Mertens v. Hewitt Associates, and the ERISA Liability of the Professional Service Provider

Andrew T. Kusner†

In Mertens v. Hewitt Associates, the United States Supreme Court held that money damages cannot be recovered as “appropriate equitable relief” under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) when the liability of professional service providers who are not fiduciaries under ERISA is in question. Nonetheless, the author maintains, Mertens is not the last word on ERISA liability of the professional providing services to ERISA plans. The 5-4 decision reflects a sharp split among members of the Court as to the appropriate construction to be given ERISA’s remedial provisions. In both the discussion of the money damages issue and the undecided issue of whether the “knowing participation” claim underlying Mertens is available at all, the Court was divided. The dissenting Justices held that the statute commands a broad construction consistent with its remedial purpose and its foundation in the common law of trusts. The majority, on the other hand, rejected any interpretation which lay outside the statute’s text. Mertens is important to the employee benefits practitioner, the author writes, not only because its holding reduces the risk that the professional will be subject to tenuous suits aimed primarily at the “deep pocket,” but also because it raises new questions in connection with the theories most favored by ERISA plaintiffs seeking to recover from independent service providers: the “knowing participation” cause of action and the claim that the service provider is liable as an ERISA fiduciary for plan losses.

I. INTRODUCTION .............................................. 274
   A. Functional Basis of ERISA Liability ................. 276
   B. “Knowing Participation” Theory Prior to Mertens .... 279
II. MERTENS V. HEWITT ASSOCIATES ..................... 281
   A. The ERISA Equitable Relief Equation: “Appropriate” =
      “Typical” .............................................. 282

† Andrew T. Kusner is a Consultant specializing in compliance matters with the Cleveland Office of The Wyatt Company, an international consulting firm that provides employee benefit, human resource, risk management, actuarial, compensation, and related consulting and recordkeeping services. Mr. Kusner received his Juris Doctor degree from Cleveland-Marshall College of Law in May 1994. The views expressed in this Article are those of the author and do not necessarily represent those of The Wyatt Company or any of its subsidiaries.

B. The Skirmish Before the "Battlefield": The Mertens Court and the "Knowing Participation" Cause of Action ................................................ 285

III. BEYOND THE "NARROW BATTLEFIELD": "KNOWING PARTICIPATION" LIABILITY AFTER MERTENS .................... 289

IV. FIDUCIARY LIABILITY OF SERVICE PROVIDERS AFTER MERTENS ................................................ 297

V. CONCLUSION .............................................. 306

I

INTRODUCTION

On June 1, 1993, the United States Supreme Court decided Mertens v. Hewitt Associates,1 holding that money damages cannot be recovered as "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended.2

The plaintiffs in Mertens were participants in a defined benefit pension plan maintained by Kaiser Steel Corporation. The defendant was the plan's enrolled actuary.3 During the early 1980s, Kaiser phased out certain operations which prompted many plan participants to take subsidized early retirements. Hewitt did not change the plan's funding assumptions to reflect the additional cost of these benefits. Some years later, the severely underfunded plan was taken over by the federal Pension Benefit Guaranty Corporation ("PBGC"), resulting in benefits being reduced to PBGC's guarantee levels.

The plaintiffs filed suit in the U.S. District Court for the Northern District of California alleging, among other things, that under ERISA, Hewitt had breached fiduciary duties to the plan and had participated with Kaiser in the sponsor's breach of duties. The district court dismissed these ERISA claims4 and the Court of Appeals for the Ninth Circuit affirmed the dismissal.5 The U.S. Supreme Court granted certiorari on the issue of whether

3. An "actuary" is a professional whose primary function is to determine the amount needed by a defined benefit pension plan to pay promised retirement benefits. An "enrolled actuary" is an actuary who is licensed to practice before government agencies responsible for administering ERISA. STEPHEN J. KRASS, THE PENSION ANSWER BOOK, 265-66 (4th ed. 1987). In the Mertens case, Hewitt is the actuarial firm which employed the individual who performed the services of enrolled actuary for the Kaiser plan.
5. Mertens v. Hewitt Assocs., 948 F.2d 607 (9th Cir. 1991) (the Ninth Circuit affirmed dismissal of the ERISA claims, but reversed dismissal of the pendant state law claims).
damages may be recovered from a nonfiduciary service provider\(^6\) who knowingly participates in an ERISA fiduciary’s breach of duty.\(^7\)

In deciding *Mertens*, the Court, after summarizing the prior history of the litigation, proceeded to review the ERISA provisions pertaining to duties owed under ERISA, the liabilities which attach to those who breach such duties, and the statute’s mechanisms for enforcing these substantive liabilities.\(^8\) Despite finding that the textual detail with which these provisions were wrought called into question the availability of the petitioner’s “knowing participation” cause of action under ERISA, the Court turned to the issue of what remedies may be available as “appropriate equitable relief” under the statute, assuming a finding of liability.\(^9\) Within the context of a meticulous analysis of the scope of relief traditionally available in courts of equity, the Court concluded that money damages could not be obtained as “appropriate equitable relief” under the enforcement provision chosen by the petitioner to vindicate his claim.\(^10\)

This paper focuses on some of the implications of *Mertens* from the perspective of the professional who is hired to provide services to ERISA plans. Although the Court’s reaching a decision on the damages issue while leaving undecided the question of whether the cause of action is sustainable in the first instance seems artificially narrow, *Mertens* may be a keyhole through which we can peer and gauge the interpretive posture the Court may take in dealing with future ERISA cases.

After brief discussions of the nature of ERISA’s liability and enforcement provisions and a summary of the “knowing participation” cause of action asserted in *Mertens*, this paper reviews the Court’s analytical discussion of the issue it did decide: whether money damages are “appropriate equitable relief” for purposes of Section 502(a)(3) of ERISA. The article continues with a study of the inferences that may be drawn from the *Mertens* opinions regarding the significant undecided issue in the case: whether any cause of action exists under ERISA against a nonfiduciary for knowing participation in a fiduciary’s breach of duty. Together, these suggest a sharp split among members of the Court as to the appropriate construction to be given to ERISA. On the one hand, the dissenting Justices would argue that the statute commands a broad construction consistent with its remedial purpose and its foundation in common law. The Justices in the

---

\(^6\) “Service provider,” as used herein, refers to a professional who is engaged to perform services on behalf of an ERISA plan. In general, the term includes accountants, actuaries, attorneys and consultants. These service providers ordinarily function in roles other than that of an ERISA fiduciary, hence the frequent use of the term “nonfiduciary.”

