COMMENT

A Path of No Return: Employer Overpayments into Employee Benefit Plans

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The author notes that the courts are divided over whether an employer is entitled to sue to recover overpayments made to ERISA trust funds. Although he maintains that policy considerations favor permitting such actions, he concludes that employers may not bring such actions under ERISA or under the LMRA. The author argues that employers cannot maintain a restitution action under ERISA because they lack standing and are not accorded a right of action. He also argues that recovery is unavailable under the LMRA because trustees are not parties to the collective bargaining agreement, and accordingly cannot breach the agreement for purposes of section 301 jurisdiction by refusing to return an overpayment.

I
INTRODUCTION

A. Overview

Over the years employee benefits have assumed a greater prominence in the world of employee compensation and labor relations. Recognizing the increased importance of employee benefit plans and the

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1. Section 3(3) of ERISA, 29 U.S.C. § 1002(3) (1982), defines employee benefit plans as follows: "The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Sections 3(1) and (2) of ERISA, 29 U.S.C. § 1002(1) and (2) (1982), define employee welfare benefit plans and employee pension benefit plans as follows:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits . . . or (B) any benefit described in section 302(c) of the Labor Management Relations Act of 1947 [29 U.S.C. § 186(c) (1982)] (other than pensions on retirement or death, and insurance to provide such pensions).
value of ensuring conscientious management and equitable administration of employee benefit plans, Congress enacted the Employee Retirement Income Security Act of 1974\(^2\) ("ERISA") and amended ERISA with the Multi-Employer Pension Plan Amendments Act of 1980\(^3\) ("MEPPA").

Presently ERISA\(^4\) dominates the law of employee benefits. The Act governs employee benefit plans and preempts all state laws which "relate" to employee benefit plans.\(^5\)

Perhaps due in part to the favorable climate ERISA created with respect to employee benefit plans, employee benefit plans have prospered since 1974.\(^6\) At present, over 56 million employees, both in the public and the private sectors, are covered by the more than 820,000 employee benefit plans governed by ERISA.\(^7\)

Given the number of plans, the multitude of employees and the staggering financial obligations, a large number of employers inevitably overpay or underpay the trusts.\(^8\) ERISA establishes the ability of plan trustees and beneficiaries to compel employers to fulfill funding obliga-

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement.

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.


4. Unless otherwise qualified, "ERISA" refers to ERISA as modified by MEPPA.

5. ERISA 514(a), 29 U.S.C. § 1144(a) (1982), provides:

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a) (1982)] and not exempt under section 4(b) [29 U.S.C. § 1003(b) (1982)].


7. EBRI, ISSUE BRIEF No. 34, supra at 3.

8. The term "overpayment" here refers to a payment or portions of a payment made by an
Whether employers are able to recover trust fund overpayments made to employee benefit plans where the plan trustees deny the existence of an overpayment or refuse to return an admitted overpayment is left ambiguous in the Act and unresolved in the case law. This comment focuses on whether employers are authorized to file a civil action to recover overpayments, and, if so, when such recoveries are permitted.

Recently the law relating to the recovery of overpayments has been in flux. Prior to enactment of ERISA, the laws of some states provided employers a means to recover overpayments. With the enactment of ERISA, however, state law was preempted. This forced employers to rely on ERISA to facilitate recoveries of overpayments. Initially, employers succeeded in recovering overpayments because most courts concluded that section 403(c)(2)(A) of ERISA provided employers with a right of action against plans for restitution. Some of the more recent and better reasoned cases have refused to read section 403(c)(2)(A) as granting employers a right of action.

Without an express right of action for the return of overpayments, employers will attempt to protect themselves through contractual provisions. Any provision in a collective bargaining agreement or an agreement of trust which requires the return of overpayments probably is unenforceable under either ERISA or the Labor Management Relations Act (LMRA). At present, the courts are split over whether an employer to an employee benefit plan which exceeds the amount the employer is obligated to pay pursuant to an enforceable contract.

No survey has been conducted to ascertain the frequency with which employers fail to meet funding obligations or overpay the funds. Though no such survey has been conducted, the abundance of cases in this area indicates that underpayments and overpayments frequently occur.

ERISA § 502, 29 U.S.C. § 1132(a)(3) (1982), provides:

A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

In addition, MEPPA § 306(a), 29 U.S.C. § 1145 (1982), provides:

Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.


See infra note 37.

See supra note 5.


See infra note 48.

See, e.g., infra note 57.

ployer has standing to assert a claim under ERISA. Even if an employer does have standing, it appears that employers lack a private right of action to enjoin violations of fiduciary duty. The employer’s prospects of recovery under the LMRA are equally dismal. An employer might argue that trustees who breach an agreement of trust by failing to return an overpayment violate the LMRA, giving rise to a claim for relief. Such a claim must fail. The LMRA authorizes suits between labor organizations and employers. Because an employee benefit plan is not a labor organization, the federal courts lack subject matter jurisdiction to hear such a claim.  

If state law is preempted by ERISA and ERISA fails to provide employers with a private right of action to recover overpayments, a serious problem is created. Aside from the inequities in denying employers a means to recover overpayments, such a result undermines the very policies ERISA was designed to promote. In part, ERISA was enacted to create an environment favorable to the growth and maintenance of employee benefit plans. The Act was promulgated to reduce plan terminations, and to stabilize the funding levels and the financial integrity of plans. Depriving employers of a means to recover overpayments provides them with an incentive not to participate in employee benefit plans. In addition, to protect their assets from permanent alienation, employers will be inclined to refuse to contribute to plans any time they question their obligations under the collective bargaining agreements or disagree with the amount of contributions due. Ultimately the number of employers participating in employee benefit plans could decrease, the regularity and level of contributions drop, and the frequency of delinquent contributions and litigation rise.

These potential results of a policy disallowing the employer to bring civil actions to recover overpayments are inherently undesirable and contrary to the express objectives of ERISA. A statutory right of action or a stratagem which employers could use to recover some or all overpayments would ultimately benefit employers and plan beneficiaries and would facilitate the policy aims of Congress. Unfortunately, it appears that no right of action is available to employers and no stratagem can be used to safely recover overpayments. This situation puts the employer in  

17. See infra note 85.
19. The likelihood that an employer will refrain from making a contribution where the employer questions the amount due was reduced with the enactment of MEPPA, which requires an employer who has underpaid a trust plan to pay the delinquency, interest, and the plan’s attorney’s fees. 29 U.S.C. § 1132(g)(2) (1982). Nonetheless, an employer is still able to forestall making contributions without becoming liable for the fund’s attorney’s fees by settling the claim before litigation is commenced or trial is concluded.
an unenviable position; it can only recover an overpayment if the trustees admit that an overpayment exists and choose to return it.

B. How Overpayments Occur

Before examining the law governing the restitution of overpayments, it is necessary to understand how employee benefit plans are created, how contributions are made and how overpayments occur.

An employer’s obligation to contribute to a plan can be created in a number of ways. A single employer trust plan can be created by an employer’s unilateral action,\textsuperscript{20} as part of a collective bargaining agreement, or through an independent agreement between the union and the employer.\textsuperscript{21} Multi-employer plans\textsuperscript{22} can be created through collective bargaining agreements or other labor-management contracts, but not unilaterally. The plan must be established as a trust with the trustees appointed in equal numbers by the union and employer.\textsuperscript{23} Most employers that participate in multi-employer funds were not involved in the establishment of the plan but joined a pre-existing plan by way of collective bargaining agreements with a local union. Single employer and multi-employer plans can be either defined contribution plans\textsuperscript{24} or defined benefit plans.\textsuperscript{25} The method of funding can have a substantial impact on how plan contribution levels are set and how overpayments occur.

In a defined contribution plan the beneficiaries are not guaranteed a set benefit. Instead, the employer promises to make a pre-determined contribution to the plan for each qualified employee. The trustees are responsible for applying and investing the funds to maximize the coverage and benefits available to the beneficiaries.

A defined benefit plan operates in a different manner; the beneficiaries are guaranteed a set benefit. The employer must provide the plan with funds sufficient to guarantee each beneficiary the amount and type

\textsuperscript{20} In such an instance, the plan would either be administered by the employer or trustees appointed by an employer. See ERISA §§ 3(16), 402(e), 29 U.S.C. §§ 1002(16), 1103 (1982). Though the employer’s representative or trustees would hold a fiduciary position with respect to the plan beneficiaries, it is probable that most overpayments would be returned unless a strong reason militated against such a return.

\textsuperscript{21} Section 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B) (1982), provides that such a plan must be in the form of a trust and requires that the union and employer each appoint an equal number of trustees.

\textsuperscript{22} ERISA § 3(37)(A), 29 U.S.C. § 1002(37)(A) (1982) defines a multi-employer plan as follows:

The term “multiemployer plan” means a plan—
(i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary may prescribe by regulation.


\textsuperscript{24} ERISA § 3(34), 29 U.S.C. § 1002(34) (1982).

\textsuperscript{25} ERISA § 3(35), 29 U.S.C. § 1002(35) (1982).
of benefits set forth in the collective bargaining agreement. The benefits may include life insurance, health insurance and annuities of guaranteed sums. Because the costs of providing benefits is dependent upon unpredictable factors, the employer's funding obligations vary over time. Each year the trustees actuarily calculate the amount the employer must contribute to provide the plan beneficiaries with the promised benefits. This actuarial determination defines the employer's funding obligation.

Because of the differences in their structure and operation, overpayments in the two types of plans arise from different sources. Employer error is the primary cause of overpayments to defined contribution plans, while trustee error is the most frequent cause of overpayments to defined benefit plans.

In a defined contribution plan employers generally calculate the amount due the trust by following a formula outlined in the trust agreement. For instance, the formula might require that fifty cents be contributed for each hour worked by a covered employee. The employer determines the amount due by totalling the number of hours worked by covered employees and multiplying this sum by fifty cents. Because employers are responsible for calculating the amount due the trust, any resulting overpayments are generated by the employer. Though the formulas do not require complex calculations, overpayments do occur. They result from a variety of circumstances including: contributions made pursuant to an improperly executed, unenforceable collective bargaining agreement; contributions made in accordance with an expired collective bargaining agreement although the new collective bargaining agreement requires no contributions; contributions made by a successor employer who is not bound by previous collective bargaining agreements; contributions made pursuant to an expired collective bargaining agreement; contributions mistakenly calculated on the basis of all compensable hours, including vacation, holiday and sick pay, rather than on hours worked; contributions for employees who are no longer in the bargaining unit; contributions for uncovered employees; contribu-

tions on behalf of ineligible partners;\textsuperscript{33} contributions on behalf of ineligible sole proprietors;\textsuperscript{34} and unrequired contributions due to other circumstances.\textsuperscript{35} If these overpayments occur in connection with a defined contribution plan, the employer, who calculates the amount due, is primarily responsible for the overpayment.

