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THE INVISIBLE MAN: A CALL TO EMPOWER INDIVIDUAL PARTICIPANTS AND BENEFICIARIES AGAINST FIDUCIARY BREACHES IN ERISA PLANS

ANDREA KOUTOULOGENIS*

INTRODUCTION

Sam is a fifty-three year old employee¹ of Company X, a farm equipment manufacturer.² Sam and the other employees in his division were participants³ in Company X's self-funded welfare benefit plan⁴ protected by the Employee Retirement Income Secu-

* J.D./LL.M. Candidate, January 1999.

1. The Employee Retirement Income Security Act of 1974 (ERISA) does not clearly define the term "employee" or "employer." "Employee" refers to any individual who works for an employer. ERISA § 3(6), 29 U.S.C. § 1002(6) (1994). "Employer" refers to "any person acting directly as an employer" or "in the interest of an employer" with regard to an employee benefits plan. ERISA § 3(5), 29 U.S.C. § 1002(5) (1994). The Supreme Court recently deciphered this circular language by declaring that the common law definition of employee is controlling. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). The common law test for who is an employee is not simple. The test is comprised of thirteen factors, of which, no single factor is dispositive. *Id.* 323-24. In order to determine who is an employee, a court must examine the work relationship as a whole. *Id.* at 324.

2. This hypothetical is based upon the facts in *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996). This situation represents only one of the many ways in which a fiduciary breach can result in the loss of benefits to an individual employee.

3. A "participant" is the person ERISA seeks to protect. ERISA § 3(7), 29 U.S.C. § 1002(7) (1994). "Participant" is defined as "any employee or former employee . . . who is or may become eligible to receive a benefit" from a plan, "or whose beneficiaries may become eligible to receive any such benefit." *Id.* The decision of the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989), interpreted this definition to refer to employees in covered employment or former employees who reasonably expect to return to covered employment or who have "a colorable claim to vested benefits." In order to demonstrate eligibility for benefits, a claimant must have a colorable claim in a suit for benefits, or prove that eligibility criteria will be met in the future. *Id.* at 117-18.

4. ERISA neither defines the term "plan" nor illustrates how to create a plan. ERISA §§ 3(1)-(3) indicate only that "plan" means an employee welfare benefit plan, an employee pension benefit plan or a plan which comprises both a welfare benefit plan and a pension benefit plan. ERISA §§ 3(1)-(3), 29

rity Act (ERISA).⁵ Toward the end of the 1980s, Company X developed a scheme to rid itself of some of its floundering divisions. Sam's division happened to be one of the divisions targeted by the Company. The scheme consisted of transferring the Company's money-losing divisions into a newly-created and separately incorporated⁶ subsidiary⁷ that was, from its inception, effectively bankrupt⁸ with little chance of survival. To do this, Company X took two steps. First, it transferred 4000 of the retirees from Company X's self-insured health plan to the new subsidiary plan. Second, Company X induced 1500 employees to transfer to the new subsidiary by intentionally overstating its prospects and by promising that employees' benefits would remain secure. Sam and approximately 1500 other employees elected to move to the new subsidiary as a result of the Company's representations. Company X knew that the failure of the newly created subsidiary would automatically eliminate Company X's obligations to pay medical and other non-pension benefits⁹ and avoid distressing the remainder of its employees.¹⁰ Within two years, the subsidiary declared bank-

U.S.C. § 1002(1)-(3) (1994). Welfare plans may provide, through the purchase of insurance or other means, medical, surgical or hospital care and benefits in the event of accidental death, dismemberment, illness or unemployment. ERISA § 3(1), 29 U.S.C. § 1002(1). Welfare plans may also provide vacation benefits, apprenticeship and training programs, day care services, scholarship funds and prepaid legal aid. *Id.* Pension benefit plans may provide for retirement income to employees or create a system through which employees can defer income to a retirement account over the period of covered employment. ERISA § 3(2)(A)(i)-(ii), 29 U.S.C. 1002(2)(A)(i)-(ii) (1994).

5. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)).

6. "Incorporation" refers to the process by which a corporation is formed. BLACK'S LAW DICTIONARY 766 (6th ed. 1990). Incorporation creates a legal or political body that can exist indefinitely unless the act of incorporation limits the subsidiary in some way. *Id.*

7. A "subsidiary" is a company controlled by a "parent" corporation. *Id.* at 1428. The parent is able to exercise control over the subsidiary because it owns a majority of the subsidiary's stock. *Id.*

8. "Bankrupt" refers to the inability of an individual, partnership, corporation or municipality to pay its debts as they are due. *Id.* at 147.

9. *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1068 (1996). Company X employees had to elect to transfer to the new subsidiary in order for Company X's scheme to succeed. It is not generally understood why the success of the scheme rested upon employee consent to the transfer. The Supreme Court in *Varity* argued that consensual transfer shielded *Varity* from the "undesirable fallout that could have accompanied" direct termination of benefits. *Id.* The lower courts believed that *Varity's* employee consent requirement stemmed from "a desire to avoid a severance pay obligation" and to "shift liability for unfunded retirement benefits." *Varity Corp. v. Howe*, 5 ERISA Litig. Rep. No. 2, at 12 (June 1996).

10. *Varity*, 116 S. Ct. at 1069. Company X could have avoided the situation had they chosen to terminate employee welfare benefits directly. *Id.* at 1068. ERISA generally permits employers and plan sponsors to adopt, modify or terminate welfare plans at any time and for any reason. *Adams v. Avondale*

ruptcy. Sam lost his job and his benefits ceased.

Unfortunately, thousands of employees experience similar disruptions in employment benefits when employers, acting as fiduciaries,¹¹ mislead plan participants about information that it holds as a plan sponsor,¹² especially when that information may seriously impact a participant's benefit elections.¹³ Until recently, none of ERISA's provisions permitted plan participants and beneficiaries¹⁴ to obtain individualized equitable relief in these types of fiduciary breach cases.¹⁵ The Supreme Court's decision in *Varity*

Indus. Inc., 905 F.2d 943, 947 (6th Cir. 1990). Recently, the United States Supreme Court re-emphasized that when an employer (who is also the plan fiduciary) decides to amend or terminate a benefit plan, it is not acting in a fiduciary capacity. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 77-81 (1995). However, the *Varity* Court determined that although decisions to amend or terminate benefit plans are not acts of plan administration or management for which a fiduciary is accountable, conveying information about the financial integrity of the plan or the plan's future is. *Varity*, 116 S. Ct. at 1074.

11. ERISA defines "fiduciary" to include any person who exercises discretionary authority or control over the management or disposition of a plan's assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1994). A plan fiduciary also includes anyone who provides investment advice regarding plan assets for compensation, or has any authority to do so or has any discretionary authority or responsibility in the administration of the plan. *Id.*

12. A "plan sponsor" is the entity that establishes or maintains a plan, usually an employer or an employee organization. ERISA § 3(16)(B), 29 U.S.C. 1002(16)(B) (1994). In the case of multi-employer plans and plans established or maintained by more than one employer, the plan sponsor is the committee, board or other group of representatives or entities that establish or maintain the plan. *Id.*

13. Kathryn D. Linstromberg, *Labor Department Official Discusses Plans to Ease Effect of Court Rulings*, 23 Pens. & Ben. Rep. (BNA) No. 14, at 892 (Apr. 1, 1996).

14. The term "beneficiary" refers to a person, chosen by the participant or appointed by the benefit plan, who may become entitled to a plan benefit. ERISA § 3(8), 29 U.S.C. § 1002(8) (1994). Under ERISA, a participant's children or other dependents are not considered beneficiaries unless they are specifically designated as such by the participant. *Keys v. Eastman Kodak Co.*, 739 F. Supp. 135, 138 (W.D.N.Y.), *aff'd without opinion*, 923 F.2d 844 (2d Cir. 1990).

15. *Varity Ruling Not Total Win for Employees, Official Says*, 23 Pens. & Ben. Rep. (BNA) No. 14, at 892 (Apr. 1, 1996) [hereinafter *Varity Ruling*]. ERISA has always permitted an individual to bring an action for fiduciary breach on behalf of the plan. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1994). However, for a number of years, ERISA did not appear to permit individualized redress. *See generally* *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (precluding individual participants and beneficiaries from bringing a cause of action for extracontractual damages); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821 (1st Cir. 1988) (denying compensatory and punitive damages to individual beneficiary of retirement program); *Brokke v. Stauffer Chem. Co.*, 703 F. Supp. 215 (D. Conn. 1988) (holding that punitive damages are not available to individual participants and beneficiaries in actions under § 502). The Supreme Court in *Russell* held that any recovery for a violation of § 409 goes to the plan as a whole and not to an indi-

Corp. v. Howe,¹⁶ however, recognized an individual's right to seek equitable relief for a fiduciary breach under § 502(a)(3) of ERISA.¹⁷

Although *Varity* authorized individual redress in cases of fiduciary malfeasance under § 502(a)(3), it failed to respond to a second more pervasive problem.¹⁸ The Court resurrected the controversy concerning the meaning of "other appropriate equitable relief" in § 502(a)(3),¹⁹ but it failed to indicate whether the monetary damages awarded to the plaintiffs were "appropriate equitable relief" under § 502(a)(3) of ERISA.²⁰ The majority called these moneys restitution, but the dissent believed they were traditional consequential legal damages and as such, not recoverable under § 502 (a)(3).²¹

Prior to *Varity*, the issue of whether § 502(a)(3) authorizes extracontractual damages²² appeared to have been partially put to rest in *Mertens v. Hewitt Associates*.²³ The *Mertens* Court held that monetary damages are not available under § 502(a)(3)'s equitable relief provision.²⁴ With respect to punitive damages, the Supreme Court, in *Massachusetts Mutual Life Insurance Co. v. Russell*,²⁵ held that a cause of action for extracontractual damages under § 409(a)²⁶ of ERISA could not be maintained under § 502(a)(2) because such damages were not a valid remedy under § 409(a).²⁷ Although the *Russell* Court "had no occasion to determine whether any other provision of ERISA authorized the recovery of extracon-

vidual beneficiary. *Russell*, 473 U.S. at 140. Other courts have determined that recovery for fiduciary breaches belongs to the plan and not an individual beneficiary. See *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 617 (11th Cir. 1991) (citing *Russell* for the proposition that "a cause of action for an ERISA fiduciary's breach. . . arises under 29 U.S.C. § 1109 rather than § 1132(a)(1)(B), and § 1109 does not permit an individual beneficiary to recover. . ."); *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (reiterating that fiduciary liability is governed by § 409 which provides for redress to the plan only).