\(^7\) 113 S. Ct. 49 (1992).

\(^8\) *Mertens*, 113 S. Ct. at 2065-67.

\(^9\) *Id.* at 2067-68.

\(^10\) *Id.* at 2068-72.
majority, on the other hand, clearly reject any construction which cannot fit squarely within the four corners of the statute's text.

Finally, this paper looks at the likely impact that Mertens will have on the ERISA-based liability of professional service providers. This discussion will focus on two specific areas. First, we will sift through the ashes of Mertens to discern the continuing viability of the "knowing participation" cause of action which was central to that litigation. Second, we will review another favored basis for finding service providers liable under ERISA—the fiduciary liability of the independent service provider who, in the course of providing professional services, is seen to assume the mantle of the fiduciary by exercising discretionary authority, responsibility, or control with respect to the management or administration of an ERISA plan.

A. Functional Basis of ERISA Liability

In order to understand the Court's line-drawing in Mertens, it is necessary to take a brief detour into the conceptual and procedural underpinnings of ERISA liability and to briefly summarize the state of the law with respect to the "knowing participation" cause of action in the years leading up to Mertens.

ERISA liability is distributed on a functional basis. The primary substantive duties and prohibitions under the statute apply to plan fiduciaries—persons defined under ERISA by reference to the nature of those functions they perform in relation to an ERISA plan. ERISA fiduciaries have certain statutory duties which apply to fiduciaries as fiduciaries.

---


12. In general § 3(21)(A) of ERISA provides that:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A). Note that tucked within the broad language of this definition there exists an important limitation on fiduciary status. This limitation is that a person will be considered a fiduciary only "to the extent" he performs one of the defined fiduciary functions. See, e.g., F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987) ("[A] person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only 'to the extent' that he has or exercises the described authority or responsibility"); Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985) (employer which was a fiduciary because it appointed the plan administrator was not itself a fiduciary with respect to plan administration).

13. ERISA § 404, 29 U.S.C.A. § 1104(a)(1). Among the requirements set forth in § 404 are that:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;
The failure of a fiduciary to perform in accordance with these duties subjects that fiduciary to statutory liability.\textsuperscript{14} Similarly, fiduciaries may be liable for the breach of a co-fiduciary.\textsuperscript{15} Finally, fiduciaries, as a group, are prohibited from engaging in certain transactions, appropriately known as "prohibited transactions."\textsuperscript{16} These substantive liability provisions may be enforced by participants, beneficiaries, other fiduciaries, or by the Secretary of Labor.\textsuperscript{17}

Other ERISA duties, obligations, and attendant liabilities inure to certain subclasses of the broad fiduciary designation. For instance, a plan administrator, a fiduciary by virtue of having discretionary authority in the administration of an ERISA plan, has numerous substantive responsibilities under ERISA quite apart from those duties the administrator is obliged to perform as a fiduciary. Among these additional responsibilities are the ongoing obligations to provide various statements, summaries and notices to plan participants and beneficiaries. These obligations, generally arising under Part 1 of Title I of ERISA, are enforceable against the administrator under Section 502 of ERISA.\textsuperscript{18} Under the statute, the plan administrator

\begin{itemize}
\item[(B)] with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
\item[(C)] by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
\item[(D)] in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Titles I and IV of ERISA].
\end{itemize}

\textsuperscript{14} ERISA § 409(a) provides that:

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


\textsuperscript{15} ERISA § 405, 29 U.S.C.A. § 1105.


\textsuperscript{17} ERISA § 502(a)(2) provides that a civil action may be brought "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 . . . ." 29 U.S.C.A. § 1132(a)(2). ERISA § 502(a)(3) provides that a civil action may be brought:

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of [Title I of ERISA] or the terms of the plan.

29 U.S.C.A. § 1132(a)(3). ERISA § 502(a)(5) mirrors the language of § 502(a)(3) in providing the Secretary of Labor a cause of action similar to that available to private parties under § 502(a)(3) for violations of Title I of ERISA, but not for violations of the terms of the plan. 29 U.S.C.A. § 1132(a)(5).

\textsuperscript{18} See 29 U.S.C.A. § 1025(c) (substantive provision requiring plan administrator to provide a statement of deferred vested benefits to plan participants separating from service with such a benefit entitlement [enforceable by a participant or beneficiary under ERISA § 502(a)(4)]; 29 U.S.C.A. §§ 1022(a), 1024(b)(1) and (3) (requiring the plan administrator to distribute to participants and beneficiaries, at specified times, summary plan descriptions, summaries of material modifications and summary annual reports [enforceable by a participant or beneficiary under § 502(a)(3) of ERISA]); 29 U.S.C.A. § 1024(b)(4) (requiring plan administrator to furnish specific items at the written request of a

\textsuperscript{14} 138
also has specific duties which are more likely to arise in extraordinary circumstances. Here again, Part I of ERISA provides the substantive requirements while the provisions for enforcement are located in Section 502.\textsuperscript{19}

Certain substantive prohibitions of ERISA expressly extend to persons other than those included in the category of "fiduciary." In addition to the restrictions imposed upon plan fiduciaries, the prohibited transaction rules also restrain other "parties in interest"\textsuperscript{20} from entering into the sanctioned activities.\textsuperscript{21} As in the case of a fiduciary's engagement in a prohibited transaction, the substantive restrictions imposed on a nonfiduciary under ERISA may be enforced under Sections 502(a)(3) and 502(a)(5) of the statute.\textsuperscript{22}

It is an accepted principle that a service provider, although presumptively not a fiduciary under ERISA, may perform the functions of a fiduciary, thereby becoming a \textit{de facto} fiduciary.\textsuperscript{23} In such events, the service provider subjects himself to the duties of a fiduciary insofar as those duties are relevant to the fiduciary function the service provider is performing.\textsuperscript{24} Part and parcel with one's assumption of fiduciary duties is the prospect of liability for a breach of such duties.\textsuperscript{25} As with any fiduciary, the substantive liability provisions may be enforced under Section 502(a)(2) of ERISA.

