Mertens v. Hewitt Associates: Nonfiduciary Liability for Money Damages Under ERISA

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**MERTENS v. HEWITT ASSOCIATES**: NONFIDUCIARY LIABILITY FOR MONEY DAMAGES UNDER ERISA

A larger proportion of the United States population is aging, and the graying of America will continue as the "baby-boom" generation ages.\(^1\) Presently, over thirty-one million Americans, 12.4% of the United States population, are age sixty-five or older.\(^2\) By the year 2020, this age group will represent approximately twenty percent of the United States population.\(^3\) Retirees and employees approaching retirement rely on their pen-

1. Demographic Changes in the United States: The Economic and Social Consequences into the 21st Century Before the Subcomm. on Economic Resources, Competitiveness, and Security Economics of the Senate Joint Economic Comm., 99th Cong., 2d Sess. 26 (1987) (statement of John G. Keane, Director, Bureau of the Census). There are two primary reasons for the explosion of the elderly population. First, the absolute number of people who reach age 65 has increased, and the "baby boomers" will contribute to this age bracket by 2005. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 688 (1991). Second, as average life expectancy increases, many individuals will live long past age 65. *Id.* at 689. While the average life expectancy in the United States in 1950 was 68.2 years, it had climbed to 74.9 years by 1985. *Id.*


Using age 65 to label an individual as "old" is an arbitrary demarcation. *See id.* at 684-86. Those who reach this benchmark may not satisfy the stereotype of an elderly person because they are not yet physically or mentally incapacitated. *Id.* To make further distinctions among the elderly, they can be categorized into three distinct groups. *Id.* at 690. Those age 65 to 75 comprise the "young old"; those age 75 to 85 constitute the "old;" those age 85 and over comprise the "old old." *Id.* The 85 and over group is one of the fastest growing segments of the United States population. *Id.* In 1980, 1.5 million women and 675,000 men were included in the "old old" category. *Id.* Nevertheless, the government, employers, and other social institutions prefer to use an objective bright-line of age 65 for administrative ease and to avoid a subjective determination of an individual's condition. *See id.* at 687.

3. *See Frolik & Barnes, supra* note 1, at 688 n.9. By 2050, it is estimated that 21.7% of all Americans will constitute the 65 and older age bracket. *Id.* at 688.

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sion benefit plans to ensure their current and future financial security. Private pension fund assets are the largest source of capital in the United States, totaling $2.26 trillion in 1990. This substantial capital source has tempted those entrusted with pension fund administration and management to abuse and misuse these resources for their own private purposes. Congress enacted the Employee Retirement Income Security Act (ERISA) an "employee benefit plan" is any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

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

29 U.S.C. § 1002(2)(A) (1988). ERISA also covers employee welfare benefit plans, which are defined as any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (1988). An ERISA "employee benefit plan" refers to "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." Id. § 1002(3).

5. See 29 U.S.C. § 1001(a) (1988) (stating "that the continued well-being and security of millions of employees and their dependents are directly affected by these [employee benefit] plans"). The need to provide financial security for current and potential retirees is growing because of

(1) the growth in the number and proportion of the aged population of the United States; (2) the decrease in employment opportunities for the aged; (3) the decreased capacity of the general public to save for old age as a result of increased taxes and inflation; and (4) a general erosion in society's concern with filial responsibility.


7. Thornton v. Evans, 692 F.2d 1064, 1065 (7th Cir. 1982) (stating that pension funds are susceptible to being "pillared, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence").
Act\(^8\) (ERISA) to safeguard the soundness and stability of employee benefit plans, assuring American employees that they would receive their retirement benefits.\(^9\)

Title I of ERISA\(^10\) protects individual pension rights by mandating that every plan designate at least one "named fiduciary" to manage the plan's

ISA recognized the problems of pension fund abuse. For example, Senator Ribicoff noted that

[while most corporate pension funds are carefully managed and conservatively invested, misuse, manipulation, and poor management of pension trust funds are all too frequent. One financially ailing company tried to borrow over a million dollars from a subsidiary's pension pool for use as operating capital. Another company has a policy of investing more than half its pension fund's assets in the company's own common stock and in the real estate of a company subsidiary. And yet another firm routinely dips into its pension funds for cash to make acquisitions.]


Senator Ribicoff also discussed the abuses of George Barasch, a pension fund fiduciary who fully controlled two union employee benefit plans, which held a total of $15.5 million.\(^{120}\) CONG. REC. 29,951 (daily ed. Aug. 22, 1974) (statement of Sen. Bentsen). Barasch improperly used these funds to capitalize several corporations and to create a management firm to administer the pension funds. \(\text{Id.}\) He also channeled the funds into various foreign corporations, some of which he had created. \(\text{Id.}\) In total, Barasch diverted almost five million dollars from the employees' pension plan assets. \(\text{Id.}\) Moreover, Barasch received an annual salary of $35,000, life insurance coverage in the amount of $407,000, and total retirement benefits in the amount of $54,098 per year. \(\text{Id.}\) His pension fund alone was worth $796,925. \(\text{Id.}\) Barasch returned $4.2 million to the employee benefit plans only after being pressured by a Senate subcommittee and federal and state agencies. \(\text{Id.}\) Incredibly, federal and state officials never prosecuted Barasch because he had not broken any laws. \(\text{Id.}\)


\(^{9}\) The House Education and Labor Committee stated that ERISA's purpose was "to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." H.R. REP. No. 533, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4646. The Committee added that Congress also enacted ERISA to stabilize the private pension plan system, which plays a major role in the United States economy. \(\text{Id.}\) at 4646-47; see Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (stating that the purpose of ERISA is "to promote the interests of employees and their beneficiaries in employee benefit plans"); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374 (1980) (stating that "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated" (footnote omitted)).

\(^{10}\) ERISA is divided into four titles. Title I provides for the protection of employee benefit rights by outlining reporting and disclosure requirements, participation and vesting requirements, funding standards, fiduciary responsibilities, administration and enforcement procedures, and continued health coverage requirements. ERISA §§ 2 to 514, 29 U.S.C. §§ 1001-1144 (1988). Title II addresses ERISA's tax consequences. ERISA, Pub. L. No. 93-406, 88 Stat. 832, 898 (codified as amended in scattered sections of 26 U.S.C.). Title III delineates the jurisdiction of federal agencies and establishes procedures for joint
operation and administration. ERISA broadly defines “fiduciary” as any person who has discretionary authority or control over a plan’s management or assets. This functional definition typically encompasses trustees, plan administrators with discretionary control, a plan’s investment committee, investment advisors, and the persons who select these individuals. ERISA fiduciaries must exercise their authority in the sole interest of the plan participants and beneficiaries, and must abide by the standard of conduct that a prudent man would exercise under similar circumstances. Moreover, fiduciaries must carefully diversify plan administration of the Act by the Secretaries of Labor and Treasury. ERISA §§ 3001-3042, 29 U.S.C. §§ 1201-1242 (1988). Title IV establishes a plan termination insurance program administered by the Pension Benefit Guaranty Corporation. ERISA §§ 4001-4082, 29 U.S.C. §§ 1301-1382 (1988).


12. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988). The full text of the definition is as follows:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id.; see also Olson v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992) (defining an ERISA fiduciary as anyone who exercises discretionary authority or control over the management and assets of a plan); American Fed’n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc’y of the United States, 841 F.2d 658, 662 (5th Cir. 1988) (same); Mutual Life Ins. Co. v. Yampol, 840 F.2d 421, 425 (7th Cir. 1988) (same).


14. ERISA defines “participant” as any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. 29 U.S.C. § 1002(7) (1988).

15. ERISA defines “beneficiary” as “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” 29 U.S.C. § 1002(8) (1988).

16. ERISA § 404(a), 29 U.S.C. § 1104(a)(1) (1988). The statute provides that an ERISA fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and
sets and comply with plan documents. If a fiduciary breaches his responsibilities, a participant or beneficiary may sue under section 502(a)(2) of ERISA to hold such fiduciary personally liable for any resulting loss to the plan, to mandate restoration of any profits gained through the use of plan assets, or to subject the fiduciary to other equitable and legal relief.

In contrast to fiduciaries who exercise discretionary control over pension plan management, nonfiduciaries perform nondiscretionary, ministerial and advisory functions for a pension plan. Nonfiduciaries include

(ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter . . . .

Id.

17. Id.
18. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988). The statute provides that “[a] civil action may be brought—(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.” Id.
19. See ERISA § 409(a), 29 U.S.C. § 1109(a) (1988). The civil action may be brought to recover the appropriate relief under ERISA § 409, which provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter [Title I] 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.; see, e.g., Starr v. JCI Data Processing, Inc., 767 F. Supp. 633, 641-42 (D.N.J. 1991) (holding that an ERISA fiduciary breached his fiduciary duty of care by failing to ensure that a retirement plan was in compliance with ERISA’s statutory requirements); Chambers v. Kaleidoscope, Inc. Profit Sharing Plan & Trust, 650 F. Supp. 359, 376-77 (N.D. Ga. 1986) (holding that ERISA fiduciaries breached their fiduciary duties of care, prudence, and diligence where they, among other things, failed to provide participants with a summary description of the plan, failed to file records and reports pursuant to statutory requirements, and failed to inform participants of the effects of the sponsoring company’s poor financial condition on the plan); McNeese v. Health Plan Mktg., Inc., 647 F. Supp. 981, 986 (N.D. Ala. 1986) (holding that an ERISA fiduciary breached his obligations by failing to provide participants with annual financial reports that would have alerted them to the plan’s declining financial status); see also infra note 29 (discussing the distinctions between legal and equitable remedies).

20. 29 C.F.R. § 2509.75-5 (1993). A “nonfiduciary” is an attorney, accountant, actuary or consultant who renders legal, accounting, actuarial or consulting services to an employee benefit plan (other than an invest-
professionals who render services, such as actuaries, attorneys, accountants, and plan administration companies. While nonfiduciaries are not held to the same standard of conduct as fiduciaries, most United

ment adviser to the plan) . . . absent a showing that such consultant (a) exercises discretionary authority or discretionary control respecting the management of the plan, (b) exercises authority or control respecting management or disposition of the plan's assets, (c) renders investment advice for a fee, direct or indirect, with respect to the assets of the plan, or has any authority or responsibility to do so, or (d) has any discretionary authority or discretionary responsibility in the administration of the plan.

Id.


22. Anoka Orthopaedic Assoc. v. Lechner, 910 F.2d 514, 517 (8th Cir. 1990) (finding that an attorney who provides legal advice for a plan, helps prepare the plan's financial statements and makes two investment recommendations is not a fiduciary); Yeseta v. Baima, 837 F.2d 380, 385 (9th Cir. 1988) (stating that an attorney who reviews a plan's compliance with ERISA does not maintain control over the plan and therefore is not an ERISA fiduciary); New York State Teamsters Council Health & Hosp. Fund v. Estate of DeFerno, 816 F. Supp. 1138, 148 (N.D.N.Y. 1993) (holding that a pension fund attorney who does not provide daily direction, does not exercise discretionary authority or control over the plan's management and assets, and does not provide investment advice is not an ERISA fiduciary). But see Bouton v. Thompson, 764 F. Supp. 20, 23 (D. Conn. 1991) (finding that an attorney who provides legal services to an employer and its president may be an ERISA fiduciary if the attorney exercises discretionary authority or control over the plan).

23. Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1149 (3d Cir. 1989) (deciding that an accounting firm that serves as the auditor of a plan is not a fiduciary because it does not exercise authority over the plan assets); Pension Plan of Pub. Serv. Co. v. KPMG Peat Marwick, 815 F. Supp. 52, 55 (D.N.H. 1993) (stating that an independent accounting firm that merely performed an audit for an ERISA plan is not an ERISA fiduciary); Brown v. Roth, 729 F. Supp. 391, 396 (D.N.J. 1990) (determining that an accountant, who did not have authority to sign a trust's checks, to pass on the validity of claims, or to implement plan policy is not an ERISA fiduciary). But see Martin v. Feilen, 965 F.2d 660, 669 (8th Cir. 1992) (holding that accountants who, in addition to providing normal accounting services, recommend transactions, structure deals, and provide investment advice are ERISA fiduciaries), cert. denied, 113 S. Ct. 979 (1993); Wright v. Nimmons, 641 F. Supp. 1391, 1402 (S.D. Tex. 1986) (finding that an accountant who has authority over and responsibility for a plan is an ERISA fiduciary).

24. Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 129 (7th Cir. 1992) (stating that a plan administrator who performs only ministerial and clerical functions is not an ERISA fiduciary); Baxter v. C.A. Muer Corp., 941 F.2d 451, 455-56 (6th Cir. 1991) (deciding that a plan administrator who merely processes and pays claims pursuant to the plan's terms is not an ERISA fiduciary); Mitnik v. Cannon, 784 F. Supp. 1190, 1194 (E.D. Pa. 1992) (finding that neither a company nor a president of a company that prepares year-end reports and provides accounting services are fiduciaries with respect to the plan), aff'd, 989 F.2d 488 (1993).

