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Redressing All ERISA Fiduciary Breaches Under Section 409 (a)

Eric D. Chason
William & Mary Law School, edchas@wm.edu

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I. INTRODUCTION

ERISA[1] is a federal statute that regulates employee benefits such as pensions, 401(k) plans, health care, and disability—collectively some of the most important property and contract rights that working Americans have. Passed in 1974,[2] ERISA preempts state law[3] and imposes fiduciary duties on those who administer

* Associate Professor of Law, College of William and Mary, Marshall-Wythe School of Law.

1. The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2006). This Article generally cites to ERISA but provides parallel citations to the United States Code.

2. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1001–1461.

3. ERISA generally preempts any state law that "relate[s] to" an employee benefit plan. ERISA §

employee benefits.[4] ERISA fiduciary duties largely track the duties of a trustee. So, ERISA requires employers to set aside funds in trust to pay pension benefits (including those offered under 401(k) plans). Employers need not, however, set aside funds to pay non-pension benefits (called welfare benefits), but may do so if they wish or to satisfy the demands of a labor union. The legal entity that pays ERISA-covered benefits is the "plan," and any associated funds are "plan assets."

An ERISA fiduciary who harms or abuses plan assets (e.g., by negligent investing) must make the plan whole by paying either damages or restitution.[5] Trust beneficiaries may seek similar redress for breach of trust. Yet, unlike trust law, ERISA imposes fiduciary duties extending beyond the management and distribution of property. ERISA fiduciaries have discretion to pay or deny claims for benefits, and a wrongful denial of benefits can devastate an employee and her covered dependents. In *Corcoran v. United Healthcare Inc.,*[6] Florence Corcoran was suffering through a difficult pregnancy and asked her ERISA-covered health plan to pay for hospitalization, which her doctor had recommended. The reviewing fiduciary (United Healthcare) denied the claim, determining hospitalization to be medically unnecessary despite her doctor's recommendation. About two weeks later, Mrs. Corcoran's fetus went into distress and died.[7] Mrs. Corcoran sued United Healthcare, but the Fifth Circuit—in interpreting Supreme Court precedent at the time—denied her any ERISA remedy.[8]

Later Supreme Court cases confirm the result of *Corcoran*.[9] Fiduciary breaches that harm plan assets warrant full relief. Breaches that do not harm plan assets warrant only "appropriate equitable relief," which excludes most forms of monetary relief according to the Court.[10] Most commentators, the Department of Labor, and several judges and justices would grant money damages to plaintiffs like Mrs. Corcoran.[11] These reformers note that Congress based ERISA on trust law and argue that the Court should conform ERISA remedies with trust remedies, which aim to "make whole" beneficiaries who are harmed by fiduciary breach.[12]

514(a), 29 U.S.C. § 1144(a) (2006). ERISA allows states to regulate insurance companies even if they insure ERISA-governed benefits. *Id.* § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

4. *Id.* § 404(a), 29 U.S.C. § 1104(a).

5. *Id.* § 409(a), 29 U.S.C. § 1109(a).

6. 965 F.2d 1321 (5th Cir. 1992); *cf.* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 155 (2009) ("As far as wrongful denial of benefits claim scenarios, few are better known than [*Corcoran*].").

7. *Corcoran*, 965 F.2d at 1324.

8. *Id.* at 1328, 1332–34.

9. See *infra* Parts III.C and III.D for a discussion of cases confirming the result of *Corcoran*.

10. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 255–58 (1993) (noting that equitable relief traditionally precludes monetary damages); Mass. Mut. Life Ins. v. Russell, 473 U.S. 134, 151 n.3 (1985) (noting statute does not provide for extracontractual damages).

11. Susan Harthill, *A Square Peg in a Round Hole: Whether Traditional Trust Law "Make-Whole" Relief Is Available Under ERISA Section 502(a)(3),* 61 OKLA. L. REV. 721, 723–25 (2008); *see also* Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(A)(3),* 39 J. MARSHALL L. REV. 827, 848–50 (2006).

12. *See* Brief for the United States as Amicus Curiae at 6, Amschwand v. Spherion Corp., No. 07-841 (U.S. May 23, 2008), 2008 WL 2185730 (arguing that breaching ERISA fiduciaries should be treated analogously to breaching trust fiduciaries).

But this make-whole argument ignores the central role of property in trust law. The Restatement and treatises all define a trust as "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."[13] Trustees breach this "fiduciary relationship with respect to property" when they harm or misappropriate trust property, and the make-whole principle redresses such property-based breaches. Trust law does not routinely redress harm that is personal to the beneficiary with damages.[14]

Health and other welfare plans often hold no assets and comprise promises to pay benefits. They impose "merely personal duties" upon the employer (or other administrator of the plan), precluding the application of trust law.[15] Nevertheless, the courts roughly follow the remedial system of trust in ERISA cases, redressing breaches that involve plan assets but denying relief to employees for their personal harm. Trust law, rather than being the solution to ERISA remedies, is part of the problem.

The other part of the problem is the Supreme Court's inconsistency in interpreting ERISA. The Supreme Court has consistently narrowed ERISA remedies, but has used inconsistent methods of statutory interpretation to do so. In *Massachusetts Mutual Life Insurance v. Russell*,[16] the Court found that section 409(a) does not redress a fiduciary breach causing personal harm.[17] Even though the text of section 409(a) would support granting "equitable or remedial relief" for any breach, the Court found that the overall purpose and context of the statute protected only plan assets and the plan itself.[18] Yet, in *Mertens v. Hewitt Associates*[19] and *Great-West Life and Annuity Insurance Co. v. Knudson*,[20] the Court analyzed section 502(a)(3) textually, concluding that its narrower grant of "equitable relief" must mean something less than all relief.[21] Based on historical equity practice, the Court held that section 502(a)(3) does not offer the remedies of damages or even legal (as opposed to equitable) restitution.

Those who would reform ERISA remedies focus their attention on *Mertens*, *Great-West*, and the need to incorporate the "make-whole doctrine" of trust law

13. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); *accord* 1 AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1 (3d ed. 2007), *available at* Westlaw BOGERT [hereinafter BOGERT'S TRUSTS AND TRUSTEES]. *But cf.* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 671 (1995) [hereinafter Langbein, *Contractarian Basis*] (arguing that trust law operates more like contract than property law).

14. See *infra* Part IV.D for a discussion of how make-whole relief redresses property-based breaches in trust law.

15. See *infra* notes 223–24 and accompanying text for a discussion of the definition of a trust and how it requires more than the imposition of merely personal duties.

16. 473 U.S. 134 (1985).

17. *Russell*, 473 U.S. at 144.

18. See *infra* Part III.B for a discussion of the *Russell* Court's analysis.

19. 508 U.S. 248 (1993).

20. 534 U.S. 204 (2002).

21. See *infra* Parts III.C and III.D for a discussion of *Mertens* and *Great-West* and the Court's narrow reading of "equitable relief" therein.

into section 502(a)(3).[22] The make-whole theorists, though, overlook the limits of trust remedies and the textual barriers to interpreting the "equitable relief" of section 502(a)(3) broadly. The superior way of expanding ERISA remedies is through the broader grant of "equitable or remedial relief" under section 409(a). Unlike section 502(a)(3), section 409(a) is directed expressly at fiduciary breaches and avoids the trap of historical equity practice. By broadening section 409(a), the Supreme Court would point ERISA's remedies away from the law of trusts and towards the text of the statute.

II. ERISA FIDUCIARY STANDARDS

A. The ERISA Fiduciary Relationship

To be a fiduciary is to be in a relationship with another. A trust, for example, is "a fiduciary relationship with respect to property" joining trustee and beneficiary and arising from the intent of the settlor.[23] The trustee holds a formal office subject to onerous duties and heavy sanctions for breach. Reflecting the burdens of the office, trust law requires consent by the trustee.[24]

ERISA creates a fiduciary relationship with respect to any "employee benefit plan" or simply "plan," which provides either "pension" or "welfare" benefits.[25] Pension plans—including 401(k) plans—provide retirement income[26] to employees and must be funded by the employer.[27] Because it is funded, a pension plan is a "fiduciary relationship with respect to property"—just like a trust.

Welfare plans provide health care, disability benefits, severance, and life insurance to employees.[28] Administering welfare plans (e.g., reviewing employees' claims for benefits) is a fiduciary function.[29] While welfare plans may be "fiduciary relationships," the relationship is often not one "with respect to property" because benefits are paid directly from the employer's general assets rather than a

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22. *See, e.g.*, John H. Langbein*, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell*,* Mertens*, and* Great-West, 103 COLUM. L. REV. 1317 (2003) [hereinafter Langbein, *Trail of Error*].

23. See *supra* note 13 and accompanying text for the Restatement (Second) of Trusts' definition of a trust.

24. *See* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 150 ("The cases fully sustain the position that a person named as trustee in a deed or will always has the election of accepting the trust or rejecting it and statutes often give the power to disclaim or decline the trusteeship. No one can be compelled to undertake the burdens of trusteeship against his desire." (footnotes omitted)).

25. ERISA § 3(1), 29 U.S.C. § 1002(1) (2006).

26. *Id.* § 3(2), 29 U.S.C. § 1002(2).

27. Pension plans come in two categories: defined contribution and defined benefit. Defined contribution plans are "based solely upon the amount contributed to the [employee's] account," along with any associated income, expenses, gains, and losses*. Id.* §§ 3(34)–(35), 29 U.S.C. §§ 1002(34)–(35); *see also id.* § 3(23)(B), 29 U.S.C. § 1002(23)(B) (defining accrued benefit of DC plan as "the balance of the individual's account"). Defined plans must pay benefits "in the form of an annual benefit commencing at normal retirement age." *Id.* § 3(23)(A), 29 U.S.C. § 1002(23)(A). ERISA requires employers to fund defined-benefit plans. *See Id.* §§ 301–07, 29 U.S.C. §§ 1081–85.

28. *Id.* § 3(1), 29 U.S.C. § 1002(1).

29. Aetna Health Inc. v. Davila, 542 U.S. 200, 218–19 (2004).

segregated trust fund.[30] Nevertheless, ERISA treats all ERISA plans, whether or not funded, as trusts and impose fiduciary duties on those who administer them.[31]

ERISA provides for formal fiduciary offices—including that of trustee—but extends its fiduciary reach broadly.[32] The possession or exercise of discretionary authority or control over a plan is sufficient to make one a "fiduciary with respect to a plan."[33] Formal consent is not necessary for ERISA fiduciary status, which triggers the fiduciary duties of loyalty and prudence.

B. Duty of Loyalty (a.k.a. the Exclusive Benefit Rule)

ERISA was enacted primarily to reform defined-benefit pension plans, although it covers all employee benefit plans.[34] Prior to ERISA's passage, legions of disappointed workers would write government officials to complain that they were denied pension benefits for failing to meet decades-long vesting schedules.[35] A plan might have required twenty years of service with an employer before vesting, and an employee who left after nineteen years would leave without any pension at all. Workers who had vested in their pension benefits could still lose out if their pension plan failed and terminated without enough assets to pay everyone.[36]

ERISA responded to these scandals by mandating vesting according to a fixed schedule,[37] mandating minimum funding of ongoing plans,[38] and partially insuring benefit payments from failed plans.[39] ERISA also created an administrative framework that completely federalized the rights and remedies with respect to benefit plans.[40] Most importantly for this Article, ERISA imposed mandatory

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30. *See* RESTATEMENT (SECOND) OF TRUSTS § 2. See *supra* note 13 and accompanying text for the definition of a trust.

31. *See* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 395 (2000) (explaining that ERISA treats any individual with discretion over assets, administration, or management of benefit plan—or is paid to give investment advice to benefit plan—as a fiduciary).

32. *Id*.

33. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

34. *See* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 4–5 (2004) (describing pre-ERISA pension plan environment and need for pension plan reform).

35. *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* U.S. Sen. Special Comm. on Aging, 98th Cong., The Employee Retirement Income Security Act of 1974: The First Decade 16 (1984), *substantially reprinted in* JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 67–78 (4th ed. 2006) (finding that numerous personal letters sent to government offices confirmed that workers were denied pension benefits despite many years on the job).