16. 116 S. Ct. 1065 (1996).

17. *Id.* at 1075-79. Section 502(a)(3) provides that a civil action may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title . . ." ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1994).

18. *Varity*, 116 S. Ct. at 1079.

19. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

20. *Varity*, 116 S. Ct. at 1079.

21. *Id.* at 1084.

22. Extracontractual damages award participants and beneficiaries more than what is contemplated by the specific terms of a plan. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1335 (5th Cir. 1992).

23. 508 U.S. 248 (1993).

24. *Id.* at 263.

25. 473 U.S. 134 (1985).

26. ERISA § 409(a), 29 U.S.C. § 1109(a) (1994).

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

tractual damages,"²⁸ lower courts considering damages in § 502(a)(3) actions have determined that extracontractual damages are not an appropriate form of relief and often cite to *Russell* for that proposition.²⁹ In some instances, the failure to define what constitutes "other appropriate equitable relief" under § 502(a)(3) has resulted in the denial of the only meaningful relief § 502(a)(3) could provide an individual.³⁰

This Comment maintains that courts have mistakenly applied the *Russell* rationale to § 502(a)(3) actions. In light of the *Varity* decision, this Comment proffers that "other appropriate equitable relief" in ERISA § 502(a)(3) should provide for extracontractual damages in cases of fiduciary breach, particularly in cases of fiduciary fraud. Part I discusses some general ERISA principles, including the reason for ERISA's enactment, the role of the fiduciary in ERISA-protected plans and the chronology of the "other appropriate equitable relief" debate leading up to the decision in *Varity*. Part II examines the types of relief at issue in the § 502(a)(3) debate and the rationale for applying one type of relief over the

28. *Id.* at 139 n.5 (1985). The respondent in *Russell* expressly disclaimed reliance on § 502(a)(3). *Id.* As a result, the Court did not consider § 502(a)(3). *Id.*

29. See *Pane v. RCA Corp.*, 868 F.2d 631, 636 (3d Cir. 1989) (stating that § 502(a) causes of action are "explicitly equitable"); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir. 1988) (citing *Russell* for the proposition that extracontractual damages for fiduciary breaches are not authorized by ERISA); *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1508 (11th Cir. 1988) (concluding that although *Russell* may not be dispositive on the issue of damages under § 502(a)(3), "a textual exegesis of the *Russell* opinion, combined with careful examination of the statute's structure and legislative history, compels the conclusion that damages for emotional distress are unavailable under Section 502(a)(3). . ."); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (indicating that *Russell* and *Pilot Life* argue against an interpretation of ERISA favoring punitive damages); *Kleinhans v. Lisle Savs. Profit Sharing Trust*, 810 F.2d 618, 626 (7th Cir. 1987) (prohibiting punitive damages based on the *Russell* opinion); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306 (9th Cir. 1986) (casting doubt on the availability of extracontractual damages under ERISA after the *Russell* decision); *Award Serv., Inc. v. Northern Cal. Retail Clerks Union*, 774 F.2d 1391, 1391 (9th Cir. 1985) (stating in dicta that "ERISA provides various express remedies for a beneficiary, but compensatory and punitive damages against a trustee [are] not among them."); *Brokke v. Stauffer Chem. Co.*, 703 F. Supp. 215, 222 (D. Conn. 1988) (explaining that although *Russell* did not discuss the types of damages that might be recovered under § 502(a), the *Russell* court indicated that recovery of "extra-contractual damages by a plan beneficiary" is prohibited).

30. See *Buckley Dement, Inc. v. Travelers Plan Adm'rs.*, 39 F.3d 787, 789 (7th Cir. 1994) (denying recovery for medical expenses that would have been covered had the plan administrator processed plaintiff's claim within required time period); *Slice v. Sons of Norway*, 34 F.3d 630, 634-35 (8th Cir. 1994) (rejecting recovery of pension plan benefits promised by administrator but not provided under the plan).

other. Part III addresses why the *Varity* interpretation of § 502(a)(3) damages best protects individual participants and beneficiaries, and explores the gaps left when courts refuse to provide remedies beyond equitable relief for fiduciary breaches. Part IV proposes that the legislature amend ERISA so as to allow the award of extracontractual damages in individual actions for fiduciary breach brought under § 502(a)(3). In addition, this Comment proposes that the legislature recognize punitive damage awards when fiduciary malfeasance arises out of fraud. This will deter fiduciary mishandling of plans and provide much needed protection to participants.

I. ERISA: AN OVERVIEW

To understand the necessity for extracontractual remedies in § 502(a)(3) cases, it is important to identify how § 502(a)(3) fits into the employee benefits protection scheme. This Part briefly surveys the organization, history and policy of ERISA. Section A addresses the circumstances which led to ERISA's enactment and briefly describes how ERISA is organized. Section B explores the role of the fiduciary in ERISA-protected plans. Section C examines the relationship between § 409, § 502(a)(2) and § 502(a)(3) of ERISA. These three sections traditionally receive close scrutiny in cases asserting the propriety of extracontractual remedies under § 502(a)(3). Finally, Section D tracks the federal courts' interpretation of § 502(a)(3) prior to the *Varity* decision.

A. Congress Responds to Demands for Greater Employee Benefit Protections

ERISA is the body of federal law that governs employee benefit plans and protects the welfare and economic security of participants and their beneficiaries in these plans.³¹ President Gerald Ford signed ERISA into law on Labor Day 1974,³² thereby bringing all prior federal regulations pertaining to employee benefits into one regulatory scheme.³³ ERISA's enactment acknowledged the insufficient protection afforded plans and their members and also responded to the scarcity of employee information concerning the operation of benefit plans.³⁴ ERISA attempts to make plan sponsors and fiduciaries more responsive to participants and employees. One way it does this is by making ERISA plans legal entities

31. ERISA § 2(a), 29 U.S.C. § 1001(a) (1994).

32. *Statement on the Employee Retirement Act of 1974*, 10 WEEKLY COMP. PRES. DOC. 1083, 1084-85 (Sept. 2, 1974).

33. Deborah A. Geier, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. 743, 743 (1985).

34. ERISA § 2(a), 29 U.S.C. § 1001(a).

separate from employers or sponsors.³⁵ A plan can file suit, have judgments entered against it, hire employees, enter into agreements, hold property and employ attorneys to represent it.³⁶

ERISA is comprised of four titles.³⁷ Title I includes declarations of policy and all the regulatory provisions applicable to ERISA plans, including requirements pertaining to reporting, disclosure, participation, vesting, funding, fiduciary responsibilities, administration, enforcement procedures and group health plans.³⁸ Title II deals exclusively with pension plans; it houses amendments to the Internal Revenue Code relating to these plans.³⁹ Title III contains miscellaneous administrative provisions and addresses issues pertaining to joint pensions, profit-sharing and the employee stock ownership plan task force.⁴⁰ Finally, Title IV deals with the termination of defined benefit plans lacking assets to pay benefit obligations.⁴¹

ERISA protects many different types of plans and excludes coverage of some others. Title I covers plans established or maintained by employers engaged in commerce or whose industry or activity affects commerce, including unions representing employees engaged in commerce.⁴² But, under Title I of ERISA, federal, state and local government employee benefit plans,⁴³ and plans established by churches or church organizations, do not generally receive coverage.⁴⁴ ERISA also excludes excess benefit plans.⁴⁵ Despite these exclusions, the fiduciary's responsibilities in ERISA-protected plans are expansive. Knowledge of the statute, proper interpretation of its provisions and compliance with the requirements are central issues in most ERISA litigation.

35. ERISA § 502(d), 29 U.S.C. § 1132(d) (1994).

36. *Id.*

37. ERISA § 2, 29 U.S.C. § 1001 (1994).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1) (1994).

43. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1) (1994). Government plans are those plans instituted and administered by the United States Government, state governments or political subdivisions thereof. MICHAEL J. CANAN, *QUALIFIED RETIREMENT PLANS AND OTHER EMPLOYEE BENEFIT PLANS* § 8.2, at 374 (Student ed. 1996). When state law permits, state and local governments can offer certain benefits through qualified retirement plans. *Id.* § 22.4, at 1103. However, these plans are controlled by the Internal Revenue Code. *Id.* ERISA does not apply to government plans. *Id.*

44. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (1994).

45. ERISA § 4(b)(5), 29 U.S.C. § 1003(b)(5) (1994). Excess benefit plans furnish benefits to highly compensated employees. ERISA § 3(36), 29 U.S.C. § 1002(36) (1994). The benefits involved in these plans do not qualify for tax deductions. *Id.*

B. *The Fiduciary in ERISA-Protected Benefit Plans*

While a general understanding of ERISA is important to the § 502(a)(3) extracontractual relief issue, one must further apprehend how the fiduciary functions in ERISA plans. Congress proclaimed that ERISA's fiduciary responsibility provisions are an integral part of Title I's protective mechanism.⁴⁶ A large portion of the fiduciary's duties involves the disclosure and reporting of financial information to participants and beneficiaries.⁴⁷ ERISA further promotes the integrity of employee benefit plans by establishing standards of conduct and responsibility for fiduciaries, and by providing appropriate remedies, sanctions, and ready access to the federal courts in the event of a breach.⁴⁸ A fiduciary can be any individual who exercises discretionary authority or control in the management or administration of plan assets or who provides investment advice for a fee.⁴⁹ ERISA § 404 requires that a fiduciary discharge his or her duties to a plan for the exclusive benefit of participants and beneficiaries.⁵⁰ In the event of a breach, a fiduciary is held personally liable for any losses that his or her conduct causes the plan.⁵¹ The fiduciary may have to disgorge any profits made through misuse of plan assets and be subject to other remedial relief a court finds appropriate.⁵² A participant, beneficiary, the Department of Labor or a plan trustee may sue a fiduciary for breach.⁵³ However, a cause of action must be brought within six

46. Bernard Dobranski, *The Arbitrator as a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U.L. REV. 65, 67 n.7 (1982).