However, where the services rendered by the provider do not exceed the provider's usual professional functions, the service provider will not be considered a fiduciary.\textsuperscript{26} Although no attempt is being made here to define those activities which might be considered the "usual functions" of a given professional in relation to an ERISA plan, it is likely that the term would encompass, for instance, in the case of a pension attorney, providing count-participant or beneficiary [enforceable by a participant or beneficiary under §§ 502(c)(1) and 502(a)(1)(A) of ERISA].

19. See 29 U.S.C.A. § 1021 (requiring plan administrator to notify participants and beneficiaries of a pending transfer of excess pension assets to a health benefits account [enforceable by a participant or beneficiary under §§ 502(c)(3) and 502(a)(1)(A) of ERISA]; see also 29 U.S.C.A. § 1021 (requiring employer to notify participants and beneficiaries of a failure to make a contribution required under ERISA's minimum funding rules [enforceable by a participant or beneficiary under §§ 502(c)(3) and 502(a)(1)(A) of ERISA]).

20. ERISA § 3(14), 29 U.S.C.A. § 1102(14). A party in interest under ERISA includes, among others, fiduciaries, service providers, sponsoring employers and employees of a sponsoring employer.


24. See Mertens, 113 S. Ct. at 2071-72; F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987); \textit{see also} ERISA § 3(21)(A), 29 U.S.C.A. § 1102(a) (a person who is a fiduciary is subject to the duties of a fiduciary "to the extent" he or she performs one of the enumerated fiduciary functions).


26. See 29 C.F.R. § 2509.75-5, Q&A D-1.
sel regarding a plan's compliance with tax and labor laws and, in the case of an enrolled actuary, determining and resolving plan funding issues.

B. "Knowing Participation" Theory Prior to Mertens

Before Mertens, the federal Courts of Appeals were split on the question of whether a cause of action exists under ERISA for a nonfiduciary's knowing participation in a fiduciary's breach of duty. The Courts of Appeals for the Second, Fifth, Sixth, Seventh and District of Columbia Circuits held a nonfiduciary liable under common law "knowing participation" theory where the nonfiduciary, with knowledge, and through affirmative acts or by a failure to act, aided and assisted a breach of duty committed by an ERISA fiduciary. The Courts of Appeals for the Ninth and Eleventh Circuits, however, found that no such liability existed. Of those courts which recognized the liability of the nonfiduciary, most held that damages were an appropriate form of relief.

In November of 1991, the Court of Appeals for the Ninth Circuit affirmed a decision by the U.S. District Court for the Northern District of California to dismiss plaintiff Mertens' ERISA-based claim of nonfiduciary service provider liability for knowingly participating in another's breach of duty. In finding that the plaintiff failed to state a cognizable claim, the court reaffirmed its decision in Nieto, which held that there are no federal law claims relating to ERISA plans other than those described in Section 502(a) of ERISA. In supporting its decision, the Nieto court employed the familiar dicta contained in the majority opinion of the landmark ERISA decision of Massachusetts Mutual Life Insurance Co. v. Russell.

Russell held that an ERISA plan participant could not personally recover damages from a plan fiduciary who may be found to have breached his duties to the plan; rather, any recovery from the fiduciary for breach must inure to the plan as a whole. Russell, however, has had influence far beyond its narrow holding. Pertinent to this discussion is the oft-cited dicta suggesting that the comprehensive nature of ERISA's carefully integrated enforcement scheme is strong evidence that Congress intended the remedies contained therein to be exclusive and not open to expansive interpretation.


28. See Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991), cert. denied, 113 S. Ct. 2927 (1993); Call v. Sumitomo Bank of Cal., 881 F.2d 626 (9th Cir. 1989); Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988).

29. See Whitfield, 853 F.2d at 1303; Lowen, 829 F.2d at 1220; Thornton, 692 F.2d at 1078.


31. Nieto, 845 F.2d at 873.


33. Id. at 144.
Some of the lower federal courts have seized upon this language as a general precept that, when it comes to interpretation of ERISA’s remedial provisions, strict construction should be the rule. The posture taken by the Ninth Circuit in its “knowing participation” decisions (Nieto v. Ecker, in the subsequent decisions of Call v. Sumitomo Bank of California and Gibson v. Prudential Ins. Co. of America, and carried through to Mertens) was consistent with this view of Russell—a court’s role in interpreting ERISA’s enforcement provisions requires a textual reading of the statute’s language. The rationale underlying these decisions may be summarized as follows: ERISA permits a participant or beneficiary to enforce the statute’s provisions. These provisions include the liability of fiduciaries and co-fiduciaries for any breach of the fiduciary duties imposed by the statute. Nowhere does ERISA expressly provide that a participant or beneficiary may bring suit against a nonfiduciary for participation in a fiduciary breach. The only appearance in ERISA of the term “knowing participation” is in a civil penalty provision added to the statute in 1989. This provision cannot be construed so as to grant an implied cause of action in favor of private parties.

The Ninth Circuit’s approach varied considerably from the interpretive posture adopted by other courts which visited the issue. These other courts had justified finding nonfiduciary “knowing participation” liability under a statute that did not expressly provide for it on the grounds that ERISA’s legislative history evinced an intent by Congress to incorporate the cause of action from the common law of trusts. Under trust law, a knowing participant in a fiduciary breach is jointly and severally liable for the full

34. Id. at 146-48.

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

(emphasis in original) (citation omitted); see also Giardono v. Jones, 867 F.2d 409, 413 (7th Cir. 1989) ("[T]he statutory scheme of ERISA does not lend itself to judicial expansion of available remedies.").


36. 845 F.2d 868 (9th Cir. 1988).

37. 881 F.2d 626 (9th Cir. 1989).

38. 915 F.2d 414 (9th Cir. 1990).


