alone was inadequate to safeguard participants' rights[301] and that the pre-ERISA federal employee benefit plan standards, namely the arbitrary and capricious review standard, were not good enough for ERISA.[302] Furthermore, Congress directed the courts to take into consideration the special differences between employee benefit trusts and traditional testamentary trusts.[303] These differences should at least take into account that: (1) the employer has a continuing economic interest in the program to reduce its costs since the employer is ultimately liable for its benefits and costs; (2) the employee's interest in the program represents the employee's deferred compensation; and (3) the plan administrator's review process is geared to justify its own prior determination in a non-neutral fashion.[304] Thus, Congress recognized that employee benefit programs were far more than just trusts.

---

298. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987); *see also* Robert Egelko, *Losing Faith in Bad Faith: Suing Insurers for Handling Claims in Bad Faith was a Popular Pastime—Until Last Spring*, 7 CAL. LAW. 26 (Oct. 1987); L. Barnes, *Pilot Life v. Dedeaux: ERISA Preempts Bad Faith Claims Against Insurers*, 61 WIS. B. BULL. 17 (Feb. 1988).

299. *See supra* notes 260, 285 and accompanying text.

300. See *supra* notes 195–99 and accompanying text for congressional recognition, expressed in the statute, of non-trust employee benefit program documents, some governed by contract law.

301. H.R. REP. NO. 533, *supra* note 10, at 12, *reprinted in* 1974 U.S.C.C.A.N. at 4650 ("[C]onventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries.").

302. *Id.* at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4642 ("[LMRA] is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.").

303. H.R. CONF. REP. NO. 1280, *supra* note 28, at 302, *reprinted in* 1974 U.S.C.C.A.N. at 5083 ("The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.").

304. *See* Flint, *supra* note 45, at 173; Langbein, *supra* note 35, at 211–12.

Congress provided expressly in ERISA that the rights of the participant arise in the contractual plan instrument relating to the establishment of the benefit program.[305] These rights, under the deferred wage theory of pre-ERISA law, were contractual, a fact noted by both Congress at the time of ERISA's passage[306] and later by the Supreme Court.[307] They represented an exchange of the promise of deferred wages, the benefits, for the consideration of present services.[308] Congress recognized these rights as contractual in its committee reports: "In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding."[309]

Moreover, these congressional committee reports specifically acknowledge that ERISA adopted the deferred wage theory for participant rights under employee benefit plans: "[ERISA] presumes that promised pension benefits are in the form of a conditional deferred wage."[310] Thus the document that creates the rights of the participant, the one that establishes the plan, is contractual in nature under the congressional explanation. Moreover, it is under that plan document that participants sue in a benefits-due lawsuit,[311] not under the trust instrument. The trust's only involvement in the benefits-due lawsuit is that it is contractually obligated to satisfy the participant's judgment. Congress thus expected courts to enforce these contractual rights through the benefits-due lawsuit under contract law, which generally entails a right to recover extracontractual damages in certain circumstances.

c. Federal Common Law

In another strand of legislative history, the conference committee report indicates that courts should treat the benefits-due lawsuit as arising under the federal law in the same fashion as pre-ERISA benefits-due lawsuits under the Labor Management Relation Act of 1947 (LMRA):[312]

> [S]uits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of [ERISA's] provisions ... may be brought ...also in State courts ....All such actions in Federal or State courts are to be regarded as arising under the laws of

---

305. *See, e.g.,* Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132(a)(1)(B) (1985) (referring to enforceable rights of participants as arising under terms of the plan instrument, not the trust).

306. *See infra* note 310 and accompanying text for congressional recognition of the deferred wage theory giving rise to contractual rights.

307. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989).

308. *See* Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan,* 23 U. CHI. L. REV. 96, 99–103 (1955) (explaining contract theory of employee benefit plans with consideration in either longevity of service or in present services for deferred wages).

309. H.R. REP. NO. 533, *supra* note 10, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 4643; S. REP. NO. 127, *supra* note 240, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 4841–42.

310. H.R. REP. NO. 533, *supra* note 10, at 13, *reprinted in* 1974 U.S.C.C.A.N. at 4651.

311. *See* Employee Retirement Income Security Act of 1974 § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1985).