25. See supra notes 16-17 and accompanying text (describing ERISA's fiduciary standard of conduct).
States Circuit Courts impose liability on nonfiduciaries who knowingly participate in the breach of a fiduciary’s obligations.\textsuperscript{26}

This liability is commonly based on the common law of trusts, which is the foundation of ERISA.\textsuperscript{27} Trust law provides a cause of action against nonfiduciaries who knowingly participate in a breach of trust in an effort to make the victims of the breach whole.\textsuperscript{28} These circuits provide both legal and equitable relief in such cases.\textsuperscript{29} Both forms of relief may be based on the broad judicial interpretation of section 502(a)(3) of ERISA,\textsuperscript{30} which permits a participant or beneficiary to obtain an injunction

\textsuperscript{26} See Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988) (holding that a nonfiduciary union representative is liable when he “aid[ed] and assist[ed]” a fiduciary in “furthering his breach of fiduciary duty”); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220 (2d Cir. 1987) (stating that “parties who knowingly participate in fiduciary breaches may be liable under ERISA to the same extent as the fiduciaries”); Fink v. National Sav. & Trust Co., 772 F.2d 951, 958 (D.C. Cir. 1985) (finding the nonfiduciary founder of a holding company liable for a breach of fiduciary duty because courts “may award relief against nonfiduciaries who knowingly participate in a breach of trust”); Thornton v. Evans, 692 F.2d 1064, 1082 (7th Cir. 1982) (deciding that a nonfiduciary who conspires with a fiduciary to mislead other fiduciaries into taking action detrimental to the plan is liable under ERISA); Brock v. Gerace, 635 F. Supp. 563, 569 (D.N.J. 1986) (holding nonfiduciaries who reap personal gain from their knowing participation in a fiduciary breach liable); Donovan v. Daugherty, 550 F. Supp. 390, 410-11 (S.D. Ala. 1982) (stating that a nonfiduciary who is enriched by his knowing participation in a trustee’s fiduciary violation is liable); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 642 (W.D. Wis. 1979) (finding that nonfiduciaries are liable for their knowing participation in a trustee’s breach of fiduciary duty).

\textsuperscript{27} See 120 CONG. REC. 29,932 (1974) (statement of Sen. Lessor).

\textsuperscript{28} See infra notes 62-66 and accompanying text (discussing nonfiduciary liability under the common law of trusts).

\textsuperscript{29} While many courts have addressed nonfiduciary liability issues, only a few courts have addressed nonfiduciary remedial issues. See, e.g., Hendershott, 840 F.2d at 342 (requiring a nonfiduciary to disgorge his realized financial gain and enjoining him from selling goods to or acting as a fiduciary of an ERISA benefit plan for five years); Lowen, 829 F.2d at 1221 (ordering a nonfiduciary to disgorge fees and other consideration received in violation of ERISA); Freund, 485 F. Supp. at 644 (permanently prohibiting nonfiduciaries from serving as fiduciaries with respect to the pension plan, enjoining them from further ERISA violations, and finding them jointly and severally liable to restore damages).

Although the two judicial systems of law and equity have merged, the classification of a remedy as either legal or equitable still persists. DAN B. DOBBS, LAW OF REMEDIES § 2.1(1), at 48 (2d ed. 1993). “Legal” remedies are “traditionally recognized by the old separate law courts,” while “equitable” remedies are traditionally recognized by the Chancellors. Id. This distinction is important for purposes of litigation because a jury trial is not available in equity cases. Id. § 1.2, at 9. This distinction also is significant because equitable relief is traditionally discretionary. Id. Traditional equitable remedies include: the injunction, which is a personal order forcing the defendant to act or prohibiting the defendant from acting in a certain manner; the declaratory judgment, which “provides an authoritative declaration of the parties’ disputed rights;” and restitution, through which a “plaintiff can recover things or money to prevent the defendant’s unjust enrichment.” Id. § 2.1(2), at 53-54.

\textsuperscript{30} See infra note 52 (providing the text of section 502(a)(3)).
and other forms of equitable relief; section 502(l) of ERISA,\(^3\) which authorizes the Secretary of Labor to assess a penalty on nonfiduciary individuals who knowingly participate in a fiduciary breach; and trust law principles that utilize both remedial forms to provide complete relief for participants and beneficiaries.\(^3\) Furthermore, because some courts have interpreted ERISA to preempt state remedies, they broadly construe ERISA's remedies to include both equitable and legal relief against nonfiduciaries.\(^3\) In \textit{Mertens v. Hewitt Associates},\(^3\) however, the United States Supreme Court rejected the circuit courts' broad remedial interpretations and maintained that money damages\(^3\) are not available against nonfiduciaries who knowingly participate in the breach of a fiduciary's duty.\(^3\)

The petitioners in \textit{Mertens} were former employees of the Kaiser Steel Corporation (Kaiser) and participants\(^3\) in the Kaiser Steel Retirement Plan, an ERISA pension plan.\(^3\) In 1980, Kaiser terminated a portion of its operations, forcing many of its employees into early retirement.\(^3\) The petitioners alleged that Hewitt Associates (Hewitt), the actuaries for the retirement plan, did not recalculate their actuarial assumptions to reflect

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\(^3\) \textit{See infra} note 44 (providing the text of section 502(l)).

\(^3\) \textit{See infra} note 66 and accompanying text (discussing remedies available under the common law of trusts).

\(^3\) \textit{See infra} notes 260-62 and accompanying text (discussing ERISA preemption). There is no clear authority determining whether ERISA precludes a state suit for professional malpractice against nonfiduciaries. \textit{Compare} Gibson v. Prudential Ins. Co., 915 F.2d 414, 418 (9th Cir. 1990) (holding that ERISA not only restricts actions against nonfiduciaries, but also preempts non-ERISA actions against them) \textit{with} Sparks v. Mo-Kan Iron Workers Pension Fund, 765 F. Supp. 566, 569 (W.D. Mo. 1990) (finding that because ERISA does not regulate claims against nonfiduciaries, ERISA does not preempt state law claims against them).

\(^3\) \textit{Mertens}, 113 S. Ct. 2063 (1993).

\(^3\) A money damages remedy is a traditional legal remedy. \textit{Dobbs, supra} note 29, § 1.2, at 9. "The damages remedy is a judicial award in money, payable as compensation to one who has suffered a legally recognized injury or harm." \textit{Id.} § 3.1, at 208 (footnote omitted). Traditionally, this award is made in a single "lump sum to compensate for all the relevant injuries, past and future." \textit{Id.} (footnote omitted).

\(^3\) \textit{Mertens}, 113 S. Ct. at 2072; \textit{see infra} notes 166-201 and accompanying text (discussing the majority opinion in \textit{Mertens}).

\(^3\) \textit{See supra} note 14 (defining participant under ERISA).

\(^3\) \textit{Mertens}, 113 S. Ct. at 2065; \textit{see supra} note 4 (providing the definition of an ERISA employee pension benefit plan). Employers who establish pension plans that meet ERISA's qualifications receive special tax treatment. An employer may immediately deduct its contributions to the plan. I.R.C. § 404(a)(1)-(3) (1988). Employees who participate in the plan also receive special tax treatment. An employee-participant is not required to pay tax on his benefits until his benefits are actually distributed. I.R.C. § 402(a)(1). An employee-participant also enjoys a tax-free interest buildup on his benefits. I.R.C. § 501(a) (1988).

\(^3\) \textit{Mertens}, 113 S. Ct. at 2065.
this change, causing the plan to be underfunded and unable to pay full benefits to its participants.\textsuperscript{40} The petitioners, seeking recovery for their losses, sued the fiduciaries of the plan for breaching their fiduciary duties and sued Hewitt for money damages for knowingly participating in the fiduciary breaches.\textsuperscript{41}

The United States District Court for the Northern District of California found the petitioners’ claims insufficient and dismissed them as a matter of law.\textsuperscript{42} The United States Court of Appeals for the Ninth Circuit affirmed this ruling consistent with its decision in \textit{Nieto v. Ecker}\textsuperscript{43} and with its reluctance to construe additional remedies from section 502(l) of ERISA.\textsuperscript{44} The Ninth Circuit also dismissed the claim for nonfiduciary restitution\textsuperscript{45} because the petitioners did not establish a direct link between the

\textsuperscript{40} \textit{Id.} (explaining that the petitioners received an amount that was “substantially lower” than the fully vested benefits to which they were entitled).

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Mertens v. Hewitt Assoc., 948 F.2d 607, 610 (9th Cir. 1991), aff’d, 113 S. Ct. 2063 (1993).} The district court granted Hewitt’s motion to dismiss the complaint, which alleged a “breach of professional duties to the plan” under ERISA, because the complaint failed to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). \textit{Id. at 609.}

\textsuperscript{43} 845 F.2d 868, 874 (9th Cir. 1988) (determining that no cause of action exists against a nonfiduciary alleged to have knowingly participated in a trustee's breach of fiduciary duty by failing to supervise the trustee); see infra notes 121-42 and accompanying text (providing a full discussion of \textit{Nieto}).

\textsuperscript{44} \textit{Mertens, 948 F.2d at 611} (examining only the “plain language” of section 502(l) because “[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it” (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985))). Section 502(l) of ERISA provides in relevant part:

\begin{enumerate}
  \item In the case of—
    \begin{enumerate}
      \item any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
      \item any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
    \end{enumerate}
  \item For purposes of paragraph (1), the term “applicable recovery amount” means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—
    \begin{enumerate}
      \item pursuant to any settlement agreement with the Secretary, or
      \item ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.
    \end{enumerate}
\end{enumerate}


\textsuperscript{45} \textit{Mertens, 948 F.2d at 612.} “Restitution is a return or restoration of what the defendant has gained in a transaction. It may be a return of a specific thing or it may be a ‘return’ of a money substitute for that thing.” \textit{Dobbs, supra} note 29, § 4.1(1), at 365; see also \textit{Restatement of Restitution} § 1 cmt. a, at 12 (1937) (stating that “[a] person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money”). Restitution is a legal remedy in some cases and an equitable remedy in others. \textit{Dobbs,
loss and the recovery sought. The court found that Kaiser used its own
corporate funds, rather than the plan's assets to pay for Hewitt's actuarial
services. Therefore, Hewitt was not unjustly enriched. Further, in ac-
cordance with the Nieto decision, the Ninth Circuit ruled that allowing
the plaintiffs to recover money damages from Hewitt would be inconsis-
tent with section 502(l).

The United States Supreme Court granted certiorari to determine
whether nonfiduciaries who knowingly participate in a breach of fiduciary
duty may be liable for money damages under ERISA. The majority,
led by Justice Scalia, affirmed the Ninth Circuit's holding, finding that the
petitioners was entitled to traditional equitable relief, but not money
damages. The Court reasoned that the term "equitable relief" in sec-
tion 502(a)(3) referred exclusively to traditional equitable remedies,

supra note 29, § 1.2, at 9. The classification depends upon the specific type of restitution
sought. Id.; see also Restatement of Restitution gen. scope note at 4 (1937) (noting that
the principles of restitution are the same at law and in equity). See generally Douglas
Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277 (1989) (providing
a general review of the definition and implications of restitution).

46. Mertens, 948 F.2d at 612 (explaining that "restitution requires that there be a di-
rect link between the loss complained of and the recovery sought").

47. Id.

48. Id. A person is unjustly enriched if his "retention of the benefit would be unjust." Restatement of Restitution § 1 cmt. a, at 12 (1937). Unjust enrichment is the "fundamental substantive basis for restitution." Dobbs, supra note 29, § 4.1(2), at 371. A defend-
ant may be "unjustly enriched by receiving something, tangible or intangible, that properly
belongs to the plaintiff." Id. The remedy of "[r]estitution rectifies unjust enrichment by
forcing restoration to the plaintiff." Id.; see also Restatement of Restitution § 1 (1937)
("A person who has been unjustly enriched at the expense of another is required to make
restitution to the other."). Although "unjust enrichment" is not clearly defined, the con-
cept frequently arises in the following cases: (1) where the defendant benefits and title
remains in the plaintiff; (2) where the defendant benefits and title passes through miscon-
duct; (3) where the defendant benefits as a result of a breach of contract; and (4) where the
defendant receives benefits of money or services without misconduct, such as mistakes and

49. Mertens, 948 F.2d at 611; see supra note 44 (providing the text of section 502(l)).


51. See id. at 2071-72; see supra note 29 (explaining the distinction between legal and
equitable remedies).

52. ERISA section 502(a)(3) provides, in part:

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 en-

force his rights under the terms of the plan, or to clarify his rights to future

benefits under the terms of the plan;

. . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice
which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such viola-
which do not include money damages.\textsuperscript{53} The dissent, written by Justice White, maintained that section 502(a)(3) should be interpreted to provide compensatory monetary relief to make a participant or beneficiary whole for a breach of trust.\textsuperscript{54} The dissent reasoned that this interpretation corresponds with ERISA's primary goal of protecting plan participants and beneficiaries through established trust remedies.\textsuperscript{55}

This Note examines the principles of trust law concerning fiduciary breaches and analyzes the relevant ERISA provisions based on those principles. This Note then discusses the conflicting positions among the federal circuits regarding the provision of money damages for nonfiduciary liability resulting from knowing participation in a fiduciary breach prior to \textit{Mertens}. This Note analyzes the reasoning of \textit{Mertens} and its impact on the resolution of the conflicting judicial interpretations of this issue. Furthermore, this Note asserts that the dissent in \textit{Mertens} is correct in reasoning that ERISA provides money damages to redress nonfiduciary liability because this interpretation is consistent with the intent of ERISA's drafters and the tenets of trust law. Finally, this Note concludes that the \textit{Mertens} decision will result in a level of protection for plan participants and beneficiaries who are victims of fiduciary breaches that is lower than that formerly available to such victims under the common law of trusts prior to ERISA's enactment, a result that directly counters ERISA's purpose.