36. *See generally* James A. Wooten, "*The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001) (describing infamous Studebaker plant shutdown in Indiana, where pension plan lacked sufficient assets to meet all obligations).

37. ERISA §§ 201–08, 29 U.S.C. §§ 1051–58.

38. *Id.* §§ 301–05, 29 U.S.C. §§ 1081–85.

39. *Id.* §§ 4000–4402, 29 U.S.C. §§ 1301–1461.

40. *See id.* §§ 501–14, 29 U.S.C. §§ 1131–44 (creating criminal and civil penalties and establishing claims procedures, investigatory rights, and other administrative guidelines for enforcement of ERISA).

fiduciary duties on all who held discretion over plans.[41] ERISA did not invent the idea of holding benefit-plan assets in trust, a practice employers performed voluntarily in the late-nineteenth century and codified in federal tax and labor laws in the early to mid-twentieth century.[42] Nevertheless, it federalized and mandated a trust model for all employee benefit plans.

The duty of loyalty is "[p]erhaps the most fundamental duty of a trustee,"[43] and preeminent in the trust-law duty of loyalty is the prohibition against self-dealing.[44] The fiduciary provisions were prompted in part by the looting of pension funds, particularly by union officials, which eroded funds that had been set aside for the payment of benefits.[45] Pre-ERISA law was not inert in combating pension looters, who were already subject to federal criminal sanction. Jimmy Hoffa, famously, was convicted and jailed in 1964 for defrauding the Central States Teamsters' pension plan.[46] Nevertheless, Congress viewed these controls as inadequate and imposed heightened fiduciary standards in ERISA.

Even though pension plans were the focus of ERISA, the fiduciary provisions apply to almost all varieties of plans.[47] Would-be Jimmy Hoffas can loot welfare funds just as well as pension funds.[48] What is curious about the fiduciary standards, though, is that they reach the entire administration of plans, rather than just the management and distribution of plan assets.[49] For example, employers typically provide health care and disability benefits by paying the costs directly or by buying insurance for employees. Despite the historical concern of misusing plan assets, the fiduciary provisions of ERISA make no exception for unfunded plans.[50]

While the loyalty standard makes sense for pension plans, it is virtually incoherent when applied to unfunded ERISA plans. The cardinal element of the duty of loyalty is the prohibition on self-dealing. One might plausibly claim that unfunded plans *never* involve self-dealing because there are no assets involved. Or, one might just as plausibly claim that unfunded plans universally implicate self-dealing because the employer pays the bills directly.[51] The reason for this

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41. *See id.* §§ 401–14 29 U.S.C. §§ 1101–14 (establishing fiduciary duties and specific protective limits, prohibitions, and obligations regarding management and administration of benefit plans).

42. John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 209.

43. BOGERT'S TRUST AND TRUSTEES, *supra* note 13, § 543.

44. *See* RESTATEMENT (THIRD) OF TRUSTS § 78(2) (2007) (prohibiting trustee self-dealing).

45. *See, e.g.*, Gordon, *supra* note 35, at 10–11 (discussing Senate subcommittee's reaction to manipulation of pension funds by two New Jersey unions).

46. WOOTEN, *supra* note 34, at 118.

47. *See* ERISA § 401(a), 29 U.S.C. § 1101(a) (outlining types of plans governed by ERISA).

48. *See* LANGBEIN ET AL., *supra* note 35, at 119–20 (explaining that general prevention of self-dealing and mismanagement in multiemployer plans requires subjecting welfare benefit plans to same fiduciary requirements as pension plans.)

49. *See* Varity Corp. v. Howe, 516 U.S. 489, 506–07 (1996) (holding that employer, who was also plan administer, breached fiduciary duty when deliberately misled employees to change benefit plans).

50. *See* Muir, *supra* note 31, at 401–04 (suggesting that unfunded plans were not exempted from ERISA because unfunded and underfunded plans were widespread problems necessitating ERISA's enactment).

51. *See generally* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988).

incoherence is that, traditionally, fiduciaries are proxies for beneficiaries. A trustee manages assets on behalf of beneficiaries, and an agent takes action on behalf of a principal. Beneficiaries or principals need their fiduciary's expertise, which can be effectively deployed only by an expansive grant of authority. The potential for abuse of this authority, however, necessitates the imposition of fiduciary duties.[52] In economic terms, trust law curtails the agency costs inherent in discretionary power.[53]

Yet, employees seeking medical coverage, disability benefits, or severance are not typically seeking expertise from their employer or any other ERISA "fiduciary." An employee's own physician provides expertise on treatment decisions. Employees simply want money to pay the bills. The *employer* might indeed appoint administrators with expertise to handle claims. Fiduciary law is probably flexible enough to handle ERISA, so long as judges are aware of the inherent limits of existing doctrine. The history of fiduciary law has seen the creation of new fiduciary relationships based on analogy. So, for example, the law came to impose fiduciary duties on corporate directors by analogizing corporations to prototypes like trusts, agency, or partnerships.[54]

Nevertheless, analogy to prototypes is useful only at the initial stage of doctrinal development. Even if corporate directors were initially recognized as fiduciaries, it did not follow that trust law held all (or even many) answers to corporate law issues. Perhaps employers should themselves be viewed as lawful beneficiaries of employee benefit plans along with their employee. Under this view, employers would be restrained by the duty of impartiality, under which they may not favor their own beneficial interest over that of their employees.[55]

C. Duty of Prudence

ERISA also imports the duty of prudence from trust law, imposing on its fiduciaries the obligation to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[56] The classic application of prudence principles is to

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52. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 804 (1983) (discussing potential for abuse arising from delegation of power to fiduciary).

53. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 624–26 (2004) (arguing trust law should minimize agency costs inherent in granting trustee discretionary authority).

54. *See* Frankel, *supra* note 52, at 804–05 (explaining that courts create new fiduciary relationships by drawing analogies to prototypical fiduciary relationships such as agency, trust, and bailment). *But cf.* Sitkoff, *supra* note 53, at 623 & n.2 (noting historical connection between trust and corporation).

55. *See* Fischel & Langbein, *supra* note 51, at 1159–60 (suggesting duty of impartiality should be imported to pension law).

56. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2006). A traditional trustee is required to "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

trust investing. ERISA fiduciaries who handle assets must also diversify plan investments, except for those rare occasions in which doing so is imprudent and those common occasions when the plan invests in employer securities.[57] The traditional trust-law standard is adequate for policing investments of plan assets. We simply ask if a reasonable person would invest this way with his or her own money.

The Supreme Court has interpreted claims decisions as being fiduciary acts.[58] In a traditional trust, distribution decisions are regulated by the duty of prudence and also the duty of impartiality.[59] The trustee must balance the interest of various claimants in the assets she administers. But, the administrator of an unfunded ERISA plan is not balancing various claims to assets. She is simply deciding whether to perform on a contract. Again, the employee does not want fiduciary expertise from the administrator, only the payment of benefits.

Traditional trust law, then, is an imperfect fit for regulating unfunded ERISA plans. As the Supreme Court recently said, trust-law principles "serve as a guide under ERISA but do not 'tell the entire story.'"[60] Professor Dana Muir has contrasted "asset administration" (e.g., investing assets) and "benefit administration" (e.g., handling claims).[61] When Congress enacted the fiduciary provisions of ERISA, it was focused on pension plans and asset administration and looked to trust law as a regulatory model.[62] Benefit administration is less important to pension plans because of the dramatically lower level of discretion. For example, benefits under a defined-benefit pension plan must be "definitely determinable,"[63] thus precluding broad administrative discretion.[64] But benefit administration is hugely important to welfare plans. One court has even held that payment of welfare benefits can be within the complete discretion of the employer.[65] In the area of benefit administration, the trust model of ERISA is at its weakest. Not coincidentally, this is the area where ERISA remedies are at their narrowest.

57. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C); *id.* § 404(a)(2), 29 U.S.C. § 1104(a)(2).

58. Aetna Health Inc. v. Davila, 542 U.S. 200, 218–19 (2004).

59. RESTATEMENT (SECOND) OF TRUSTS §§ 174, 232.

60. Conkright v. Frommert, 130 S. Ct. 1640, 1643 (2010) (quoting Variety Corp. v. Howe, 516 U.S. 489, 497 (1996)).

61. Muir, *supra* note 31, at 399–410 (quoting *Varity*, 516 U.S. at 497).

62. *See id.* at 399–404 (discussing Congress's focus on pension plans and problems with asset administration, which led to ERISA's enactment).

63. 26 C.F.R § 1.401-1(b)(1)(i) (2009).

64. This is not to say that courts deny administrative discretion over pension plans. *See, e.g.*, *Conkright*, 130 S. Ct. at 1651 (granting discretion to administrator of defined-benefit plan after administrator initially miscalculated benefits).

65. *See* Hamilton v. Air Jam., Ltd., 945 F.2d 74, 79 (3d Cir. 1991) (holding that ERISA does not forbid employer from making individual benefit determinations on case-by-case basis).

III. ERISA REMEDIES

A. *Statutory System*

By statute, ERISA preempts state law that "relate[s] to" any employee benefit plan,[66] preempting almost any state law claim based on the misconduct of an ERISA fiduciary. For example, even though ERISA saves state insurance regulation from preemption,[67] the Supreme Court has held that this exception does not allow employees to seek remedies under state insurance law.[68] According to the Court, ERISA's remedial provisions have their own preemptive force, making them the exclusive means by which beneficiaries can seek redress for fiduciary breach. Just as ERISA's statutory remedies preempt state law remedies (even those based on state insurance law), it also precludes implicit federal remedies.[69] If an aggrieved employee cannot bring a claim under one of ERISA's express statutory provisions, she has no remedy at all.

ERISA has three major remedies for employees, found in the first three parts of section 502(a), which read as follows:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under [section 409 of ERISA];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.[70]

The "appropriate relief" of section 409 is as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such

66. ERISA § 514(a), 29 U.S.C. § 1144(a) (2006).

67. *Id.* § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

68. See Aetna Health Inc. v. Davila, 542 U.S. 200, 221 (2004) (holding that Texas Health Care Liability Act claims are completely preempted by ERISA); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (finding state lawsuit asserting improper processing of claim for benefits under ERISA-regulated plan preempted by federal law).

69. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (holding that ERISA even precludes extracontractual damages that arise from improper or untimely processing of claims).

70. ERISA § 502(a)(1)–(3), 29 U.S.C. § 1132(a)(1)–(3).

> other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[71]

The three remedies just described are the workhorses of ERISA litigation, although ERISA does grant less important remedies to enforce statutory penalties and the like.[72] Together, they make up what the Supreme Court described as a "carefully integrated . . . . interlocking, interrelated, and interdependent remedial scheme, which is . . . part of a 'comprehensive and reticulated statute.'"[73]

According to Professor Dobbs, "[j]udicial remedies usually fall in one of four major categories: (1) Damages remedies, (2) Restitutionary remedies, (3) Coercive remedies . . . or (4) Declaratory remedies."[74] ERISA clearly grants declaratory and coercive remedies, as an employee can bring an action "to clarify his rights to future benefits under the terms of the plan" and the court can "enjoin any act or practice which violates [ERISA] or the terms of the plan."[75] The provisions also grant the ability to enforce the payment of promised benefits.[76]

The Supreme Court has struggled, though, in determining what other forms of damages and restitution ERISA offers.[77] The aim of the damages remedy is to make whole a plaintiff for harm suffered, and the aim of restitution is to prevent unjust enrichment of a defendant by restoring her wrongful gains to the plaintiff.[78] As we will see in the remainder of this Part, ERISA grants full damages and restitution to redress a fiduciary breach involving plan assets. Fiduciary breaches that do not involve plan assets, along with other ERISA violations, warrant far narrower remedies—in essence, equitable restitution but no damages or legal restitution.