47. ERISA § 101(a), 29 U.S.C. § 1021(a) (1994). In order to facilitate the safeguarding of employee benefits, ERISA requires that plan administrators disclose and report certain matters to plan participants and beneficiaries on a regular basis. *Id.* In § 101(a), ERISA mandates that the administrator of each employee benefit plan supply all participants and beneficiaries with a summary plan description (SPD) and annual report information. *Id.* A SPD must notify participants and beneficiaries of their rights and obligations under the benefits plan. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1994). It must contain "[a] summary of any material modification in the terms of the plan" and must communicate changes in the information contained in the SPD as required by other sections of ERISA. *Id.* All information required to appear on the SPD must be written in "a manner calculated to be understood by the average plan participant." *Id.*

Section 103(b)(3) directs plan administrators to distribute all information, including statements and schedules, which is necessary to summarize the latest annual report. ERISA § 103(b)(3), 29 U.S.C. § 1023(b)(3) (1994).

48. ERISA FIDUCIARY LAW 3 (Susan P. Serota & Frederick A. Brodie eds., BNA, 1995).

49. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1994).

50. ERISA § 404, 29 U.S.C. § 1104 (1994).

51. Dobranski, *supra* note 46, at 69.

52. *Id.*

53. *Id.*

years of an alleged violation.⁵⁴ While fiduciaries generally play a central role in employee benefit plans, they are integral to the debate regarding § 502(a)(3).

C. *The Pertinent Statutory Provisions*

As previously discussed, a breach of fiduciary standards and duties subjects the fiduciary to a number of penalties.⁵⁵ These penalties most often involve a discussion of three specific sections. ERISA § 409, § 502(a)(2) and § 502(a)(3) are central to the "other appropriate equitable relief" debate. Understanding how these ERISA sections relate to one another and how the leading cases interpret them is essential to consideration of the current dilemma.

Section 409 indicates that plan fiduciaries are personally liable to the plan for any losses incurred by the plan resulting from a fiduciary breach.⁵⁶ This provision permits redress only of losses to the plan and provides remedies that make the plan whole or otherwise cure the breach.⁵⁷ Remedies available under this provision are broad. They may include both monetary and equitable relief, in addition to removal of the breaching fiduciary.⁵⁸ However, § 409 only creates liability.⁵⁹ "In order to enforce the right under § 409, a plaintiff must bring suit under § 502(a)(2)."⁶⁰

Section 502(a)(2) states that any fiduciary who breaches his or her obligations, duties or responsibilities to a plan shall be held personally liable for any losses incurred by the plan as a result of the breach.⁶¹ That fiduciary must disgorge profits which have been garnered from misuse of plan assets.⁶² The difference between § 409 and § 502(a)(2) exists only in the entities it permits to bring an action against the fiduciary.⁶³ Unlike § 409 which confers standing

54. *Id.*

55. *See supra* notes 46-54 and accompanying text.

56. ERISA § 409 sets forth the following:

[A] fiduciary . . . who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title 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 . . .

ERISA § 409(a), 29 U.S.C. § 1109(a) (1994).

57. *Id.*

58. *Id.*

59. *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1080 (1996) (Thomas, J., dissenting).

60. *Id.*

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

62. *Id.*

63. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1994). Section 502(a)(2) permits the Secretary, a participant, a beneficiary or a fiduciary to bring a

to sue upon the plan, § 502(a)(2) grants participants, beneficiaries, fiduciaries and the Secretary of Labor the right to sue.⁶⁴

On the other hand, § 502(a)(3) is often cited in conjunction with § 409 and § 502(a)(2), but it does not correspond to either one, nor does it cross-reference either section in its text.⁶⁵ Section 502(a)(3) allows the Secretary of Labor, participants, beneficiaries and fiduciaries to seek equitable relief for a violation of ERISA or the plan terms.⁶⁶ Prior to *Varity*, some federal courts broadened the holding in *Russell*, a case dealing with § 409 and § 502(a)(2), and determined that participants and beneficiaries have no right to extracontractual damages under § 502(a)(3).⁶⁷

D. The Courts' Position on § 502(a)(3) Prior to *Varity*

In order to appreciate how *Varity* altered the "other appropriate equitable relief" scheme in § 502(a)(3), it is important to note where the courts stood prior to this decision. In 1985, the *Russell* Court addressed the question of whether extracontractual damages could be awarded to a plaintiff for a breach resulting from a fiduciary's failure to file a timely claim.⁶⁸ The Ninth Circuit interpreted § 409 to permit equitable or remedial relief.⁶⁹ On review, the U.S. Supreme Court reversed, holding that the phrase "other equitable or remedial relief" did not include extracontractual damages.⁷⁰ Furthermore, it suggested that this interpretation might also apply to § 502(a)(3).⁷¹ In a concurring opinion, Justice Brennan chastised the majority for its sweeping interpretation and indicated that the issue of "appropriate equitable relief" under § 502(a)(3) had yet to be decided.⁷²

A suitable interpretation of § 502(a)(3) remained elusive. In 1990, *Ingersoll-Rand Co. v. McClendon* resurrected the debate when, in one part of the opinion, Justice O'Connor insinuated that § 502(a)(3) would sustain an extracontractual damages claim.⁷³ Finally, in 1993, *Mertens v. Hewitt Associates*⁷⁴ attempted to re-

civil action for "other appropriate equitable relief" under § 409. *Id.*

64. *Id.* This would seem to imply that plans have no standing to sue for fiduciary breach.

65. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1994).

66. *Id.*

67. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985).

68. *Id.* at 136.

69. *Id.* at 137-38.

70. *Id.* at 148.

71. *Id.* at 150-51 (Brennan, J., concurring).

72. *Id.*

73. 498 U.S. 133, 145 (1990).

74. 508 U.S. 248 (1993). The Ninth Circuit originally addressed the availability of legal damages against a nonfiduciary for knowing participation in a fiduciary's breach of duty. Richard Rouco, *Available Remedies Under ERISA 502(a)*, 45 ALA. L. REV. 631, 637 (1994). The circuit court's opinion centered on whether § 502(a)(3)(B)(i) permitted a claim against nonfiduciaries. *Id.* On

solve the matter of "appropriate equitable relief" under ERISA § 502(a)(3). In *Mertens*, the Supreme Court determined that "appropriate equitable relief" under § 502(a)(3) is defined as traditional equitable relief (restitution,⁷⁵ injunctive relief,⁷⁶ etc.), not legal damages.⁷⁷

Until March 1996, the *Mertens* decision appeared to have resolved the controversy over "other appropriate equitable relief" in § 502(a)(3). However, *Varity* revived the issue once more.⁷⁸ In *Varity*, the Supreme Court of the United States established the right of individual participants and beneficiaries to sue benefit plan sponsors who intentionally mislead employees about the security of their benefits.⁷⁹ The Court awarded money damages to the individual beneficiaries, as opposed to the plan.⁸⁰ The district court held that these employees were entitled to "appropriate equitable relief" which included reinstatement of coverage under *Varity's* plan and money damages.⁸¹ The United States Court of Appeals for the Eighth Circuit affirmed.⁸² The Supreme Court granted certiorari and affirmed the Eighth Circuit's decision.⁸³ The majority called the damages awarded to the plaintiffs restitution, but the dissent believed them to be traditional consequential legal damages and not recoverable under § 502(a)(3) as equitable.⁸⁴ The debate, once more, centers on the kinds of damages § 502(a)(3) permits. The way in which courts interpret the damage award in *Varity* will determine whether a participant receives any remedy for a fiduciary breach in future decisions.

II. THE COURTS' DIVISION OVER EXTRACONTRACTUAL DAMAGES IN § 502(a)(3)

In recent years, attempts to define what constitutes "other appropriate equitable relief" in § 502(a)(3) of ERISA have resulted in a plethora of decisions that treat damage awards inconsistently.

review, the Supreme Court addressed the secondary issue regarding money damages. *Id.*

75. Restitution is "[a]n equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred." BLACK'S LAW DICTIONARY, *supra* note 6, at 1313.

76. An injunction is an equitable remedy, usually in the form of a court order, "prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." *Id.* at 784.

77. *Mertens*, 508 U.S. 248 at 256.

78. 116 S. Ct. 1065, 1075-76 (1996).

79. *Id.* at 1078.

80. *Id.* at 1079.

81. *Id.* at 1069.

82. *Id.*

83. *Id.* at 1079.

84. *Varity*, 116 S. Ct. at 1081-82 nn.1-2. The majority claimed that the monetary relief awarded *Varity* employees is equitable in nature. *Id.*

With the Supreme Court's ruling in *Varity*, the question of whether monetary damages conform to § 502(a)(3)'s equitable relief scheme is once again before the courts.⁸⁵

Many courts debating the "appropriate relief" clause disagree about the kinds of awards that constitute equitable relief under § 502(a)(3).⁸⁶ Many of these same courts contest the limits to which equitable relief can be stretched.⁸⁷ Some feel that equity must provide whatever relief is necessary to make the plaintiff whole,⁸⁸ while others feel that equity has well-defined boundaries that must be strictly adhered to in order to preserve the integrity of the equitable relief doctrine.⁸⁹ Thus, it is necessary to first examine the three major types of relief in contention, and how they are applied in § 502(a)(3) cases. This Part outlines the three categories of relief relevant to the § 502(a)(3) problem and briefly examines how courts applied these remedies in § 502(a)(3) cases before *Varity*. In addition, the division of the courts over the propriety of extracontractual damages as a § 502(a)(3) remedy is closely examined.