I. \textbf{The Evolution of ERISA's Remedial Scheme from the Common Law of Trusts to Current Interpretations}

\textbf{A. Trust Law Principles Concerning Fiduciary and Nonfiduciary Liability}

Prior to ERISA's enactment in 1974, the common law of trusts governed the imposition of liability on trustees and the remedies available to trust beneficiaries.\textsuperscript{56} A trustee is a fiduciary who acts for the benefit of

\begin{footnotesize}
\textsuperscript{53} Mertens, 113 S. Ct. at 2071.
\textsuperscript{54} Id. at 2078 (White, J., dissenting).
\textsuperscript{55} Id.
\textsuperscript{56} H.R. REP. No. 533, 93d Cong., 2d Sess. 1, \textit{reprinted in} 1974 U.S.C.C.A.N. 4639, 4643. In general, "[a] trust may be defined as a property right held by one party for the use of another." Keplinger v. Keplinger, 113 N.E. 292, 293 (Ind. 1916). Parties may elect to form an express trust, a charitable trust, a resulting trust, or a constructive trust. An express trust is defined as "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, which arises as a result of a manifestation of an
another, the beneficiary. The trustee owes a duty to the beneficiary to manage the trust with the standard of care and skill that an ordinary prudent man would exercise in dealing with his own property. The trustee also is governed by a duty of loyalty, that requires him to administer a trust solely in the interest of its beneficiaries. If a trustee breaches his duties, the beneficiary is entitled to both legal and equitable relief.

intention to create it." Restatement (Second) of Trusts § 2 (1959). A charitable trust differs from an express trust only in that the equitable duties are invoked "to deal with the property for a charitable purpose." Id. § 348. A resulting trust is defined as an instrument whereby

a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of.

Id. § 404. Finally, a constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

57. Restatement (Second) of Trusts § 2 (1959); see also George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 1, 4-5 (1984) (defining a "trustee" as "the individual or entity (often an artificial person such as a corporation) which holds the trust property for the benefit of another" (footnote omitted)).

58. A beneficiary is "[t]he person for whose benefit property is held in trust." Restatement (Second) of Trusts § 3(4) (1959); see also Bogert & Bogert, supra note 57, § 1, at 5 (defining "beneficiary" as "the person for whose benefit the trust property is held by the trustee" (footnote omitted)).

59. Bogert & Bogert, supra note 57, § 541, at 167 (explaining that the trustee has a duty to manage the trust with "the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question" (footnote omitted)).

60. Restatement (Second) of Trusts § 170 (1959); see also Bogert & Bogert, supra note 57, § 543, at 217 (stating that a trustee must demonstrate "complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons"); see, e.g., Britton v. Winger, 442 N.E.2d 264, 266 (Ill. App. Ct. 1982) (holding that a trustee breached his duty of loyalty when he mortgaged the trust corpus without fully disclosing the material facts to the beneficiaries); Wheeler v. Mann, 763 P.2d 758, 760 (Utah 1988) (finding that a trustee breached his duty of loyalty when he invested trust funds into his own companies and used the funds to finance failing corporate ventures).

61. Bogert & Bogert, supra note 57, § 870; see also Ex parte Morton, 75 So. 2d 500, 511 (Ala. 1954) (noting that a beneficiary " 'may freely elect between the relief which the law can give and the constructive trust device,' [an equitable remedy]" (quoting 3 Bogert's Trusts and Trustees § 471, at 11 (1993))); Lane County Escrow Serv., Inc. v. Smith, 560 P.2d 608, 612 (Or. 1977) (acknowledging that a plaintiff may choose to pursue either equitable or legal relief against the trustee), superseded by statute as stated in Schmidling v. Dove, 670 P.2d 166 (Or. 1983); American Express Travel Related Serv. Co. v. Laughlin, 623 A.2d 854, 856 (Pa. Super. Ct.) (recognizing that a "beneficiary has an option to pursue either equitable or legal relief in an action against a trustee"), appeal denied, 633 A.2d 149 (Pa. 1993).
A beneficiary also has the right to expect that a third person will not knowingly aid a breach of a trustee's duties. A cause of action against a nonfiduciary for participation in a breach of trust is available to a beneficiary if two elements are satisfied. First, the nonfiduciary's action or omission must continue or complete the trustee's breach. Second, the nonfiduciary must have known or should have known at the time he committed the action or omission that the action or omission constituted a breach of trust. Where a nonfiduciary knowingly participates in a fiduciary's breach of duty, the common law of trusts firmly establishes that the nonfiduciary may be held liable for money damages.

The difference between legal and equitable relief is important in the context of litigation because only those seeking legal relief are entitled to a jury trial. See Jefferson Nat'l Bank v. Central Nat'l Bank, 700 F.2d 1143, 1150 (7th Cir. 1983) (holding that an action for the payment of indebtedness arising from a trustee's breach is an action at law properly tried before a jury); In re Estate of Archambault, 520 A.2d 154, 154 (Vt. 1986) (stating that because the parties sought equitable relief in the form of an accounting remedy, they did not have a right to a jury trial); see supra note 29 (explaining the distinction between legal and equitable remedies).


63. Id. § 901, at 258-59. The two elements necessary to sustain a cause of action against a nonfiduciary include "(1) an act or omission which furthers or completes the breach of trust by the trustee; and (2) knowledge at the time that the transaction amounted to a breach of trust, or the legal equivalent of such knowledge." Id. (footnotes omitted).

64. Id.

65. Id. § 901, at 259; see also Coster v. Crookham, 468 N.W.2d 802, 809 (Iowa 1991) (stating that notice of the breach is an essential element in an action against a third person for participation in a trustee's breach of fiduciary duty); Dahlborg v. Middleborough Trust Co., 452 N.E.2d 281, 283 (Mass. App. Ct. 1983) (noting that when a trustee satisfies his personal debts to a third person with trust funds and the third person is cognizant of the source of funds, the third person participates in the trustee's breach).

66. Bogert & Bogert, supra note 57, § 868, at 79-80 (stating that "a third party who has assisted a trustee in committing a breach of trust has been held liable in a suit by the beneficiary or his representative for money damages" (footnotes omitted)); Austin W. Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454, 454 (1920) (explaining that "[a]nyone who participates with a trustee in a breach of trust may be held liable in a court of equity [for damages] . . . if he has never received or no longer holds the trust property or its proceeds"); see also Jackson v. Smith, 254 U.S. 586, 589 (1921) (emphasizing that when a fiduciary breaches his duty, "others who knowingly join [him] in such an enterprise likewise become jointly and severally liable with him for such profits"); Ellerdt v. Griffith, 22 F.2d 793, 793 (5th Cir. 1927) (stating that any defendant "who participated in the commission of [the breach of fiduciary duty] was liable to the plaintiff for damages resulting to him therefrom"); Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 803 (N.D. Ohio 1965) (holding a third party who induced a fiduciary to reveal confidential information liable for damages); Ripperger v. Schroder-Rockefeller & Co., 37 F. Supp. 375, 377 (S.D.N.Y. 1940) (stating that "[o]ne who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise" (quoting Ripperger v. Allyn, 25 F. Supp. 554, 555 (S.D.N.Y. 1938))); Saks v. Damon Raike & Co., 8 Cal. Rptr. 2d 869, 875 (Cal. Ct. App. 1992) (acknowledging that a beneficiary may sue the trustee and "third persons who directly participated with the trustee in breaches of trust" for dam-
Congress intended the common law of trusts to serve as a foundation for ERISA and encouraged the judiciary to use trust law as a guide in developing federal common law for ERISA.\textsuperscript{67} In \textit{Donovan v. Mazzola},\textsuperscript{68} the United States Court of Appeals for the Ninth Circuit employed trust law principles to fashion an ERISA remedy for fiduciary breaches.\textsuperscript{69} In \textit{Mazzola}, the United States District Court for the Northern District of California ordered the defendants, who had breached their fiduciary duties, to post a one million dollar bond to insure the pension fund against potential losses.\textsuperscript{70} The Ninth Circuit reviewed the order to determine whether it was an appropriate remedy under ERISA.\textsuperscript{71} The Ninth Circuit

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\item \textsuperscript{67} The purpose of ERISA's fiduciary provisions is "to make applicable the law of trusts; ... to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust." 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams, Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the Conference Report H.R. 2); see also H.R. Rep. No. 533, 93d Cong., 2d Sess. (1974), \textit{reprinted in} 1974 U.S.C.C.A.N 4639, 4649 (stating that "[t]he fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts"); H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), \textit{reprinted in} 1974 U.S.C.C.A.N 5038, 5076 (explaining that the ERISA drafters wanted to "apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries"); S. Rep. No. 127, 93d Cong., 2d Sess. (1974), \textit{reprinted in} 1974 U.S.C.C.A.N 4838, 4871 (stating that Congress intended to apply the common law of trusts to ERISA "to provide the full range of legal and equitable remedies available in both state and federal courts").

Prior to ERISA's enactment, courts applied trust law principles in the context of employee benefits. See, e.g., Blankenship v. Boyle, 329 F. Supp. 1089, 1103 (D.D.C. 1971) (holding that a bank that has actual knowledge of the fiduciary breach by the trustees of a multiemployer welfare plan is liable for its participation in the trustee's breach). Most pension and other employee benefit plans were established in the form of a trust. For example, in 1947, the Taft-Hartley Act provided that multiemployer plans must be in the form of a trust arrangement. Labor Management Relations Act, § 302(c)(5), 29 U.S.C. § 186(c)(5) (1988).

\item \textsuperscript{68} 716 F.2d 1226 (9th Cir. 1983), \textit{cert. denied}, 464 U.S. 1040 (1984). In \textit{Mazzola}, the trustees of a pension fund breached their fiduciary duties by granting a $1.5 million loan to themselves as trustees of another fund at a below-market interest rate. \textit{Id.} at 1231-32. Furthermore, the trustees failed to follow the proper procedures for hiring a consultant to conduct a feasibility study and imprudently paid that consultant $250,000. \textit{Id.} at 1234.

\item \textsuperscript{69} \textit{Id.} at 1238-39.

\item \textsuperscript{70} \textit{Id.} at 1235. The district court had ordered the trustees to post a $1 million cash or corporate surety bond to insure the pension fund against potential losses flowing from the $1.5 million loan. \textit{Id.}

\item \textsuperscript{71} \textit{Id.} at 1238-39.
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referred to traditional trust law principles and noted that they provide broad remedies for fiduciary breaches. The court recognized that the judiciary has a duty to construct the most favorable remedy for the participants. It determined that because the purpose of the bond remedy was "to safeguard the beneficiaries' interests," it was consistent with the common law of trusts, and thus consistent with ERISA. Similarly, other courts followed the congressional mandate to apply trust law principles in their interpretations of ERISA.

B. ERISA's Remedial Scheme

ERISA's purpose is to protect the individual pension rights of participants and their beneficiaries. It does so, in part, by establishing fiduciary obligations and remedies to address fiduciary breaches. The judiciary is cognizant of ERISA's protective purpose and the breadth of its provisions. Consequently, courts liberally construe the statute to sat-

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72. Id. at 1235 (stating that trust law furnishes "'broad and flexible remedies in cases involving breaches of fiduciary duty'" (quoting Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1982))).

73. Id.

74. Under common law, when there is a breach of trust, "the court may order the giving of a bond to secure faithful performance in the future, or may increase the amount of the existing bond, or may require new sureties." Id. at 1236 (quoting George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 861, at 11-12 (1982) (footnote omitted)).

75. Id.

76. See infra notes 112-20 and accompanying text (discussing the judicial application of trust law to ERISA to find nonfiduciary liability).