B. Massachusetts Mutual Life Insurance Co. v. Russell

As previously noted, ERISA section 409(a) imposes personal liability on fiduciaries that breach their fiduciary duties.[79] Conceptually, section 409(a) offers four classes of remedies: (1) reimbursement of losses to plan assets; (2) payment of profits made by the fiduciary's use of plan assets; (3) removal of a breaching fiduciary; and (4) "other equitable or remedial relief as the court may deem appropriate."[80]

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71. *Id.* § 409(a), 29 U.S.C. § 1109(a).

72. *See id.* § 502(a)(4)–(10), 29 U.S.C. § 1132(a)(4)–(10) (listing further remedial options available to Secretary of Labor).

73. *Russell*, 473 U.S. at 146 (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980)).

74. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §1.1, at 2 (2d ed. 1993).

75. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); *id.* § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A).

76. *Id.* § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); *id.* § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A).

77. For a discussion of Supreme Court decisions determining forms of damages and restitution available under ERISA, see *infra* the remainder of Part III.

78. DOBBS, *supra* note 74, § 3.1.

79. See *infra* note 71 and accompanying text for a discussion of remedies for breach of fiduciary duties.

80. ERISA § 409(a), 29 U.S.C. § 1109(a).

The first three remedies largely track the liability that the law of trusts imposes to redress a breach of trust. Trustees are subject to personal liability for any harm they cause to, or any illicit benefit they derive from, trust property.[81] The third category, fiduciary removal, also has a clear corollary in trust law.[82]

The fourth category operates as something of catchall for breaching fiduciaries. It has no obvious analogue in the Restatement of Trusts beyond the fact that trust remedies are exclusively equitable.[83] The fourth category is also most famous for being the subject of the Supreme Court's most important ERISA decision.

In *Massachusetts Mutual Insurance Co. v. Russell*,[84] an employee, Doris Russell, began receiving benefits under her employer's ERISA-governed disability plan in May 1979. In October 1979, the employer concluded that Doris was not disabled and stopped paying benefits.[85] Using the employer's internal appeals process, Doris convinced her employer that she was in fact disabled and began receiving benefits (including retroactive benefits) in March 1980.[86] Doris claimed that the interruption of benefit payments harmed her, however, by forcing her husband to cash out his own retirement plans, thereby aggravating the psychological condition that caused her to become disabled in the first place.[87]

Doris then sued her employer, claiming it breached its fiduciary duties by mishandling her disability claim and seeking compensatory and punitive damages under section 409(a).[88] The Supreme Court denied Doris' claim, construing the entirety of section 409(a) as providing only plan-level relief.[89]

Russell is most remembered for stating that ERISA has no implied causes of action. According to the Court:

> The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."[90]

Despite the Court's triumphal language, most commentators are dubious of the draftsmanship that the Court found in ERISA.[91] Of the six enforcement provisions,

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81. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959) (holding trustees personally liable for breaches of trust).

82. *See id.* § 199 (allowing for removal of trustee for breaches of trust).

83. See *infra* notes 263–65 and accompanying text for a discussion of the exclusively equitable nature of trust remedies.

84. 473 U.S. 134 (1985).

85. *Russell*, 473 U.S. at 136.

86. *Id.*

87. *Id.* at 137.

88. *Id.* at 137–39.

89. *Id.* at 140–42, 148.

90. *Id.* at 146 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

91. *See, e.g.*, George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 613 (1994) (discussing "serious threat" to Congress's apparent purpose of

only three[92] offer any significant relief to employees and their beneficiaries, but the types of actions that can arise under ERISA are legion.[93] Of these remedial provisions, Doris brought her claim under only one, ERISA section 409(a);[94] she did not alternatively ask for relief elsewhere (e.g., under section 502(a)(3)).

When suing her employer under section 409(a), Doris was making a fairly straightforward textual claim. Her employer was a fiduciary who breached its duties and should be subject to "equitable or remedial relief as the court may deem appropriate."[95] In short, Doris argued that section 409(a) should be interpreted so that the black-lined text, appearing below, has no limiting effect on her claim:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter ~~shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and~~ shall be subject to such ~~other~~ equitable or remedial relief as the court may deem appropriate, ~~including removal of such fiduciary~~.[96]

In other words, Doris viewed section 409(a) as granting alternate and independent grounds of relief. It could provide the traditional remedies from trust law of redressing harming to plan assets and fiduciary removal.[97] In addition and more broadly, it could authorize additional "equitable or remedial relief" for fiduciary breaches that have no connection to plan assets or the plan as a whole.

The Court, however, rejected this reading of section 409(a), holding that *all* relief under section 409(a) must flow to the plan and not to individual beneficiaries.[98] After citing the voluminous legislative history focusing on protecting plan assets,[99] the Court rejected Doris' reading of the statute:

> This "blue pencil" method of statutory interpretation—omitting all words not part of the clauses deemed pertinent to the task at hand—impermissibly ignores the relevant context in which statutory language subsists. In this case, this mode of interpretation would render superfluous the preceding clauses providing relief singularly to the plan, and would slight the language following after the phrase "such other equitable or remedial relief." Congress specified that this remedial phrase includes "removal of such fiduciary"—an example of the kind of "plan-related" relief provided by the more specific clauses it succeeds. A

providing "the full range of legal and equitable remedies" under ERISA).

92. See *supra* notes 70–72 and accompanying text for a discussion of the three major remedies available to employees under ERISA.

93. *See, e.g.*, Medill, *supra* note 11, at 831 (indicating "variety of possible claims" under ERISA Section 502(a)(3) makes judicial determination of remedies difficult).

94. *Russell*, 473 U.S. at 139 n.5.

95. ERISA § 409(a), 29 U.S.C. § 1109(a) (2006).

96. *Id.*

97. See *infra* note 266 and accompanying text for the Restatement (Second) of Trusts list of remedies for breach of trust.

98. *Russell*, 473 U.S. at 148.

99. *Id.* at 140 n.8.

> fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.[100]

Later, this Article will try to revive Doris's "blue pencil" method for reading section 409(a).[101] The important point for now, though, is that Doris was the only person harmed by the breach, and her alleged harm was by the untimely payment of benefits.[102] The Court even suggested that timely payment of plan benefits is governed not by the fiduciary provisions of ERISA but by the administrative provisions found in section 503.[103]

Russell is based on the supposed premise that "there is a stark absence—in [ERISA] itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages,"[104] which is the Court's curious term for consequential damages. Above, we already saw that ERISA's legislative history shows that Congress was primarily concerned about the misuse of plan assets.[105] Preventing the Jimmy Hoffas of the world from looting pension funds was clearly on the mind of Congress when it enacted the fiduciary provisions of ERISA.

Keeping with this history, the Court said in *Russell* that ERISA fiduciary duties focus on "proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."[106] The specific fiduciary duties mentioned in *Russell* are the main duties of a traditional trustee, leading *Russell* implicitly to follow the trust model of basing remedies on harm to property.[107]

Yet, Doris' claim in *Russell* was about the hardship she alleged from the breach of a benefit promise. She had no claim to property, and thus *Russell* left her with no remedy beyond specific performance of the benefit promise.

The *Russell* decision could be read to extend beyond section 409(a) so as to restrict the entire universe of ERISA remedies. If so, the only remedy an aggrieved beneficiary could seek is specific performance of benefit promises. Four Justices were sufficiently disturbed by this suggestion as to write a concurring—yet critical—opinion of the majority.[108] In their view, section 502(a)(3)—which was not pled in *Russell*—could serve as the basis for granting a remedy for the mishandling of benefit claims.[109] Later cases would both vindicate and frustrate the position of the concurring justices. In *Varity Corp. v. Howe*,[110] the Court would

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100. *Id.* at 142 (citation omitted).

101. See *infra* Part V for a discussion of how the language in section 409(a) can be interpreted to allow for the redress of all fiduciary breaches.

102. *Russell*, 473 U.S. at 136–37.

103. *Id.* at 143–44.

104. *Id.* at 148.

105. *Id.* at 142.

106. *Id.* at 142–43.

107. See *infra* part IV.D.3 for a discussion of the model of basing remedies on harm to property.

108. *Russell,* 473 U.S. at 150–51 (Brennan, J., concurring).

109. *Id.* at 151–55.

110. 516 U.S. 489 (1996).

in fact hold that breaching fiduciaries could be liable to individual beneficiaries under section 502(a)(3).[111] Yet, as discussed later, section 502(a)(3) has been construed to preclude consequential damages.[112] As a result, a remedy does exist for individual-level harms, but it is limited to coercive relief and equitable restitution.

Russell expressly sanctioned fiduciary liability for negligently investing defined-benefit plan assets.[113] Yet, until very recently, it was thought that fiduciaries would not be liable for negligently investing the account of a single participant in a defined-contribution plan.[114] The reason for this theory was dicta in *Russell*: that a fiduciary breach must harm the plan as a whole, not a single participant, before the fiduciary could be subject to damages.[115] In *LaRue v. DeWolff, Boberg & Associates*,[116] the Supreme Court held otherwise, subjecting a plan fiduciary to liability for negligently investing the account of a single participant.

C. Mertens v. Hewitt Associates

The plaintiffs in *Mertens v. Hewitt Associates*[117] were employees who participated in a pension plan that terminated without enough assets to pay all benefits due.[118] They sued the fiduciaries of the plan, claiming that the failure to fund the plan adequately was a breach of fiduciary duties.[119] The deep pockets, though, belonged to the plan's actuary, Hewitt Associates, a multi-billion dollar consultancy firm.

As the plan's actuary, Hewitt was not an ERISA fiduciary.[120] The plaintiffs, though, claimed that Hewitt was liable for participating in a fiduciary breach by not advising the plan sponsor to fund the plan at a higher level.[121] Trust law imposes liability on non-trustees who participate in a fiduciary breach,[122] although there were good reasons to think that ERISA would not impose a similar liability because of the more expansive definition of fiduciaries and the vigorous regulation of transactions with nonfiduciary parties in interest.[123] Moreover, it is

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111. *Howe,* 516 U.S. at 515.

112. See *infra* Parts III.C and III.D for a discussion of cases where the courts have interpreted section 502(a)(3) to preclude consequential damages.

113. *Russell,* 473 U.S. at 139 (finding that section 409 relief must inure to the plan as a whole).

114. *See, e.g.*, Medill, *supra* note 11, at 848–52 (discussing difficulties individuals face in obtaining remedies for fiduciary duty breach under current Supreme Court interpretations of ERISA).

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

116. 552 U.S. 248 (2008).

117. 508 U.S. 248 (1993).

118. *Mertens*, 508 U.S. at 250.

119. *Id.*

120. *See* 29 C.F.R. § 2509.75-5 (2009) (advising that actuaries will not ordinarily be considered fiduciaries while performing usual professional functions).

121. *Mertens*, 508 U.S. at 250–51.

122. BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 901.

123. Unlike trust law, ERISA does not limit fiduciary duties to the formal office of trustee. Instead, duties apply to all those with discretion over plan administration. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2006). Moreover, ERISA has a detailed system of "prohibited transactions" between

doubtful that the act of funding a plan even falls within the purview of ERISA fiduciary duties at all. Acts such as "establishing, funding, amending, and terminating" are considered settlor functions and beyond the bounds of ERISA fiduciary duties.[124] In short, there likely was no breach for Hewitt to have participated in.

