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ARTICLE: ERISA Remedies: Chimera or Congressional Compromise?

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LEXISNEXIS SUMMARY:
... Senator Williams, a cosponsor of the Employee Retirement Income Security Act of 1974 (ERISA), made the foregoing statement in 1974 when he introduced the conference report on ERISA to the Senate. ... Part Four of Title I contains ERISA's provisions regarding the scope of fiduciary responsibility. ... The petitioners contended that requiring a participant in a fiduciary breach to make the plan whole for any losses resulting from the breach constitutes appropriate equitable relief. ... However, the majority determined that the context of the provision supported the equally plausible meaning that "equitable relief" included only "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." ... But another commentator has argued "the award of benefits differs from equitable restitution, which might merely refund the beneficiary's past contributions to the pension plan. ... Similarly, while some courts have taken liberal views of what constitutes equitable restitution, the current interpretation of ERISA's remedial provisions leaves numerous plaintiffs who successfully allege fiduciary violations without any remedy whatsoever. ... However, compensatory and punitive damage awards should be capped so as not to discourage benefit plan sponsorship or fiduciary service unduly. ...

TEXT:
[*1] [*2]

"A pension reform law is now a reality because of the hardship, deprivation and inequity suffered by American working people. . . . The discipline of law will enable this and succeeding generations of workers to face their retirement period with greater confidence and greater security . . . ." n1

Introduction

Senator Williams, a cosponsor of the Employee Retirement Income Security Act of 1974 n2 (ERISA), made the foregoing statement in 1974 when he introduced the conference report on ERISA to the Senate. While the Supreme Court has given lip service to "ERISA's broadly protective purposes," n3 a number of its decisions have narrowly construed the remedies available to ERISA plaintiffs. n4 The Court extended this line of cases in 1993 with its decision in Mertens v. Hewitt Associates. n5 As a result of the Mertens decision, many plaintiffs who successfully allege an ERISA violation will face disturbing implications concerning their potential remedies.

Although Mertens involved a fiduciary-type claim, the effects of Mertens will manifest themselves in the context of other types of substantive ERISA claims as well, including suits alleging violations of Section 510. n6 Section 510 prohibits specified actions, such as termination of employment, taken against employees n7 or their beneficiaries n8 in retaliation for exercising benefit rights, or in order to prevent employees n9 from becoming entitled **[*3]** to benefits. As employers attempt to avoid the rising costs of providing employee benefits, this provision affords increasingly important protections to those covered by benefit plans. n10

In addition to specific regulatory provisions such as those found in Section 510, ERISA imposes upon plan sponsers a range of fiduciary requirements. n11 ERISA's provisions broadly define "fiduciary" for purposes of ERISA. n12 However, neither ERISA's fiduciary provisions nor Section 510 is self-enforcing; instead, plaintiffs typically must seek enforcement under ERISA's general remedial provisions. Those remedial provisions, found in ERISA Section 502, n13 have generated substantial controversy and have garnered repeated attention from the Supreme Court. In its 1993 decision in Mertens, the Supreme Court narrowly interpreted Section 502(a)(3), n14 an important subsection of Section 502. n15 Although the plaintiffs in Mertens sought relief for the defendant's knowing participation in a breach of ERISA's fiduciary duty provisions, n16 Section 502(a)(3) also supplies the remedies for many Section 510 suits.

For some years after ERISA's enactment, employee benefit concerns received far less attention than other areas of employment law, such as sexual harassment and employment discrimination. However, with more than $ 3.2 trillion invested in private pension plans n17 and the value of health care benefits increasing, it should not be surprising that benefits claims have multiplied in recent years. One indication of the court system's frustration with the volume and complexity of ERISA litigation came in 1993 when Justice Byron White complained that the members of the Supreme Court have "ERISA cases coming out of their ears." n18 A significant number of these cases allege violations of either Section 510 n19 or ERISA's fiduciary provisions. n20

This Article concentrates on the scope of relief available in ERISA fiduciary and Section 510 claims after Mertens. To provide a basis for the remedial discussion, Part I explains the application and purpose of Section 510. The Part also examines the parameters of ERISA's fiduciary **[*4]** provisions. Part II describes ERISA's remedial framework and discusses the development of ERISA's remedial jurisprudence for violations of Section 510 and ERISA's fiduciary provisions prior to Mertens. Part II also discusses the Mertens decision in some detail. Next, Part III analyzes the remedies available after Mertens to a plaintiff who otherwise would prevail in a Section 510 or fiduciary action. Part III establishes that Mertens created serious deficiencies in ERISA's remedial scheme. The Part then describes similarities between the ERISA deficiencies and problems that arose as a result of Supreme Court jurisprudence under Title VII of the Civil Rights Act of 1964 n21 (Title VII). Congress enacted the Civil Rights Act of 1991 n22 (CRA) to reverse numerous Court decisions that narrowly construed Title VII and made recovery difficult for victims of employment discrimination. n23

This Article concludes by advocating the amendment of ERISA. Specifically, this Article suggests that, unless the courts permit back pay awards to plaintiffs who lose employment due to a violation of ERISA, Congress should amend ERISA to permit such awards. In addition, the Article supports statutory amendments to permit recovery of other limited compensatory and, in egregious cases, punitive damages. Such legislation would ensure adequate compensation for victims of ERISA violations and provide proper incentives for ERISA compliance. Without assurance of adequate remedies, the hope of "greater confidence and greater security" n24 for retirement benefits may become another chimera n25 enacted by an optimistic, but ultimately unsuccessful, Congress.

I. Section 510 and ERISA's Fiduciary Provisions

Congress enacted ERISA in 1974 as the first comprehensive federal statute governing private employee benefit plans. n26 President Gerald R. **[*5]** Ford signed the final version on Labor Day, 1974 after more than a decade of hearings and arguments over ERISA's complex provisions. n27 According to its declaration of policy, Congress intended ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries." n28 Numerous references in the legislative history indicate congressional concern with the existence of adequate remedies to ensure appropriate enforcement of ERISA's substantive provisions. n29 Even the Supreme Court has recognized "ERISA's broadly protective purposes. . . ." n30

While many dread confronting ERISA's "comprehensive and reticulated" n31 provisions, this Article focuses primarily on Section 510, ERISA's fiduciary duty requirements, and its basic remedial concepts, all of which are contained in the first of ERISA's four titles. n32 Title I also contains definitions and establishes requirements for reporting and disclosure, n33 participation and vesting, n34 funding, n35 plan administration, n36 and continuation coverage under group health plans. n37 While a **[*6]** thorough review of ERISA's provisions is unnecessary, the following Sections briefly describe the parameters of Section 510 and the reach of ERISA fiduciary law. As in many other areas of ERISA, n38 the courts continue to confront a legion of issues in determining the scope and application of these substantive ERISA provisions; a general understanding of these protections informs the subsequent discussion of remedial deficiencies.

A. Section 510

Section 510 states, in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or ERISA] [the Exercise Clause], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA] [the Interference Clause]. n39

Most Section 510 claims are brought by employees against their employers, and this Article focuses on Section 510 claims in that context. However, the statutory prohibition runs against "any person," and ERISA broadly defines the term "person." n40 As a result, plaintiffs may bring claims against entities other than employers, including insurance companies. n41

To establish a statutory violation, a plaintiff bears the burden of proving the defendant acted with the specific intent to interfere with benefit eligibility or to retaliate for the exercise of benefit rights. n42 In determining the existence of specific intent, courts generally utilize the concepts for shifting burdens of production and persuasion that developed under Title VII jurisprudence. n43 To demonstrate a prima facie case of retaliation, a plaintiff typically must show: (i) the plaintiff's actions constituted a protected activity; (ii) the employer's retaliatory action occurred after the plaintiff engaged in the protected activity; and (iii) some causal link between the protected activity and the employer's action. n44 Section 510 does not protect an employee from an employer's **[*7]** action which disproportionately affects the employee so long as that action at least nominally extends to all employees. n45 On the other hand, Section 510 arguably reaches broad-based employment decisions when employers intend to interfere with the attainment of employee benefits. n46

The specific intent requirement balances the need to protect the employment relationship with the preservation of employers' general rights to control their employment decisions and to operate in an efficient and profitable manner. As such, this requirement has served as a significant limitation on lawsuits, and numerous defendants have obtained summary judgment against Section 510 claims on that basis. n47 The specific intent requirement also protects against complete federalization of the state common law employment-at-will doctrine by ensuring that ERISA does not reach employment actions that unintentionally, but effectively, prevent benefit plan participants from earning additional benefits. n48

While the specific intent requirement provides important limitations, ERISA's legislative history reveals that its drafters expected Section 510 to play a key role in guaranteeing employee benefit rights. In fact, the conference report on ERISA included protection against interference as one of the "fourteen basic rights" which were "at the heart of pension reform and provided much-needed and long-denied protections." n49 The significant body of litigation spawned by Section 510 n50 confirms its importance in protecting benefit expectations. Generally, the jurisprudence under Section 510 follows separate strands depending on whether the defendant's action allegedly violated the Exercise Clause or the Interference Clause.

1. Exercise Clause

To state a valid claim under the Exercise Clause, a claimant must prove the defendant took a prohibited action against the claimant in retaliation for the exercise of ERISA rights. n51 The most obvious application occurs in situations in which an employer fires a benefit plan **[*8]** participant who makes benefit claims or challenges benefit denials. n52 However, the Exercise Clause also prohibits an employer from firing an employee in retaliation for a benefit claim filed by other plan beneficiaries, such as the employee's spouse. n53 In addition, the Exercise Clause protects against constructive discharge. n54

The Eleventh Circuit Court of Appeals has determined that the Exercise Clause prohibits employers from converting their employees to independent contractor status in order to prevent the individuals from participating in ERISA benefit plans. In Seaman v. Arvida Realty Sales, Arvida Realty Sales (Arvida) terminated the employment of all of its sales representatives, but offered those same people positions as independent contractors. n55 Ms. Seaman alleged Arvida had undertaken this scheme to prevent the employees from continuing to obtain benefits under Arvida's health care and 401(k) plans. n56 The Eleventh Circuit decided that such conduct violates Section 510. n57

Because Section 510 only covers a participant or beneficiary, however, someone who is initially and appropriately classified as an independent contractor cannot rely upon Section 510 to challenge the classification as an impermissible attempt to deprive him of participation in employee benefit plans. Nor does Section 510 generally protect participants from plan modifications. n58 The right of employers to alter benefit plans is an important corollary of their right not to sponsor a plan at all and, largely, to determine the benefit levels of any plan they choose to offer. n59

Furthermore, a plaintiff cannot invoke the Exercise Clause unless **[*9]** ERISA protects the benefit claims at issue or the claims somehow relate to the employer's benefit plan. For example, an employer suggested to one of its employees that he file a "friendly lawsuit" to determine the legality of the employer's termination of specific medical benefits utilized by the employee's son. n60 The employer subsequently fired the employee for joining with his claim for benefits a state law claim seeking compensatory and punitive damages for intentional infliction of emotional distress. n61 The Exercise Clause did not protect the employee because the employer based its decision to discharge the employee upon the state law claims for intentional infliction of emotional distress, not upon the ERISA claim for benefits. n62

2. Interference Clause

ERISA precludes an employer from reducing an employee's accrued benefit. n63 Because benefit plans are not liable for unvested benefits, one alternative way for employers to avoid benefit costs is to terminate employees prior to the date the employees' benefits vest. According to the Supreme Court, the prototypical Interference Clause violation occurs when an employer terminates an employee shortly before the employee's pension benefits vest and the employer's purpose is to prevent the vesting. n64 In Ingersoll-Rand Co. v. McClendon, Ingersoll-Rand Co. fired McClendon after nine years and eight months of employment. n65 As permitted by the vesting rules in effect at the time, the Ingersoll-Rand Co. plan contained a ten-year cliff vesting provision. n66 The number of similar cases indicates that Section 510 provides important protections against this type of employer action. n67

However, employers may interfere with employees' attainment of **[*10]** benefits in other contexts. For example, some pension plans provide enhanced retirement benefits for participants meeting certain minimum age and service requirements. n68 Sometimes enhanced benefits are available only if the participant meets the age and service criteria and a permanent layoff, plant closing, or physical disability occurs. n69 In any case, the opportunity to continue working until attainment of the plan's minimum age and years of service becomes critical to an employee hoping to become eligible for enhanced benefits. n70 Economic research shows a significant spike in the rate of pension accruals at the point an employee becomes entitled to an enhanced benefit. n71 Therefore, terminating longtime employees to prevent them from gaining eligibility for enhanced benefits can generate significant cost savings for employers. Many courts agree that Section 510 protects participants who are vested in basic benefits but who have not yet become eligible for enhanced benefits. n72

The most notable example of an employer attempting to avoid the costs of enhanced benefits occurred when Continental Can implemented a secret computer system known as the "BELL" system. n73 BELL was a reverse acronym for "Lowest Level of Employee Benefits" or "Let's Limit Employee Benefits." n74 In essence, the BELL system identified, by plant, the number of employees already eligible for enhanced benefits and fixed production at each plant at a level such that those individuals would remain employed. n75 This action permitted Continental Can to avoid the high **[*11]** benefit costs associated with the termination of individuals eligible for enhanced benefits. Similarly, the BELL system identified employees who were close to becoming eligible for enhanced benefits. n76 Continental Can permanently laid off those employees to prevent them from obtaining eligibility for the costly enhanced benefits. n77 To make matters worse, during the time it was utilizing the BELL system, Continental Can agreed with the United Steel Workers of America to increase the level of plant closing benefits. n78 Of course, the BELL system ensured Continental Can would never actually pay any of those increased benefits. After traversing the court system for approximately ten years, the Continental Can litigants settled in 1992 for $ 415 million. n79

Despite some disagreement, the trend is to protect the right of participants to earn additional accruals as well as their right to become vested in benefits. n80 By continuing to work for the same employer, an employee typically accrues additional pension benefits. In a defined benefit plan, n81 the nature of those accruals, combined with the effects of inflation, means that employees tend to accrue significant portions of their plan benefits in the final years of their employment. n82 In addition, as employees approach retirement age, the accruals become even more costly to employers because of the reduced time for investment growth of the employer's plan contributions. As in the case of entitlement to enhanced benefits, n83 economic research establishes the presence of a spike in the rate of pension accruals at the point an employee reaches normal retirement age. n84 Thus, as with enhanced benefits, Section 510's protection of the right to earn accruals is important to employees, but costly to employers. In any case, a plaintiff cannot state a cause of action **[*12]** under the Interference Clause if the plaintiff has attained the maximum level of benefits offered under the employer's plan. n85

ERISA jurisprudence consistently extends the protections of Section 510 to plaintiffs who lose their employment due to wrongful action by their employers. n86 Employees have been less successful alleging interference in suits in which the employer action does not result in a termination of employment. Some circuits have decided that no Section 510 violation occurs unless the employment relationship is interrupted. n87 Other cases indicate a Section 510 claim might survive even if the employment relationship remains intact, so long as the employee suffers another type of loss as a result of the employer's actions. n88 This issue has special relevance for situations in which employers make changes to a plan to avoid the known benefit costs associated with a specific employee. n89

Recently, plaintiffs have attempted to utilize the Interference and Exercise Clauses to challenge reductions in their medical insurance plans. For example, in McGann v. H & H Music Co., the employer amended its health insurance plan to reduce lifetime benefits from $ 1 million to $ 5,000 for expenses related to AIDS, shortly after learning that its employee, McGann, had contracted AIDS. n90 The Fifth Circuit accepted the employer's explanation that, because the AIDS cap applied to all employees who might file AIDS-related claims, its motivation was to reduce the costs of its health care plan, not to target McGann impermissibly. n91 The court found **[*13]** this sufficient to distinguish the case from Vogel v. Independence Federal Savings Bank, n92 in which a district court in Maryland determined that an employer would violate Section 510 by excluding one individual from coverage under its health insurance plan. n93 In addition, the McGann court recognized that ERISA permits an employer to amend its benefit plans so long as the employer has not contractually bound itself to offering the plans and the amendments comply with ERISA's amendment procedures. n94

A suit on behalf of a former employee experienced more success in Doe v. Kohn, Nast & Graf in which an attorney alleged his former law firm violated Section 510 n95 by discharging him, upon learning he had contracted HIV. n96 The firm apparently discovered Doe's HIV positive condition when Doe's physician sent him a letter at the firm on letterhead referring to "AIDS Services." n97 Doe was close to becoming eligible to participate in the employer's disability program at the time of his termination. n98 Utilizing the burden-shifting jurisprudence developed under Title VII, the court found that the proximity in time between receipt of the letter and certain employer correspondence related to Doe's disability benefits constituted sufficient evidence of a specific intent to interfere with Doe's rights to participate in the disability program necessary for Doe's case to go to trial. n99

In sum, legislative history confirms that the 1974 Congress viewed Section 510 as a key protection against employer actions taken to avoid ERISA's substantive requirements. The Exercise Clause guarantees employees the right to enforce benefit promises without fear of retaliation. The Interference Clause prevents employers from firing employees on the eve of attaining benefit eligibility. Both Clauses have been the subject of extensive litigation. While the interpretations are not without controversy, generally the courts have construed those clauses broadly enough to protect employees and their beneficiaries from actions taken to deny a **[*14]** variety of benefit expectations. However, the substantive protections will be effective only to the extent ERISA provides an appropriate remedial scheme to address and deter violations. Since the same remedial provisions that apply to Section 510 also determine the availability of relief for many fiduciary violations, the next Section examines ERISA's fiduciary provisions.