312. Taft-Hartly Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–187 (1978)).

the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.[313]

Senator Harrison A. Williams, Jr., then chairman of the Senate Committee on Labor and Public Welfare,[314] co-sponsor of the original draft of the ERISA legislation[315] and floor manager of the bill,[316] explained the legislation similarly.[317] Courts often treat the explanations of committee reports made by a committee member or the committee chairman as supplemental committee reports.[318]

Since the benefits-due lawsuit was not specifically provided for in LMRA,[319] this congressional directive is a mandate to develop a federal common law[320] for the benefits-due lawsuit,[321] commencing with the pre-

---

313. H.R. CONF. REP. NO. 1280, *supra* note 28, at 76–77, *reprinted in* 1974 U.S.C.C.A.N. at 5107.

314. 1974 U.S.C.C.A.N. XCII.

315. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985); Theodore P. Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action,* 52 TEMP. L.Q. 51, 61 (1979).

316. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity,* 19 U. MICH. J.L. REF. 109, 113 (1985).

317. 120 CONG. REC. 29,933 (1974) ("It is intended that such [ERISA benefits-due] actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act."), *reprinted in* 3 Legislative History, *supra* note 128, at 4745.

318. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475–77 (1921); *see also* Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 459 (1937) (explanations given in Congress make meaning plain); Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312, 322 (1934) (chairman of committee so stated); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929) (statements by those in charge); Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922) (explanatory statements of members in charge); United States v. St. P.M. & M.R. Co., 247 U.S. 310, 318 (1918) (remarks in nature of supplementary report); United States v. Coca Cola Co., 241 U.S. 265, 281 (1916) (chairman explaining the provision).

319. See Flint, *supra* note 236, at 365–368 for the development of the pre-ERISA benefits-due lawsuit under LMRA.

320. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 (1983). *See also* H.R. REP. NO. 247, *supra* note 21, at 55–56 (suggesting that federal courts have authority to fashion ERISA remedies even if not specifically enumerated).

The Supreme Court also understands this directive as authority to incorporate some LMRA procedural rules. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987); *but see* Conison, *supra* note 95, at 17–20 (explaining the danger of incorporating LMRA rules into ERISA).

In dicta the Supreme Court suggested this authority extended to permitting a wrongful termination action for firing to avoid payment of ERISA benefits. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 486 (1990). The federal courts have ignored this suggestion. *See* Harsch v. Eisenberg, 956 F.2d 651, 659 (7th Cir. 1992), *cert. denied sub. nom,* Bihler v. Eisenberg, 113 S. Ct. 61 (1992) (disparaging the idea); McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 823 (11th Cir.), *reh'g denied,* 931 F.2d 901 (11th Cir. 1991) (same); Medina v. Anthem Life Ins. Co., 983 F.2d 29, 31–32 (5th Cir. 1993) (same).

321. Benefits-due lawsuits were brought under LMRA's contractual section 301(a). *E.g.,* Rehmar v. Smith, 555 F.2d 1362, 1366–67 (9th Cir. 1976) (widow sued trustees for survivor's benefits); Smith v. Union Carbide Corp., 350 F.2d 258, 260 (6th Cir. 1965) (former employee sued for denied pension benefit); Rhine v. Union Carbide Corp., 343 F.2d 12, 15 (6th Cir. 1965) (former employee sued for denied disability benefit); United Auto. Workers v. Textron, Inc., 312 F.2d 688, 691 (6th Cir. 1963) (union action on behalf of employees to determine their rights in terminated plan); Hayes v. Morse, 347 F. Supp. 1081, 1087 (E.D. Mo. 1972) (former employee sued trustees for pension benefit), *aff'd,* 474 F.2d 1265 (8th Cir. 1973); Brune v. Morse, 339 F. Supp. 159, 159 (E.D. Mo. 1972) (same), *aff'd,* 475 F.2d 858 (8th Cir. 1973);