The parties in *Mertens*, however, focused their efforts on ERISA remedies rather than substantive duties. Because Hewitt was not a fiduciary, section 409(a) was not available to the plaintiffs; the only remedy available by statute was for "appropriate equitable relief" under section 502(a)(3).[125] The *Mertens* plaintiffs sought money damages to bring the plan up to full funding, and Hewitt argued that damages were legal, not equitable, in nature.[126] Hewitt won the case because the Court found that money damages were legal, not equitable, relief.[127]

The *Mertens* plaintiffs had a fairly straightforward argument, although less textual than the plaintiff's argument in *Russell*. According to the *Mertens* plaintiffs, "ERISA's roots [are] in the common law of trusts,"[128] and the Restatement on Trusts flatly declares that almost all trust remedies are "exclusively equitable."[129] Historically, trusts were subject to the exclusive jurisdiction of equity courts. These courts had broad authority to fashion remedies and could grant monetary relief against breaching trustees and third parties who knowingly participated in breaches.[130]

This exclusivity, though, was not enough to convince Justice Scalia, writing for the majority, that the relief sought was in fact equitable. Quoting Pomeroy's venerable treatise on equity, Justice Scalia said,

> At common law, however, there were many situations—not limited to those involving enforcement of a trust—in which an equity court could "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." The term "equitable relief" can assuredly mean, as petitioners and the Solicitor General would have it, whatever relief a court of equity is empowered to provide in the particular case at issue. But as indicated by the foregoing quotation—which speaks of "legal remedies" granted by an equity court—"equitable relief" can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages). As memories of the divided bench, and familiarity with its technical refinements, recede further into

"par[ties] in interest" and the plan. *Id.* § 406, 29 U.S.C. § 1106. One might reasonably conclude that the greater breadth of fiduciary duties would displace the need to impose liability on non-fiduciaries for participating in a breach of trust. In a later case, the Court did, however, impose liability for equitable restitution upon a nonfiduciary who knowingly participated in a breach. Harris Trust & Sav. Bank v. Salomon Bros., 530 U.S. 238, 247–48, 253 (2000).

124. Hunter v. Caliber Sys., Inc., 220 F.3d 702, 718 (6th Cir. 2000) (citations omitted).

125. *Mertens*, 508 U.S. at 252–53. See *supra* notes 67–73 and accompanying text for a review of the remedies available under ERISSA.

126. *Id.* at 255–56.

127. *Id.* at 257–58.

128. *Id.* at 255.

129. RESTATEMENT (SECOND) OF TRUSTS § 197 (1959).

130. *Mertens*, 508 U.S. at 256.

> the past, the former meaning becomes, perhaps, increasingly unlikely; but it remains a question of interpretation in each case which meaning is intended.[131]

Justice Scalia's enumeration of historical equitable relief (i.e., "injunction, mandamus, and restitution") is both unhelpful and wrong.[132] Injunction is plainly equitable, but it is specifically authorized by ERISA itself.[133] Perhaps the Court invoked injunction in order to legitimize its exhumation of equity, but as an example it illuminates nothing. Mandamus might seem equitable as it is coercive, but it was an extraordinary legal remedy like *quo warranto*, prohibition, and habeas corpus.[134] At any rate, mandamus is directed at government officials and the like,[135] giving it little or no application to the typical ERISA case. Finally, as discussed later, restitution is a modern invention, fusing legal and equitable remedies. Restitution has a very significant equitable heritage but it was not a remedy known to historical chancery.[136]

Justice Scalia's real bungle in *Mertens*, though, was his assertion that courts in equity granted legal relief in trust matters.[137] The quote from Pomeroy, noting the power to "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority," had nothing to do with trust law.[138]

In the days of the divided bench, an equity court might assume jurisdiction over cases in which equity and law courts held "concurrent jurisdiction." A contract claim[ant] enforces a legal right but could seek both equitable relief (e.g., specific performance) and legal relief (e.g., damages).[139] The equity court could assert its (concurrent) jurisdiction over the claim if the "legal remedy [was] not, under the circumstances, full, adequate, and complete."[140] And, "if the plaintiff sought an injunction or specific performance, and was also entitled to damages, the chancellor who granted equitable relief had jurisdiction to go on and grant

131. *Id.* at 256–57 (citation omitted) (quoting 1 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 181, at 257 (5th ed. 1941)).

132. *See* Langbein, *Trail of Error*, *supra* note 22, at 1319–21 (criticizing majority's opinion in *Mertens*).

133. ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A) (2006).

134. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 179–80 (2008).

135. "[M]andamus operates much in the nature of a bill in chancery for specific performance, the principal difference being that the latter remedy is resorted to for the redress of purely private wrongs, or the enforcement of contract rights, while the former generally has for its object the performance of obligations arising out of official station, or specially imposed by law upon the respondent." JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION § 1, at 4 (1874).

136. Nevertheless, interpreting section 502(a)(3) as authorizing all forms of restitution is a good textual approach to the statute, for reasons discussed below. See *infra* Part III.D.

137. Mertens v. Hewitt Assocs., 508 U.S. 248, 256–57 (1993).

138. *Id.* at 256 (quoting 1 POMEROY, *supra* note 131, § 181, at 257) (internal quotation marks omitted).

139. *Id.* at 256–57.

140. 1 POMEROY, *supra* note 131, § 173, at 234.

damages as well, as a matter of economy of litigation."[141] This power is often called the "clean-up" doctrine today.[142]

Trust law did not, however, belong to the concurrent jurisdiction and is not subject to the clean-up doctrine. It belonged to the exclusive jurisdiction of equity precisely because trusts were not enforceable at law. They created "purely equitable estates and interests."[143] Indeed, because the trust beneficiary's estate is purely equitable, "the question never is asked, nor could be asked, whether the remedies given him by a court of law are or are not adequate, *since all legal remedies are to him impossible*."[144] In short, the legal powers described by Justice Scalia exist only in the concurrent jurisdiction of equity. Trust remedies, in contrast, exist only in the exclusive jurisdiction.

Despite mangling the ancient law he tried to resurrect, Justice Scalia had a valid reason for limiting section 502(a)(3). As a textual matter, section 502(a)(3) offers remedies more limited than those under section 409(a). While section 502(a)(3) offers "equitable relief," section 409(a) offers "equitable or remedial relief."[145] Unfortunately for employees, *Russell* had already limited section 409(a) based on legislative history and purpose; when *Mertens* further constricted section 502(a)(3), it left little of value to employees.

D. Great-West Life & Annuity Insurance Co. v. Knudson

Mertens seemed to authorize restitution under section 502(a)(3), saying that it was typically available in equity.[146] The goal of restitution is to "prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff."[147] Restitution is an area of law in its own right, having its own Restatement[148] and well-regarded treatises.[149] The field is a modern invention, largely formed in 1937 with the Restatement on Restitution.[150] The Restatement brought together several equitable and legal doctrines under the aegis of "the law of restitution" one year before equitable and legal procedures were fused in the federal judiciary.[151] Thus, restitution includes the legal remedy of quasi-contract the equitable remedies of constructive trust, equitable lien, accounting for profits, and subrogation.

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141. DOBBS, *supra* note 74, § 2.7, at 83.

142. Langbein, *Trail of Error*, *supra* note 22, at 1350.

143. 1 POMEROY, *supra* note 131, § 150a, at 204–05.

144. *Id.* § 219, at 370–71 (emphasis added).

145. See *supra* Part III.A for a discussion of statutory language in ERISA authorizing injunctive relief.

146. Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).

147. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 1.1, at 4 (2d ed. 1993).

148. *See generally* RESTATEMENT OF THE LAW OF RESTITUTION (1937).

149. *See generally* 1 GEORGE E. PALMER, THE LAW OF RESTITUTION (1978).

150. *See id.* § 1.1, at 4 ("The term 'restitution' appears in early decisions, but general recognition probably began with the publication of the *Restatement of Restitution*." (footnote omitted)); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278 (1989) (stating Restatement on Restitution "created the field").

151. *See* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 14–15 (2d ed. 1948) (describing attempts to unite law and equity procedure).

In *Great-West Life & Annuity Insurance Co. v. Knudson*,[152] the remedial tables were turned because the plan sued the employee under section 502(a)(3).[153] Great-West had paid the Knudsons' medical expenses from an automobile accident. Later, the employee settled with the tortfeasor.[154] The plan document required the Knudsons to reimburse Great-West from the recovery.[155] When Great-West sued for reimbursement, the Knudsons refused, and the Supreme Court held that Great-West could not enforce its reimbursement right under section 502(a)(3).[156]

The Court's analysis turned on the source of recovery. Because Great-West sought recovery from the Knudsons' general assets, rather than a specific fund, the Court found that Great-West was seeking legal, not equitable, restitution.[157] Later, in *Sereboff v. Mid Atlantic Medical Services*,[158] the plan sought payment from the actual funds received in settlement rather than the general assets of the employee. This difference allowed the Court to recognize the plan's claim as an equitable lien on the funds received, thus falling within the equitable restitution allowed by section 502(a)(3).[159]

The Court in *Great-West* did not have the same textual dilemma as the Court in *Mertens*. In *Mertens*, the Court felt compelled to interpret section 502(a)(3) ("equitable relief") more narrowly than section 409(a) ("equitable or remedial relief"). The damages remedy naturally fell out. The Court in *Great-West*, though, had no textual reason to diminish section 502(a)(3) even further by limiting it to equitable restitution.

Justice Scalia's majority opinion claimed that Congress plainly meant to limit relief to remedies available in historic chancery practice.[160] In doing so, Justice Scalia essentially lumped legal restitution in with the damages remedy—forms of relief enforceable by a money judgment, rather than a contempt decree.[161] This enforcement mechanism is, according to Justice Scalia, what section 502(a)(3) prohibits.[162]

In dissent, Justice Ginsburg argued that section 502(a)(3) should be read to allow both legal and equitable restitution.[163] In fact, *Great-West*'s resort to historical chancery practice runs counter to Justice Scalia's own definition of textualism—a search "for a sort of 'objectified' intent—the intent that a

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152. 534 U.S. 204 (2002).

153. *Great-West,* 534 U.S. at 208.

154. *Id.* at 207.

155. *Id.* at 207–08.

156. *Id.* at 221.

157. *Id.* at 212–18; *cf.* POMEROY, *supra* note 131, § 112, at 147 ("[S]imple pecuniary recovery is, in the vast majority of cases, legal, and not equitable, but it is not unknown in equity.").

158. 547 U.S. 356 (2006).

159. *Sereboff,* 547 U.S. at 362–63.

160. *Great-West*, 534 U.S. at 217–18 ("It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect.").

161. *Id.* at 214–16.

162. *Id.* at 217–18.

163. *Id.* at 224–34 (Ginsburg, J., dissenting).

reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[164]

The corpus juris of ERISA's enactment in 1974 was the eradication of distinctions between law and equity that had started more than a century earlier.[165] Professor Dan Dobbs' treatise on the law of remedies, first written in 1973, dismissed "classification of remedies as equitable or legal," calling it "misleading" and adding that "it is often unimportant to know whether a remedy is equitable or legal now that courts of law and equity have merged."[166] Ironically, Justice Scalia cited Dobbs as one of the "standard current works . . . which make the answer clear" when lower courts must determine whether remedies are equitable or legal in nature.[167]

Dobbs does, in fact, provide a coherent system of remedies that supports *Mertens* but not *Great-West*. "Judicial remedies usually fall in one of four major categories. (1) Damages remedies, (2) Restitutionary remedies, (3) Coercive remedies, and (4) Declaratory remedies."[168] Focusing section 502(a)(3) on restitution distinguishes it from section 409(a). Moreover, section 502(a)(3) does not limit the scope of defendants—anyone can be liable under it. Yet, it could be unfair to subject someone to damages who did not even breach an ERISA duty. It would be fair, though, to subject them to restitution (i.e., the prevention of unjust enrichment). By limiting section 502(a)(3) to equitable restitution, however, *Great-West* simply resurrected dead law and fissioned restitution, even though the field was the result of a deliberate fusion of law and equity that had occurred decades before ERISSA was passed.

Great-West did not reach fiduciary breaches involving plan assets, which remain subject to section 409(a). So, a fiduciary who wrongfully profits from the use of plan assets will be liable to restore those profits to the plan, whether or not recovery is to be made against specific property.[169] Thus, the core remedies of trust law—redressing harm to or abuse of property—remain fully intact after *Great-West*. What was almost certainly destroyed, however, was the ability to redress mishandled claims and other non-asset breaches under section 502(a)(3). The only effective remedy for such cases is damages, which *Mertens* excluded from

164. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997).

165. *See* MCCLINTOCK, *supra* note 151, at 13–16 (discussing distinctions between law and equity and attempts to reconcile the two).