B. ERISA's Fiduciary Provisions

ERISA broadly defines the term "fiduciary" to include individuals who have discretion over plan management or plan administration. n100 Also, anyone who exercises authority over plan assets is a fiduciary. n101 Although ERISA does not require a particular number of fiduciaries per plan, each plan must designate a plan administrator who automatically becomes a "named fiduciary." n102

People who exercise discretionary authority over the specified aspects of an ERISA plan become ERISA fiduciaries irrespective of their titles, attempts to evade responsibility, or the existence of an arms-length relationship with the plan sponsor. According to the Supreme Court, "any discretionary authority or control" n103 confers fiduciary status upon the individual or entity possessing that discretion. n104 For example, actual control over the administration of an ERISA plan results in fiduciary status. n105 Generally, even an individual with the power to select plan fiduciaries becomes a fiduciary because of the discretion involved in the selection. n106

In reliance upon the statute and legislative history, n107 the jurisprudence applies a broad, functional test in determining one's status as an ERISA fiduciary. n108 Thus, individuals who provide investment advice in return for compensation are fiduciaries. n109 And, people who undertake **[*15]** certain plan functions, for example members of plan investment committees, automatically become ERISA fiduciaries. n110

The broad, functional test also means that the definition and theory of an ERISA fiduciary varies significantly from the "unitary" definition of trusteeship found under traditional trust law. n111 Whereas trust law historically contemplated the existence of a single fiduciary for each trust, or at most a few fiduciaries who shared all the powers of the trusteeship, ERISA favors the dispersion of trustee power and encourages delegation of those powers. n112 Professors Langbein and Wolk argue that these ERISA modifications to the traditional definition of a trustee appropriately recognize the size n113 and complexity n114 of modern benefit plans. n115

Limitations do exist, however, on the reach of ERISA's fiduciary definition. The statute explicitly confers fiduciary status on a person only "to the extent" n116 the individual undertakes one of the defined fiduciary functions. Thus, for example, though members of a company's board of directors become ERISA fiduciaries through their authority to appoint and retain plan fiduciaries, ERISA limits the scope of the directors' fiduciary duties to that single function of appointing and determining the retention of plan fiduciaries. n117 Similarly, while a plan sponsor who appoints a plan administrator becomes an ERISA fiduciary for the selection of the plan administrator, he does not automatically become a fiduciary for the actual administration of the plan. n118 ERISA views the plan administrator as the fiduciary responsible for administration. n119

Numerous other specific issues regarding ERISA's definition of fiduciary status continue to occupy commentators. n120 The appropriate **[*16]** sweep of fiduciary status in the context of health care plans, particularly in the area of managed care, is beginning to prove exceptionally nettlesome. n121 As managed care organizations attempt to reduce the spiraling cost of health care, they sometimes undertake cost-saving measures which may be at odds with the best interests of individual plan participants. For example, a managed care organization may refuse to pre-approve payment of medical treatment which it views as being costly and having a low likelihood of success. n122 When a plan participant personally pays for the treatment or suffers health consequences due to a denial of treatment, the managed care organization may face a claim that it violated ERISA's exclusive benefit rule n123 by placing considerations of the financial status of the plan ahead of the well-being of the plan participant. n124 Current jurisprudence views medical service providers or third party administrators who receive the discretion to make final claims determinations as ERISA fiduciaries. n125 In contrast, if an entity possesses only the power to administer claims, without the power to interpret plan ambiguities, the courts generally agree that such an entity is not an ERISA fiduciary. n126

In the most recent Supreme Court case to address the question of who owes a fiduciary obligation to plan participants and beneficiaries, a pension plan trustee sued the John Hancock Mutual Life Insurance **[*17]** Company (Hancock) for breach of fiduciary duty. n127 The pension plan contracted with Hancock to provide annuities to individual retirees. n128 However, in accordance with the contract, Hancock held plan money in Hancock's general corporate assets prior to converting portions of the funds to individual annuities. n129 The plan trustee alleged the moneys were "plan assets" during the time Hancock held the funds in its general corporate accounts, and thus, Hancock owed a fiduciary duty to plan participants and beneficiaries. n130

Hancock relied upon an ERISA provision exempting plan assets invested in an insurance contract that provides for guaranteed investments n131 and a favorable Department of Labor (DOL) interpretation n132 to argue it was not an ERISA fiduciary. n133 In a decision which purportedly surprised the insurance industry n134 and resulted in numerous calls for administrative and legislative action, n135 the Supreme Court resolved a split in the circuits n136 and subjected Hancock to ERISA's fiduciary requirements because of contractual limitations on the guaranteed rates. n137 The DOL subsequently proposed certain class exemptions to reverse retroactively the effect of the Supreme Court's decision. n138

Of course, once one becomes an ERISA fiduciary, the next question is **[*18]** to determine the extent of fiduciary obligations owed. Part Four of Title I contains ERISA's provisions regarding the scope of fiduciary responsibility. n139 These provisions apply, with very limited exceptions, to every private employee benefit plan. n140 ERISA Section 404 sets forth the basic duties of a fiduciary. An ERISA fiduciary must act in accordance with a "prudent man" standard. n141 ERISA also requires fiduciaries to diversify plan investments and to act in accordance with plan documents. n142 Finally, in what has come to be known as the "Exclusive Benefit Rule," fiduciaries must act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." n143

The legislative history surrounding the enactment of Section 404 evinces a congressional intent that, in contrast to its definitional provision which departs from traditional trust law, n144 ERISA's fiduciary standards be informed by traditional notions of trust law. n145 In fact, numerous courts and commentators have recognized that Congress closely patterned the "prudent man" requirement, for example, after the established common law "prudence" standard from trust law. n146 However, Congress did not intend for ERISA fiduciary jurisprudence to develop in a vacuum. Again looking to the "prudent man" requirement, the underlying concern of Congress was that "courts interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by ERISA." n147 In accordance with congressional intent and the extensive use of trusts in employee benefit plans, n148 fiduciary jurisprudence frequently recognizes **[*19]** the responsibility of the courts to fashion appropriate common law under ERISA. n149 And, as in the case of Section 510 claims, n150 substantive provisions lacking adequate enforcement opportunities provide only an illusion of protection. For this reason, the next Part turns to ERISA's remedial scheme.

II. ERISA Remedies and the Mertens Decision

For enforcement, Section 510 explicitly cross-references ERISA Section 502. Fiduciary cases also rely upon the enforcement provisions in Section 502. As a result of its multiple purposes, which extend beyond these contexts, Section 502 provides a variety of civil remedies. n151 The availability of any specific category of relief depends upon the nature of the claim raised and the status of the plaintiff. A number of gaps exist in those enforcement provisions and the legislative history is replete with evidence demonstrating that Congress intended the development of a federal common law to supplement ERISA. n152 However, the lower courts have developed a pattern in dealing with claims seeking broad interpretations of Section 502. First, the courts cite the Supreme Court's statement in Massachusetts Mutual Life Insurance Co. v. Russell, n153 that Congress carefully drafted Section 502 to provide a systematic remedial scheme. Next, feeling constrained by the view that Section 502's precisely developed provisions should be enforced as written, the courts refuse to permit remedies not explicitly authorized by Section 502. n154 **[*20]**

A. The Statutory Scheme

For purposes of a Section 510 claim, the most relevant portions of Section 502 are subsections (a)(1) and (a)(3). The subsections provide:

(a) A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section [regarding information and disclosure violations], 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;

. . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan;

. . . . n155

The same subsections apply to fiduciary claims. However, fiduciary claimants also may look to Section 502(a)(2), which permits suits seeking relief in conjunction with Section 409. n156 Section 409 establishes specific liability for the breach of ERISA's fiduciary provisions, requiring a breaching fiduciary to reimburse the plan for any losses caused by the fiduciary's breach and to repay any gains wrongfully received by the fiduciary. n157 The statute also subjects fiduciaries to "other equitable or remedial relief as the court may deem appropriate." n158

Federal courts have exclusive jurisdiction over all remedial actions permitted by Section 502 except those brought under Section 502(a)(1)(B) and Section 502(a)(7); there, federal jurisdiction is concurrent with the state court systems. n159 ERISA permits an award of attorney's fees and costs, at the discretion of the court, in all actions. n160 Other subsections of Section 502 address details such as venue for suits against the DOL, n161 special penalties for certain types of prohibited **[*21]** transactions, n162 and offsets for duplicate penalties which may be assessed under the Internal Revenue Code. n163

B. ERISA Remedial Jurisprudence Prior to Mertens

Because Section 510 and ERISA's fiduciary provisions have been the subject of substantial litigation, a significant body of remedial jurisprudence has developed. This Section traces the historical development of that jurisprudence. It pays special attention to the scope of remedies permitted under Section 502(a)(3), the subsection at issue in Mertens, but also provides necessary context by delving into other remedial provisions and controversies.

1. Section 510 Remedial Jurisprudence

Because Sections 510 and 502 both are found in Title I of ERISA, Section 502(a)(3)'s grant of a cause of action for a violation of "any provision of this title" n164 provides an obvious basis for a Section 510 suit. Subsection (A) of Section 502(a)(3) limits relief to injunctive relief. In contrast, subsection (B) offers a wider variety of remedies by permitting "other appropriate equitable relief." n165 Some early Section 510 commentators relied upon the broad remedial objectives evidenced in ERISA's legislative history to advocate a liberal interpretation of this phrase. They suggested that the reference to "equitable relief" permitted all categories of relief, including monetary relief, that could be awarded by courts of equity. n166

The commentators' arguments appear to have swayed some courts regarding the scope of "equitable relief." Those courts cited ERISA's remedial purposes and the legislative history, which indicated Congress intended to provide "the full range of legal and equitable remedies available in both state and federal courts." n167 Proceeding on those authorities, plaintiffs were successful in obtaining a variety of remedies. For example, courts indicated that a plaintiff whose employment had been terminated in violation of Section 510 could recover back pay, n168 reinstatement, n169 and front pay. n170 They also permitted reinstatement of **[*22]** lost benefits n171 and prejudgment interest. n172 A few district courts even went so far as to state that punitive damages would be available in appropriate cases--generally thought to be instances in which the employer's action was egregious, flagrant, or malicious. n173

Other courts construed the scope of relief permitted by Section 502(a)(3)(B) far more narrowly. These courts read the statute's reference to "equitable relief" as constraining available recoveries. For example, the Ninth Circuit Court of Appeals rejected a plaintiff's request for extracontractual damages, stating, "It appears that Congress used the word 'equitable' to mean what it usually means--injunctive or declaratory relief." n174 And no circuit court has ever upheld an award of punitive damages under that Section. n175

Instead of resolving the controversy, the Supreme Court added to the confusion with its unanimous opinion in Ingersoll-Rand Co. v. McClendon. n176 McClendon brought a state common law claim for unlawful discharge after Ingersoll-Rand Co. allegedly fired him to prevent him from obtaining vested benefits under the company's pension plan. n177 As relief, McClendon requested "'lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.'" n178 In a unique turn of affairs, special regulations which apply to terminated participants meant McClendon had vested in the company pension plan, and the issue for resolution by the Supreme Court was the pre-emptive effect of Section 510. n179 The Court determined that the direct conflict between the provisions of the state common law and the federal prohibitions in Section 510 meant that the state common law would be pre-empted even in the absence of ERISA's broad pre-emption clause. n180 Instead of stopping there though, the opinion went on to state: "There is no basis in section 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' It is clear that the relief requested here is well within **[*23]** the power of federal courts to provide." n181

Some lower courts, apparently applying the plain meaning approach, of which the Supreme Court itself has become so fond, took the Court quite literally and concluded that Section 502(a)(3) must permit all categories of damages sought by the Ingersoll-Rand plaintiff, including "extracontractual, even punitive, damages." n182 In contrast, however, other courts refused to construe the Ingersoll-Rand opinion quite so literally. Under the latter view, the Ingersoll-Rand decision does not address the availability of specific types of relief. Instead, at best, the Court's statement simply acknowledges that ERISA provides relief for actions, such as those brought under Section 510, seeking other than the recovery of benefits. n183 Of course, in what the literal-minded courts probably would view as a complete reversal of statutory interpretation, the Mertens decision may have eliminated even the opportunity to recover lost benefits. n184

2. Fiduciary Remedial Jurisprudence

Relying upon Section 409's broad language, courts have awarded a wide variety of remedies to successful plaintiffs in fiduciary duty cases. Courts have forced fiduciaries to repay salaries received for provision of plan services, n185 held them personally liable for failure to comply with a plan's investment guidelines, n186 and offset benefits the fiduciaries would have received from the plan in the absence of their breach of duty against the damages caused by the fiduciary violations. n187 In addition, courts have ordered the removal of trustees, n188 and in ERISA's version of the death sentence, even prohibited a professional trustee from serving as a plan trustee for any other plan. n189

One continuing controversy in the arena of remedial jurisprudence has been the question of who constitutes an appropriate plaintiff in fiduciary litigation. Here we begin to see conflicts between ERISA's complex provisions. For example, Section 409 confers on plans the right to recover for fiduciary breaches. n190 Section 502(a)(2), however, does not **[*24]** include plans among those entitled to bring a lawsuit to enforce ERISA's fiduciary provisions. n191 In another example of the narrow construction of Section 502 in ERISA jurisprudence, all but one of the circuits to address the issue have determined that neither plans nor employers who sponsor plans have the right to sue for fiduciary violations, n192 unless they themselves are fiduciaries. n193 Instead they must rely upon other interested parties, such as participants, fiduciaries, or the DOL, to pursue ERISA violations, even though the employer or plan may bear the financial burden created by the fiduciary violation and would thus have the strongest economic reason to pursue litigation.

Not only are there questions of who ERISA permits to sue for fiduciary violations, there are questions of who may recover. In Massachusetts Mutual Life Insurance Co. v. Russell, the Supreme Court determined that Section 409 and Section 502(a)(2) do not permit individual claimants to recover extracontractual damages on their own behalf. n194 Instead, defendants must pay any awards directly to the appropriate ERISA plan. n195 Once one combines the effect of the Massachusetts Mutual decision with the restriction on the right of plans to bring suits, one discovers that jurisprudence prohibits suits for fiduciary violations by the only entity which it permits to receive damages as a result **[*25]** of those violations. Partially due to this anomaly, some circuits now permit individuals to bring fiduciary suits for recovery on their own behalf so long as those suits are grounded in ERISA Section 502(a)(3). n196 In fact, the DOL has argued that the Supreme Court decision in Mertens v. Hewitt Associates n197 mandates such a conclusion. n198

Prior to Mertens, the circuits were split over the extent of recovery available under Section 502(a)(3). The Sixth Circuit cited precedent regarding the construction of "broad generalized language" n199 in a remedial statute to support its conclusion that Section 502(a)(3) permits a "broad range of remedies." n200 Some circuits permitted the use of a constructive trust, as traditionally available in trust law, in cases of fiduciary violations. n201 However, those same circuits otherwise prohibited the recovery of monetary awards. n202 Other circuits also rejected claims for compensatory damages as being inconsistent with the statute's provision only for equitable recoveries. n203

A number of other issues regarding remedies in fiduciary cases continue to haunt the courts, especially the extent to which traditional principles of trust law inform these remedies. Trust law, for example, provides a number of opportunities for defendants to obtain contribu- **[*26]** tion. n204 ERISA, however, does not explicitly provide for contribution among fiduciaries, and the potential existence of a valid claim for contribution has troubled both the courts n205 and commentators. n206

Commentators n207 and the courts n208 also have addressed the question of whether nonfiduciaries who take part in fiduciary breaches should be liable under ERISA. While nonfiduciary liability was a critical issue in Mertens, as the next Section discusses, the Supreme Court granted certiorari on other grounds. n209 However, dicta in the Mertens decision indicates that, unlike the practice in traditional trust law, a majority of the Court would insulate nonfiduciaries from liability. n210 On this basis, many, though not all, court decisions subsequent to Mertens have dismissed claims against nonfiduciaries. n211

C. The Mertens Decision

In its 1993 decision in Mertens v. Hewitt Associates n212 the Supreme Court clarified the types of remedies available under Section 502(a)(3). The saga began when Kaiser Steel Corporation (Kaiser) phased out its steel operations and left the related pension plan drastically underfunded. n213 Due to the insufficiency of plan assets to pay promised benefits and **[*27]** Kaiser's financial inability to fund the plan properly, the Pension Benefit Guaranty Corporation n214 (PBGC) used its authority under ERISA to terminate the pension plan. n215 The PBGC benefit guarantees then applied to the plan participants who received their future benefits directly from the PBGC. n216 However, many of the Mertens petitioners, a class consisting of Kaiser retirees, had elected to take early retirement, and the enhanced benefits promised by the pension plan substantially exceeded the PBGC guarantees. n217 For example, plaintiff William Mertens saw his monthly pension benefit reduced from $ 2,016 to $ 521. n218

Initially the petitioners filed suit alleging a breach of fiduciary duty by eleven individuals who sat on the Kaiser pension plan's investment committee. n219 The petitioners also sought recovery from Hewitt Associates (Hewitt), the former actuary to the plan. n220 It was this latter claim which eventually gained the attention of the Supreme Court. The participants alleged that Hewitt had breached a variety of ERISA duties by permitting Kaiser to leave the plan's actuarial assumptions unchanged in spite of increasing numbers of early retirements and the accompanying rise in costs, attributable to the phase-out of the steel division. n221 The petitioners also alleged that Hewitt had improperly failed to disclose Hewitt's role as plan actuary and that the plan was seriously underfunded. n222 The participants requested monetary relief which would permit payment of the benefits promised by the Kaiser plan. n223

Because Hewitt was not a plan fiduciary, the retirees premised their claim against Hewitt on the theory that ERISA provides for liability against a nonfiduciary who knowingly participates in a fiduciary breach. n224 As noted above, n225 that issue had divided the circuit courts, and a threshold question existed in the suit against Hewitt of whether ERISA permitted such a claim. While acknowledging "the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged," n226 the Supreme Court granted certiorari on the question of **[*28]** whether Section 502(a)(3) permits awards of the type of monetary damages sought by the retirees. n227

In a decision which split the Court five-to-four, the majority focused on the phrase "appropriate equitable relief" as the key to determining the scope of Section 502(a)(3). n228 The petitioners contended that requiring a participant in a fiduciary breach to make the plan whole for any losses resulting from the breach constitutes appropriate equitable relief. n229 They reasoned that the common law of trusts permitted equity courts to grant such relief prior to ERISA's enactment. n230 Because ERISA requires that pension plan funds be held in trust and the legislative history supports the notion that Congress intended to incorporate traditional trust law concepts into ERISA's fiduciary standards, n231 the petitioners argued that relief permitted by trust law also should be available under ERISA. n232

Writing for the majority, Justice Scalia agreed with the petitioners that the phrase "equitable relief" could mean "whatever relief a court of equity is empowered to provide in the particular case at issue." n233 However, the majority determined that the context of the provision supported the equally plausible meaning that "equitable relief" included only "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." n234 In reaching this conclusion, the majority compared other sections of ERISA in which Congress distinguished between "equitable" and "remedial" relief or between "equitable" and "legal" relief. n235 Because Congress made those distinctions in other portions of the statute, the majority believed it must have understood the implications of the various terms and intended Section 502(a)(3) to exclude legal remedies. n236 The majority also noted that construing Section 502(a)(3) in a way that precludes compensatory damages comports with the Court's interpretation of similar language in Title VII. n237 In dismissing the petitioners' reminder that the narrow interpretation was inconsistent with ERISA's remedial and protective goals, the majority recited the plain meaning mantra and explained once again that the actual words of a statute reign over "vague notions of a statute's 'basic purpose.'" n238

In addition, Justice Scalia rejected the petitioners' view that Section **[*29]** 502(l), which authorizes the DOL to seek civil penalties, requires a broad definition of "equitable relief." n239 The petitioners argued that because Section 502(l) refers to restoration of plan losses by other than fiduciaries and because the wording of a third provision, which also refers to suits by the DOL, is identical with Section 502(a)(3), Congress must have intended both provisions to provide for monetary recoveries. n240 However, the majority remained unpersuaded and explained that the 502(l) provision was consistent with restitutionary recoveries. n241 Because the Court viewed the participants' request for reimbursement of plan underfunding as a request for compensatory damages, "the classic form of legal relief," n242 the Court upheld the decision of the appellate court that ERISA does not permit such relief. n243

Justice White's vigorous dissent gained the votes of the Chief Justice and Justices Stevens and O'Connor. They argued that Congress intended ERISA to incorporate the common law of trusts and that trust law militated for a broad definition of "equitable relief" in Section 502(a)(3). n244 To this end the dissent would have permitted awards of any category of relief that a former equity court could award. n245 The dissent had two answers to the majority's view that this interpretation in no way restricted recoveries in spite of Congress's intent to limit recoveries in some way, an intent the majority deduced from the use of the phrase "equitable relief" instead of simply "relief." n246 First, the dissent believed that courts of equity had possessed very circumscribed powers to award punitive damages and that this restriction would extend to awards under Section 502(a)(3). n247 Second, the dissent recognized that Congress did not always utilize great precision in its wording of remedial provisions. n248 The dissent also believed the majority's narrow interpretation was inappropriate from a policy point of view because the limitation would cause benefit plan participants to receive less protection under ERISA than they had enjoyed before ERISA under the common law of trusts--an outcome the dissent termed an "anomaly." n249 **[*30]**

III. Remedies After Mertens

Following on the heels of other Supreme Court decisions narrowly construing ERISA remedies n250 and broadly construing ERISA's preemptive effect, n251 the Mertens decision created a variety of problems for plaintiffs who successfully allege a violation of Section 510 or a breach of fiduciary duty. Numerous questions remain, beginning with whether the Mertens decision even applies to Section 510 claims. And if Mertens does limit a plaintiff's remedies to equitable relief as historically defined, what are the practical effects of that limitation? Do any other subsections of Section 502(a) offer alternative avenues for relief to a Section 510 claimant? The next Section addresses these questions seriatim, first examining Section 510 claims and then considering problems with relief in fiduciary cases. Finally, the Article examines certain modifications made by the CRA to Title VII and recommends amendments to ERISA's remedial provisions.