ERISA LMRA cases, a body of pre-ERISA federal common law relating to employee benefit plans.[322] This directive to develop federal common law was made even more clear by Senator Jacob Javits, the other co-sponsor of the original draft legislation and the senior ranking Republican on the Senate Committee on Labor and Public Welfare,[323] when he explained 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."[324]

Examining the federal common law of employee benefit plans under LMRA at the time of ERISA's passage indicates that it permitted extracontractual damages for the benefits-due lawsuit. Jurisdiction was based on a structural violation of the LMRA trust requirements for employee benefit plans[325] or treatment of employee benefit plans as a contract enforceable as a collective bargaining agreement.[326] Consequently, LMRA benefits-due lawsuits were brought under both contract law and trust law. Just as state contract law decisions did, LMRA decisions also allowed recovery of consequential damages[327] and punitive damages.[328] As with state trust law decisions, LMRA

Knoll v. Phoenix Steel Corp., 325 F. Supp. 666, 668 (E.D. Pa. 1971) (action by former employees to discontinue pension fund and distribute assets to beneficiaries upon closing of plant), *aff'd*, 465 F.2d 1128 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *accord* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176–77 n.17 (1971) (dictum in unfair labor practice case); Beam v. International Org. of Masters, 511 F.2d 975, 978 (2d Cir. 1975) (spouse of deceased union member sought denied accidental death benefits).

Benefits-due lawsuits also were brought under LMRA's trust section 302(c)(5). *E.g.*, Johnson v. Botica, 537 F.2d 930, 933 (7th Cir. 1976) (former employee sued to challenge denial of disability pension); Lugo v. Employees Retirement Fund of the Illumination Prods. Indus., 529 F.2d 251, 254–56 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976) (former employee sued for declaration and injunctive relief for denial of disability pension); Pete v. United Mine Workers Welfare & Retirement Fund, 517 F.2d 1267, 1269–70 (D.C. Cir.), *reh'g granted*, 517 F.2d 1274 (D.C. Cir. 1974) (former employee sued to review pension benefit denial); Kiser v. Huge, 517 F.2d 1237, 1244 (D.C. Cir.), *reh'g granted sub. nom.*, Kiser v. Boyle, 517 F.2d 1274 (D.C. Cir. 1974) (class action brought to review denial of pension benefits); Kosty v. Lewis, 319 F.2d 744, 745 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964) (union member sued trustees to determine eligibility for pension).

322. The federal courts have already done this with respect to the fiduciary review rule by using the LMRA arbitrary and capricious rule in ERISA cases. *E.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989); *see* Flint, *supra* note 45, at 165–67 n.155.

323. *See supra* note 133.

324. 120 CONG. REC. 29,942 (daily ed. Aug. 22, 1974), *reprinted in* 3 Legislative History, *supra* note 128, at 4771; *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (acknowledging that the statement binds the Supreme Court); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55–57 (1987) (The courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans."); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983) (adopting Sen. Javits's statement).

325. Flint, *supra* note 236, at 366 n.43; Labor Management Relations Act of 1947, § 302(c)(5)(A), 29 U.S.C. § 186(c)(5)(A) (1978).

326. Flint, *supra* note 236, at 367 n.46; Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (1978).

327. *See* International Union, United Auto., Aerospace and Agricultural Implement Workers of Am. v. Anaconda Am. Brass Co., 475 F.2d 682, 685 (6th Cir. 1973) (in pension dispute under the LMRA, court is empowered to grant actual and consequential damages [but none sought with respect to the pension]); *see also* Richardson v. Communications Workers of Am., 443 F.2d 974, 984–85 (8th Cir. 1971) (can recover mental stress for breach of collective bargaining agreement against union).