A. Major Types of Relief at Issue in § 502(a)(3) Cases

The first type of relief, equitable relief, encompassed by § 502(a)(3) is the least contentious of the three. Equitable relief is typically available in a court of equity. Traditionally, such relief includes injunction, mandamus and restitution.⁹⁰ Injunctions and mandamuses are remedies, that prohibit or compel specified actions.⁹¹ At the federal level, the courts base grants of injunctive relief⁹² on findings that the harm caused by a particular act is so

85. *Id.* at 1076. *Varity* re-ignited the flames under the "appropriate equitable relief" debate when it expressly disclaimed the applicability of *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). *Id.* The *Varity* majority found that since the *Russell* plaintiff did not rely on § 502(a)(3) and her sort of injury (wrongful denial of benefits) was already covered by § 502(a)(1), *Russell* did not control the outcome of the *Varity* case. *Varity*, 116 S. Ct. at 1076.

86. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993).

87. *Russell*, 473 U.S. 134, 145-48.

88. See *infra* notes 130-42 and accompanying text for a discussion of those courts favoring a broad interpretation of equitable relief under § 502(a)(3).

89. See *infra* notes 116-29 and accompanying text for a discussion of those courts opposing a broad interpretation of equitable relief under § 502(a)(3).

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

91. *Varity Corp. v. Howe*, 5 ERISA Litig. Rep. No. 2, at 20 (1996).

92. An "injunction is an extraordinary remedy" rooted in equity. *Beermart, Inc. v. Stroh Brewery Co.*, 633 F. Supp. 1089, 1104 (N.D. Ind. 1986). The decision to grant injunctive relief rests within the district court's discretion. *Id.* However, the court must consider certain factors such as: (1) whether it is likely that the plaintiff will predominate on the merits; (2) whether a sufficient legal remedy exists; (3) whether harm to the plaintiff if injunction is not granted outweighs the harm an injunction will impose upon the defendant;

grave that typical legal remedies are insufficient to cure the harm.⁹³ Restitution is available when one party is enriched at the expense of another.⁹⁴ Like injunctions, "restitution is not a matter of right."⁹⁵ Restitution is an equitable measure that courts award to restore an injured party to the position it occupied before the event that caused harm.⁹⁶ Courts award restitution in the form of monetary relief.⁹⁷ To establish a right to restitution, a party must demonstrate: (1) "a reasonable expectation of payment;" (2) the other party's belief that it would have to pay; or (3) that "society's reasonable expectations of person and property would be defeated by nonpayment."⁹⁸

Prior to *Varity*, courts occasionally granted "other appropriate equitable relief" in the form of equitable remedies.⁹⁹ In *Mertens v. Hewitt Associates*, the Court determined that "appropriate equitable relief" under § 502(a)(3) includes relief typically available in equity.¹⁰⁰ *Health Cost Controls v. Skinner*¹⁰¹ confirmed that money damages may be available to § 502(a)(3) claimants who successfully bring an action for restitution.¹⁰² The Skinners were participants in a welfare benefit plan (the Plan) established by the Mobil Oil Corporation.¹⁰³ When Sharon Skinner was injured in a car accident, the HMO paid for treatment of her injuries.¹⁰⁴ The Skinners later recovered from the party responsible for Sharon's inju-

and (4) whether the injunction would adversely affect the public interest. *Id.*

93. *United States v. City of Asbury Park*, 340 F. Supp. 555, 567 (D.N.J. 1972).

94. *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 n.7 (7th Cir. 1995). A court deciding whether to give restitutionary relief must determine that the defendant improperly procured benefits. *Harris Trust & Savs. Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 616 (7th Cir. 1995) (citing *Health Cost Controls v. Wardlow*, 825 F. Supp. 152 (W.D. Ky. 1993)).

95. *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 873 (1st Cir. 1995).

96. *Texas Am. Oil Corp. v. Department of Energy*, 44 F.3d 1557, 1569 (Fed. Cir. 1995).

97. *Skinner*, 44 F.3d at 537 n.5.

98. *Harris Trust*, 57 F.3d at 615.

99. *See generally Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) (discussing some of the cases that have permitted "other appropriate equitable relief" in the form of equitable remedies).

100. 508 U.S. 248, 256 (1993). A five to four majority of the Supreme Court held that § 502(a)(3) does not authorize monetary damages against nonfiduciaries as "other appropriate equitable relief." *Id.* at 249, 256-57. The significance of *Mertens* does not lie in the direct holding of the Court, but in the discussion of damages in which the Court engages. Steuart H. Thomsen & W. Mark Smith, *The Implications of Mertens v. Hewitt Associates for Future ERISA Litigation*, 29 TORT & INS. L.J. 129, 129 (1993).

101. 44 F.3d 535 (7th Cir. 1995).

102. *Id.* at 537 n.5.

103. *Id.* at 536.

104. *Id.*

ries.¹⁰⁵ Health Cost Controls (HCC) filed a complaint under ERISA § 502(a)(3)¹⁰⁶ seeking reimbursement of the benefits paid for Sharon's treatment.¹⁰⁷ Because HCC failed to allege a form of relief that was equitable in nature,¹⁰⁸ the district court determined that HCC sought relief for money damages, which it declared impermissible under § 502(a)(3).¹⁰⁹

Skinner demonstrates some courts' insistence that monetary damages must comply with the traditional equity scheme. These courts are much less likely to give money damages in the form of compensation. As will be discussed later, stern adherence to this notion is misplaced and leaves many benefit plan participants without a sufficient remedy in cases of fiduciary breach.

Compensatory relief is the second type of remedy at issue in the § 502(a)(3) problem. *Mertens* described compensatory damages as "monetary relief for all losses sustained as a result of the alleged breach of fiduciary duty."¹¹⁰ Money damages are considered "the classic form of legal relief."¹¹¹

Punitive damages comprise the most controversial category of extracontractual damages a court may award. Courts have reached opposing conclusions when considering whether ERISA permits a plaintiff to recover punitive damages for breaches of fiduciary duty. In *Russell v. Massachusetts Mutual Life Insurance Co.*,¹¹² the Ninth Circuit Court of Appeals expressed its belief that ERISA contemplates punitive damages on a very limited basis.¹¹³ On the other hand, the court in *Dependahl v. Falstaff Brewing Corp.*¹¹⁴ did not believe that ERISA provides for punitive dam-

105. *Id.*

106. ERISA § 502(a)(3) permits a civil action to be brought by a participant, beneficiary or fiduciary. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1994). Most of the discussion prior to this case has involved actions by participants or beneficiaries. *Skinner* is one of many § 502(a)(3) cases in which a fiduciary seeks an equitable remedy to enforce the terms of an employee benefit plan. *Skinner*, 44 F.3d at 536. The fiduciary does not seek a remedy for himself, but for the plan as a whole. *Id.*

107. *Skinner*, 44 F.3d at 536.

108. *Id.* at 537. HCC classified the monetary relief it sought as compensatory. *Id.* The court was reluctant to grant monetary relief in a form inconsistent with traditional notions of equity. *Id.* That is why the court declared that monetary relief could be had by HCC if it could legitimately classify the award as restitution, a permissible form of equitable relief. *Id.* at 537 n.5.

109. *Id.* at 537. The court of appeals reversed and remanded finding that subject matter jurisdiction is appropriate when both the subject matter jurisdiction of the federal court and the substantive claim for relief are based on a federal statute. *Id.*

110. *Mertens*, 508 U.S. at 255.

111. *Id.*

112. 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134 (1985).

113. *Id.* at 492.

114. 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981).

ages.¹¹⁵ The inconsistent application of these awards represents one of the reasons why courts have difficulty interpreting the award provisions in § 502(a)(3) cases.

B. Why Courts Are Divided Over the Application of Compensatory and Punitive Remedies in § 502(a)(3) Cases

The debate over the grant of damages under § 502(a)(3) centers on differing interpretations of three sources: ERISA's actual language, legislative history and other case law. Courts that argue against the grant of compensatory and punitive damages for fiduciary breach under § 502(a)(3) maintain that Congress intended trust law principles to guide the interpretation of ERISA.¹¹⁶ Since compensatory and punitive damages are not ordinarily available in trust law actions for fiduciary breach, these courts do not interpret ERISA to provide such relief absent express language to the contrary in the statute.¹¹⁷ Consider the petitioners' approach to equitable remedies in *Mertens*.¹¹⁸ The petitioners argued that equity courts at common law often granted legal remedies beyond the scope of their authority.¹¹⁹ The *Mertens* court felt that defining "appropriate equitable relief" as anything a court of equity could provide in such a case, renders the modifier "equitable" ineffectual.¹²⁰ Moreover, permitting "equitable relief" in § 502(a)(3) so broad a definition effectively eradicates distinctions Congress drew between equitable and legal relief in other sections of ERISA.¹²¹ As a result, courts that advocate a narrow reading of "appropriate equitable relief" are more inclined to award money damages under

115. *Id.* at 1216. "[P]unitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts." *Id.* The court did not provide an explanation for its decision, but relied instead on *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979). *Id.*

116. See *Kleinhans v. Lisle Savs. Profit Sharing Trust*, 810 F.2d 618, 627 (7th Cir. 1987) (stating that Congress intended principles of trust law to apply to interpretations of ERISA); but see *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1463 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 479 U.S. 1089 (1987) (arguing punitive damages are not available under trust law in an action for trustee's fiduciary breach).

117. *Kleinhans*, 810 F.2d at 627; *Sommers Drug*, 793 F.2d at 1463.

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

119. *Id.* The petitioner and Solicitor General maintained that the term "equitable relief" referred to "whatever relief a court of equity" was able to grant in a specific case. *Id.* All relief for a breach of trust could be obtained from equity courts. *Id.* at 257.

120. *Id.* at 258.