166. DOBBS, *supra* note 74, § 1.1, at 3. The main remaining importance is the availability of a jury trial under the Seventh Amendment and the discretionary nature of remedies. *Id.* § 1.2, at 8–9.

167. *Great-West*, 534 U.S. at 217. Justice Scalia was likely referring to Dobbs's multivolume treatise, rather than the hornbook, although the substance of both is the same. My reason for quoting the hornbook is that it is authoritative and contemporaneous with ERISA.

168. DOBBS, *supra* note 74, § 1.1, at 1. Douglas Laycock generally follows this scheme, although he subdivides damages into compensatory and punitive elements and adds another class of ancillary remedies (such as attorney fees and contempt powers). DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 2–6 (3d ed. 2002).

169. *See* ERISA § 409(a), 29 U.S.C. § 1109(a) (2006) (stating fiduciary is personally liable for damages, restitution, and other appropriate equitable or remedial relief).

section 502(a)(3).[170] *Great-West* went even farther, denying any remedy under section 502(a)(3) if enforceable by a money judgment.[171] Responding to *Mertens* and *Great-West*, scholars and policymakers have proposed that section 502(a)(3) could accommodate money damages under the "make-whole" doctrine of trust law, discussed in the next Part.

IV. THE "MAKE-WHOLE" THEORY AND ITS SHORTCOMINGS

A. *Introduction*

Corcoran v. United Healthcare, Inc.[172] exemplifies the personal devastation that can follow the mishandling of benefit claims. In that case, the fiduciary would not pay to hospitalize a pregnant employee during the third trimester despite her doctor's recommendation.[173] Arguably, the fiduciary breached its duties to the employee and caused the death of the employee's unborn child. Employees, like Mrs. Corcoran, who suffer personal harm from a fiduciary breach need a money remedy that makes them whole.

But ERISA currently offers them none. In *Massachusetts Mutual Life Insurance Co. v. Russell*,[174] the Supreme Court held that section 409(a) could not redress breaches that harm individual employees personally.[175] In *Mertens v. Hewitt Associates*,[176] the Supreme Court held that the section 502(a)(3) does not offer the money remedy of damages—at least against a nonfiduciary who participates in a breach.[177] The Supreme Court has never ruled directly on whether section 502(a)(3) could impose liability on a breaching fiduciary, but the implication of *Mertens* is clear—damages are not available under section 502(a)(3). Without sections 409(a) or 502(a)(3), employees like Mrs. Corcoran have nowhere to turn, and they will continue to suffer personal harm without a remedy.

Critics hope that the Supreme Court will either limit or overrule *Mertens* and open section 502(a)(3) to what they call "make-whole relief."[178] The make-whole theorists claim that by authorizing appropriate equitable relief, section 502(a)(3) adopts trust remedies which "make whole" beneficiaries harmed by breach. In functional terms, make-whole relief is the same as the damages remedy; each is "a money remedy aimed at making good the plaintiff's losses."[179]

To succeed, make-whole theory would need for the Supreme Court to reverse or drastically curtail *Mertens*. The Department of Labor contends that *Mertens*

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170. Mertens v. Hewitt Assocs., 508 U.S. 248, 260–62 (1992).

171. *Great-West,* 534 U.S. at 220–21.

172. 965 F.2d 1321 (5th Cir. 1992).

173. *Corcoran,* 965 F.2d at 1322–23.

174. 473 U.S. 134 (1985).

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

176. 508 U.S. 248 (1993).

177. *Mertens*, 508 U.S. at 260–61.

178. See *infra* Part IV.D for a discussion of such criticisms.

179. *See* DOBBS, *supra* note 74, § 1.1, at 1 ("The damages remedy is a money remedy aimed at making good the plaintiff's losses.").

denies damages against nonfiduciaries only,[180] but the rationale of *Mertens* suggests otherwise. The decision turned on the monetary nature of the relief requested rather than the nonfiduciary status of the defendant. According to the Court, any general award of money is legal, not equitable, relief. *Mertens*, however, misinterpreted historical equity. Because trust law belonged to the exclusive jurisdiction of equity, trust remedies were exclusively equitable. This mistake makes *Mertens* a tempting target for reversal. But, as described in this Part, the Court would be committing another mistake by adopting the make-whole theory.

B. The Make-Whole Theory

In denying relief for individual harm under section 409(a), the *Russell* majority disparaged the power of ERISA to grant any remedy to an individual for fiduciary breach.[181] According to the majority, ERISA fiduciary duties "relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."[182] Only outside the fiduciary provisions does ERISA create rights to enforce benefit promises.[183] Later cases would make the handling of claims fiduciary acts,[184] but they remain outside the scope of section 409(a).

William Brennan and three other justices concurred with the *Russell* majority.[185] Alarmed by the narrowing of federal rights, they hoped to cabin *Russell* within section 409(a).[186] In Brennan's view, Mrs. Russell simply mispleaded her case. Section 502(a)(3), rather than 409(a), would offer relief because "Congress intended to incorporate trust law into ERISA's equitable remedies."[187] As for trust remedies, "a fundamental concept of trust law,"

180. Brief for the United States as Amicus Curiae, *supra* note 12, at 14.

181. *See* Langbein, *Trail of Error*, *supra* note 22, at 1341–42. The Court later allowed individual remedies under section 502(a)(3). Varity Corp. v. Howe, 516 U.S. 489, 515 (1996).

182. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142–43 (1985). The focus on asset management seeped into the Court's preemption analysis a few years after *Russell*. *See* Massachusetts v. Morash, 490 U.S. 107, 120–21 (1989) (exempting vacation-benefit plan from ERISA coverage because it had no associated plan assets).

183. *Russell,* 473 U.S. at 143. Part 4 of ERISA Title I contains the fiduciary provisions, whereas Part 5 contains enforcement provisions.

184. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 219 (2004) (stating benefit determination is "part and parcel" of ordinary fiduciary responsibilities); Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (concluding that section 502's "catchall" provisions provide for appropriate equitable relief for injuries caused by violations that section 502 does not elsewhere adequately remedy).

185. They were Justices Blackmun, Marshall, and White. *Russell,* 473 U.S. at 148 (Brennan, J., concurring).

186. Later cases partially vindicated Brennan, holding that individuals could seek relief for a fiduciary breach under section 502(a)(3) and could even seek relief under section 409(a) if the harm was to assets held in an account for the individual. *See* LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248, 256 (2008) (finding breach that harmed assets in defined contribution plan fell under § 409(a)); *Varity*, 516 U.S. at 509–11 (holding section 502(a)(3) is broad enough to permit individual relief for fiduciary breach).

187. *Russell,* 473 U.S. at 157–58. The concurrence does not expressly say that section 502(a)(3) incorporates trust remedies. But the concurrence repeatedly says that section 502(a)(3) redresses

according to Brennan, "is that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests.'"[188]

Following *Russell*, the Court in *Mertens* denied money damages under section 502(a)(3) under the (incorrect) view that an award of money is legal and outside the "appropriate equitable relief" of section 502(a)(3).[189] In dissent, Byron White and three other justices[190] detailed the make-whole theory. Rather than denying monetary awards,

> "[t]he traditional 'equitable remedies' available to a trust beneficiary included compensatory damages. Equity 'endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed.' This included, where necessary, the payment of a monetary award to make the victims of the breach whole."[191]

Thus, according to White, the "appropriate equitable relief" of section 502(a)(3) includes the "make-whole relief" of trust law.[192] The Department of Labor, scholars, judges, and justices have since rallied behind the make-whole theory and called for damages under section 502(a)(3).[193]

Their calls, however, have not changed the law. The Department of Labor has tried to distinguish *Mertens*, arguing that it bars damages only against nonfiduciaries.[194] These attempts have gone nowhere, and appellate judges routinely deny make-whole relief, albeit under protest.[195] The rationale of *Mertens* turns on the nature of relief rather than the identity of the defendant. Change, say the appellate judges, must come from the Supreme Court or Congress. Congress has done nothing, nor has the Supreme Court. Concurring in *Aetna Health Inc. v. Davila*,[196] a 2004 preemption decision, Justices Ginsburg and Breyer pleaded for the Court to revisit *Mertens* and allow make-whole relief under section 502(a)(3).[197]

In 2008, the Court declined these pleas by denying certiorari in *Amschwand v. Spherion Corp.*[198] Thomas Amschwand, afflicted with cancer, had left work on a medical leave but tried to maintain life insurance coverage from his employer,

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fiduciary breaches and supports the argument with repeated references to trust law. *See, e.g.*, *id.*

188. *Id.* at 157 (quoting 3 A. SCOTT, LAW OF TRUSTS § 199, at 1638 (1967)).

189. *See generally* Mertens v. Hewitt Assocs., 508 U.S. 248 (1993).

190. The other justices were Chief Justice Rehnquist and Justices Stevens and O'Connor. *Id.* at 263 (White, J., dissenting).

191. *Id.* at 266 (second alteration in original) (citations omitted) (quoting JAMES HILL, A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES, THEIR POWERS, DUTIES, PRIVILEGES, AND LIABILITIES 522 (4th ed. 1845)).

192. *Id.* at 266–67.

193. *See* Harthill, *supra* note 11, at 723–26 (providing examples of support and criticism of the "make-whole" theory).

194. *Id*. at 747–48.

195. *Id.* at 724 & n.14, 15 & 19.

196. 542 U.S. 200 (2004).

197. *Davila*, 542 U.S. at 222 (Ginsburg, J., concurring).

198. 128 S. Ct. 2995 (2008).

Spherion.[199] During this time, Spherion replaced its former insurer with Aetna. The new Aetna policy excluded employees on medical leave, like Amschwand, until they returned to work for one day. This exclusion was not communicated to Amschwand, who arguably could have returned to work for a day to keep his coverage.[200] Aetna's policy purported to waive the exclusion for those employees identified by Spherion as being on preexisting medical leave.[201] Spherion did not transmit Amschwand's name to Aetna, and Amschwand did not receive coverage when the new policy became effective. Spherion assured Amschwand he was covered.[202] He never returned to work but continued paying premiums until his death.[203] His widow filed a claim for benefits, but Aetna denied the claim because of the exclusion.[204] The widow then sued for make-whole relief under section 502(a)(3).[205]

The Fifth Circuit denied the widow relief, relying on *Mertens* and its progeny.[206] The Department of Labor and Solicitor General viewed *Amschwand* as a vehicle for the Supreme Court to modify or overrule *Mertens*.[207] By following *Mertens*, the Fifth Circuit would not redress a clear fiduciary breach that devastated an employee's widow.[208] Thus, the United States supported Mrs. Amschwand's petition for certiorari,[209] but the Supreme Court nevertheless denied it.[210] The make-whole theory may remain alive, but just barely, after *Amschwand.*[211]

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199. Amschwand v. Spherion Corp., 505 F.3d 342, 343–44 (5th Cir. 2007).

200. *Id.* at 344.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 343. The decisions of the Fifth Circuit and district court suggest that Mrs. Amschwand sued only under section 502(a)(3) for breach of fiduciary duty. Mrs. Amschwand should have also sued under section 502(a)(1)(B) as she was not seeking extra-contractual damages but simply benefits due. Also, the premiums that Mr. Amschwand paid to Spherion were plan assets. Spherion breached its fiduciary duties by not dedicating these assets to the purchase of a life insurance policy for Mr. Amschwand. Under *LaRue*, Spherion could be held liable for this breach with respect to assets, even though the remedy would flow only to Mrs. Amschwand.

206. *See id.* at 343, 345–48 (observing that Supreme Court had already limited relief available under section 502(a)(3) to remedies typically awarded in courts of equity).

207. Brief for the United States as Amicus Curiae, *supra* note 12.

208. *Id.* at 20.

209. *Id.* at 21.

210. *See* Amschwand v. Spherion Corp., 128 S. Ct. 2995 (2008) (denying petition for certiorari); *see also* Andrew L. Oringer, *A Regulatory Vacuum Leaves Gaping Wounds—Can Common Sense Offer a Better Way to Address the Pain of ERISA Preemption?*, 26 HOFSTRA LAB. & EMP. L.J. 409, 421–23 (2008) (providing a detailed description of *Amschwand*).

