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for past violations presents a justiciable case or controversy. In answering this issue, the court first explained that actions brought by the government under section 309 may be based on violations occurring entirely in the past. The court explained that in such cases the polluter's subsequent implementation of corrective action will not render the controversy moot. The court pointed out that, in *Gwaltney III*, the Supreme Court had approved the imposition of penalties in section 505 citizen suits for past violations proved to be part of, or contiguous with, ongoing violations. Accordingly, the Fourth Circuit found that citizen suits, like government actions, do not become moot once civil penalties are assessed for past violations. The court thus held that the controversy at hand in *Gwaltney VI* was not moot.

Finally, the Fourth Circuit addressed Gwaltney's claim that, because of the absence of chlorine violations since October 1982, the chlorine and TKN violation determinations should have been made separately by the district court. CBF claimed that section 505 requires only that the court find one ongoing violation of the NPDES permit to assume jurisdiction over every alleged violation. CBF contended that, once such a finding is made, the court is free to impose penalties for any past violation of the permit, whether or not that particular violation was ongoing at the time the action was filed. The Fourth Circuit rejected CBF's argument, finding first that, because Gwaltney had not violated its chlorine limitation since October 1982, it was apparent by the time the suit was filed in June 1984 that the chlorine violations were not ongoing. The court suggested that, had the chlorine violations been the only violations alleged, the district court would not have had jurisdiction over the suit. The court then explained that because the policy behind the Clean Water Act is to identify and limit specific pollutants, the logical approach is to consider separately the violation of each specific parameter when making determinations regarding ongoing violations and assessment of penalties. Because the chlorine violations had clearly ceased by the time CBF filed suit, the Fourth Circuit held that the district court had no jurisdiction to levy penalties for those violations. The court then abated the judgment for \$1,285,322 in penalties and remanded the case to the district court to enter judgment against Gwaltney for \$289,822; the amount originally levied for the TKN violations.

In *Gwaltney VI* the Fourth Circuit made a well reasoned application of the Supreme Court's holding in *Gwaltney III*. The Fourth Circuit's construction of the term "ongoing violation" is especially sensible because it will prevent defendants from making short-term pollutant corrections for the purpose of claiming that they are immune from suit for lack of an ongoing violation. Additionally, the Fourth Circuit's refusal to assume jurisdiction over Gwaltney's chlorine violations properly shields those firms that have made honest efforts to formulate long term solutions to their pollutant problems from suits brought months or years after the problem is solved.

ERISA

Prior to 1989, federal courts used a very narrow arbitrary and capricious standard of review when reviewing a beneficiary's challenge to a plan

administrator's benefit determination under an ERISA governed employee benefit plan.⁹⁰ The arbitrary and capricious standard of review applied to all determinations by a plan fiduciary, including interpretations of ambiguous terms in plan documents.⁹¹ Not all federal courts, however, applied the arbitrary and capricious standard in the same fashion. Some courts exhibited flexibility when applying the standard where evidence existed of a possibility of bias or conflict of interest on the part of the plan fiduciary.⁹² Also employing a flexible approach, the Fourth Circuit varied deference to plan fiduciary determinations depending upon the apparent degree of impartiality in the plan fiduciaries' decisionmaking process.⁹³

In response to the differing interpretations of the proper standard of review, the United States Supreme Court, in *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948 (1989), set forth a new system of judicial review that supplanted the inconsistent approaches in the lower courts. Analogizing ERISA to the law of trusts, the Court stated that settled principles of trust law required a *de novo* review of plan fiduciary determinations unless the terms of the plan itself gave the fiduciary discretionary authority to construe the terms of the plan.⁹⁴ If a plan does grant discretion to a fiduciary, the Court stated that an abuse of discretion standard should apply.⁹⁵ The Court also held that the existence of a possible conflict of interest should be considered in determining the existence of an abuse of discretion.⁹⁶

In *De Nobel v. Vitro Corporation*, 885 F.2d 1180 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered the scope

90. See, e.g., *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 457 (6th Cir. 1984); *Short v. Central States, Southeast and Southwest Areas Pension Fund*, 729 F.2d 567, 571 (8th Cir. 1984); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Berg v. Board of Trustees, Local 705 Int'l Bhd. of Teamsters Health & Welfare Fund*, 725 F.2d 68, 70 (7th Cir. 1984); *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 599 (2d Cir. 1983); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 313 (5th Cir. 1982); *Lowenstein v. International Ass'n of Machinists & Aerospace Workers*, 479 F.2d 1211, 1213 (D.C. Cir. 1973).