Overpayments to defined benefit plans occur in a slightly different fashion. The same type of mistakes which can produce overpayments to defined contribution plans can create overpayments to defined benefit funds, but the source of the mistakes is different. Because the trustees have greater knowledge of the funding necessary to provide the promised benefits, the trustees calculate the amount the employer must contribute. Consequently, trustee error is a frequent cause of overpayments to defined benefit funds.\textsuperscript{36}

The degree by which a benefit plan is enriched, if at all, by an overpayment varies from plan to plan. For example, if a plan provides for pensions by amassing assets which produce income or can be liquidated as pension needs arise, an overpayment generally enriches the fund. The overpayment allows the fund to obtain additional assets. However, an overpayment to a medical benefit plan may not enrich the plan. For instance, an overpayment resulting from a mistaken assumption that certain employees are covered may be converted into insurance for the non-covered employees. It is unlikely that the insurer will refund payments used to purchase insurance policies which the insurer was prepared to honor, or actually did honor. In no real sense is the trust fund enriched by exercising control over policies benefiting "non-covered" employees.

The equities and policies favoring the return of particular types of overpayments depend on the cause of the overpayment and the enrich-

\textsuperscript{33} Martin v. Hamil, 608 F.2d 725 (7th Cir. 1979).

\textsuperscript{36} Naturally, if the overpayment results from misinformation provided by the employer and reasonably relied on by the trustees, the employer would have caused the overpayment.
PENSION PLAN OVERPAYMENT

ment of the fund by the overpayment. The equities strongly favor the return of an overpayment which enriches a trust fund and is caused by a mistake attributable to the trustees. When the employer makes a mistake which does not enrich the fund, policy concerns militate against return of the overpayment. Finally, when the trustees make a mistake which causes an overpayment that does not enrich the fund, the policies of making the innocent employer whole and insuring that adequate reserves are held in trust for the beneficiaries fall into tension. Given the many types of overpayments, any system which provides for the return of overpayments should retain the flexibility to make relief dependent on the equities surrounding the overpayment. How these concerns should be incorporated into judicial decisions is discussed later.

C. The Preemption of State Restitution Law

Prior to the enactment of ERISA, state law governed much of pension law, and employers were often able to recover overpayments. ERISA's preemption clause, section 514, eliminates the employer's ability to rely on state law for recovery of overpayments. The language of section 514 indicates that state law cannot be invoked to support the return of an overpayment:

Except as provided in subsection (b) of this section, the provisions of this Title and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under 4(b) [29 U.S.C. § 1003(b)].

The literal language of section 514 strongly suggests that state law cannot be invoked to support the return of an overpayment. Shaw v. Delta Air Lines, Inc. supports this conclusion. In Shaw, the employer failed to comply with a New York Human Rights Law which required employers to provide certain benefits to employees unable to work because of non-occupational injuries, illnesses, or conditions, including pregnancy. Delta, which did not provide disability benefits for its pregnant employees, brought a declaratory relief action requesting the court declare that ERISA preempted the New York statute. In agreeing with the plaintiff, the Supreme Court expounded on the "relates to" phrase as follows:

37. Hardy v. National Kinney of Cal. (I), 565 F. Supp. 1027, 1030 (N.D. Cal. 1983) (employer's claim to recover overpayments made prior to the effective date stated a claim under state law); Central States Pension Fund v. Wholesale Produce Supply Co., 478 F. Supp. 884, 887 (D. Minn.), aff'd, 611 F.2d 694 (8th Cir. 1979) (Minnesota law required return of overpayments made to employee benefit plans prior to the effective date of ERISA); Bacon v. Wong, 445 F. Supp. 1189, 1194 (N.D. Cal. 1978) (California law required return of overpayments made prior to the effective date of ERISA).


The breadth of section 514(a)’s pre-emptive reach is apparent from that section’s language. A law “relates to” an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.40

The Court concluded that the New York laws requiring employers to pay specific benefits related to benefit plans and, therefore, were preempted.41

It is difficult to conceive of a matter which relates more directly to employee benefit plans than the ability of contributing employers to recover overpayments from the trust corpus. Not only would a restitution action “relate to” an employee benefit plan, but it would directly affect the plan. Because ERISA does not expressly exclude state restitution actions from is preemption clause, such actions are barred by federal law.42 Courts which have addressed this question have concluded that state claims are preempted.43

Given the inability of an employer to recover overpayments through state law, it becomes particularly important to determine whether federal law provides employers with an equivalent remedy.

II

DOES ERISA SECTION 403(c) PROVIDE EMPLOYERS WITH A PRIVATE RIGHT OF ACTION FOR THE RESTITUTION OF OVERPAYMENTS?

For the first seven years after the enactment of ERISA, the federal courts invariably concluded that section 403(c)(2)(A) of ERISA44 provided employers a right of action by which overpayments could be recovered. Recently some courts have questioned this reading.45 This second line of cases expresses the better view.

When courts have allowed employers to recover overpayments

40. Id. at 2899-2900.
41. Id. at 2900.
42. The fact that the body of state law which would enable an employer to recover an overpayment falls under a broad rubric, such as restitution, and is not per se concerned with the law of pensions, will not save the state action from preemption. See Shaw, 103 S. Ct. at 2900; Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524-25. In addition, a showing that ERISA did not direct itself to the issue of restitution actions will not save state laws which permit restitution actions. Shaw, 103 S. Ct. at 2900-01; Alessi, 451 U.S. at 524-25.
made to employee benefit plans they have relied on section 403(c) of ERISA. The subsection begins with a general prohibition:

(1) . . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan . . . .

This prohibition is followed by an exception which has been argued to be a private right of action:

(2)(A) In the case of a contribution . . .

(i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.46

Numerous factors, including the language of the section, its placement within ERISA and its legislative history suggest that Congress never intended section 403(c)(2)(A) to serve as a right of action. If Congress had intended to create a right of action, it would not have made recovery contingent on the determination of the plan administrator. Likewise, Congress would have placed this section in the portion of ERISA concerning "Enforcement" rather than "Fiduciary Responsibility." Finally, had Congress intended to create a private right of action, one would expect to find legislative history to this effect.47

Despite these obstacles, courts have interpreted section 403(c)(2)(A) to provide employers with a private right of action for restitution.48 Un fortunately few of these courts support their conclusions in any detail. An exception is E.M. Trucks, Inc. v. Central States Pension Plan.49

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47. See infra notes 61-63 and accompanying text.
48. Teamsters Local 639 v. Cassidy Trucking, Inc., 646 F.2d 865 (4th Cir. 1981) (recovery of overpayments permitted if circumstances, such as equities, dictate); Central States Pension Fund v. Wholesale Produce Supply Co., 611 F.2d 694 (8th Cir. 1979) (implying that recovery of overpayments falling within the section is automatic); Martin v. Hamil, 608 F.2d 725 (7th Cir. 1979) (overpayments can be recovered only if made due to mistake of fact); Hardy v. National Kinney of Cal. (I), 565 F. Supp. 1027 (N.D. Cal. 1983) (overpayments recoverable only if falling within § 403(c) and followed by a determination of overpayment by the plan administrator); Ethridge v. Masonry Contractors, 536 F. Supp. 365 (N.D. Ga. 1982) (recovery of overpayments falling within § 403(c) automatic); Fuller Cinder Co. v. Central States Pension Fund, [Dec. 1981-Aug. 1983 New Developments] PENS. PLAN GUIDE (CCH) § 23,593 O (E.D. Mich. 1982) (recovery allowed only if refusal to return is arbitrary and capricious); E.M. Trucks, Inc. v. Central States Pension Plan, 517 F. Supp. 1122 (D. Minn. 1981) (refund of mistaken payments permitted if equity so favors); Service Employees Int'l Union v. Baucom Janitorial Serv., Inc., 504 F. Supp. 197 (D.D.C. 1980) (defendant entitled to offset excess payments resulting from a mistake of fact); see also Audit Serv., Inc. v. Clark Bros. Contractors, 645 P.2d 953 (Mont. 1982) (equitable considerations required before refund permitted).
In *E.M. Trucks*, the employer mistakenly overpaid a trust fund and brought an action to recover the excess contributions. The trust moved to dismiss the action on the ground that section 403(c)(2)(A) did not provide employers with a private right of action. The trust maintained that section 403(c)(2)(A) simply gave trustees the discretion to return overpayments. After engaging in a three-part analysis, the court found in favor of the plaintiff. First, the court observed that a restitution action in favor of employers was consistent with 29 U.S.C. § 1001(a) which states that "it is . . . desirable . . . that minimum standards be provided assuring the equitable character of . . . plans . . . ." Second, the court noted, "if—as defendant contends—§ 1103(c)(2)(A) were totally 'permissive,' trustees of funds usually would have no incentive to voluntarily return mistakenly paid contributions, thereby effectively rendering 29 U.S.C. § 1103(c)(2)(A) a nullity." And finally, the court reinforced its conclusion by observing that the legislative history is not inconsistent with its holding because "it [the legislative history] does not address the question of whether return [of overpayments] is required when equity so demands.”

The court’s construction of section 403 lacks substance. The court’s reference to the Congressional policy statement that ERISA was enacted to promote the equitable character of benefit plans is of no assistance in statutory construction. It is axiomatic that statutes are enacted to promote the general good and equity. This is true whether Congress announces such an intent or not. The fact that Congress announces such an intent in its Congressional findings does not authorize a court to create a right of action any time it feels equity would be well served.

The only meritorious argument in *E.M. Trucks* is that section 403(c)(2)(A) will be a nullity if it is not interpreted to provide a right of action. The court reasoned that since Congress only enacts meaningful statutes, and since the only meaningful construction of section 403(c)(2)(A) is that it creates a right of action, it must create a right of action. In reaching this conclusion, the court rejected the contention that section 403(c)(2)(A) was intended to give trustees the discretion to return overpayments—discretion they would have lacked in the absence of that subsection. The court assumed that if trustees were not threatened by potential lawsuits they would not return an employer’s overpayments. However, an examination of the case law shows the court’s assumption to be questionable; trustees have been willing to return overpayments to employers when no right of action was available.