A. Post-Mertens Remedies for Section 510 Claims

1. The Practical Effect of the Mertens Limitation

Section 502(a)(3) explicitly provides an avenue for the redress of statutory violations such as violations of Section 510. In determining the scope of relief available under Section 502(a)(3), though, one threshold question is whether the Mertens interpretation of Section 502(a)(3) applies to Section 510 claims. Analogizing relief for Section 510 violations to remedies available under Title VII offers one potential contextual argument for avoiding some implications of the Mertens decision.

As noted earlier, n252 courts in Section 510 cases utilize the shifting burden of proof framework developed as part of Title VII jurisprudence. In contrast to ERISA's legislative history indicating fiduciary duties were patterned after trust law, n253 the congressional discussions refer to the National Labor Relations Act n254 (NLRA) and Title VII as providing the conceptual underpinnings for Section 510. n255 In an apparent allusion to Title VII, Senator Javits, one of the sponsors of ERISA, explained that Section 510 "would provide a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example." n256

One interpretation then, based upon the legislative history, is that **[*31]** Congress expected the courts to apply the same remedies in a Section 510 case as would be available in a Title VII case. A way to achieve this, consistent with the wording of the statute, would be to construe "equitable relief," in the context of Section 510 cases, to include the same types of relief available in Title VII cases. Title VII explicitly permits awards of back pay and appears to designate those awards as "equitable relief." n257 "Back pay" in Title VII jurisprudence includes lost benefits. n258 Under this theory then, a Section 510 plaintiff could recover both back pay and lost benefits even after Mertens. This interpretation also squares with the majority's view in Mertens that Congress must have intended the phrase "equitable relief" to impose some limits on recovery. n259 After all, construing the statute to permit back pay and lost benefits but to prohibit compensation for injuries such as pain and suffering or mental anguish, as well as to preclude punitive damages, does substantially limit a defendant's liability.

As a fiduciary-type case, however, Mertens offered a stronger factual setting for applying remedies developed by courts of equity under the common law of trusts than would actions alleging a violation of Section 510. Section 510 actions do not have an analogue in the common law of trusts. Instead, when courts do not utilize Title VII or NLRA precedent for Section 510 actions, they frequently analogize Section 510 claims to actions for breach of contract or wrongful termination. The law traditionally has viewed both breach of contract and wrongful termination claims as actions at law, not in equity. n260 Thus, courts will not necessarily construe Section 502(a)(3)'s grant of "equitable relief" to provide the same remedies provided by Title VII.

In fact, the Supreme Court's reliance upon a plain meaning approach to reach its decision in Mertens reinforces the difference between the wording of ERISA and Title VII. It would seem anomalous to argue that the words of Section 502(a)(3) have a different plain meaning when applied to Section 510 claims than when applied to fiduciary claims. When one also considers the Supreme Court's predilection for narrowly construing ERISA remedies, it appears likely that the Mertens limitation on remedies to "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)" n261 will be applied to all claims brought under Section 502(a)(3), including Section 510 claims. n262 Thus, the question becomes **[*32]** how those limitations actually affect recoveries in the context of a Section 510 claim.

As recognized above, n263 the prototypical Section 510 case occurs when an employer fires an employee to prevent the employee from vesting in pension benefits, and many courts require interference with the employment relationship as part of a Section 510 claim. n264 As a result, a Section 510 plaintiff often has experienced a loss of employment and typically seeks a variety of types of relief including reinstatement, lost benefits, back pay, front pay, compensatory damages for pain and suffering, loss of reputation, and punitive damages. Turning to the application of Section 502(a)(3) to these categories of relief after Mertens, only one, reinstatement, clearly remains available. Reinstatement to a job is a classic form of injunctive relief and should continue to be available to a prevailing plaintiff if reinstatement is practicable. n265 Unfortunately, several reasons, such as animosity between the parties, may preclude reinstatement. n266 And even when available, reinstatement almost never suffices to provide make-whole relief; at a minimum, the typical plaintiff also has lost wages and benefits during a period of unemployment.

After Mertens, a plaintiff attempting to recover lost benefits and wages in addition to reinstatement probably must show that an award of those items would constitute restitutionary relief, n267 a category of relief specifically identified by the Mertens majority as available under Section 502(a)(3). n268 One can define restitution as "an equitable remedy designed to cure unjust enrichment of the defendant absent consideration of the plaintiff's losses." n269 Many commentators agree that unjust **[*33]** enrichment constitutes one of the central principles distinguishing restitution from other potential remedies. n270 In fact, the majority in Mertens appeared to endorse the appropriateness of a restitutionary award in cases of unjust enrichment. Thus, unjust enrichment provides one unifying concept often viewed as a prerequisite to a successful restitutionary claim. In the words of one court, unjust enrichment requires "the plaintiff to show that (1) he had a reasonable expectation of payment, (2) the defendant should reasonably have expected to pay, or (3) society's reasonable expectations of person and property would be defeated by nonpayment." n271 Stated more simply, the plaintiff must have conferred a benefit on the defendant and an injustice would result if the defendant is permitted to keep the benefit. n272

Applying these concepts to a Section 510 claim, a plaintiff who has suffered an unjust discharge may argue that the employer is unjustly enriched to the extent of the benefits the plaintiff would have earned had she been permitted to continue working. For example, assume the employer offers a pension plan which provides an opportunity for enhanced benefits but also utilizes a system such as the BELL system n273 to prevent many participants from becoming entitled to the enhanced benefits. The employer arguably is unjustly enriched to the extent it avoids the financial obligation associated with the enhanced benefits that the employees would have earned but for the employer's wrongful action. An equivalent argument could be made when an employer terminates an individual employee to prevent the employee from vesting in basic benefits, accruing additional benefits, or becoming entitled to an enhanced benefit. n274 One potential way of characterizing the employer's gain in these cases is as "negative unjust enrichment." n275 However, unlike the situation of "A stealing from B to pay a debt to C," n276 thus unjustly enriching A, n277 the employer has not taken benefits from the employees **[*34]** to which they were previously entitled. Because the employees never fulfilled the plan's requirements for benefit entitlement, a claim that the employer's action deprived the employees of an existing property right becomes questionable.

A substantial portion of this analytical problem derives from ambiguity in the early scholarship over the relationship between unjust enrichment and "specific restitution." n278 One commentator later challenged the theoretical requirement of unjust enrichment. n279 More recently, in his essay proposing a practical definition of restitution, Professor Laycock suggested that restitution include claims in which: "(1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain instead of plaintiff's loss, or (3) the court restores to plaintiff, in kind, his lost property or its proceeds." n280 By clearly separating the requirement of unjust enrichment from the measurement of gain and the requirement of restoration of the property to which the plaintiff was entitled and permitting restitution in any of the three situations, Professor Laycock's definition may offer additional opportunities for recovery of lost benefits. Plaintiffs still could encounter problems, however, if the courts insist upon distinguishing between equitable and legal forms of restitution. n281

Even more difficult issues arise in the analysis of whether a back pay claim constitutes a claim for restitution. The underlying question, for those who would impose an unjust enrichment requirement on a claim of restitution, is whether the employer realized a benefit from the discharge. Some courts determine that an employer does not benefit to the extent of salary savings because the employee did not work to earn the salary. n282 The same logic can be applied to benefits if the employee did not meet the criteria necessary to earn the benefits. This inquiry becomes impossibly circular in a Section 510 case, though, once one recognizes that the employee did not meet the benefits criteria because of the forbidden employer action that was intended to prevent the attainment of the benefit criteria.

In the absence of specific provisions in another employment statute, one circuit recently refused to classify back pay as equitable relief. In Waldrop v. Southern Company Services, Inc., n283 a former employee alleged violations of the Age Discrimination in Employment Act of 1967 **[*35]** (ADEA) n284 and the Rehabilitation Act of 1973 n285 (Rehabilitation Act). The Eleventh Circuit Court of Appeals determined that the requested back pay failed to constitute restitution under the Rehabilitation Act because no unjust enrichment existed as would have occurred if the employer had failed to compensate the plaintiff for time actually worked. n286 Commentators agree, with Professor Dobbs stating: "Back pay seems on the surface to be an ordinary damages claim, almost an exemplar of a claim at law." n287

In contrast, the Sixth Circuit recently rejected the Eleventh Circuit's analysis and permitted a Section 510 plaintiff to recover both back pay and front pay. n288 The Sixth Circuit relied on dictum in Chauffeurs Local 391 v. Terry n289 that characterized as restitutionary, in addition to equitable as incidental to injunctive relief, a back pay claim made by employees who had been unjustly discharged for exercising rights under the Fair Labor Standards Act (FLSA). n290 However, the Terry Court confined its reference to the restitutionary nature of back pay to dictum in an explanatory parenthetical. n291 The context of the discussion makes clear that the Court focused its discussion of the case primarily on the equitable nature of monetary awards when "incidental to or intertwined with injunctive relief." n292 Furthermore, analysis of the referenced opinion, Mitchell v. Robert DeMario Jewelry, Inc., indicates the Mitchell Court viewed the back pay at issue under the FLSA as "compensatory only." n293

One theory for avoiding the compensatory label derives from treating a discharge undertaken in violation of statutory prohibitions, such as Section 510, as never having occurred. The courts then would view the em- **[*36]** ployee as having continued on the job while earning normal wages and benefits. Carrying this fiction to its logical conclusion, the employee would be entitled to the "earned" wages and benefits, and the employer would be unjustly enriched to the extent the wages and benefits had gone unpaid. n294

However, even if the courts are willing to apply this admittedly unusual legal fiction, a plaintiff who establishes the employer's unjust enrichment faces still another hurdle. Unlike most remedies which are clearly legal or equitable, restitution may be either. n295 Although the Court's language in Mertens is less than a model of clarity in this regard, presumably only equitable restitution will be available under Section 502(a)(3). Following the merger of the law and equity courts, the historic reasons for distinguishing between the two types of restitution disappeared. n296 However, the courts continue to categorize requests for restitution in order to determine the availability of a jury trial, whether the remedies are discretionary, and the application of equitable defenses. n297 Unfortunately, the distinction between equitable restitution and legal restitution is a difficult one to determine in application because it is based primarily upon historical happenstance and is further complicated by the fact that relief may be categorized as equitable for one purpose and legal for another purpose. n298

In deciding the characterization of a particular claim, courts typically look at the underlying remedies sought by the plaintiff, n299 and the Mertens Court appeared to endorse this test in making the Section 502(a)(3) determination. n300 Again, however, the question sounds simpler than it has proven to be in application. The second prong of the test for when the Seventh Amendment guarantees the availability of a jury trial n301 requires resolution of the same basic question. However, the Terry Court split six-tothree over back pay as a legal remedy in the context of a claim that a union breached its duty of fair representation, with the majority designating the claim as legal. n302 In other contexts, the circuit courts have split over the issue of whether back pay constitutes a legal or equitable remedy for purposes of jury trial eligibility. n303 **[*37]**

As an analytical tool to resolve these disputes, commentators also focus on the underlying relief requested in a claim for restitution. Thus, if a plaintiff seeks a specific piece of real or personal property n304 or money from an identified res, n305 the underlying remedy is a constructive trust and the claim sounds in equity. However, if the claim fails to identify a specific res or item of property, its historical roots may be traced to the writ of assumpsit, making it a claim at law. n306 Similarly, in his seminal work on restitution, Professor Palmer suggests treating a request for restitutionary relief in a personal services claim as equivalent to quasicontract and thus viewing it as a claim at law. n307

Applying these theories to Section 510 claims, requests for lost wages appear to be legal claims because they do not typically seek funds from a particular res, nor do they seek the return of a specific item previously owned by the plaintiff. Claims for lost benefits may be distinguishable because such benefits typically would be paid from an ERISA trust; thus, arguably, they identify a specific res. But another commentator has argued "the award of benefits differs from equitable restitution, which might merely refund the beneficiary's past contributions to the pension plan. Therefore, a beneficiary asking for accrued monthly benefits seeks a legal remedy." n308 This commentator focuses exclusively upon the requirement that the claimant must be seeking the return of the claimant's own property. In many ways the claims resemble historic claims for breach of personal service contracts, which claims Professor Palmer also views as sounding at law.

An alternative way of categorizing restitutionary claims as legal or equitable considers the historic nature of the underlying action. n309 This type of analysis appears dangerously close to the analysis rejected by the Mertens Court. It also tracks the first prong of the Terry analysis n310 and has proven extremely difficult in application. In this context, courts sometimes analogize Section 510 claims to retaliatory discharge claims and designate them as legal claims. n311 Another possibility would be to compare the **[*38]** claims to Title VII claims in which courts generally have categorized back pay as equitable relief. n312 To reach that conclusion, the courts have relied on a variety of arguments, including the wording of Title VII. n313 A second Title VII theory views back pay as equitable when granted incidentally to the injunctive remedy of reinstatement. n314 However, those rationalizations are inconsistent with the basic compensatory nature of back pay claims. n315 Thus, it would compromise the analytical integrity of the legal/equitable inquiry to extend those rationalizations by analogy to ERISA.

Few past cases have applied restitution under ERISA, making it even more difficult to predict how the courts will treat these issues. Prior to Mertens, courts granted restitution under ERISA in cases in which employers inadvertently made overpayments to a multiemployer plan and sought to recover the excess contributions. n316 An insurance company also may obtain a restitutionary recovery where a benefit plan participant receives double payment of benefits. n317 In both instances, though, the restitution granted falls within the traditional boundaries of remedying a situation of unjust enrichment; these types of cases offer little insight into the application of restitution in Section 510 actions.

Most likely, to the extent the courts treat ERISA claims for items such as back pay as compensatory damages, those categories of relief will be unavailable after Mertens. And few analytically coherent arguments exist in favor of designating back pay as anything other than compensatory relief. The theoretical arguments over the categorization of lost benefits are more difficult, and the outcome may depend both upon one's view of the nature of how benefits are earned and upon the breadth of restitutionary awards permitted after Mertens. But, denying remedies such as back pay, and lost benefits to the extent that is a problem, to a successful Section 510 plaintiff often will leave the plaintiff without full compensation for the employer's wrongful acts. That result not only fails to further "ERISA's broadly protective purposes," n318 it also provides little in the way of deterrence. **[*39]**

2. Alternative Avenues of Recovery

A potential way of avoiding the limitations of Section 502(a)(3) would be to ground a claim for a Section 510 violation in another subsection of Section 502. However, Section 502(a)(1)(B), which permits participants to recover, enforce, or clarify benefits due under a benefit plan, appears to be the only possible alternative. Some courts have stated that Section 502(a)(1)(B) and Section 502(a)(3) both are available to remedy Section 510 violations. n319

However, the gist of the usual Section 510 complaint is that an employer took an action intended to prevent the plaintiff from becoming entitled to plan benefits. n320 Many commentators n321 and courts agree that Section 502(a)(3), the provision at issue in Mertens, provides the sole basis for suits alleging a violation of Section 510. The Seventh Circuit explained the reasons for this in Tolle v. Carroll Touch, Inc. n322 Tolle claimed Carroll Touch, Inc. terminated her employment to deprive her of benefits in violation of Section 510. In determining the appropriate statute of limitations, the Seventh Circuit Court of Appeals explained that Section 502(a)(1)(B) essentially provides relief for the breach of contractual rights under a benefit plan. n323 However, in order for such a breach to occur, a participant must have satisfied the plan's requirements for receipt of such benefits. Carroll Touch's actions prevented Tolle from fulfilling the plan's requirements, and therefore, Section 502(a)(1)(B) did not provide a basis for her suit. n324

A number of theories to avoid this problem have been offered. For example, one plaintiff argued that the ability under Section 502(a)(1)(B) "to enforce [] rights under the terms of the plan" grants a cause of action to enforce the right to be free from actions forbidden by Section 510. n325 However, such an interpretation fails to give meaning to the phrase "terms of the plan"; Section 510 confers a statutory right not typically replicated in **[*40]** employee benefit plans. n326 Another court determined, without addressing these issues, that a Section 510 plaintiff could seek monetary damages under Section 502(a)(1)(B) and termed the damages as "restitutionary in character and therefore equitable in nature." n327

B. Post-Mertens Remedies for Fiduciary Claims

Although the Mertens defendants were not fiduciaries, the petitioners based their claim on Hewitt's knowing participation in a fiduciary breach. Also, the Court's discussion of ERISA's fiduciary provisions indicates the narrow reading of "equitable relief" adopted by the majority of the Court which almost certainly applies to claims for breach of fiduciary duty brought under Section 502(a)(3). n328 In addition to the Mertens restrictions, plan participants or beneficiaries attempting to bring suit on their own behalf in some circuits also face the requirement that recoveries in fiduciary duty cases inure only to the plan, not to individual plaintiffs. n329 Interestingly, now that remedies are severely restricted, at least one circuit has reversed its position and determined that Mertens' acknowledgment of the "importance and availability of equitable relief" n330 militates for access to equitable remedies by individual claimants. n331 The DOL also favors an interpretation of Section 502(a)(3) which would permit individual recoveries. n332

The recent decision of the Eighth Circuit in Howe v. Varity Corp. n333 serves as an appropriate starting place to begin the discussion of how Mertens may affect recoveries in suits for breach of fiduciary duty. In Howe, according to the determination of the district court, Varity Corporation (Varity) formed Massey Combines Corporation (MCC) in substantial part to avoid high employee benefits costs associated with certain poorly performing lines of its operations. n334 Acting on its own accord, Varity transferred individuals who had retired from jobs associated with those product lines to MCC. n335 In order to encourage current employees to accept voluntarily a transfer to MCC, Varity misrepresented the financial prospects of MCC and chose not to disclose that it contemplated changes **[*41]** in employee benefits. n336 As anticipated by management, MCC failed, and retirees lost their entitlement to health care benefits. n337 The court found that Varity's actions violated ERISA's fiduciary standards n338 and agreed with the district court's view that "Project Sunshine [the name Varity assigned to the development of MCC] was a sucker punch on loyal employees who had given a lifetime of service to a company . . . ." n339

After finding a breach of fiduciary duty, the court next decided that a class representing individuals who had retired from MCC only to lose their health care benefits upon MCC's liquidation (the Retiree Class) n340 could bring a cause of action seeking individual recoveries. n341 Having found a fiduciary breach and standing for the claimants, the Eighth Circuit faced the question of what remedies were available to the Retiree Class under Section 502(a)(3). n342 The district court had set aside a jury award of $ 36 million in punitives as inconsistent with ERISA, but had given the plaintiffs a choice between (i) the jury's award of approximately $ 8.3 million in compensatory damages and (ii) payment of certain costs together with an injunction reinstating the Retiree Class's participation in Varity's health care plan. n343 The class selected the compensatory damages. n344 On appeal the Eighth Circuit determined that Mertens precludes the compensatory relief granted by the jury and chosen by the class. n345 In lieu of those damages, the circuit court awarded the alternate relief offered by the district court. n346 The circuit court pointed to the language in Mertens permitting awards of "restitution" n347 and explained that the monetary relief portion of the award constituted "restitution to compensate plaintiffs for benefits of which . . . they had been deprived." n348 According to the court, this award would restore the plaintiffs "to the position they would have occupied if the misrepresentations described in this opinion had never occurred." n349 **[*42]**

If any award "restoring" plaintiffs "to the position they would have occupied" n350 but for the defendant's misdeeds constitutes restitution, and thus, equitable relief, one might wonder about the difference between the definitions of restitution and equitable relief on the one hand and compensatory damages and legal relief on the other hand. This award appears dangerously close to an award of compensatory damages because it seems to evaluate the plaintiffs' losses, to restore the status quo from the plaintiffs' perspective, and not to focus on the differing positions of Varity and the benefit plan. n351 In contrast, restitution typically requires the court to look to the unjust enrichment of the defendant and quantify relief based upon the change in the defendant's position. n352 Even under Professor Laycock's formulation, which would permit "specific restitution" even in the absence of unjust enrichment, the plaintiff's loss must be restored in kind; otherwise, it becomes difficult to distinguish such an award from one of compensatory damages. n353 Of course, after permitting individual causes of action, finding a breach of fiduciary duty, and agreeing with the district court's view that "ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine," n354 perhaps it should not be surprising that the majority may have strained the boundaries of equitable restitution to permit a monetary award. However, the strenuous dissent n355 portends that all plaintiffs may not find such a sympathetic court.