LMRA decisions also considered the effects of investment returns by allowing discretionary prejudgment interest, *e.g.*, Burroughs v. Board of Trustees of Pension Trust Fund for Operating Engineers, 398 F. Supp. 168, 175 (D.C. Cal. 1975), *aff'd*, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (under LMRA, participant gets denied benefit decisions followed the rule of requiring fixation of eligibility and the amount due before permitting the trust law legal remedy[329] or permitting recovery of consequential damages.[330]

Congressional committee reports subsequent to ERISA's passage indicate that at least some members of Congress believed that this directive to develop the federal common law included authorization for courts to award punitive damages for bad-faith claims processing.[331] Although subsequent reports do not

---

plus legal interest from due date); Becker v. Pension Fund, 229 N.W.2d 888, 893 (Mich. Ct. App. 1975) (failed to recover prejudgment interest for LMRA retirement benefit as did not request jury instruction), and discounting lump sum equivalents of annuities. *E.g.*, Hoefel v. Atlas Tack Corp., 581 F.2d 1, 7 (1st Cir.), *cert. denied*, 440 U.S. 913 (1979) (when discounting a lump sum payment for denied annuity from an LMRA pension plan use competitive commercial annuity rate rather than the higher 8 percent the plan ordinarily makes since participants are not sophisticated investors); Smith v. Beall, 451 S.W.2d 195, 198–99 (Ark. 1970) (future plan disability payments must be reduced to their present value, based on life expectancy).

328. *E.g.*, Smith v. Beall, 451 S.W.2d 195, 198 (Ark. 1970) (permitting statutory penalty for wrongfully withheld disability payments under plan).

Under another ERISA predecessor, the Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86–257, 73 Stat. 519, 29 U.S.C. §§ 401–531 (1985), the Landrum-Griffith Act, employees recovered punitive damages against certain union practices in the non-employee benefit situation. *E.g.*, Bise v. International Bhd. of Elec. Workers, 618 F.2d 1299, 1305 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) (wrongful discipline imposed by union on members); Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815, 820 (9th Cir. 1976) (remanded to permit punitive damages against union for retaliatory job reassignment); International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 199–20 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968) (same; recovered for unlawful expulsion from union); Simmons v. Avisco, Local 713, Textile Workers Union of Am., 350 F.2d 1012, 1018–20 (4th Cir. 1965) (same; recovered for suspension).

329. *E.g.*, Pete v. United Mine Workers of Am. Welfare & Retirement Fund, 517 F.2d 1275, 1280, 1287–88 (D.C. Cir. 1975) (trust law legal damage remedy applied when participants denied benefits under illegal LMRA plan provision and entitled to recover interest and attorney's fees); Hellman v. Ploss, 359 N.Y.S.2d 823, 827 (App. Div. 1974), *appeal dism'd* 330 N.E.2d 645 (N.Y. 1975) (trust law legal remedy applicable in a benefits-due lawsuit under LMRA since trustees have admitted eligibility and the amount due); Sichko v. Lewis, 191 F. Supp. 68, 69 (W.D. Pa. 1960) (trust law legal remedy inapplicable to a benefits-due lawsuit under LMRA since dispute over eligibility does not satisfy the immediate-and-unconditional requirement); Milberg v. Nagler, 191 N.Y.S.2d 821, 822–23 (Sup. Ct. 1959) (trust law legal damages remedy [for amount specified by the plan formula] inapplicable to a benefits-due lawsuit under LMRA since dispute over eligibility does not satisfy the immediate-and-unconditional requirement; motion to dismiss from court without equitable jurisdiction granted); *see* Local No. 92, Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers v. Norris, 383 F.2d 735, 741 & n.22 (5th Cir. 1967) (cannot use trust law legal remedy to force repayment of excessive salaries paid by trust to union trustee as not dealing with an amount due immediately and unconditionally; case under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), Pub. L. No. 86–257, 73 Stat. 535 (1959), 29 U.S.C. § 501 (1978)); *see also* Bise v. International Bhd. of Elect. Workers, 618 F.2d 1299, 1305–06 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) (in an injunction action jury can award damages for emotional distress and lost wages, and punitive damages for wrongful discipline imposed by union; equitable case under LMRDA but without a trust).

330. *E.g.*, Pete v. United Mine Workers of Am. Welfare & Retirement Fund, 517 F.2d 1275, 1280, 1287–88 (D.C. Cir. 1975) (trust law legal damage remedy applied when participants denied benefits under illegal LMRA plan provision and entitled to recover interest and attorney's fees).