50. *Id.* at 1124-25.
51. *Id.* at 1125.
Because trustees are sometimes willing to return overpayments, section 403(c)(2)(A) is of value even if it does not provide employers with a right of action. Without section 403(c)(2)(A), the only provision relating to the return of overpayments would be section 403(c)(1)—a prohibition against allowing any trust assets to inure to the benefit of an employer. Absent section 403(c)(2)(A), the return of overpayments would be prohibited. Consequently, section 403(c)(2)(A) is vitally important to maintaining a system which allows for the voluntary return of overpayments.

Despite the weakness of the *E.M. Trucks* analysis, its approach is followed in many cases, including two recent Ninth Circuit cases: *Chase v. Teamsters Pension Trust Fund* and *Award Service, Inc. v. Northern California Retail Clerks.* Unfortunately, these cases fail to independently examine section 403 and simply conclude, as a matter of precedent, that section 403 creates a private right of action.

However, in 1982 a district court reached the opposite conclusion in *Crown Cork & Seal Co. v. Teamsters Pension Fund,* a case which has generated a significant following. In *Crown Cork,* the trustees refused the employer's request to return overpayments that had been discovered in an audit. Subsequently, the employer brought an action for a declaratory judgment as to its right to recover the overpayments. The court concluded that section 403(c)(2)(A) does not give employers a right of action. The court reasoned that:

An examination of the statutory language shows that such a cause of action is not expressly granted. Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1) (1976) clearly restricts the categories of individuals empowered to bring a civil action to four groups of persons, none of which include employers. . . . Thus I find by the express language of this section that plaintiff is not entitled to assert a cause of action for restitution.

Although the court based its holding solely on the fact that section 502(a) does not expressly authorize employers to bring an ERISA ac-

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53. Moreover, absent § 403(c)(2)(A) the return of an overpayment would violate ERISA and render the responsible trustee(s) personally liable for the amount returned. Cf. Moore v. Adkins, 576 P.2d 245 (Kan. Ct. App. 1978) (trustee held personally liable to the trust for wrongfully returning a contribution to an employer).

54. *See supra* notes 49-52 and accompanying text.

55. 753 F.2d 744 (9th Cir. 1985).


58. *See,* e.g., *Hardy v. National Kinney of Cal. (II)*, 571 F. Supp. 1214 (N.D. Cal. 1983); R.V. Cloud v. Teamsters Pension Fund, 566 F. Supp. 1426 (N.D. Cal. 1983); Wall Plastering v. Trowel Trades Employees H & W Fund, 98 Lab. Cas. (CCH) ¶ 10,407 (S.D. Fla. 1983); Teamsters Local 348 H & W Fund v. Kohn Beverage, 749 F.2d 315 (9th Cir. 1984); *but see* *Award Serv., Inc. v. Pension Fund,* 763 F.2d 1066 (9th Cir. 1985).

tion, several other factors require the conclusion that section 403(c)(2)(A) does not provide a private right of action. These factors can be classified into four categories: the location of section 403(c) within ERISA as a whole; the specific language of section 403(c); the contrast between the language of section 403 and the language of other sections which create private rights of action; and the legislative history of section 403(c).

First, section 403 of ERISA is found in Part 4 of Subtitle V, entitled “Fiduciary Responsibility.” Had Congress intended section 403 to serve as a private right of action, Congress would have placed the section in Part 5, Subtitle V, entitled “Enforcement and Administration.” This section contains a plethora of private rights of action. The placement of section 403 in Part 4 suggests that the section concerns circumstances under which trustees may voluntarily return overpayments without violating their fiduciary responsibilities.

Second, the language of section 403 is entirely consistent with this reading. Any attempt to read section 403 as a private right of action runs into a confounding obstacle—recovery of an overpayment is prohibited unless the plan administrator first determines that an overpayment occurred:

In case of a contribution . . . made by an employer to a multiemployer plan by mistake of fact or law . . . paragraph (1) shall not prohibit the return of the contribution or payment to the employer within six months after the plan administrator determines that the contribution was made by such a mistake. 61

Such language gives a plan administrator the means to foil any restitution action an employer brings—the administrator need only refrain from making a determination. Rather than assuming that Congress used language so inartfully and created such a glaring loophole, it is best to assume Congress knew the import of the language it employed. If section 403 informs trustees as to the circumstances under which a return of an alleged overpayment is permitted, the language concerning the plan administrator makes perfect sense. Before plan trustees transfer trust assets to an employer that claims to have made an overpayment, the plan administrator must determine that an overpayment has actually occurred.

Third, section 403(c)(2)(A) bears no similarity to other sections which are universally read as creating private rights of action. For instance, section 502(a), entitled “Civil Enforcement,” contains the subtitle, “Persons empowered to bring civil action.” The text of this subsection, which begins “A civil action may be brought . . . ,” leaves no

60. See supra note 9.
doubt as to the intention underlying the provision. Other striking examples exist. Section 403(c)(2)(A) contains nothing similar.

Lastly, the legislative history of section 403 forecloses any claim that Congress intended section 403 to serve as a private right of action. Nowhere in the thousands of pages of Congressional reports on ERISA, in any precursor to section 403, nor in any comments concerning section 403 is there an inkling that Congress intended section 403(c) to function as a private right of action.

The inclusion of section 403 in the part concerning "Fiduciary Responsibility," the language of section 403, and the legislative history of ERISA make it abundantly clear that Congress never intended section 403 to provide a private right of action.

III
MAY AN EMPLOYER SET OFF AN OVERPAYMENT BY DELIBERATELY UNDERPAYING THE TRUST IN AN AMOUNT EQUIVALENT TO THE PAST OVERPAYMENT?

If ERISA does not authorize employers to recover overpayments

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62. Any ambiguity that may have been present in § 403(c) was removed with the enactment of MEPPA. MEPPA expressly authorizes an employer to contest an assessment of withdrawal liability by commencing an arbitration proceeding against the trustees. See MEPPA § 104(2), 29 U.S.C. § 1401 (1982). An employer is also able to enforce an arbitration award in federal court, id., or bring an action for other appropriate relief under MEPPA. MEPPA § 104(2)(a); 29 U.S.C. § 1451(a) (1982) provides:

(a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381-1433] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

Given that Congress has proved that it is able to clearly draft a private right of action to benefit employers, one must conclude that if Congress had intended § 403 to serve as a private right of action that the intent would have been more clearly expressed.

through legal action, employers will seek alternative means to effect recoveries. For example, an employer might deliberately underpay the trust fund in an amount equivalent to the past claimed overpayment. If the trustees then sued the employer for the recent delinquency, the employer would assert the past overpayment as a defense. Three courts have allowed such set-offs, but all relied on the improper interpretation of section 403(c)(2)(A) as providing employers with a private right of action. Because these cases rely on an erroneous assumption, the permissibility of set-offs under ERISA must be determined by examining the underlying policies and content of ERISA, not precedent. An examination of ERISA suggests that set-offs were not contemplated by Congress and should be disallowed.

The legislative history is entirely silent on whether to allow set-offs. Because Congress chose not to provide employers with a right of action for restitution, a more equitable way to facilitate the return of overpayments than use of set-offs, it appears that Congress did not intend and would not approve of a set-off recovery device.

The inequity of allowing a set-off, but denying employers a private right of action, rests in the disparate treatment of employers currently contributing to employee benefit plans as compared with those no longer contributing to such plans. Employers may have ceased making contributions for a number of reasons, including bankruptcy, voluntary cessation of business, a decision not to contribute to any employee benefit plan, or a decision to contribute to a different plan. Employers no longer contributing to benefit plans are unable to recover overpayments through set-offs. If Congress had intended to permit the recovery of overpayments over the objections of the trustees, Congress would have treated all employers equally. Because allowing employers to set-off overpayments would produce disparate treatment of employers for no logical reason, courts should interpret ERISA so as to deny set-off recoveries.

Use of a set-off mechanism would also place greater financial and managerial strains on a trust than would use of a direct right of action. When an employer can recover an overpayment only by a direct right of action, the burden of proceeding is placed on the employer. But where the employer can recover the overpayment by use of a set-off, the burden of proceeding is on the trust. In the event of a small set-off the costs of bringing the action may well exceed the amount to be recovered. The trustee may ultimately conclude that it is better to absorb the loss than to initiate an action to recover the loss, even if the employer is not legally

entitled to the set-off. In addition, when the employer uses a set-off, it immediately recoups the overpayment or, if no overpayment occurred, the "set-off" produces a delinquency. When the employer must bring legal action to recover the alleged overpayment, the trust retains the disputed assets while the suit is pending.\(^{65}\)

In sum, allowing set-offs, but not a right of restitution, provides certain employers with an adequate remedy, but deprives other equally deserving employers of all relief. The use of set-offs also produces greater collection burdens on trust funds and could serve to reduce the total assets available to trusts. Given the deleterious effects of a set-off mechanism, it is doubtful that Congress intended to allow such a device.

**IV**

**Does ERISA Authorize an Employer to Bring Suit Against Trustees for Failing to Return an Overpayment Where the Trust Instrument Requires Such a Return?**

**A. Generally**

If future courts disallow recovery of employer overpayments through set-offs or actions based on section 403(c)(2)(A), employers will inevitably attempt to protect themselves through contractual provisions. Such a provision would require a trustee to return an overpayment under specifically identified circumstances set forth in the trust agreement.\(^{66}\) Failure of a trustee to abide by the trust terms would constitute a breach of the trustee's fiduciary duties and would be a violation of ERISA.\(^{67}\) Such a failure could potentially give rise to an action under ERISA or under the LMRA.\(^{68}\) This section discusses actions under ERISA. An employer's suit against trustees who violate the trust agreement by failing to return an overpayment would not be based on a private right of action for the recovery of overpayments predicated on section 403(c)(2)(A), but would be based, instead, on a general implied right of action allowing employers to sue any party who violates ERISA so as to injure the employer. Although a 1982 Ninth Circuit case, *Fentron Industries v. Na-*

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65. Though it is true that employers, even if given a right of restitution, could always attempt a set-off, many would prefer legal action so as to avoid an automatic assessment of attorneys' fees (payable to trust funds which successfully recover delinquent contributions from employers) and possible punitive damages (assessable for deliberately underpaying trust funds).