Judge Posner recently grappled with a similar issue in a claim brought in the Seventh Circuit by the DOL against a nonfiduciary insurance company. n356 The DOL sought restitution on behalf of a plan from an insurance company, which allegedly had knowingly participated in a breach of fiduciary duty by charging the plan $ 970,000 to renew a one-year liability insurance policy that provided $ 1 million worth of coverage. n357 Judge Posner explained that restitution holds a somewhat unique position, overlapping the boundary between law and equity. n358 He distinguished **[*43]** restitution from other remedies, such as injunctions, which are purely equitable, and traditionally legal remedies, such as damages occasionally awarded under the "clean-up" doctrine in an equity case to provide a make-whole remedy. n359 Having decided that restitution remains available subsequent to Mertens, Posner next considered whether the $ 818,000 sought by the DOL, which represented the difference between the $ 970,000 paid by the plan and the fees paid by the insurance company, actually constituted a claim for restitution. n360 The insurance company later applied the balance to offset underwriting losses. n361 To avoid the obvious difficulty in categorizing the $ 818,000 as profits, and thus unjust enrichment, Judge Posner relied on the doctrine of "negative unjust enrichment." n362 Because the insurance company arguably reduced its liability at the expense of the plan, this theory permitted the application of restitution. n363 In the end, however, the Seventh Circuit's unwillingness to find a cause of action against nonfiduciaries who participate in a fiduciary breach precluded recovery for the plan. n364

Even the right to pursue an individual claim and a finding of breach of fiduciary duty does not guarantee a recovery. Although stories abound about sympathetic treatment of the proverbial "widows and orphans," n365 one circuit applied traditional equitable maxims to deny a widow recovery of life insurance proceeds even though the defendant had breached its fiduciary duties in obtaining an assignment of the life insurance policy from the deceased. n366 Another circuit, after assuming the availability of an individual cause of action and breach of fiduciary duty, denied a remedy to former plan participants who suffered substantial tax obligations. n367 Their employer had encouraged them to accept lump sums in lieu of continuing health care benefits, but according to the employees, intentionally chose **[*44]** not to disclose the tax effects of taking the lump sums. n368 On appeal the plaintiffs attempted to characterize their claim as one seeking restitution, an argument the court called "highly dubious" since the employer had not received any "ill-gotten profits" as a result of its failure to deal openly and honestly with the employees. n369 And, in somewhat analogous claims, courts have denied monetary relief to individuals who decided to retire in reliance upon their employer's calculations of retirement benefits only to be told after retirement that there had been a miscalculation and to see their pension benefits substantially reduced. n370

Nor do the Mertens limitations apply only to plan participants and beneficiaries. In some situations Mertens also precludes employers from obtaining relief. For example, in Buckley Dement, Inc. v. Travelers Plan Administration of Illinois, the employer, Buckley Dement, Inc. (Buckley Dement), contracted with Travelers Plan Administrators of Illinois (TPA) for TPA to process medical claims filed by Buckley Dement's employees. n371 When TPA failed to process $ 49,325 of claims prior to the expiration of Buckley Dement's stop loss policy, Buckley Dement became liable for the claims. n372 Buckley Dement's claim against TPA under Section 502(a)(2) failed because TPA did not have any discretion over plan interpretation; thus, it was not an ERISA fiduciary. n373 Buckley Dement also sought reimbursement of the $ 49,325 under Section 502(a)(3). n374 The Seventh Circuit determined the essence of the claim was for compensatory relief n375 and "Mertens required the conclusion" n376 that ERISA does not permit such relief.

Thus it would appear that, after Mertens, even plan sponsors typically do not have the opportunity to recover money damages under Section 502(a)(3) for violations of ERISA or an employee benefits plan. Alternative claims brought under state or federal common law theories such as equitable estoppel or restitution often do not meet with any more success than do Section 502(a)(3) claims. ERISA contains what one commentator called "the most expansive pre-emption clause found in any federal statute." n377 Though criticized by the courts as "quicksand," n378 a "black **[*45]** hole," n379 and a "morass serving as the stage for a theater of the absurd," n380 the statutory provision pre-empts all state law claims that "relate to any employee benefit plan . . . ." n381 As a result, ERISA pre-empts many state law claims. n382 Moreover, the jurisprudence narrowly construing ERISA's remedial provisions as permitting only claims explicitly authorized in Section 502 n383 results in the dismissal of most claims predicated on federal common law theories. n384

Even conceding the truth of the assertion that "ERISA . . . resolved innumerable disputes between powerful competing interests--not all in favor of potential plaintiffs," n385 it seems unlikely that Congress intentionally drafted Section 502, in conjunction with ERISA's pre-emption provision, to deny a remedy to an employer such as Buckley Dement. n386 After all, the beneficiary of this interpretation is the TPA, not one of the "'principal ERISA entities.'" n387 For Congress to have intended a legislative compromise to benefit a third party would be unlikely, and is made even more implausible by the fact that outside claims administrators were rare at the time of ERISA's enactment in 1974. n388 Instead, precluding recovery by employers against third parties may discourage plan formation, n389 **[*46]** reduce the actuarial integrity of plan funding, n390 and perhaps permit third parties who contract with benefit plans to avoid responsibility for inept, negligent, or malicious conduct. n391 None of these outcomes is consistent with providing benefit plan participants access to stable benefit plans or with balancing access to plans with the obligations imposed upon plan sponsors and plan fiduciaries.

C. ERISA Remedies and the CRA

The foregoing examination of ERISA remedies reveals a narrowing of available relief culminating in the Mertens decision. A substantial risk now exists that application in Section 510 actions of theoretically coherent remedies jurisprudence will deprive "successful" plaintiffs of many components of make-whole relief, including back pay. Furthermore, the available categories of relief fail to provide significant incentives for statutory compliance. In an attempt to avoid these problems, courts have strained basic doctrinal concepts to permit a variety of types of relief. Specific examples include the creative application of equitable doctrines and the use of inappropriate ERISA provisions. Similarly, while some courts have taken liberal views of what constitutes equitable restitution, the current interpretation of ERISA's remedial provisions leaves numerous plaintiffs who successfully allege fiduciary violations without any remedy whatsoever. In comparison, Title VII has always permitted back pay awards, and when injustices cropped up in Title VII case law, Congress incorporated appropriate amendments into the CRA. n392 The rest of this Section looks to the CRA for guidance on the possibilities and pitfalls of potential amendments to ERISA's remedial scheme.

1. Title VII and the CRA

Beginning in 1989, the Supreme Court issued a number of decisions impeding the ability of plaintiffs to recover for violations of civil rights. In the first of these decisions, Patterson v. McLean Credit Union, the Court determined that Section 1981 n393 did not bar racial discrimination that occurs after an individual is hired. n394 This left numerous individuals employed at companies small enough not to be subject to regulation under Title VII without protection from racial discrimination in the terms and conditions of their employment. n395 **[*47]**

Other Supreme Court decisions negatively affected plaintiffs in discrimination cases by reassigning or otherwise modifying burden of proof requirements. One such decision shifted the burden of proof to plaintiffs in disparate impact cases in which the employer produces evidence of a business justification for the employment practice being challenged. n396 Prior law arguably required employers to prove that business necessity justified employment practices which created a disparate impact upon protected employees. n397 However, in yet another 1989 decision, the Supreme Court determined that an employer may avoid liability in what is known as a "mixed motive" case by proving that, even if it would have disregarded the impermissible criteria, the employer still would have taken the challenged action. n398

While some questions were raised about the efficacy of the remedial provisions shortly following the initial enactment of Title VII, those provisions went largely unquestioned for a number of years. n399 However, as the courts made it increasingly difficult for plaintiffs to recover in civil rights actions and specific problems came to light, the issue caught the attention of commentators. For instance, the courts typically denied all but nominal damages for sexual harassment in cases in which the plaintiffs did not lose their employment due to the harassment. n400 Other courts even denied the availability of nominal damages, and one commentator highlighted the case of a sexual harassment victim in which the court not only denied her any recovery, it ordered her to pay the court costs of her harasser. n401 Commentators also argued that remedies were deficient in cases in which job loss occurred as a result of harassment or discrimination. Limiting relief failed to provide adequate incentives for victims to bring lawsuits, n402 failed to discourage employers from taking prohibited **[*48]** actions, n403 and failed to compensate successful plaintiffs fully for their losses. n404

In 1972 Congress amended Title VII to expand its coverage and to strengthen its administrative enforcement provisions. n405 The amendments also added the phrase "any other equitable relief" n406 to Title VII's remedy provisions. While the courts relied upon the statutory reference to equitable relief to narrow available remedies, n407 their interpretation did not go uncriticized. n408 Congress paid little heed to the issue until February 1990 when both the House and Senate again began consideration of amendments to Title VII. Much of the proposed legislation focused upon the decisions issued by the Supreme Court during the 1988-89 term. n409 However, in introducing the proposed Civil Rights Act of 1990, Senator Kennedy specifically referred to the lack of an "effective Federal remedy" for victims of sexual harassment in the workplace. n410

Voicing concern over the potential of the Civil Rights Act of 1990 to foster quotas, President George Bush vetoed the bill, n411 and Congress failed to override the veto. n412 However, recognizing the need for legislation, President Bush proposed a modified version. n413 Congress continued work on civil rights proposals, and on November 21, 1991, President Bush signed the CRA. n414 Among its provisions, n415 the CRA **[*49]** permits plaintiffs who prove intentional discrimination under Title VII to recover compensatory and punitive damages in addition to back pay, front pay, and lost benefits. n416 The statute provides for ceilings on awards of compensatory and punitive damages according to a sliding scale which varies by the employment levels of the defendant. The maximums vary from $ 50,000 to $ 300,000. n417

The legislative history confirms that Congress hoped the CRA would address the concerns typically targeted by compensatory and remedial damage awards. True to their name, compensatory damages provide makewhole relief to victims who have suffered losses attributable to the defendant's unlawful actions. n418 These losses encompass not only lost wages or benefits but also include damage to physical and mental well being. n419 In contrast, punitive damages punish egregious wrongdoing and reinforce the unacceptable nature of discrimination and harassment in the workplace. n420 By raising the cost of noncompliance, both compensatory and punitive damages help to deter unlawful conduct. n421

2. A Proposal

Because of differences in historic statutory treatment, this Section addresses separately the questions of the availability of back pay and the availability of compensatory and punitive damages. Back pay has always been available under both the NLRA and Title VII. n422 Other federal and state employment statutes also routinely permit a plaintiff who has been discharged in violation of the law to recover back pay. n423 Even in common law claims for wrongful discharge, courts typically permit recovery of back pay. n424 Like each of these other employment actions, ERISA's prohibition on discharging benefit plan participants acts as an important protection against unjust discharge.

While ERISA embodies numerous compromises among a variety of interest groups, no affirmative indication exists to support an argument that Congress intended to preclude Section 510 plaintiffs from receiving back pay, a basic remedy widely permitted by other federal and state employment statutes. Instead, Congress referred explicitly to the remedial provisions of the NLRA and Title VII, both of which permit back pay, as **[*50]** informing the drafting of ERISA's remedial provisions. n425 Congress had amended Title VII's remedial provisions only four years prior to ERISA's passage. The proximity in time of the amendments to Title VII to ERISA's enactment, together with congressional references to Title VII, indicate that Congress probably assumed the availability of back pay for individuals terminated in violation of ERISA.

The importance Congress placed upon the Section 510 protections also militates against the preclusion of back pay awards. Floor debate clarified the application of Section 510 and its importance in preventing employers from avoiding ERISA's substantive requirements. n426 And Congress included Section 510 as one of the "fourteen basic rights" which lay "at the heart of pension reform and provide much-needed and longdenied protection." n427 It seems anomalous to argue that Congress intended to compromise a basic category of relief, and one widely available in similar statutes, for claims on which it placed so much import in guaranteeing ERISA's statutory integrity.

Thus, back pay should be available to remedy ERISA violations. The courts may permit awards of back pay, at least in Section 510 actions, n428 as consistent with ERISA's remedial language and goals. Given Mertens' limitations on equitable relief, however, this most basic remedy may become available only through congressional action. And although the prospects for such employee-friendly legislation might appear grim in view of the current conservatism in Congress, the "equities" supporting such relief are clear.

The availability of other compensatory and punitive damages raises more difficult issues. Even the two statutes cited by Congress as the basis for ERISA's remedial provisions, the NLRA and Title VII, now differ in whether they permit compensatory and punitive damages. As seen above, n429 the amendments permitting recovery of these additional categories of damages under Title VII were intended to provide appropriate compensation to plaintiffs, to encourage victims to pursue private actions to vindicate their rights, to bolster compliance with the law, and to punish statutory violations. All are laudable goals and apply also in the contexts of Section 510 and fiduciary actions.

Like Title VII, ERISA relies heavily on private actions to enforce its substantive protections. In some ways ERISA provides an even stronger case for monetary remedies intended to encourage compliance because, unlike Title VII violations which are often based upon ingrained notions of discrimination such as racism or sexism, fiduciary and Section 510 **[*51]** violations often are founded upon goals of monetary gain or cost avoidance. While one would hope that eventually societal pressures may help counter racism or sexism, our capitalistic system encourages profit enhancement and decreased costs. Thus, monetary penalties simply may not be the most effective ways to discourage fiduciary and Section 510 violations, they may be the only way to combat those violations.

Opponents of adding compensatory and punitive damages to ERISA are likely to raise some of the same objections offered against the addition of those categories of damages to Title VII. The prevalent theme in the Title VII debate was the negative effect such damages would have on the statute's goals of conciliation and settlement. n430 Both Title VII and the NLRA create administrative bodies, respectively the Equal Employment Opportunity Commission (EEOC) and National Labor Relations Board (NLRB), to investigate claims and work toward the amicable settlement of disputes. One justification for permitting compensatory and punitive damages under Title VII but not the NLRA relied upon the differences between the EEOC and NLRB. Because the NLRB follows an adjudicative concept, resolves claims relatively quickly, and enforces private but not public rights, the NLRA requires relatively few categories of remedies. n431 Unlike the NLRB, the EEOC historically has reacted rather slowly, and many claims eventually are litigated as private actions. n432 Because of the delays and the relative lack of public enforcement, more incentives are necessary to encourage Title VII claimants to pursue their rights through private litigation. Once again, the rationale for extending compensatory and punitive damages to ERISA is even stronger than in the Title VII construct, since ERISA did not establish an administrative body dedicated to the timely resolution of claims. n433

However, one unique aspect of ERISA weighs heavily against unlimited compensatory and punitive damages, even for egregious actions. Sponsorship of employee benefit plans is completely voluntary, n434 and one of ERISA's fundamental goals is to encourage the development of such plans. n435 As a result, one important consideration is the extent to **[*52]** which large damage awards, or the possibility of such awards, might discourage the formation or continuation of plans. After all, federal legislation that protects the right of employees to earn and enforce benefits or that sets forth fiduciary standards provides nothing of worth if employers choose not to, or cannot afford to, offer benefit plans. Similar considerations arise in the context of fiduciary liability where personal liability may affect the willingness of individuals to serve as fiduciaries.

While the exact balance between adequate compensation and preventative measures on the one hand and sufficient protection against unlimited awards on the other will be struck in another forum, once again Title VII provides insight. In order to provide deterrence and litigation incentives, while at the same time protecting employers from unlimited damages awards, the CRA permits capped punitive and compensatory awards. n436 The notion of variable caps also provides a precedent for distinguishing between the liability of individual fiduciaries and of employers more generally. Some employment statutes contain alternative restrictive provisions, such as the provision of liquidated damages in an amount equal to back pay awards, permitted under the ADEA. n437

A CRA-type provision appears most appropriate for ERISA. Any provision tied to back pay, such as ADEA's, would be of limited efficacy because it would address only some of the problems experienced by ERISA claimants. Not all egregious violations of Section 510 or fiduciary duties result in employment terminations. In addition to addressing the problems occurring in termination cases, a CRA-type provision also would permit limited recoveries if an employer breaches fiduciary duties to retirees n438 or a health care fiduciary breaches fiduciary duties owed to plan participants. n439 Furthermore, such a provision would permit some recovery by employers who suffer injury at the hands of nonfiduciary service providers. n440

In sum, ERISA should permit limited recoveries of compensatory and punitive damages to address violations of Section 510 and ERISA's fiduciary provisions. Limitations on awards are important in order to protect benefit plans and the fiduciaries that serve those plans. At the same time, the limitations must be flexible enough to permit recovery by the variety of claimants who may suffer injuries as a result of an ERISA violation. **[*53]**

Conclusion

This Article argues that the Supreme Court jurisprudence narrowly construing ERISA remedies, most recently reflected in its decision in Mertens v. Hewitt Associates, n441 precludes adequate remedies for many plaintiffs who "successfully" allege a violation of Section 510 or ERISA's fiduciary duty provisions. Section 510 serves as an important safeguard against employer action taken to deny employees their expected benefit plan entitlements. The extensive amount of Section 510 litigation confirms the key role the Section continues to play in precluding employer avoidance of ERISA's provisions. Similarly, enforcement of fiduciary duties is critical to the efficacy of ERISA's cornerstone requirement that employee benefit plan assets be held in trust.

