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Closing The Massachusetts Mutual V. Russell Gap: Monetary Damage Awards Under Erisa Section 502(A)(3)

CLOSING THE *MASSACHUSETTS MUTUAL v. RUSSELL* GAP: MONETARY DAMAGE AWARDS UNDER ERISA SECTION 502(a)(3)

Enacted in 1974, the Employee Retirement Income Security Act (ERISA)[1] comprehensively reformed employee benefit law by codifying standards of conduct in respect to employee benefit plans.[2] Despite this reformation, the issue of whether a plan[3] beneficiary[4] or participant[5] may receive extracontractual[6] compensatory or punitive damages remains unsettled. At-

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1. 29 U.S.C. §§ 1001-1461 (1988).

2. *See* S. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 5 (1988) (discussing ERISA's comprehensive reform of employee benefit law).

3. *See* 29 U.S.C. § 1002(1,2) (1988), ERISA § 3(1,2) (defining plan). ERISA defines one plan covered by the statute as an employee welfare benefit plan. *Id.* An employee welfare benefit plan is any plan, fund or program established or maintained to provide benefits including medical, surgical or hospital care benefits; benefits in the event of sickness, death or unemployment; vacation, training or apprenticeship benefits; and benefits including the operation of day care centers, scholarship funds or prepaid legal services. *Id.*

A second plan covered by ERISA is an employee pension benefit plan. *Id.* An employee pension benefit plan is any plan, fund or program which either provides retirement income to employees, or results in a deferral of income to the termination of covered employment or beyond. *Id.*

The determination of whether a plan is a plan covered by the provisions of ERISA is beyond the scope of this note. *See* Kanne v. Connecticut Gen. Life Ins. Co., 859 F.2d 96, 98-99 (9th Cir. 1988) (determining that purchase of group insurance came within ERISA definition of plan), *vacated in part on other grounds* 867 F.2d 489 (9th Cir. 1988), *cert. denied*, U.S. , 109 S.Ct. 3216 (1989); Petr v. Nationwide Mut. Ins. Co., 712 F. Supp. 504, 507-508 (D.Md. 1989) (finding compensation plan within ERISA definition of plan); *cf.* Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1134-35 (7th Cir. 1986) (holding annuity contract with insurer not within ERISA definition of plan), *cert. denied*, 486 U.S. 1026 (1988); Fraver v. North Carolina Farm Bureau Mut. Ins. Co., 801 F.2d 675, 676-78 (4th Cir. 1986) (determining that contract provisions for termination benefits not within ERISA definition of plan), *cert. denied*, 480 U.S. 919 (1987).

4. *See* 29 U.S.C. § 1002(8) (1988), ERISA § 3(8) (defining beneficiary). The statute defines a beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.*

5. *See* 29 U.S.C. § 1002(7) (1988), ERISA § 3(7) (defining participant). The statute defines a participant as:

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

Id. For purposes of this note, the term beneficiary is used to connote both participant and beneficiary. In the remedial context, the beneficiary and the participant receive the same statutory protection. *See* 29 U.S.C. 1132(a) (1988), ERISA § 502(a) (defining ERISA's remedial scheme).

6. *See* Drinkwater v. Metropolitan Life Insurance Co., 846 F.2d 821, 824-25 (1st Cir.) (defining extracontractual), *cert. denied*, 488 U.S. 909 (1988). The *Drinkwater* court defined

tempting to resolve this question, the United States Supreme Court, in *Massachusetts Mutual Life Insurance Co. v. Russell*[7] held that a plan participant individually could not receive extracontractual or punitive damages under ERISA section 409,[8] which covers liability for breach of fiduciary duty.[9] *Russell*'s specific holding, however, did not address whether a participant could receive extracontractual or punitive damages under section 502,[10] which is an entirely separate section of ERISA setting forth ERISA's enforcement provisions.[11] In view of the comprehensive enforcement provisions of ERISA[12] and language in the statute allowing for equitable as opposed to legal relief,[13] ERISA's drafters did not seem to contemplate extracontractual damages and, therefore, damages properly termed extra contractual should not be read into ERISA's enforcement provisions by the courts.

The continual growth of the private pension system in the United States has signaled a shift from a rural based society to a primarily urban based society.[14] This growth generated legislative concern over the pension system's

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extracontractual as used in the *Russell* opinion as any damage award not within the terms of the ERISA-governed benefit plan that is the subject of the litigation. *Id.*; *see also infra* notes 190-201 and accompanying text (discussing distinction between contractual and extracontractual damages).

7. 473 U.S. 134 (1985).

8. 29 U.S.C. § 1109 (1988), ERISA § 409; *see also infra* notes 38-43 and accompanying text (discussing remedial provisions of ERISA § 409).

9. *See infra* note 72 and accompanying text (discussing holding of *Russell*).

10. *See infra* notes 31-47 and accompanying text (discussing enforcement provisions of ERISA § 502).

11. *See infra* note 72 and accompanying text (discussing limited holding of *Russell*). The holding of *Russell* also failed to reach the issue of whether a plan rather than an individual could receive extracontractual damages under section 409 in an action brought by an individual beneficiary. *See infra* notes 38-43 and accompanying text (discussing remedies available to plan under ERISA § 409).

12. *See infra* notes 30-47 and accompanying text (discussing comprehensive enforcement provisions of ERISA).

13. *See infra* notes 42-45 and accompanying text (discussing language in ERISA allowing for equitable as opposed to legal relief).

14. *See* H.R. REP. No. 533, 93rd Cong., 1st Sess. 2-3 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4639, 4641 [hereinafter *House Report*] (discussing continual growth of private pension system in United States and shift from rural to urban base). The legislative history of the act states that in 1940 private pension plans only covered an estimated four million employees. *Id.* at 3. By the 1970's, private pension plans covered over 30 million employees. *Id.* This number represented at the time almost one-half of the private, non-farm workforce. *Id.* The legislative history also predicted that by the early 1970's, the amount of assets held in reserve to pay credited benefits had risen to $150 billion. *Id.*; *see also* BRUCE, *supra* note 2, at 1 (discussing current size and growth of pension plans since World War II). As of 1988, thirty million American employees were participating in more than 500,000 private pension plans. *Id.* The plans covering these employees were holding assets in excess of $948 billion and were receiving additional employer contributions of about $70 billion annually. *Id.* As of 1988, private pension plans ranked second only to social security as a provider of retirement income. *Id.*

possible adverse impact on the American economy.[15] Congress' realization that no single statute regulated the ever-growing pension system highlighted this legislative concern.[16] Rather, three federal statutes carried the burden of regulating the pension system prior to 1974.[17] These statutes were the Welfare and Pension Plan Disclosure Act,[18] the Labor Management Relations Act,[19] and the Internal Revenue Code.[20] The Welfare and Pension Plan Disclosure Act, enacted in 1958, was primarily a reporting act which sought to increase available information that would allow participants and beneficiaries to oversee pension plans themselves.[21] Section 302 of the Labor Management Relations Act, enacted in 1947, provided for the creation and operation of a pension plan, but had no standards of conduct relating to the plan once the plan became operative.[22] The Internal Revenue Code of 1954 also contained only limited provisions for pension security.[23] Although these three statutes evidenced some congressional concern over the creation

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15. *See House Report*, *supra* note 14, at 3 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4641. (discussing growth and impact of pension system on American economy).

16. *See House Report*, *supra* note 14 at 3-5 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4641-43 (discussing existing law before enactment of ERISA). *See generally* INTERIM REPORT OF THE PRIVATE WELFARE AND PENSION STUDY, S. REP. No. 634, 92d Cong., 2d Sess. (1971) (giving complete description of federal regulation affecting administration of private plans).

17. *See House Report*, *supra* note 14, at 3 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4641 (listing three statutes that covered pension plan security prior to 1974).

18. 29 U.S.C. §§ 301-309 (1968), *repealed by* Employee Retirement Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988).

19. 29 U.S.C. §§ 141-531 (1988).

20. I.R.C. §§ 401-404, 501-503 (1954).

21. *See* 29 U.S.C. §301 (1968) (asserting congressional purpose that statute require stricter reporting), *repealed by* Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 (1988). In its short title, the Welfare and Pension Plans Disclosure Act stated that Congress intended to protect the interests of participants and beneficiaries in employee benefit plans by "requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto." *Id.*

22. *See* 29 U.S.C. § 302 (1968) (providing for creation and operation of employee pension plans), *repealed by* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 (1988); *see also* 29 U.S.C. § 141 (1988) (stating purposes of Labor Management Relations Act). In its short title, the Labor Management Relations Act sets forth its general purposes. *Id.* These purposes include the clarification of rights of both employer and employee, as well as procedures for the orderly settlement of disputes. *Id.* The underlying purpose of the act is to continue the full flow of commerce without the interference of employer-employee disputes. *Id.* It is evident from this declaration of purpose that the rights of parties involved in employer offered pension and welfare plans was intended to be secondary to the primary purpose of the act, labor relations. *Id.*

23. *See* I.R.C. § 401 (1954) (discussing Internal Revenue Code's pension provisions). The Internal Revenue Code, similar to the Labor Management Relation Act, did not have as its primary focus the policing of employer pension and welfare plans. *Id.* Rather, the Internal Revenue Code focused on the types of plans which would qualify as pensions for income accounting procedures. *Id. See also* BRUCE, *supra* note 2, at 5 (discussing the statutory predecessors to ERISA). Bruce states that one primary impact of the Internal Revenue Code on pensions was the provision, adopted in the 1942 Revenue Act, that pension plans could not discriminate in favor of officers, shareholders or highly compensated employees. *Id.*

and operation of pension plans, no comprehensive statute existed which controlled all aspects of pension security.[24]

Given the limited legal protection for pension security, Congress considered a bill, enacted as ERISA in 1974, to revise the Welfare and Pension Plans Disclosure Act.[25] The primary purpose of the proposed bill was to protect individual pension rights that were in jeopardy because of inherent defects in the existing statutory structure.[26] The drafters of ERISA designed the statute, as enacted, to establish minimum standards of vesting[27] and funding,[28] and also to protect the security of pension rights.[29]

By enacting ERISA's civil enforcement scheme, Congress intended to provide income security while identifying specific causes of action which could be brought under the statute.[30] Section 502(a) contains six different

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24. *See House Report*, *supra* note 14, at 4-5 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4642-43 (stating that no single statute existed governing pension security); S. REP. No. 127, 93d Cong., 2d Sess. 3 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS 4838, 4841 (observing lack of comprehensive statute governing pension security).

25. H.R. 2, 92nd Cong., 2d Sess. (1973).

26. *See House Report*, *supra* note 14, at 1 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4639 (stating that ERISA designed to revise Welfare and Pension Plans Disclosure Act).

27. *See* M. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS 307 (1988) (discussing vesting requirements under ERISA). A benefit becomes vested under ERISA at the moment that the benefit becomes non-forfeitable. *Id.* The amount of benefit that vests in an employee is directly proportional to the years that the employee has been employed. *Id.* at 308-309. For the minimum vesting standards under ERISA, *see* 29 U.S.C. § 1053 (1988), ERISA § 203 (defining minimum vesting standards); *see also* BRUCE, *supra* note 2, at 184-245 (outlining vesting requirements of ERISA).

28. *See* BRUCE, *supra* note 2, at 21-22 (discussing funding of employee benefit plans). An employer "funds" an employee benefit plan when the employer makes contributions to the plan. *Id.* ERISA requires certain amounts to be contributed, or "funded," by employers depending on the form of benefit plan offered by the employer. *Id.*; *see also* 29 U.S.C. § 1082 (1988), ERISA § 302 (defining ERISA's minimum funding standards).

29. *See House Report*, *supra* note 14, at 5 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4643 (stating that Congress intended ERISA to protect security of pension rights); *see also* 29 U.S.C. §1001 (1988), ERISA § 2 (declaring congressional policy behind ERISA). The Congressional declaration of policy states:

> The Congress finds that the growth in size, scope and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans;. . .that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . .and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Id.

30. *See* CANAN, *supra* note 27, at 658-684 (discussing enforcement provisions of ERISA).

civil enforcement provisions,[31] allowing actions to be brought by a participant, a beneficiary, a fiduciary or the Secretary of Labor.[32] Of these six civil enforcement provisions, only four are available to a plan beneficiary.[33] The effect of section 502(a)(1)[34] is to clarify the rights of the beneficiary,

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31. *See* 29 U.S.C. § 1132(a) (1988), ERISA § 502(a) (setting forth civil enforcement provisions of ERISA). ERISA § 502 states:

> CIVIL ENFORCEMENT
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> (A) PERSONS EMPOWERED TO BRING A CIVIL ACTION
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
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> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
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> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
>
> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
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> (6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Id. See generally CANAN, *supra* note 27, at 658-684 (discussing civil enforcement provisions of ERISA § 502).