66. For example, the trust could specify that all overpayments which fall within the requirements of § 403(c)(2)(A) must be returned, provided that the trust has not detrimentally changed its financial position due to the overpayment.


\[
\D \text{ ... a fiduciary shall discharge his duties} \ldots
\]

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.\ldots

68. See infra Part V.
tional Shopmen Pension Fund,\textsuperscript{69} and two other cases\textsuperscript{70} have sanctioned such suits, the more persuasive cases have reached the opposite conclusion.\textsuperscript{71}

The controversy centers around ERISA sections 502(a)\textsuperscript{72} and section 502(e).\textsuperscript{73} These subsections provide that certain parties may bring suit to enforce ERISA and that the federal courts have jurisdiction over these claims. Because section 502(a) neither authorizes employers to bring suit under ERISA, nor precludes such suits, the propriety of such suits is left open. The same ambiguity is found in section 502(e), which neither provides the federal courts with subject matter jurisdiction over all claims brought under ERISA nor restricts federal court jurisdiction to those claims specified in subsection 502(a). Whether employers have a private right of action to enforce the provisions of ERISA, and whether the federal judiciary has subject matter jurisdiction to hear such claims, must be decided by reference to the law of subject matter jurisdiction, standing and implied rights of action. Like section 403 of ERISA, these doctrines fail to create a private right of action for employers.

The first case to grapple with these issues was \textit{Fentron Industries}. In \textit{Fentron}, an employer sought declaratory and injunctive relief against the trustees' refusal to give Fentron employees credit for past service in the employ of Fentron unless the Fentron employees quit Fentron and began work at a competitor of Fentron who was still contributing to the plan. The employer asserted that this policy violated the trustees' fiduciary duties. The trial court, rejecting the trustees' argument that employers lack standing to bring suit under ERISA, entered partial summary judgment

\begin{itemize}
\item \textsuperscript{69} 674 F.2d 1300 (9th Cir. 1982).
\item \textsuperscript{71} \textit{See infra} notes 82-84 and accompanying text.
\item \textsuperscript{72} Section 502(a), 29 U.S.C. § 1132(a) (1982) reads:
\begin{itemize}
\item (a) Persons empowered to bring a civil action.
\item A civil action may be brought—
\begin{itemize}
\item (1) by a participant or beneficiary—
\begin{itemize}
\item (A) for the relief provided for in subsection (c) of this section, or
\item (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
\end{itemize}
\item (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
\item (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief . . .
\end{itemize}
\end{itemize}
\item \textsuperscript{73} Section 502(e), 29 U.S.C. § 1132(e) (1982) reads:
\textbf{Jurisdiction.} (1) Except for actions under (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.
\end{itemize}
in favor of the employer. 74

Following the Supreme Court in Association of Data Processing Service Organizations v. Camp, 75 the Fentron court affirmed the district court's judgment. The Ninth Circuit explained:

In order to have standing to sue for violations of a federal statute, a plaintiff must: (1) suffer an injury in fact; (2) fall arguably within the zone of interests protected by the statute allegedly violated; and (3) show that the statute itself does not preclude the suit. 76

The court explained that these factors had been satisfied, providing the employer with standing and permitting the lower court to grant relief to the employer. 77 Although the result in Fentron was arguably due to an improper application of the Data Processing test, a more fundamental question is whether the Data Processing test applies at all. It is axiomatic that establishing standing under the Data Processing test does not endow a plaintiff with a private right of action. 78 The existence of standing and a private right of action are independent.

The Supreme Court has repeatedly noted that a finding of standing is no substitute for a finding that the plaintiff has a private right of action. The concepts are distinct. 79 The failure of Fentron to consider whether

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74. The question of whether an employer can obtain relief is best analyzed in terms of subject matter jurisdiction and implied rights of action rather than standing. Fentron frames the issue as one of standing and standing terminology crops up in many of the cases in this area. It is true that, where the federal court lacks subject matter jurisdiction to hear a particular claim the plaintiff lacks standing to bring the suit, but addressing the question as one of standing merely confuses the issue. The use of the term standing in such a situation is confusing in that it is unclear whether the court refers to Article III standing, prudential standing, a lack of standing resulting from a lack of jurisdiction or a lack of standing resulting from a failure to state a right of action over which the federal courts have subject matter jurisdiction.


76. Fentron, 674 F.2d at 1304.

77. The court noted, "[W]e do not believe that Congress, in enacting ERISA, intended to prohibit employers from suing to enforce its provisions." Id. at 1305. The court also explained that the "failure of the fund to pay pension benefits [to Fentron's employees] will impair Fentron's relationship with the union" and "cause Fentron specific and personal" injury. Id. at 1304.

The court also concluded that the third factor had been satisfied:

Fentron's alleged injuries also fall within the zone of interests that Congress intended to protect when it enacted ERISA. Section 2(a) of ERISA, 29 U.S.C. § 1001(a), recognizes that pension plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that therefore it was desirable to enact ERISA. The threat to Fentron's relationship with the Union, and to the continued employment by Fentron of its employees, falls within the range of concerns.

Id. at 1305.

78. For instance, in Davis v. Passman, 442 U.S. 228 (1978), the Court noted that the plaintiff clearly had standing to bring the suit, but that standing was not enough without a cause of action. The Court in Davis, however, did find a cause of action as well as standing.

79. "[J]urisdiction is a question of whether a federal court has the power under the Constitution or laws of the United States to hear a case; standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Article III case or controversy, or at least to overcome prudential limitations on federal court jurisdiction; cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court..." Id. at 239 n.18 (citations omitted).
the plaintiff had stated a right of action renders the opinion suspect and
vulnerable, though it has been followed in the Ninth Circuit.\footnote{80}

Not surprisingly, \textit{Fentron} has met with significant criticism as noted
before.\footnote{81} Unfortunately, the critical decisions focus on whether the
federal courts have jurisdiction to hear a claim brought by an employer
rather than on whether an employer can state a claim for relief.\footnote{82}

An early case to criticize \textit{Fentron} and hold that an employer lacks
standing to sue under \textit{ERISA} was \textit{Tuvia Convalescent Center v. National
Union of Hospital and Health Care Employees}.\footnote{83} In \textit{Tuvia}
the employer bought an action against the trustees seeking damages for injuries
allegedly caused by various breaches of their fiduciary duties. The trustees
successfully moved to dismiss the action for want of subject matter juris-
diction. The Second Circuit affirmed and offered the following analysis
and criticism of \textit{Fentron}:

In \textit{Fentron}, the Ninth Circuit found that where an employer alleged
sufficient injuries to sue under \textit{ERISA}, and the alleged injuries fell within

\footnote{80} Of the cases that follow \textit{Fentron} the most significant is \textit{Award Serv., Inc. v. Northern Cal.
Retail Clerks}, 763 F.2d 1066 (9th Cir. 1985), \textit{mot. to recall mandate denied}, No. 83-2625 (9th Cir.

\textit{In Award Service} plaintiff employer brought suit to recover alleged overpayments made to an
employee benefit plan. The district court found no jurisdictional basis within \textit{ERISA} for such an
action and dismissed plaintiff's claim. Plaintiff appealed and the Ninth Circuit found jurisdiction
present:

The district court correctly observed that section 502 of \textit{ERISA} does not explicitly author-
zize a civil action by an employer to enforce the provisions of \textit{ERISA}. Nevertheless, we
have held that an employer may bring an action under \textit{ERISA} to enforce its terms where
the employer alleges specific and personal injury. The requirement of a specific and per-
sonal injury is clearly met here where the employer alleges that it has mistakenly contrib-
uted more than $167,000 in contributions which it was not obligated to make.

\textit{Id. at} 1067-68 (citations omitted). \textit{See also} \textit{Chase v. Teamsters Pension Trust Fund}, 753 F.2d 744,
748 (9th Cir. 1985) (although distinguishing \textit{Fentron}). \textit{Associated Builders & Contractors v.
Carpenters Trust Fund}, 700 F.2d 1269, 1278 (9th Cir.), \textit{cert. denied}, 104 S. Ct. 94 (1983) (though
employers may sue to enforce the provisions of \textit{ERISA} if the employer has sustained specific and
personal injury, an employer who signs a collective bargaining agreement which permits trustees
to disburse trust fund assets to pay union dues, assertedly in violation of \textsection{403(c)}, has failed to allege
the specific and personal injury necessary to enjoin the practice allegedly violative of \textit{ERISA}); Team-
PLAN GUIDE} (CCH) \textsection{23,655 K} (W.D. Wash. 1984) (in an order denying defendant's motion to
dismiss employer's claim for lack of standing, the court, following \textit{Fentron}, held that an employer
may bring an action against trustees who allegedly breached their fiduciary duties so as to needlessly
deplete the fund reserves, thereby increasing the employer's withdrawal liability). \textit{UFCW Fund v.
national Bhd. of Painters}, 724 F.2d 100 (10th Cir. 1983) (declining to consider whether an employer
\textit{qua} employer may bring an action to enforce a return of contributions mistakenly made).

\textit{81. See infra} notes 83-85 and accompanying text.

\textit{82. Whether or not \textit{ERISA} implicitly provides the federal courts with jurisdiction to hear
claims brought by employers, the federal courts have jurisdiction under \textsection{28 U.S.C. \textsection{1331}
which allows federal courts to hear claims for relief arising from any federal statute. Consequently,
the real obstacle to employers obtaining judicial relief for breaches of \textit{ERISA} rests with the ability of
an employer to state a claim for relief.

\textit{83. 717 F.2d 726 (2d Cir. 1983).}
the interests that Congress intended to protect when it enacted ERISA, the specific language of section 1132 and the legislative history of the Act did not "suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers." As we recently expressed in Pressroom Unions-Printer's League Income Security Fund v. Continental Assurance, 700 F.2d 889, 892 (2d Cir.), cert. denied, 104 S. Ct. 148 (1983):

In our view, the Fentron court applied an inappropriate standard in resolving this issue. We focus not on whether the legislative history reveals that Congress intended to prevent actions by employers or other parties, but instead on whether there is any indication that the legislature intended to grant subject matter jurisdiction over suits by employers, funds, or other parties not listed in §1132(e)(1).