However, generous statutory protections provide minimal value to ERISA's principal parties if appropriate remedies are not provided for violations. Section 510 violations occur because employers can achieve significant cost savings by firing an employee to avoid benefit costs associated with that employee. Powerful financial incentives also act to encourage fiduciaries to cut corners, deny benefits, or misrepresent benefit choices. This Article examines the extent of the available remedies after Mertens and concludes that the only certain remedy available to individual plaintiffs, who suffer the loss of their employment in violation of ERISA, may be injunctions for reinstatement of employment or participation in benefit plans. Similarly, the statute may preclude a variety of plaintiffs from obtaining make-whole relief in cases of fiduciary breach.

As a result of the current limitations, ERISA fails in two ways. First, the jurisprudence denies adequate compensation to successful plaintiffs, often at a time in an individual plaintiff's life when benefit entitlement and job security are of great importance. Second, as interpreted, ERISA fails to provide adequate deterrence against wrongdoing, especially given the financial incentives for statutory violations. In the absence of liberal construction in the existing jurisprudence, this Article proposes that Congress amend ERISA's remedial provisions to permit compensatory damages, including back pay awards. The amendment also should permit plaintiffs to recover punitive damages in egregious situations. However, compensatory and punitive damage awards should be capped so as not to discourage benefit plan sponsorship or fiduciary service unduly. With these changes in place, ERISA's remedial provisions will become more than "mere chimeras of what Congress intended them to be." n442

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFiduciary ResponsibilitiesLabor & Employment LawWrongful TerminationRemediesGeneral Overview-Pensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview

FOOTNOTES:

n1 120 Cong. Rec. 29,935 (1974) (statement of Sen. Williams).

n2 Employee Retirement Income Security Act (ERISA) sections 1-4402, *29 U.S.C. sections 1001*-1461 (1988 & Supp. IV 1992).

n3 *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 524 (1993).*

n4 See, e.g., *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990)* (holding ERISA preempts former employee's state common law claim for unlawful discharge); *Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990)* (holding neither a constructive trust nor general equitable remedies are available against pension plan benefits of a participant and former pension plan trustee who embezzled funds from his union); *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55-57 (1987)* (holding ERISA preempts an employee's state common law claim against an insurance company for failure to process health insurance claims but provides only limited relief); *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144, 148 (1985)* (holding compensatory and punitive damages are not available to a plan beneficiary under section 409).

n5 *113 S. Ct. 2063 (1993).*

n6 ERISA section 510, *29 U.S.C. section 1140;* see infra text accompanying note 39 for the exact language of the relevant portion of section 510.

n7 Technically, the statutory reference is to "participants." ERISA defines "participant" to mean employees and certain other individuals who are eligible, or may become eligible in the future, for benefits from an employee benefit plan. ERISA section 3(7), *29 U.S.C. section 1002*(7).

n8 A beneficiary is "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." ERISA section 3(8), *29 U.S.C. section 1002*(8).

n9 While the first clause of section 510, which protects the exercise of benefits, covers both participants and beneficiaries, the second clause, which protects against interference with the attainment of benefits, explicitly covers only participants. For the relevant language of section 510 see infra text accompanying note 39.

n10 See discussion infra part I.A.

n11 See infra text accompanying notes 139-43.

n12 See infra text accompanying notes 109-38.

n13 ERISA section 502, *29 U.S.C. section 1132* (1988 & Supp. IV 1992) (amended 1993 & 1994).

n14 ERISA section 502(a)(3), *29 U.S.C. section 1132*(a)(3) (1988 & Supp. IV 1992).

n15 *Mertens, 113 S. Ct. at 2068-72.*

n16 *Id. at 2066.*

n17 John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law iii (2d ed. 1995).

n18 Justices Question Whether Non-Fiduciary is Liable for Money Damages Under ERISA, 20 Pens. Rep. (BNA) 524 (Mar. 1, 1993).

n19 See, e.g., infra part I.A.

n20 See, e.g., infra part I.B.

n21 *42 U.S.C. sections 2000e-1* to 17 (1988 & Supp. IV 1992).

n22 Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of *2 U.S.C., 29* U.S.C., and 42 U.S.C.).

n23 See infra text accompanying notes 393-98 for a discussion of the Supreme Court jurisprudence which led to the enactment of the CRA.

n24 120 Cong. Rec. 29,935 (1974) (statement of Sen. Williams) (quoted supra note 1).

n25 See *Adams v. Bell, 711 F.2d 161, 210 (D.C. Cir. 1983)* (Wright, J., dissenting) (en banc) (arguing majority opinion reduces Title VI and similar statutes "to mere chimeras of what Congress intended them to be"), cert. denied, *465 U.S. 1021 (1984);* see also John Donne, Sermon LXXX Preached at the Funeral of Sir William Cokayne, in LXXX Sermons Preached by that Learned and Reverend Divine John Donne, Dr. in Divinity, Late Dean of the Cathedral Church of St. Paul's London 816, 820 (Johannes Donne ed., 1660):

> Sometimes I find that I had forgot what I was about, but when I began to forget it, I cannot tell. A memory of yesterday's pleasures, a fear of tomorrow's dangers, a straw under my knee, a noise in mine ear, a light in mine eye, an anything, a nothing, a fancy, a Chimera in my brain, troubles me in my prayer. So certainly is there nothing . . . perfect in this world.

n26 Earlier statutes provided minimal regulation of private pension plans. See Labor Management Relations (Taft-Hartley) Act, *29 U.S.C. sections 141*-97 (1982) (original version at ch. 120, 61 Stat. 136 (1947)); Internal Revenue Code of 1954, Pub. L. No. 159, ch. 736, 68A Stat. 3 (1954) (codified as amended at *26 U.S.C. sections 1*-9722 (1982 & Supp. IV 1992)); Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), repealed by ERISA, Pub. L. No. 93-406, section 111(a), 88 Stat 829, 851 (1974). For additional history regarding pre-ERISA employee benefits law, see Note, Pension Plans and the Rights of the Retired Worker, *70 Colum. L. Rev. 909 (1970).*

n27 ERISA: The Law and the Code v (Dana J. Domone ed., 1994).

n28 ERISA section 2(b), *29 U.S.C. section 1001*(b) (1988). But see G. Richard Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?, *68 Tex. L. Rev. 509, 561 (1990)* (citing evidence indicating Congress enacted ERISA as a "special-interest law passed to subsidize one segment of the labor market--union workers in dying firms") (citing Richard A. Ippolito, A Study of the Regulatory Effect of the Employee Retirement Income Security Act, *31 J. L. & Econ. 85, 120 (1988)).*

n29 See, e.g., ERISA section 2(b), *29 U.S.C. section 1001*(b) (1988); H. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973); Joint Explanatory Statement of the Committee of Conference on the Employee Retirement Income Security Act, in ERISA--Selected Legislative History 1974-1991 1, 54-55, 59-61 (Paul Albergo ed., 1992).

n30 *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 524 (1993)* (citation omitted).

n31 *Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980).*

n32 In contrast to Title I, Title II sets forth amendments to the Internal Revenue Code (I.R.C.) and many of its provisions substantially parallel provisions of Title I. ERISA sections 10012008, 88 Stat. 829, 898-94 (1974) (codified as amended in scattered sections of the I.R.C. (1988)). Generally, an employer must comply with the requirements of Title II and the I.R.C. for its pension and welfare benefit costs to receive tax-favored treatment. See Nancy J. Altman, Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security, *42 Tax L. Rev. 433, 444-46 (1987).* Title III designated agency authority at the time of ERISA's enactment. ERISA sections 3001-43, *29 U.S.C. sections 1201*-42 (1988 & Supp. IV 1992). The original designation of agency authority was revised by Reorganization Plan No. 4. Reorganization Plan No. 4 of 1978, 3 C.F.R. section 332 (1978), reprinted in 5 U.S.C. app. at 1163 (1982) and in 92 Stat. 3790 (1978). Title IV governs the termination of pension plans, creates the Pension Benefit Guaranty Corporation (PBGC), and outlines the PBGC insurance program. ERISA sections 4001-4402, *29 U.S.C. sections 1301*-1461 (1988 & Supp. IV 1992).

n33 ERISA sections 101-11, *29 U.S.C. sections 1021*-31 (1988 & Supp. IV 1992).

n34 ERISA sections 201-11, *29 U.S.C. sections 1051*-61 (1988 & Supp. IV 1992).

n35 ERISA sections 301-08, *29 U.S.C. sections 1081*-86 (1988 & Supp. IV 1992).

n36 ERISA sections 501-15, *29 U.S.C. sections 1131*-45 (1988 & Supp. IV 1992).

n37 ERISA sections 601-08, *29 U.S.C. sections 1161*-68 (1988 & Supp. IV 1992).

n38 Langbein & Wolk, supra note 17, at iii ("ERISA cases have become one of the largest spheres of federal civil litigation.").

n39 ERISA section 510, *29 U.S.C. section 1140* (1988).

n40 ERISA section 3(9), *29 U.S.C. section 1002*(9).

n41 See, e.g., *Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 421 (4th Cir. 1993)* (holding insurance company that neglects to pay medical benefits promised by ERISA plan is subject to section 510 even though it is not the employer of the plan beneficiary).

n42 See, e.g., *Unida v. Levi Strauss & Co., 986 F.2d 970, 979-80 (5th Cir. 1993).*

n43 See, e.g., *Gavalik v. Continental Can Co., 812 F.2d 834, 852-53* (3d Cir.), cert. denied, *484 U.S. 979 (1987),* later proceeding sub nom. *McLendon v. Continental Group, 802 F. Supp. 1216 (D.N.J. 1992),* aff'd, *22 F.3d 302* (3d Cir.), and cert. denied, *115 S. Ct. 446 (1994).*

n44 *Doe v. Kohn, Nast & Graf, 862 F. Supp. 1310, 1316* (E.D. Pa.), complaint dismissed in part, *No. 93-4510, 1994 U.S. Dist. LEXIS 13,476* (E.D. Pa. Sept. 20, 1994) (dismissing conspiracy claim).

n45 *McGann v. H & H Music Co., 946 F.2d 401, 403-05, 408 (5th Cir. 1991),* cert. denied, *113 S. Ct. 482 (1992).* For a discussion of McGann, see infra text accompanying notes 90-94.

n46 Dana M. Muir, Plant Closings and ERISA's Noninterference Provision, *36 B.C. L. Rev. 201, 222-23 (1995).*

n47 See, e.g., *Unida v. Levi Strauss & Co., 986 F.2d 970, 980-81 (5th Cir. 1993)* (granting summary judgment to the employer because the employees failed to prove a specific intent to interfere with benefits and recognizing that every plant closing decision should not become the subject of litigation).

n48 Muir, supra note 46, at 221.

n49 120 Cong. Rec. 29,935 (1974) (statement of Sen. Williams).

n50 See infra parts I.A.1 and I.A.2.

n51 See, e.g., *Owens v. Storehouse, Inc., 984 F.2d 394, 396-98 (11th Cir. 1993)* (holding employer did not violate the Exercise Clause by instituting a $ 25,000 cap on AIDS-related health care claims because employer did not institute the cap to retaliate for previous claims).

n52 See *Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 825 (7th Cir. 1984)* (stating that if employer had fired employee in retaliation for seeking relief under ERISA, the employer might be liable under section 510).

n53 See *Fitzgerald v. Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989)* (holding employee's suit cognizable under section 510 if he was fired in retaliation for benefit claims filed by his former wife).

n54 *Crouch v. Mo-Kan Iron Workers Welfare Fund, 740 F.2d 805, 810 (10th Cir. 1984)* (holding union secretary stated a claim under section 510 even though she quit after union officials made her working conditions unbearable).

n55 *985 F.2d 543, 544-45* (11th Cir.), cert. denied, *114 S. Ct. 308 (1993).*

n56 *Seaman, 985 F.2d at 544.*

n57 *Id. at 547.*

n58 See, e.g., *Haberern v. Kaupp Vascular Surgeons Pension Plan, 24 F.3d 1491, 1503-04 (3d Cir. 1994),* cert. denied, *113 S. Ct. 1099 (1995); McGath v. Auto-Body N. Shore, 7 F.3d 665, 670 (7th Cir. 1993)* (holding employer, as plan sponsor, may amend substantive provisions of ERISA pension plan); *West v. Butler, 621 F.2d 240, 245-46 (6th Cir. 1980)* (holding trustees did not state a claim because actions could not affect employment relationship). But see *McGann v. H & H Music Co., 946 F.2d 401, 406 n.8 (5th Cir. 1991)* (reserving judgment on the issue of whether a plan amendment could ever violate section 510), cert. denied, *113 S. Ct. 482 (1992); Aronson v. Servus Rubber, 730 F.2d 12, 16* (1st Cir.) (suggesting, in dictum, that an intentionally discriminatory plan amendment could violate section 510), cert. denied, *469 U.S. 1017 (1984); Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1225 (D. Md. 1990)* (holding grant of summary judgment improper where plan amendment may have impermissibly targeted a single employee).

n59 See, e.g., *McGann, 946 F.2d at 407-08.*

n60 *Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 825 (7th Cir. 1984).*

n61 Id.

n62 Id.

n63 ERISA section 204(g)(1), *29 U.S.C. section 1054* (1988); *Smith v. National Credit Union Admin. Bd., 36 F.3d 1077, 1081-82 (11th Cir. 1994)* (holding retroactive amendments to pension and savings plan violate ERISA by reducing accrued benefits).

n64 *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990).*

n65 *Id. at 135-36.*

n66 Id. For a more detailed discussion of the Ingersoll-Rand case, see infra text and accompanying notes 176-81.

n67 See, e.g., *Humphreys v. Bellaire Corp., 966 F.2d 1037, 1043-44 (6th Cir. 1992)* (involving employee fired two months prior to vesting); *Olitsky v. Spencer Gifts, 964 F.2d 1471, 1473, 1479 (5th Cir. 1992)* (involving employee fired a few months prior to vesting under a ten-year cliff vesting provision), cert. denied, *113 S. Ct. 1253 (1993); Biggins v. Hazen Paper Co., 953 F.2d 1405, 1416 (1st Cir. 1992),* vacated on other grounds, *113 S. Ct. 1701 (1993)* (vacating counts under the Age Discrimination in Employment Act of 1967 (ADEA), *29 U.S.C. sections 621*-34 (1988 & Supp. IV 1992)); *Ursic v. Bethlehem Mines, 719 F.2d 670, 672 (3d Cir. 1983)* (involving employee terminated after twenty-nine and one-half years who would have qualified for a disability pension in another six months); *McKay v. Capital Cities Communications, 605 F. Supp. 1489, 1490-91*

(S.D.N.Y. 1985) (involving employee fired after nine years of service where employer's plan had a ten-year cliff vesting provision).

n68 See, e.g., *Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 903 (W.D. Mich. 1987)* (involving plan with 30 and out and 85 point benefits), later proceeding, *No. K84-433, 1988 U.S. Dist. LEXIS 18,156* (W.D. Mich. Feb. 15, 1988) (certifying questions for appeal).

n69 See, e.g., *Gavalik v. Continental Can Co., 812 F.2d 834, 838-39* (3d Cir.), cert. denied, *484 U.S. 979 (1987)*, later proceeding sub nom., *McLendon v. Continental Group, 802 F. Supp. 1216 (D.N.J. 1992),* aff'd, *22 F.3d 302* (3d Cir.), and cert. denied, *115 S. Ct. 446 (1994).*

n70 ERISA does not require an accrued benefit to include the value of early retirement subsidies. ERISA section 204(b)(1)(H)(v), *29 U.S.C. section 1054*(b)(1)(H)(v) (1988). Therefore, such benefits are not covered by statutory vesting.

n71 Alan L. Gustman et al., The Role of Pensions in the Labor Market: A Survey of the Literature, *47 Indus. & Lab. Rel. Rev. 417, 426-27 (1994).*

n72 See, e.g., *Dister v. Continental Group, Inc., 859 F.2d 1108, 1110-11 (2d Cir. 1988)* (assuming that section 510 protected the plaintiff's right to his employer's enhanced "75/80" benefit plan even though he was vested fully in the basic pension plan); cf. *Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1318-19 (N.D. Cal. 1984)* (granting employer summary judgment after fully vested employee brought claim alleging the employer terminated him solely to prevent him from attaining eligibility for early retirement). Some read Baker as indicating that section 510 does not protect a vested participant's right to an early retirement benefit. However, Baker simply requires a plaintiff to make a strong showing of specific intent in order to avoid summary judgment. See also Muir, supra note 46, at 238-40.

n73 *Gavalik, 812 F.2d at 840-41.* For a more detailed description of the actions against Continental Can Company and related employers, see Gordon L. Clark, Pensions and Corporate Restructuring in American Industry 75-98 (1993).

n74 *McLendon v. Continental Can Co., 908 F.2d 1171, 1175 n.4 (3d Cir. 1990),* later proceeding, *802 F. Supp. 1216 (D.N.J. 1992),* aff'd, *22 F.3d 302* (3d Cir.), and cert. denied sub nom., *Sanchez v. McLendon, 115 S. Ct. 446 (1994).*

n75 *Gavalik, 812 F.2d at 840-41.*

n76 Id.

n77 *McLendon, 908 F.2d at 1174.*

n78 *Clark*, *supra* note 73, at 86-87.

n79 *McLendon, 802 F. Supp. at 1217, 1221* .

n80 See, e.g., *Clark v. Coats & Clark, 990 F.2d 1217, 1222 (11th Cir. 1993); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 236 (4th Cir. 1991).*

n81 Two types of pension plans exist: defined contribution pension plans and defined benefit pension plans. ERISA section 3(34)-(35), *29 U.S.C. section 1002*(34)-(35) (1988).

n82 See Richard A. Ippolito, The Economics of Pension Insurance 16-21 (1989) [hereinafter Ippolito, Pension Insurance]; Richard A. Ippolito, Pensions, Economics and Public Policy 36-51 (1986) [hereinafter Ippolito, Pensions]; see also Langbein & Wolk, supra note 17, at 135-36. Primarily because of perceived abuses aimed at benefiting company insiders, the I.R.C. sets forth some rather complex minimum accrual formulas. *I.R.C. section 411(b)* (West 1988); 1 Gary I. Boren, Qualified Deferred Compensation Plans sections 3:22, 3:27 (Norman P. Stein & Carolyn E. Smith eds., 1994). Also, the exact definition of "accrued benefits" sometimes becomes controversial when a pension plan is terminated. See, e.g., Dana M. Muir, Note, Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Plans, *87 Mich. L. Rev. 1034, 1038-51 (1989)* (discussing whether early retirement benefits constituted accrued benefits prior to clarifying amendments in the Retirement Equity Act of 1984 section 301(a)(2), 98 Stat. 1451 (codified at *29 U.S.C. section 1054*(g) (1988)).

n83 See supra text accompanying note 71.

n84 Gustman et al., supra note 71, at 426-27.

n85 See *Garry v. TRW, Inc., 603 F. Supp. 157, 162 (N.D. Ohio 1985)* (discussing Houck v. Lee Wilson Eng'g Co., No. C82-351 (N.D. Ohio filed July 23, 1984)).

n86 *Gavalik v. Continental Can Co., 812 F.2d 834, 851* (3d Cir.), cert. denied, *484 U.S. 979 (1987),* later proceeding sub nom., *McLendon v. Continental Group, 802 F. Supp. 1216 (D.N.J. 1992),* aff'd, *22 F.3d 302* (3d Cir.), and cert. denied, *115 S. Ct. 446 (1994); Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 903 (W.D. Mich. 1987),* later proceeding, *No. K84-433. 1988 U.S. Dist. LEXIS 18,156* (W.D. Mich. Feb. 15, 1988) (certifying questions for appeal).