211. Commentators differ on whether the make-whole theory remains viable at all after *Amschwand. Compare* Thomas P. Gies & Jane R. Foster, *Leaving Well Enough Alone: Reflections on the Current State of ERISA Remedial Law*, 26 HOFSTRA LAB. & EMP. L.J. 449, 467 (2008) (arguing that Court's refusal to hear *Amschwand* conclusively excludes make-whole relief from section 502(a)(3)), *with* Secunda, *supra* note 6, at 174 (arguing that make-whole theory remains viable).

C. How the Trust-Law Analogy Fails

In interpreting ERISA, the Supreme Court follows trust law (or at least tries to). Perhaps its most comprehensive application of trust law to ERISA is *Firestone Tire & Rubber Co. v. Bruch*.[212] In *Firestone*, one company bought a division of another company.[213] The employees of the acquired division claimed that the transaction resulted in their termination of employment, thus entitling them to severance benefits.[214] The employer denied the claim because the employees continued working for the acquiring employer.[215] The question before the Court was how to review the employer's decisionmaking as the plan's fiduciary.[216]

The Supreme Court decided *Firestone* using the law of trusts, likening the ERISA fiduciary to a traditional trustee.[217] According to this trust-regulatory model, the Court ruled that fiduciary decisionmaking is generally reviewed de novo.[218] However, if the governing document reserves discretion to the employer, then the federal courts will overturn the fiduciary's decision only if its decision is arbitrary and capricious.[219] The natural outcome of *Firestone* was that every well-advised employer amended its plans to reserve to it—or its appointed fiduciary—the appropriate discretion in administering plan claims. So, the de facto standard of review in ERISA cases asks whether the denial was arbitrary and capricious.

Rather than entangling itself with state trust law, the Court could have answered *Firestone* under the text of ERISA. *Firestone* involved an ERISA fiduciary who had to decide whether employees were eligible for benefits under the standard set forth in the plan document. Trust law gives a clear analogue in those very common situations in which a trustee is directed to pay income or principal for the "support" or "education" of a beneficiary. In those cases, the beneficiary cannot challenge the amount that "the trustee in the exercise of a sound discretion deems necessary for [the beneficiary's] education or support."[220] Under trust law, then, eligibility for trust distributions involves trustee discretion that will be overturned only if abused. And, the Court had no need to search through Restatements of Trusts to find this answer. The text of ERISA, like trust law, imposes a duty of prudence (i.e., reasonableness) on its fiduciaries in the administration of employee benefit plans.[221] As a textual matter, the Court could have simply said that the benefit determinations would be subject to the same standard of reasonableness that applies to all other fiduciary acts.

212. 489 U.S. 101 (1989).

213. *Firestone,* 489 U.S. at 105.

214. *Id.* at 105–06.

215. *Id.* at 106.

216. *Id.* at 108.

217. *Id.* at 110–11.

218. *Id.* at 112.

219. *See id.* at 109–12 (observing that federal courts have adopted arbitrary and capricious standard).

220. RESTATEMENT (SECOND) OF TRUSTS § 128 cmt. e. (1959).

221. *See* ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (requiring fiduciaries to act with diligence and prudence).

The use of trust law, rather than the text of ERISA, in *Firestone* was peculiar because the severance plan was not even a trust. ERISA health and welfare plans are often not trusts.[222] The standard definition of a trust is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."[223] Scott's treatise breaks this definition into five components:

> (1) a trust is a relationship;
>
> (2) it is a relationship of a fiduciary character;
>
> (3) it is a relationship with respect to property, not one involving merely personal duties;
>
> (4) it subjects the person who holds title to the property to duties to deal with it for the benefit of charity or [sic] one or more persons, at least one of whom is not the sole trustee; and
>
> (5) it arises as a result of a manifestation of an intention to create the relationship.[224]

All ERISA plans satisfy (1) because they are relationships in the sense used by Scott, as they involve both the rights of employees[225] and the duties of the ERISA fiduciaries.[226] As for (5), ERISA plans are voluntary structures, entered into only with the manifest, written intent of the employer.[227] Because plans are voluntary, the Supreme Court has often hesitated to rule against employers out of fear that additional liability will thwart the formation of ERISA plans.[228] Even

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222. Professor Donald Bogan has previously criticized the role of trust law in ERISA cases. Under *Firestone*, courts will defer to a fiduciary's denial of benefits if the plan expressly grants discretion to the fiduciary. Professor Bogan notes that ERISA plans share far more in common with insurance contracts than with donative trusts. *See* Donald T. Bogan, *ERISA: The Foundational Insufficiencies for Deferential Review in Employee Benefit Claims*—Metropolitan Life Insurance Co. v. Glenn, 27 HOFSTRA LAB. & EMP. L.J. 147, 196 (2009) ("These considerations, which form the foundation for court deference under donative trust law, have no relation to a contract of insurance."); *see also* Donald T. Bogan, *ERISA: Re-thinking* Firestone *in Light of* Great-West—*Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 694 (2004) (concluding article with plea for "re-evaluation of *Firestone*, the ERISA standard of review issue, and the question of a plan participant's right to a jury trial in claims for benefits due under an ERISA plan"); Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637, 684 (2005) (arguing that courts "have not adhered to trust law's no-further-inquiry rule in the analysis of what standard of review to apply in ERISA benefits claims litigation tarnished by a plan administrator's conflict of interest").

223. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 1.

224. 1 AUSTIN WAKEMAN SCOTT, ET AL., SCOTT AND ASCHER ON TRUSTS § 2.1.3 (5th ed. 2006).

225. *Cf.* ERISA §§ 502, 503, 514, 29 U.S.C. §§ 1132, 1133, 1144 (detailing enforcement rights under ERISA).

226. *Cf. id.* §§ 101–05, 29 U.S.C. §§ 1021–31 (detailing reporting and disclosure requirements); *id.* §§ 401–14, 29 U.S.C. §§ 1101–14 (detailing fiduciary duties).

227. *See id.* § 402(a)(1), 9 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument.").

228. *See generally* Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 376 (2002); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 42 (1987).

though ERISA does contain mandatory terms that cannot be altered by the governing plan document,[229] employers enter into ERISA plans only voluntarily. The text of ERISA mandates fiduciary duties, which are arguably satisfying the requirement of (2) that the relationship be of a fiduciary character.[230]

What remains a problem, however, is fitting ERISA plans into characteristics (3) and (4) dealing with trust property. While "[a]n interest in property is always an element of a trust,"[231] many ERISA plans have no associated assets. They are simply promises to pay benefits from the general funds of the employer,[232] involving "merely personal duties" of the employer.[233] Trust law does not act as a less formal body of contract law, enforcing gratuitous promises unsupported by consideration. "The promise to give cannot be tortured into a trust declaration . . . ."[234] This is because personal promises are not property. Or, as Justice Scalia once quipped, "[a] trust without a res can no more be created by legislative decree than can a pink rock-candy mountain."[235]

One might claim that this black-letter critique is unfair to the trust-model of ERISA. Austin Scott, author of the five characteristics, viewed trust law as property law, a means by which the settlor grants a property interest, enforceable by courts in equity, to a beneficiary.[236] A more modern account, still based on property, comes from Henry Hansmann and Ugo Mattei, who claim that trust serves to establish the rights of different creditors.[237] In particular, trust law serves to grant broad power to the trustee while protecting trust property from the claims of the trustee's personal creditors.[238] Robert Sitkoff proposes a similar account, viewing trust law as a means to control the agency costs that come with broad managerial power over assets.[239]

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229. *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (requiring fiduciary to administer plan according to plan document "insofar as . . . consistent with the provisions of [ERISA]"); *id.* § 410, 29 U.S.C. § 1110) (prohibiting the exculpation of plan fiduciaries from ERISA liability).

230. *See id.* § 404(a), 29 U.S.C. § 1104(a)(1) (mandating that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and the beneficiaries").

231. BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 1.

232. *See* Muir, *supra* note 31 (explaining welfare benefit plans often do not need to establish trust since benefits are payable from plan sponsor's general fund).

233. SCOTT ET AL., *supra* note 224.

234. Unthank v. Rippstein, 386 S.W.2d 134, 136 (Tex. 1964). Even modern authorities follow this rule. *See* RESTATEMENT (THIRD) OF TRUSTS § 16(2) (2003) ("If a property owner intends to make an outright gift inter vivos but fails to make the transfer that is required in order to do so, the gift intention will not be given effect by treating it as a declaration of trust.").

235. Begier v. IRS, 496 U.S. 53, 70 (1990) (Scalia, J., concurring). Justice Scalia might have been thinking of the mythical hobo paradise praised in the song "Big Rock Candy Mountain." *See generally* HARRY MCCLINTOCK, *Big Rock Candy Mountain, on* O BROTHER WHERE ART THOU? (Lost Highway Records 2000).

236. *See* Austin Wakeman Scott, *The Nature of the Rights of the* Cestui Que Trust, 17 COLUM. L. REV. 269, 270 (1917) (observing that trust is formed by transfer of property and distinguishing trust law from contract law).

237. *See generally* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998).

238. *Id.* at 437–38.

239. *See generally* Sitkoff, *supra* note 53.

While Scott's property-centric view might be considered the dominant one, it has detractors. The most pointed is Professor John Langbein, who claimed that "[t]rusts are deals."[240] Langbein does not appear to go so far as to claim, though, that trust law has no need for property, rather that the "trust deal" is the "distinguishing feature of the trust" which "defines the powers and responsibilities of the trustee in managing the property."[241] The actual conveyance of property is, in Langbein's view, a mere "background event."[242] Trusts might be deals, but they are deals about property. Property is the key feature of trusts for purposes of this Article because the rights of a trust beneficiary are, ultimately, rights to trust property. The trust beneficiary can demand that the trustee administer trust property according to the trust instrument and the fiduciary duties of trust law. But the beneficiary cannot go beyond that and demand financial support directly from the trustee or settlor. In contrast, many ERISA plans have no trust property or have trust property that merely secures personal promises to provide benefits.

The line between promise and property, though, is not always clear. Almost ninety years ago, Roscoe Pound wrote, "[w]ealth, in a commercial age, is made up largely of promises."[243] Most financial assets could be described as promises (e.g., stocks, bonds, mutual fund holdings).[244]

Financial assets, even if "promises," can be bought and sold by the trustee. Without the duty of loyalty, trustees could enjoy these financial assets for themselves. In contrast, a trustee's own promise looks less like property subject to fiduciary administration. For this reason, the Restatement (Second) of Trusts, which was effective at the enactment of ERISA, prohibited the creation of a trust with obligations enforceable against the trustee personally.[245] So, "if a person makes a note payable to himself as trustee for a third person, or if he makes a note payable to bearer and declares himself trustee of the note for a third person, no trust is created, and the the [sic] third person has no enforceable claim against the maker."[246]

The Restatement (Third) of Trusts liberalizes this prohibition somewhat stating that "a *chose in action* consisting of a legally enforceable claim against the trustee may be held in trust."[247] In order to create a trust, though, the settlor must

240. Langbein, *Contractarian Basis*, *supra* note 13, at 671.

241. *Id.* at 627.

242. *Id.*

243. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133 (8th prtg. 1966), *quoted in* Langbein, *Contractarian Basis*, *supra* note 13, at 637.

244. Langbein, *Contractarian* Basis, *supra* note 13, at 638; *see also* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 115, at 333–37 (discussing "notes, bonds, obligations under other contracts, shares of stock, bank deposits, and claims under an insurance policy" as common choses in action held in trust (footnotes omitted)).

245. RESTATEMENT (SECOND) OF TRUSTS § 87 (Tentative Draft. No. 4, 1957) ("An obligor cannot be trustee of the duties which he owes to the obligee . . . .").

246. *Id.* § 87 cmt. a.