32. *See* 29 U.S.C. § 1132 (1988), ERISA § 502 (defining civil enforcement provisions of ERISA); *see also* 29 U.S.C. § 1002(21)(A) (1988), ERISA § 3(21)(A) (defining fiduciary). The statute states that for purposes of the entire statute, a person is a fiduciary with respect to a plan to the extent that that person exercises any discretionary control over the management of the plan or the disposition of the plan's assets, or to the extent that the person renders investment advice for a fee with respect to any monies in a plan, or to the extent that the person has any discretionary authority over the plan. *Id.*; *see also* 29 U.S.C. § 1002(13) (1988), ERISA § 302(13) (defining Secretary). The statute further states that for purposes of the entire statute, references to the Secretary refer to the Secretary of Labor. *Id.*

33. *See* 29 U.S.C. § 1132(a) (1988), ERISA § 502(a) (listing participant's four actions against fiduciary for breach of trust).

34. *See* 29 U.S.C. § 1132(a)(1) (1988), ERISA § 502(a)(1) (discussing first of six civil enforcement remedies). Section 502(a)(1) of ERISA allows a participant to seek relief under § 502(c), 29 U.S.C. § 1132(c); *see also* 29 U.S.C. § 1132(c) (1988), ERISA § 502(c) (providing remedies to beneficiary where fiduciary fails to comply with request for information). Section 502(c) provides:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary for up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Id.

pay benefits due, and secure present and future rights under an ERISA governed plan.[35] Similarly, under section 502(a)(4), a beneficiary may bring a civil action for appropriate relief when the fiduciary has failed to properly furnish the beneficiary with a statement of information furnished to the Internal Revenue Service.[36] Under all enforcement provisions of section 502(a), a beneficiary may recover attorney's fees at the discretion of the court.[37]

Section 502(a)(2) allows a beneficiary to seek appropriate relief under section 409[38] which defines liability for breach of fiduciary duties and possible remedies.[39] If a fiduciary breaches fiduciary duties to the plan, as defined in section 404,[40] section 409 provides for several remedies.[41] These

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35. *See* 29 U.S.C. § 1132(a)(1) (1988), ERISA § 502(a)(1) (describing civil action that may be brought by ERISA participant). Section 502(a)(1) allows a plan participant to bring an action similar to a contempt proceeding, authorizing a court to impose up to $100 per day for non-compliance with a request for information. *Id.* Direct damages are also available to a participant under this section, but these damages are only for amounts contractually due under the terms of the plan. *Id.* Also under § 502(a)(1), a participant may bring an action similar to a declaratory judgment against the plan administrator. *Id.*

36. *See* 29 U.S.C. § 1132(a)(4) (1988), ERISA § 502(a)(4) (discussing beneficiary's civil action against fiduciary for failure to provide information given to Internal Revenue Service).

37. *See* 29 U.S.C. § 1132(g)(1) (1988), ERISA § 502(g)(1) (allowing for awards of attorney's fees at discretion of court). 29 U.S.C. § 1132(g)(1) states: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." *Id. See generally* Note, *Attorney's Fees Under ERISA: When Is An Award Appropriate?*, 71 CORNELL L. REV. 1037 (1986) (discussing attorney's fee awards under ERISA).

38. *See* 29 U.S.C. § 1132(a)(2) (1988), ERISA § 502(a)(2) (discussing second of six enforcement provisions under ERISA); *see also* 29 U.S.C. § 1109 (1988), ERISA § 409 (discussing liability for breach of fiduciary duty). 29 U.S.C. § 1109, ERISA § 409 states:

> LIABILITY FOR BREACH OF FIDUCIARY DUTY
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> (a) 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.

Id.

39. 29 U.S.C. § 1109 (1988), ERISA § 409. An action for fiduciary breach must be brought under § 502(a)(2) to enforce rights defined in section 409. *Id.*

40. *See* 29 U.S.C. § 1104 (1988), ERISA § 404 (defining fiduciary duties under ERISA). The statute states that a fiduciary must discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. *Id.* The statute further states that a fiduciary must act for the exclusive purpose of providing benefits to participants and their beneficiaries while defraying reasonable expenses in administering the plan; a fiduciary must act with the care, skill, prudence and diligence of a prudent man familiar with administering plans; a fiduciary must diversify investments of a plan so as to minimize the risk of large losses; and a fiduciary must act in accordance with the documents and instruments governing the plan. *Id.* This note assumes that the fiduciary duty has been breached leading to the remedial provisions of the statute. A discussion of judicial interpretation of breach of fiduciary duty is beyond the scope of this note. For this discussion, *see* Knickerbocker, *Trust Law with a*

remedies include personal liability of the fiduciary for any losses to the plan as well as restoration to the plan of any profits earned by the fiduciary with plan assets.[42] In addition, the court may impose appropriate equitable or remedial relief, including removal of the fiduciary.[43]

Under section 502(a)(3) a participant or beneficiary may bring a civil action to enjoin any act or practice which violates ERISA or the terms of the individual plan.[44] A participant or beneficiary may also bring an action to obtain "other appropriate equitable relief" to either redress violations or enforce the statute or terms of the plan.[45]

Given the civil enforcement provisions of ERISA, a participant's claim for extracontractual relief must be made under either section 502(a)(2) or 502(a)(3).[46] Because Congress did not provide for specific extracontractual relief in section 502, courts are uncertain about the legislative intent behind that section and have reached differing conclusions as to what damages should be available.[47] For example, in 1985, the United States Supreme Court denied a claim for damages under section 502(a)(2) of ERISA in *Massachusetts Mutual Life Insurance Co. v. Russell*.[48]

In *Russell* the plaintiff qualified as a beneficiary under two employee benefit plans administered by Massachusetts Mutual Life Insurance Company. ERISA governed both plans.[49] After suffering an injury which entitled her to benefits, Russell stopped receiving those benefits after the plan administrator determined that Russell no longer qualified.[50] After the plan administrator reviewed a second report detailing Russell's injuries, Russell

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Difference: An Overview of ERISA Fiduciary Responsibility, 23 REAL PROP. PROB. & TR. J. 633 (1988); Scogland, *Fiduciary Duty: What Does It Mean?*, 24 TORT & INS. L.J. 803 (1989).

41. *See* 29 U.S.C. § 1109 (1988), ERISA § 409 (discussing liability for breach of fiduciary duty).

42. *Id.*

43. *Id.*

44. *See* 29 U.S.C. § 1132(a)(3) (1988), ERISA § 502(a)(3) (discussing third of six enforcement provisions of ERISA).

45. *Id.* An action brought under ERISA § 502(a)(3) does not defer to any other section of the statute, but rather is independent. *See* CANAN, *supra* note 27, at 666-69 (stating that § 502(a)(3) operates independently of other remedial provisions of ERISA); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 153-55 (1985) (concurring opinion of Brennan, J.) (asserting that § 502(a)(3) operates independently of all other remedial provisions of ERISA).

46. *See* 29 U.S.C. §1132 (1988), ERISA § 502 (stating ERISA's enforcement provisions). The language "other equitable or remedial relief" in 409, enforceable through § 502(a)(2), and the language "other equitable relief" in § 502(a)(3) could allow a plan participant to sue for damages beyond those specifically due under the terms of the plan. *Id.*

47. *See* BRUCE, *supra* note 2, at 672 (citing mixed decisions on the availability of extracontractual damages).

48. 473 U.S. 134 (1985).

49. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 136 (1985). o

50. *Id.* In *Russell*, the plaintiff suffered a back injury that allowed her to receive plan benefits. *Id.* Upon determining that she no longer qualified for benefits, the plan administrator terminated her benefits under the plan. *Id.* The plaintiff then sought out and received a second determination of her injury. *Id.*

again began to receive benefits.[51] The plan paid Russell's complete retroactive benefits for the intervening period.[52] Although the plan paid Russell all benefits contractually due, Russell sued for damages based on emotional distress.[53]

The United States District Court for the Central District of California granted a summary judgment motion for Massachusetts Mutual.[54] The district court held that ERISA barred any claim to extracontractual[55] or punitive damages for the original denial of benefits under plaintiff's plans.[56] Reversing the lower court's holding, the United States Court of Appeals for the Ninth Circuit held that Massachusetts Mutual's violation did give rise to a cause of action under section 409(a) which a plan beneficiary could assert pursuant to section 502(a)(2).[57] The Ninth Circuit reasoned that the language of section 409 that asserted "such other equitable or remedial relief as the court may deem appropriate" allowed for a damage award which would remedy the wrong and make the aggrieved individual whole.[58] The Ninth Circuit also held that a participant or beneficiary could recover punitive damages under section 409(a) but concluded that these damages only would be recoverable if the fiduciary acted with actual malice or wanton indifference to the rights of the participant or beneficiary.[59]

Reversing the Ninth Circuit's decision, the United States Supreme Court held that, while a beneficiary may bring a cause of action under section 502(a)(2), recovery under this section must benefit the plan as a whole, not an individual beneficiary.[60] Writing for the majority, Justice Stevens reasoned that by reading the text of section 409 as a whole, the remedies are

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51. *Id.* In *Russell*, five months lapsed between the initial denial of benefits to the plaintiff and the reinstatement of new benefits. *Id.*

52. *Id.* The *Russell* court also pointed out that the plaintiff later qualified for permanent disability benefits which, up to the time of the suit, Massachusetts Mutual had paid regularly. *Id.*

53. *Id.* at 137. In *Russell*, the plaintiff claimed that the fiduciaries administering the plan breached their fiduciary duties by ignoring readily available medical evidence, by applying unwarrantedly strict eligibility standards, and by deliberately delaying processing of her claim beyond the 120 days required by Secretary of Labor regulations (29 C.F.R. § 2560.503-1(h) (1984)). *Id.* For a closer analysis of the plaintiff's claims and the proceedings in the lower courts, *see generally* Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages after Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014 (1986).

54. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 137 (1985).

55. *Id.* at 136. The *Russell* Court used the term extracontractual, but did not indicate in the opinion any specific definition of that term. *Id.*; *see also supra* note 6 (defining extracontractual).

56. *Russell*, 473 U.S. at 137.

57. *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 490 (9th Cir. 1983), *rev'd* 473 U.S. 134 (1985).

58. *Id.* at 490.

59. *Id.* at 490-492.

60. Mass. Mut. Life Ins. Co. v. Russell 473 U.S. 134, 140 (1985).

"plan related."[61] The majority asserted that concern of ERISA's drafters focused on remedies that would protect the entire plan rather than the rights of an individual beneficiary.[62] Finding nothing in the statutory text which supported a private right of action for compensatory or punitive relief,[63] the majority further held that the legislative history of ERISA implies that extracontractual compensatory and punitive damages fall outside of the statute's provisions.[64] Justice Stevens cited to the legislative history which originally used the terminology "legal or equitable" relief.[65] In the final bill, Justice Stevens observed, the drafters deleted the reference to "legal" relief, evidencing an appreciation of the distinction between the two forms of relief.[66] The majority reasoned that the six carefully integrated civil enforcement provisions found in section 502(a)[67] provided strong evidence that Congress did not intend to authorize other remedies not expressly included in the statute.[68] The majority found adequate remedial relief in

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61. *Id.* at 142. In *Russell*, Justice Stevens looked to the sections of ERISA defining a fiduciary's relationships under the statute for the proposition that remedies are plan related. *Id.* In all instances, Stevens found that a fiduciary's primary relationship is always to the plan. *Id.* at 140-42.

62. *Id.* at 142.

63. *Id.*, at 144.

64. *Id.*

65. *Id.* at 146. In *Russell*, Justice Stevens cited to House and Senate Reports, which both included references to legal relief. *Id. See House Report*, supra note 14, at 17, *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4655 (asserting that ERISA's remedy structure provided legal and equitable relief); S. REP. No. 93-127 35, *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4871 (same).

66. *Russell*, 473 U.S. at 146. The *Russell* Court emphasized the fact that the references in the legislative history to legal relief stem from reports published before debate on the Senate and House floors. *Id.* The Court, therefore, placed little weight on the references to "legal" relief relied on by the plaintiff. *Id.*; *see also* DOBBS, HANDBOOK ON THE LAW OF REMEDIES 3 (1973) (discussing distinction between legal and equitable remedies) Remedies may be classified as either legal or equitable. *Id.* Legal remedies traditionally include damages, while equitable remedies, such as injunctions, are coercive. *Id.* Dobbs states that merger of law and equity into one court renders some of the distinctions between the two principles moot. *Id.* The specific mention of equitable remedies in ERISA to the exclusion of legal remedies, however, convinced the *Russell* court that legal remedies are beyond the scope of the statute. *See Russell*, 473 U.S. at 135 (highlighting *Russell* majority's refusal to include remedy Congress did not incorporate expressly); *see also* 29 U.S.C. §§ 1109, 1132(a)(2), 1132(a)(3) (mentioning equitable relief to exclusion of legal relief).

67. *See* 29 U.S.C. § 1132(a) (1988), ERISA § 502(a) (listing six civil enforcement remedies of ERISA).

68. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). For the proposition that ERISA is a comprehensively drafted statute, Justice Stevens, in *Russell*, cited Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980). The implication Stevens makes in *Russell* is that the exclusive ERISA remedies should preempt all others. *Russell*, 473 U.S. at 146-147. Justice Stevens stated "[t]he six carefully integrated civil enforcement provisions found in § 502 of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." (emphasis in original) *Id.* at 146; *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (citing *Russell* for proposition that ERISA's remedies are

the express provisions of the statute[69] and further stated that the courts should be reluctant to fine tune ERISA's enforcement provisions which, Justice Stevens asserted, had been drafted with care.[70] Citing to a stark absence in both the statute itself and in the legislative history of any intention to authorize extracontractual damages, the majority found this lack of acknowledgement of an extracontractual remedy in direct contrast to the repeatedly emphasized purpose of protecting contractually defined benefits.[71] Despite holding that an individual's cause of action must fail under section 502(a)(2), the Court failed to answer whether an individual participant may recover extracontractual compensatory or punitive damages under section 502(a)(3), an independent remedial provision of the statute.[72]

Although the *Russell* decision was unanimous, a strong concurring opinion, written by Justice Brennan, challenged much of the majority's holding as dicta.[73] Justice Brennan attempted to limit the majority's holding to whether section 409's "appropriate relief" referred to in section 502(a)(2) includes individual recovery by a participant or beneficiary of extracontractual damages for breach of fiduciary duty.[74] While agreeing with the majority that section 409 only provides remedies to an entire plan as opposed to individuals, Justice Brennan reasoned that participants and beneficiaries should be able to look to other parts of the statute for relief.[75] For this additional relief, Brennan concluded that a participant or beneficiary should be able to look to section 502(a)(3).[76] Justice Brennan disagreed with the

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exclusive). The United States Supreme Court in *Pilot Life*, after citing Justice Stevens' opinion in *Russell*, stated: "The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Pilot Life*, 481 U.S. at 54; *see also* Ingersoll Rand Co. v. McClendon, 111 S.Ct. 478, 485 (1990) (citing *Pilot Life* and *Russell* for proposition that Congress intended § 502(a) to govern all remedies under ERISA); Narda, Inc. v. Rhode Island Hospital Trust National Bank, 744 F. Supp. 685, 696-97 (D.Md. 1990) (contending that ERISA's inclusion of certain remedies should exclude all others).

69. *Russell*, 473 U.S. at 147. In *Russell*, Justice Stevens asserted that provisions in ERISA allowing for removal of fiduciaries [§ 409] and for awards of attorney's fees [§ 502(g)] provided ample redress for a plan beneficiary without awarding extracontractual damages. *Id.* Justice Stevens specifically noted that concern that claims would not be brought was unfounded in light of ERISA's provision for awards of reasonable attorney's fees. *Id.*; *see also supra* note 37 and accompanying text (discussing ERISA's provision for awards of attorney's fees).

70. *Russell*, 473 U.S. at 147.

71. *Id.* at 148.

72. *Id.* at 148. The *Russell* Court's specific holding stated:

> Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims.

Id.

73. *Id.* at 148 (Brennan, J., concurring).

74. *Id.* at 149.

75. *Id.* at 150.

76. *Id.*

majority's limitation on the availability of extra-contractual damages to a plan participant or beneficiary under all provisions of ERISA.[77] Justice Brennan believed the legislative history of ERISA gave federal courts significant freedom to develop a federal common law around the statute.[78] Brennan reasoned that this common law should arise from trust law.[79] Interpreting trust law in the case of breach of fiduciary duty, Brennan stated that a "black letter" concept of trust law is that courts will award remedies to beneficiaries necessary to protect the interests of the beneficiary.[80] Thus, Justice Brennan concluded that a beneficiary is entitled to a

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77. *Id.* at 151.

78. *Id.* at 156; *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (asserting that Congress intended federal law to solely govern ERISA). The Court in *Pilot Life* stated ERISA included an expectation that federal law would exclusively govern ERISA regulated plans. *Id.* The court further stated that the remedies already explicitly included in ERISA indicated that courts should not create new federal common law remedies. *Id. But see* H.Rep. No. 247, 101st Cong., 1st Sess. 55-56 *reprinted in* 1989 U.S. CODE CONG. AND ADMIN. NEWS at 1947-48 (stating that federal courts should fashion federal common law with respect to employee benefit plans). The Committee on Education and Labor, in response to the Supreme Court's decision in *Pilot Life* that ERISA's enforcement provisions were exclusive, stressed that the Committee still believed courts should develop a federal common law around ERISA. H.R. REP. No. 247, at 56 *reprinted in* 1989 U.S. CODE CONG. AND ADMIN. NEWS at 48. The Committee then reaffirmed the authority of courts to shape legal and equitable remedies to fit the facts of cases before them. *Id.* The Eleventh Circuit rejected the directive of the House Report in the face of judicial precedent to the contrary. *See infra* notes 135-138 and accompanying text (discussing Eleventh Circuit's assertion that H.R. REP. 247 carries little weight in light of judicial precedent).

79. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 154-158 (1985) (Brennan, J. concurring). In *Russell*, Justice Brennan found authority in the legislative history for the proposition that courts should develop a common law around ERISA based on trust law. *Id.*; *see also House Report, supra* note 14, at 13 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4651 (indicating Congressional intent to incorporate trust law into ERISA). The legislative history states "[t]he principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans." *Id.* Brennan also cited to case law. *Russell*, 473 U.S. at 153; *see also* Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985) (stating that Congress invoked common law of trusts to define fiduciary authority and responsibility); NLRB v. Amax Coal Co., 453 U.S. 322, 332 (1981) (stating that Congress codified trust principles into ERISA); Leigh v. Engle, 727 F.2d 113, 122 (7th Cir. 1984) (asserting that ERISA requires fiduciaries to act solely in interest of beneficiaries); Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983) (applying principles developed under common law of trusts to ERISA); Sinai Hosp. v. National Benefit Fund for Hosp. & Health Care Employers, 697 F.2d 562, 565-66 (4th Cir. 1982) (citing *Amax* for the proposition that ERISA incorporates trust law); Donovan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir.) (citing trust law to determine duties of ERISA plan fiduciary), *cert. denied*, 459 U.S. 1069 (1982). For more recent cases holding that ERISA incorporates trust law, *see* Nieto v. Ecker 845 F.2d 868, 872 (9th Cir. 1988) (citing *Mazzola* for proposition that ERISA incorporates trust law); Martens v. Kaiser Steel Retirement Plan, 744 F.Supp. 917, 920 (N.D.Cal. 1990) (citing *Nieto* for proposition that Congress intended courts to draw on trust law when formulating remedies under ERISA).

80. *Russell*, 473 U.S. at 157 (Brennan, J., concurring). For the proposition that trust law allows for remedies to protect beneficiary interests, Justice Brennan, in *Russell* cited several sources. *See* 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 199 (4th ed. 1988) (stating that

remedy which would put the beneficiary in the position in which the beneficiary would have been if there had been no breach of trust.[81]

Both the legislative history of ERISA and the concurring opinion in *Russell* mention that ERISA's drafters intended courts to administer ERISA as an equitable statute, using the law of trusts as a framework.[82] With very limited exceptions, the remedies of a beneficiary under trust law are equitable.[83] In an equitable action by a beneficiary against a trustee for breach of trust, five remedies are available to the court.[84] Of these five remedies, only one remedy provides for an award of monetary damages.[85] Trust law provides that a beneficiary may maintain a suit to compel the trustee to redress a breach of trust.[86] This redressability, however, is limited. A trustee

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beneficiary is entitled to remedy that will put beneficiary in same position prior to breach of trust); RESTATEMENT (SECOND) OF TRUSTS § 205, and comment a (1959) (same); G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 862 (rev. 2d ed. 1982) (same). *See infra* notes 83-96 and accompanying text (discussing remedial provisions of trust law).

81. *Russell*, 473 U.S. at 157, n. 16 (Brennan, J., concurring).

82. *See Id.* at 152 (Brennan, J., concurring) (stating that Congress intended to incorporate trust law into ERISA); *House Report*, *supra* note 14, at 13 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4649 (stating that drafters designed fiduciary responsibility section of ERISA using law of trusts); S. REP. 93-127, 93d Cong., 2d Sess. at 28 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4865 (indicating Congressional intent to incorporate trust law into ERISA); *see also* Transamerica Occidental Life Insurance Co. v. DiGregorio, 811 F.2d 1249, 1252 (9th Cir. 1987) (asserting that ERISA only permits equitable actions).

83. *See* G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 861 (rev. 2d ed. 1982) (stating that equity is primarily responsible for the protection or rights arising under trusts); 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 197 at 188-89 (4th Ed. 1988) (stating that trusts are within the province of equity); RESTATEMENT (SECOND) OF TRUSTS § 197 (1959) (stating that with single limited exception, remedies of beneficiary against trustee are exclusively equitable); *see also* Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985) (holding common law of trusts equitable in character); In re Vorpahl, 695 F.2d 318, 321 (8th Cir. 1982) (asserting that trust law is equitable); Wardle v. Central States Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980) (stating that suits for pension benefits are equitable in nature), *cert. denied* 449 U.S. 1112 (1981).

84. *See* RESTATEMENT (SECOND) OF TRUSTS § 199 (1959) (setting forth equitable remedies of beneficiary). First, a suit may be maintained to compel the trustee to perform his duties as trustee. *Id.* Second, a suit may be maintained to enjoin the trustee from committing a breach of trust. *Id.* Third, the beneficiary can sue to compel the trustee to redress a breach of trust. *Id.* Fourth, the beneficiary may sue to appoint a receiver to take possession of the trust property and administer the trust. *Id.* Finally, a beneficiary may maintain a suit to remove the trustee. *Id. See generally* 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 199 at 203-207 (4th ed. 1988) (detailing equitable remedies).

85. *See* RESTATEMENT (SECOND) OF TRUSTS § 199(c) and comment c (1959) (providing for action by beneficiary against fiduciary to compel fiduciary to redress breach of trust); 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 199.3 at 206 (4th ed. 1988) (stating that redressability provision of trust law provides for monetary damage awards).

86. *See* RESTATEMENT (SECOND) OF TRUSTS § 199(c) and comment c (1959) (providing for action by beneficiary against fiduciary to compel fiduciary to redress breach of trust); 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 199.3 at 206 (4th ed. 1988) (stating that if trustee has committed breach of trust, beneficiary may maintain action to compel redress of breach). *See generally* G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 861 (rev. 2d ed. 1982) (discussing remedies available to beneficiary).

who commits a breach of trust is only liable for: 1) any loss or depreciation in value of the trust estate, 2) any profit made by the trustee, and 3) any profit which would have accrued to the trust estate had there been no breach of trust.[87] Under the provision allowing for a return of profits that the trust would have earned, the purpose of returning profit is to put the beneficiary in as good a position as he would have been in had there been no breach.[88] If the concept of liability for unrealized profit is read broadly, indirect monetary damage awards might be read into trust law as consequential to a breach of trust.[89] The law of trusts, however, emphasizes equitable remedies, including injunctions and declaratory relief.[90] When monetary damage awards are made, these awards are generally given to effectuate the contractual terms of the trust.[91] The use of the terms "con-

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87. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959) (indicating liability of trustee where trustee has breached trust); 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 205 at 237 (4th ed. 1988) (stating that beneficiary has three alternative monetary remedies where fiduciary breached trust). *See generally* G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 862 (rev. 2d ed. 1982) (discussing possible monetary awards where trustee breached trust).

88. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 Comment a (1959) (discussing alternative remedies for breach of trust). The comment states that a beneficiary may under § 205 seek a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust. *Id. See* 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 205 at 240 (4th ed. 1988) (asserting that beneficiaries are entitled to be put in position they would have been in had there been no breach of trust).

89. *See infra* notes 148-149 and accompanying text (discussing Sixth Circuit's assertion that trust law interpretation of ERISA's enforcement provisions does not preclude monetary damage awards).

90. *See* RESTATEMENT (SECOND) OF TRUSTS § 199 (1959) (discussing equitable remedies available under the law of trusts); 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 199 at 203-207 (4th ed. 1988) (illustrating trust law's provision for declaratory and injunctive relief). *See generally* G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 861 (rev. 2d Ed. 1982) (detailing equitable remedies under trust law).

91. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959) (discussing liability of trustee in case of breach of trust). Even where the comments to § 205 state that lost profits may be recovered, this recovery is limited. The example in the RESTATEMENT (SECOND) OF TRUSTS is recovery of interest. *See id.* comment i (giving lost interest as example of lost profits); RESTATEMENT (SECOND) OF TRUSTS § 207 (1959) (discussing liability of trustee for interest where the trustee has committed breach of trust). Section 207 of the Restatement allows the recovery of interest at the legal rate or whatever rate the court may determine. *Id.* This interest must be interest actually received by the trustee or interest the trustee should have received. *Id.* The Restatement is careful even in the case of interest to limit the recovery to interest directly traceable to the breach of trust. *See id.* (discussing proper computation of interest); *see also* 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 207 at 255-66 (4th ed. 1988) (discussing trustee liability for interest where breach of trust).