41. See generally supra note 24 and Freund v. Marshall & Ilsey Bank, 485 F. Supp. 629, 641 (W.D. Wis. 1979); see also Lowen v. Tower Asset Management, 829 F.2d 1209, 1220 (2d Cir. 1987) ("Courts have without difficulty disregarded form for substance where ERISA’s effectiveness would otherwise be undermined.").
amount of the loss sustained.\textsuperscript{42} As a rule, these courts paid little attention to \textit{Russell}, perhaps impliedly distinguishing the case on the grounds that the decision dealt only with a cause of action under ERISA Section 502(a)(2)—that is, an action against a person who is an ERISA fiduciary for that fiduciary’s breach of duty under Section 409 of the statute. \textit{Russell}, however, did not speak at all to Section 502(a)(3), the provision which these courts perceived to be the textual support for the “knowing participation” claim on the basis that its general language did not explicitly limit application to narrowly-defined factual settings.\textsuperscript{43}

Subsequent Supreme Court decisions can be read as sanctioning this line of reasoning by expressly recognizing ERISA’s common law roots and its remedial purpose. In \textit{Firestone Tire \& Rubber Co. v. Bruch}, the Court found that ERISA’s legislative history confirms that the statute’s fiduciary responsibility provisions “codify and make applicable . . . certain principles developed in the evolution of the law of trusts.”\textsuperscript{44} The Court in \textit{Bruch} went on to direct the federal courts to develop a common law of rights and obligations under ERISA plans, drawing upon principles of trust law.\textsuperscript{45} Furthermore, in \textit{Ingersoll-Rand Co. v. McClendon}, the Court hinted that it might be willing to retreat from the strict textual approach to ERISA that had characterized \textit{Russell} in suggesting that the remedial provisions of ERISA Section 502 are broad enough to encompass remedies not specifically enumerated in the statute.\textsuperscript{46}

Thus, as the \textit{Mertens} litigation teams were making the trek from the West Coast to the halls of the U.S. Supreme Court, ERISA aficionados were anticipating a showdown between what appeared to be two fundamentally irreconcilable approaches to ERISA interpretation, each amply supported by venerable authority.

\section*{II \textit{Mertens v. Hewitt Associates}}

Taken in this context, the \textit{Mertens} decision is an anticlimax. To many, the Court’s decision on the equitable relief issue, while failing to reach the threshold question of whether a cause of action exists under ERISA against nonfiduciary service providers who knowingly participate in a fiduciary’s breach of duty, is a matter of putting the cart before the horse. Although

\begin{itemize}
\item \textsuperscript{43} See Petitioner’s Brief at 21-22, \textit{Mertens v. Hewitt Assocs.}, 113 S. Ct. 2063 (1993) (No. 91-1671); see also \textit{Russell}, 473 U.S. at 149-50 (Brennan, J., concurring).
\item \textsuperscript{44} 489 U.S. 101, 110 (1989) (citing H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 11 (1973)).
\item \textsuperscript{45} Id. at 110-11.
\item \textsuperscript{46} 498 U.S. 133, 145 (1990) ("[T]here is no basis in § 502(a)’s language for limiting ERISA actions to only those which seek ‘pension benefits.’ It is clear that the relief requested here [for unlawful discharge] is well within the power of federal courts to provide.").
\end{itemize}
Mertens has clearly provided guidance to the professional service provider as to the remedies to which he may be subjected in an action brought under ERISA Section 502(a)(3), the decision yielded no definitive answer as to whether these professionals would be insulated from what has become the prevailing theory for hauling them into federal court in the first place—"knowing participation." The incongruity of leaving this primary question in legal limbo was not lost upon the Court, as both the majority and dissenting opinions speak specifically to the availability of the cause of action underlying the petitioner's claim for money damages. As the following discussion illustrates, the views expressed in these opinions—on both the "cause of action" issue and on the "equitable relief" issue—suggest a fundamental split among members of the Court on how strictly to construe what the Russell Court called "[t]he six carefully integrated civil enforcement provisions" of ERISA § 502(a). 48

A. The ERISA Equitable Relief Equation: "Appropriate" = "Typical"

The issue actually decided by the Court in Mertens was whether money damages are "appropriate equitable relief" for purposes of Section 502(a)(3) of ERISA.49 In analyzing this issue, the Court, speaking through Justice Scalia, discussed what it considered to be two plausible constructions of the phrase "equitable relief" when used in a statute of recent vintage. Under one approach, equitable relief may be considered to mean whatever relief a court of equity was empowered to provide.50 This view would authorize a federal court to provide a wide array of remedies—including the legal remedy of money damages—in an ERISA action grounded in a breach of trust claim. This is because equity courts, the forum which had exclusive jurisdiction over private actions for breach of trust, had the power to award money damages against a trustee and against a third party who knowingly participated in the trustee's breach.51 Although compensatory in nature, the damage claim would nonetheless sound in equity because the substantive law was equitable. The dissenting Justices subscribed to this meaning of "appropriate equitable relief."52

The other construction of "equitable relief" discussed by Justice Scalia includes only "those categories of relief that were typically available in equity."53 Examples of these "typical" forms of equitable relief include injunctions, mandamus, and restitution, but not compensatory damages.54

47. Mertens, 113 S. Ct. at 2067-68; see also id. at 2073 n.1 (White, J., dissenting).
49. 113 S. Ct. at 2069 (emphasis added).
50. Id. at 2068-69.
51. See supra note 42 and accompanying text.
52. Mertens, 113 S. Ct. at 2073-74 (White J., dissenting).
53. Id. at 2069.
54. Id.
Which of the two constructions of "equitable relief" is appropriate in a given statutory provision is an issue to be resolved at the time and within the context of the case in which the question arises.\textsuperscript{55} In the context of Section 502(a)(3) of ERISA, the Court held that the latter construction of "equitable relief" is "no doubt" the one evidenced by the statute.\textsuperscript{56} In a discussion likely to be referred to by supporters as a hallmark of textual interpretation and respect for original intent, the majority concluded that if every type of relief available at common law to the court of equity was intended to be available to federal courts deciding ERISA cases, the enacting Congress would have refrained from using the modifier "equitable" to describe the nature of the relief available under Section 502(a)(3).\textsuperscript{57} As used, the majority posits, the term "equitable" can only have been intended as a limitation on the term it modifies ("relief"); since the latter term, in the context of the common law of trusts, was already understood to encompass all forms of relief, both equitable and legal.\textsuperscript{58} Therefore, the majority indicates, if Congress intended Section 502(a)(3) to encompass all forms of relief available at common law, the word "relief" would have appeared alone in the statute's text.\textsuperscript{59}