91. See *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1148 (4th Cir. 1985) (applying arbitrary and capricious review to administrator's interpretation of ambiguous plan terms).

92. See *Jung v. FMC Corp.* 755 F.2d 708, 711-12 (9th Cir. 1985) (granting less deference to administrator's decision where evidence of conflict existed); *Dennard*, 681 F.2d at 314 (determining that evidence of bad faith affects arbitrary and capricious standard).

93. See *Holland*, 772 F.2d at 1149 (asserting that arbitrary and capricious standard of review will not insulate administrator where evidence of bad faith exists); see also *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987) (varying deference in proportion to evidence of bias); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144-45 (3rd Cir. 1987) (asserting stricter arbitrary and capricious review where evidence of conflict of interest exists).

94. *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 954 (1989).

95. *Bruch*, 109 S. Ct. at 956-57.

96. *Bruch*, 109 S. Ct. at 957 (citing RESTATEMENT (SECOND) OF TRUSTS § 187 comment d (1959)).

of review applicable to a fiduciary's interpretation of ambiguous terms in an ERISA governed employee benefit plan. The plaintiffs in *De Nobel*, sixteen retired employees of the defendant Vitro Corporation (Vitro), alleged that the administrators of Vitro's corporate retirement plan (plan) violated the terms of the plan by underpaying benefits properly due to the plaintiffs. The plan allowed beneficiaries several options for the payment of benefits, including options for payment if a beneficiary retired prior to reaching the age of sixty-five. Under this early retirement scheme, a beneficiary could select one of three payment options. Two of these options provided for payments over a period of time, while the third option provided for payment in a lump sum. The plan provided for two different valuations depending on whether the employee opted for early retirement or began receiving benefits at the normal retirement age of sixty-five. With respect to early retirement benefits, the terms of the plan appeared to provide for payments actuarially equivalent to one another regardless of which option the beneficiary chose. In practice, however, the plan administrators computed the single sum payment in a different fashion than the periodic payments. If an employee opted for a single sum payment, the plan administrators computed the benefits based on the normal retirement scheme as opposed to the higher early retirement scheme. This computation resulted in significantly lower payments to the beneficiaries than the computation used for the periodic payment scheme.

The plaintiffs sued Vitro, arguing that the plain language of the plan did not allow the plan administrators to use the lower computation scheme for the single lump-sum payment. The plaintiffs further argued that the plan administrators' conduct violated section 204(d) of ERISA, which requires that a plan distribute vested nonforfeitable benefits at not less than the present value of those benefits. Finally, the plaintiffs argued that Vitro falsely represented the benefits of the plan in plan summaries, in violation of federal common law contract principles.

The United States District Court for the District of Maryland granted Vitro's motion for summary judgment. The district court reasoned that the administrators' interpretation of the plan's provisions was consistent with the plain language of the plan. Using the arbitrary and capricious standard of review, which allowed the court to overturn a plan administrator's benefit determination only when clearly arbitrary or capricious, the district court held that the administrators' benefit determinations were reasonable.

On appeal, the Fourth Circuit first analyzed the proper scope of review necessary in light of the Supreme Court's holding in *Bruch*. The Fourth Circuit concluded that the *Bruch* decision resulted in a complete abandonment of the arbitrary and capricious standard of review as used by the district court. The Fourth Circuit stated that the threshold question after *Bruch* is whether the particular plan at issue vests in its administrators the discretion to construe ambiguous provisions of the plan itself. If the plan does vest such discretion, the Fourth Circuit reasoned that reviewing courts may disturb the challenged denial of benefits only if plaintiffs show substantive or procedural abuse.