331. *See* H.R. REP. NO. 247, 101st Cong., 1st Sess., 55–56 (1989) (legislative history of ERISA indicates Congress intended courts through federal common law to develop "appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA" for improper claims processing and the Budget Committee reaffirms the "authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not specifically be mentioned in ERISA" by "drawing

have the same authoritative standing as legislative history, they do serve to confirm interpretations based on prior legislative history.[332]

3. Policy Considerations

Fiduciary organizations, fearing extracontractual damages as if they desire otherwise to violate ERISA, have developed three basic policy arguments for the denial of extracontractual damages. First, extracontractual damages disrupt reasoned decision making by encouraging plan administrators to grant unjustified claims they otherwise would resist, thereby violating their sole benefit duty.[333] Second, extracontractual damages frustrate orderly claims procedures by involving lengthy and expensive litigation violating the speedy resolution of benefit matters.[334] Lastly, extracontractual damages are uneven in practice, upsetting the statutory and regulatory provisions.[335]

Participants have responded that extracontractual damages are available only in limited circumstances[336] and that there is no reason to immunize ERISA fiduciaries from liability faced by other fiduciaries.[337] Additionally, since federal common law is involved, certainly federal judges are capable of protecting honest ERISA fiduciaries using the traditional contract and trust law principles without aid of a blanket prohibition.

Moreover, a blanket prohibition overlooks the behavior of some fiduciaries in handling claims for benefits due. The egregious behavior that ERISA should have ended includes seizing upon obscure sentences in one of numerous diagnoses to deny benefits,[338] manufacturing of false material

---

upon principles enunciated in state law, including such remedies as the awarding of punitive and/or compensatory damages against the person responsible for the failure to pay claims in a timely manner.").

The federal courts have ignored these calls. *See* McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 823 (11th Cir.), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991) (disparaging H.R. REP. NO. 247); Medina v. Anthem Life Ins. Co., 983 F.2d 29, 31–32 (5th Cir. 1993) (same).

332. Sioux Tribe of Indians v. United States, 316 U.S. 317, 329–30 (1942) (committee report five years later confirming debate statements at passage of Indian Allotment Act of 1887 conclusive); *see* Weinberger v. Rossi, 456 U.S. 25, 33, 35 (1982) (post hoc statements by committees six and ten years after passage are not entitled to much weight when original passage report was silent); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 & n.13 (1980) (post hoc statements by committee four years after passage not weighty when not directed to issue before court); *see generally* 2A SUTHERLAND, *supra* note 91, § 48.06, at 309.

333. *E.g.*, Brief for Petitioners at 24, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9); Petition for Writ of Certiorari at 14, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9).

334. *E.g.*, Brief for Petitioners at 22, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9); Petition for Writ of Certiorari at 15, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9).

335. *E.g.*, Brief for Petitioners at 27, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9); Petition for Writ of Certiorari at 16, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84–9).

336. See *supra* notes 236–39, 255–58 and accompanying text for contract and trust law limitations.

337. See *supra* notes 243–53, 268–76 and accompanying text for duties faced by insurance companies under insurance law.

338. *E.g.*, Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 83–84 (Cal. Ct. App. 1970) (statement that condition might have been contracted from horses to deny under injury clause).

misrepresentations to deny benefits,[339] threatening suit on non-existing disputes to urge settlement,[340] and use of economic pressure to urge settlement.[341] Extracontractual damages need only be feared by those plan administrators engaging in such egregious conduct and not by plan administrators acting in the interests of the participants as required by ERISA.

V. CONCLUSION

The legislative history makes it clear that Congress intended that the remedies provided by ERISA include at least those available under then current state contract law and trust law as well as the then current federal common law under LMRA. It is also clear that those bodies of law followed basic contract law that permitted recovery of both consequential damages (such as investment losses and mental anguish) and punitive damages under certain circumstances as well as basic trust law that permitted participants to recover trust law legal damages. Yet participants have generally failed to recover these extracontractual damages under ERISA.

The problem has arisen because of a misunderstanding concerning what ERISA did for employee benefit law. Most ERISA participant lawyers have assumed ERISA is an embodiment of trust law, basically a body of equitable law.[342] Hence, they have attempted recoveries of extracontractual damages under trust law theories they believe are authorized by ERISA's remedies for breach of fiduciary duty and other equitable remedies.[343] This view overlooks the historical development of employee benefit law.