In support of this conclusion, Justice Scalia relied on Sections 502(a)(2) and 502(g)(2)(E) of ERISA. These, he asserted, are enforcement provisions which clearly permit the forms of relief which petitioner claims are available under Section 502(a)(3).\textsuperscript{60} Section 502(a)(2) authorizes an individual to bring suit for relief under Section 409, a provision which expressly subjects a breaching fiduciary to appropriate forms of "remedial" and "equitable" relief.\textsuperscript{61} Similarly, under Section 502(g)(2)(E), certain plans which are successful in actions to compel payment of delinquent contributions may be awarded appropriate "legal" and "equitable" relief.\textsuperscript{62}

To the majority, petitioner's interpretation of "equitable relief" under Section 502(a)(3) as conveying the same remedies as are explicitly made available under Sections 502(a)(2) and 502(g)(2)(E) would force the Court either (i) to give the term "equitable" a different, and broader, meaning under § 502(a)(3) than it has under these other sections of the statute, or (ii) to "deprive of all meaning" the terms "remedial" and "legal" as they appear in §§ 502(a)(2) and 502(g)(2)(E).\textsuperscript{63} Neither approach is acceptable to the Court, because while \textit{Bruch} expressly recognized the authority of courts to  

\begin{itemize}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} ERISA § 409, 29 U.S.C.A. § 1109 (emphasis supplied).
\item \textsuperscript{62} 29 U.S.C.A. § 1132(g)(2)(E) (emphasis supplied).
\item \textsuperscript{63} 113 S. Ct., 2069-70.
\end{itemize}
develop a federal common law under ERISA, this authority cannot be exercised in a manner at odds with the text of the statute.  

Finally, the Court assailed the view promoted by the dissent (and grounded in *Bruch* and *McClendon*) that ERISA's basic goal of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans" should be dispositive in this case.  In contrast, Justice Scalia exhorted, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Noting that Congress, in enacting ERISA, "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs," the Court refused to read the requested relief into the statute and thereby "adjust the balance . . . Congress has struck."

Justice Scalia's analysis of the scope of "appropriate equitable relief" in the ERISA context clearly has its roots in *Russell*, citing that decision two times in the opening paragraphs of the opinion. Although the dry, measured opinion is not likely to grace the bedside table of your typical attorney or law student, it does leave one with some thoughts regarding the remedies available under ERISA as against service providers who, in the ordinary performance of their professional services, do not become fiduciaries under the statute. Assuming, as the *Mertens* Court did, that a private cause of action exists under Section 502(a)(3):

1. The only relief that will be available from the service provider is that relief "typically" available in equity. The Court explicitly includes injunctions, mandamus and restitution among these. Monetary remedies and "novel" equitable remedies will not be available against a service provider (or anyone else) under Section 502(a)(3) of ERISA.
2. Given that the substantive language of Section 502(a)(5) of ERISA is identical to that of Section 502(a)(3), it is likely that the relief available in an action brought by the Secretary of Labor under Section 502(a)(5) is likewise limited to "typical" forms of equitable relief.
3. Although not a necessary conclusion, the majority's analysis suggests that money damages and other legal forms of relief are available under ERISA only where such relief is expressly provided for in the statute. As a practical matter, such an interpretation would require a participant or beneficiary to prove, as a condition to obtaining ERISA damages, the "status" and "conduct" elements of Section 409; that is, (i) the person against whom the action is brought is either a named fiduciary or a person acting as a

---

64. Id. As to the *Bruch* position regarding federal common law, see supra notes 44 and 45 and accompanying text.
66. 113 S. Ct. at 2071 (emphasis in original).
67. Id.
68. Id. at 2072.
69. Id. at 2066-67.
70. Id. at 2069.
71. Id. at 2069, 2071-72.
fiduciary in connection with the transaction(s) at issue (the "status" element) and (ii) the conduct of such person amounts to a breach of that person's fiduciary duty under Title I of ERISA (the "conduct" element). The reciprocal position is that the ERISA remedy available in an action against any person who could not be proven to be an ERISA fiduciary would be limited to "typical" equitable relief. Under the same rationale, it is arguable that "typical" equitable relief has received the Court's imprimatur as the touchstone for determining the remedies obtainable in an action by a participant or beneficiary against one who is an ERISA fiduciary, but who is sued for reasons other than his breach of fiduciary duty.

B. The Skirmish Before the "Battlefield": The Mertens Court and the "Knowing Participation" Cause of Action

[Petitioners and their amicus the United States [Department of Labor] seem to assume that respondent's [Hewitt's] alleged action (or inaction) violated ERISA, and address their arguments almost exclusively to what forms of relief are available. [Hewitt], despite considerable prompting by its amici, expressly disclaims reliance on this preliminary point ... . Thus, although we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen, and reserve decision on that antecedent question.]

With these words, the Mertens Court assumed away the issue of whether any cause of action exists against a nonfiduciary for knowing participation in a fiduciary's breach of duty. Nonetheless, in the thrust-and-parry of responding footnotes, the majority and dissenting factions tip their hands as to how they believe the issue should have been decided if it were before the Court.

Any claim by a participant or beneficiary for relief under ERISA must find its source in the enforcement provisions of Section 502(a). The petitioner in Mertens asserted that his claim for monetary relief against a nonfiduciary for that person's knowing participation in a fiduciary's breach had a statutory foundation in Section 502(a)(3) of ERISA. In the language of Section 502(a)(3), the posture of the Mertens lawsuit was as follows: a participant brought a civil action to obtain appropriate equitable relief to redress an act or practice which he alleged had violated a provision of [Title I of ERISA]. Once distilled, the question the majority and dissenting opinions seemed to focus on is whether the "act or practice" element of Section 502(a)(3) liability would require the one against whom the liability would be asserted to be the one who performed the act or practice (or the one who

73. Mertens, 113 S. Ct. at 2067-68.
74. See supra note 34.
failed to act in the case of an omission) that resulted in the ERISA violation. 76

The dissenting justices imply that the conduct of the breaching fiduciary—being conduct clearly in violation of Section 409 of the statute—sufficiently establishes the “act or practice in violation of ERISA” that is necessary to impose Section 502(a)(3) liability upon a nonfiduciary who knowingly participated in the fiduciary’s breach. 77 To reach this end, the dissent appears to assume the existence of two propositions. The first of these is that upon a finding that a fiduciary has breached a duty, equitable relief may be obtained from such sources as would be “appropriate.” Second, if a nonfiduciary is among these “appropriate” sources, relief may be obtained from the nonfiduciary irrespective of whether the nonfiduciary himself performed an “act or practice” that violated a provision contained in ERISA.