The Fourth Circuit then looked to the provisions of the Vitro plan to see if the plan gave discretion to the plan administrators. Noting that the plan gave the administrators the "power . . . to determine all benefits and resolve all questions pertaining to the administration, interpretation, and application of Plan provisions," the Fourth Circuit held that the plan vested discretion in the plan administrators and, therefore, under *Bruch*, the Fourth Circuit would apply an abuse of discretion standard of review. The Fourth Circuit also dismissed the plaintiffs' claim that discretion only could be vested in the administrators if the plan expressly used the term "discretion." Stating that there are no "magic words" required to trigger discretionary review, the Fourth Circuit, citing *Bruch*, held that if the plan documents appear to give the fiduciary the power to construe doubtful terms, the fiduciary's interpretation of those terms, if reasonable, will not be disturbed.

Using definitions of reasonableness under the abandoned arbitrary and capricious standard of review, the Fourth Circuit listed five factors for courts to consider when reviewing administrators' interpretations of plan provisions under the abuse of discretion standard of review. First, courts should consider whether the administrators' interpretation is consistent with the goals of the plan. Second, courts should decide whether the administrators' interpretation would render some language in the plan meaningless or inconsistent. Third, courts should weigh the challenged interpretation against the procedural and substantive requirements of ERISA itself. Fourth, courts should determine whether the provisions at issue have been applied consistently. Finally, courts should judge whether the administrators' interpretation is contrary to the clear language of the plan.

Applying this five part test to the facts of the case, the Fourth Circuit determined that the interpretation of the Vitro administrators was reasonable. The Fourth Circuit determined that the administrators' explanation, that the administrators offered higher benefits to long term beneficiaries for the valid plan purpose of encouraging a lifetime income source, satisfied the first test. Under the second test, the Fourth Circuit stated that the administrators' interpretation would leave some language in the plan document as surplusage. The court, however, also found that the plaintiffs' interpretation of the document would leave certain terms meaningless. Thus, the court placed little emphasis on this test.

As to the third test, the plaintiffs claimed that the administrators' interpretation violated section 204(d) of ERISA. Under section 204(d), to buy back a beneficiary's future benefits with a single lump-sum payment, the fiduciaries must pay at least the present value of the beneficiary's nonforfeitable benefits. The plaintiffs argued that the plaintiffs' nonforfeitable benefits consisted of those benefits that the plaintiffs would have received if the option for long term early retirement benefits had been taken. Rejecting this argument, the Fourth Circuit stated that nonforfeatability under ERISA only protects claims to benefits rather than specific computations of benefit amounts. Furthermore, the Fourth Circuit reasoned that nonforfeitable benefits could be created by the terms of the plan itself. The court, however, found no such created right in the Vitro plan. The

court reasoned that because the higher benefits could only be attained if the beneficiary opted for early retirement, continued employment to the retirement age of sixty-five would necessarily "forfeit" the benefit. Terming the benefit advantage of early retirement a subsidy, the Fourth Circuit found ample support in ERISA and the Internal Revenue Code for holding the subsidy to be forfeitable rather than nonforfeitable. Accordingly, the Fourth Circuit held that the administrators' interpretation of the terms of the plan did not violate a substantive right created by ERISA.

The Fourth Circuit next determined that the plan administrators' evidence, indicating that the administrators adopted the challenged interpretation of the plan thirteen years before, and consistently applied the interpretation since that time, satisfied the fourth test. The Fourth Circuit also determined that the administrators' determination satisfied the fifth test, holding that the administrators' interpretation had support in the express provisions of the plan. Despite the plaintiffs' compelling interpretation of the plan's provisions, the court held the administrators' interpretation to be reasonable, reasoning that there could be no abuse of discretion unless there existed a conflict of interest.

Addressing the issue of conflict of interest, the Fourth Circuit, citing *Bruch*, stated that evidence of administrative bias remained relevant even under the deferential abuse of discretion standard of review. The plaintiffs argued that because the administrators were also employees of the plan's sponsor, the court should presume administrative bias. The Fourth Circuit rejected this argument, noting that courts have repeatedly refused to raise that presumption. Without this presumption, the court could find no evidence of administrative bias and, therefore, no abuse of discretion.