121. *Id.* The Court also felt that allowing "equitable relief" in § 502(a)(3) to mean anything available for breach of trust at common law would change the definition of the phrase as it appears in other parts of ERISA. *Id.*

§ 502(a)(3) if the award can be classified as restitution and does not disrupt *Mertens* "equitable relief" scheme.¹²²

Additionally, many of these same courts maintain that ERISA is so deliberately and carefully drafted that courts cannot add to the specific remedies for fiduciary breach already set forth in each civil enforcement provision.¹²³ For example, § 409(a) imposes liability upon fiduciaries for breach of their duties and sets out remedies available against them.¹²⁴ These include personal liability for damages, restitution and "such other equitable or remedial relief as the court may deem appropriate."¹²⁵ Section 502(a)(2) permits the Secretary of Labor, plan beneficiaries, participants and fiduciaries to bring a civil action "for appropriate relief under § 409."¹²⁶ Courts that want to limit § 502(a)(3) remedies to those typically available in equity (injunction, mandamus and restitution) argue that Congress specifically created two independent provisions detailing appropriate relief in distinct terms: § 502(a)(3) permitting only remedies that are equitable in nature¹²⁷ and § 502(a)(2) allowing equitable and legal damages.¹²⁸ Because canons of statutory construction require statutes to be interpreted as a whole, these courts assert that the provisions are too well-crafted to be altered.¹²⁹

122. *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995). The court, considering whether back pay and front pay constitute "appropriate equitable relief," found that relief sought under § 502(a)(3) must have attributes justifying departure from the general rule that money damages are legal relief. *Id.* at 1022-23. The plaintiff, a former employee, brought an action against her employer and his financial planning association alleging breach of fiduciary duty and retaliatory discharge. *Id.* at 1019-20. The court of appeals concluded that back and front pay was an appropriate award against the employer because it was necessary to restore the plaintiff to the position she would have occupied had she not been illegally discharged. *Id.* at 1022. The court relied on *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 570-71 (1990), which also characterized back pay as restitutionary, and proclaimed that relief "incidental to or intertwined with injunctive relief may be considered to be equitable." Since restitution is a remedy typically available in equity, the court believed it fell within § 502(a)(3)'s "appropriate equitable relief" scheme. *Schwartz*, 45 F.3d at 1022-23.

As to front pay, the court found that it is granted only when reinstatement (an equitable remedy) is not practicable. *Id.* at 1023. As such, it is an equitable remedy encompassed by § 502(a)(3). *Id.* See also *Shore v. Federal Express Corp.*, 42 F.3d 373, 378 (6th Cir. 1994) (characterizing front pay as an equitable remedy under Title VII, 42 U.S.C. § 2000(e)-5(g)).

123. *Mertens*, 508 U.S. at 251.

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

125. *Id.*

126. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

127. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

128. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

129. *Northwest Paper Co. v. Federal Power Comm'n*, 344 F.2d 47, 50 (8th Cir. 1965). These courts fail to recognize Congress' intention that "courts . . . develop a federal common law of rights and obligations under

At the other end of the spectrum, courts favoring a broader interpretation of § 502(a)(3) have fashioned ERISA remedies not specifically enumerated in § 502(a) so as to better protect ERISA plan participants and beneficiaries.¹³⁰ In considering whether extracontractual and punitive damages are available to participants and beneficiaries in § 502(a)(3), Justice Brennan, in his well-known concurrence in *Massachusetts Mutual Life Insurance Co. v. Russell*, declared that ERISA legislative history encourages courts to develop a federal common law.¹³¹ Although courts recognize that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employment benefit plans,"¹³² they maintain that Congress could not have intended to deprive participants and beneficiaries of the protections afforded by the common law and not replace them with equivalent statutory protections.¹³³ This would defeat the purpose of enacting "legislation to protect the very persons whose rights were the focus of the legislation."¹³⁴

Justice Brennan further argued that Congress intended to incorporate trust law principles into ERISA's civil enforcement

ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). Hence, federal courts are authorized to supplement federal law with state law theory when federal legislation is incomplete. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985).

130. See, e.g., *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 136 (1990) (stating that a court may award extracontractual remedies, even punitive damages, if the facts of a particular case require such a remedy); *Haywood v. Russell Corp.*, 584 So. 2d 1291, 1297 (Ala. 1991) (maintaining that the legislative history and ensuing revisions of ERISA uphold the view that Congress intended for the courts to develop a federal common law applicable to employee benefit plans, including the development of appropriate remedies not specifically provided for in § 502(a)). But see *Pilot Life Ins., Co. v. Dedeaux*, 481 U.S. 41, 41 (1987) (deciding ERISA preempts state laws that permit extracontractual and punitive damages).

131. 473 U.S. at 155-56 (Brennan, J., concurring). See also *Firestone Tire*, 489 U.S. at 110 (upholding the development of a federal common law for benefit plans); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988) (finding that a central purpose of federal common lawmaking is to correct discontinuity in statutory schemes); *Kwatcher v. Massachusetts Serv. Employees Fund*, 879 F.2d 957, 966 (1st Cir. 1989) (noting that filling gaps with respect to ERISA benefit plans is essential and contemplated by Congress).

132. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

133. *Haywood*, 584 So. 2d at 1298. See also *Lorenzen v. Employees Retirement Plan of the S & H Group, Inc.*, 896 F.2d 228, 230 (7th Cir. 1990) (holding in dicta that if "ERISA preempts suits under state tort law against employer-fiduciaries by ERISA plan participants. . . [this] strongly implies that such suits can be brought under ERISA; for otherwise there would be a big gap in liability for misconduct by ERISA fiduciaries").

134. *Haywood*, 584 So. 2d at 1298. The court maintains that it is not unusual for statutory enactments to mimic characteristics of state remedies the acts preempted. *Id.*

scheme.¹³⁵ Trust law principles identify equitable relief as including damages necessary to make the plaintiff whole.¹³⁶ In trust law, courts may award both direct and consequential damages to make a party whole.¹³⁷ Therefore, courts that favor a broader interpretation of ERISA's civil enforcement scheme argue, as Justice Brennan did, that money damages may also be available in § 502(a)(3) for a fiduciary breach.¹³⁸

Moreover, not all courts feel that ERISA is consistently well-crafted and fine-tuned.¹³⁹ While Congress closely scrutinized questions that might arise under ERISA, some courts feel it inadvertently omitted a number of issues.¹⁴⁰ In *Winstead v. J.C. Penney Co., Inc.*, the court declared that there are "loads of gaps and redundancies in the law."¹⁴¹ Those omissions or inconsistencies that

135. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156-57 (1985) (Brennan, J., concurring).

136. H.R. 533, 93d Cong., (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 4639; S.REP. 127, 93d Cong., (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 4838. *Accord Firestone*, 489 U.S. at 110-11. In addition, section 205 of the Restatement (Second) of Trusts permits a plaintiff alleging breach of trust to pursue a remedy that will either put the plaintiff in the position he occupied prior to the breach or put him in the position he would have occupied had the trustee not committed the breach of trust. RESTATEMENT (SECOND) OF TRUSTS § 205 & cmt. a (1992).

137. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1336 (5th Cir. 1992). The legislative history pertaining to § 502(a)(3) does not definitively reveal what kinds of remedies Congress intended § 502(a)(3) to encompass. Eduard A. Lopez, *Equitable Remedies for Breach of Fiduciary Duty Under ERISA After Varity Corp. v. Howe*, 18 BERKELEY J. EMP. & LAB. L. 323, 345 (1997). One author suggests that "Congress's reliance on trust law in establishing ERISA's fiduciary duties and its decision to limit relief to equitable relief . . . is at least consistent with the notion that such remedies consist of those available at common law for breach of trust." *Id.* at 346. See also G. BOGERT & BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 862, at 27-29 (rev. 2d ed. 1982) (indicating that under certain circumstances, equitable relief may include monetary damages).

138. *Corcoran*, 965 F.2d at 1335-36.

139. *Winstead v. J.C. Penney Co., Inc.*, 933 F.2d 576, 579-80 (7th Cir. 1991).

140. *Id.* at 579. Judge Posner summarized the problem underlying detailed statutes like ERISA as follows:

Detailed statutes such as ERISA and the Bankruptcy Code bristle with interpretive conundra. A statute may be detailed not because the draftsmen quixotically undertook to resolve all possible interpretive questions before they arose but because a number of specific problems were brought to their attention and they tried to solve them. There may have been an equal number of problems that were not raised and therefore—because Congress is too busy to resolve problems that are entirely hypothetical—not provided for. It is perverse on the one hand to penalize draftsmen for having made detailed provision for the problems that were brought to their attention by denying them a helping judicial hand in the problem areas they did not foresee, and on the other hand to treat a lazily drafted statute, worded in generalities, as a broad delegation to the judiciary to create a sensible code of governance.

Id. at 579-80.

do not appear deliberate must be made to accord with the statute's intent and design.¹⁴²

III. *VARIETY* RATIONALE BETTER PROTECTS PARTICIPANTS AND BENEFICIARIES

There is little doubt that ERISA fiduciaries must act in the interest of the plans they serve and that they are accountable to those plans for their breaches.¹⁴³ However, emphasis on the relationship between the fiduciary and the plan undermines the fact that participants are the intended beneficiaries of this relationship.¹⁴⁴ Restrictive interpretations of § 502(a)(3) do not adequately protect individual participants and beneficiaries from fiduciary breaches. In 1988, the Education and Labor Committee of the House of Representatives addressed violations of ERISA's fiduciary obligations that affect individuals, but not the plan.¹⁴⁵ The committee received complaints from members of Congress and their constituents regarding improper denials of medical claims and continuation coverage and unreasonable delays in processing claims by employers or insurers.¹⁴⁶ Allowing an injured participant or beneficiary recourse through the courts in these situations is essential to fulfilling the purpose of ERISA.¹⁴⁷ *Variety's* approach to extracontractual damages is an effective means of protecting individual participants and beneficiaries from fiduciary misconduct. Accordingly, Section A explores the gaps left when courts refuse to provide remedies beyond typical equitable relief under § 502(a)(3). Section B discusses those cases which successfully granted extracontractual relief under § 502(a)(3). Finally, Section C probes the construction of the *Variety* rationale and discusses the necessity of applying it to cases of fiduciary breach affecting individual participants.

141. *Id.* at 580.

142. *Id.*

143. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570-71 (1985).