n87 See, e.g., *Haberern v. Kaupp Vascular Surgeons Pension Plan, 24 F.3d 1491, 1503 (3d Cir. 1994)* (stating employer "actions [must affect] . . . the employer/employee relationship"), cert. denied, *115 S. Ct. 1099 (1995); McGath v. Auto-Body N. Shore, 7 F.3d 665, 668 (7th Cir. 1993)* (noting focus of section 510 protections is on the employment relationship).

n88 See *Stiltner v. Beretta U.S.A. Corp., No. 94-1323, 1995 U.S. App. LEXIS 945,* at *24-28 (4th Cir. Jan. 18, 1995) (stating Exercise Clause prevents an employer from making receipt of health benefits contingent upon waiving a claim for disability benefits); *Aronson v. Servus Rubber, 730 F.2d 12, 16* (1st Cir.) (noting that under certain circumstances a plan amendment could violate section 510), cert. denied, *469 U.S. 1017 (1984); Newton v. Van Otterloo, 756 F. Supp. 1121, 1136 (N.D. Ind. 1991)* (suggesting retaliatory reduction in benefits might violate section 510), later proceeding, *No. 90-2445, 1991 U.S. App. LEXIS 22,525* (7th Cir. Sept. 18, 1991) (dismissing appeal for mootness). The Fifth Circuit has reserved decision on this issue. *Hines v. Massachusetts Mut. Life Ins. Co., 43 F.3d 207, 210 n.5 (5th Cir. 1995).*

n89 Carl A. Greci, Note, Use it and Lose It: The Employer's Absolute Right Under ERISA Section 510 to Engage in Post-Claim Modifications of Employee Welfare Benefit Plans, *68 Ind. L.J. 177, 195-96 (1992)* (arguing against limiting section 510 to employment terminations).

n90 *946 F.2d 401, 403 (5th Cir. 1991),* cert. denied, *113 S. Ct. 482 (1992).*

n91 *Id. at 405-08;* see also *Owens v. Storehouse, Inc., 984 F.2d 394, 398-99 (11th Cir. 1993).* For additional commentary on employers' rights to modify health care plans in order to contain costs with respect to HIV and AIDS, see James M. Smith, HIV/AIDS and Workplace Discrimination: Dickens Revisited--"It was the Best of

Times, It was the Worst of Times," *22 U. West L.A. L. Rev. 19 (1991);* James R. Bruner, Note, AIDS and ERISA Preemption: The Double Threat, *41 Duke L.J. 1115 (1992);* T. J. Dorsey, Recent Developments, McGann v. H & H Music Co.: The Limited Meaning of "Discrimination" Under Section 510 of ERISA, *67 Tul. L. Rev. 305 (1992).*

n92 *728 F. Supp. 1210, 1225-26 (D. Md. 1990).*

n93 *McGann, 946 F.2d at 405-06.*

n94 *Id. at 405-08.*

n95 The plaintiff alleged a variety of other claims as well. *862 F. Supp. 1310, 1313-14 (E.D. Pa. 1994),* complaint dismissed in part, *No. 93-4510, 1994 U.S. Dist LEXIS 13,476* (E.D. Pa. Sept. 20, 1994) (dismissing conspiracy claim).

n96 *Kohn, Nast & Graf, 862 F. Supp. at 1313.*

n97 *Id. at 1314-15.*

n98 *Id. at 1322-23.*

n99 *Id. at 1323-24;* see also *Zimmerman v. Sloss Equip., 835 F. Supp. 1283, 1288 (D. Kan. 1993)* (holding that termination of plaintiff while she was on medical leave created an inference of specific intent).

n100 ERISA section 3(21)(A)(i), (iii), *29 U.S.C. section 1002*(21)(A)(i), (iii) (1988 & Supp. IV 1992).

n101 ERISA section 3(21)(A)(i), *29 U.S.C. section 1002*(21)(A)(i) (1988 & Supp. IV 1992); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 521 (1993).*

n102 *29 C.F.R. section 2509.75-8*, Q & A FR-12 (1976).

n103 *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989).*

n104 Id.; see also *Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994)* ("The linchpin of fiduciary status under ERISA is discretion.").

n105 *Eaton v. D'Amato, 581 F. Supp. 743, 746-47 (D.D.C. 1980)* (holding corporation engaged to administer plan was a fiduciary because it possessed "broad latitude" in making final decisions).

n106 See, e.g., *29 C.F.R. section 2509.75-8*, Q & A D-4 (1976) (holding members of a company's board of directors became ERISA fiduciaries by selecting and retaining plan fiduciaries); *Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988)* (involving selection of pension plan's administrative committee).

n107 H.R. Rep. No. 1280, 93d Cong., 2d Sess. 323 (1974).

n108 See, e.g., *Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2071 (1993); Confer v. Custom Eng'g Co., 952 F.2d 34, 39-40 (3d Cir. 1991)* (Seitz, J., concurring); *Useden v. Acker, 947 F.2d 1563, 1577 (11th Cir. 1991),* cert. denied, *113 S. Ct. 2927 (1993).*

n109 ERISA section 3(21)(A)(ii), *29 U.S.C. section 1002*(21)(A)(ii) (1988 & Supp. IV 1992); see also *29 C.F.R. section 2510.3-21(c) (1974)*. While this may sound like an easily applied definition, the courts have developed a complex five-part test to facilitate its implementation. See, e.g., *Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1116-20 (9th Cir. 1994),* cert. denied, *63 U.S.L.W. 3562* (U.S. Jan. 24, 1995). A split has developed in the circuits over the application of at least one prong of the test. Compare *Thomas, Head & Greisen Employees Trust, 24 F.3d at 1118* (holding recommendation of partnership's investment notes constitutes rendering investment advice) with *Schloegel v. Boswell, 994 F.2d 266, 273* (5th Cir.) (holding sales pitch for life insurance policies did not constitute rendering investment advice), cert. denied, *114 S. Ct. 440 (1993); Consolidated Beef Indus., Inc. v. New York Life Ins. Co., 949 F.2d 960, 965 (8th Cir. 1991)* (holding sale of specific investments does not constitute investment advice), cert. denied, *112 S. Ct. 1670 (1992); Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 293-94 (7th Cir. 1989)* (holding salesman could not provide investment advice where plan did not provide him with information on the plan's complete investment portfolio).

n110 *29 C.F.R. section 2509.75-8*, Q & A D-3 (1976).

n111 Langbein & Wolk, supra note 17, at 626-27.

n112 Id.

n113 Supra text accompanying note 17 (noting private pension plans held assets of $ 3.2 trillion in 1993).

n114 *Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 940-41 (3d Cir. 1985)* ("The substantive protections of ERISA establish a complex and evolving body of federal law . . . .")

n115 Langbein & Wolk, supra note 17, at 627.

n116 ERISA section 3(21)(A), *29 U.S.C. section 1002*(21)(A) (1988 & Supp. IV 1992).

n117 *29 C.F.R. section 2509.75-8*, Q & A D-4 (1976).

n118 *Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985).*

n119 Id.

n120 See, e.g., Jane K. Stanley, The Definition of a Fiduciary Under ERISA: Particular Persons and Entities, *27 Real Prop. Prob. & Tr. J. 711 (1993)* [hereinafter Stanley, Particular Persons and Entities]; Jane K. Stanley, The Definition of a Fiduciary Under ERISA: Functions Covered Under Subsections 3(21)(A)(i), (ii) and (iii), *27 Real Prop. Prob. & Tr. J. 468 (1992)* [hereinafter Stanley, Fiduciary Functions]; Jane K. Stanley, The Definition of a Fiduciary Under ERISA: Basic Principles, *27 Real Prop. Prob. & Tr. J. 237 (1992).*

n121 See, e.g., Langbein & Wolk, supra note 17, at 634; Stanley, Particular Persons and Entities, supra note 120, at 732-33; Stanley, Fiduciary Functions, supra note 120, at 491-93, 508-09.

n122 See *Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1013 (5th Cir. 1992)* (involving managed care company that denied precertification of psychiatric hospitalization); *Corcoran v. United Healthcare, 965 F.2d 1321, 1324* (5th Cir.) (involving fetus which died after health care utilization review company denied mother hospitalization during pregnancy), cert. denied, *113 S. Ct. 812 (1992).*

n123 See infra text accompanying note 143.

n124 See *Pitman v. Blue Cross & Blue Shield, 24 F.3d 118, 119-20 (10th Cir. 1994)* (involving patient who paid for treatment when insurer/plan administrator refused to pay); *Kuhl v. Lincoln Nat'l Health Plan, 999 F.2d 298, 300 (8th Cir. 1993)* (denying a remedy although precertifier's refusal to approve heart surgery probably contributed to patient's early death), cert. denied, *114 S. Ct. 694 (1994);* see also Langbein & Wolk, supra note 17, at 634.

n125 See, e.g., *Sixty-Five Sec. Plan v. Blue Cross & Blue Shield, 583 F. Supp. 380, 384-86 (S.D.N.Y. 1984)* (finding discretion to make final decision on claims payment resulted in fiduciary status).

n126 See, e.g., *Klosterman v. Western Gen. Management, 32 F.3d 1119, 1124-25 (7th Cir. 1994)* (involving third party administrator who possessed no control or authority over discretionary items of plan administration); *Pohl v. National Benefits Consultants, 956 F.2d 126, 128-29 (7th Cir. 1992)* (involving plan administrator who performed purely administrative duties); Buckley Dement, Inc. v. Travelers Plan Admin. of Ill., No. 92-*C5946, 1993 U.S. Dist. LEXIS 15,663*, at *7-10 (N.D. Ill. Nov. 2, 1993) (involving third party administration contract which reserved all discretion to the plan sponsor), aff'd on other grounds, *39 F.3d 784, 787 (7th Cir. 1994)).*

n127 *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 521 (1993).*

n128 *Id. at 521-22.*

n129 *Id. at 522.*

n130 *Id. at 523.*

n131 *Id. at 527-29.* The ERISA provision is at ERISA section 401(b)(2)(B), *29 U.S.C. section 1101*(b)(2)(B) (1988).

n132 *29 C.F.R. section 2509.75-2(b) (1986).*

n133 *Hancock, 114 S. Ct. at 528-31.*

n134 *Id. at 532* (Thomas, J., dissenting) ("The court abruptly overturns the settled expectations of the insurance industry . . . ."). But see Scott V. Rozmus, Note, Insurers Beware: General Account Activities May Subject Insurance Companies to ERISA's Fiduciary Obligations, *88 Nw. U. L. Rev. 803 (1994)* (predicting the Supreme Court would hold insurers such as Hancock to be ERISA fiduciaries).

n135 DOL Issues Proposed Class Exemption to Grant Insurers Relief From Ruling, Pensions & Benefits Daily (BNA) (Aug. 22, 1994); ACLI Requests DOL Advisory Opinion on "Customary" Practices of Insurers, Pensions & Benefits Daily (BNA) (Apr. 19, 1994); Life Insurance Industry to Request Class Exemption in Response to Court Ruling, Pensions & Benefits Daily (BNA) (Mar. 17, 1994) (citations available in LEXIS, Labor Library, BNAPEN file). On July 12, 1995, the DOL issued a final exemption granting the insurance industry both retroactive and prospective relief from the Hancock decision. Class Exemption for Certain Transactions Involving Insurance Company General Accounts, *60 Fed. Reg. 35,925 (1995).*

n136 Compare *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1143-45 (2d Cir. 1992)* (noting insurers may be ERISA fiduciaries with respect to certain investments), aff'd, *114 S. Ct. 517 (1993)* with *Mack Boring & Parts v. Meeker Sharkey Moffitt, 930 F.2d 267, 270-77 (3d Cir. 1991)* (finding moneys held in general assets are not plan assets so long as the contract does not provide for variable benefits).

n137 *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 528-29 (1993).*

n138 Proposed Class Exemption for Certain Transactions Involving Insurance Company General Accounts, *59 Fed. Reg. 43,134 (1994).*

n139 ERISA sections 401-14, *29 U.S.C. sections 1101*-14 (1988 & Supp. IV 1992).

n140 ERISA section 401, *29 U.S.C. section 1101* (1988 & Supp. IV 1992).

n141 ERISA section 404(a)(1)(B), *29 U.S.C. section 1104*(a)(1)(B) (1988 & Supp. IV 1992).

n142 ERISA section 404(a)(1)(C)-(D), *29 U.S.C. section 1104*(a)(1)(C)-(D) (1988 & Supp. IV 1992).

n143 ERISA section 404(a)(1)(A), *29 U.S.C. section 1104*(a)(1)(A) (1988 & Supp. IV 1992). For a critique of this provision, see Daniel Fischel & John H. Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, *55 U. Chi. L. Rev. 1105 (1988).*

n144 See supra text accompanying notes 111-15.

n145 *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989)* ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.'") (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649) (all brackets inserted by Firestone opinion); *Central States Pension Fund v. Central Transp., 472 U.S. 559, 570 (1985)* ("Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility.") (citing, among other authorities omitted here, S. Rep. No. 127, 93d Cong., 2d Sess. 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4865; H.R. Rep. No. 533, 93d Cong., 2d Sess. 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649).

n146 See, e.g., *Martin v. Schwab, No. 91-5059, 1992 U.S. Dist. LEXIS 14,772,* at *24 n.9 (W.D. Mo. 1992) (discussing ERISA's fiduciary standards in the context of claims brought by the DOL); *Restatement of Trusts (Second) sections 174*, 227 (1959); Langbein & Wolk, supra note 17, at 651.

n147 H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4650.

n148 In fact, unlike traditional trust law under which the use of a trust is optional, ERISA requires most employee benefit plan assets to be held in trust. ERISA section 403, *29 U.S.C. section 1103* (1988).

n149 See, e.g., *Acosta v. Pacific Enters., No. 89-56170, 1992 U.S. App. LEXIS 639,* at *13 (9th Cir. Jan. 23, 1992) (noting ERISA does not detail each duty of a fiduciary but relies generally upon trust law); *Useden v. Acker, 947 F.2d 1563, 1581 (11th Cir. 1991)* (stating ERISA "is, in its contours, meaningfully distinct from the body of the common law of trusts"), cert. denied, *113 S. Ct. 2927 (1993); Bird v. Shearson Lehman/Am. Express, 926 F.2d 116, 12223* (2d Cir.) (Kearse, J., dissenting) (arguing Congress intended the courts to develop fiduciary standards tailored to the needs of employee benefit plans, participants, and beneficiaries), cert. denied, *501 U.S. 1251 (1991).*

n150 See supra text following note 99.

n151 Section 501 contains ERISA's criminal enforcement provisions. ERISA section 501, *29 U.S.C. section 1131* (1988).

n152 See Jay Conison, Suits for Benefits Under ERISA, *54 U. Pitt. L. Rev. 1, 6-8 (1992)* (stating section 502 establishes an imprecise and unsystematic civil enforcement system).

n153 *473 U.S. 134, 146-47 (1985).*

n154 See, e.g., *Pacificare, Inc. v. Martin, 34 F.3d 834, 836 (9th Cir. 1994)* (holding ERISA does not permit an insurer to sue a participant for unjust enrichment); *Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 58-60* (4th Cir.) (allowing estoppel claims may burden plans with significant unanticipated expenses), amended, slip op. (4th Cir. July 17, 1992), cert. denied, *113 S. Ct. 1051 (1993);* see also *Coonce v. Aetna Life Ins. Co., 777 F. Supp. 759, 770 (W.D. Mo. 1991)* (suggesting claim for estoppel or misrepresentation may affect actuarial integrity of plans); Conison, supra note 152, at 7-8.

n155 ERISA section 502(a)(1), (3), *29 U.S.C. section 1132*(a)(1), (3).

n156 ERISA section 502(a)(2), *29 U.S.C. section 1132*(a)(2) (1988 & Supp. IV 1992).

n157 ERISA section 409(a), *29 U.S.C. section 1109*(a) (1988 & Supp. IV 1992).

n158 Id.

n159 ERISA section 502(e)(1), *29 U.S.C. section 1132*(e)(1) (1988 & Supp. IV 1992).

n160 ERISA section 502(g)(1), *29 U.S.C. section 1132*(g)(1).

n161 ERISA section 502(k), *29 U.S.C. section 1132*(k).

n162 ERISA section 502(i), *29 U.S.C. section 1132*(i).

n163 ERISA section 502(l)(4), *29 U.S.C. section 1132*(l)(4).

n164 ERISA section 502(a)(3), *29 U.S.C. section 1132*(a)(3).

n165 Id.

n166 Terry Collingsworth, ERISA Section 510--A Further Limitation on Arbitrary Discharges, 10 Indus. Rel. L.J. 319, 348 (1988); William C. Martucci & John L. Utz, Unlawful Interference with Protected Rights

Under ERISA, *2 Lab. Law. 251, 262-64 (1986);* Joan Vogel, Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?, *62 Notre Dame L. Rev. 1024, 1047, 1053-54 (1987).*

n167 H.R. Rep. No. 533, 93d Cong., 2d Sess. 17 (1973), reprinted in 1974 U.S.C.C.A.N 4639, 4655.

n168 See, e.g., *Fleming v. Ayers & Assocs., 948 F.2d 993, 998 (6th Cir. 1991); Folz v. Marriott Corp., 594 F. Supp. 1007, 1016-17 (W.D. Mo. 1984); Bittner v. Sadoff & Rudoy Indus., 490 F. Supp. 534, 536 (E.D. Wis. 1980),* aff'd in part and rev'd in part, *728 F.2d 820 (7th Cir. 1984).*

n169 *Folz, 594 F. Supp. at 1018* (denying reinstatement because of level of plaintiff and extreme hostility between the parties); *Bittner, 490 F. Supp. at 536.*

n170 *Folz, 594 F. Supp. at 1018-19; Bittner, 490 F. Supp. at 536.*

n171 See, e.g., *Prod. and Maintenance Employees' Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1407 (7th Cir. 1992); Folz, 594 F. Supp. at 1019-20; Bittner, 490 F. Supp. at 536.*

n172 See, e.g., *Velez v. Puerto Rico Marine Management, 957 F.2d 933, 941 (1st Cir. 1992); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1219* (8th Cir.), cert. denied, *454 U.S. 968 (1981); Folz, 594 F. Supp. at 1016-17.*

n173 *Bittner, 490 F. Supp. at 536; Baeten v. Van Ess, 474 F. Supp. 1324, 1331 (E.D. Wis. 1979)* (discussing damages available under section 502(a)(3) in the context of flagrant and malicious actions by plan trustees).

n174 *Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986),* later proceeding, *812 F.2d 559 (9th Cir. 1987)* (awarding attorneys' fees).

n175 See, e.g., *Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2077 n.6* (White, J., dissenting).

n176 *498 U.S. 133 (1990).*

n177 *Id. at 135-36.*

n178 *Id. at 136* (quoting *McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 n.3 (Tex. 1989)).*

n179 *McClendon, 498 U.S. at 136;* see also *29 C.F.R. section 2530.200b-4 (1980).*

n180 *McClendon, 498 U.S. at 142.*

n181 *Id. at 145.*

n182 *Blue Cross & Blue Shield v. Lewis, 753 F. Supp. 345, 347 (N.D. Ala. 1990)* (showing deference to the Court by "being willing to attribute literacy to the Supreme Court"), supp. op., *753 F. Supp. 345 (N.D. Ala. 1991),* later proceeding, *754 F. Supp. 849 (N.D. Ala. 1991).*

n183 See, e.g., *McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821 n.7 (11th Cir. 1991).*

n184 See infra parts III.A. & III.B.