Addressing plaintiffs' final claim that the administrators breached federal common law of contracts by breaching representations made in the plan summaries distributed to employees, the Fourth Circuit looked to the summaries themselves. Citing to a disclaimer in the summary that deferred ambiguities to the provisions of the plan itself, the Fourth Circuit stated that courts repeatedly uphold such disclaimers, rejecting beneficiary reliance on summaries. Holding that the terms of the plan itself will always override any distributed materials describing the plan where a disclaimer is in the summary, the Fourth Circuit rejected the plaintiffs' federal common law contract claim. The Fourth Circuit, therefore, affirmed the holding of the district court dismissing all of the plaintiffs' claims, but applied a different standard of review in light of the intervening *Bruch* decision of the Supreme Court.

Following the decision in *De Nobel*, the Fourth Circuit established a two-step analysis to use when deciding the standard of review concerning a fiduciary's denial of benefits to a beneficiary. The first step is a determination of whether the provisions of the plan document grant discretionary authority to the plan fiduciary. While the *De Nobel* court emphasized that no specific language is necessary to grant such authority, decisions of the Fourth Circuit following *De Nobel*, as well as decisions in other circuits, seem to require that a fiduciary show express language in the document.

itself granting some decisionmaking power to the fiduciary. Without express language, courts have tended to review fiduciary decisions and interpretations *de novo*.⁹⁷ When a court finds that a plan document confers discretion to the fiduciary, the court is required to defer to the decision or interpretation of the fiduciary, if reasonable. While the *De Nobel* court stated that the *Bruch* court had swept away the old arbitrary and capricious standard for reasonableness, several circuit courts have acknowledged that the test for abuse of discretion is the same test used under the previous arbitrary and capricious standard.⁹⁸ Even under the abuse of discretion, arbitrary and capricious standard, however, the existence of a conflict of interest is a factor to be considered. While not addressed in *De Nobel*, the United States Court of Appeals for the Eleventh Circuit has established a comprehensive test for what constitutes a conflict sufficient to warrant strict review.⁹⁹

* * *

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1132(a)(3) (1988) (section 502(a)(3)), provides, in part, that a "participant, beneficiary, or fiduciary" may file suit to secure "appropriate equitable relief" for violations of ERISA or for the enforcement of ERISA provisions. Legislative history indicates that the drafters of ERISA intended for courts to develop a federal common law with regard to the remedies available under section 502(a)(3).¹⁰⁰ Though

97. See *Reinking v. Philadelphia American Life Insurance Co.*, F.2d 1210, 1214 (4th Cir. 1990) (holding *de novo* review appropriate because express terms of plan only conferred limited authority to fiduciaries); *Pirozzi v. Blue Cross-Blue Shield of Virginia*, 741 F. Supp. 586 (E.D. Va. 1990) (asserting *de novo* review appropriate unless plan expressly confers discretion to fiduciary); cf. *DeWitt v. State Farm Ins. Co. Retirement Plan*, 905 F.2d 798, 800-801 (4th Cir. 1990) (finding language in plan broad enough to preclude *de novo* review); *Richards v. United Mine Workers of America Health & Retirement Fund* 895 F.2d 133, 135 (4th Cir. 1990) (holding that plan's express grant of discretion entitled fiduciary determination to abuse of discretion standard); *Boyd v. Trustees of United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) (finding discretionary authority granted by plan sufficient to preclude *de novo* review). See also *Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990) (applying *de novo* standard where undisputed that no discretionary authority given); *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1047 (7th Cir. 1989) (finding clause giving fiduciary power to determine disability sufficient to preclude *de novo* judicial review).

98. See *Boyd*, 873 F.2d at 60 (equating pre-*Bruch* arbitrary and capricious review with post-*Bruch* abuse of discretion review); see also *Jett v. Blue Cross & Blue Shield of Ala.*, 890 F.2d 1137, 1139 (11th Cir. 1989) (applying pre-*Bruch* arbitrary and capricious standards to post-*Bruch* abuse of discretion review); *Batchelor v. International Bhd. of Electrical Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 444-48 (5th Cir. 1989) (using Fifth Circuit's pre-*Bruch* arbitrary and capricious principles to determine application of *Bruch*'s abuse of discretion standard).