144. The purpose of ERISA is to promote the best interests of participants and beneficiaries through rigorous fiduciary standards of care. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 158 (1985) (Brennan, J., concurring).

145. H.R. 801, 100th Cong., p.2, at 63 (1988).

146. *Id.* The committee expressed concern that participants and beneficiaries were being denied the only legal recourse available to them, that is, punitive or other extracontractual remedies. *Id.*

147. Justice Brennan stated the fundamental purpose of ERISA is the "enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries." *Russell*, 473 U.S. at 158 (Brennan, J., concurring).

A. Shortcomings of Narrowly Interpreting § 502(a)(3)

There are a number of situations where a narrow interpretation of § 502(a)(3) deprives individual employees or beneficiaries of the only meaningful redress available to them under ERISA. Although ERISA fiduciaries are expected to treat administrative conflicts impartially¹⁴⁸ and determine which course best serves the interests of the plan, breaches often do occur.¹⁴⁹ The individual participants have little recourse under the pre-*Varity* scheme to address a fiduciary breach if harm befalls them and not the plan.¹⁵⁰ The case of *Rollo v. Maxicare of Louisiana, Inc.* is a prime example of this.¹⁵¹ The court denied the plaintiff relief under § 502(a)(3) because he sought extracontractual remedies for tortious interference with his benefit plan rights, specifically his right to receive continuing medical care.¹⁵²

The court denied a motion to amend the complaint to include a § 502(a)(3) claim relying, in part, on *Russell*.¹⁵³ However, the *Rollo* court, in rendering this decision, readily acknowledged that *Russell* alone could not control § 502(a)(3) issues because the case only addressed extracontractual damages in § 409.¹⁵⁴ That is why the court also cited *Pilot Life Insurance Co. v. Dedeaux*¹⁵⁵ for the proposition that Congress, in later cases, expressly proclaimed the

148. ERISA § 404(a)(1) requires fiduciaries to perform their duties for the exclusive benefit of plan participants and beneficiaries. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1994).

149. See *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984) (holding that a trustee must deal "even-handedly" with beneficiaries and safeguard the interests of the trust as a whole); *Winpisinger v. Aurora Corp. of Ill.*, 456 F. Supp. 559, 566 (N.D. Ohio 1978) (re-emphasizing a trustee's obligation to discharge duties in the interest of plan participants and beneficiaries).

150. "Pre-*Varity*" is used in this Comment to refer to the line of decisions beginning with and following *Russell*, 473 U.S. 134. Remember that *Russell* confronted the issue of whether a participant filing suit under ERISA § 502(a)(2) could recover compensatory or punitive damages under § 409, in addition to disability benefits provided under the terms of the employee benefit plan. *Id.* at 136. That Court held that such damages were not recoverable. *Russell*, 473 U.S. at 148. Despite the fact that the holding in *Russell* was limited to actions under § 502(a)(2) and the corresponding provision in § 409, this Comment argues that the same rationale has been misapplied in § 502(a)(3) cases.

151. 698 F. Supp. 111 (E.D. La. 1988).

152. *Id.* at 116. The plaintiff had been injured in an automobile accident while a member of his employer's health care plan. *Id.* at 112. The defendant, a health maintenance organization, administered the plan. *Id.* The defendant then contracted with an independent physicians association for medical services to plan members. *Id.* The case was dismissed after the court determined that it had subject matter jurisdiction under ERISA, but all of the plaintiff's claims were founded on state law claims. *Id.* The court dismissed the suit because none of the claims had been made under ERISA. *Id.* at 112.

153. *Id.* at 115.

154. *Id.*

155. 481 U.S. 41 (1987).

unavailability of extracontractual damages under § 502(a)(3).¹⁵⁶ In light of the United States Supreme Court's decision in *Varity*, this argument is stale. A plan participant or beneficiary is now permitted to pursue individual claims under § 502(a)(3) and the decision provides greater latitude in the types of relief that courts can award.¹⁵⁷

A restrictive interpretation of § 502(a)(3) led to the denial of extracontractual damages for a flagrant fiduciary breach in *Sokol v. Bernstein*.¹⁵⁸ The beneficiary, Bernice Sokol, was denied relief for medical expenses and damages for emotional distress when the administrator of her deceased husband's pension plan fund arbitrarily disbursed death benefits without her permission.¹⁵⁹ The administrator refused to re-deposit the proceeds in the fund unless Sokol waived all fiduciary breach claims against him and paid administrative fees.¹⁶⁰ Even though the court of appeals agreed that the defendant's conduct violated fiduciary standards mandated by ERISA, it refused to grant an award of extracontractual damages.¹⁶¹ The court argued that *Russell* was not dispositive.¹⁶² However, an examination of the text of § 502(a)(3), combined with close scrutiny of the entire statute and the legislative history "compels the conclusion that damages for emotional distress are unavailable under § 502(a)(3) as well as § 409."¹⁶³

B. Courts Favoring Extracontractual Damages in § 502(a)(3) Cases

The decision in *Varity* is not without precedent. A number of

156. *Rollo*, 698 F. Supp. at 115. In *Pilot Life*, the Court denied the plaintiff's common law breach of contract and tort claims because it believed Congress only authorized relief to individuals in the form of "accrued benefits due, [a] declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Id.* A participant can bring an action against a fiduciary, but only to seek the fiduciary's removal on behalf of the entire plan. *Id.*

157. Stephen T. Lindo & Elizabeth S. Stong, *U.S. Supreme Court Permits Individual Equitable Recovery for Breach of Fiduciary Duty Under ERISA Section 502(a)(3)*, 23 Pens. & Ben. Rep. (BNA) No. 23, at 1453 (June 3, 1996). Prior to *Varity*, interpretations of ERISA have restricted individual claims by invoking doctrines of preemption of state law remedies and clinging to narrow limits on extracontractual and punitive damages. *Id.*

158. *Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986).

159. *Id.* at 533, 538. The administrator violated an express contract requirement which stipulated that pension fund proceeds were to be distributed only upon Sokol's request. *Id.* at 533. Disbursement of the pension proceeds created adverse tax consequences that Sokol originally set out to avoid. *Id.* at 534.

160. *Id.* at 534.

161. *Id.* at 534-38.

162. *Id.* at 534.

163. *Id.*

prior cases refused to discount the availability of extracontractual damages in individual cases for fiduciary breach. For example, in 1987, *Bartucca v. Katy Industries, Inc.*¹⁶⁴ held that an action to collect extracontractual damages under § 502(a)(3) should not be dismissed only because those damages were sought.¹⁶⁵ The court determined that the decision precluding extracontractual damages under § 409 in *Russell* did not necessarily apply to recovery of those damages under § 502(a)(1) or § 502(a)(3).¹⁶⁶ Furthermore, it recognized that the Supreme Court in *Russell* only considered extracontractual damages with respect to § 409.¹⁶⁷ Finally, the court noted that Justice Brennan and three other Justices reasoned that the remaining statutory provisions and legislative history sustained a reading that provided the same protections against fiduciary breaches to plan participants and beneficiaries as it did to the plan.¹⁶⁸

In 1993, the U.S. Court of Appeals for the Third Circuit declared that an individual beneficiary may file an action on his or her own behalf for a fiduciary breach against ERISA trustees and administrators.¹⁶⁹ The case involved an employee of a truck driver service, Vaughn Bixler.¹⁷⁰ Bixler and his family received medical, disability and life insurance through the Central Pennsylvania Teamsters Health and Welfare Fund (the Fund).¹⁷¹ Bixler suffered from a heart attack and died while his employer and the union were negotiating the terms of a new collective bargaining agree-

164. 668 F. Supp. 111 (D. Conn. 1987).

165. *Id.* at 112-13. Plaintiffs, a group of terminated employees, brought suit under § 502(a)(3) alleging that they were denied termination benefits when Wallace, a subsidiary of the defendant, was sold to Syratech Corporation. *Id.* at 111-12. The employees belonged to a welfare benefit plan that provided termination pay for any salaried employee terminated as a result of a reduction in business activity or consolidation of operations. *Id.* at 111. Specifically, the terminated employees claimed that the employer, acting as plan administrator, breached its fiduciary obligations in failing to manage and administer the Plan in accordance with ERISA and by denying benefits due upon termination of the plan. *Id.* at 112.

166. *Id.* at 112. One year later, the same court reiterated its conclusions regarding extracontractual damages in *Brokke v. Stauffer Chemical Co.*, 703 F. Supp. 215 (D. Conn. 1988). While considering and rejecting the availability of punitive damages under ERISA, the court indicated that compensatory damages are included within the parameters of § 502. *Id.* at 223.

167. *Brokke*, 703 F. Supp. at 222.

168. *Id.* Justice Brennan and the three other Justices did agree that § 409 was correctly interpreted to extend benefits solely to the plan. *Id.* They doubted, however, that this conclusion could be transferred so easily to § 502(a)(1) and § 502(a)(3). *Id.*

169. *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299-1300 (3d Cir. 1993).

170. *Id.* at 1294.

171. *Id.* The Fund was the product of a collective bargaining agreement between Mr. Bixler's employer and his union. *Id.*

ment.¹⁷² Lucinda Bixler, as administratrix of Vaughn Bixler's estate, brought suit to recover her husband's medical expenses and death benefits.¹⁷³ Due to certain complications in the negotiation process,¹⁷⁴ Lucinda claimed that both the employer and the Fund wrongfully denied her husband medical coverage.¹⁷⁵ She asserted that the Fund breached its fiduciary duty when it caused her to believe that continuing medical coverage was open only to the entire group, not the individual, under the Consolidated Omnibus Budget Reconciliation Act (COBRA).¹⁷⁶ In addition, Lucinda contended that the employer breached its fiduciary duty to properly inform her about all options available under COBRA.¹⁷⁷

The circuit court, relying on Brennan's concurrence in *Russell*, held that "[s]ection 502(a)(3) authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress' 'any act or practice which violates any provision of this title.'"¹⁷⁸ The court indicated that a generic emphasis had been placed on the relationship between the trustee and the plan.¹⁷⁹ The simple fact is that the intended beneficiary of the trustee-plan relationship is the participant.¹⁸⁰ It makes little sense to safeguard the integrity of a plan solely for the sake of that plan. ERISA must take into account those situations where a fiduciary breach harms

172. *Id.* The current collective bargaining agreement expired on August 31, 1990. *Id.* A few months prior to this date, the Fund informed Mr. Bixler's employer that it was going to increase the monthly employer contribution upon expiration of the current agreement. *Id.* The union wanted to continue benefits through the Fund at the greater cost. *Id.* Mr. Bixler's employer refused to do so. *Id.*

173. *Id.* at 1296.