Under this view, the extension of ERISA liability beyond those individuals to whom the statute explicitly provides causes of action independent of the Section 502(a) enforcement provisions would depend on a murky “when appropriate” standard. The dissent’s reading of Section 502(a)(3) sets that clause up as a result-oriented, catch-all provision. Although giving the common law cause of action for “knowing participation” the necessary mooring to the statute, this reading of Section 502(a)(3) would apparently not preclude—and to the Mertens dissent, does not preclude—less traditional and even creative forms of equitable relief when “appropriate” to do so under the circumstances. 78 The natural implications of the dissent’s view can be summarized as follows:

• the conduct which may be considered for purposes of Section 502(a)(3) to be an “act or practice in violation of ERISA” should be broadly construed;
• the breadth of defendants to whom Section 502(a)(3) liability may be applied is coextensive with those persons to whom such liability would be “appropriate”; and
• that which ordinarily might be considered critical in assessing liability against a defendant, (i.e. whether the conduct of the defendant will satisfy the elements of a statutory cause of action such that relief may be granted) is, in the ERISA Section 502(a)(3) context, subordinate to the provision of the relief itself.

This expansive view of Section 502(a)(3) may be reasonable under a purposive interpretation of ERISA. One may argue with conviction that such a

76 113 S. Ct. at 2067, 2073.
77 Id. at 2073, n.1.
78 Under this view of § 502(a)(3), “appropriate” remedies can presumably be grafted onto any independent ERISA violation. Thus, for example, a non-fiduciary service provider could find himself a defendant in a suit alleging he was a “knowing participant” in a co-fiduciary breach (29 U.S.C. § 1105) where the professional has performed services for one trustee or other fiduciary who is himself sued for failure to prevent yet another fiduciary from affirmatively breaching his duties to the plan.
view is clearly consonant with traditional notions of equity jurisdiction's focus on remedies and the pursuit of justice. This view also furthers the congressional intent that federal courts develop a common law of rights and obligations under ERISA-regulated plans. However, as noted above, these views carry little weight for the majority in the face of the "'comprehensive and reticulated statute' [that was] the product of a decade of congressional study of the Nation's private employee benefit system."\(^{80}\)

In stark contrast to the viewpoint of the dissenters, Justice Scalia's majority opinion questions whether ERISA's Section 502(a)(3) "act or practice" requirement is satisfied by a claim against a nonfiduciary through knowing participation in a fiduciary breach.\(^{81}\) The majority opinion notes that "it is far from clear" that the "knowing participation" cause of action exists and that it is "unlikely" that its failure to appear explicitly in ERISA is "oversight," given that the knowing participation liability of third persons was well established under the common law of trusts.\(^{82}\) Although nonfiduciaries may have certain obligations under ERISA, the majority notes, the statute does not explicitly require them to avoid participation in a fiduciary's breach of duty.\(^{83}\) Therefore, the Court expresses disbelief that the parties have assumed that the facts underlying the petitioner's claim for money damages have established the "act or practice in violation of ERISA" necessary to invoke the remedial provisions of Section 502(a)(3).\(^{84}\) Implicit in the majority's construction of Section 502(a)(3) is a requirement that the one to whom the liability would attach must be the one who engages in the "act or practice" which violates ERISA.

Thus, the majority opinion suggests a fundamentally different view of ERISA Section 502(a)(3) than that offered by the dissent. Whereas the dissenting opinion can be read as treating Section 502(a)(3) as a provision that effectuates ERISA's basic "purpose" by both creating a substantive cause of action and providing for its enforcement (or, as suggested above, bootstrapping to an existing cause of action in the statute but providing for enforcement as against persons beyond those parties contemplated by the underlying cause of action), the majority opinion appears content to view Section 502(a)(3) as an enforcement provision in the narrow sense—a statutory authorization to a given party to go to court on the basis of a substantive claim provided elsewhere in the statute. The view of the majority that Section 502(a)(3) acts strictly as an enforcement mechanism appears to find support in the statutory pattern wherein the provisions of Section 502 are

---

80. Mertens, 113 S. Ct. at 2066 (quoting Nachman Corp. v. PBGC, 446 U.S. 359, 361 (1980)).
81. Id. at 2067.
82. Id. (citing 3 AUSTIN W. SCOTT & WILLIAM F. FRATCHE, LAW OF TRUSTS § 224.1, p.404 (4th ed. 1988)).
83. Mertens, 113 S. Ct. at 2067.
84. Id.
enlisted to enforce the substantive requirements found in the other sections of ERISA.\footnote{85. See discussion supra notes 18-22 and accompanying text. Note that with the exception of 29 U.S.C.A. § 1132(a)(5), the terms of which are substantially identical to 29 U.S.C.A. § 1132(a)(3), the remaining enforcement provisions of 29 U.S.C.A. § 1132(a) appear to share the common purpose of enforcing substantive ERISA rights provided in provisions other than 29 U.S.C § 1132(a).}

The opinions of the majority and dissenting justices in \textit{Mertens} on this “cause of action” issue, and on the “equitable relief” issue discussed earlier, demonstrate what appears to be a fundamental split among the Court members regarding the proper interpretive approach to ERISA. The dissenting opinion manifests an intent by a minority of justices to employ the statute’s remedial purpose and foundation in common law as significant guiding principles for dealing with ERISA cases. As respects the nature of the equitable remedy which ERISA makes available, these justices seem content to find that any relief available under common law is likewise available under ERISA.\footnote{86. \textit{Mertens}, 113 S. Ct. at 2074.} Similarly, regarding those causes of action which may be recognized under ERISA, this faction of the Court favors an expansive interpretation of the parties who may be found responsible for breaches in trust under the statute’s enforcement provisions. This approach, they believe, would permit courts to “do equity” in the traditional sense.\footnote{87. \textit{Id.} at 2073 n.1.}

The justices in the majority, on the other hand, appear to be strict advocates of the position that ERISA—although borrowing from the common law—was intended to \textit{supersede} the common law and “federalize” the law of employee benefits.\footnote{88. \textit{See, e.g.}, \textit{Pilot Life Ins. Co. v. Dedeaux}, 481 U.S. 41, 46 (1987).} Given this theory, any purported cause of action or remedy under ERISA must have clear textual support.\footnote{89. \textit{Mertens}, 113 S. Ct. at 2071.} This approach emphasizes a more limited role for the federal judiciary than does that taken by the dissenting justices and explicitly places upon Congress the responsibility to provide—in the text of the statute, and through the use of no uncertain or inconsistent terms—those remedies which Congress \textit{intends} to provide.