In the ERISA context, interest awards provide an illustrative example of the distinction courts make between contractual and extracontractual awards. *Id.* Consistently, courts have not balked at awarding prejudgment interest in ERISA cases for lost benefits. *See* Katsaros v. Cody, 744 F.2d 270, 281 (2d Cir. 1984) (awarding prejudgment interest in ERISA case), *cert denied sub nom.* Cody v. Donovan, 469 U.S. 1072 (1984); Blanton v. Anzalone, 760 F.2d 989, 992-93 (9th Cir. 1985) (same); E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 579 (6th Cir. 1984) (asserting that interest awards are within discretion of court); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1219 (8th Cir.) (indicating that interest

tractual" and "extracontractual" by courts when dealing with cases arising under section 502(a)(3) seems to indicate that the relationship between the fiduciary and the beneficiary is a contractual relationship.[92] As Justice Stevens noted in *Russell*, ERISA's drafters intended the statute to protect contractually defined benefits. In light of this contractual relationship, damage awards under ERISA must fit into a dual framework of both trust and contract remedies.[93] Because contract law only provides remedies fore-

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awards fall within equitable relief language of ERISA § 502(a)(3)), *cert denied* 454 U.S. 968 (1981). In awarding interest to the plaintiffs, the court in *Dependahl* carefully pointed out that the interest directly resulted from deprivation of contractual benefits which the fiduciary controlled during the entire period of wrongful deprivation. *Id.* The *Dependahl* court stressed that the defendant continued to have use of the funds. *Id.*; *see also* Cefali v. Buffalo Brass Co., 748 F. Supp 1011 (W.D.N.Y. 1990) (awarding interest under ERISA § 502(a)(3) as properly defined contractual benefit).

In *Cefali*, the plaintiff's argued that the *Russell* decision prohibited the awarding of prejudgment interest because interest should be characterized as extracontractual rather than contractual. *Id.* at 1024. The district court rejected this argument, stating that because a direct monetary award had already been determined to be due for a breach, the award of interest on that amount should also be contractual. *Id.* Therefore, the *Cefali* court agreed with *Russell* that extracontractual damages are beyond the reach of ERISA, but found interest on a proper damage award recoverable as a contractual claim. *Id.* The *Cefali* court also cited post-*Russell* cases supporting interest awards. *Id.*; *see also* Blanton v. Anzalone, 813 F.2d 1574, 1576 (9th Cir. 1987) (allowing prejudgment interest award in ERISA suit); Jansen v. Greyhound Corp., 692 F. Supp. 1029, 1044 (N.D.Iowa 1987) (awarding prejudgment interest); *see also infra* notes 190-201 and accompanying text (discussing contractual/extracontractual distinction in ERISA litigation).

92. *See* Warren v. Society Nat'l Bank, 905 F.2d 975, 977 (6th Cir.) (discussing distinction between contractual and extracontractual damages in context of ERISA § 502(a)(3)), *petition for cert. filed* (1990); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 824-25 (1st Cir.) (discussing definition of term extracontractual), *cert. denied* 488 U.S. 909 (1988); United Steelworkers v. Connors Steel Co., 855 F.2d 1499, 1508 (11th Cir. 1988) (discussing extracontractual damages under ERISA § 502(a)(3)), *cert. denied sub nom.* H.K. Porter Co. v. United Steelworkers, 489 U.S. 1096 (1989); Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1307 (9th Cir. 1986) (discussing case arising under ERISA § 502(a)(3)); Powell v. Chesapeake & Potomac Telephone Co., 780 F.2d 419, 424 (4th Cir. 1985) (discussing availability of extracontractual damages under ERISA § 502(a)(3)), *cert. denied*, 476 U.S. 1170 (1986).

93. *See generally* DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973) (discussing remedies available under contract and trust). Where there has been an express intent to create a trust, that express intent creates an express trust. *Id.* at 240. Once parties create an express trust, the relationship between the parties parallels that of the relationship between parties to an express contract. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 2 (1959)). *But see* 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 197.2 at 192 (4th ed. 1988) (stating that trustee is not liable to beneficiary in contract for breach of trust).

Under contract law, the test laid out in Hadley v. Baxendale, 9 Exch. 341, 156 Eng.Rep. 145 (1854) governs the provisions for extracontractual damages. DOBBS, *supra*, at 804. Under the *Hadley* test, as translated today, special damages must be foreseeable to the parties in order to be recoverable. DOBBS, *supra*, at 804; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) (stating that damages are not recoverable for loss that parties to contract did not have reason to foresee). Dobbs contends that an overriding principle of contract law is that contract damages should be limited in some respect. DOBBS, *supra*, at 804. American courts continue to follow this principle, extending the rule of *Hadley* farther than the *Hadley* court

seeable to the parties to the contract, trust law's remedy structure in the context of a contractual relationship should provide for only those damages specifically contemplated by the terms of the trust relationship.[94] Because

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intended. *Id.* at 805. Extracontractual damages are not always denied in contract claims, however. In cases where the plaintiff has proven that the parties contemplated certain damages, courts have granted those damages. *Id.* at 812. Further, the strict test under *Hadley* has become less rigid in recent years, but the *Hadley* rule continues to remain very complicated. *Id.* at 814. Dobbs contends that the proper measure of damages will in the end depend on the court's view of how the risk had been allocated between the parties, resulting in judgments not clearly dictated by a rule of law. *Id.* at 816. *Compare* Starmakers Publishing Corp. v. Acme Fast Freight, Inc., 615 F. Supp. 787, 791 (S.D.N.Y. 1985) (denying damages because no proof of foreseeability) *with* Havens Steel Co. v. Randolph Engineering Co., 613 F. Supp. 514, 541, (W.D.Mo.1985) (holding damages foreseeable by affirmative action of party to contract), *judgment aff'd* 813 F.2d 186 (8th Cir. 1987).

Emotional distress damages require an even higher standard of proof. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1959) (requiring that emotional disturbance damages only be awarded if such damages particularly likely aspect of contract breach). *Compare* Dean v. Dean, 821 F.2d 279, 282 (5th Cir. 1987) (finding emotional distress damages denied because contract did not have personal feelings as its essence), *with* Huskey v. National Broadcasting Co., 632 F. Supp. 1282, 1293 (N.D.Ill. 1986) (awarding emotional distress damages because contract had by its very nature elements of emotional nature). Incorporating contract principles into a trust law remedy scheme is not the norm, however. *See* Sinai Hosp. v. National Benefit Fund for Hosp. & Health Care Employees, 697 F.2d 562, 566 (4th Cir. 1982) (indicating that courts handling trust disputes should interpret contract principles in light of prevailing trust law).

After stating that courts should interpret rules of contract law in trust disputes only in light of the specific purposes of the involved trust laws, the *Sinai* court stated that there is no firmer principle in the common law of trusts than that requiring the trustees to act only in accordance with the terms of the trust. *Id.* Supporting the *Sinai* court's view that contract law is to be subordinate to trust law in trust cases, Scott, analyzing trust remedies, states that a trustee is not liable in an action at law for breach of contract unless the trustee has undertaken to do more than merely administer the trust. 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 197.2 (4th ed. 1988). Scott further states that courts do not hold a trustee liable in contract because the determination of fiduciary conduct necessary to determine breach of contract at law is only proper in equity. *Id.*; *see also* Nedd v. Thomas, 316 F. Supp. 74, 76-77 (M.D.Pa. 1970) (stating that questions of trust administration are better handled in equity). Scott's analysis highlights the difficulty of attempting to combine the remedy principles of contract and trust together. 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 197.2 (4th ed. 1988). However, the development of ERISA's remedy structure seems to require some grafting of contract principles onto the overriding dominance of trust law. *See supra* note 92 and accompanying text (discussing use of contractual terms in ERISA decisions). This uncomfortable mix can only be accomplished if trust law continues to dominate the remedial scheme, with contract principles only used in very rare circumstances such as defining the extracontractual/contractual distinction of direct and indirect damages. *See Sinai*, 697 F.2d at 566 (asserting that contract law subordinate to trust law in trust cases).

94. *See* G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 862 (rev. 2d ed. 1982) (discussing possible damage awards under the law of trusts). The argument for foreseeability is not made without an understanding of the possible harm the beneficiary may suffer due to a breach of the trust. When a fiduciary disallows benefits under a trust, the fiduciary's determination may deny the beneficiary a very necessary source of income. *See* McRae v. Seafarers' Welfare Plan, 726 F. Supp. 817, 818-20 (S.D.Ala. 1989) (discussing effect of loss of benefit income), *rev'd* 920 F.2d 819 (11th Cir. 1991). The provisions for monetary damage awards under trust law, however, are very specific. G.G. BOGERT & G.T. BOGERT, TRUSTS

trust law is equitable and Congress designed ERISA to be an equitable statute using the principles of trust law,[95] the use of contractual language by courts does not necessarily imply room for legal contractual remedies.[96] Justice Brennan's assertion in his concurrence in *Russell* that the incorporation of trust law allows for extracontractual damages under ERISA, therefore, is not necessarily as "black letter" as Justice Brennan indicated.

Because of the strong concurring opinion and the limited holding of *Russell*, the Supreme Court gave lower courts little guidance beyond a prohibition of individual recovery of extracontractual damages under section 409 of ERISA. The opinion in *Russell* did not address whether extracontractual compensatory or punitive damages were available under section 502(a)(3) of ERISA.[97] The question whether extracontractual damages are

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AND TRUSTEES § 862 (rev. 2d ed. 1982). The beneficiary is not the preferred claimant in a breach of trust case, and therefore the individual remedies available are limited to damages arising directly out of the breach. *Id.* If damages are direct, then they may be properly viewed as contractual rather than extracontractual. *See infra* notes 190-201 and accompanying text (discussing contractual/extracontractual distinction). In a situation where the damages are properly direct, it seems that the law of trusts, in equity will allow for an award. G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 862 (rev. 2d ed. 1982); *see also* 3 SCOTT & FRATCHER, THE LAW OF TRUSTS § 205 at 237-43 (4th ed. 1988) (stating that a trustee is chargeable for loss to trust estate).

The danger arises in determining what damages are direct enough to be properly contractual rather than extracontractual. *See* In re Trust Under Will of Comstock, 219 Minn. 325, 337, 17 N.W.2d 656, 664 (1945) (holding that trustee not liable for beneficiary's increased tax burden); In re Wanamaker's Trust Estate, 340 Pa. 419, 422, 17 A.2d 380, 382 (1941) (finding trustee not liable for increased tax burden of beneficiary). In both *Comstock* and *Wanamaker*, the courts found the trustee beyond liability for actions resulting in higher tax consequences to the beneficiary because such damages are speculative and indirect. *Comstock*, 219 Minn. at 337, 17 N.W..2d at 664, Wanamaker, 340 Pa. at 422, 17 A.2d at 382. The *Comstock* court further stated that the only measure of damages for failure to pay money under trust law is not consequential damages but rather only lawful interest accrued upon the amount due. *Comstock*, 219 Minn. at 337, 17 N.W.2d at 664. For an extension to ERISA of the holding that damages must be direct to be within trust principles, *see* Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988) (holding that Congress did not intend implied rights of action to supplement the express provisions of ERISA) *cert. denied*, 110 S.Ct. 1166 (1990). After citing *Russell* for the proposition that a fiduciary could not be held liable to a beneficiary for extracontractual damages, the Tenth Circuit stated that the beneficiary had no cause of action under ERISA because he was in fact receiving all benefits contractually due under the express terms of his plan. *Id.* at 1266.

95. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (stating that ERISA abounds with language and terminology of trust law); De Nobel v. Vitro Corp., 885 F.2d 1180, 1185 (4th Cir. 1989) (citing *Bruch* for proposition that ERISA abounds with terminology of trust law); Nieto v. Ecker 845 F.2d 868, 872 (9th Cir. 1988) (holding that ERISA incorporates trust law); Martens v. Kaiser Steel Retirement Plan, 744 F. Supp. 917, 920 (N.D. Cal. 1990) (citing *Nieto* for proposition that Congress intended courts to draw on trust law when formulating remedies under ERISA). q

96. *See* Sinai Hosp. v. National Benefit Fund For Hosp. & Health Care Employees, 697 F.2d 562, 566 (4th Cir. 1982) (holding that contract law must be interpreted in light of trust law in trust situations).

97. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 139 n. 5 (stating that Court's decision did not reach issue of damages available under § 502(a)(3)). The *Russell*

available under ERISA. section 502(a)(3) has been the basis of differing holdings in the federal district and appellate courts.[98]

Court stated in a footnote that because the plaintiff had disclaimed any reliance on § 502(a)(3), the Court did not need to consider whether any other provision of ERISA authorized the recovery of extracontractual damages. *Id.*

Because the law after *Russell* strictly stated that a participant or beneficiary could not recover extracontractual compensatory or punitive damages individually under § 409 of ERISA, a second question remained, however, whether, in an action brought by an individual participant or beneficiary, a plan might recover extracontractual compensatory or punitive damages under § 409. The *Russell* court specifically failed to reach this question. *Russell*, 473 U.S. at 144 n. 12. Lower court decisions, however, have split on the issue of whether an award of extracontractual compensatory and punitive damages to a plan is appropriate under § 409. *See* Shoenholtz v. Doniger, 657 F. Supp. 899, 913-16 (S.D.N.Y. 1987) (finding awards of extracontractual compensatory and punitive damages to plan appropriate under ERISA § 409); California Digital Defined Benefit Pension Fund v. Union Bank, 705 F. Supp. 489, 491 (C.D. Cal. 1989) (allowing plan to sue for punitive damages). The court in *Shoenholtz* held that while an action could be brought by an individual beneficiary to a plan, any judgement could only benefit the plan as a whole. *Shoenholtz*, 657 F. Supp. at 913. The court further found that an award of extracontractual damages would be appropriate. *Id.* The court reasoned that this interpretation remained consistent with the holding in *Russell*. *Id. But see* Sommers Drug Store Co. Employee Profit Sharing Trust v. Corrigan Enter., 793 F.2d 1456, 1462-65 (5th Cir. 1986) (holding that plan could not recover punitive damages), *cert. denied* 479 U.S. 1034 (1987). In *Sommers*, the plaintiff was the entire plan. While the *Sommers* court agreed that an action could be brought under § 502(a)(2) or § 502(a)(3), the court reasoned that the same principles relating to individual awards of extracontractual damages should apply to suits brought by plans. *Id.* Having determined to apply the same standards, the court held an award of extracontractual damages to be inappropriate. *Id.*

The *Shoenholtz* decision is criticized in Diduck v. Kaszycki & Sons Contractors, Inc., 737 F. Supp. 792 (S.D.N.Y. 1990), a case out of the same district court. In *Diduck*, the district court acknowledged that a plan could bring an action under 502(a)(2), but concluded that in light of the legislative history and the *Russell* decision, the provisions disallowing an award of extracontractual relief to an individual are equally applicable to a plan. *Id.* at 806 n. 23. Therefore, a conclusion as to the availability of damages to an individual participant also should become a conclusion as to the availability of damages to a plan under section 502(a)(2). *See infra* notes 171-200 and accompanying text (discussing possible conclusions as to availability of damages to individual under ERISA 502(a)(3)).

98. *See e.g.* McRae v. Seafarers' Welfare Plan, 920 F.2d 819 (11th Cir. 1991); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); Kleinheins v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc., 793 F.2d 1456 (5th Cir. 1986), *cert. denied* 479 U.S. 1034 and 479 U.S. 1089 (1987); Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986); Powell v. Chesapeake & Potomac Telephone Co., 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *cf.* Warren v. Society Nat'l Bank, 905 F.2d 975 (6th Cir. 1990), *petition for cert. filed* (1990); Vogel v. Independence Federal Sav. Bank, 728 F. Supp. 1210 (D. Md. 1990).

Four Circuits have not ruled on the specific issue whether § 502(a)(3) allows for extracontractual damages. The Eighth Circuit has yet to address the specific issue and the Second Circuit has specifically avoided any ruling. *See* Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1221 (2d Cir. 1987) (indicating that court would not address issue unless specifically presented). The Third Circuit also has not addressed the specific issue, but has indicated that some of the language in Justice Brennan's *Russell* concurrence might be persuasive. *See* Chait v. Bernstein, 835 F.2d 1017, 1027 (3rd Cir. 1987) (citing *Russell* concurrence for proposition that ERISA remedies should be tailored to effectuate fiduciary

The United States Court of Appeals for the Ninth Circuit held that ERISA section 502(a)(3) makes no provision for extracontractual damages in *Sokol v. Bernstein*.[99] In *Sokol* an action was brought by the plaintiff, a beneficiary of a pension plan, against the defendant, the plan administrator, for breach of fiduciary duty.[100] The plaintiff, forced to take the proceeds of her pension at a disadvantageous time for tax purposes, claimed a violation of the express written terms of the plan.[101] The plaintiff claimed damages for lost interest, attorney's fees, and emotional distress.[102] Citing *Russell*, the Ninth Circuit concluded that the reasoning of the *Russell* Court supported the proposition that no provision in ERISA authorized an award of extracontractual damages.[103] The Ninth Circuit further concluded that rather than reading *Russell* narrowly, limiting the decision to section 409, the *Russell* holding should be read broadly.[104] Placing a great deal of emphasis on the *Russell* court's observance of Congress' omission of any mention of extracontractual damages in general, or emotional distress damages in particular, the court concluded that a prohibition against extracontractual damages should apply to sections 409, 502(a)(2), and 502(a)(3).[105]

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duties). The indication from the *Chait* court is that in the proper circumstances, extracontractual damages might be available. *Id.* The Tenth Circuit has also indicated some flexibility in the equitable relief of ERISA without addressing specific remedies available under § 502(a)(3). *See* Anthony v. Texaco, Inc., 803 F.2d 593 (10th Cir. 1986) (stating that court in equity is not rigidly confined to specific remedies). While not specifically stating that extracontractual damages would be available, the Tenth and Third Circuits certainly allowed themselves room to move within the equitable language of ERISA, indicating alignment with the *Russell* concurrence over the majority. *Id. See* Chait, 835 F.2d at 1027.

99. 803 F.2d 532 (9th Cir. 1986). In *Sokol*, the district court found that the fiduciary duty had been breached and proceeded to award the plaintiff damages including interest, attorney's fees and an award for emotional distress. *Id.* at 534. The 9th Circuit affirmed all findings of the district court except the finding of an award of damages for emotional distress. *Id.* at 533.

100. Sokol v. Bernstein, 803 F.2d 532, 533-34 (9th Cir. 1986). R

101. *Id.* at 533-34. In *Sokol*, the plaintiff, a beneficiary under an ERISA governed plan, sued the administrator of the plan for breach of fiduciary duty. *Id.* The express terms of the plan stated that the administrator could distribute funds only on the request of the beneficiary. *Id.* The administrator in *Sokol*, however, requested that the plan distribute funds without the request of the plaintiff. *Id.* The plaintiff then ordered the administrator to redeposit the funds, which the administrator eventually did. *Id.*

102. *Id.* In *Sokol*, the district court found for the plaintiff on all claims and awarded her $1,996.29 in lost interest, $4,000 in medical expenses and damage for emotional distress, and $5,150 in attorney's fees. *Id.*

103. *Id.* at 536-38. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (highlighting absence in ERISA of express statutory authority for extracontractual damages). Other courts following the *Russell* majority opinion in the same manner as the *Sokol* court also have held that in no circumstances should an award of extra-contractual compensatory or punitive damages be allowable under §§ 502(a)(2) or 502(a)(3). *See e.g.* United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988), *cert. denied sub nom.* H.K. Porter Co. v. United Steelworkers of America, 489 U.S. 1096 (1989); Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302 (9th Cir. 1986).

104. *Sokol*, 803 F.2d at 535-36.

105. *Id.* at 534-38; *see also* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (finding nothing in ERISA's express language authorizing award of extracontractual damages).

Therefore, because the court had found a breach of fiduciary duty, the Ninth Circuit awarded interest and attorney's fees but denied plaintiff's claim for emotional distress damages.[106]

Slightly differing from the Ninth Circuit, the United States Court of Appeals for the First Circuit also denied a plan participant's claim for emotional distress damages in *Drinkwater v. Metropolitan Life Insurance Company*.[107] The plaintiff in *Drinkwater* suffered a heart attack on the job and began to receive permanent disability benefits.[108] After determining that the disability had ceased, Metropolitan Life Insurance Company (MetLife), an ERISA governed insurer, terminated the plaintiff's benefits.[109] The plaintiff then returned to work and suffered another heart attack on the very same day.[110] The plaintiff sued MetLife under ERISA section 502(a)(3), seeking compensatory and punitive damages.[111] Denying both of the plaintiff's damage claims, the First Circuit reasoned, as did the Ninth Circuit in *Sokol*, that Congress intended the comprehensive provisions of ERISA to be the exclusive remedy for beneficiaries under ERISA authorized plans.[112] The First Circuit, however, chose not to focus on an absence of specific extracontractual relief in ERISA, but noted Congress' use of the term "equitable" in section 502(a)(3).[113] The First Circuit concluded that the equitable nature of ERISA could not be read to include extracontractual or punitive damages but rather could only be read to allow for equitable remedies, limited to declaratory or injunctive relief.[114]

Using a third method of interpretation, the United States Court of Appeals for the Fourth Circuit also denied a plan participant's claim for extracontractual damages in *Powell v. Chesapeake & Potomac Telephone Co.*[115] In *Powell* the plaintiff sued her employer, C & P Telephone Company

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106. *Sokol*, 803 F.2d at 534-39.

107. 846 F.2d 821 (1st Cir), *cert denied*, 488 U.S. 909 (1988).

108. Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 822 (1st Cir), *cert denied*, 488 U.S. 909 (1988).

109. *Id.* at 823.

110. *Id.*

111. *Id.* In *Drinkwater*, the plaintiff sued for compensatory damages of $5,000,000 and punitive damages of $10,000,000. *Id.*

112. *Id.* at 824. In *Drinkwater*, the court found as persuasive the language of the Supreme Court's *Russell* decision stating that Congress intended ERISA's remedy structure to be exclusive. *Id. See* Mass. Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 146-147 (1985) (holding that ERISA's remedy structure is comprehensive); *see also* Ingersoll-Rand Co. v. McClendon, U.S. , 111 S.Ct. 478, 485 (1990) (holding ERISA's statutory remedy structure exclusive); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (stating that Congress designed ERISA's remedy provisions to be exclusive).

113. *Drinkwater*, 846 F.2d at 825.

114. *Id.* at 825; *see also* Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986) (asserting that Congress used term equitable to mean declaratory and injunctive relief); Framingham Union Hosp., v. Travelers Ins. Co., 744 F. Supp. 29, 32 (D. Mass. 1990) (supporting proposition that Congress intended equitable relief to mean declaratory and injunctive relief).

115. 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). Although the plaintiff in *Powell* had received all benefits due her under the plan, the plaintiff sought $5

of Virginia, its parent company, American Telephone & Telegraph, and Connecticut General Life Insurance Company.[116] The plaintiff, a beneficiary under an ERISA governed employee benefit plan, claimed breaches of various fiduciary duties in the handling of a claim for disability benefits.[117] The plaintiff argued, as Justice Brennan argued in the *Russell* concurrence, that the court should incorporate principles of trust law when awarding relief under section 502(a)(3), thus allowing for extracontractual damages.[118] The Fourth Circuit, however, rejected the plaintiff's argument, holding that even if the "other appropriate equitable relief" language of section 502(a)(3) may in certain circumstances include extracontractual or punitive damages, this form of relief is generally not available in an action by a beneficiary against a trustee for a breach of trust.[119] Reading ERISA more liberally

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million in extracontractual and punitive damages. *Id.* at 420. The United States District Court for the Eastern District of Virginia granted the defendants' motions for summary judgment and dismissed all of the plaintiff's claims. *Id.* Holding that ERISA did not provide for extracontractual or punitive relief under these circumstances, the United States Court of Appeals for the Fourth Circuit affirmed the district court's holding. *Id.*

116. Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 420 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

117. *Id.* In *Powell*, the plaintiff claimed that the administrators consistently harassed her and her son, requesting unnecessary medical reports and withholding payments. *Id.* at 420-21.

118. *Id.* at 424. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156-57 (1985) (Brennan, J., concurring) (asserting that Congress intended courts to incorporate trust law into ERISA). The *Powell* court acknowledged that the legislative history supported the incorporation of trust law. *Powell* 780 F.2d at 424. *See House Report*, *supra* note 14, at 11 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4650-51 (indicating ERISA intended to incorporate trust law principles).

119. *Powell*, 780 F.2d at 424. For the proposition that extracontractual relief is not available to a beneficiary in an action for breach of trust, the *Powell* court cited to the RESTATEMENT (SECOND) OF TRUSTS, BOGERT, TRUSTS & TRUSTEES, and SCOTT, THE LAW OF TRUSTS. *Id. See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959) (defining remedies available to beneficiary where trustee has breached trust); G.G. BOGERT & G.T. BOGERT, TRUSTS & TRUSTEES § 862 (rev. 2d ed. 1982) (stating that trustee is usually only charged with loss in value of trust estate); 3 SCOTT & FRATCHER, THE LAW OF TRUSTS, § 198.1 at 198 (4th ed. 1988) (stating that beneficiary cannot maintain action at law against trustee not under immediate and unconditional duty to pay money). *See supra* notes 83-96 and accompanying text (discussing remedial principles under trust law).