(Emphasis in original). In Pressroom, we observed that "ERISA's legislative history is silent on both these questions... and we therefore conclude that absent such expression §1132(e)(1) should be viewed as an exclusive jurisdictional grant."

Accordingly, we hold that Tuvia, as an employer, did not have standing to bring an action under section 1132 of ERISA.84

A number of cases have followed these holdings.85 Unfortunately, the Pressroom and Tuvia line of decision is largely unsatisfying. Although ERISA does not contain an explicit grant of federal jurisdiction over claims brought by employers, such a grant is unnecessary. A claim brought against a defendant for breach of a duty imposed by ERISA qualifies for subject matter jurisdiction under section 1331 as a fed-

84. Id. at 730.
85. Great Lakes Steel v. Deggendorf, 716 F.2d 1101 (6th Cir. 1983) (appellate court held that §502(e)(1) does not confer jurisdiction over an action brought by an employer in its capacity as an employer, but an employer who serves as a fiduciary is permitted to bring suit as a fiduciary); Blue Cross & Blue Shield of Kansas City v. Bell, 596 F. Supp. 1053, 1057-58 (D. Kan. 1984) (followed Pressroom rather than Fentron in disallowing insurer standing to sue); Local 807 Labor-Man. Pension v. Owens Trucking, 585 F. Supp. 616 (E.D.N.Y. 1984) (disallowing former employer standing to sue); District 65, UAW v. Harper & Row Publishers, 576 F. Supp. 1468 (S.D.N.Y. 1983) (Union had no standing to bring an action against an employer for violating terms of ERISA because ERISA did not provide the union with a personal right of action. The court, following Pressroom, added that assuming District 65 had standing to bring the action, the court probably lacked subject matter jurisdiction); Amalgamated Industrial Union, Local 44-A Health & Welfare Fund v. Webb, 562 F. Supp. 185 (N.D. Ill. 1983) (court following Pressroom dismissed for lack of subject matter jurisdiction complaint filed by employee benefit plan against fiduciaries for allegedly receiving excess compensation for their services); R.M. Bowler Contract Hauling Co. v. Central States Pension Fund, 547 F. Supp. 783 (S.D. Ill. 1982) (action brought by employer against employee benefit plan for breach of fiduciary duty dismissed because employer lacks standing to sue). Contra Award Serv., Inc. v. Northern Cal. Retail Clerks, 101 Lab. Cas. (CCH) ¶ 10,026 (N.D. Cal. 1983) (employer action to recover overpayment made to employee benefit plan dismissed for lack of subject matter jurisdiction), rev'd, 763 F.2d 1066 (9th Cir. 1985), mot. to recall mandate denied, No. 83-2625 (9th Cir. Oct. 24, 1985), petition for cert. filed, 54 U.S.L.W. 3285 (U.S. Oct. 10, 1985) (No. 85-625) (holding that plaintiff had standing to bring the action pursuant to Fentron, and holding alternatively that federal question jurisdiction was present pursuant to §1331).
eral question.\footnote{Federal courts have jurisdiction to decide whether the employer has a cause of action. Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 310 (E.D. Pa. 1982), aff'd 720 F.2d 661 (3d Cir. 1983); see also Award Serv., Inc., v. Northern Cal. Retail Clerks, 763 F.2d 1066 (9th Cir. 1985), mot. to recall mandate denied, No. 83-2625 (9th Cir. Oct. 24, 1985), petition for cert. filed, 54 U.S.L.W. 3285 (U.S. Oct. 10, 1985) (No. 85-625).} There is no test for federal question jurisdiction that is uniformly applied by the courts. However, Professor Paul Mishkin proposes that original federal question jurisdiction should be based on "a substantial claim founded 'directly' upon federal law."\footnote{MISHKIN, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157 (1953). See also, C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3562 at 46. See generally Bell v. Hood, 327 U.S. 678 (1945).} Had the plaintiffs in \textit{Pressroom} and \textit{Tuvia} and their progeny asserted jurisdiction under section 1331, it is likely that jurisdiction would have been found.

But the question here is whether federal question jurisdiction enables the district courts to entertain an employer's claim to recover an overpayment where the trustees' refusal to return it violates the trust instrument. The answer is almost certainly yes. First, such an action would be premised on the fiduciary duty to follow the trust instrument imposed by ERISA section 404. Second, if employers are to be allowed restitution, the degree of restitution would probably be limited by federal statute—section 403(c)(2)(A).\footnote{Arguably any action by an employer to recover an overpayment would be restricted to those overpayments which qualify under § 403(c), 29 U.S.C. § 1103(c)(2)(A) (1982). Section 403(c)(2)(A) does not permit the return of intentional overpayments. Subsection (ii) requires that the plan administrator make a determination as to the cause of the overpayment before a return is permitted. Finally the time during which a return is allowed is also restricted by subsection (ii). A provision requiring a trustee to return an overpayment not within § 403(c) would constitute a breach of the trustee's fiduciary duty and hence would be unenforceable under § 404.} Finally, a court in shaping or denying a remedy could choose to draw on federal policy concerns underlying ERISA. This blend of statutes and policy concerns forms the basis for an employer's claim. As a matter of definition, such a claim would be founded directly upon federal law. The cases which have addressed this issue are in agreement.\footnote{Award Serv., Inc., v. Northern Cal. Retail Clerks, 763 F.2d 1066 (9th Cir. 1985), mot. to recall mandate denied, No. 83-2625 (9th Cir. Oct. 24, 1985), petition for cert. filed, 54 U.S.L.W. 3285 (U.S. Oct. 10, 1985) (No. 85-625); Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307 (E.D. Pa. 1982), aff'd, 720 F.2d 661 (3d Cir. 1983).} Given that federal courts have jurisdiction over an employer's restitution claim, the relevant question is whether an employer has a private right of action for restitution. The answer appears to be "no."

\section*{B. Implied Rights of Action}

As explained previously,\footnote{See supra notes 87-89 and accompanying text.} even if the \textit{Pressroom} line of cases is incorrect and the federal courts have subject matter jurisdiction to hear claims brought by employers, an employer must still state a right of ac-
tation in order to obtain judicial relief. Because ERISA does not provide employers with an express right of action by which overpayments can be recovered, the ability of employers to obtain relief under ERISA depends on whether the nature, purpose and legislative history of ERISA is sufficient to imply a private right of action. The factors to be considered in deciding whether an implied right of action exists were set forth in Cort v. Ash:

In determining whether a private right of action is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy to plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

The central focus of this inquiry "must ultimately be . . . whether Congress intended to create the private remedy asserted" by the plaintiff. A court conducting such an inquiry should adopt the assumption that "[I]n the absence of strong indicia of a contrary congressional intent . . . [a court is] compelled to conclude that Congress provided precisely the remedies it considered appropriate." The Supreme Court appears especially reluctant to find implied rights of action in connection with ERISA. In Massachusetts Mutual Life Insurance Co. v. Russell, a plan beneficiary brought suit against a plan fiduciary, seeking extra-contractual and punitive damages for all-

91. See Davis v. Passman, 442 U.S. 228, 239 n.18 (1978) (the existence of a right of action is a separate determination from determinations of standing and jurisdiction); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1969) (tests used to determine the existence of standing do not go to the merits of a claim, whether or not a claim for relief has been stated); Chicago v. Atchison T. & S.F. R.R., 357 U.S. 77, 83-84 (1958) (standing is not dependent upon whether a plaintiff will eventually prevail on the merits); Bell v. Hood, 327 U.S. 678, 682 (1945) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").


95. 105 S. Ct. 3085 (1985). The Ninth Circuit, however, has recently found that Massachusetts Mutual does not disturb that circuit's finding of an implied right of action for employer overpayments, contending that the two situations are "quite different." Award Serv., Inc. v. Northern Cal. Retail Clerks, 763 F.2d 1066 (9th Cir. 1985), mot. to recall mandate denied, No. 83-2625 (9th Cir. Oct. 24, 1985), petition for cert. filed, 54 U.S.L.W. 3285 (U.S. Oct. 10, 1985) (No. 85-625). The Ninth Circuit contended that: 1) "There was no complex and interrelated system of express remedies in ERISA that [relates to an employer's claim to overpayments]," and that 2) the provision for voluntary return of overpayments in § 403(c)(2)(A)(ii) of ERISA "was clearly enacted for the benefit
leged fiduciary violations. The beneficiary's claim was dismissed on the ground that section 409 of ERISA did not authorize an award of these kinds of damages.

The Supreme Court concluded that section 409 did not authorize the relief sought by the beneficiaries. The Court then inquired whether an implied right of action was present. The Court declined to "imply" such a right.

The six carefully-integrated enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which in turn is part of a "comprehensive and reticulated statute."97

We are reluctant to "fine tune" an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in Transamerica Mortgage Advisors, Inc. v. Lewis (TAMA): "[W]here a statute expressly provides a particular remedy or remedies a court must be chary of reading others into it. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedure for enforcement."98

In Franchise Tax Board v. Construction Laborers Vacation Trust,99 the Supreme Court again revealed its reluctance to tamper with the remedial scheme of ERISA. In Construction Laborers the Court held that California could not bring an action for declaratory judgment because such an action did not arise under ERISA. California had placed a number of tax liens on assets held by the Laborers Vacation Trust for the benefit of members who had fallen behind in their taxes. The state sought a declaratory judgment action in state court to determine whether of employers who mistakenly made payments to a fund, but there existed no express remedy to effectuate that congressional purpose." Award Service, No. 83-2625 at 2-3.

96. The beneficiary claimed that the plan fiduciary had processed her disability claim in bad faith, contending that § 409 of ERISA specifically authorized an award of extra-contractual and punitive damages under the circumstances.