174. The union and the employer were unable to reach an agreement by the August deadline. *Id.* at 1294. The employer agreed to extend coverage until September 15, but after that date it told employees it was no longer required to make contributions to the Fund. *Id.* Negotiations continued after the September 15 deadline, but eventually broke down. *Id.* at 1295. The employer began its plans to implement a new benefits plan and the union went on strike. *Id.*

175. *Bixler*, 12 F.3d at 1298.

176. *Id.* at 1296 & n.4. In certain circumstances, COBRA, 29 U.S.C. §§ 1161-68 (1994), permits individual employees to continue health and welfare coverage on a self-pay basis. *Id.* at 1295. In the current case, two COBRA notices were issued: one by the Fund when the employer ceased contributing to the plan at the increased rate, and the second, by the employer when the union went on strike. *Id.*

177. *Bixler*, 12 F.3d at 1295.

178. *Id.* at 1298.

179. *Id.*

180. *Id.* ERISA was enacted primarily to protect the "continued well-being and security of millions of employees and their dependents . . . directly affected by these plans." ERISA § 2(a), 29 U.S.C. § 1001(a) (1994). It is the declared policy of ERISA to protect the interests of participants and beneficiaries in employee benefit plans and private pension plans. ERISA §§ 2(b)-(c), 29 U.S.C. §§ 1001(b)-(c) (1994).

an individual and not the plan.¹⁸¹

Perhaps the most persuasive decision of all came out of the Sixth Circuit Court of Appeals in 1990.¹⁸² The plaintiff, Dr. Warren, participated in a pension plan and a profit sharing plan and trust.¹⁸³ The Society National Bank (the Bank) administered both plans.¹⁸⁴ Dr. Warren directed the Bank to transfer all of his assets to an investment banking firm.¹⁸⁵ The Bank failed to transfer the balance in the two plan accounts within one calendar year, causing whatever balance remained in the account after 1984 to become taxable.¹⁸⁶ Dr. Warren sued the Bank alleging that the failure to transfer the proceeds in the two retirement accounts constituted a fiduciary breach.¹⁸⁷

Relying on *Russell*, the Bank argued that Dr. Warren sought extracontractual damages and ERISA only provides for damages strictly contemplated by the terms of the plan.¹⁸⁸ Dr. Warren argued that he was entitled to compensatory damages for the Bank's failure to follow his instructions under the plans' options for handling a participant's share of plan assets.¹⁸⁹

The court held that a plan participant can sue for "other appropriate relief" in a case of fiduciary breach, and in its attempt to "secure complete justice," a court of equity may award monetary damages.¹⁹⁰ In addition, the *Warren* court determined that the "other appropriate equitable relief" clause implicated a wide spectrum of remedies.¹⁹¹ When Congress employs broad and general

181. *Bixler*, 12 F.3d at 1298.

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

183. *Id.* at 976.

184. *Id.*

185. *Id.*

186. *Id.* The Warrens were forced to pay over \$87,000 in income taxes out of their retirement funds. *Id.* In addition, the funds transferred in 1985 could not be rolled over or kept in the IRA. *Id.*

187. *Id.* In an amended complaint, Dr. Warren contended that the Bank negligently, or in order to earn additional fees, delayed a portion of the rollover until the next calendar year. *Id.*

188. *Warren*, 905 F.2d at 976-77. The Bank maintained that it had transferred all of Dr. Warren's assets as he instructed, and that his complaint pursued benefits that were not available under either retirement plan. *Id.*

189. *Id.* at 977. In other words, Dr. Warren "sought compensatory damages that flowed directly and proximately from the bank's failure to provide a contractual benefit, i.e., a single lump-sum distribution." *Id.*

190. *Id.* at 982. The Court here cited Justice Brennan's concurrence in *Russell*, agreeing with his interpretation of the law of trusts. *Id.* A beneficiary is entitled to whatever relief is necessary to put him in the position he would have occupied had it not been for the trustee's breach. *Id.* This may include monetary damages. *Id.* From a historical perspective, equity courts were designed "to do complete justice," and many courts have found that they may adjust their remedies in order to grant the necessary relief. *Id.*

191. *Id.* It is important to note that this view of equitable damages accounts for instances when "traditional" remedies in equity, an injunction or declara-

language in a remedial statute, and if the language of the statute is not contradicted by conclusive legislative history, a court should interpret the provision charitably in order to give effect to those important congressional objectives.¹⁹² Since one of the most important aims of ERISA is to protect the interests of participants and beneficiaries, § 502(a)(3) should be given an interpretation, that guarantees full relief when a fiduciary breach occurs.¹⁹³

C. *The Varsity Rationale at Work*

Justice Brennan's concurrence in *Massachusetts Mutual Life Insurance Co. v. Russell* suggests that the legislative history of ERISA encourages development of a federal common law in fashioning "other appropriate equitable relief."¹⁹⁴ Brennan encouraged courts faced with extracontractual damage claims to determine whether and to what extent trust and pension laws supply a recovery beyond benefits denied by the breach.¹⁹⁵ Brennan indicated that "any deficiency in trust law in the availability of make-whole remedies should not deter courts from authorizing such remedies under § 502(a)(3)."¹⁹⁶ Second, Brennan instructed courts to contemplate whether extracontractual awards would antagonize ERISA's relief provisions, while remembering that ERISA set out to promote the best interests of participants and fiduciaries.¹⁹⁷

The Supreme Court in *Varsity Corp. v. Howe*¹⁹⁸ followed this advice. After deciding two other issues,¹⁹⁹ Justice Breyer ad-

tion of rights, would provide no redress to a participant or beneficiary. Sometimes the only redress that can cure a breach is money damages. For instance, an injunction or declaration of rights in Dr. Warren's case would not have provided any relief at all. *Id.*

192. *Id.*

193. *Id.*

194. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 155-56 (1985).

195. *Id.* at 156-57. Benefits claims are generally brought under § 502(a)(1)(B) of ERISA. See ERISA § 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (1994) (providing that "[a] civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan . . .").

196. *Russell*, 473 U.S. at 157-58 n.17. Brennan reiterated his belief that remedies under § 502(a)(3) were intended by Congress to strengthen the requirements of common law trusts as they apply to employee benefit plans. *Id.*

197. *Id.* at 157-58.

198. 116 S. Ct. 1065 (1996).

199. *Varsity* raised three issues: (1) was the company acting as a fiduciary or an employer when it spoke to employees about benefits with the new subsidiary; (2) if the company did act in a fiduciary capacity, did it breach its duty under ERISA § 404 to act solely in the interest of participants and beneficiaries; and (3) does § 502(a)(3) afford individuals relief for fiduciary breaches. *Id.* at 1071, 1074-75. As to the first issue, the Court found that although ERISA does not expressly require a plan administrator to give employees information about future benefits to aid them in plan participation decisions, any communication that does occur falls within the ambit of fiduciary responsibilities. *Id.* at 1073. The majority also rejected *Varsity's* argument that conveying infor-

dressed the topic of whether § 502(a)(3) authorizes monetary relief for a breach of fiduciary duty.²⁰⁰ Breyer argued that § 502(a)(3) encompasses monetary relief for breach of fiduciary duty.²⁰¹ In support of this proposition, the Court proffered two theories. First, the language of § 502(a)(3) permits "appropriate equitable relief" to remedy violations of Title I - the location of the fiduciary duty provisions.²⁰² Second, § 502(a)(3) does not contain any language that prohibits individualized damages for fiduciary breach.²⁰³ The Court felt that it was improbable that Congress would define a breach of fiduciary duty and then not supply a remedy to individual participants and beneficiaries.²⁰⁴ The Court then said that the phrase "other appropriate equitable relief" is broad enough to

mation to employees about the integrity of future benefits cannot be a fiduciary act because an employer's decision to terminate a plan is not a fiduciary act. *Id.* at 1074.

Varity also argued that misleading statements about the subsidiary's financial future had nothing to do with benefits administration and, therefore, it could only have been speaking as an employer. *Id.* But, the Supreme Court adhered to the district court's conclusion that the statements regarding the future of the subsidiary were too closely connected to statements about benefits to be anything but a fiduciary act. *Id.* The essential message to employees was that transferring to the new subsidiary would not undermine the security of their benefits. *Id.* The Court said that "reasonable employees" in these circumstances, could have believed that Varity was speaking to them as both employer and plan administrator. *Id.* at 1073.

With regard to whether Varity actually breached its fiduciary obligations, the second issue, the Court determined that knowingly deceiving participants in order to save money at the participants' expense violates the exclusive benefit rule. *Id.* at 1074. "[L]ying," said the Court, "is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." *Id.* at 1074 (quoting *Peoria Union Stockyards Co. v. Pennsylvania Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)).