77. See supra note 9 and accompanying text (discussing ERISA's legislative purpose).

78. See 29 U.S.C. § 1001(b) (1988). This section provides that ERISA safeguards the interests of participants and beneficiaries "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." Id.; see also Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir.) (stating that "ERISA's purpose is to secure guaranteed pension payments to participants by insuring the honest administration of financially sound plans"), cert. denied, 459 U.S. 1039 (1982); United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. Local 198 AFL-CIO Pension Plan v. Myers, 488 F. Supp. 704, 709 (M.D. La. 1980), (finding that "the unmistakable purpose of [ERISA] was to protect union workers from mismanagement and corruptive practices of those people selected to oversee their pension plans"), aff'd, 645 F.2d 532 (5th Cir. 1981); Nachman Corp. v. Pension Benefit Guar. Corp., 436 F. Supp. 1334, 1337 (N.D. Ill. 1977) (determining that ERISA "sets safeguards for the operation of covered plans and establishes standards for the administration of pension plans in an effort to minimize terminations of pension plans and losses to beneficiaries"), rev'd on other grounds, 592 F.2d 947 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980).

79. See Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 952 (7th Cir. 1979) (acknowledging that "ERISA was designed to insure benefits which were vested under the plan terms"), aff'd, 446 U.S. 359 (1980); Eaves v. Penn, 587 F.2d 453, 457 (10th Cir. 1978) (recognizing that ERISA "is a comprehensive remedial statute designed to pro-
isfy its remedial objective and to provide the highest level of protection to participants and their beneficiaries.

To enforce the provisions guarding plan participants and beneficiaries, ERISA furnishes remedies for noncompliance with the statute. Section 501 of ERISA authorizes criminal penalties for certain violations. Section 502 of ERISA provides six types of civil enforcement provisions that may be brought against a variety of parties. In particular, section 502 of ERISA provides:

(1) a participant or beneficiary to recover, enforce, or clarify his rights under the plan; (2) the Secretary of Labor, participant, beneficiary, or fiduciary to sue to enforce section 409(a) of ERISA; (3) a participant, beneficiary, or fiduciary to obtain injunctive and other equitable relief; (4) a participant or beneficiary to recover a penalty of up to $100 per day against an administrator who willfully withholds information that the participant or beneficiary is entitled to receive; (5) the Secretary of Labor to obtain injunctive and other equitable relief; and (6) the Secretary of Labor to collect civil penalties.

This remedial statute is designed to protect the pensions and other benefits of employees and have recognized the broad sweep of its provisions.


ERISA Section 502(a) provides, in part:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

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

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i)
Section 502(a)(2) permits a participant or beneficiary to bring a civil action to enforce section 409(a) of ERISA on behalf of the pension plan against a fiduciary who breached his fiduciary duties. Section 409(a) subjects a fiduciary who breaches his fiduciary responsibilities under ERISA to personal liability for damages, restitution, and other appropriate equitable or remedial relief. Section 502(a)(3) grants equitable relief to plan participants and beneficiaries for fiduciary conduct that does not constitute a fiduciary breach. Section 502(f), added to ERISA by the Omnibus


85. ERISA section 409(a) provides, in part:

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


86. ERISA section 502(a)(3) provides in part:

A civil action may be brought—

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

Budget Reconciliation Act of 1989,\textsuperscript{87} authorizes the Secretary of Labor to impose a penalty against fiduciaries or other persons who knowingly participate in a breach of fiduciary duty.\textsuperscript{88} The Secretary may assess a penalty of twenty percent of any amounts recovered from the fiduciary or other person for such breach.\textsuperscript{89} Despite ERISA's clear and definite purpose to provide maximum protection for participants and beneficiaries, some courts still questioned whether this remedial scheme should be broadly interpreted to include additional remedies.

C. Statutory Interpretation of ERISA's Remedies

In \textit{Massachusetts Mutual Life Insurance Co. v. Russell},\textsuperscript{90} the Supreme Court determined whether a remedy that is not expressly stated in ERISA should be recognized.\textsuperscript{91} In \textit{Russell}, a beneficiary sought to bring a cause of action under section 409(a) of ERISA to impose liability for punitive damages on a fiduciary for his faulty processing of benefit claims.\textsuperscript{92} The Supreme Court held that punitive damages were not available under section 409(a) because the purpose of imposing personal fiduciary liability is to reimburse the plan, not the individual beneficiary, for its losses.\textsuperscript{93} In addition, the Court stated that the statute's text failed to identify expressly punitive damages as an available remedy.\textsuperscript{94}

Moreover, the \textit{Russell} Court maintained that the plaintiff failed to satisfy the four-factor test established in \textit{Cort v. Ash}\textsuperscript{95} to determine whether

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\item \textsuperscript{88} See supra note 44 (providing the text of section 502(l)).
\item \textsuperscript{89} 29 U.S.C. § 1132(l) (Supp. III 1989); see supra note 44.
\item \textsuperscript{90} 473 U.S. 134 (1985).
\item \textsuperscript{91} See supra notes 82-89 and accompanying text (outlining ERISA's express remedies).
\item \textsuperscript{92} \textit{Russell}, 473 U.S. at 136.
\item \textsuperscript{93} \textit{Id.} at 140. The \textit{Russell} Court determined that not only is the relevant fiduciary relationship characterized at the outset as one "with respect to a plan," but the potential personal liability of the fiduciary is "to make good to such plan and losses to the plan . . . and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan."
\item \textsuperscript{94} \textit{Id.} (quoting H.R. CONF. REP. No. 93-1280, at 320 (1974)) (emphasis added).
\item \textsuperscript{95} 422 U.S. 66, 78 (1975) (establishing and applying a four-part test to determine "whether a private remedy is implicit in a statute not expressly providing one"). A person harmed by a violation of a federal statute does not necessarily have an automatic private
an implied private remedy is available where no explicit private remedy is provided in the statute. The first Cort factor is whether the plaintiff is a member of the class that Congress intended the statute to benefit. In Russell, the Court implied that Congress enacted ERISA to benefit plaintiff beneficiaries of employee benefit plans. The second factor is whether there is evidence of explicit or implicit legislative intent to create the proposed remedy. The Russell Court presumed that Congress intended to exclude punitive damages as a form of relief because the six civil enforcement provisions in section 502(a) do not expressly mention this remedy. The third factor is whether the remedy would be consistent with the underlying objectives of the legislative scheme. In Russell, the Court found that while Congress designed ERISA's comprehensive scheme to protect participants and beneficiaries, the statute does not include an express reference to punitive damages. The Court concluded that enforcing such a remedy would be inconsistent with the statute. The final Cort factor evaluates the propriety of furnishing the remedy under federal law when it already is provided under state cause of action. Cannon v. University of Chicago, 441 U.S. 677, 688 (1979) (applying the Cort test to determine if an implied right of action exists under Title IX of the Education Amendments of 1972). The Cort v. Ash four-prong analysis seeks to determine whether Congress intended that a private remedy be available. Cort, 422 U.S. at 78; see also California v. Sierra Club, 451 U.S. 287, 293-98 (1981) (using the Cort test to determine whether private parties have an implied cause of action under section 10 of the Rivers and Harbors Appropriation Act of 1899); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981) (applying the Cort analysis to determine whether a private right of action exists under the Davis-Bacon Act); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) (employing the Cort test to determine whether the Investment Advisors Act provides for a private right of action).

97. Cort, 422 U.S. at 78.
98. See Russell, 473 U.S. at 145.
99. See infra note 230 (discussing the debate concerning the use of legislative history in statutory interpretation).
100. Cort, 422 U.S. at 78. Cases subsequent to the Cort decision indicate that legislative intent is the most crucial factor. Sierra Club, 451 U.S. at 293; Transamerica Mortgage Advisors, 444 U.S. at 23-24; Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 575-76 (1979). The Court maintains, however, that the four Cort factors are still the "'criteria through which this intent could be discerned.'" Sierra Club, 451 U.S. at 293 (quoting Davis v. Passman, 442 U.S. 228, 241 (1979)).
101. Russell, 473 U.S. at 146 (explaining that because ERISA is a comprehensive statute, there is little chance that Congress inadvertently omitted a provision regarding punitive damages).
102. Cort, 422 U.S. at 78.
103. Russell, 473 U.S. at 147-48 (stating that "[i]n contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages" (footnotes omitted)).
104. Id.
The Russell Court promptly found that ERISA's broad preemption of state law satisfies this element. Accordingly, the Court concluded that section 409(a) of ERISA does not provide a remedy for punitive damages because such an implied provision would fail to satisfy the second and third requirements of the Cort test. The Cort analysis continues to provide essential guidelines for courts engaged in the statutory interpretation of ERISA causes of action.

D. Varying Views on the Imposition of Nonfiduciary Liability for Money Damages

Congress intended the courts to develop a body of ERISA common law based on trust law. Courts disagreed, however, as to how to use trust law to determine issues of nonfiduciary liability and issues of appropriate relief. While some courts employed trust law as a basis to impose nonfiduciary liability and to award the corresponding relief, other courts ignored trust law and strictly interpreted ERISA to preclude nonfiduciary liability and its related remedies.

1. Imposing Nonfiduciary Liability

The seminal case addressing the issue of nonfiduciary liability under ERISA is Freund v. Marshall & Ilsley Bank. In Freund, the trustee fiduciaries of a pension plan allowed most of the plan's assets to be loaned to its nonfiduciary sponsoring companies in exchange for unsecured promissory notes. In a suit against both fiduciaries and nonfiduciaries, the United States District Court for the Western District of Wisconsin found that the fiduciary trustees of the pension plan breached their ERISA fiduciary obligations to the plan's participants and beneficiaries.

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105. Cort, 422 U.S. at 78.  
106. Russell, 473 U.S. at 146. ERISA states that its provisions “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a) (1988).  
109. See supra note 67 and accompanying text (discussing ERISA's intended purpose).  
110. See infra notes 112-20, 152-60 (discussing judicial decisions imposing nonfiduciary liability).  
111. See infra notes 121-51 (listing decisions rejecting nonfiduciary liability).  
113. Id. at 636.  
114. Id. The court held that in doing so, the trustees failed to satisfy their fiduciary duty of prudence required by ERISA sections 404(a)(1)(A) and (B). Id.; see also supra note 16.
Pursuant to the congressional mandate to extend the traditional tenets of trust law to ERISA, the Freund court stated that it was authorized to impose traditional trust law remedies against nonfiduciaries who knowingly participate in a breach of trust. The court noted that under trust law, a beneficiary is entitled to be free from third-party interference with the value of the trust. It also recognized that under trust law, a third party who aided a trustee in a breach of trust not only could be held liable for the breach, but also could be held jointly liable for any consequential losses to the trust property. Based on this reasoning, the court found that the nonfiduciary sponsoring companies were liable under section 409(a) of ERISA for their knowing participation in the fiduciary’s breach of duty. Four circuit courts subsequently adopted reasoning similar to Freund, demonstrating the logic of and necessity for imposing nonfiduciary liability.

and accompanying text. By loaning most of the plan's assets to the sponsoring companies, they failed to diversify the plan's investment portfolio as required by section 404(a)(1)(C) of ERISA. Freund, 485 F. Supp. at 636; see also supra note 16 and accompanying text. Because the sponsoring companies are defined as “parties in interest,” the fiduciaries also violated sections 406(a)(1)(B) and (D) of ERISA, which prohibit such transactions. Freund, 485 F. Supp. at 637. Finally, by approving the loan transaction, the fiduciaries violated sections 406(b)(1) and (2) of ERISA, which prohibit fiduciaries from using plan assets for their own purposes and from acting, in a transaction involving the plan, on behalf of a party with adverse interests to the plan. Id. at 637-38.

115. See supra note 67 and accompanying text.
116. Freund, 485 F. Supp. at 641-42 (citing the congressional intent to apply the law of trusts).
117. Id. at 642; see also supra note 62 and accompanying text (noting that beneficiaries may expect that third parties will not knowingly assist in a trustee’s breach).
118. Freund, 485 F. Supp. at 642 (stating that third parties “could be joined in a suit for the recovery of the value of the trust property lost on account of the breach”); see also supra note 66 and accompanying text (recognizing that, under the common law of trusts, nonfiduciaries who aid fiduciaries in a breach of fiduciary duty may be liable for money damages).
120. See Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988) (stating that nonfiduciaries are liable for knowingly “aiding and assisting” a fiduciary in breaching his fiduciary duties); Lowen v. Tower Asset Management, 829 F.2d 1209, 1220 (2d Cir. 1987) (finding that recovery from nonfiduciaries is based upon traditional principles of the common law of trusts and on section 502(a)(3) of ERISA); Fink v. National Sav. & Trust Co., 772 F.2d 951, 958 (D.C. Cir. 1985) (determining that “a district court may award relief against nonfiduciaries who knowingly participate in a breach of trust”); Thornton v. Evans, 692 F.2d 1064, 1079 (7th Cir. 1982) (recognizing that a remedy against nonfiduciaries who knowingly participate in the breach of a fiduciary's duty “is a necessary development of the law of ERISA”).
2. Rejecting Nonfiduciary Liability

Despite the Freund rationale and its acceptance among a number of federal circuits, the Ninth Circuit refused to impose nonfiduciary liability for damages in *Nieto v. Ecker*. In *Nieto*, the plaintiffs, members of a labor union, sued their multiemployer funds' attorney for failing to bring legal actions to collect delinquent contributions and for receiving payment for services never rendered. The plaintiffs sought relief in the form of restitution to the fund, injunctive relief, and punitive damages. The Ninth Circuit first determined that the defendant was not a fiduciary under ERISA. The court then held that it would not extend liability under section 409(a) to nonfiduciaries because the "plain language" of this section and the language of the statute as a whole did not sustain this interpretation.