97. Russell, 105 S. Ct. at 3093 (emphasis in original) (citations omitted).

98. Id. (citations omitted) (quoting Transamerica, 444 U.S. 11, 19 (1979); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 97 (1981)). A four-justice concurrence took exception with the majority's conclusion that ERISA's "carefully integrated" remedial scheme precluded the judiciary from creating remedial measures not explicitly authorized in ERISA. Id. at 3094. The concurrence explained that ERISA engrafted trust law and other bodies of law in which it was understood that the judiciary was given discretion in creating remedies. Moreover, the Court reasoned § 409 expressly authorized the courts to formulate "other appropriate equitable relief...to redress" ERISA violations. Id. at 3097. Accordingly, the concurrence concluded that the creation of new remedies would be appropriate under the proper circumstances.

the trustees were permitted to honor the liens. The trust removed the action to federal court. The Supreme Court held that the case was not within the removal jurisdiction created by 28 U.S.C. § 1441. In reaching this conclusion, the Court rejected the trust’s argument that removal was appropriate because the state’s action for a declaratory judgment arose under ERISA. Though ERISA section 502(a)(3) provides that a participant, beneficiary, fiduciary or the Secretary of Labor may bring an action for a declaratory judgment, the Court refused to expand this section to include the State of California. The Court explained:

Under § 502(a)(3)(B) of ERISA, the participant, beneficiary, or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court to determine whether the plan’s trustees may comply with a state levy on funds held in trust. Nevertheless, [the trust’s] argument that [the state’s] second cause of action arises under ERISA fails for the second reason given above. ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party “does not arise under” that provision.

The rationale expressed in Construction Laborers was adopted in Hardy v. National Kinney of California (II), which held that under ERISA an employer cannot recover mistakenly made overpayments. In Hardy, the trustees of a pension fund brought suit to recover delinquent contributions. The employer counterclaimed seeking reimbursement of past overpayments pursuant to section 403(c)(2)(A) of ERISA. The trustees successfully moved to dismiss the counterclaim. In support of the dismissal the district court offered two justifications. First, the court, following Crown Cork, concluded that section 403 was not intended to confer a private right of action. Second, the court stated:

The Supreme Court’s recent decision in Franchise Tax Board of California v. Construction Laborers Vacation Trust, lends further support to this conclusion. A reading of § 1103(c)(2)(A)(ii) requiring a determination by the plan administrator upon an employer’s demand would logically imply that the section creates a cause of action for an employer making such a demand. However, in Franchise Tax Board, the Supreme Court plainly indicated that § 1132 exhaustively enumerated those parties empowered to bring civil actions under the Employee Retirement Income Security Act (ERISA). Section 1132 does not provide that an employer may bring action under ERISA.

Both Russell and Construction Laborers indicate that the Supreme

101. Construction Laborers, 103 S. Ct. at 2855.
103. Id. at 1215 (citations omitted).
Court would decline to recognize an implied right of action for employers to recover overpayments. In *Russell*, the Court revealed a reluctance to tamper with the remedial scheme of ERISA. In *Construction Laborers*, the Court refused to expand the parties entitled to sue under ERISA. Accordingly, the Court would likely refuse to expand the remedial scheme of ERISA to include restitution actions by employers.

C. Suits by Employers Claiming Fiduciary or Beneficiary Status

Under section 1132 a fiduciary or beneficiary may enjoin any violation of the Act or obtain other appropriate equitable relief. It is possible that an employer, seeking to use the remedial structure of ERISA, might claim to be a beneficiary or fiduciary. However, such a suit is likely to fail.

Pension Fund

The court in *R.M. Bowler Contract Hauling Co. v. Central States Pension Fund* explained why an employer cannot be properly classified as a beneficiary.104 In *R.M. Bowler* an employer brought suit against the employees' benefit plan. The Fund moved to dismiss the action for lack of subject matter jurisdiction. The employer, arguing that it was a beneficiary, asserted that subject matter jurisdiction was present. The employer reasoned that it was a beneficiary because it "received" a benefit from the provisions in the pension fund which provided for the processing and settlement of controversies between the Fund and the employers.105 The court rejected the argument. First, the court noted that "[t]he term 'beneficiary' is defined in 29 U.S.C. § 1002(8) to be 'a person designated by a participant or the terms of an employee benefit plan who is or may become entitled to a benefit thereunder.' "106 The court then concluded:

While plaintiff's argument is creative, it is unpersuasive. Although the word "benefit" is not specifically defined in ERISA, it is used, most notably in 29 U.S.C. § 7002(1), to mean traditional fringe benefits to which employees are entitled, such as medical disability, unemployment and vacation benefits.107

On this basis the court concluded that jurisdiction was lacking.

An employer can make a more credible claim to being a fiduciary. However, its status as a fiduciary is still not sufficient to create a private right of action for the recovery of overpayments. Employers can certainly be fiduciaries to trust funds.108 But an employer who is a fiduciary to a plan in one respect is not a fiduciary to the plan in all respects. This

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104. 547 F. Supp. 783, 784 (S.D. Ill. 1982).
105. *Id.* at 784.
106. *Id.*
107. *Id.*
108. Great Lakes Steel v. Deggendorf, 716 F.2d 1101 (6th Cir. 1983); United States Steel Corp.
concept is well established with respect to fiduciary liability.109

This principle was adopted in Brandt v. Grounds,110 where certain trustees brought suit against a bank for breach of fiduciary duty. The bank was a fiduciary because it provided the trust with financial advice. The trustees asserted that certain checks were wrongfully issued against the trust’s accounts. The trial court held that the trustees failed to state a claim under ERISA because there was no connection between the bank’s service as a fiduciary financial adviser and the injury which resulted from the wrongful issuance of the checks. The trustees appealed, arguing that the bank’s service as a fiduciary made it liable as a fiduciary for all its actions regarding the trust. The court rejected this argument, explaining that the defendant could be held liable only for those actions in which it was acting as a fiduciary.111

These same principles are applicable to an employer who seeks to invoke the remedial provisions of ERISA by donning the garb of a fiduciary. Under ERISA112 and the Code of Federal Regulations,113 an employer, who happens to be a fiduciary, is not a fiduciary for all actions. When the employer does not act as a fiduciary, the employer cannot be held liable under ERISA as a fiduciary. Similarly, an employer, who happens to be a fiduciary for certain purposes, can bring suit under ERISA only if the suit is in furtherance of the employer’s fiduciary duties.

Thus, in a suit to recover an overpayment, an employer must establish that it brought the suit as a fiduciary. A fiduciary and a beneficiary cannot transact business unless the beneficiary approves the transactions.114 For this reason an employer cannot maintain a restitution action to benefit itself under the pretense that it is acting as a fiduciary.

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109. The Code of Federal Regulations provides:

A fiduciary with respect to the plan who is not a named fiduciary is a fiduciary only to the extent that he or she performs one or more of the functions described in section 3(21)(A) of the Act. The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan.

110. 687 F.2d 895 (7th Cir. 1982).
111. Id. at 898.
112. ERISA § 409(a); 29 U.S.C. § 1109(a) (1982).
113. See supra note 109.
114. RESTATEMENT (SECOND) OF TRUSTS § 170(2) comment w at 364, 373 (1957).
DOES THE LABOR MANAGEMENT RELATIONS ACT AUTHORIZE AN EMPLOYER TO BRING SUIT AGAINST TRUSTEES FOR FAILING TO RETURN AN OVERPAYMENT WHEN THE TRUST INSTRUMENT REQUIRES SUCH A RETURN?

Although ERISA probably does not provide employers with a private right of action to recover overpayments, and it preempts state restitution actions, employers might still be able to recover overpayments if authorized by a federal law other than ERISA. Section 514(d) of ERISA provides:

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law. 115

The federal statute likely to be of most assistance to employers is LMRA section 301(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 116

If section 301 authorizes employers to sue trustees who fail to abide by trust agreements, employers could assure themselves of restitution by executing trust agreements which require the return of overpayments. If the trustees fail to abide by the trust terms, the employer would obtain relief by way of a suit predicated on section 301. Such an action would be premised on two Supreme Court decisions, Retail Clerks International Association v. Lion Dry Goods 117 and Smith v. Evening News Association. 118

In Lion Dry Goods, the unions and employers entered into two strike settlement contracts which could not properly be classified as collective bargaining agreements. 119 Each contract contained an arbitration clause. The employers failed to abide by the arbitration award and the unions sought enforcement of the award under section 301. The employers successfully moved to dismiss the action for want of subject matter jurisdic-

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117. 369 U.S. 17 (1962) (holding that the protection of § 301(a) extends to collective bargaining agreements and other labor-management contracts).
118. 371 U.S. 195 (1962) (holding that § 301(a) suits are not restricted to actions between employers and labor organizations).
119. The agreements contained, inter alia, "the unions’ acknowledgement that they were not then entitled to recognition as exclusive representatives, and would not seek such recognition unless and until certified as so entitled in single store unit elections conducted by the NLRB . . . ." 369 U.S. at 20-21.
tion and the circuit court affirmed the dismissal. The Sixth Circuit explained:

The contract here involved is not a collective bargaining agreement between an employer and a labor organization representing its employees. We think that the trial court was correct in reaching the conclusion that the collective bargaining contracts between a union and an employer are the only contracts intended to be actionable in a United States District Court under the provisions of Section 301(a).\(^{120}\)

The Supreme Court reversed, adopting a common sense reading of the statute. The Court first pointed out that:

[T]he section says "contracts" though Congress knew well the phrase "collective bargaining contracts" . . . . Had Congress contemplated a restrictive differentiation, we may assume that it would not have eschewed "collective bargaining contracts" unwittingly.\(^{121}\)

The Court went on to explain that enforcement of contracts between labor organizations and employers, though not collective bargaining agreements, is consistent with federal labor law policy:

If this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult.\(^{122}\)

The Court summarized its holding as follows:

It is enough that this [the contract in question] is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within § 301(a). "[F]ederal courts should enforce these agreements on behalf of or against labor organizations and . . . industrial peace can be best obtained only in that way."\(^{123}\)

Inasmuch as employee benefits constitute a subject of mandatory bargaining,\(^{124}\) agreements concerning employee benefit plans sufficiently promote labor peace to qualify for section 301 protection.

\textit{Lion Dry Goods} establishes the foundational principle that section 301 covers any agreement between an employer and labor organization which is significant to the maintenance of labor peace. A second princi-
ple is required, however, if an employer is to obtain relief by way of section 301: "301" suits are not restricted to actions between employers and labor organizations. This principle was supplied in Smith v. Evening News Association.125

In Evening News, an employee brought a "301" action in state court against his employer for allegedly discriminating against employees in breach of the collective bargaining agreement. The action was dismissed for want of subject matter jurisdiction. The lower court concluded that the employee's action could not be brought under section 301, because the action alleged an unfair labor practice and accordingly was within the jurisdiction of the National Labor Relations Board. The employee appealed to the Supreme Court arguing that section 301 provided the district court with jurisdiction to entertain the action. The employer argued, inter alia, that the lower court had properly held that it was without jurisdiction. The employer maintained that, although section 301 gave the federal courts subject matter jurisdiction over actions between employers and labor organizations, this jurisdiction did not extend to actions between employers and employees. The Supreme Court disagreed and remanded the case to the trial court. The Court observed that "[n]either the language and structure of § 301 nor its legislative history requires or persuasively supports this [the employer's] restrictive interpretation."126

Evening News, when combined with Lion Dry Goods, provides the basis for an argument that trustees who fail to comply with trust agreements are subject to "301" actions. The first case to reach this conclusion and express its reasoning in any detail was Alvares v. Erickson.127

In Alvares, the members of a local union which had withdrawn from a statewide bargaining unit brought an action against the trustees. The members sought to have a portion of the uncommitted accumulated trust reserves transferred to a second trust, now benefiting the members. The trial court dismissed the action for want of subject matter jurisdiction. The Ninth Circuit reversed and remanded.