For case law agreeing with the reasoning of the Fourth Circuit, *see* Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 627 (7th Cir. 1987) (holding punitive damages not available in action brought pursuant to § 502(a)(3) of ERISA); Varhola v. Doe, 820 F.2d 809, 817 (6th Cir. 1987) (holding punitive damages not available under § 502(a)(3)). Finding that punitive damages are not recoverable under § 502(a)(3), the *Kleinhans* court cited the fact that punitive damages are generally not recoverable from trustees under the law of trusts for breach of fiduciary duty. *Kleinhans*, 810 F.2d at 627. The court agreed that Congress had intended for ERISA to incorporate principles of trust law but the Seventh Circuit would "not interpret ERISA to provide punitive damages for breach of a trustee's fiduciary obligations where such damages are not generally available under the law of trusts." *Id.*

The *Varhola* court held that punitive damages are ordinarily not available under trust law in an action for a breach of a trustee's fiduciary duty. *Varhola*, 820 F.2d at 817. Citing to *Kleinhans*, the court was not prepared to allow such damages without express statutory authority to do so. *Id.*

than the First and Ninth Circuits, the Fourth Circuit reasoned that the provisions of ERISA, combined with common law trust principles, provided the possible authority for an award of extracontractual damages.[120] The Fourth Circuit, however, reasoned that the fiduciary relationship in an ERISA plan context is analogous to the relationship between a beneficiary and trustee.[121] Extending its conclusion that extracontractual damages are unavailable in an action by a beneficiary against a trustee for a breach of trust, the Fourth Circuit found an award of extracontractual damages inappropriate under section 502(a)(3) for the plan administrator's breach of fiduciary duties.[122]

Similarly, the Eleventh Circuit Court of Appeals reversed a district court award of extracontractual damages in *McRae v. Seafarers' Welfare Plan*.[123] In *McRae* the plaintiff qualified as a participant under an ERISA governed employee benefit plan.[124] The plan administrator told the plaintiff that certain surgery would be covered by the plan.[125] After receiving this affirmative statement of coverage, the plaintiff incurred surgical expenses beyond what the plaintiff could afford without coverage.[126] After the plaintiff had surgery, the plan reversed its prior decision regarding coverage and refused to pay.[127] Because of the subsequent debt, the plaintiff suffered loss of credit and harassment by collection agencies.[128] The plaintiff sued for the amount of lost benefits as well as extracontractual damages for emotional distress and attorneys fees.[129] The United States District Court for the Southern District of Alabama awarded plaintiff lost benefits and attorney's fees as well as extracontractual damages of $50,000.[130] The district court looked to the specific language of section 502(a)(3) providing for "other appropriate equitable relief" in conjunction with the concurring opinion of

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120. *Powell*, 780 F.2d at 424. The *Powell* court did indicate that other appropriate equitable relief might include extracontractual damages in the proper circumstances. *Id.* In this case, however, where a beneficiary sued a fiduciary for breach of trust, such proper circumstances did not exist. *Id.*

121. *Id.*

122. *Id.* at 424-25. The *Powell* court did acknowledge that one proper circumstance for an extracontractual award might occur when the misconduct rose to the level of willful misconduct sufficient to subject the fiduciary to ERISA's criminal provisions. *Id.* at 424 n. 8. *See* 29 U.S.C. § 1131 (1988) (defining criminal conduct under ERISA).

123. 920 F.2d 819 (11th Cir. 1991).

124. McRae v. Seafarers' Welfare Plan, 726 F. Supp. 817, 818 (S.D. Ala. 1989), *rev'd* 920 F.2d 819 (11th Cir. 1991).

125. *Id.* In *McRae*, the plaintiff introduced into evidence a note written by an insurance clerk stating that the insurer had verified coverage of 80% of the plaintiff's surgery, a tubal reversal. *Id.*

126. *Id.* at 819. In *McRae*, the plaintiff's expenses included anesthesia services at a cost of $700.00, two hospital charges of $3,112.03 and $142.06, respectively, and a doctor's bill of $3,086.60. *Id.*

127. *Id.*

128. *Id.* at 820.

129. *Id.* at 820-21.

130. *Id.* at 822.

Justice Brennan in *Russell*.[131] Determining that the *Russell* opinion did not preclude an award of extracontractual damages, the district court applied Justice Brennan's reasoning in *Russell* that trust law principles should be incorporated into the enforcement provisions of ERISA.[132] Further citing Justice Brennan's concurrence in *Russell*, the district court concluded that trust law allowed for any remedy which would fully protect the interests of the participant.[133] In reversing the district court, the Eleventh Circuit stated that authority existed in the Eleventh Circuit as well as other Circuits indicating the unavailability of extracontractual damages under section 502(a)(3).[134] The Court of Appeals did, however, acknowledge the existence

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131. *Id.* at 821.

132. *Id.*; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156-57 (1985) (concurring opinion of Brennan, J.) (asserting that Congress intended to incorporate trust law into ERISA).

133. *McRae*, 726 F. Supp. at 821 (S.D.Ala. 1989), *rev'd* 920 F.2d 819 (11th Cir. 1991); *see also* Smith v. ABS Indus., Inc., 653 F. Supp. 94, 99-100 (N.D. Ohio 1986) (holding that neither *Russell* nor ERISA preclude award of extracontractual damages). In *Smith* the district court ruled, similarly to *McRae*, that nothing in the holding of *Russell* precluded an award of extracontractual damages under § 502(a)(3). *Id.* at 99. The *Smith* court acknowledged the *Russell* court's statement that the six carefully integrated enforcement provisions indicated that Congress did not intend to authorize other remedies. *Id.* at 99; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (stating that ERISA's strict enforcement scheme did not allow other remedies). However, the district court still found no direct command from *Russell* prohibiting an allowance of extracontractual damages. *Smith*, 653 F. Supp. at 99. The district court, therefore, allowed the plaintiff's complaint for extracontractual and punitive damages to stand. *Id.* at 100. For a similar holding, *see* James A. Dooley Assoc. Employees Retirement Plan v. Reynolds, 654 F. Supp. 457, 460-61 (E.D.Mo. 1987) (allowing claim for extracontractual damages to stand). The *Dooley* court cites case law besides *Russell* for the proposition that punitive damages should be available under ERISA, only citing *Russell* in a footnote, to state, similarly to the *McRae* court, that the *Russell* Court did not resolve whether extracontractual damages could be recovered under ERISA § 502(a)(3). *Id.* at 461; *see also Russell*, 473 U.S. at 139 n. 5 (stating that *Russell* holding does not reach ERISA § 502(a)(3)).

134. McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 822 (11th Cir. 1991). The *McRae* court cites to several cases both within the circuit and outside the circuit. *Id.*; *see also* Amos v. Blue Cross-Blue Shield of Ala., 868 F.2d 430, 431 n. 2 (11th Cir.) (stating that Eleventh Circuit continually denies extracontractual damages under ERISA § 502(a)(3)), *cert. denied* 110 S.Ct. 158 (1989); United Steelworkers v. Connors Steel Co., 855 F.2d 1499, 1509 (11th Cir. 1988) (stating that equitable nature of ERISA prevents recovery of extracontractual damages), *cert. denied sub nom.*, H.K. Porter Co. v. United Steelworkers, 489 U.S. 1096 (1989); Bishop v. Osborn Transp., Inc., 838 F.2d 1173, 1174 (11th Cir 1988) (highlighting lack of provision for extracontractual damages in ERISA § 502(a)), *cert. denied*, 488 U.S. 832 (1988); Varhola v. Doe, 820 F.2d 809, 817 (6th Cir. 1987) (holding punitive damages unavailable under ERISA § 502(a)(3)); Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 626-27 (7th Cir. 1987) (citing to *Russell* for proposition that punitive damages unavailable under ERISA § 502(a)(3)); Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986) (concluding extracontractual damages unavailable under ERISA § 502(a)(3)); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc., 793 F.2d 1456, 1462-65 (5th Cir. 1986) (holding punitive damages unrecoverable under §§ 502(a)(3) and 409), *cert. denied* 479 U.S. 1034 and 479 U.S. 1089 (1987); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424 (4th Cir. 1985) (denying extracontractual damage award), *cert. denied* 476 U.S. 1170 (1986); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir. 1981) (asserting punitive damages unavailable under ERISA), *cert. denied* 454 U.S. 968 (1981).

of a 1988 report by the House Education and Labor Committee, cited by the plaintiffs.[135] In this report, which the House Committee on the Budget adopted, the Committee reaffirmed the authority of the courts to shape legal and equitable remedies under ERISA, including, in the proper circumstances, punitive damages.[136] The Eleventh Circuit, however, placed little weight in the report, stating that while the existence of the report evidenced Congressional concern over extracontractual remedies, Congress had not acted to provide any explicit remedy.[137] Therefore, the Eleventh Circuit refused to create a federal common law remedy in the face of clear adverse precedent.[138]

Despite the rejection of extracontractual damages in the First, Fourth, Ninth, and Eleventh Circuits, the United States Court of Appeals for the Sixth Circuit awarded monetary damages to a plan participant in *Warren v. Society National Bank*.[139] In *Warren* the plaintiff qualified for benefits under two employee benefit plans.[140] The plans allowed the plaintiff to take payments either in a single lump-sum payment or over a period of time.[141] Because of tax benefits, the plaintiff opted for the lump-sum option, ordering the plan administrator to transfer the plaintiff's retirement plan assets to an investment banking firm.[142] The plan administrator delayed the

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135. *McRae*, 920 F.2d at 822; *see also* H.R. REP. No. 101-247, 101st Cong., 1st Sess. 55-56 *reprinted in* 1989 U.S. CODE CONG. AND ADMIN. NEWS at 1947-48 (stating that federal courts should fashion federal common law with respect to employee benefit plans).

136. *See* H.R. REP. No. 247, 101st Cong., 1st Sess. 55-56 *reprinted in* 1989 U.S. CODE CONG. AND ADMIN. NEWS at 1947-48 (reaffirming authority of courts to shape federal common law around ERISA's remedy provisions).

137. *See McRae*, 920 F.2d at 822 (observing no explicit Congressional enactment despite concerns over remedial needs of ERISA); *see also* H.R. REP. No. 247, 101st Cong., 1st Sess. at 56, *reprinted in* 1989 U.S. CODE CONG. AND ADMIN. NEWS at 1948 (indicating that while Committee considered amending statute, such action unnecessary). The Committee on Education and Labor stated that over the years the Committee considered amending ERISA, but that in light of the legislative history of the statute allowing for federal law to develop, the Committee reasoned that action was unnecessary. *Id.*

138. *McRae*, 920 F.2d at 822.

139. 905 F.2d 975 (6th Cir.), *petition for cert. filed* (1990). While a majority of the court in *Warren* held that the plaintiff could recover damages, one judge filed a strong dissent arguing that the majority holding in *Russell* as well as authority in other circuits should preclude awards of extracontractual damages. *Id.* at 984-86 (Wellford, C.J., dissenting). The dissent stated that the tax losses suffered by the plaintiff were extracontractual and therefore unrecoverable in view of the clear precedent barring extracontractual recovery under ERISA § 502(a)(3). *Id.*; *see also infra* notes 99-138 and accompanying text (discussing cases holding extracontractual recovery beyond provisions of ERISA § 502).

140. Warren v. Society Nat. Bank, 905 F.2d 975, 976 (6th Cir.), *petition for cert. filed* (1990). In *Warren*, the plaintiff participated in a pension plan and a profit sharing plan and trust. *Id. See infra* note 3 and accompanying text (discussing definition of plan).

141. *Id.* In *Warren*, by an express provision of the plaintiff's plan, the plaintiff could take out all accrued benefits at one time, thus termed a lump sum option. *Id.*; *see also* BRUCE, *supra* note 2 at 249-50 (discussing lump sum benefits); CANAN, *supra* note 27 at 102-103 (discussing distribution of benefits); 29 U.S.C. § 1056 (defining rules concerning form and payment of benefits).

142. *Warren*, 905 F.2d at 976. The plaintiff in *Warren* hoped to put the funds from his

transfer of funds subjecting plaintiff to a tax loss.[143] The plaintiff sued the plan administrator for damages under section 502(a)(3) of ERISA.[144] Reversing a district court decision denying monetary relief as extracontractual[145], the United States Court of Appeals for the Sixth Circuit carefully avoided drawing distinct lines between extracontractual and contractual damages.[146] After determining that the Supreme Court in *Russell* had not reached the issue of damage awards under section 502(a)(3), the Sixth Circuit agreed with Justice Brennan's approach in *Russell* that courts deciding ERISA issues should apply black letter trust law by placing strict duties on fiduciaries running directly to beneficiaries in the administration of trust benefits.[147] Citing Brennan's concurrence in *Russell*, the Sixth Circuit also stated that, under trust law, a beneficiary is entitled to a remedy that will put the beneficiary in the position that the beneficiary would have been in had there been no breach of trust.[148] The Sixth Circuit, still relying on Brennan's

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plan into an Individual Retirement Account, thus continuing to defer his income tax liability. *Id.*

143. *Id.* In *Warren*, the transfer of plaintiff's funds occurred beyond the end of the plaintiff's tax year, thus subjecting the plaintiff to income tax on those funds. *Id.* For a general discussion of the tax consequences involved in ERISA and Individual Retirement Accounts (IRA), *see* CANAN, *supra* note 27, at 175-81 (discussing taxation with respect to IRAs).