One sure-fire effect that the Court’s debate on these issues should have on lower courts is a rejection of the notion that common law trust theory should be imported into ERISA lock, stock, and barrel.\footnote{90. To the dissent’s comment that ERISA “clearly does not bar” a knowing participation cause of action, 113 S. Ct. at 2073 n.1, Justice Scalia responds that the statute’s failure to prohibit the common law claim “is not the issue. The issue is whether the statute affirmatively \textit{authorizes} such a suit.” 113 S. Ct. at 2068 n.5 (emphasis in original).} By rejecting the common law principle that money damages are available from a nonfiduciary and by calling into question the viability of the “knowing participation” cause of action after ERISA, the \textit{Mertens} Court has issued notice to interested parties that the Court’s discussion of ERISA’s common law founda-
tion and remedial purpose in *Bruch* and *McClendon* was not to be taken as a license for courts to casually incorporate common law remedies into ERISA. The *Mertens* Court's textualist position should act to rein in those lower courts that have seen *Bruch* and *McClendon* as decisions empowering the federal judiciary to actively, and expansively, effectuate the evolution of ERISA remedies.

**III**

**BEYOND THE “NARROW BATTLEFIELD”: “KNOWING PARTICIPATION” LIABILITY AFTER *MERTENS***

The main question left after *Mertens* is how the lower courts are going to deal with the *Mertens* Court's treatment of the common law cause of action for "knowing participation." Clearly, the *Mertens* decision does not discredit the rationale underlying a cause of action for "knowing participation." The invocations to the common law of trusts as a guide in the development of a federal common law of employee benefit plans are not likely to be seen as being now transformed into hollow summonses by a painstakingly textual reading of a few dozen words comprising the elements of just one of many enforcement provisions under the statute. In fact, despite the majority's criticisms of the underlying cause of action, at least four of the *Mertens* Justices would find that ERISA supports the cause of action. However, since the time *Mertens* was decided, Justices White and Blackmun have retired. Although Justice White's departure from the Court may strengthen the *Mertens* majority, his successor, Justice Ginsburg, has recently participated in decisions in which the court expansively interpreted the protections afforded participants under ERISA.

As a strategic matter, the ERISA plaintiff bringing an action in connection with conduct alleged to be in violation of fiduciary standards may still proceed against a service provider involved in that conduct on the basis of the knowing participation principles established by the federal courts in the Second, Fifth, Sixth, Seventh and District of Columbia Circuits. Although these decisions pre-date *Mertens*, the *Mertens* holding does not disturb their

---

91. In a post-*Mertens* opinion, the U.S. District Court for the Eastern District of New York stated, in the context of an ERISA case, “[f]ederal courts have the power to develop federal common law-equity remedies where ‘the particular facts of a case... fall outside of the literal coverage of a federal statute, but the use of common law will fill gaps in the congressional statutory pattern or otherwise make that pattern effective.'” Cutler v. The 65 Security Plan, 831 F. Supp. 1008, 1022 (E.D.N.Y. 1993) (quoting Quasar Co. v. Atchison, Topeka & Santa Fe Ry. Co., 632 F. Supp. 1106, 1112 (N.D. Ill. 1986)).

92. See Page v. Pension Benefit Guar. Corp., 968 F.2d 1310 (D.C. Cir. 1992) (court reinstated action by plan participants who alleged that the federal agency which insured pension obligations wrongfully refused to guarantee benefits which had not become vested under the terms of the plan); Eddy v. Colonial Life Ins. Co., 919 F.2d 747 (D.C. Cir. 1990) (court expanded the fiduciary standard of care employed by the district court with the result that a group health insurer was held liable for fiduciary breach).
holdings with respect to the availability of the "knowing participation" cause of action and their discussions of the standard principles of formulating the cause of action. These principles require the plaintiff to prove three elements:

1. the existence of a fiduciary breach;
2. an act or omission of the service provider which furthers or completes the breach; and
3. the knowledge of the service provider, at the time of the transaction(s) constituting the breach, that the transaction(s) amounted to a breach. 

As a preliminary note, there does not appear to be a lack of factual circumstances which might support a claim against a service provider for knowingly participating in a fiduciary breach. On the contrary, given the complexity involved in administering employee benefit plans, active involvement of professional service providers is virtually guaranteed, not only during significant stages of a plan's "life cycle" (such as plan inception or termination), but, more frequently, during what may be considered day-to-day administration. In addition, it appears that public attention to these factual circumstances is likely to increase. Recently, for example, the Wall Street Journal and BNA's Pension Reporter have run stories on the failure of pension plan sponsors (and implicitly, the actuaries hired by these sponsors) to adjust certain actuarial assumptions for determining pension plan funding—the very issues that underlie the claims made by the Mertens plaintiffs. Also, the Pension Benefit Guaranty Corporation—the federal agency that insures, to stated limits, the pensions of retirees—publishes an annual list of the top 50 companies ranked by unfunded pension liabilities. In recent months, the Securities and Exchange Commission has begun to pressure pension plan sponsors to adjust actuarial assumptions used in the calculation of pension expense for financial reporting purposes.

However, a plaintiff wishing to invoke a post-Mertens "knowing participation" cause of action against a service provider still must face at least three problems. First, despite the failure of the Mertens Court to decide the issue of whether the cause of action exists after ERISA, lower courts may well read the majority opinion as strongly suggesting that the claim is not cognizable. This aspect of the Mertens decision—to what extent will the


Mertens dicta trickle down and influence lower court decisions on the availability of the "knowing participation" cause of action—may be one of the most interesting developments arising out of the case.