To support its conclusion that subject matter jurisdiction existed, the court first noted that the trust agreement had been incorporated by reference into the collective bargaining agreement. The trust agreement also referred to the collective bargaining agreement: "This agreement is and shall be deemed a supplement to the Labor-Management Agreement ... [and] ... [a]ny violation of this agreement ... shall be deemed a

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126. Id. at 200-01.
127. 514 F.2d 156 (9th Cir. 1975), cert. denied, 423 U.S. 874 (1975). See also Austin v. Calhoon, 360 F. Supp. 515 (S.D.N.Y. 1973) (trustees can be subjected to a "301" action if they have given rise to the action by violating the trust plan); Hayes v. Morse, 347 F. Supp. 1081 (E.D. Mo. 1972) (assuming jurisdiction over an action by employees against trustee without discussion).
violation of the Labor-Management Agreement."

Having laid this foundation, the appellate court went through a three part analysis. First, the court found that a contract between an employer and a labor organization was present. Second, the court found that the contract had possibly been breached by the trustees. Third, the court concluded that suits between employees and trustees could be entertained under section 301.

The court held the trust agreement constituted a contract for purposes of section 301:

Separate documents are frequently used to define the rights and obligations contemplated in a single conceptual contract. That the parties here intended the trust agreement to form “part and parcel” of the collective bargaining contract is evident. We therefore conclude that the word “contract” as it appears in § 301(a) encompasses the provisions of a welfare trust, such as this, established as a supplement to and referred to in a collective bargaining agreement. The two together are the “contract.”

The court ruled that the failure of the trustees to comply with the trust plan constituted a breach for purposes of section 301.

Having found a contract and a potential breach, the court addressed the trustees’ final argument that the members’ action failed “the ‘betweenness’ requirement of § 301 jurisdiction, because neither a labor union nor an employer is a party of this lawsuit.” The court, relying on Evening News, noted that the “betweenness” requirement mandated only that the contract be between a labor organization and an employer; the suit could involve other parties. Finally, the court concluded that, although the refusal of the trustees to transfer uncommitted reserves did not cause a severe threat to labor-management peace, it was sufficiently important to warrant section 301 jurisdiction.

The logic of Alvares could be invoked by an employer who seeks to recover an overpayment which trustees refuse to return, provided the trust plan requires the return. The argument would follow these lines: a

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128. Alvares, 514 F.2d at 161.
129. Id.
130. The court’s conclusion that the trust plan is part of the collective bargaining agreement and qualifies as a Labor-Management Agreement is sound. But whether trustees, non-signatories to the agreement, breach the contract by not complying with the terms of the trust plan is debatable and discussed later. The court does not seem to recognize that a failure of a trustee to comply with a trust agreement may be qualitatively different from the failure of the union or employer to comply with the same agreement. Not recognizing this potential distinction or not finding the distinction significant, the court offered no discussion on this point.
131. Id. at 162.
132. The court rejected a variant of the same argument, that Evening News “implies that either a union or an employer must be a party to the action if § 301 is to be invoked.” The court held that “such a requirement would be inconsistent with the court’s instruction in Smith that § 301(a) is not to be given a narrow reading.” Alvares, 514 F.2d at 162.
133. Alvares was essentially followed in Rehmar v. Smith, 555 F.2d 1362 (9th Cir. 1976), and followed in part by the Second Circuit in Whelan v. Colgan, 602 F.2d 1060 (2d Cir. 1979).
trust agreement, if incorporated into the collective bargaining agreement, constitutes a labor-management contract. The failure of the trustees to return an overpayment in accordance with the contract would constitute a breach of the contract.\textsuperscript{134} Finally, the dispute between the employer and the trustees would be sufficiently related to promoting labor peace to allow for "301" subject matter jurisdiction.\textsuperscript{135}

Unfortunately for employers this theory has a weak link. Section 301 requires a breach of contract before relief can be granted. It is questionable whether trustees, non-signatories to the labor-management contract, can breach that contract. Three cases have addressed this point, \textit{McCaffrey v. Rex Motor Transportation},\textsuperscript{136} \textit{Loss v. Blankenship},\textsuperscript{137} and \textit{Nedd v. United Mine Workers},\textsuperscript{138} the last offering the most detailed analysis.

In \textit{Nedd}, a beneficiary of a pension fund brought a number of actions against the trustees for failing to comply with the following trust provision: "The trustees of the Fund shall use due diligence and all rea-

\textsuperscript{134} Whether a non-signatory can breach a Labor-Management Agreement is discussed infra.

\textsuperscript{135} It is well established that employee benefits maintain a substantial place in labor-management negotiations. \textit{See supra} note 124. The ability of a trust to retain its assets and apply these assets for the benefit of its beneficiaries is of central concern to unions and the membership. The fact that a trust may have reserves depleted by return of overpayments is exacerbated by the fact that the employer can be seen to benefit at the expense of the employee. For these reasons, the enforcement of provisions concerning the return of overpayments are of sufficient import to qualify for LMRA jurisdiction.

\textsuperscript{136} In \textit{McCaffrey v. Rex Motor Transp.}, 672 F.2d 246 (1st Cir. 1982), defendant employer counterclaimed against an employee benefit plan seeking to set off overpayments against amounts due the trust. The trustees successfully moved to dismiss the counterclaim for lack of subject matter jurisdiction. The employer appealed arguing, \textit{inter alia}, that § 301(a) provided jurisdiction. Surprisingly, the circuit court rejected this argument on the ground that, except under unusual circumstances (not relevant to this discussion), only employers and labor organizations could be parties to "301" actions. \textit{Id.} at 249. The circuit court holding directly contradicts the Supreme Court's holding in \textit{Evening News} that "301" actions need not be limited to actions between employees and labor organizations. Nowhere in the \textit{McCaffrey} opinion does the court attempt to limit its opinion so as not to conflict with the higher authority. The court does not argue that non-signatories are appropriate plaintiffs, but not appropriate defendants. For these reasons, the \textit{McCaffrey} opinion is valueless. It is in conflict with the Supreme Court precedent and fails to distinguish itself from this precedent. In addition, the opinion offers no illumination on the question of whether a non-signatory to a Labor-Management Agreement can commit a breach so as to precipitate a "301" action.

\textsuperscript{137} \textit{Loss v. Blankenship}, 673 F.2d 942 (7th Cir. 1982) offers a better-reasoned opinion than \textit{McCaffrey}. In \textit{Loss} plaintiff employees brought a "301" action against an agent of an employer who had allegedly breached its collective bargaining agreement by hiring an agent to disrupt the union. Defendant successfully moved to dismiss for lack of subject matter jurisdiction and plaintiff appealed. Though the circuit court conceded that at times suits against non-signatories are appropriate, it added that such suits are only appropriate where the injured party is unable to obtain relief through an action against a signatory. The court concluded that because the employer would be liable for the alleged acts of its agent the plaintiffs could obtain relief from a signatory and an action against a non-signatory was inappropriate. Certainly the court reached the right result and its analysis with respect to actions against non-signatories touches on fundamental concerns. But again the court fails to ask whether a non-signatory can breach a Labor-Management Agreement so as to give rise to a "301" action.

reasonable means to collect and prevent delinquent obligations to the fund." The district court found subject matter jurisdiction lacking under section 301 and the Third Circuit summarized the trial court's reasoning as follows:

The district court points out that the trustees were not parties to the contract, and therefore undertook no duties under it. It urges, moreover, that the clause is merely a statement of the trustees' fiduciary duties, and does not render those duties contractual in nature.\footnote{139}

Although the appellate court conceded that the trustees were not parties to the contract and had allegedly breached a fiduciary duty as opposed to a contractual duty, it held that the trial court did have jurisdiction over the action brought against the trustees. To support its opinion, the court consciously combined two Supreme Court opinions. First, the court observed that under *Evening News* it is "settled law that employees, although not formal parties to a collective bargaining agreement, can bring a § 301 suit to enforce its terms."\footnote{140} The circuit court also cited *Chemical Workers v. Pittsburgh Glass*:

Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.\footnote{141}

From this foundation the court reached the following conclusion:

The federal common law of collective bargaining agreements, which grows out of 29 U.S.C. § 185(a), would permit pension trust fund beneficiaries to sue, derivatively, to enforce the mine operators' payment obligations when the trustees did not. It is but a small step further to suggest that the same federal common law of collective bargaining agreements permits a suit against the Fund Trustees, and the Union which allegedly acted in concert with them for the destruction of the value of the bargained-for and vested contract rights.\footnote{142}

The *Nedd* holding supports an employer action against trustees for failure to comply with the trust instrument. If employees who are not signatories to labor-management contracts have a private right of action under section 301 against trustees who fail to abide by the trust instrument, employers, who are signatories to the underlying contract, should also have a comparable right of action under section 301. Furthermore, the equities favoring suit by an employer at least equal the equities which justify suits by employees. Had the employees in *Nedd* been denied a right of action against the trustees, a similar suit could have been brought against the employer. But in the case of an overpayment, the only parties

\footnote{139} Id. at 197.

\footnote{140} Id.

\footnote{141} Id. (quoting *Chemical Workers*, 404 U.S. 157, 181 n.20 (1971)).

\footnote{142} *Nedd*, 556 F.2d at 197.
who can provide an employer with the desired relief (a return of the over-payment) are the trustees.