144. *Warren*, 905 F.2d at 976. In *Warren*, the plaintiff's amended complaint alleged total losses to the plaintiff in the amount of $375,430. *Id.* The alleged losses constituted a combined tax loss as well as lost future income on those funds used to pay the tax. *Id.*

145. *Id.* In *Warren*, the United States District Court for the Northern District of Ohio, in an unpublished decision, dismissed the plaintiff's claim against SNB, holding that damages were not available to a plan participant under § 502(a)(3). *Id.* In discussing *Russell*, the district court noted that the Supreme Court did not define the term "extracontractual" damages which the plaintiff in *Russell* was seeking. *Id.* The district court determined that the damages Dr. Warren sought were properly defined as extracontractual and therefore not recoverable as beyond the relief provisions of ERISA. *Id.* The district court also reasoned that "other appropriate equitable relief," as used in section 503(a)(3) should be limited to injunctive or declaratory relief. *Id.* Citing Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988), the district court found these conclusions to be fully supported by the common law of trusts. *Warren*, 905 F.2d at 978.

146. *Id.* at 978-79. The *Warren* court was careful not to define contractual damages as only those due under the specific terms of the plan. *Id.* at 979-81; *cf.* Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir.) (defining extracontractual damages as those due beyond express provisions of plan), *cert. denied* 488 U.S. 909 (1988).

147. *Id.* at 979. The *Warren* court stated that whenever a fiduciary breaches the duties set forth in §404(a), the beneficiary should be allowed appropriate equitable relief as against the fiduciary. *Id.* The court finds authority for this in Brennan's *Russell* concurrence. *Id.*; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 154 (1985) (Brennan, J. concurring) (stating that beneficiary may obtain appropriate equitable relief whenever fiduciary breaches duties set forth in ERISA §404(a)); *supra* notes 83-96 and accompanying text (discussing principles of trust law).

148. *Warren*, 905 F.2d at 979; *see also Russell*, 473 U.S. at 157 (contending that beneficiary in trust law is entitled to remedy that will put beneficiary in position beneficiary would have been in had there been no breach of trust); RESTATEMENT (SECOND) OF TRUSTS § 205 and comment a (1959) (stating that beneficiary is entitled to remedy that will put beneficiary into

concurrence in *Russell*, further reasoned that by construing ERISA sections 404(a) and 502(a)(3) together, a court could find grounds for an award of monetary damages.[149]

Attempting to distinguish its holding from the *Russell* majority as well as the First, Fourth, and Ninth Circuits, the Sixth Circuit asserted that the plaintiff in *Warren* did not seek the same type of extracontractual relief that the plaintiff sought in *Russell*.[150] Determining that the claim for damages fell within the scope of the section 502(a)(3) "other appropriate equitable relief," the Sixth Circuit distinguished the damages sought in *Warren* by noting that the plaintiff in *Russell* sought damages for emotional distress.[151] Using principles of trust law, the Sixth Circuit reasoned that while monetary damages would not be appropriate in an emotional distress case, monetary damages would be appropriate in a case where injury was directly attributable to the breach of trust.[152] The Sixth Circuit distinguished its award of monetary damages from cases in other circuits which had found no authority for such an award by construing the award of damages as contractual rather than extracontractual, and therefore properly recoverable

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same position as prior to breach of trust); *supra* notes 83-96 and accompanying text (discussing principles of trust law). The *Warren* court cites several cases for the proposition that courts may tailor remedies to afford the most complete relief. *Warren*, 905 F.2d at 982; *see also* United States v. Martinson, 809 F.2d 1364, 1367 (9th Cir. 1987) (asserting that court in equity has power to adjust remedies to allow for complete relief); Goldberg v. Medtronic, Inc., 686 F.2d 1219, 1229 (7th Cir. 1982) (stating that court in equity has power to fashion remedy to do complete justice, including monetary award); Walters v. Marathon Oil Co., 642 F.2d 1098, 1100 (7th Cir. 1981) (holding equity court has power to award monetary remedies to effectuate complete justice). None of these cases cited, however, revolves around an issue in trust or under ERISA. *Cf. supra* notes 83-170 and accompanying text (discussing reluctance of courts to award monetary damages in trust and ERISA cases).

149. *Warren*, 905 F.2d at 979; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 154 n. 10 and 157 n. 16 (1985) (stating that beneficiary is entitled to remedy, including monetary damages, which will put beneficiary in position beneficiary would have been in had no breach of trust occurred); *supra* notes 38-45 and accompanying text (discussing fiduciary duties under ERISA § 404 and remedies under § 502(a)(3)); *supra* notes 83-96 and accompanying text (discussing remedial principles of trust law).

150. *Warren*, 905 F.2d at 979-80. *Cf.* Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 824 (1st Cir.) (holding extracontractual damages unavailable under ERISA § 502(a)(3)), *cert. denied*, 488 U.S. 909 (1988); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424 (4th Cir. 1985) (finding no provision in ERISA for extracontractual damages), *cert. denied* 476 U.S. 1170 (1986); Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986) (same); *see also* Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689 (6th Cir. 1989) (stating that there could be no extracontractual recovery in context of ERISA plan), *cert. denied* 110 S.Ct. 1924 (1990).

151. *Warren*, 905 F.2d at 980; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 137 (1985) (stating that plaintiff's request for damages was based on reduction of psychological condition); Sokol v. Bernstein, 803 F.2d 532, 533 (9th Cir. 1986) (indicating that extracontractual damages sought by plaintiff were for emotional distress).

152. *Warren*, 905 F.2d at 982. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 comment a (1959) (stating that trust remedies designed to put beneficiary in position beneficiary would have been in had no breach of trust occurred); *see also supra* notes 83-96 and accompanying text (discussing trust law remedy principles).

under section 502(a)(3)'s "other appropriate equitable relief" language.[153] The Sixth Circuit concluded, therefore, that the loss of tax benefit due to administrator error was a direct contractual loss to the participant and should be recoverable under section 502(a)(3).[154]

Conceding that ERISA made no provision for extracontractual damage awards, the United States District Court for the District of Maryland, in *Vogel v. Independence Federal Savings Bank*,[155] found a monetary award justified under ERISA section 502(a)(3) as a contractual rather than extracontractual loss.[156] In *Vogel* the plaintiff received permanent and total disability benefits under an ERISA governed insurance plan through the plaintiff's prior employer.[157] The employer, however, changed insurance carriers and terminated the benefits the plaintiff was receiving.[158] Due to this termination in benefits, the plaintiff's family spent considerable sums of money in order to care for the plaintiff.[159] The quality of the plaintiff's medical care declined and the plaintiff eventually died.[160] The estate of the plaintiff sued the employer, the health insurer and the insurance agency seeking compensatory damages for out-of-pocket expenses, extreme emotional distress, pain and suffering, and wrongful death.[161] The court dismissed all the claims except the claim for out-of-pocket expenses.[162] The court characterized the claims for emotional distress, pain and suffering and wrongful death as extracontractual, concluding, in line with the *Russell* majority, that the plaintiff could not recover damages on these claims.[163] The district court, however, held that the plaintiff's estate could recover out-of-pocket expenses for care of the plaintiff.[164] Although agreeing with

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153. *Warren*, 905 F.2d at 982. The *Warren* court stated that the tax and tax interest liability, as well as loss of investment earnings were direct injuries to the plaintiff resulting from the bank's failure to follow plaintiff's instructions. *Id. Cf. supra* notes 99-138 and accompanying text (discussing cases in which courts refused to award extracontractual damages).

154. *Warren*, 905 F.2d at 982. The *Warren* court points out that one reason plans include lump sum distributions is the knowledge that these distributions receive extremely favorable tax treatment. *Id.* The *Warren* court, therefore determined that the favorable tax consequences of plaintiff's lump sum option became part of the contractual terms of the plan. *Id.*; *see also* CANAN, *supra* note 27, at 477-92 (discussing favorable tax consequences of lump sum distributions).

155. 728 F. Supp. 1210 (D.Md. 1990).

156. Vogel v. Independence Federal Sav. Bank, 728 F. Supp. 1210, 1214-35 (D. Md. 1990).

157. *Id.* at 1214-15.

158. *Id.* at 1215.

159. *Id.* at 1216.

160. *Id.* at 1217.

161. *Id.* at 1228. The employer in *Vogel* also counterclaimed in the suit, seeking recovery of $720,000 in benefits paid for the care of the plaintiff, stating that plaintiff was never entitled to receive benefits. *Id.* at 1232-33. The court granted summary judgment for the plaintiffs on the counterclaim. *Id.* at 1233-34.

162. *Id.* at 1228-30.

163. *Id.*; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (stating that ERISA did not provide for extracontractual damages).

164. *Vogel*, 728 F. Supp. at 1228-29.

the *Russell* holding that ERISA does not provide for extracontractual damages, the district court asserted that *Russell* did not support the contention that all claims for damages by an individual in a suit for breach of fiduciary duty must be dismissed.[165] Similar to the Sixth Circuit in *Warren*, the District Court distinguished extracontractual damages from those damages resulting directly from a breach.[166] In *Vogel* the court reasoned that the defendant bank terminated the plaintiff's benefits, forcing expenditures of money for services that should have been covered by the plan.[167] The district court held that these expenditures were sufficiently proximate to the breach to allow for the plaintiff's estate to seek recovery under section 409 of ERISA.[168] The *Vogel* court stated that as long as the damages were properly classified as contractual, the damages could be recoverable.[169] The *Vogel* court drew an important distinction between the characterization of damages as extracontractual or contractual, concluding that all damages properly construed as contractual are recoverable, while all damages properly construed as extracontractual are unrecoverable.[170]

As seen by the conflicting judicial opinions, the availability of extracontractual damages under section 502(a)(3) remains unsettled.[171] Proponents of damage awards under section 502(a)(3) assert that the language of the statute stating "other appropriate equitable relief" should be read broadly.[172] These proponents believe that the principles of trust law do in fact allow monetary damages if monetary damages are the only remedy which would afford complete relief.[173] Both the *Warren* court and the district court in *McRae* reasoned that the only relief that would properly make a party

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165. *Id. See supra* notes 48-72 and accompanying text (discussing holding of *Russell*).

166. *Id.* at 1229; *see also* Warren v. Society Nat'l Bank, 905 F.2d 975, 980 (6th Cir. 1990) (distinguishing extracontractual damages from contractual damages).

167. *Vogel*, 728 F. Supp. at 1214-16.

168. *Id.* at 1228-29. The *Vogel* court found provision in ERISA § 409 for an individual award of monetary damages despite the overriding language in both *Russell* and § 409 that relief is plan related. *Id.*; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140-42 (1985) (holding that ERISA § 409 designed to benefit plan); 29 U.S.C. § 1109 (1988), ERISA § 409 (discussing remedies for fiduciary breach).

169. *Vogel*, 728 F. Supp. at 1229.

170. *Id.* The *Vogel* court found nothing in the *Russell* opinion to indicate a prohibition against contractual damage recovery, even under ERISA § 409. *Id.*; *cf.* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (holding recovery of extracontractual damages beyond provisions of ERISA § 409).

171. *See supra* notes 99-170 and accompanying text (discussing conflicting decisions as to availability of extracontractual damages under ERISA).

172. *See e.g.* Warren v. Society Nat'l Bank, 905 F.2d 975 (6th Cir.), *petition for cert. filed* (1990); Vogel v. Independence Federal Sav. Bank, 728 F. Supp. 1210 (D. Md. 1990); McRae v. Seafarers' Welfare Plan, 726 F. Supp. 817 (S.D. Ala. 1989), *rev'd* 920 F.2d 819 (1991); *see also supra* notes 130-33 and 139-70 and accompanying text (discussing courts' broad reading of ERISA's equitable language).

173. *See supra* notes 130-33 and 139-70 and accompanying text (discussing certain courts' assertions that certain monetary damages are proper under ERISA).

whole would be monetary damages.[174] These courts reasoned that because the statute is silent on whether extracontractual relief should be available, that silence should not be read to limit the statute, but rather should be read to allow courts the discretion in equity to afford the most complete relief courts can.[175] Proponents of damage awards also assert that nothing in the Supreme Court's *Russell* decision specifically forbids extracontractual damage awards under section 502(a)(3).[176] Because a lack of a specific holding indicates an absence of established law on the matter, proponents see nothing limiting a court's discretion on the matter.[177] Congress, however, drafted ERISA as a comprehensive statute.[178] The extensive remedy provisions show an unusually high amount of attention to detail.[179] If Congress had intended to allow for extracontractual relief under ERISA, Congress quite easily could have provided specifically for extracontractual relief.[180] The original drafts of ERISA contained language providing for both equitable and legal relief, yet no provision for legal relief survived final enactment of ERISA.[181] The omission of legal relief indicates that Congress understood the distinction between legal and equitable relief and chose to authorize only the latter.[182] ERISA does in fact provide for injunctions, removal of fiduciaries, and attorneys fees.[183]

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174. *See Warren* 905 F.2d at 982 (asserting that monetary damages are the only remedy which would afford complete relief to plaintiff); *McRae*, 726 F. Supp at 822 (holding that monetary damages are only remedy affording complete relief).