The Ninth Circuit acknowledged that other circuits imposed nonfiduciary liability in similar cases, but concluded that this was based merely on Senator Williams' statement that Congress intended to apply relevant trust law principles and to provide remedies for breaches of trust in ERISA's fiduciary provisions. The Ninth Circuit maintained that this "nebulous statement" did not justify the incorporation of all trust law principles into ERISA. The court considered the action against the defendant to be a legal malpractice suit under state tort law that could not be recharacterized as an action under ERISA simply because the plaintiffs happened to be plan participants. The Ninth Circuit also dismissed its decision in *Donovan v. Mazzola* as "not on point," despite the Mazzola court's recognition that Congress based ERISA's fiduciary provisions on traditional trust law principles and intended the judiciary to

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121. 845 F.2d 868 (9th Cir. 1988).
122. *Id.* at 870. The district court originally dismissed both the ERISA claim and a state law fraud claim against the attorney. *Id.*
123. *Id.*
124. *Id.* (citing its decision in *Yesata v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988)).
125. *Id.* at 871 (deciding that the Freund decision did not justify a departure from the statutory language).
126. *Id.* (stating that "several courts have nevertheless held that section 409(a) imposes liability on non-fiduciaries insofar as they abetted fiduciaries in their breaches of duty"); *see also* Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-21 (2d Cir. 1987); Fink v. National Sav. & Trust Co., 772 F.2d 951, 958 (D.C. Cir. 1985); Thornton v. Evans, 692 F.2d 1064, 1078 (7th Cir. 1982); Donovan v. Daugherty, 550 F. Supp. 390, 410-11 (S.D. Ala. 1982).
127. *Nieto*, 845 F.2d at 871; *see supra* note 67 (providing a portion of Senator Williams' statement).
128. *Nieto*, 845 F.2d at 871.
129. *Id.* at 871-72.
130. 716 F.2d 1226, 1231 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *see supra* notes 68-75 and accompanying text (discussing *Donovan v. Mazzola*).
use these principles in fashioning remedies for ERISA fiduciary breaches.\textsuperscript{131} Moreover, the Ninth Circuit maintained that section 502(a)(3) of ERISA did not authorize legal relief for nonfiduciary violations of ERISA because such an interpretation would render section 409(a) unnecessary.\textsuperscript{132}

The Ninth Circuit did find, however, that the defendant attorney was liable as a "party in interest"\textsuperscript{133} under ERISA because he furnished services to the funds.\textsuperscript{134} As a party in interest, he was liable for participating

\begin{itemize}
\item[(131)] Nieto, 845 F.2d at 872; see supra notes 68-75 and accompanying text (discussing Donovan).
\item[(132)] Nieto, 845 F.2d at 873 (explaining that the rules of statutory construction prevented the court from interpreting one provision in such a way as to make another superfluous); see supra note 85 (providing the text of section 409(a)).
\item[(133)] ERISA defines "party in interest" as
\begin{itemize}
\item[(A)] any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
\item[(B)] a person providing services to such plan;
\item[(C)] an employer any of whose employees are covered by such plan;
\item[(D)] an employee organization any of whose members are covered by such plan;
\item[(E)] an owner, direct or indirect, of 50 percent or more of—
\begin{itemize}
\item[(i)] the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,
\item[(ii)] the capital interest or the profits interest of a partnership, or
\item[(iii)] the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);
\end{itemize}
\item[(F)] a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);
\item[(G)] a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—
\begin{itemize}
\item[(i)] the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
\item[(ii)] the capital interest or profits interest of such partnership, or
\item[(iii)] the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
\end{itemize}
\item[(H)] an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or
\item[(I)] a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).
\end{itemize}
\end{itemize}


\begin{itemize}
\item[(134)] Nieto, 845 F.2d at 873.
\end{itemize}
in a "prohibited transaction" with the plan fiduciary. Consequently, the Ninth Circuit remanded the case to the lower court to determine the extent of his equitable obligations as a party in interest under section 502(a)(3).

In contrast, a concurring opinion disagreed with the majority’s analysis in Nieto. The concurrence asserted that the defendant was not only liable as a party in interest but also as a nonfiduciary under section 409(a). Recognizing that section 409(a) must be read in the context of the entire statute, which Congress enacted to provide beneficiaries with extensive remedies, the concurring opinion found that the legislative intent urged courts to apply the law of trusts in ERISA actions. The concurring opinion argued that Senator Williams' speech, as well as the Senate and House committee reports, illustrated this intent. Furthermore, the concurrence stated that the Mazzola decision was relevant because, in that case, the court used its broad ERISA-delegated authority to extend a trust law remedy to ERISA section 409(a), thereby forcing the defendants to post a one million dollar bond to protect against the plan's losses. Nieto was a surprising divergence from the position taken by the other circuits that had already addressed this issue.

135. Under ERISA, prohibited transactions include, inter alia: (1) the sale or exchange, or lease of property between a plan and a disqualified person or party in interest, ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A) (1988); (2) loans and extensions of credit between the plan and any disqualified person or party in interest, ERISA § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B) (1988); (3) goods furnished, services rendered, or facilities provided between the plan and a disqualified person or a party in interest, ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C) (1988); (4) a fiduciary's act of transferring or using the income and assets of a plan in his or her personal interest, ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(1) (1988); and (5) a fiduciary's act involving the plan on behalf of a party whose interests are adverse to the interests of the plan or its participants and beneficiaries, ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2) (1988).

136. Nieto, 845 F.2d at 873.

137. Id. at 874 (stating that "if plaintiffs prevail on the merits, they will be entitled to whatever equitable relief—including issuance of an injunction or the imposition of a constructive trust upon property improperly received").

138. Id. at 874-75 (Wiggins, J., concurring).

139. Id. at 875 (acknowledging that Congress intended "to provide the broadest possible remedies under ERISA to plan beneficiaries").

140. Id. (finding support for this proposition in Senator Williams' statement, as well as in committee reports and other forms of legislative history).

141. Id.; see supra note 67 (providing a portion of Senator Williams' statement and the relevant language of committee reports).

142. Nieto, 845 F.2d at 875 (quoting Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984)); see supra notes 68-75 and accompanying text (discussing the Donovan decision).
3. Reactions to Nieto—Circuits Take Opposite Positions

Following the Ninth Circuit’s decision in Nieto, the United States Court of Appeals for the Eleventh Circuit also found that nonfiduciaries were not liable for money damages in Useden v. Acker. In an analysis similar to that employed by the Nieto court, the Eleventh Circuit examined the text of the statute for language expressly authorizing such liability. Finding none, the court refused to interpret the ERISA provisions broadly to include nonfiduciary liability for money damages. Unlike the Ninth Circuit in Nieto, the Useden court acknowledged that the Supreme Court expressly provided for the application of traditional trust law principles to the development of ERISA federal common law. The Eleventh Circuit, however, qualified this assertion by stating that ERISA federal common law would only adopt a principle of trust law if the statutory language did not intentionally exclude the provision from the statute. The court determined that it could not derive nonfiduciary liability for money damages from section 409(a) because Congress expressly limited the section’s application to fiduciaries. Similarly, the court found that it could not include liability for money damages in section 502(a)(3) because Congress restricted that section to equitable remedies. Thus, the Eleventh Circuit concluded that there could not be an ERISA cause of action for money damages against a nonfiduciary because the statute’s text effectively precluded such a remedy and Congress had remained silent on the issue.

143. 947 F.2d 1563 (11th Cir. 1991), cert. denied, 113 S. Ct. 2927 (1993).
144. See supra notes 121-37 (discussing the Nieto decision).
145. Useden, 947 F.2d at 1580 (beginning the analysis with a “search [of] ERISA’s text for any language plainly extending liability to nonfiduciaries”).
146. Id. (declining to broadly interpret a single section, thereby making it inconsistent with the overall statutory scheme).
147. Id. at 1580 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989)). The Bruch court explained that ERISA abounds with the language and terminology of trust law. ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions “codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.” Given this language and history, we have held that courts are to develop a “federal common law of rights and obligations under ERISA-regulated plans.”
148. Useden, 947 F.2d at 1581.
149. Id. at 1580 (finding that “‘[t]he plain language of section 409(a) limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section’” (quoting Nieto v. Ecker, 845 F.2d 868, 871 (9th Cir. 1988))).
150. Id. at 1581.
151. Id. at 1582. The court stated:
Conversely, in accord with *Freund v. Marshall & Ilsley Bank*, other courts continued to hold nonfiduciaries liable for knowingly participating in a breach of fiduciary duty. In *Whitfield v. Lindemann*, for example, the United States Court of Appeals for the Fifth Circuit held a nonfiduciary attorney, who had accepted overvalued assets from the plan's previous trustees, jointly and severally liable with the plan fiduciary for losses suffered by the plan. The court concluded that the attorney's liability could extend beyond the personal benefit he derived from the transaction. Similarly, in *Pension Fund v. Omni Funding Group*, the United States District Court for the District of New Jersey held a nonfiduciary bank, which the fiduciary had employed to manage plan assets, liable for knowingly participating in a design to enrich the fiduciary. Applying the four-factor *Cort v. Ash* test, the district court recognized an implied cause of action under ERISA against nonfiduciaries because it found that ERISA's remedial provisions should be broadly construed to protect the interests of participants and beneficiaries.

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152. 485 F. Supp. 629 (W.D. Wis. 1979); see supra notes 112-20 and accompanying text (discussing the reasoning of the *Freund* decision).

153. See infra text accompanying notes 154-60 (providing examples where courts imposed nonfiduciary liability following *Nieto*).


155. *Id.* at 1307. In this case, the Department of Labor charged a trustee of a pension plan and his attorney with fiduciary violations for accepting assets overvalued by $775,551 from former trustees in satisfaction of the trust's claims against them. *Id.* at 1302.

156. *Id.* at 1303 (rejecting the attorney's argument that his liability was limited to his personal gain).


158. *Id.* at 179.

159. See supra notes 95-108 and accompanying text (delineating the four factors of the *Cort v. Ash* test and discussing their application in *Russell*).

160. *Pension Fund*, 731 F. Supp. at 177-79 (holding that "ERISA does provide a remedy against nonfiduciaries . . . [because] ERISA is a comprehensive remedial statute designed to protect the interests of participants and beneficiaries").
II. **MERTENS v. HEWITT ASSOCIATES: A NARROW INTERPRETATION OF ERISA PRECLUDING NONFIDUCIARY LIABILITY FOR MONEY DAMAGES**

In *Mertens v. Hewitt Associates*, the United States Supreme Court addressed the issue dividing the federal courts regarding whether section 502(a)(3) of ERISA includes a cause of action for money damages against nonfiduciaries who knowingly participate in the breach of a fiduciary’s duties. The Court adopted the Ninth and Eleventh Circuits’ stricter interpretations of ERISA and rejected such a cause of action. The Court’s narrow focus on explicit statutory language overlooked ERISA’s fundamental purpose to provide financially secure retirement benefits. As a result, *Mertens* provides less protection for participants and beneficiaries than they had received prior to ERISA’s enactment.

**A. The Majority Opinion: A Deliberate Exclusion**

The majority opinion, written by Justice Scalia, adopted the minority position espoused by the Ninth Circuit in holding that a cause of action for money damages against nonfiduciaries who knowingly participate in the breach of a fiduciary’s duties does not exist under ERISA. First, the Court concluded, as the Ninth Circuit had in *Nieto v. Ecker*, that nonfiduciary liability under section 409(a) of ERISA does not exist because the provision making a fiduciary “personally liable for damages (‘to make good to [the] plan any losses to the plan resulting from each such breach’)” applied exclusively to fiduciaries. Because the petitioners did not challenge the Ninth Circuit’s finding that the respondent was not a fiduciary, and because section 409(a) contains no express provisions

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161. 113 S. Ct. 2063 (1993). Justices Blackmun, Kennedy, Souter and Thomas joined Justice Scalia’s majority opinion, while Justices Stevens and O’Connor joined Chief Justice Rehnquist’s dissenting opinion. *Id.* at 2065.

162. *Id.* at 2066; see *supra* note 86 (providing the text of section 502(a)(3)).

163. *See infra* notes 166-201 and accompanying text (providing a full discussion of the majority opinion); *see also supra* notes 121-42 and accompanying text (discussing *Nieto*); *supra* notes 143-51 and accompanying text (discussing *Useden*).

164. *See supra* note 9 and accompanying text (explaining ERISA’s purpose).

165. *See infra* notes 254-62 and accompanying text (contending that *Mertens* will provide less security for participants and their beneficiaries).