247. RESTATEMENT (THIRD) OF TRUSTS § 40 cmt. b (2003). The position of the Third Restatement may reflect the law at the time ERISA was passed. *See* SCOTT ET AL., *supra* note 224, § 10.11, at 580–82 ("The Third Restatement [abandons] the traditional rule and . . . acknowledges that a trustee can hold his or

actually declare herself trustee of the chose in action or transfer it to a third party trustee.[248] The Third Restatement will not torture a contract into a trust and distinguishes between promise and property as follows:

> 10. In consideration of valuable services that have subsequently been performed by B, A promised B that on the first of the next month he (A) will transfer certain securities to T in trust for B. Although no trust arises until A transfers the securities to T in trust, A is liable for breach of contract if he fails to create the trust.
>
> 11. In consideration of funds that have since been received from B's parents, A executed a signed writing promising T that on the first of the next month he (A) will convey Blackacre to T in trust for B. A delivers the writing to T, informing her that it is his intention thereby to create a trust for B's benefit. T thereby acquires a right to specifically enforce the contract or to recover damages from A if he breaks his promise, and she now holds these rights in trust for B.[249]

Even if one thinks that the unfunded ERISA plan resembles illustration eleven rather than ten, the plan must clear even more hurdles to be a trust under the Third Restatement. A chose in action must be "definite or ascertainable."[250] So, there is no trust with respect to a chose in action that "remains wholly in the control of the settlor or if its description is so indefinite that it cannot be ascertained."[251] Yet, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[252] Even the most modern, post-ERISA authorities would not recognize an unfunded benefit promise as a trust.

D. Make-Whole Relief Redresses Harm to Trust Property

Critics of ERISA decisions point to trust law as the way to expand remedies under section 502(a)(3). Yet, the necessity of property divides ERISA and trust law. Without property (a res), one cannot create a trust, but one can create an ERISA plan. This subsection shows that property is just as central to trust remedies as it is to trust formation.

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her own debt in trust for another.").

248. RESTATEMENT (THIRD) OF TRUSTS § 10 cmt. g (2003) ("If, however, a person makes or causes to be made an enforceable promise to pay money or transfer property to another as trustee, and if the person (with the expressed or implied acceptance of the intended trustee) also manifests an intention immediately to create a trust of the promisee's rights, a trust is created at the time of the contract, with a *chose in action* (the rights under that contract) then being held for the beneficiaries by the trustee.").

249. *Id.* § 10 cmt. g, illus. 10–11.

250. *Id.* § 40 cmt. e.

251. *Id.*

252. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). Moreover, the trustee of a revocable trust owes a fiduciary duty only to the settlor rather than other beneficiaries. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(1) (2007) ("[D]espite the lack of enforceable fiduciary duties in these circumstances, a valid trust exists . . . .").

1. Professor Langbein and the Bogert Treatise

The make-whole theory originated in Justice Brennan's concurrence in *Russell* and Justice White's dissent in *Mertens*, but it has found its most complete exposition in a 2003 article by Professor John Langbein.[253] Langbein repeatedly refers to make-whole relief as "routine" under trust law,[254] but the trust authorities he cites do not fill the void of current ERISA remedies. The centerpiece of Langbein's argument is a passage from the Bogert treatise on trusts, which reads as follows:

> The extent of liability in the cases within this section is determined by the general rule that the object of damages is to make the injured party whole. Stated otherwise, the goal is to put the injured party in the same condition in which they would have been had the wrong had not been committed and the trustee had done his or her duty. Both direct and consequential damages may be awarded. Costs, counsel fees and expenses of litigation would fall within the latter type of award and are granted by the courts in their discretion when they deem the breach has been the cause of their being incurred.[255]

Langbein misuses this passage, failing to note that his centerpiece quote deals with the investment duties of a trustee, a point the Bogert treatise makes perfectly clear.[256] But, Langbein is not agitating for a make-whole theory to deal with investment losses, which ERISA already redresses under section 409(a). What Langbein needs, in order to make his case, are trust authorities that redress personal harm to beneficiaries.

The closest Langbein comes is another passage from Bogert that states:

> In suits to collect money from a trustee for breach of trust, the direct damages will usually be measured by the difference between the value of the beneficiary's rights to principal and income before and after the breach, but consequential damages may also be awarded, and exemplary or punitive damages may be awarded where malice or fraud is involved.[257]

This passage appears promising, but the cases Bogert cites also deal with trust investments.[258] The sole outlier, decided after the passage of ERISA, imposed

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253. Langbein, *Trail of Error*, *supra* note 22, at 1319–20. Langbein's article has been relied upon by concurring justices in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring), and by the Solicitor General. Brief for the United States as Amicus Curiae, *supra* note 12, at 13.

254. *See, e.g.*, Langbein, *Trail of Error*, *supra* note 22, at 1320 ("[T]he drafters of ERISA were evoking the relief routinely obtainable for breach of trust."); *id.* at 1321 (referring to "routine make-whole relief").

255. BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 701, *quoted in* Langbein, *Trail of Error*, *supra* note 22, at 1319–20.

256. BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 701 ("The object of this chapter is to discuss the extent of the trustee's financial liability for breach of his duties with regard to making (or failing to make), retaining, or selling trust investments. Additionally, it will discuss the methods that the courts use in measuring that liability.").

257. *Id.* § 862.

258. *Id.* § 862, at 50 n.33.

damages upon a trustee based not on its acts as trustee but on its contractual estate-planning relationship with a beneficiary.[259]

I do not claim that trust law never redresses personal harm to beneficiaries. For example, the court in *Marsman v. Nasca*[260] appeared ready to impose personal liability upon a trustee for the harm he caused to a beneficiary's personal interests. The beneficiary's widow convinced the court that the beneficiary had to convey his home because the trustee failed to provide for the beneficiary's support, as required by the trust agreement.[261] Forcing the trustee to pay the withheld funds to the widow was easy, but arguably does not make her whole because of the loss of the home. The court appeared willing to impose additional personal liability upon the trustee; it elected against doing so, however, because the trust agreement contained an exculpatory clause.[262] Perhaps similar cases exist, but they are not evident from either Langbein or Bogert. The make-whole doctrine is routine to investment losses but not personal harm.

2. The Remedies of the Second Restatement of Trusts

The natural place to look for trust remedies is the Second Restatement, which reigned as the authority on trust law when Congress passed ERISA in 1974. The later Third Restatement and Uniform Trust Code cannot be evidence of the trust system Congress intended to adopt. But, like Bogert's treatise, the Second Restatement does not address personal harm suffered by beneficiaries. In fact, it does not speak of make-whole relief at all outside its citations to ERISA cases.

With limited exception, the remedies available to a trust beneficiary against a trustee are exclusively equitable.[263] The only legal remedy available is an action to enforce an unconditional and immediate right to payment of money or transfer of personal property from the trust.[264] The remaining trust remedies, all equitable, allow a trust beneficiary to bring a suit to:

> (a) to compel the trustee to perform his duties as trustee;
>
> (b) to enjoin the trustee from committing a breach of trust;
>
> (c) to compel the trustee to redress a breach of trust;
>
> (d) to appoint a receiver to take possession of the trust property and administer the trust; [or]

259. Merrick v. Mercantile-Safe Deposit & Trust Co., 855 F.2d 1095, 1101 (4th Cir. 1988).

260. 573 N.E.2d 1025 (Mass. App. Ct. 1991). In *Marsman*, the court found the trustee to have breached by not inquiring into the financial needs of his beneficiary. *Id.* at 1029–31. The beneficiary was forced to convey a remainder interest in his house to his stepdaughter. Upon the beneficiary's death, his widow sued the trustee. *Id.* at 1029. The court ordered the trustee to transfer funds to the widow that should have been paid to the beneficiary. *Id.* at 1031. The court would not, however, impose personal liability on the trustee because of an exculpatory clause. *Id.* at 1033. *Marsman* is well known to many professors who teach trusts and estates because of its inclusion in JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 598–604 (8th ed. 2009).

261. *Marsman*, 573 N.E.2d at 1030.

262. *Id.* at 1032–33.

263. RESTATEMENT (SECOND) OF TRUSTS § 197 (1959).

264. *Id.* § 198.

(e) to remove the trustee."[265]

The third remedy, allowing a suit to "redress a breach of trust," should be the core of the make-whole theory. But, the redress allowed by the Second Restatement concerns itself with harms to or abuse of trust property. To quote:

> If the trustee commits a breach of trust, he is chargeable with
>
> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
>
> (b) any profit made by him through the breach of trust; or
>
> (c) any profit which would have accrued to the trust estate if there had been no breach of trust.[266]

The Second Restatement, just like ERISA section 409(a), redresses harm to or abuse of plan assets.[267]

The make-whole theory would need to reverse cases, like *Corcoran*, that preclude relief for wrongful denials and delays. The Second Restatement redresses these breaches but only barely. If the denial or delay is an *intentional* breach, the beneficiary is entitled to interest:

> If the breach of trust consists in the failure to pay to the beneficiary trust funds to which he is entitled, the trustee is ordinarily chargeable with interest at the legal rate if he intentionally violated his duty to the beneficiary in withholding payment. If, however, his failure to pay was due to a reasonable doubt as to his duty to make payment, he is not liable, during the period while the question of his duty is being litigated, for any interest except such as he has actually received or should have received during that period. In such a case the trustee should ordinarily not invest the money but should deposit it in a bank in order that he may be in a position to pay it over immediately if the court should so decree.[268]

3. Professor Harthill's Defense of the Make-Whole

Professor Susan Harthill defends the make-whole theory from the charge that trust remedies redress harm only to trust property.[269] It is true that she identifies examples of relief not predicated upon harm to plan assets. But, the relief is not make-whole (i.e., damages) but restitution. The primary goal of damages is to compensate a plaintiff for loss.[270] In contrast, restitution "prevent[s] unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff."[271] The ERISA make-whole theory is one of damages as it would compensate the plaintiff.

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265. *Id.* § 199.

266. *Id.* § 205.

267. See *supra* note 71 and accompanying text for a discussion of section 409(a).

268. RESTATEMENT (SECOND) OF TRUSTS § 207 cmt. c.

269. Harthill, *supra* note 11, at 723.

270. DOBBS, *supra* note 74, § 1.1, at 3. Dobbs includes punitive damages within the category of damages while Laycock places them within a separate category. LAYCOCK, *supra* note 133, at 2–6.

271. DOBBS, *supra* note 74, § 1.1, at 4.

Professor Harthill points to a comment in the Second Restatement "[w]here a trustee of shares of stock uses his power as shareholder to make an improper profit."[272] In this case, the trustee "is liable for the profit so made" even if the breach has not diminished trust property.[273] But this is not make-whole relief; neither the trust estate nor its beneficiaries have suffered harm that must be made whole. Instead, it is restitution, imposed to prevent the unjust enrichment of the disloyal fiduciary. And, ERISA section 409(a) expressly imposes restitution on disloyal fiduciaries[274] as does trust law.[275]

What Professor Harthill needs are trust authorities redressing harm that is personal to the beneficiaries. She discusses *West v. Biscoe*,[276] in which "the settlor left land to her sons on the condition that they paid $500 to each of her two granddaughters."[277] The sons did not perform on the obligation. The widower of one of the granddaughters sued in equity, and the chancellor imposed a personal obligation of payment upon the sons.[278] Professor Harthill characterizes the case as a breach of trust,[279] but it was not. The sons were not trustees, and the chancellor dismissed the bill of complaint as to the actual trustee.[280] Instead, the settlor created an equitable charge upon the sons,[281] which is not a fiduciary relationship.[282]

The title of Professor Harthill's article, "*A Square Peg in a Round Hole,*" acknowledges the difficulty in using trust law to redress personal harm to beneficiaries.[283] To date, though, neither peg nor hole has given way. Courts routinely deny relief when harm does not fall into the trust model of section

272. RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. o (1959); Harthill, *supra* note 11, at 759 (stating "a trustee who receives a bonus or commission from a third party for an act done by the trustee in connection with trust administration is liable for breach of the duty of loyalty").

273. RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. o (1959).

274. *See* ERISA § 409(a), 29 U.S.C. § 1109(a) (2006) (forcing breaching fiduciaries to "restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan").

275. *See* RESTATEMENT (SECOND) OF TRUSTS § 205(b) (holding trustee liable for "any profit made by him through the breach of trust").

276. 6 H. & J. 460 (Md. 1825).

277. Harthill, *supra* note 11, at 774 (citing *West*, 6 H. & J. at 460–61). This quote misstates the facts slightly, as the settlor created a trust during her lifetime, not by will, and the charge was for £500, not $500. *West,* 6 H. & J., at 460–61.

278. Harthill, *supra* note 11, at 774–75.

279. *Id.*

280. *West,* 6 H & J. at 463.

281. *Id.* at 466 ("[T]he portion claimed is a charge in equity upon the estate conveyed in trust . . . .").

282. *See* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 31 ("[A]bsence of a fiduciary duty in the equitable charge is the most important distinction between a charge and trust."). W*est* held that the charge would be enforceable against the sons personally in equity. *West*, 6 H & J. at 469. The Bogert treatise, though, states personal obligation is enforceable at law. *See* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 13, § 31 ("[A] charge beneficiary has two legal remedies: (1) to impose a personal obligation against the transferee subject to the charge and (2) to impose *in rem* rights against the property.").

283. Indeed, Professor Harthill acknowledges that the trust authorities do not satisfactorily answer the question. *See* Harthill, *supra* note 11, at 765 ("[T]he Bogert treatise does not satisfactorily resolve the debate of what conditions attached to make-whole relief . . . .").

409(a). The make-whole theory would grant relief only if the Supreme Court is willing to shave the sharp edges off of trust remedies.

E. Conclusion

After *Russell*[284] limited section 409(a) to plan-level and asset-based breaches, section 502(a)(3) was the only place left to redress harm personal to beneficiaries. With the Supreme Court's denial of certiorari in *Amschwand*,[285] though, the faint hope for make-whole relief under of section 502(a)(3) may have flickered out.

The make-whole theory's practical failure follows its theoretical weakness. Make-whole theorists must claim that Congress incorporated trust remedies into section 502(a)(3) by granting "appropriate equitable relief." Yet, trust remedies focus on the integrity of trust assets, just as *Russell* focused ERISA remedies on the integrity of plan assets. Trust law is the problem with ERISA remedies, not the solution.

Rather than looking to trust law and cryptic references to equity, the courts and commentators should look again at the text of section 409(a) to redress all fiduciary breaches, including personal harm to beneficiaries. *Russell*, of course, precludes this interpretation of section 409(a). But, the rationale—if not holding—of *Mertens* precludes a court from granting damages under section 502(a)(3). Remedial expansion can come only after the Supreme Court revisits its precedents, and reformers should start at the beginning with *Russell* and the text of section 409(a).

V. OVERTURNING *RUSSELL* AND REDRESSING ALL FIDUCIARY BREACHES UNDER ERISA §409(a)

Section 409(a) allows a court to impose upon a breaching fiduciary such "equitable or remedial relief as the court may deem appropriate." [286] Yet, reading the statute as a whole and in light of the legislative history, the Court concluded that Congress was "primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of the an individual beneficiary."[287] Prior scholars have focused their attention on why Congress intended to grant full remedies under ERISA.[288]

Rather than duplicate those efforts, I hope to bolster them with arguments from the text of the statute. Here (again) is the text of section 409(a), black-lined to highlight and aid the reader in evaluating the textual merits of *Russell*:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter ~~shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to~~

284. See *supra* Part III.B for a discussion of *Russell*.

285. See *supra* notes 198–210 and accompanying text for a discussion of *Amschwand*.

286. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 138 (1984).

287. *Id.* at 142.

288. *See generally,* Harthill, *supra* note 11.

> ~~such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and~~ shall be subject to such ~~other~~ equitable or remedial relief as the court may deem appropriate~~, including removal of such fiduciary~~.[289]

Relief under the black-lined text flows exclusively to the plan since the breaching fiduciary must "make good to such plan any losses" and "restore to such plan any profits" associated with the breach.[290] Thus, the Court found the black-lined text establishes a context of plan-level relief that must apply to a later grant of "equitable or remedial relief" as well.[291]

The Court's reasoning was based implicitly on the canon of *ejusdem generis*, which is "[a] canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed."[292] The black-lined text is not, however, a lengthy list that establishes an unmistakable context of plan-level relief. Alternatively, the Court could have been applying *noscitur a sociis,* the "canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[293] For example, the Court seemed to think that referring to a fiduciary "*with respect to a plan*" made the focus on plan-level relief clear.[294] But, this is simply the unnecessarily long phrase used by the ERISA definitional section; every fiduciary is a "fiduciary with respect to a plan."[295]

The text does, however, pose a conundrum. A broad interpretation of the general phrase "equitable or remedial relief" might render the specific forms of plan-level relief superfluous. Yet, a narrow interpretation might render the general phrase itself superfluous.[296] The Court chose the latter, but never explained in *Russell* exactly what type of relief would come under "equitable and remedial relief." Later cases under section 502(a)(3) eroded the need for "equitable or remedial relief" under section 409(a).[297] The Court interpreted section 502(a)(3)'s grant of "equitable relief" as redressing a fiduciary breach in *Varity* and as benefitting the plan as a whole in *Harris Trust*.

I suggest the following interpretation of section 409(a). The plan-level relief, black-lined above, adopts the traditional remedies for breach of trust. They neatly track the remedies of the Second Restatement, as discussed above, by protecting the integrity of plan assets. Nevertheless, Congress went beyond trust remedies by

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289. ERISA § 409(a), 29 U.S.C. § 1109(a) (2006).

290. *Id*.

291. *Russell,* 473 U.S. at 140 (emphasis omitted).

292. BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

293. *Id.* at 1087.

294. *Russell*, 473 U.S. at 140 (emphasis added).

295. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

296. *Cf.* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:17, at 374 (7th ed. 2007) (stating that canon applies where "the class is not exhausted by the enumeration"). The same parties that can enforce section 409(a) have independent authority under section 502(a)(3) to seek "equitable relief" against breaching fiduciaries. The Secretary of Labor technically proceeds under section 502(a)(5), which is indistinguishable from 502(a)(3) for this purpose.

297. *See generally Russell*, 473 U.S. 134.

also granting "such other equitable or remedial relief as the court may deem appropriate" [298] to redress fiduciary breach, including redress for harm to a beneficiary's personal interest.

This interpretation achieves all the goals of the make-whole theory without contorting the remedies of trust law or the text of ERISA. Most importantly, it avoids historical equity. Section 409(a) authorizes "equitable and remedial relief," which is obviously broader than the limited "equitable relief" available under section 502(a)(3). The logical reading of "equitable or remedial relief" includes the main forms of monetary remedies: damages (i.e., making plaintiffs whole) and restitution (i.e., preventing defendant's unjust enrichment). Section 409(a) specifies plan-level damages ("losses to the plan") and plan-level restitution ("profits of [the] fiduciary") before granting general relief ("equitable or remedial relief"). *Russell* interpreted the specific relief as focusing on types of plan-level relief but could have readily found it focusing on types of damages and restitution.

Yet this is not the most important contextual clue. Section 409(a) redresses fiduciary breaches specifically whereas section 502(a)(3) redresses ERISA violations generically. This fact alone supports using section 409(a) to redress all ERISA fiduciary breaches, not just those involving plan assets or the plan as a whole. Courts should redress fiduciary breaches with the provision drafted for that purpose.

Redressing fiduciary breach under section 409(a) would also relieve the pressure placed on section 502(a)(3). Despite bungling historical equity, *Mertens* contains a core truth. "'Equitable' relief," Justice Scalia wrote, "must mean *something* less than *all* relief."[299] Damages naturally fall from section 502(a)(3) because "simple pecuniary recovery is, in the vast majority of cases, legal, and not equitable."[300] Moreover, an expansive section 502(a)(3) potentially subjects nonfiduciaries to damages, even though they generally owe no duties to employees covered by ERISA plans. In the case of fiduciary breach, section 409(a) should offer full relief. In cases of other ERISA violations, section 502(a)(3) should ordinarily offer narrower relief.

Great-West was unnecessary because *Mertens*, by excluding damages, had already solved the textual problem of limiting section 502(a)(3). Once damages were removed from section 502(a)(3), there was no further need to limit its scope to ensure textual coherence. Restitution—the prevention of unjust enrichment—should always be available in its legal and equitable forms under section 502(a)(3). Historically and procedurally, restitution mixes law and equity. Yet, as Professor Dobbs points out, "[t]he substantive basis of restitution is related to substantive equity. That is, courts applying substantive equity and courts applying the law of unjust enrichment are both applying a law of 'good conscience.'"[301]

The system I propose is admittedly only a sketch of ERISA remedies, intended to show that the text, rather than trust law, is the solution to ERISA remedies. Courts would still need to consider a variety of issues under section

298. ERISA § 409(a), 29 U.S.C. § 1109(a).

299. Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993).

300. 1 POMEROY, *supra* note 131, § 112, at 147.

301. *See* DOBBS, *supra* note 74, § 4.1, at 370.

409(a), such as whether to grant punitive damages, whether to redress noneconomic loss (e.g., pain and suffering), and how to limit consequential damages.[302] ERISA section 510 may also pose a problem. It prohibits employers from interfering with their employee's rights to benefits; firing an employee on the eve of vesting is the prototypical violation.[303] Since section 510 contains no express remedies, employees must turn to section 502(a)(3) for enforcement. Some courts, however, have denied awards for backpay on the grounds that they are legal relief.[304] Yet, section 510 is equally problematic under the make-whole theory, which addresses only fiduciary breaches not employment decisions. It may be that section 510 needs its own separate enforcement mechanism by legislation.

To conclude, the Supreme Court should overturn *Russell* and allow damages for all fiduciary breaches under section 409(a). Doing so maintains the textual integrity of section 409(a) and 502(a)(3), which need not be contorted to accommodate the make-whole theory. Section 502(a)(3) should focus on restitution, which is substantive—if not historically or procedurally—equitable.

VI. CONCLUSION

Despite its ancient and far-reaching history, trust law is, in a crucial way, narrower than the 36-year-old ERISA. A trustee commits to manage trust property—not her personal resources—for the benefit of the beneficiary. In contrast, ERISA health and welfare plans often impose "merely personal duties" on the employer or administrator to pay benefits. Trusts are deals about property, whereas ERISA plans are deals about benefits.

This difference explains the failure of current ERISA remedies *and* the make-whole theory. Trust law routinely redresses breaches involving property but not personal harm suffered by beneficiaries. *Russell*[305] followed this model, misinterpreting section 409(a) as reaching only asset administration. The make-whole theory purports to expand ERISA remedies, but relies on trust remedies for investment losses to do so. Because ERISA already redresses investment losses in section 409(a), the make-whole theory adds nothing to ERISA remedies.

While trust law should guide the growth of ERISA jurisprudence, it will often fail at answering specific questions.[306] Fortunately, the statute itself answers the most challenging question of ERISA: section 409(a) imposes damages on breaching fiduciaries that harm employees personally. Rather than expanding remedies, the trust model of ERISA led to *Russell* and marked a path of limited remedies for breaches not involving plan assets. Reading the statute and

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302. *See, e.g.*, Secunda, *supra* note 6, at 167–74 (proposing statutory corrections to ERISA remedies).

303. ERISA § 510, 29 U.S.C. § 1140.

304. Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1254 (10th Cir. 2004); *see also* Medill, *supra*, note 11, at 836–37 (anticipating that backpay and front pay may no longer be available as equitable remedy); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1 (1995) (discussing backpay under ERISA remedies generally).

305. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1984).

306. *See* Conkright v. Frommert, 130 S. Ct. 1640, 1646–48 (2010) (noting trust law provides conflicting answers to whether courts should give deference to plan administrator).

overturning *Russell* are ways by which the Court could, and should, get ERISA remedies back on the right path.