175. *See Warren*, 905 F.2d at 982 (reading ERISA to allow monetary damage awards at discretion of court); *McRae*, 726 F. Supp. at 822 (asserting that ERISA allows courts discretion to award damages).

176. *See supra* notes 132-33 and 147-49 and accompanying text (discussing assertion that nothing in Supreme Court's *Russell* holding forbids extracontractual damages under ERISA § 502(a)(3)).

177. *See supra* notes 131-33 and 145-49 and accompanying text (discussing courts' interpretations of limited holding of *Russell*).

178. *See supra* notes 30-47 and 67-71 and accompanying text (discussing comprehensive remedy structure of ERISA).

179. *See* 29 U.S.C. § 1132(a) (1988), ERISA § 502(a) (detailing ERISA's comprehensive enforcement scheme).

180. *See* U.S. CONST. Art. II (giving Congress power to enact all laws); *see also House Report*, *supra* note 14, at 1 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4639 (recommending that Congress pass amendments to Welfare and Pension Plans Disclosure Act); H.R. REP. 101-247, 101st Cong., 1st Sess. 56 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 1948 (stating that issue of preemption and civil remedies under ERISA is within exclusive purview of labor committees of Congress).

181. *See* 29 U.S.C. § 1132(a)(3) (1988), ERISA § 502(a)(3) (providing for other appropriate equitable relief); 29 U.S.C. § 1109 (1988), ERISA § 409 (providing for equitable as opposed to legal relief); *see also supra* notes 65-66 and accompanying text (discussing *Russell* Court's distinction between equitable and legal relief in ERISA).

182. *See supra* notes 65-71 and accompanying text (discussing *Russell* Court's assertion that Congress only intended remedies specifically expressed in ERISA); *see also supra* notes 92-95 and accompanying text (discussing equitable remedies under trust law and legal remedies under contract law).

183. *See supra* notes 30-47 and accompanying text (discussing remedial provisions under ERISA § 502(a).

Proponents of extracontractual damage awards also argue that the incorporation of trust law principles into ERISA's enforcement scheme should allow for extracontractual damage awards, because trust law allows any remedy which will put the injured party in the same position as before the breach of trust.[184] Viewing trust law's remedial principles in the context of ERISA's comprehensive remedial scheme, the application of trust law should not expand ERISA.[185] ERISA specifically states that a civil action may be brought by a participant or beneficiary to obtain other appropriate equitable relief.[186] Although the legislative history indicates that the drafters designed the enforcement provisions to provide equitable and legal relief[187], the reference to legal relief did not survive the final enactment of the bill.[188] Interpreting the wording of the statute as well as the principles of trust law behind the statute, extracontractual damages do not properly fit into the remedial scheme of the statute.[189]

The *Vogel* court, recognizing the precedent against awards of extracontractual damages, held that ERISA's incorporation of trust law still allows for those damages directly traceable to the breach of the contractual terms of the trust.[190] The *Warren* court similarly reasoned that if damages attributable to the breach of the fiduciary duty are direct, then these damages are contractual rather than extracontractual.[191] While the *Vogel* and *Warren*

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184. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 157, and n. 16 (1985) (concurring opinion of Brennan, J.) (asserting that trust law allows for remedies that put beneficiary in position beneficiary in before breach of trust); Warren v. Society Nat'l Bank, 905 F.2d 975, 979 (6th Cir.), *petition for cert. filed* (1990) (same); *see also supra* notes 83-96 and accompanying text (discussing trust law remedies).

185. *See Russell*, 473 U.S. 134, 147 (1985) (showing reluctance to tamper with comprehensively designed statute). The *Russell* majority hesitated to read into ERISA remedies not explicitly provided for by Congress. *Id.* Other Courts have reaffirmed this proposition. *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 91 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 14-15 (1981); Texas Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-40 (1981); California v. Sierra Club, 451 U.S. 287, 295, n. 6 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-376 (1958), *reh'g denied*, 355 U.S. 907 (1958); Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301 (1943); Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929).

186. *See* 29 U.S.C. § 1109 (1988), ERISA § 409 (stating that beneficiary may obtain equitable relief); 29 U.S.C. § 1132(a) (1988), ERISA § 502(a) (stating that beneficiary may bring action for equitable relief).

187. *See House Report*, *supra* note 14, at 17 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4655 (asserting that ERISA provides for both legal and equitable relief).

188. *See supra* note 181 and accompanying text (discussing omission of legal relief in final enactment of ERISA).

189. *See supra* notes 30-47 and accompanying text (discussing remedial provisions of ERISA); *supra* notes 83-96 and accompanying text (discussing principles of trust law).

190. *See* Vogel v. Independence Federal Savings Bank, 728 F. Supp. 1210, 1228 (D. Md. 1990) (holding damages directly traceable to breach of fiduciary duty recoverable under ERISA).

191. *See* Warren v. Society Nat'l Bank, 905 F.2d 975, 982 (6th Cir.), *petition for cert. filed* (1990) (holding award of damages distinguishable from extracontractual awards granted by other courts).

courts' reasoning is sound on its face, this reasoning fails under closer analysis. Trust remedies constitute only those losses due under the contractual terms of the trust.[192] The term extracontractual properly defines damages proximately caused by a breach of trust.[193] To read the term any other way is to defeat the distinction between contractual and extracontractual. While the *Warren* court was careful to distinguish tax benefits from emotional distress[194], the implications are the same. As Justice Stevens stated in *Russell*, ERISA's drafters intended the statute to protect contractually defined benefits.[195] Such benefits include those benefits expressly enumerated by the terms of the plan.[196] If a line must be drawn between extracontractual and contractual damages, the plans themselves should determine the distinction by defining expressly what benefits are due.[197] While a tax advantage might be a favorable consequence of receiving a contractually defined benefit, a tax advantage is not contractual unless expressly provided for by the terms of the plan.[198] If courts award damages outside of the benefits due under the express terms of the plan, then these damages are extracontractual and should be treated as such.[199] As the *McRae* decision illustrates, clearly extracontractual damages such as emotional distress are facing an ever increasing body of precedent disallowing an award.[200] In light of this majority of case law denying relief properly termed extracontractual[201],

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192. *See supra* notes 91-96 and accompanying text (concluding that trust law remedies include only those due under express terms of plan).

193. *See* Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 826 (1st Cir. 1988) (stating that extracontractual damages are those awarded beyond the express terms of plan), *cert. denied*, 488 U.S. 909 (1988); *see also Warren*, 905 F.2d 975, 985-86 (Wellford, J., dissenting) (stating that claim for lost tax benefits is extracontractual).

194. *See Warren*, 905 F.2d at 980 (distinguishing tax benefits from emotional distress awards).

195. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (stating that Congress emphasized protection of contractually defined benefits); Nachman Corp. v. Pension Benefit Guar. Corp. 446 U.S. 359, 374-75 (1980) (indicating that Congress intended to insure security of defined benefits).

196. *See* BRUCE, *supra* note 2, at 115-32 (discussing accrual rules of defined benefit plans); CANAN, *supra* note 27, at 292-97 (discussing nature of accrued benefits for defined benefit plans).

197. *See* BRUCE, *supra* note 2, at 46-101 (discussing flexibility of benefit and contribution formulas in employee benefit plans); CANAN, *supra* note 27, at 131 (asserting that benefit formulas for pension plans must have definitely determinable benefit).

198. *See* Warren v. Society Nat'l Bank, 905 F.2d 975, 985-86 (6th Cir. 1990) (Wellford, C.J., dissenting) (asserting that lost tax benefit is extracontractual); *see also supra* note 94 and accompanying text (discussing trust law decisions refusing to award damages for tax losses as too remote from trust terms).

199. *See* Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 824 (1st Cir. 1988) (stating that damages are extracontractual if not within terms of plan), *cert. denied*, 488 U.S. 909 (1988); *see also supra* notes 99-138 and accompanying text (discussing courts' refusal to award extracontractual damages).

200. *See* McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821 (11th Cir. 1991) (disallowing emotional distress damages in face of precedent in eleventh and other circuits).

201. *See supra* notes 99-138 and accompanying text (discussing case law denying relief properly termed extracontractual).

damages such as those awarded by the courts in *Warren* and *Vogel* should be unrecoverable as properly defined extracontractual damages.

The availability of extracontractual compensatory or punitive damages under ERISA could have a significant impact on both the cost and availability of pension plans.[202] Extracontractual damage awards could undermine the statute because a principle purpose of the statute is to continue to allow pension systems to be cost effective.[203] Pension plans are not a mandatory requirement of employers.[204] One reason employee benefit plans covered by ERISA have been popular to employers is the existence of substantial tax benefits.[205] These benefits aid both the employees under plans as well as the employers providing them.[206] If court costs and damage awards exceed the benefit that employers receive from the government in the form of favorable tax treatment, employers, due to the prohibitive costs, may no longer provide employee benefit plans.[207] The legislative history of ERISA makes clear that the drafters designed ERISA to provide pension security while not increasing the costs to employers substantially.[208] Therefore, remedy awards in ERISA cases should be designed to encourage employers to provide employee benefit

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202. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 and n. 17 (1985) (indicating that awards of extracontractual damages could discourage growth of private pension plans).

203. *See House Report*, *supra* note 14 at 1 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4639-40 (discussing legislative awareness of possible cost impact of pension plan legislation); *Russell*, 473 U.S. at 148 n. 17 (discussing Congressional intent to limit cost impact due to enactment of ERISA).

204. *See* CANAN, *supra* note 27, at 1-15 (stating that while laws may govern present compensation to employees and established benefit plans, no law requires creation of benefit plan).

205. *See* CANAN, *supra* note 27, at 14 (asserting that tax advantages of qualified retirement plan make them extremely desireable); *see also* Vine, *Cash or Deferred Arrangements: What's the Beef? What's at Stake?*, 5 VA. TAX REV. 855, 856-59 (1986) (discussing favorable treatment of qualified plans); Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 874-94 (1987) (discussing tax policies behind employer-provided pensions); Note, *Employees Not Covered By Qualified Retirement Plans and Those Covered By Inadequate Plans: The Need For Reform*, 20 RUTGERS L. J. 535, 552 (1989) (discussing favorable tax treatment given to qualified benefit plans). One explanation for the favorable tax treatment given to qualified benefit plans asserts that there is a national consensus that the elderly should be supported and social security alone is inadequate to accomplish this support. *Id.* at 552.

206. *See supra* note 205 and accompanying text (discussing tax advantages of qualified retirement plans).

207. *See* CANAN, *supra* note 27, at 90 (stating that major disadvantage of retirement plans is increased administrative cost due to compliance with the Internal Revenue Service and the Labor Department).

208. *See House Report*, *supra* note 14, at 1 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4639 (highlighting congressional concern over danger of increased costs to employers because of ERISA). The legislative history indicates that the drafters weighed the improvements sought with ERISA against the increased costs to employers. *Id.* In fact, the Committee hired an outside consultant due to concern over the possible increased costs to employers. *Id.* at 9 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4646.

plans rather than discourage employers from providing such plans.[209]

Although proponents of extracontractual damage awards under ERISA section 502(a)(3) do not read ERISA to limit awards of damages,[210] courts should not read into ERISA provisions for damages that Congress did not explicitly include.[211] Courts should read ERISA comprehensively, acknowledging that Congress enacted ERISA with references to legal relief removed from the text.[212] Even if courts incorporate trust principles into the statute, as proponents would argue, extracontractual damages still should not be available.[213] The legislative history and the decision of the *Russell* Court should not provide for damage awards which could undermine the availability of pension funds, while offering only a minimal added amount of security.

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209. *See House Report*, supra note 14, at 10 *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS at 4647 (stating that Congress intended to continue to encourage growth of private employee benefit plans). *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (asserting that public interest requires encouragement of employee benefit plan formation). The Court in *Pilot Life*, supporting the view that the public interest is served best by encouraging the formation of employee benefit plans, stated that the detailed provisions of ERISA's enforcement scheme represent "a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.*

210. *See supra* notes 80-81 and 147-49 and accompanying text (discussing courts' reasoning that equitable relief language of ERISA does not limit award of monetary damages).

211. *See supra* note 67-71 and accompanying text (discussing *Russell* majority's reluctance to read remedies into ERISA not explicitly included by Congress); *see also supra* notes 30-47 (discussing comprehensive enforcement provisions of ERISA).

212. *See supra* note 181 and accompanying text (discussing deletion of legal relief in final enactment of ERISA).

213. *See supra* notes 83-96 and accompanying text (illustrating why trust principles do not effect comprehensive scheme of ERISA).