166. *Mertens*, 113 S. Ct. at 2072 (finding that “ERISA has eliminated ... all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did”).

167. 845 F.2d 868, 871 (9th Cir. 1988); see *supra* notes 121-42 and accompanying text (providing a detailed discussion of *Nieto*).


169. *Id.* at 2067.
providing a remedy of money damages against nonfiduciaries, the Court denied the relief.

The Court then examined section 502(a)(3) to determine if it explicitly or implicitly provides a money damages remedy against nonfiduciaries. Section 502(a)(3) provides, in part, that equitable remedies may be available to provide relief for ERISA violations and to enforce ERISA’s provisions. Although Congress expressly authorized liability for the knowing participation of cofiduciaries, the Court found that section 502(a)(3) contains no explicit provision concerning nonfiduciary liability for damages. The Court concluded that the nonfiduciary liability exclusion probably was deliberate in light of the imposition of such liability on both cofiduciaries and nonfiduciaries under the common law of trusts.

170. See supra note 85 (providing the text of section 409(a)).

171. Mertens, 113 S. Ct. at 2067 (maintaining, after discussing the causes of action and remedies available against fiduciaries, that there are no “equivalent provisions specifying nonfiduciaries as potential defendants, or damages as a remedy available”).

172. Id.

173. See supra note 86 (providing the text of section 502(a)(3)).

174. Mertens, 113 S. Ct. at 2067 (stating that “while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary’s breach of fiduciary duty” (footnote omitted)).

ERISA explicitly imposes liability for cofiduciary breaches of fiduciary duty. Section 405(a) states:

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

1. if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

2. if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

3. if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.


175. Mertens, 113 S. Ct. at 2067. The Court maintained that “[i]t is unlikely . . . that this was an oversight, since ERISA does explicitly impose ‘knowing participation’ liability on cofiduciaries” and this “limitation appears all the more deliberate in light of the fact that ‘knowing participation’ liability on the part of both cotrustees and third persons was well established under the common law of trusts.” Id. (citations omitted) (quoting ERISA § 405(a), 29 U.S.C. § 1105(a) (1988)); see also supra note 66 and accompanying text (demonstrating the availability of a damages remedy under the common law of trusts against nonfiduciaries who knowingly participate in a trustee’s breach of fiduciary duty).
In addition, the Court found that traditional equitable relief does not include money damages, an instrument of legal relief. Although the Court had not interpreted the phrase “other appropriate equitable relief” in the context of ERISA, it analogized this expression to its construction of the phrase “any other equitable relief as the court deems appropriate” in Title VII of the Civil Rights Act of 1964, which prohibits the imposition of punitive damages. The Court acknowledged that under the common law of trusts in courts of equity, beneficiaries could obtain a money damages remedy against nonfiduciaries who knowingly participate in a breach of a fiduciary’s duty. Equitable relief, therefore, could be interpreted as any form of relief an equity court was authorized to grant. The Court, however, elected to construe equitable relief as referring to general equitable remedies, such as “injunction, mandamus, and restitution, but not compensatory damages.” The Court reasoned that if Congress had intended all forms of relief to be available for a breach of trust under ERISA, the statutory language would not have expressly limited the remedies to equitable relief. A broader interpretation, the Court reasoned, would render the word “equitable” “superfluous.” Furthermore, the Court maintained that defining equi-

176. *Mertens*, 113 S. Ct. at 2068 (determining that the petitioners, in reality, were seeking money damages).
177. *Id.* at 2068 (quoting 42 U.S.C. § 2000e-5(g) (1988)).
178. *Id.* The Court admitted that “at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust” and “that money damages were available in those courts against the trustee, and against third persons who knowingly participated in the trustee’s breach.” *Id.* (citations omitted); see also *supra* notes 62-66 and accompanying text (regarding nonfiduciary liability under the common law of trusts).
180. *Id.* at 2069 (distinguishing between those forms of relief that equity courts were authorized to provide and those types that typically were available).
181. *Id.* (stating that “[s]ince all relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to ‘equitable relief’ in the sense of ‘whatever relief a common-law court of equity could provide in such a case’ would limit the relief not at all” (footnote omitted); see also *supra* note 61 (discussing the availability of both legal and equitable remedies for breaches of trustee). The majority also indicated that, at the time Congress enacted ERISA, punitive damages were not a major issue. *Mertens*, 113 S. Ct. at 2069 n.7.
182. *Mertens*, 113 S. Ct. at 2069; see also United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992) (stating that a statute should “be construed in such fashion that every word has some operative effect”); United States v. Menasche, 348 U.S. 528, 539 (1955) (recognizing that the Court has a “duty ‘to give effect, if possible, to every clause and word of a statute’ ” (quoting Inhabitants of Montclair v. Ramsdell, 107 U.S. 147, 152 (1883))); Mail Order Ass’n v. United States Postal Serv., 986 F.2d 509, 515 (D.C. Cir. 1993) (finding that courts must interpret statutes such that “no provision is rendered ‘inoperative or superfluous, void or insignificant’ ” (quoting Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1285 (D.C. Cir. 1983))); Gonzalez v. McNary, 980 F.2d 1418, 1420 (11th Cir.
table relief to include all forms of relief under common law would give the phrase "a different meaning than it bears elsewhere in ERISA," and would obscure the distinction between "equitable" and "remedial" or "legal" relief elsewhere in the statute. The Court concluded that its mandate to develop ERISA federal common law did not authorize it to alter the statute's text.

The Court also asserted that the addition of section 502(l) to ERISA did not create a remedy against nonfiduciaries for money damages. Section 502(l) allows the Secretary of Labor to "assess a civil penalty . . . in an amount equal to 20 percent of the applicable recovery amount" against nonfiduciaries who knowingly participate in a fiduciary breach. Section 502(a)(5) authorizes the Secretary to provide "appropriate equitable relief," corresponding to the same language in section 502(a)(3) referring to private actions. The Court stated that equitable relief under section 502(a)(5) encompasses restitution and that cofiduciaries include "other person[s]" besides nonfiduciaries. The Court also noted that the proposed regulation implementing Section 502(l) distinguishes between equitable relief and money damages. Consequently, the Court found that the text of section 502(l) does not establish a remedy for damages against nonfiduciaries under section 502(a)(5).
The majority rejected the argument that its narrow construction of the appropriate equitable remedies contradicted ERISA's purpose of protecting participants and beneficiaries and afforded these individuals less protection than before ERISA was enacted.\(^\text{194}\) The Court reasoned that the statute's purpose was "vague" and did not outweigh an interpretation of specific text in the context of a particular issue.\(^\text{195}\) The Court stated that this was true especially in the context of ERISA because Congress enacted a comprehensive statute to balance contentions between "powerful competing interests" without always reaching a favorable outcome for the claimants.\(^\text{196}\) The majority determined that professional service providers will be liable for money damages only when "they cross the line" from their initial role to a fiduciary capacity.\(^\text{197}\) At that point, nonfiduciaries become fiduciaries and may be liable for money damages.\(^\text{198}\) The Court explained that the statute still provides traditional forms of equitable relief, such as restitution.\(^\text{199}\) The Court also reasoned that imposing greater liability on professional service providers in this context would result in increased insurance costs, thereby increasing the total costs for the plans.\(^\text{200}\) Accordingly, the Court refused to modify the existing balance between ERISA's competing objectives of protecting employees and controlling the costs of pension plans.\(^\text{201}\)

\(\text{B. The Dissenting Opinion: A Broad Interpretation to Make the Victim Whole}\)

The dissent, written by Justice White, agreed with the position adopted in \textit{Freund v. Marshall & Isley Bank}\(^\text{202}\) and construed section 502(a)(3) of

\(^{194}\) \textit{Id}. (stating that specific statutory language is more probative than broad purposes).

\(^{195}\) \textit{Id}. (reasoning that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration").

\(^{196}\) \textit{Id}.

\(^{197}\) \textit{Id}. (stating that "[p]rofessional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary").

\(^{198}\) \textit{Id}; see supra notes 12-19 and accompanying text (defining fiduciary responsibilities and liability under ERISA).

\(^{199}\) \textit{Mertens}, 113 S. Ct. at 2072; see supra note 29 (analyzing traditional equitable remedies); \textit{supra} note 45 (discussing restitution).

\(^{200}\) \textit{Mertens}, 113 S. Ct. at 2072.

\(^{201}\) \textit{Id}. The Court explained that there is a "‘tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.’" \textit{Id}. (alteration in the original) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 515 (1981)). The Court therefore concluded that it would "not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck." \textit{Id}.

\(^{202}\) 485 F. Supp. 629 (W.D. Wis. 1979); see supra notes 112-20 (discussing the \textit{Freund} decision).
ERISA to hold nonfiduciaries who knowingly participate in a fiduciary breach liable for money damages to make a plan beneficiary "whole." First, the dissent reasoned that this interpretation of ERISA's fiduciary provisions corresponded with the traditional principles of trust law. The dissent noted that the statute's language includes many trust law terms and determined that Congress wanted the judiciary to look to the common law of trusts for guidance in construing ERISA's provisions. The dissent also found that in the common law of trusts, courts of equity provided both equitable and legal remedies, including money damages, to ensure that the beneficiaries received complete relief. The dissent concluded that the phrase "appropriate equitable relief" found in section 502(a)(3) includes all of the remedies traditionally available in equity for breaches of trust. These remedies include money damages for both fiduciary and nonfiduciary liability to make the participant or beneficiary whole. Accordingly, the dissent reasoned that this result would confer the same level of protection to participants and beneficiaries under ERISA as they had received prior to its enactment.

Furthermore, the dissent interpreted appropriate equitable relief to be a "descriptive" reference to all equitable remedies available under traditional trust law. While Congress distinguished equitable from legal relief in other provisions, the dissent argued that only section 502(a)(3) had

203. Mertens, 113 S. Ct. at 2078 (White, J., dissenting). Justice White, joined by Chief Justice Rehnquist, Justice Stevens and Justice O'Connor, asserted that "[t]he text of the statute supports a reading of § 502(a)(3) that would permit a court to award compensatory monetary relief where necessary to make an ERISA beneficiary whole for a breach of trust." Id.; see supra note 52 (providing text of section 502(a)(3)); see also supra notes 112-20, 152-60 and accompanying text (reviewing federal decisions that have adopted nonfiduciary liability).

204. Mertens, 113 S. Ct. at 2078; see supra notes 56-66 and accompanying text (discussing the relevant trust law concepts).

205. See supra notes 82-89 and accompanying text (providing ERISA's remedial scheme).

206. Mertens, 113 S. Ct. at 2073.

207. Id. at 2074 (explaining that equity authorized "the payment of a monetary award to make the victims of the breach whole"); see also BOERT & BOERT, supra note 57, § 870; supra note 66 and accompanying text (discussing nonfiduciary liability for money damages for knowing participation in a breach of trust).

208. Mertens, 113 S. Ct. at 2074. Justice White declared that "§ 502(a)(3)'s reference to 'appropriate equitable relief' " embraced "equity's routine remedy for such breaches—a compensatory monetary award calculated to make the victims whole, a remedy that was available against both fiduciaries and participating nonfiduciaries." Id.

209. Id. (noting that such a construction would eliminate the possibility of construing ERISA in such a way as to contradict its legislative purpose).

210. Id.

211. Id. at 2075. The dissent asserted that the term equitable is "descriptive and simply refer[s] to all remedies available in equity under the common law of trusts, whether or not they were or are the exclusive remedies for breach of trust." Id.
a foundation in the common law of trusts. According to the dissent, even if Congress intended to make a similar distinction in this area, equitable relief would still encompass all equitable remedies available under the common law of trusts. For example, a punitive damages remedy was not a traditional equitable remedy available at common law in breach of trust cases. This is consistent with the Court's decision in Massachusetts Mutual Life Insurance Co. v. Russell, where the Court held that punitive damages are not a remedy available under ERISA. Punitive damages, however, were available as a legal remedy under the common law of trusts. Recently, courts have used "legal powers" to authorize punitive damages, even though historically the action could only have been equitable, because modern courts use both legal and equitable authority to award a remedy for breach of trust. The dissent concluded that the Court may interpret section 502(a)(3) of ERISA to authorize an award of money damages against nonfiduciaries who knowingly participate in a fiduciary breach to make a participant or beneficiary whole.

III. MERTENS IS INCONSISTENT WITH THE CORT V. ASH STANDARD AND OTHER POLICY CONSIDERATIONS

The majority's holding in Mertens is inconsistent with the origins, language, and purpose of ERISA, which serve to provide participants and their beneficiaries with maximum retirement security and protection. The Supreme Court, in an opinion focusing on strict statutory interpretation rather than the foundation and function of ERISA, concluded that the statute does not authorize money damages for nonfiduciary liability. This decision jeopardizes the retirement security for participants and their beneficiaries.