99. See *Brown v. Blue Cross & Blue Shield of Ala.*, 898 F.2d 1556, 1560-68 (11th Cir. 1990) (defining conflict of interest in fiduciary context and discussing application of conflict of interest on post-*Bruch* abuse of discretion review).

100. See 120 CONG. REC. 29942 (1974) (statement of Senator Javits referring to intention for courts to develop body of federal substantive law to resolve disputes as to rights and obligations under private welfare and pension plans).

interpreting a different provision of ERISA, the Supreme Court, in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), concluded that an individual may recover contractual damages but not extracontractual damages under section 409(a) of ERISA, 29 U.S.C. section 1109(a) (1982). In *United States Steel Mining Co. v. District 17, UMW*, 897 F.2d 149, 153 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit construed the language of section 502(a)(3) in light of the Supreme Court's reasoning in *Russell*. The *Steel Mining* court faced the issue of whether monies paid by a benefit plan to participants pursuant to a state injunction are recoverable under ERISA when the state statute which provided the basis for the injunction was actually preempted (superseded) by ERISA.

Before reaching the issue of what relief was available under section 502(a)(3), the *Steel Mining* court dealt with the issues of whether the plaintiffs, United States Steel Mining Company (the company) and the United States Steel and Carnegie Pension Fund (the fund), had standing and whether the court itself had jurisdiction. In *Steel Mining*, the original dispute began when the United Mine Workers (the union) and the union's individual members obtained an injunction from a state court that required the company and the fund to comply with a state statute¹⁰¹ which prohibited an employer from canceling or decreasing an employee's (or his dependent's) medical coverage while the employee was claiming or receiving benefits under the West Virginia Workers' Compensation Act for a temporary disability. Although denying the company's motion to dismiss on the ground that ERISA preempted the state statute, the state court did not enter a final order. Subsequently, the United States District Court for the Southern District of West Virginia, in *Fixx v. UMW*, 645 F. Supp. 352 (S.D.W. Va. 1986), held that section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1982), preempted the state statute in question. After this preemption ruling, the company and the fund sought and obtained from the United States District Court for the Southern District of West Virginia declaratory relief and an injunction with regard to the preemption issue. Afterwards, the company and the fund filed a motion in the same action in federal district court seeking damages and attorney's fees. The company and the fund alleged that ERISA entitled the company and fund to recover monies paid pursuant to a state injunction enforcing a state statute later held to be preempted by ERISA. The district court denied the motion on the grounds that the company lacked standing under ERISA and that ERISA did not confer upon the district court jurisdiction under the facts of the case.

On appeal, the Fourth Circuit analyzed the language of section 502(a)(3), which provides that a fiduciary has standing to file suit under ERISA to determine whether the company and the fund had standing to sue under ERISA. According to the *Steel Mining* court, the fund was obviously a fiduciary because it acted as the fund administrator. Furthermore, the court

101. W. VA. CODE § 23-5A-2 (1990).

found that the company also qualified as a fiduciary because of the discretionary authority it exercised over the administration of the plan, as evidenced by its action in arranging the plan to follow the state injunction. The Fourth Circuit also noted that the district court, by granting the earlier permanent injunction, had "implicitly" granted standing to the company and the fund. Thus, the Fourth Circuit in *Steel Mining* reasoned that to grant standing to a party for an injunction and then to deny standing to the same party in the party's quest for further equitable relief would undermine section 502(a)(3). The Fourth Circuit, therefore, concluded that both the company and the fund had standing.

After resolving the issue of standing, the *Steel Mining* court turned to the question of whether the federal court had subject matter jurisdiction to hear the case. The Fourth Circuit principally relied on the district court's explicit finding of jurisdiction in the action in federal district court seeking the permanent injunction. Because the company and the fund brought the action under section 502(a)(3) of ERISA, the federal court had jurisdiction under section 502(e)(1) of ERISA, 29 U.S.C. section 1132(e)(1) (1982). According to the court, to deny a motion due to lack of jurisdiction in an action in which the court had already found itself to have jurisdiction would be "inconsistent" with the grant of jurisdiction in section 502(e)(1) to "civil actions." Thus, the Fourth Circuit asserted jurisdiction to hear the motion.