n185 *Gilliam v. Edwards, 492 F. Supp. 1255, 1267 (D.N.J. 1980).*

n186 *Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1242-43 (2d Cir. 1989).*

n187 *Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117, 122* (D.C. Cir.), cert. denied, *484 U.S. 943 (1987).* Crawford may no longer be good law after *Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 375-77 (1987)* which held that plan could not impose a constructive trust on benefits of participant who embezzled from his union.

n188 *Katsaros v. Cody, 744 F.2d 270, 281* (2d Cir.), cert. denied, *469 U.S. 1072 (1984).*

n189 *Marshall v. Carroll, 2 Employee Benefits Cas. (BNA) 2491* (N.D. Cal. Apr. 18, 1980), aff'd without op. sub nom., *Donovan v. Carroll, 673 F.2d 1337 (9th Cir. 1982).*

n190 ERISA section 409, *29 U.S.C. section 1109.*

n191 ERISA section 502, *29 U.S.C. section 1132.*

n192 *Giardono v. Jones, 867 F.2d 409, 413 (7th Cir. 1989)* (denying standing for employer); *Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 71 (D.C. Cir. 1987)* (same); *Dime Coal Co. v. Combs, 796 F.2d 394, 396 (11th Cir. 1986)* (denying federal jurisdiction for employer claims); *Whitworth Bros. Storage Co. v. Central States Pension Fund, 794 F.2d 221, 228-29* (6th Cir.) (denying federal jurisdiction for employer's claim), cert. denied, *479 U.S. 1007 (1986); Pressroom Unions v. Continental Assurance Co., 700 F.2d 889, 891-93* (2d Cir.) (denying subject matter jurisdiction over suit by Taft-Hartley plan), cert. dismissed, *463 U.S. 1233,* cert. denied, *464 U.S. 845 (1983); Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323, 326 (2d Cir. 1982)* (holding section 502(e) did not confer subject matter jurisdiction for employer's suit); see *Coleman v. Champion Int'l Corp./Champion Forest Prods., 992 F.2d 530, 536 (5th Cir. 1993)* (finding son of deceased plan participant did not have standing to pursue ERISA suit); *Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 987-88* (4th Cir.) (denying federal jurisdiction for suit by plan administrator), cert. denied, *498 U.S. 982 (1990); Mitchell v. Mobil Oil Corp., 896 F.2d 463, 473-74* (10th Cir.) (denying standing for former employee), cert. denied, *498 U.S. 898 (1990); Northeast Dep't ILGWU Health & Welfare v. Teamsters Local Union No. 229, 764 F.2d 147, 152-54 (3d Cir. 1985)* (denying standing for union). But see *Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300, 1304-05 (9th Cir. 1982)* (granting employer standing to sue under general test developed by Supreme Court as to when a plaintiff has standing to sue under a federal statute). Recently even the Ninth Circuit has questioned the continuing vitality of *Fentron. Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1265 (9th Cir. 1992);* see also *Pilkington v. Perelman, No. CV 91-5195, 1993 U.S. Dist. LEXIS 19,574,* at *8-11 (C.D. Cal. Mar. 15, 1993) (deciding Fentron is no longer binding in the 9th Circuit after Cripps).

n193 See *Saramar Alum. Co. v. Pension Plan for Employees, 782 F.2d 577, 581 (6th Cir. 1986)* (finding plan that is also a fiduciary has standing to counterclaim as a fiduciary); *Great Lakes Steel v. Deggendorf, 716 F.2d 1101, 1104-05 (6th Cir. 1983)* (permitting employer that is also a fiduciary to sue as a fiduciary).

n194 *473 U.S. 134 (1985).*

n195 See, e.g., *Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993).*

n196 See, e.g., *Howe v. Varity Corp., 36 F.3d 746, 754-55* (8th Cir.) (permitting participants to sue on their own behalf for breach of fiduciary duty which resulted in their loss of health care plan benefits), clarified, *41 F.3d 1263 (8th Cir. 1994)* (regarding reinstatement to plan), cert. granted, *115 S. Ct. 1792 (1995); Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 992-93 (7th Cir. 1993)* (allowing an individual plan participant to sue for a fiduciary violation in case in which he failed to receive important plan information). But see *Sokol v. Bernstein, 803 F.2d 532, 535 (9th Cir. 1986)* ("The Russell Court used language implying that all of the statute's provisions relating to fiduciary duties run only to plans, and not to . . . individuals."). The United States Supreme Court has granted certiorari on this and other issues in the *Howe case. 115 S.Ct. 1792 (1995).* For a discussion of the Eighth Circuit's opinion in Howe, see infra notes 333-55. However, regardless of the proper outcome, the scope of relief in a breach of fiduciary duty suit brought under section 502(a)(3) remains an important issue because of the potential for recovery of compensatory or punitive damages. In addition, causes of action brought by plan sponsors deserve attention. See infra text accompanying notes 371-76.

n197 *113 S. Ct. 2063 (1993).* See infra part II.C for a detailed discussion of Mertens and text accompanying notes 330-31 for a discussion of this issue following Mertens.

n198 *Anweiler, 3 F.3d at 993.*

n199 *Cia. Petrolera Caribe v. ARCO Caribbean, 754 F.2d 404, 428 (1st Cir. 1985).*

n200 *Warren v. Society Nat'l Bank, 905 F.2d 975, 982 (6th Cir. 1990).*

n201 See, e.g., *Novak v. Andersen Corp., 962 F.2d 757, 760 (8th Cir. 1992),* cert. denied, *113 S. Ct. 2928 (1993); ACTWU v. Murdock, 861 F.2d 1406, 1419 (9th Cir. 1988); Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988);* see also S. Rep. No. 383, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4989 (stating equitable relief includes a constructive trust on plan assets).

n202 *ACTWU, 861 F.2d at 1419; Nieto, 845 F.2d at 875.*

n203 *Novak, 962 F.2d at 760; First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, 960 F.2d 1546, 1553 (11th Cir. 1992);* see also Norman Stein, ERISA and the Limits of Equity, 56 Law & Comtemp. Probs. 71, 90-94 (1993) (discussing unwillingness of courts to permit compensatory and punitive relief).

n204 *Restatement (Second) of Trusts section 258* (1959).

n205 Compare *Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 15-18 (2d Cir. 1991)* (noting application of traditional trust law principles gives rise to a right of contribution), cert. denied, *112 S. Ct. 3014 (1992); Free v. Briody, 732 F.2d 1331, 1336-38 (7th Cir. 1984)* (permitting a right of indemnification), later proceeding, *793 F.2d 807 (7th Cir. 1986)* (regarding fees), with *Lumpkin v. Envirodyne Indus., 933 F.2d 449, 464 n.10 (7th Cir. 1991)* (calling the matter "unsettled"); *Kim v. Fujikawa, 871 F.2d 1427, 1432-33 (9th Cir. 1989)* (finding contribution not available); *Donovan v. Robbins, 752 F.2d 1170, 1178 (7th Cir. 1984)* (questioning the continuing validity of the "dictum" in Free).

n206 Elizabeth A. Di Cola, Comment, Fairness and Efficiency: Allowing Contribution Under ERISA, *80 Cal. L. Rev. 1543 (1992);* Paul J. Hunt, Note, Bucking the Trend: An Argument in Favor of a Fiduciary's Implied Right to Contribution Under ERISA, *76 Va. L. Rev. 1377 (1990).*

n207 Kevin B. Bogucki et al., Case Comment, ERISA--Nieto v. Ecker: The Propriety of NonFiduciary Liability Under Section 409, *64 Notre Dame L. Rev. 271 (1989);* Gregory A. Hewett, Should Non-Fiduciaries Who Knowingly Participate in a Fiduciary Breach be Liable for Damages Under ERISA?, *71 Wash. U. L.Q. 773 (1993).*

n208 Compare *Useden v. Acker, 947 F.2d 1563, 1579-80 (11th Cir. 1991)* (denying cause of action against nonfiduciaries), cert. denied, *113 S. Ct. 2927 (1993); Nieto v. Ecker, 845 F.2d 868, 872-73 (9th Cir. 1988)* (denying cause of action against nonfiduciary attorney) with *Pappas v. Buck Consultants, 923 F.2d 531, 541 (7th Cir. 1991)* (permitting nonfiduciary liability); *Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988)* (same).

n209 *113 S. Ct. 2063, 2066 (1993).*

n210 See *id. at 2067.*

n211 See, e.g., *Reich v. Continental Casualty Co., 33 F.3d 754, 757-58 (7th Cir. 1994)* (denying claim for knowing participation against a nonfiduciary and questioning continuing availability of claim for conspiracy), cert. denied, *115 S. Ct. 1104 (1995);* see also Andrew T. Kusner, Mertens v. Hewitt Associates and the ERISA Liability of the Professional Service Provider, *15 Berkeley J. Employment & Lab. L. 273, 289-97 (1994).*

n212 *113 S. Ct. 2063 (1993).*

n213 *Id. at 2065.*

n214 The Pension Benefit Guaranty Corporation (PBGC) is a governmental entity within the Department of Labor. The PBGC supervises the termination of defined benefit pension plans and insures benefits, up to specified amounts, under those plans. See ERISA section 4001, *29 U.S.C. section 1302.*

n215 *Mertens, 113 S. Ct. at 2065.*

n216 See id.

n217 See id.

n218 Brief for Petitioners at 5 n.1, *Mertens v. Hewitt Assocs., 113 S. Ct. 2063 (1993)* (No. 91-1671).

n219 *Mertens v. Black, 948 F.2d 1105, 1106 (9th Cir. 1991),* summary judgment denied sub nom., *Mertens v. Kaiser Steel Retirement Plan, 829 F. Supp. 1158, 1163 (N.D. Cal. 1992).*

n220 *Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2065 (1993).*

n221 Id.

n222 Id.

n223 Id.

n224 *Id. at 2066.*

n225 See supra text accompanying notes 207-11.

n226 *Mertens, 113 S. Ct. at 2067.*

n227 *Id. at 2066.*

n228 *Id. at 2067.*

n229 Id.

n230 *Id. at 2068.*

n231 See supra text accompanying notes 144-49.

n232 *Mertens, 113 S. Ct. at 2068.*

n233 *Id. at 2068-69.*

n234 *Id. at 2069.*

n235 *Id. at 2069-70.*

n236 Id.

n237 *Mertens, 113 S.Ct. at 2068.*

n238 *Id. at 2071.*

n239 *Id. at 2070.*

n240 See id.

n241 *Id. at 2071.*

n242 *Mertens, 113 S. Ct. at 2068.*

n243 *Id. at 2072.*

n244 *Id. at 2073.*

n245 *Id. at 2074.*

n246 *Id. at 2069.*

n247 *Mertens, 113 S. Ct. at 2076.*

n248 *Id. at 2075 n.4.*

n249 *Id. at 2074.*

n250 See supra note 4.

n251 See infra text accompanying notes 377-82.

n252 See supra text accompanying note 43.

n253 H.R. Rep. No. 533, 93d Cong., 1st Sess. 1-2 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649.

n254 119 Cong. Rec. 30,374 (1973) (statement of Sen. Hartke).

n255 See 119 Cong. Rec. 30,043-44 (1973) (statement of Sen. Javits).

n256 Id.

n257 *42 U.S.C. section 2000e-5*(g)(1) (Supp. IV 1992); see *Setser v. Novack Inv. Co., 638 F.2d 1137, 1141* (8th Cir.) ("Seeming unanimity of judicial thinking interpreting [Title VII] as providing solely equitable relief.") (citation omitted), amended, *657 F.2d 962* (8th Cir.) (regarding affirmative action plans), cert. denied, *454 U.S. 1064 (1981).*

n258 See, e.g., *EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 879 (7th Cir. 1994),* cert. denied, *No. 94-981, 1995 U.S. LEXIS 1800* (U.S. Feb. 27, 1995).

n259 *Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2069 (1993).*

n260 See, e.g., *McDonald v. Artcraft Elec. Supply Co., 774 F. Supp. 29, 35 (D.D.C. 1991).*

n261 *Mertens, 113 S. Ct. at 2069.*

n262 See *Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994);* 1 Boren, supra note 82, section 16:13.

n263 See supra text accompanying note 64.

n264 See supra text accompanying notes 87-89.

n265 2 Dan B. Dobbs, Law of Remedies section 6.10(5) (2d ed. 1993).

n266 *Schwartz v. Gregori, No. 93-3964, 1995 U.S. App. LEXIS 1764,* at **6 (6th Cir. Jan. 31, 1995), petition for cert. filed, *63 U.S.L.W. 2528* (U.S. June 12, 1995) (No. 94-2035).

n267 Another possibility may be to argue that awards of benefits or back pay are equitable because they are intertwined with the equitable award of reinstatement. See *Chauffeurs, Teamsters & Helpers No. Local 391 v. Terry, 494 U.S. 558, 571 (1990)* (recognizing that "a monetary award 'incidental to or intertwined with injunctive relief' may be equitable"). However, this theory appears contrary to Mertens' rejection of the plaintiff's interpretation of section 502(a)(3), which would have permitted any relief a court of equity could award. See *Reich v. Continental Casualty Co., 33 F.3d 754, 756 (7th Cir. 1994),* cert. denied, *115 S. Ct. 1104 (1995)* (stating the clean-up doctrine permits the use of "a legal remedy . . . to provide complete relief in an equity case . . . ."); *Setser v. Novack Inv. Co., 638 F.2d 1137, 1141* (8th Cir.) (viewing back pay as equitable relief "appears to be the theoretical equivalent of the repudiated 'clean-up doctrine' in equity"), amended, *657 F.2d 962* (8th Cir.) (regarding affirmative action plans), cert. denied, *454 U.S. 1064 (1981).*

n268 See, e.g., *Zimmerman v. Sloss Equip., 835 F. Supp. 1283, 1289 (D. Kan. 1993)* (referring to "restitution of forfeited benefits"); see also Kusner, supra note 211, at 295. But see *Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1295, 1298 (3d Cir. 1993)* (appearing to authorize a section 502(a)(3) claim for recovery of benefits after Mertens without any justification or explanation).

n269 *Waldrop v. Southern Co. Servs., 24 F.3d 152, 158 (11th Cir. 1994).*

n270 See, e.g., 1 *Restatement on Restitution section 1* (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."); 1 George E. Palmer, The Law of Restitution section 1.1 (1978). But see infra text accompanying notes 279-81. A recovery also must relate to the plaintiff's loss. See *Mertens v. Hewitt Assocs., 948 F.2d 607, 612 (9th Cir. 1991),* aff'd, *113 S. Ct. 2063 (1993).*

n271 *Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 993-94* (4th Cir.) (citing C. Kaufman, Corbin on Contracts section 19A, at 50 (Supp. 1989)), cert. denied, *498 U.S. 982 (1990).*

n272 1 Palmer, supra note 270, at section 1.7.

n273 See supra text accompanying notes 73-79. In contrast, the analysis applicable to a defined contribution plan would appear to be the even more stringent analysis applicable to back pay claims. See infra text accompanying notes 282-315.

n274 See *Zimmerman v. Sloss Equip., 835 F. Supp. 1283, 1289 (D. Kan. 1993)* (referring, without analysis, to "restitution of forfeited benefits").

n275 See *Reich v. Continental Casualty Co., 33 F.3d 754, 756-57 (7th Cir. 1994),* cert. denied, *115 S. Ct. 1104 (1995)* (permitting monetary award in case in which insurer used premium proceeds to offset other losses). For a discussion of the Continental Casualty case, see infra notes 356-64.

n276 *Continental Casualty, 33 F.3d at 756-57.*

n277 Id.

n278 Douglas Laycock, The Scope and Significance of Restitution, *67 Tex. L. Rev. 1277 (1989).*

n279 John P. Dawson, Restitution Without Enrichment, *61 B.U. L. Rev. 563, 578-619 (1981).*

n280 Laycock, supra note 278, at 1293.

n281 See infra text accompanying notes 268-98.

n282 See infra text accompanying notes 283-87.

n283 *24 F.3d 152, 154 (11th Cir. 1994);* see also text accompanying note 302.

n284 *29 U.S.C. sections 621*-34 (1988 & Supp. IV 1992).

n285 *29 U.S.C. sections 701*-96f-6 (1988 & Supp. IV 1992).

n286 *Waldrop, 24 F.3d at 159;* see also 2 Dobbs, supra note 265, at section 6:10(5) ("Back pay does not seem to fit the restitutionary category.").

n287 2 Dobbs, supra note 265, at section 6:10(5); see also *Restatement (Second) of Contracts section 373* cmt. d, illus. 12 (1979) (illustrating unavailability of restitution for time not worked in wrongful discharge); Martin H. Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, *70 Nw. U. L. Rev. 486, 528 (1975)* (discussing absence of benefit to employers).

n288 *Schwartz v. Gregori, No. 93-3964, 1995 U.S. App. LEXIS 1764,* at **18 (6th Cir. Jan. 31, 1995), petition for cert. filed, *63 U.S.L.W. 2528* (U.S. June 12, 1995) (No. 94-2035); see also *Zimmerman v. Sloss Equip., 835 F. Supp. 1283, 1289 (D. Kan. 1993)* ("The court may award damages such as back pay . . . to make plaintiff whole.").

n289 *494 U.S. 558, 571 (1990).*

n290 *Schwartz, 1995 U.S. App. LEXIS 1764,* at **14.

n291 *Terry, 494 U.S. at 571.*

n292 Id. (quoting *Tull v. United States, 481 U.S. 412, 424 (1987))* The Court's use of the singular "this characteristic" must refer to an award incidental to injunctive relief and not include separate restitutionary awards. Designating back pay as equitable when granted as incidental to reinstatement does not appear to support a claim that back pay constitutes "equitable relief" as defined by *Mertens. Mertens, 113 S. Ct. at 2069-70.*

n293 *361 U.S. 288, 293 (1960);* see also *id. at 295* (distinguishing, as restitutionary, awards for which the employees had been underpaid for time worked).

n294 See *id. at 299* (Whittaker, J., dissenting).

n295 See *Reich v. Continental Casualty Co., 33 F.3d 754, 756 (7th Cir. 1994);* 1 Dobbs, supra note 265, at section 2.6(3); Redish, supra note 287, at 528.

n296 Laycock, supra note 278 at 1278.

n297 2 Dobbs, supra note 265, at section 6.10(5).

n298 Id.

n299 See 1 Dobbs, supra note 265, at section 2.6(3); Redish, supra note 287, at 490.

n300 *Mertens, 113 S. Ct. 2063, 2069* ("Categories of relief that were typically available in equity.").

n301 *Chauffeurs Local 391 v. Terry, 494 U.S. 558, 565 (1990).*

n302 *Id. at 573.*

n303 See 2 Dobbs, supra note 265, at section 6.10(5) ("The courts of appeal have taken at least five different positions about the right of jury trial in back pay claims under sections 1981 and 1983 . . . ."). Compare *Setser v. Novack Inv. Co., 638 F.2d 1137, 1142* (8th Cir.) (finding back pay claim in section 1981 claim seeks legal relief), amended, *657 F.2d 962* (8th Cir.) (regarding affirmative action plans), cert. denied, *454 U.S. 1064 (1981),* with *Moore v. Sun Oil Co. , 636 F.2d 154, 156 (6th Cir. 1980)* (finding back pay claim in section 1981 claim seeks equitable relief).