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212. Id. (stating that ERISA's other remedial provisions lacked "any discernible analogue in the common law").
213. Id. at 2075-76 (noting that the courts of equity were not authorized to grant all forms of relief).
214. Id. at 2076 (explaining that in a breach of trust case at common law, the plaintiffs could recover compensatory damages, but not punitive or exemplary damages).
216. Id. at 148; see supra notes 90-108 and accompanying text (providing a detailed discussion of Russell).
217. Mertens, 113 S. Ct. at 2076.
218. Id. at 2077 (noting that courts cite the merger of law and equity as a justification for the exercise of this power).
219. Id. at 2078.
220. See supra note 9 and accompanying text (discussing the legislative purpose of ERISA).
221. See supra notes 166-201 and accompanying text (reviewing the majority opinion in Mertens).
A. The Majority Opinion Conflicts with the Cort v. Ash Standard

The four-part test developed in *Cort v. Ash*,\(^{222}\) and applied in *Massachusetts Mutual Life Insurance Co. v. Russell*,\(^{223}\) determines whether a remedy may be implied where a statute does not explicitly award it.\(^{224}\) Even assuming that "equitable relief" in section 502(a)(3) does not include a money damages remedy, an application of the *Cort v. Ash* analysis in the context of *Mertens* implies such a remedy and illustrates the fundamental flaws in the majority's reasoning and ultimate conclusion.

I. Federal Right for the Plaintiff

The first *Cort* factor considers whether the statute creates a federal right for the benefit of the plaintiff.\(^{225}\) In making this determination, the Court should examine the statutory language.\(^{226}\) In *Mertens*, the majority failed to address the existence of a federal right for participants and beneficiaries. It is explicitly clear, however, in ERISA's statutory language\(^ {227}\) and legislative history\(^ {228}\) that Congress enacted the statute for the benefit of participants and beneficiaries. Moreover, the *Russell* Court expressly verified that a beneficiary of an employee benefit plan possessed a federal right under ERISA.\(^ {229}\) Based on ERISA's language, legislative history, and interpretive case law, it is evident that participants and their beneficiaries possess the requisite ERISA federal right.

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\(^{222}\) 422 U.S. 66, 78 (1975); *see supra* notes 95-108 and accompanying text (detailing the *Cort* analysis).

\(^{223}\) 473 U.S. 134 (1985); *see supra* notes 89-108 and accompanying text (applying the *Cort* test to the facts of *Russell*).

\(^{224}\) *Cort*, 422 U.S. at 78; *see supra* note 96 and accompanying text.

\(^{225}\) *Cort*, 422 U.S. at 78.

\(^{226}\) *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (stating that Congress intends to create a cause of action "where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case").

\(^{227}\) *See supra* note 78 and accompanying text (discussing ERISA's purpose to safeguard participants and beneficiaries under section 401(b) of ERISA).

\(^{228}\) *See supra* note 9 (providing the relevant legislative history concerning ERISA's purpose); *supra* note 67 (discussing Congress' intent to apply trust law to ERISA's fiduciary provisions).

\(^{229}\) *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985) (stating that a beneficiary "is a member of the class for whose benefit the statute was enacted").
2. Legislative Intent

The second Cort factor analyzes whether there is explicit or implicit legislative intent\textsuperscript{230} to establish the remedy sought.\textsuperscript{231} This factor is the focal point of the Cort analysis.\textsuperscript{232} In Mertens, following its reasoning in Massachusetts Mutual Life Insurance Co. v. Russell,\textsuperscript{233} the Court stated that ERISA's comprehensive remedial scheme demonstrated Congress' intent to make the express remedies exclusive.\textsuperscript{234} Thus, because there are no express provisions addressing nonfiduciary liability for knowing participation in a fiduciary breach, the Court determined that a money damages remedy does not exist.\textsuperscript{235}

\begin{itemize}
  \item \textsuperscript{230} Cort v. Ash, 422 U.S. 66, 78 (1975). There is debate over the use of legislative history in statutory interpretation. Justice Scalia and other proponents of the "plain meaning" rule argue that if the statutory language is ambiguous, the judge must rationalize "whether one possible meaning of a term comports better with the rest of the statute in question," rather than consulting legislative history. Note, Why Learned Hand Would Never Consult Legislative History Today, 105 Harv. L. Rev. 1005, 1005 (1992). Supporters of this view reason that the Constitution limits Congress' role in passing laws. Arthur Stock, Note, Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses, 1990 Duke L.J. 160, 166. The law does not incorporate legislative history because Congress does not subject it to a vote. \textsuperscript{Id}. Courts have the authority to review only the law, not legislative history. \textsuperscript{Id}. Supporters also argue that legislative history is an inadequate source because congressional staff members create legislative history, not the Members of Congress. \textsuperscript{Id.} at 163.

  \item Nevertheless, there are many compelling arguments supporting the judicial analysis of legislative history. Context is critical to fully comprehend the meaning of words, especially in the case of complex and technical statutes where an understanding of policy is important. Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 Am. U. L. Rev. 277, 301 (1990). Other sources of interpretation of congressional intent often are inadequate. \textsuperscript{Id.} at 303. Moreover, when a judge rationalizes the meaning of statutory language, he effectively "substitutes the legislative meaning with one created by an unelected judge whose constitutional role is limited to deciding cases, not rewriting laws to fit his own sense of rationality." Stock, supra, at 172-73. Furthermore, legislative history production is not left to the sole discretion of congressional staffs. \textsuperscript{Id.} at 174. All three branches of government participate in drafting written materials that are compiled by staff members, while Congress has specific procedural and substantive rules governing the production of committee reports. \textsuperscript{Id}. Even if the courts misinterpreted legislative history, Congress can enact amendments to override these misinterpretations. Wald, supra, at 308.

  \item \textsuperscript{231} Cort v. Ash, 422 U.S. at 78.

  \item \textsuperscript{232} See supra note 100 and accompanying text (indicating the importance of legislative intent in the Cort analysis).

  \item \textsuperscript{233} Russell, 473 U.S. at 134; see supra notes 90-108 and accompanying text (providing a detailed discussion of Russell).

  \item \textsuperscript{234} Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2067 (1993); see also Russell, 473 U.S. at 146-47.

  \item \textsuperscript{235} Mertens, 113 S. Ct. at 2067.
\end{itemize}
Section 502(l) of ERISA exemplifies the implicit legislative intent to create a remedy for monetary damages against nonfiduciaries. This section allows the Secretary to assess a civil penalty not only against fiduciaries who commit fiduciary breaches, but also against other persons who knowingly participate in a fiduciary breach. In addition, this section defines the civil penalty as amounts the Secretary obtains from "other person[s]" under section 502(a)(5) of ERISA. Therefore, section 502(l) is based upon the Secretary's ability to obtain "other appropriate equitable relief" under section 502(a)(5). Because the Secretary's authority to assess a civil penalty under section 502(l) is based upon the same language as that which appears in section 502(a)(3), section 502(a)(3) implicitly authorizes private causes of action against nonfiduciaries for money damages. The majority in Mertens, however, rejected this interpretation. The Court merely dismissed the fact that Congress intended courts to award both equitable and legal relief for participants and beneficiaries under section 502(l).

Furthermore, ERISA's legislative history demonstrates Congress' intent to invoke a remedy for money damages against nonfiduciaries. The legislative history indicates that Congress intended the courts to rely upon traditional trust law principles in developing ERISA federal common law. Therefore, the Court must examine the common law of

236. 29 U.S.C. § 1132(l) (Supp. III 1991); see supra note 44 and accompanying text (providing the text of section 502(l)).
237. See supra note 44.
238. See supra note 44; see also 29 U.S.C. § 1132(a)(5) (1988); supra note 189 (providing the text of section 502(a)(5)).
239. See supra note 44; see also supra note 189.

The Supreme Court of the United States has recognized the need to generate federal common law where "a federal rule of decision is 'necessary to protect uniquely federal interests.' " Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)). The Court also has acknowledged the need to develop federal common law where "Congress has given the
trusts to interpret "appropriate equitable relief" as it appears in section 502(a)(3) of ERISA. This conclusion is supported by the rules of statutory interpretation, which dictate that where Congress uses language with "accumulated settled meaning," a court must assume that Congress intended to use that established meaning in the statute. The majority in Mertens chose to limit the meaning of equitable relief to its general definition, embracing only injunction, mandamus, and restitution. The true, settled meaning of the term "equitable relief" in the context of the common law of trusts, however, includes awards that make breach of trust victims whole, since traditional equity courts could award legal remedies to enforce a trust. Furthermore, in the common law of trusts, beneficiaries may recover money damages against third parties who knowingly participate in a fiduciary breach. Because Congress intended the courts to apply the established meaning of terms according to the common law of trusts, and because nonfiduciary liability for money damages in equity is entrenched firmly in trust law, it is clear that Congress intended to create this remedy under ERISA.

3. Underlying Purposes

The third factor of the Cort test is whether the proposed remedy would be consistent with the underlying purposes of the statute. ERISA's explicit underlying purpose is to protect the interests of participants and courts the power to develop substantive law." Id. (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).

243. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 157 (1985) (emphasizing that in analyzing questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery); see also supra note 52 and accompanying text (providing the text of section 502(a)(3)).


245. See Mertens, 113 S. Ct. at 2069; see Dobbs, supra note 29, §§ 2.1(1), at 48 (explaining the distinction between legal and equitable remedies).

246. See Mertens, 113 S. Ct. at 2068. The majority stated that equitable relief could refer to "whatever relief a court of equity is empowered to provide in the particular case at issue" and its meaning is "a question of interpretation." Id. at 2068-69.

247. Id. at 2074; see also supra notes 62-66 and accompanying text (discussing traditional trust law remedies against third parties).

248. See supra note 67 and accompanying text (demonstrating congressional intent to apply trust law principles to ERISA's fiduciary provisions).

249. See supra note 66 and accompanying text (demonstrating the availability of a money damages remedy against nonfiduciaries who knowingly participate in fiduciary breaches).

250. Cort v. Ash, 422 U.S. 66, 78 (1975); see supra notes 102-04 and accompanying text (applying the third Cort factor in the context of Russell).
beneficiaries in employee benefit plans. Despite the clear indications of this purpose in legislative history and case law, the majority in Mertens promptly dismissed the statute's purpose as "vague" and declared that ERISA's goal was to balance the interests of all parties concerned. In fact, the Court appeared to express a greater concern for nonfiduciaries who might be subject to higher insurance premiums as a result of greater liability than for the participants and beneficiaries who are the victims of a breach. The purpose of ERISA's enforcement provisions is to make participants and beneficiaries whole in the context of the common law of trusts. Under the common law, courts of equity held nonfiduciaries who knowingly participate in a fiduciary breach liable for compensatory money damages to make a beneficiary whole. In addition, other remedies may not be available where ERISA preempts state law. If money damages against nonfiduciaries are unavailable, participants and beneficiaries will have less protection than they had prior to ERISA's enactment, contravening ERISA's purpose to provide greater protection for these parties. Thus, appropriate equitable relief must include money damages against nonfiduciaries.

4. Appropriateness of a State Law Cause of Action

The final Cort factor examines whether it is more appropriate for a party to bring the proposed cause of action under state law rather than


252. Mertens, 113 S. Ct. at 2071.

253. Id. at 2072 (noting that greater nonfiduciary liability "would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans"); see also DOL Urges Overturn of Mertens; Says Ruling Will Hamper Enforcement, [July-Dec.] 20 Pens. & Ben. Rep. (BNA) No. 31, at 1638, 1639 (Aug. 2, 1993) [hereinafter DOL Urges Overturn of Mertens] (supporting Mertens by stating that "[i]f nonfiduciaries were exposed to unlimited liability, such potential exposure would lead to increased costs, which would ultimately be passed on to plan participants in the form of reduced benefits").

254. 29 U.S.C. § 1001(b) (1988); Russell, 473 U.S. at 157; see supra notes 9, 78 and accompanying text (discussing ERISA's purpose).

255. See Mertens, 113 S. Ct. at 2076 (White, J., dissenting); see supra notes 62-66 and accompanying text (discussing traditional trust law causes of action against third parties).

256. 29 U.S.C. § 1144(a) (1988) (stating that ERISA will "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); see also supra note 33 and accompanying text (discussing the disagreement among federal circuits as to whether ERISA preempts state malpractice claims).

257. Mertens, 113 S. Ct. at 2078 (White, J., dissenting); see supra notes 210-11 and accompanying text (explaining that a money damages remedy would provide participants and beneficiaries with the same protection under ERISA as they enjoyed under the common law of trusts).
Prior to ERISA's enactment, the states' common law of trusts governed causes of action for fiduciary breaches. ERISA's broad preemption provision, however, displaces all state laws relating to employee benefit plans, including relevant contract and tort actions. Because this preemption precludes other avenues to establish nonfiduciary liability for money damages, there is a greater need for a corresponding ERISA common law remedy. Thus, a denial of this remedy reduces the available protection and piece of mind for participants and beneficiaries. A cause of action against an ERISA nonfiduciary, therefore, is more appropriate under ERISA and its federal common law than under state law. If the Mertens Court had applied the four-prong Cort v. Ash analysis, the results would have indicated overwhelmingly that a private remedy of money damages against nonfiduciaries who knowingly participate in fiduciary breaches should be implied under ERISA.