Through ERISA, Congress recognized that, historically, employee benefit plans were contracts enforced under contract law. Unfortunately, the ethical level of contract transactions is that of the survival of the fittest.[344]

---

339. *Id.* at 84–85 (seizing upon obscure statement concerning congenital defect in one diagnosis to claim material misrepresentation in application for insurance policy, when no investigation was made concerning whether alleged fact was known to insured).

340. *Id.* at 86–87 (using threat of false material misrepresentation case to urge low settlement on denied benefit).

341. *Id.* at 87 (offering a check for some of the damages with "full and final payment" language on it when its insured was known to be unable to make ends meet).

342. *See, e.g.*, Petition for Writ of Certiorari at 12, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (fiduciary lawyer claiming ERISA remedies "as a whole are equitable in nature").

343. Under the federal rules of procedure, there is no requirement for specification of a particular legal theory for the claim, if plaintiff is entitled to relief on any theory. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 68, at 441 (4th ed. 1983); *see* FED. R. CIV. P. 8 (requiring only a short statement of facts relating to the claim). Pleadings are automatically amended to conform to the evidence, FED. R. CIV. P. 15(b), and the judgment may include any relief the successful party is entitled to regardless of demand. FED. R. CIV. P. 54(c); *see* WRIGHT, *supra*, § 98, at 658. In the appellate courts, the judgment can be defended on any ground consistent with the record, even if rejected by the trial court. *Id.* § 104, at 721. So failure to recover extracontractual damages and appellate court opinions relating to trust law indicates that contract theories have been overlooked by participants' attorneys.

344. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829–32 (1983) (explaining that contract law does not go beyond morals of marketplace, while fiduciary law is altruistic).

Congress recognized the need to raise the ethical level of employee benefit contracts and so added the higher ethical standards of fiduciary law,[345] taken predominantly from trust law. But the contractual nature of employee benefit plans remained intact, including the old contractual remedies and the old trust law legal damage remedy. As the Supreme Court has so often inarticulately pointed out, for ERISA, legal remedies such as extracontractual damages are not supported under the various equitable remedy provisions. Instead, they are supported by the legal remedy provision, the one for benefits due under the terms of the plan, section 501(a)(1)(B).

The impact on employee benefit plans of using the proper rule for awarding extracontractual damages should be another tool to reduce improper plan administrator behavior. Under contract law, a court is likely to find extracontractual damages such as investment loss for delayed pension payments to be foreseeable. Similarly for extracontractual damages such as emotional distress for failure to properly pay medical bills, a court might sometimes find that fiduciaries have reason to know such behavior will cause mental anguish. But since the behavior that causes the damage can be anticipated, the damage can be avoided (and probably is avoided in the vast majority of claims processing) merely by taking care. Courts uphold fiduciary decisions under the very favorable abuse of discretion review rule.[346] Many professional plan administrators, such as insurance companies, are already under these standards for their non-ERISA work without the benefit of the arbitrary and capricious rule.[347] The only fiduciaries that will have problems are those making decisions in favor of themselves or their employers,[348] a practice that ERISA discourages through the sole benefit rule.[349] So the only fiduciaries that need concern themselves with the possibility of extracontractual damage liability are those otherwise violating ERISA.

345. H.R. REP. NO. 533, *supra* note 10, at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4649 (ERISA "codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts."); S. REP. NO. 127, *supra* note 217, at 29, *reprinted in* 1974 U.S.C.C.A.N. at 4865 (same); *see* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1988).

346. *See* Flint, *supra* note 45, at 168–79; Michael S. Beaver, *The Standard of Review in ERISA Benefits Denial Cases After Firestone Tire & Rubber Co. v. Bruch: Revolution or Déjá Vu?*, 26 TORT & INS. L.J. 1, 20–25 (1990).

347. *See supra* notes 243–52, 268–76 and accompanying text for insurance law.

348. *See supra* notes 54–56 and accompanying text for examples of self-interested behavior by plan administrators.

349. *See supra* note 54 and accompanying text.