200. *Id.* at 1075-80. The Court first disposed of the contention that *Russell* explicitly or implicitly answered the question of whether the "other appropriate equitable relief" clause in § 502(a)(3) includes individual relief or refers only to relief for the plan as a whole. *Id.* at 1076-78. It said that the language which limits relief to the plan as a whole appears only in § 409, and *Russell* only discussed § 502(a)(2), which cross-references § 409. *Id.* at 1076. *Russell* did not discuss § 502(a)(3). *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Varity*, 116 S. Ct. at 1078. At oral arguments in November 1995, Chief Justice Rehnquist and Associate Justices Breyer, Ginsburg and Souter commented on the lack of remedies available to participants who have been fraudulently misled if § 502(a)(3) did not authorize individual recovery for breach of fiduciary duty. Jayne Elizabeth Zanglein, *Do Plan Participants Have a Remedy?; Justices Tackle Case Involving Employer Accused of Misrepresentations*, THE LEGAL INTELLIGENCER, Jan. 18, 1996, at 9. Justice Souter, unconvinced that participants in the Varity plan could have sued under § 502(a)(1) for back benefits, argued that participants were left without a remedy. *Id.* "There is no remedy. There is in fact a gap in the possibility of recovery . . . the individuals have nothing they can recover for." *Id.*

cover individual relief for breach of fiduciary duty.²⁰⁵ Thus, § 409 is not the only way to remedy a fiduciary breach.²⁰⁶ The majority rejected the notion that because § 409 specifically refers to breach of fiduciary duty, the “catchall” provision in § 502(a)(3) cannot be interpreted to apply to a fiduciary breach.²⁰⁷ The Court believed that § 502(a)(3) acts as “a safety net offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.”²⁰⁸ Given that ERISA requires fiduciaries to execute their duties in the best interest of participants and beneficiaries, it is difficult to fathom a less comprehensive interpretation of § 502(a)(3).²⁰⁹

Each employer has the right to establish or not establish an employee benefit program.²¹⁰ However, once that employer does so and employees come to rely on the plan for welfare or pension benefits, the employer, as fiduciary, must act in the best interest of plan participants.²¹¹ When a fiduciary’s actions threaten or destroy

205. *Varity*, 116 S. Ct. at 1076. In addition, the Court noted that the basic purpose of ERISA compels an interpretation that provides participants with a legal remedy under § 502(a)(3). *Id.* at 1078. ERISA sets out to protect participants and beneficiaries through the establishment of conduct standards, duties and obligations for fiduciaries. ERISA § 2(b), 29 U.S.C. § 1001(b) (1994).

206. *Varity*, 116 S. Ct. at 1075-80.

207. *Id.* at 1076-77. The Court reasoned that four of the six subsections in § 502 deal with specific areas. *Id.* at 1077. For example, the first subsection deals with wrongful denial of benefits and clarification of rights under the terms of a plan. *Id.* The second addresses fiduciary obligations with respect to the financial management of the plan. *Id.* The fourth deal with tax registration, and the sixth with civil penalties. *Id.* The language in the third and fifth subsections creates “catchalls” which provide equitable relief for “any” violation of the statute. *Id.* at 1077-78. The Court relied on this structural arrangement to suggest that these last two provisions are intended to relieve those fiduciary breaches which are not provided for specifically in the other parts of § 502(a). *Id.*

208. *Id.* at 1078.

209. John P. Furfaro & Maury B. Josephson, *Review of Supreme Court Decisions*, N.Y. L.J., Aug. 2, 1996, at 3.

210. See *McGann v. H&H Music*, 946 F.2d 401, 407 (5th Cir. 1991) (explaining that the decision to establish a plan is within the employer’s discretion); *Nazay v. Miller*, 949 F.2d 1323, 1328 (3d Cir. 1991) (stating that, “an employer is free to develop an employee benefit plan as it wishes because the creation of a benefit plan is a corporate management decision unrestricted by ERISA’s fiduciary duties”). There are many reasons why employers establish and maintain employee benefit plans. Some of these reasons include the retention of qualified employees, the maintenance of a competitive position within an industry, tax savings for the employer and tax deferral for the employee, protection against “unexpected financial loss owing to illness or injury” and the provision of retirement income. JEFFREY D. MAMORSKY, *EMPLOYEE BENEFITS HANDBOOK*, § 1.02 at 1-2 through 1-3 (rev. ed. 1995).

211. *Varity Ruling*, *supra* note 15, at 892. The solicitor general filed an amicus brief in *Varity* arguing that § 502(a)(3) provides a cause of action for individual recovery by plan participants and beneficiaries. *Id.* He stated that

expectations created by a plan, the fiduciary is made accountable not only to the plan itself, but to the individual members of the plan it harms. It is illogical to suggest that ERISA cannot provide redress to individuals for injuries resulting from these breaches.

IV. A PROPOSAL FOR AMENDMENT OF § 502(a)(3)

When an individual participant lacks the ability to bring suit against a fiduciary whose actions have cost that participant valuable benefits or coverage, ERISA fails in its efforts to better protect the interests of plan participants and beneficiaries and maintain the security of the plan. An individual participant or beneficiary must be empowered to bring suit on his or her own behalf, not only as a representative of the plan. Moreover, ERISA must be construed to provide an appropriate range of remedies - equitable and legal - if it is to properly address the pre-*Varity* remedial void and post-*Varity* confusion over the scope of § 502(a)(3) relief.

There are a number of ways this can be accomplished. First, Congress must amend ERISA § 502(a)(3) to clarify and codify the holding in *Varity Corp. v. Howe*. In the event of a fiduciary breach, the amendment should explicitly provide for the grant of an award that will return the participant to the position he or she occupied prior to the breach, even if this requires an extracontractual remedy. Where fiduciary fraud can be attributed to the breach, § 502(a)(3) should be amended to permit punitive damages.

Second, Congress should codify a standard of review for actions under § 502(a)(3). A suit for benefits under this section should not be viewed as an appeal from a fiduciary's adverse determination, but as an original proceeding entitled to de novo review.²¹² A lesser standard may appear to condone fiduciary malfeasance which costs participants precious benefits and to neglect conflicts of interest that might lead plan administrators to deny claims improperly.

CONCLUSION

Since the Supreme Court's 1985 decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, most plan participants covered by ERISA have only prevailed in suits on behalf of the plan; they could not recover individually.²¹³ In 1993, *Mertens v. Hewitt Associates* held that a plaintiff who sues for breach of fiduciary

"[i]f there's a theme to the legal positions that we're taking, ERISA is not—contrary to what some advocates are saying—and shouldn't be, some magic wand employers can wave to avoid accountability . . . [i]f employers tell employees they have a benefit, they ought to be held to it." *Id.*

212. On de novo review, a court hears the matter anew; as a court of original and not appellate jurisdiction. BLACK'S LAW DICTIONARY, *supra* note 6, at 721 (citing *Collier & Wallis v. Astor*, 70 P.2d 171, 173 (Cal. 1937)).

213. 473 U.S. 134 (1985).

duty could not recover extracontractual damages under ERISA § 502(a)(3).²¹⁴ It left unresolved, however, the issue of whether a plaintiff could obtain equitable relief for a breach of fiduciary duty under § 502(a)(3).²¹⁵ Then, the Sixth and District of Columbia Circuits recognized a right to individual recovery in *Warren v. Society National Bank*²¹⁶ and *Eddy v. Colonial Life Insurance Co.*,²¹⁷ respectively. The Supreme Court of the United States finally picked up on this trend in *Varity Corp. v. Howe*.²¹⁸ *Varity* "gave new teeth to the Federal law" by acknowledging the obvious discontinuity in protections afforded individual participants.²¹⁹

Although *Varity* emphatically establishes the importance of protecting individual participants' rights, it leaves many wondering what will happen in the wake of subsequent interpretations of the case. Some feel that the United States Supreme Court has unnecessarily toyed with a fairly straightforward section of ERISA and confused the standards that govern employer communications.²²⁰ Opponents of *Varity* observe that such an interpretation will obligate employers to alter the way in which they transmit benefit information to employees,²²¹ increase administrative costs to the employer and discourage employers from instituting benefit and pension plans.²²² They warn that "the courts should give greater credence to the practical effects of their decisions, past administrative enforcement, accepted business practices, and the need to establish a clear framework."²²³ How practical, however, is a remedial statute that does not provide adequate safeguards for the individuals it was enacted to protect?²²⁴ This reluctance to

214. 508 U.S. 248 (1993).

215. *Id.*

216. 905 F.2d 975, 982 (6th Cir. 1990).

217. 919 F.2d 747 (D.C. Cir. 1990).

218. 116 S. Ct. 1065, 1068 (1996).

219. Linda Greenhouse, *Legacy of a Term - A Special Report; In Supreme Court's Decisions, a Clear Voice, and a Murmur*, N.Y. TIMES, July 3, 1996, at A1.

220. Ronald E. Richman & Morton I. Lorge, *ERISA: Fear and Loathing*, THE METRO. CORP. COUNS., July 1996, at 12.

221. *Id.*; See also David B. Brandolph, *Impact of Court's Varity Ruling Considered by ERISA Practitioners*, 23 Pens. & Ben. Rep. (BNA) No. 14, at 891 (Apr. 1, 1996) (stating that "plan sponsors may find themselves liable for giving wrong answers to participants while attempting to explain complicated plan provisions . . . employers will ultimately fail in their efforts to control such communications and the result will be more litigation against them.").

222. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989).

223. Brandolph, *supra* note 223, at 891.

224. *Employment; Misrepresentation Claims - State Law Claims - ERISA Preemption*, MASS. LAW. WKLY., May 6, 1996, at 7. One court commented that it found "added impetus for applying the [Varity] exception because of the nature of the case ERISA is a remedial statute designed to fashion anodynes that protect the interests of plan participants and beneficiaries . . . Courts should not hasten to employ technical rules of pleading and practice to

burden employers with additional obligations and liabilities contradicts Congress' intention to protect plan participants and beneficiaries from fiduciary malfeasance.²²⁵ In the instant case, a gap in the ERISA scheme leaves individual participants and beneficiaries bereft of relief if their rights are compromised.

While permitting individuals to sue for extracontractual relief may open the door to more litigation,²²⁶ it is hardly a reason to quell individual rights to extracontractual remedies where they are called for to make a participant whole. Congress now needs to amend ERISA to reflect the need for greater protection and to prevent further misinterpretation of § 502(a)(3).

defeat that goal." *Id.*

225. Zanglein, *supra* note 204, at 9.

226. Some practitioners believe that by permitting individual participants to bring actions for equitable relief, the court expanded the scope of claims that can potentially confront plan fiduciaries. Lindo & Stong, *supra* note 157, at 1453. As a result these practitioners assume increased fiduciary litigation is inevitable. *Id.*