B. Additional Policy Ramifications

In addition to the considerations illustrated in the Cort analysis, other policy grounds demonstrate that Mertens jeopardizes the security of retirement benefits for participants and beneficiaries. As a direct result of

258. Cort v. Ash, 422 U.S. 66, 78 (1975); see supra notes 105-06 and accompanying text (providing a discussion of the fourth Cort factor in Russell).

259. See supra notes 56-66 and accompanying text (discussing traditional trust law principles and remedies).

260. 29 U.S.C. § 1144(a) (1988) (stating that "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" are preempted). The Court has noted the "expansive sweep" of ERISA's preemption provision. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). In particular, the phrase "relate to" is given the most expansive meaning possible so that "a state law 'relate[s] to' a benefit plan . . . 'if it has a connection with or reference to such a plan.'" Dedeaux, 481 U.S. at 47 (alteration in original) (quoting Metropolitan Life, 471 U.S. at 739).

261. See Gibson v. Prudential Ins. Co., 915 F.2d 414, 416 (9th Cir. 1990) (holding that under ERISA, actions at state law are preempted because conduct in connection to the plan "relates to" the plan).

A state malpractice claim would be ineffective against an ERISA nonfiduciary if the suit depended upon proof that the nonfiduciary participated in an ERISA fiduciary breach. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990) (determining that ERISA preempted a suit for wrongful termination to avoid a benefit payment). Even if ERISA does not preempt in this context, state law would determine the nonfiduciary's liability, while federal law would determine the fiduciary's liability. Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 281 (2d Cir. 1992) (emphasizing that the "liability of nonfiduciaries would be assessed by varying state laws, while the conduct and liability of the fiduciary whom the third party is claimed to have knowingly assisted in breaching a duty would be governed by federal law"). This outcome would directly contradict Congress' intent to ensure that there is uniformity in the administration of employee benefit plans. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-10 (1987).

the *Mertens* decision, victims of fiduciary breaches are limited to seeking relief from fiduciaries.\(^{263}\) If the fiduciaries are insolvent or if they possess few valuable assets, they will be unable to provide complete relief to make the victims whole, leaving participants and beneficiaries to grapple with an unexpected financial strain.\(^{264}\) Ironically, this result is reminiscent of the problems employees encountered prior to the enactment of ERISA.\(^{265}\) It is inequitable to allow an innocent participant or beneficiary, rather than a knowing participant in the breach, to bear the burden of this unanticipated financial loss. Moreover, ERISA's broad provisions illustrate Congress' intent to deter statutory violations.\(^{266}\) In the absence

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\(^{263}\) See Brock v. Gerace, 635 F. Supp. 563, 569 (D.N.J. 1986) (noting that participants and beneficiaries would be denied full relief if they were barred from recovering from nonfiduciaries).

\(^{264}\) For example, Olena Berg, Assistant Labor Secretary for Pensions and Welfare Benefits stated that in one case, as a result of *Mertens*, "'benefit losses for claims totalling over $200,000 will fall on the shoulders of over three hundred people who thought they were covered by the arrangement.'" *DOL Urges Overturn of Mertens*, supra note 253, at 1638. Morton Klevan, Director of the Office of Policy and Legislative Analysis in the Department of Labor's Pension and Welfare Benefits Administration, stated that "'[f]iduciaries may have few assets, but fiduciaries very often, when they breach their duties, they don't do it themselves. They have help.'" *Labor Department to Back Bill on Lawsuits Against Non-Fiduciaries*, [July-Dec.] 20 Pens. & Ben. Rep. (BNA) No. 29, at 1526, 1526 (July 19, 1993) [hereinafter *Labor Department to Back Bill*].

\(^{265}\) Congress enacted ERISA because participants and beneficiaries were not receiving the benefits they expected. See 119 CONG. REC. 147 (daily ed. Jan. 4, 1973) ("All too often working men and women contribute to these pension plans only to find when they retire that the benefits they had been promised are denied them.") (statement of Sen. Ribicoff); see also Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 720 (1984) (emphasizing that Congress enacted ERISA "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits"), *superseded by statute as stated in* Long Island Oil Prods. Co. v. Local 553 Pension Fund, 775 F.2d 24 (2d Cir. 1985); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980) (stating that Congress intended that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it"); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir.) (explaining that ERISA's purpose is to ensure that "each participant know[s] exactly where he stands with respect to the plan"), *cert. denied*, 459 U.S. 1039 (1982); United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. Local 198 AFL-CIO Pension Plan v. Myers, 488 F. Supp. 704, 709 (M.D. La. 1980) (stating that ERISA is "designed to ensure that legitimate expectations of workers in receiving retirement benefits actually materialize"), *aff'd*, 645 F.2d 532 (5th Cir. 1981).

\(^{266}\) See S. REP. NO. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N., 4639, 4871 (explaining that Congress intended ERISA "to provide both the Secretary and participants with broad remedies for redressing or preventing violations of ERISA"); see also Nachman Corp., 446 U.S. at 360 (describing ERISA as a "comprehensive and reticulated statute"); Brock, 635 F. Supp. at 566 (emphasizing that "[i]ke other remedial legislation, ERISA should be given a liberal construction in order to carry out its purposes of protecting the employees' interests and preserving the integrity of plan assets"); Marshall v. Snyder, 430 F. Supp. 1224, 1231 (E.D.N.Y. 1977) (categorizing ERISA as a "comprehensive remedial statute"), *aff'd in part*, 572 F.2d 894, 901 (2d Cir. 1978).
of a risk of liability, nonfiduciaries will have a greater incentive to knowingly participate in fiduciary breaches to reap personal gain, or at the very least, they will not be as attentive to the existence of abuse and misconduct as it relates to these retirement plans.267

The Mertens decision also has had a substantial impact on the other two branches of government. The Department of Labor (Department) is deeply concerned that Mertens has hampered its efforts to seek full relief that would make ERISA benefit plans whole following a breach of fiduciary duty.268 For example, in Reich v. Rowe,269 the Department sought equitable relief in the form of an injunction against a nonfiduciary accountant, who advised a plan trustee as to how to evade state regulators, to prevent the nonfiduciary from performing such services in the future.270 The United States Court of Appeals for the First Circuit broadly

267. See Deborah A. Geier, Note, ERISA: Punitive Damages for Breach of Fiduciary Duty, 35 CASE. W. RES. L. REV. 743, 755 (1985) (explaining that “deterrence is most acute in the situation where the defendant tacitly determines that he will engage in wrongful conduct with the expectation of greater profits and run the risk of later paying compensation for the conduct” (quoting Lisa M. Broman, Comment, Punitive Damages: An Appeal for Deterrence, 61 NEB. L. REV. 651, 653 (1982))); see also DeRance, Inc. v. PaineWebber Inc., 872 F.2d 1312, 1328 (7th Cir. 1989) (stating that “[t]he most effective deterrent to an advisor’s breach of his duty out of self-interest or potential profit is to make the costs of such activity prohibitive”).

268. 139 CONG. REC. S9874 (daily ed. July 29, 1993) (“As a result of the Mertens case, the Department of Labor believes that approximately half of its enforcement efforts may be impaired.”) (statement of Sen. Metzenbaum). This is especially true with respect to cases arising from the demise of the Executive Life Insurance Company. Id. In this situation, employer-fiduciaries terminated their company pension plans and replaced them with Executive Life insurance annuities to pay out the workers’ pension benefits. 139 CONG. REC. S8530 (daily ed. July 1, 1993) (statement of Sen. Kennedy). The fiduciaries proceeded with the knowledge that junk bonds funded over 60% of Executive Life. Id. In 1991, Executive Life went bankrupt, and “[a]s a result, the beneficiaries have lost some of their pension benefits and they live month to month not knowing if they will be able to collect the full value of the pensions they were promised.” Id.

Morton Klevan, a Department of Labor official, stated that Mertens was problematic because

by saying that participants under [ERISA Section] 502(a)(3) and by analogy Department of Labor under [Section] 502(a)(5) could only sue under the language of appropriate and equitable relief, could only get restitution of profits of ill-gotten gains that the person being sued got but could not get make-whole relief, otherwise known as consequential damages, you would be faced with situations where the participants could not be made whole for losses.

Labor Department to Back Bill, supra note 264, at 1526 (alteration in original). Sherwin Kaplan, another Department of Labor official, stated that because Mertens suggested that ERISA be construed narrowly, the Department’s ERISA litigation has become “very, very difficult.” Labor Department Hampered By Mertens Ruling, Official Says, [Jan.-June] 21 Pens. & Ben. Rep. (BNA) No. 2, at 103, 103 (Jan. 10, 1994).

269. 20 F.3d 25 (1st Cir. 1994). The Secretary of Labor originally sought money damages, but following Mertens, the Secretary dropped this claim. Id. at 29.

270. Id.
applied the *Mertens* rationale and prevented a claim for equitable relief against the nonfiduciary accountant under section 502(a)(5).\(^{271}\) Although the *Mertens* opinion was primarily dicta, the trend toward strict statutory interpretation continues. In *Central Bank v. First Interstate Bank*,\(^{272}\) the Supreme Court addressed whether a private cause of action existed for aiding and abetting under section 10(b) of the Securities Act of 1934.\(^{273}\) As in *Mertens*, the Court focused on the express statutory language and stated that section 10(b) did not establish aiding and abetting liability directly or indirectly.\(^{274}\)

The Department has urged Congress to implement a legislative solution that will overturn the *Mertens* decision that has harshly narrowed the available remedies.\(^{275}\) The Department supported Senator Howard Metzenbaum's proposed amendment, attached to the Omnibus Reconciliation Act of 1993,\(^{276}\) seeking to overturn *Mertens*.\(^{277}\) Senator Metzenbaum, however, dropped the amendment from this bill, choosing instead to reintroduce the bill as a separate piece of legislation\(^ {278}\) and to hold hearings on the bill.\(^{279}\) As Congress addresses the dilemma created

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\(^{271}\) *Id.* at 31. The First Circuit concluded “that Congress did not intend for its grant of equitable relief in section 1132(a)(5) to authorize the present action against [a nonfiduciary].” *Id.*

\(^{272}\) 114 S. Ct. 1439 (1994).

\(^{273}\) *Id.* at 1443.

\(^{274}\) *Id.* at 1455. The Court stated that “[b]ecause the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).” *Id.* (emphasis added).

\(^{275}\) In a letter to Senator Edward Kennedy (D-Mass.), Secretary of Labor Robert Reich stated that *Mertens* “‘takes the trend [of narrowed remedies for plan participants and beneficiaries] a giant step further, and creates a need for immediate corrective legislation.’” *Non-Fiduciary Liability Amendment Dropped from Budget Reconciliation Bill, [Jan.-June] 20 Pens. & Ben. Rep. (BNA)* No. 26, at 1363, 1363 (June 28, 1993) [hereinafter *Non-Fiduciary Liability Amendment Dropped*]; see 139 CONG. REC. S8530 (daily ed. July 1, 1993) (“[B]ecause of a June 1 decision of the Supreme Court in *Mertens* versus Hewitt, the Labor and Human Resources Committee, at the request of the Department of Labor, voted ... to address the problems created by the Mertens decision as quickly and as cleanly as possible.”) (statement of Sen. Kennedy).


\(^{277}\) The amendment included a provision assessing pension and health plan service professionals a minimum penalty of $1,000 for breaches of fiduciary duty, a provision imposing a five percent civil penalty on recovery made by private parties, and a provision creating a retroactive cause of action for any pending case or case brought under the statute of limitations. *Non-Fiduciary Liability Amendment Dropped, supra* note 274, at 1363.


\(^{279}\) *Non-Fiduciary Liability Amendment Dropped, supra* note 275, at 1363.
by *Mertens*, it may use this issue to stimulate additional pension reform.\textsuperscript{280}

IV. CONCLUSION

Congress enacted ERISA to protect the pension benefits of a growing number of retirees from those who misappropriate pension assets for personal gain. Fiduciaries and nonfiduciaries of pension benefit plans who knowingly participate in fiduciary breaches are among the exploiters. If participants and beneficiaries are to receive complete relief from such breaches, a private cause of action against nonfiduciaries for damages must be available. Unfortunately, in *Mertens*, the Court's narrow statutory construction effectively precludes nonfiduciary liability for money damages. The Court's restricted focus has obscured its broader perspective of ERISA's fundamental purpose. As a result, the present form of ERISA provides participants and beneficiaries who depend upon their employee benefit plans for their financial security with *less* safeguards than they would have had under trust law prior to ERISA's enactment. Because the Court refuses to find a private cause of action against nonfiduciaries, Congress must remedy this illogical and inequitable decision with a statutory measure that expressly provides a private cause of action against nonfiduciaries under ERISA.

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