Upon resolving the threshold issues of standing and jurisdiction, the *Steel Mining* court next analyzed the issue of whether ERISA provided the remedy of recovery of monies paid pursuant to a state injunction and a state statute when ERISA actually preempted the state statute. In analyzing this issue, the Fourth Circuit initially noted that the plaintiffs, the company and the fund, were seeking damages, and that section 502(a)(3) only affords equitable relief. However, the court accepted the plaintiffs' characterization of the relief requested as "equitable relief in the form of restitution for recovery of the cost of benefits that unjustly enriched their employees." Thus, the court narrowed the issue to whether the recovery of the monies and attorney's fees constituted "appropriate equitable relief" under section 502(a)(3).

After narrowing the issue to one of determining the scope of "appropriate equitable relief," the Fourth Circuit noted the support in the legislative history for the proposition that courts are to develop a federal common law in granting "appropriate equitable relief" under section 502(a)(3). The court then turned to the United States Supreme Court's decision in *Russell*, for guidance in determining what constitutes "appropriate equitable relief." In *Russell* the Supreme Court determined that section 409(a) of ERISA, 29 U.S.C. section 1109(a) (section 409(a) (1982)), which refers to "such other equitable relief as the court may deem appropriate," did not afford extra-contractual damages to a beneficiary, thus overruling the Ninth Circuit's liberal reading of section 409(a).

Though the Supreme Court did not interpret section 502(a)(3), the Fourth Circuit nevertheless relied on the Supreme Court's reasoning in

Russell that a court must consider ERISA's remedial language in the context of the whole statute. In light of the reasoning in *Russell*, the Fourth Circuit concluded that, although courts were authorized to create federal common law as to the appropriate equitable relief available under section 502(a)(3), courts only should allow remedies "appropriate and necessary" in furthering the purposes of ERISA.

After determining that the term "appropriate equitable relief" actually limited the relief available to the plaintiffs, the Fourth Circuit adopted from *Russell* the specific distinction between contractual and extracontractual damages. According to the distinction adopted in *Steel Mining*, a plaintiff would be able to recover only contractual damages under section 502(a)(3). After accepting this distinction, the Fourth Circuit reasoned that the West Virginia Worker's Compensation Act actually had caused the company and the fund to make the payments which the company and the fund were seeking to recover. In issuing the original state injunction, the West Virginia judge simply applied the state statute and not a particular provision of the pension plan. The company and the fund were, in effect, seeking extracontractual damages. Because the damages were extracontractual in nature, the company and the fund could not recover the monies under ERISA. Instead, the Fourth Circuit intimated that the state court would be the appropriate forum for this claim to the monies paid pursuant to the state injunction.

The Fourth Circuit thus concluded that section 502(a)(3) does not afford a remedy for extracontractual damages. After reaching this conclusion, the Fourth Circuit, noting that courts slowly will develop a body of federal common law under ERISA, apparently limited its holding to the facts of the case. The Fourth Circuit subsequently has cited *Steel Mining* to support the proposition that, in an ERISA action, general principles of recognizing congressional intent when formulating federal common law limit federal courts to providing remedies that are "appropriate and necessary" in effectuating ERISA.¹⁰² Additionally, the Fourth Circuit, by concluding that section 502(a)(3) does not afford extracontractual damages, joins several other circuits that have concluded that section 502(a)(3) does not provide for extracontractual compensatory damages.¹⁰³ The *Steel Mining* decision

102. See *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990) (citing *Steel Mining* in reasoning that federal courts may construct federal common law if "appropriate and necessary" to effect ERISA, and further concluding that remedy of unjust enrichment would be appropriate addition to federal common law).

103. See *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988) (holding extracontractual damages unavailable under ERISA), *cert. denied sub nom.* H.K. Porter Co. v. *United Steelworkers*, 489 U.S. 1096 (1989); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.) (concluding that extracontractual damages do not fall under "other appropriate equitable relief"), *cert. denied*, 488 U.S. 909 (1988); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302 (9th Cir. 1986) (applying reasoning of Supreme Court in *Russell* in concluding that extracontractual damages were unavailable under 29 U.S.C. § 1132(a)(3)); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (holding that extracontractual damages for emotional distress were unavailable under § 502(a)(3) of ERISA). *Cf.* *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989)