But the Nedd holding might not pave the way for section 301 actions by employers against trustees. The Nedd court justifies its novel holding by referring to the well-established doctrine that Congress, by enacting section 301, gave the federal courts the power to create a common law of labor-management contracts. This grant of authority, however, does not give a federal court the license to ignore the very parameters that exist in the grant of authority on which it relies. Section 301 gives the federal courts jurisdiction where there is a breach of labor-management contract. It is highly debatable, however, whether an agreement of trust constitutes such a contract.

Even if trust agreements constitute contracts, an action against trustees for "breach of contract" may not satisfy the jurisdictional requisites of section 301. For jurisdiction to be present under section 301, the contract which is breached must be between a labor organization and an employer. If a trust agreement is a contract, and the trustees are parties to that contract, it remains debatable as to whether the second contractual party is the employer (the trustor) or the trust beneficiaries. If the latter, subject matter jurisdiction is lacking. If the former (or both), jurisdiction would be absent unless trust funds are labor organizations.

A reading of the case law and the LMRA indicates that trustees and trust funds should not be classified as labor organizations. The LMRA defines a labor organization as follows:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Neither trustees nor trust funds "represent" employees in the manner intended by the Act. Likewise, employees do not "participate" in trust funds as contemplated by the Act. It is, therefore, questionable whether the Nedd holding is correct.

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144. Restatement (Second) of Trusts § 282(2) 922 n.64 (1957); 4A Corbin, Contracts § 799A (1950).
146. In unions, the typical labor organization, employees elect union officials, vote on union policy, direct union action and assume leadership positions within the union. Such participation is not possible in trust funds. Employees do not elect trustees. Employees do not direct the investment strategy of the fund. And the employees do not control managerial decisions such as the issuance or denial of disability benefits.
147. The Nedd court attempts to support its conclusions by noting that its holding goes "but a small step further" than past precedent and statutory interpretation. Nedd, 556 F.2d at 197. But if courts continuously take "small steps" away from the literal language of the statutes and the underlying policy concerns these guideposts will soon fade from sight altogether. Not only is this a dan-
An analogous issue was addressed in *NLRB v. Amax Coal Co.* In *Amax* the Supreme Court analyzed whether management-appointed trustees, for the purpose of the NLRA, could be classified as collective bargaining representatives. In concluding that welfare fund trustees were not bargaining representatives, the Court refined the meaning of collective bargaining and clarified the role of trustees. The views adopted by the Court in *Amax* suggest that an employee benefit plan is not a labor organization for the purpose of section 301 actions because such plans are not sufficiently involved in the representation of employee interests in collective bargaining. For the same reason, trustees of welfare funds cannot be classified as labor organizations.

In *Amax*, the employer, Amax, made contributions to a multi-employer pension fund on behalf of certain employees. Upon expiration of the collective bargaining agreement requiring contributions to the multi-employer fund, Amax proposed that its contributions be directed to a single-employer plan that it alone would fund. Amax believed that a single-employer fund would be advantageous because, as the only employer, it would have exclusive discretion to appoint one of the plan trustees. This discretion was lacking in the multi-employer plan because the member employers, by a majority vote, had already selected a trustee. To maintain the status quo, the union struck.

Due to the strike, Amax filed with the NLRB an unfair labor practice charge. The employer maintained that the strike violated section 8(b)(1)(B) of the NLRA, which prohibits interference by a union in an employer's selection of a bargaining representative. The employer asserted that, for purposes of the NLRA, management-appointed trustees served as collective bargaining representatives. Consequently, the union's effort to maintain the status quo, which would prevent Amax from appointing its own trustee, constituted interference.

The Supreme Court rejected Amax's arguments. The Court found the roles of trustee and representative mutually exclusive:

The language and legislative history of § 302(c)(5) and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. Thus, the statutes defining the

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duties of a management-appointed trustee make it virtually self-evident that welfare funds trustees are not "representatives for the purposes of collective bargaining or adjustment of grievances" . . . . 149

The Amax holding strongly suggests that a trust fund cannot be classified as a labor organization. At least one case, McCaffrey v. Rex Motor Transportation, 150 has reached this conclusion. Unfortunately the only justification the McCaffrey court offers for its holding is a simple citation to Amax. Nonetheless, an argument in support of the McCaffrey holding is easily formed. In Amax the Court clearly announced that the essential quality of a trustee is the trustee's allegiance to trust beneficiaries. This allegiance precludes the trustee from representing the party that appointed him. For these same reasons a trust fund cannot be considered a "labor organization." The fund exists and operates to benefit the plan beneficiaries. 151 The fund does not represent employees in any significant way. It does not negotiate working conditions, employment contracts, contribution levels or any other matter, nor does it represent individual employees in grievances. Any trust fund action which allegedly represents employee interests is merely coincidental; it primarily serves the interests of the plan beneficiaries. For these reasons the fund cannot properly be deemed a labor organization, 152 and an action brought against an employee benefit plan or its trustees cannot be predicated on section 301 of the LMRA.

150. 672 F.2d 246, 249 n.2 (Ist Cir. 1982).
151. As a group plan, beneficiaries rarely coincide with the employees currently in the bargaining unit. Beneficiaries may include retired employees, employees now working for a different employer or employees no longer in the bargaining unit due to a position change. Furthermore, for each employee participant, there can be one or more additional beneficiaries, including spouses, children and other individuals.
152. Though there is substantial evidence that welfare benefit plans and the trustees to such plans are not "labor organizations," a few contrary arguments can be made.

For an organization to be classified as a "labor organization," two requisites must be satisfied. First, employees must "participate" in the organization. See 29 U.S.C. § 152(5) (1982). Second, the organization must exist "for the purpose, in whole or part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Id.

The participation requisite is arguably satisfied because under ERISA an employee is a "participant" if the employer contributes money to a welfare fund on the employee's behalf. It is questionable, however, whether an employee that is a "participant" in a trust fund "participates" in the welfare organization as contemplated under the LMRA.

It can also be argued that the representation requisite is satisfied. Though the trustees do serve the trust, and the trust serves the beneficiaries, in a sense, the trust and trustees serve the employees. For instance, the trustees can sue the employer for delinquent contributions and withdrawal liability. Trustees can compromise these claims. Arguably, these matters involve the representation of employees in disputes involving "wages, rates of pay . . . or conditions of work." Any appeal this argument has, however, is severely undercut by the Supreme Court holding in Amax. See supra notes 148-51 and accompanying text.
CONCLUSION

The foregoing analysis illustrates that the current law probably precludes employers from effectively taking legal action to recover overpayments. Actions based on ERISA and the LMRA, and attempts to deliberately underpay a trust so as to set off overpayments, are all likely to fail or prove ineffective.

The impact that this legal predicament will have on employee benefit plans is unclear. No statistical information on the frequency of overpayments or on the frequency of their return is available. Despite the absence of this information, it is almost certain that the frequency with which overpayments are returned will decrease. The trustee's fiduciary obligation to the trust beneficiaries provides the trustee with a perspective hostile to the return of overpayments. Until 1983, the judiciary (and presumably trustees and legal counsel) were of the opinion that section 403(c) provided employers with a private right of action for recovery of overpayments. Confronted with a threat of litigation and a potentially useless expenditure of trust assets on attorney fees, trustees returned certain overpayments they presumably would not have returned had the threat of litigation not been present. Since 1983, some courts have declined to read section 403(c)(2)(A) as providing a private right of action. Certain recent cases have also held that employers lack standing to sue under ERISA. If these trends continue, employers will be forced to seek alternative theories of recovery, including actions premised on section 301 of the LMRA. But such actions are not likely to produce favorable results. As the recent cases barring recovery become more widely known, legal counsel will inform trustees contemplating the return of overpayments that they may have no obligation to return the overpayment and employers may find it difficult to compel a return. Counsel will also inform trustees that a wrongful return could expose them to personal liability. Unable to obtain judicial relief, an employer might attempt to set off an overpayment through a deliberate underpayment. But it is unlikely that such set-offs will be allowed. Furthermore, an unsuccessful set-off attempt will expose the employer to liability for delinquency, interest, attorney fees, and possibly punitive damages.

The inability of employers to recover overpayments could serve as an incentive for employers to withdraw from plans, reduce contribution levels and avoid creating new plans. It is ironic that ERISA, which was designed to promote fringe benefit plans and to benefit employees, should inadvertently dissuade employers from participating in these plans. It is unfortunate that ERISA, which was designed to prevent pension benefits from being lost due to mismanagement, unfair vesting rules, and other inequitable devices, should itself create inequities. It is strange indeed that ERISA should lay a path of no return, a path by which an employer
can be obligated to contribute to employee benefit plans but be effectively precluded from recovering any overpayment.

One can only hope that this inequitable arrangement does not produce significant deleterious effects. If the existing law proves sufficiently damaging, ERISA can easily be amended to allow employers to recover overpayments. For instance, section 502 can be amended to provide employers a private right of action to recover overpayments provided the trust has not detrimentally changed its financial position due to the overpayment. If such reliance has occurred the trust would be allowed to retain any portion of the overpayment necessary to compensate it for any proved reliance. This would protect all parties covered and promote the objectives underlying ERISA. The return of overpayments would be structured so that the financial position of the trust would be protected. Employers, though unable to recover all overpayments, could recover some overpayments. This would reduce the incentive employers have to reduce participation in employee benefit plans. Until such legislation is enacted there will exist a path of no return.

153. If a legislative scheme for the return of overpayments is carelessly drafted, trust funds and trust beneficiaries can be injured. It has been argued that a mechanism producing frequent returns of overpayments could render "actuarial projections . . . impossible since the value of the assets held by the plan would be subject to significant fluctuation due to refunds of employer contribution." Central States Pension Plan v. Wholesale Produce Supply Co., 478 F. Supp. 884, 887 (D. Minn.), aff'd, 611 F.2d 694 (8th Cir. 1979). Inaccurate projections could cause a fund to provide benefits beyond the plan's actual means or deprive current beneficiaries of benefits they deserve and the fund could afford. Moreover, a series of large returns could so severely deplete trust reserves that future beneficiaries would not receive their entitlements. These damages, however, can easily be avoided by limiting any restitutionary right of action. For instance, equitable considerations could limit the return of overpayments. Prior to any return, a court could be required to weigh various factors including whether the employer caused the overpayment and whether a return of the overpayment would jeopardize the fund's ability to meet its upcoming obligations. Additional protection could be insured by requiring a finding, based on clear and convincing evidence, that the fund would be able to meet its future obligations. Limiting the refund of overpayments to a short period of time, one or two years, would provide still greater protection.