n304 1 Palmer, supra note 270, at section 4.1.

n305 Id.

n306 Id.; Redish, supra note 287, at 528.

n307 1 Palmer, supra note 270, at section 4.1.

n308 Note, The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA, *96 Harv. L. Rev. 737, 753 (1983)* (citations omitted).

n309 1 Dobbs, supra note 265, at section 2.6(3).

n310 *Chauffeurs Local 391 v. Terry, 494 U.S. 558, 565 (1990).*

n311 See *Spinelli v. Gaughan, 12 F.3d 853, 857 (9th Cir. 1993); McDonald v. Artcraft Elec. Supply Co., 774 F. Supp. 29, 35 (D.D.C. 1991).* But see *Pegg v. General Motors Corp., 793 F. Supp. 284, 286 (D. Kan. 1992)* (designating a section 510 claim as an equitable claim by analogizing it to a Title VII claim), later proceeding, No. 88-4267*C, 1992 U.S. Dist LEXIS 15,420* (D. Kan. Sept. 21, 1992) (regarding motion in limine).

n312 The Supreme Court, however, reserved decision on the issue of whether Title VII plaintiffs had a right to jury trial. *Lorillard v. Pons, 434 U.S. 575, 583-84 (1978).* Congress finally resolved the issue in the CRA.

n313 2 Dobbs, supra note 265, at section 6.10(5).

n314 See, e.g., *Terry, 494 U.S. at 571* ; *Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929* (9th Cir.), modified, and reh'g denied, *28 Fair Empl. Prac. Cas. (BNA) 1820* (9th Cir.), cert. denied, *459 U.S. 971 (1982);* 2 Dobbs, supra note 265, at section 6.10(5).

n315 See, e.g., 2 Dobbs, supra note 265, at section 6.10(5); Redish, supra note 287, at 526-29. But see *Pegg, 793 F. Supp. at 286* (designating a section 510 claim as an equitable claim by analogizing it to a Title VII claim), later proceeding, No. 88-4267*C, 1992 U.S. Dist. LEXIS 15,420 (D. Kan. Sept. 21 1992)* (regarding motion in limine).

n316 See, e.g., *Jamail, Inc. v. Carpenters Dist. Council , 954 F.2d 299, 303-04 (5th Cir. 1992).*

n317 See, e.g., *Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 992-93* (4th Cir.), cert. denied, *498 U.S. 982 (1990).*

n318 *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 524 (1993).*

n319 Babich v. Unisys Corp., No. 92-1473-*MLB, 1994 WL 167984,* at *3 (D. Kan. Apr. 8, 1994); *Zimmerman v. Sloss Equip., 835 F. Supp. 1283, 1290 (D. Kan. 1993).*

n320 But see *Richards v. General Motors Corp., 850 F. Supp. 1325 (E.D. Mich. 1994)* (involving plaintiffs' allegations that G.M. reduced benefits which the plaintiffs had earned under the plan and relied on section 502(a)(1)(B)).

n321 See, e.g., 2 Boren, supra note 82, section 16:13; Collingsworth, supra note 166, at 348; see also Martucci & Utz, supra note 166, at 262-64; *Vogel*, *supra* note 166, at 1047, 1053-54.

n322 *977 F.2d 1129, 1132 (7th Cir. 1992),* on remand, summary judgment granted, *813 F. Supp. 1368 (C.D. Ill. 1993),* aff'd, *23 F.3d 174 (7th Cir. 1994);* see also *Spinelli v. Gaughan, 12 F.3d 853, 856 (9th Cir. 1993); Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 421 (4th Cir. 1993); Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1203 (10th Cir. 1990); Bishop v. Osborn Transp., 838 F.2d 1173, 1173 (11th Cir. 1988),* later proceeding, *687 F. Supp. 1526* (N.D. Ala.) (awarding attorney's fees), cert. denied, *488 U.S. 832 (1988).*

n323 *Tolle, 977 F.2d at 1133.*

n324 *Id. at 1133-34.*

n325 See *Cox v. Keystone Carbon Co., 894 F.2d 647, 649* (3d Cir.), cert. denied, *498 U.S. 811 (1990)* (denying plaintiff a jury trial on his section 510 claim).

n326 See id.

n327 Babich v. Unisys Corp., No. 92-1473-*MLB, 1994 WL 167984,* at *7 (D. Kan. Apr. 8, 1994) (finding availability of a jury trial).

n328 See, e.g., *Howe v. Varity Corp., 36 F.3d 746, 755-57* (8th Cir.), clarified, *41 F.3d 1263 (8th Cir. 1994)* (regarding reinstatement to plan), cert. granted, *115 S. Ct. 1792 (1995); Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994).*

n329 See supra text accompanying notes 194-95.

n330 *Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 993 (7th Cir. 1993).*

n331 See *Howe, 36 F.3d at 754-55* (regarding reinstatement to plan).

n332 See *Anweiler, 3 F.3d at 993* (citing the DOL's amicus curiae brief).

n333 *36 F.3d 746* (8th Cir.), clarified, *41 F.3d 1263 (8th Cir. 1994),* cert. granted, *115 S. Ct. 1792 (1995)* (regarding reinstatement to plan).

n334 *Id. at 748-49.*

n335 *Id. at 749.*

n336 *Id. at 749-50.*

n337 *Id. at 750.*

n338 *Howe, 36 F.3d at 753-54,* clarified, *41 F.3d 1263 (8th Cir. 1994).* The Supreme Court has granted certiorari on this question though. *115 S. Ct. 1792 (1995).*

n339 *Howe, 36 F.3d at 755.*

n340 *Id. at 750.* Another class represented terminated employees and a group of ten individuals Varity had transferred to MCC after they retired also sued. Id. The court dismissed the terminated employees' claim for severance benefits. *Id. at 752.* As to remedies, the court treated the ten individuals identically to the retiree class. *Id. at 756-57.*

n341 *Id. at 754-55.* This is the second issue on which the Supreme Court has granted certiorari. *115 S. Ct. 1792 (1995).*

n342 Id. at 756.

n343 Id. at 751.

n344 *Howe, 36 F.3d at 751.*

n345 *Id. at 756.*

n346 Id.

n347 *Id. at 756-57.*

n348 *Id. at 756.*

n349 *Howe v. Variety Corp., 36 F.3d 746, 756* (8th Cir.), clarified, *41 F.3d 1263 (8th Cir. 1994),* cert. granted, *115 S. Ct. 1792 (1995).*

n350 Id.

n351 Black's Law Dictionary 390 (6th ed. 1990) (defining compensatory damages as those that "will simply make good or replace the loss caused by the wrong or injury").

n352 See, e.g., *Restatement (Second) of Contracts section 370* (1979) ("A party is entitled to restitution . . . only to the extent that he has conferred a benefit on the other party by way of part performance or reliance."); 1 *Restatement on Restitution section 1* (1937) ("Ordinarily, the measure of restitution is the amount of enrichment received . . . ."); 2 Dobbs, supra note 265, at 167 n.62 ("In the law of remedies the terms restitution usually refers sic to restoration of gains received by the defendant.").

n353 Laycock, supra note 278, at 1282-83.

n354 *Howe, 36 F.3d at 755.*

n355 *Id. at 757* (Hansen, J., dissenting).

n356 *Reich v. Continental Casualty Co., 33 F.3d 754, 755 (7th Cir. 1994),* cert. denied, *115 S. Ct. 1104 (1995).*

n357 *Id. at 755.*

n358 *Id. at 756;* see also 1 Dobbs, supra note 265, at section 2.6(3); 1 Palmer, supra note 270, at section 1.1 (noting that restitution developed more or less independently at law and in equity).

n359 *Reich, 33 F.3d at 756.*

n360 *Id. at 756-57.*

n361 *Id. at 757.*

n362 *Id. at 756.*

n363 See *id. at 757.*

n364 *Reich, 33 F.3d at 757-78.*

n365 See, e.g., Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, *104 Yale L.J. 763, 804 (1995);* Douglas D. Evanoff, The Medicare DRGs: Preferred Sources of Market Discipline, 10 Yale J. on Reg. 347, 365 (1993); Manning G. Warren III, A Review of Regulation D: The Present Exemption

Regimen for Limited Offerings Under the Securities Act of 1933, *33 Am. U. L. Rev. 355, 382 (1984);* Calvin Woodard, Listening to the Mockingbird, *45 Ala. L. Rev. 563, 578 (1994).*

n366 *Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 993 (7th Cir. 1993)* (finding widow had unclean hands because she knew the deceased improperly kept double benefits from social security and disability insurance).

n367 *Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 12 (1st Cir. 1994);* see also Fraser v. Lintas: *Campbell-Ewald, 56 F.3d 722, 724-26 (6th Cir. 1995)* (denying relief although employer's failure to communicate required tax information increased recipient's tax burden). But see *Farr v. U.S. West, 58 F.3d 1361,1365-66 (9th Cir. 1995)* (finding that ERISA does not pre-empt a state law claim for damages in a case in which employer allegedly gave fraudulently misleading tax information).

n368 *Armstrong, 30 F.3d at 11.*

n369 *Id. at 13 n.5.*

n370 See *Slice v. Sons of Nor., 34 F.3d 630, 631-33 (8th Cir. 1994)* (involving monthly pension reduction from $ 251.87 to $ 105.80); *Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1527-28 (9th Cir. 1993)* (involving monthly pension that decreased because initial estimate had overstated credited service).

n371 *39 F.3d 784, 785 (7th Cir. 1994).*

n372 Id.

n373 *Id. at 786.*

n374 Id.

n375 *Id. at 787.*

n376 *Buckley, 39 F.3d at 787-88.*

n377 Jay Conison, The Federal Common Law of ERISA Plan Attorneys, *41 Syracuse L. Rev. 1049, 1083 (1990).*

n378 *Butler v. Fringe Benefit Plan, 701 F. Supp. 804, 807 (N.D. Ala. 1988).*

n379 *Cathey v. Metropolitan Life, 805 S.W.2d 387, 392* (Tex.), cert. denied, *111 S. Ct. 2855 (1991).*

n380 *Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, 827 (N.D. Ala. 1988),* later proceeding, *716 F. Supp. 582 (N.D. Ala. 1989),* aff'd in part, *922 F.2d 732 (11th Cir. 1991).*

n381 ERISA section 514(a), *29 U.S.C. section 1144.*

n382 See, e.g., *District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580, 582-85 (1992)* (holding ERISA pre-empts District of Columbia statute regarding provision of health insurance to those who receive workers' compensation); *Ingersoll Rand v. McClendon, 498 U.S. 133, 138-42 (1990)* (holding ERISA pre-empts state common law claim for wrongful discharge); *Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 521-26 (1981)* (holding ERISA pre-empts New Jersey's law regarding the integration of workers' compensation benefits); *Howe v. Varity Corp., 36 F.3d 746, 752-53* (8th Cir.) (holding a fraudulent misrepresentation claim pre-empted), clarified, *41 F.3d 1263 (8th Cir. 1994)* (regarding reinstatement to plan), cert. granted, *115 S. Ct. 1792 (1995).* But see *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995)* (holding ERISA does not pre-empt state law imposing surcharges on health care expenses paid by certain ERISA plans).

n383 See supra text accompanying notes 153-54.

n384 See *Buckley Dement, Inc. v. Travelers Plan Admin. of Ill., 39 F.3d 784, 788-89 (7th Cir. 1994)* (finding ERISA does not permit federal common law claim against nonfiduciary); *Slice v. Sons of Nor., 34 F.3d 630, 633-35 (8th Cir. 1994)* (denying federal common law claim for equitable estoppel in a case in which employer erroneously calculated pension benefit); *Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1527-28 (9th Cir. 1993)* (ruling Mertens precludes a federal claim for equitable estoppel); Richard Rouco, Note, Available Remedies Under ERISA Section 502, *45 Ala. L. Rev. 631, 639-45 (1994).*

n385 *Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2071 (1993).*

n386 See *id. at 2075 n.4* (White, J., dissenting).

n387 *Sommers Drug Stores v. Corrigan Enters., Inc., 793 F.2d 1456, 1467 (5th Cir. 1986),* cert. denied, *479 U.S. 1034 (1987).* ERISA's principal entities include employers, plans, fiduciaries, and beneficiaries. Id.

n388 See Jonathan P. Weiner & Gregory de Lissovoy, Razing a Tower of Babel: A Taxonomy for Managed Care and Health Insurance Plans, 18 J. Health Politics, Pol. & L. 75, 76-79 (1993).

n389 Congress intended ERISA to encourage plan formation. See H.R. Rep. No. 533, 93d Cong., 1st Sess. 1-2 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4640.

n390 Congress intended ERISA to improve the funding of benefit plans. See ERISA section 2, *29 U.S.C. section 1001.*

n391 See *Buckley Dement v. Travelers Plan Admin. of Ill., 39 F.3d 784, 786 (7th Cir. 1994).*

n392 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of *2 U.S.C., 29* U.S.C., and 42 U.S.C.). However, because jury trial issues are beyond the scope of this paper, the author does not intend the incorporation of Title VII-type remedies to be a comment on the appropriateness of the availability of a jury trial.

n393 *42 U.S.C. section 1981* (1988).

n394 *Patterson v. McLean Credit Union, 491 U.S. 164, 179-81 (1989).*

n395 Title VII only applies to businesses with 15 or more employees, whereas section 1981 applies to all employers regardless of size. *42 U.S.C. sections 1981,* 2000e(b) (1988).

n396 *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989).*

n397 See *Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).*

n398 *Price Waterhouse v. Hopkins, 490 U.S. 228, 243, 259-60, 261 (1989)* (plurality opinion with White, J., and O'Connor, J., separately concurring).

n399 Minna J. Kotkin, Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, *41 Hastings L.J. 1301, 1309 n.32 (1990)* (citing early articles questioning the remedial provisions).

n400 Katherine S. Anderson, Note, Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson, *87 Colum. L. Rev. 1258 (1987);* Sharon T. Bradford, Note, Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers, *99 Yale L.J. 1611, 1615-19 (1990);* Michael D. Vhay, Note, The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment, *55 U. Chi. L. Rev. 328 (1988);* Marlisa Vinciguerra, Note, The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment, *98 Yale L.J. 1717 (1989).*

n401 See Judith A. Winston, Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990, *79 Cal. L. Rev. 775, 793-94 (1991)* (discussing *Swanson v. Elmhurst Chrysler Plymouth, 882 F.2d 1235 (7th Cir. 1989),* cert. denied, *493 U.S. 1036 (1990)).*

n402 Kotkin, supra note 399, at 1306-07.

n403 Bradford, supra note 400, at 1616; Kotkin, supra note 399, at 1306.

n404 Bradford, supra note 400, at 1616-17; Kotkin, supra note 399, at 1306.

n405 See Kotkin, supra note 399, at 1320-21.

n406 Pub. L. No. 92-261, section 4(g), 86 Stat. 104, 107 (1972).

n407 See *Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2068 (1993); United States v. Burke, 504 U.S. 229, 236 (1992); Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989).*

n408 See Kotkin, supra note 399, at 1325-26.

n409 136 Cong. Rec. S1 018, S1 018-19 (daily ed. Feb. 7, 1990) (introduction of S. 2104 to the Senate); 136 Cong. Rec. E229, E229-30 (daily ed. Feb. 7, 1990) (introduction of H. 4000 to the House of Representatives).

n410 136 Cong. Rec. S1 018, S1 019 (daily ed. Feb. 7, 1990). Although more oblique, Representative Hawkins referenced provisions meant "to ensure fair and effective civil rights enforcement . . . ." 136 Cong. Rec. E229, E230 (daily ed. Feb. 7, 1990) (statement of Sen. Hawkins).

n411 136 Cong. Rec. S16,562, at S16,562-63 (daily ed. Oct. 24, 1990) (veto message from Pres. Bush).

n412 136 Cong. Rec. S16,589 (daily ed. Oct. 24, 1990).

n413 See 136 Cong. Rec. S16,562, at S16,562-63 (daily ed. Oct. 24, 1990) (veto message from Pres. Bush).

n414 1991 U.S.C.C.A.N. 768 (statement of Pres. George Bush upon signing S. 1745). For additional analysis of the history of the CRA, see Neal Devins, Reagan Redux: Civil Rights Under Bush, *68 Notre Dame L. Rev. 955, 984-99 (1993);* Ronald R. Rotunda, The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation, *68 Notre Dame L. Rev. 923, 924-28 (1993).*

n415 For extensive discussion of the CRA, see, e.g., Douglas W. Kmiec, Foreword--The Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma, *68 Notre Dame L. Rev. 911 (1993);* Rotunda, supra note 414, at 929-50; Marian C. Haney, Note, Litigation of a Sexual Harassment Case After the Civil Rights Act of 1991, *68 Notre Dame L. Rev. 1037 (1993).*

n416 CRA section 102F(b)(3), 105 Stat. at 1072.

n417 Id.

n418 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (interpretative memorandum offered by Sen. Edwards).

n419 Id.

n420 Id.

n421 Id.

n422 See Kotkin, supra note 399, at 1313-14 & n.43.

n423 ADEA, *29 U.S.C. section 626*(b) (1988); Americans with Disabilities Act, *42 U.S.C. section 12*,117(a) (Supp. IV 1992); see 2 Dobbs, supra note 265, at section 6.10(4) ("Running through all of the federal statutory claims summarized in the preceding section is the back pay remedy.").

n424 See 2 Dobbs, supra note 265, section 6.10(2).

n425 See supra notes 254-55 and accompanying text.

n426 See 119 Cong. Rec. 30,043, at 30,043-44 and 30,374 (1973).

n427 120 Cong. Rec. 29,935 (1974) (statement of Sen. Williams).

n428 See supra text accompanying notes 282-315. Equivalent arguments apply to the recovery of lost benefits.

n429 See supra text accompanying notes 418-21.

n430 See, e.g., 137 Cong. Rec. H3729, H3730 (daily ed. May 30, 1991) (statement of Rep. Gunderson); 137 Cong. Rec. E1,599, at E1,599 (daily ed. May 2, 1991) (statement of Rep. Grandy); 136 Cong. Rec. S15,355, at S15,356-57 (daily ed. Oct. 16, 1990) (letter of Zachary D. Fasman inserted in the record by Sen. Dole); 136 Cong. Rec. S16,562, at S16,562 (daily ed. Oct. 14, 1990) (veto message from Pres. Bush); see also Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, *70 Tex. L. Rev. 17, 99 (1991)* ("The prospect of very large monetary recoveries may in fact undermine Title VII's policy in favor of conciliation, settlement, and rapid resolution of claims.").

n431 Kotkin, supra note 399, at 1315-27.

n432 Id.

n433 But see ERISA section 502, *29 U.S.C. section 1132* (permitting the DOL to bring actions for ERISA violations).

n434 See supra text accompanying note 94.

n435 See H.R. Rep. No. 533, 93d Cong., 1st Sess. 1-2 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4640.

n436 See supra text accompanying note 417.

n437 *29 U.S.C. section 626*(b) (1988).

n438 See, e.g., supra text accompanying notes 333-55.

n439 See, e.g., supra text accompanying notes 122-24.

n440 See, e.g., supra text accompanying notes 371-76.

n441 *113 S. Ct. 2063 (1993).*

n442 *Adams v. Bell, 711 F.2d 161, 210 (D.C. Cir. 1983)* (Wright, J. dissenting) (en banc).