As discussed above, the majority opinion is something less than hospitable to an ERISA-based claim for knowing participation. This approach may prove persuasive to lower courts called on to decide the fate of future "knowing participation" claims. Some commentators have predicted that, as was the case after Russell eight years ago, lower courts reading Mertens will adopt the Supreme Court dicta and dismiss claims against a nonfiduciary for knowing participation in a fiduciary breach.97

At this early date, there is some evidence that courts are responding in this manner. For example, in Reich v. Continental Casualty Co., the District Court for the Northern District of Illinois indicated:

The Mertens opinion in no manner impairs the Secretary's underlying claim for relief against [the defendant insurer] as a non-fiduciary who knowingly participated, to its financial benefit, in the trustees' fiduciary violations of ERISA. The holding[ ] in Thornton v. Evans . . . remain[s] the controlling law in this circuit as to the viability of such a claim.98

Nevertheless, following a detailed analysis of the High Court's Mertens opinion, the district court deferred to the Mertens dicta in the absence of settled case law in the Seventh Circuit:

[It would be foolish for this court to ignore the Supreme Court's relatively extended and careful statement of its views on the subject . . . merely because it is dicta. This is particularly true in light of the strength of the statement of those views; in light of any lack of indication by the Court that it is doubtful on the question . . . . This court believes that the Mertens opinion precludes the claim the plaintiff has brought . . . [and this court concludes] that plaintiff has failed to state a claim upon which relief can be granted . . . .99

In Reich v. Compton, the District Court for the Eastern District of Pennsylvania reached a similar conclusion.100 The court reversed an earlier

---

97. 2 ERISA LITIGATION REPORTER 3, at p.7 (Eccles & Gordon eds.)
99. Id. at *6; see also Blevins Screw Prods., Inc. v. Prudential Bache Securities, Inc., 835 F. Supp. 984, 986 (E.D. Mich. 1993), where the court stated:

To the extent that Brock [v. Hendershott] recognized a cause of action holding a nonfiduciary liable for knowingly participating in a fiduciary's breach of duty, that statement of the law cannot be applied by this Court in light of the Supreme Court's opinion in Mertens. Although the discussion of this disavowed cause of action was not the basis for the Court's ruling in Mertens, the reasoning cannot be ignored in application of ERISA to nonfiduciaries.

But see Gruby v. Brady, 838 F. Supp. 820 (S.D.N.Y. 1993) (Second Circuit precedent authorizing a knowing participation claim is not invalidated by Mertens; however, plaintiff's knowing participation cause of action is dismissed to the extent it seeks money damages) and Reich v. Lancaster, 1993 U.S. Dist. LEXIS 14891, at *31-32 (N.D. Tex. 1993) (Defendant will be liable to ERISA plan on the basis of Fifth Circuit precedent "to the extent" that knowing participation liability is a valid theory of recovery after Mertens.).
grant of summary judgment in favor of the U.S. Department of Labor on a prohibited transaction issue because, after Mertens, the court was reluctant to allow claims under ERISA unless the causes of action were expressly enumerated in the statute.\textsuperscript{101}

In the first appellate court decision to deal with the "knowing participation" theory of liability after Mertens, the Court of Appeals for the First Circuit, in Reich v. Rowe, affirmed the district court's dismissal of an action seeking equitable relief against a nonfiduciary service provider who allegedly assisted plan fiduciaries in obfuscating efforts by regulators to obtain information on the plan's legal status and otherwise breach their fiduciary duties.\textsuperscript{102} Aligning itself with the Mertens majority, the court of appeals rejected the Department of Labor's assertions that the nonfiduciary's participation in the fiduciary breach is an "act or practice" violating ERISA.\textsuperscript{103} The court also refused the Department's claim that the judiciary's power to make common law under ERISA authorizes the equitable relief requested. Citing the Mertens dicta, the court held that permitting the common law remedy would conflict with the apparent intention of Congress to deliberately omit the "knowing participation" cause of action from ERISA's enforcement scheme.\textsuperscript{104}

If this can be considered a trend after Mertens, the ERISA plaintiff may likely find himself facing unfavorable odds in getting his "knowing participation" claim into court at all, even in those jurisdictions which may have been considered friendly to the common law claim prior to Mertens.

Second, although a significant body of lower court opinions holding that the common law cause of action for knowing participation exists in the ERISA era, these precedents are often of little help in defining the scope of nonfiduciary conduct that will satisfy the "knowledge" and "participation" elements of the cause of action.\textsuperscript{105} On the one hand, those courts recognizing the cause of action have had little difficulty in finding nonfiduciary conduct to satisfy the common law elements where the affirmative conduct of the nonfiduciary amounted to a scheme to defraud an ERISA plan.\textsuperscript{106}


\textsuperscript{102} Reich v. Rowe, 20 F.3d 25 (1st Cir. 1994).

\textsuperscript{103} Id. at 29. Compare supra notes 81-85 and accompanying text.

\textsuperscript{104} Rowe, 20 F.3d at 30-31.

\textsuperscript{105} See generally cases cited at supra note 27.

\textsuperscript{106} See, e.g., Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987) (non-fiduciary investment bankers conspired with fiduciaries in self-dealing transactions); Thornton v. Evans, 692 F.2d 1064 (7th Cir. 1982) (non-fiduciary attorneys conspired to divert plan assets); Freund v. Marshall & Isley Bank, 483 F. Supp. 629 (W.D. Wis. 1979) (non-fiduciaries directly participated in process by which virtually all plan assets were invested in entities affiliated with sponsoring employer); Foltz v. U.S. News & World Report, Inc., 627 F. Supp. 1143 (D.D.C. 1986) (non-fiduciary independent appraiser participated in a scheme to undervalue Company stock in plan so as to minimize value of plan...
However, in those cases where the conduct of the nonfiduciary has not risen to the level of fraud and in others where the nonfiduciary's actual knowledge of the breach could not be shown, the decisions have been unclear as to what activity and state of mind will support the common law liability.

A significant volume of authority seems to support the proposition that the "knowledge" requirement may be satisfied by a showing of the defendant's "constructive knowledge." These precedents indicate that a participant could satisfy his or her burden of proof by showing that the nonfiduciary could not have reasonably been unaware of the breach of duty by the fiduciary. In practice, this might be shown by evidence of a substantial working relationship between the nonfiduciary and the breaching fiduciary, especially one involving those kinds of activities which became the subject of the breach.

In contrast to this approach, however, other authorities suggest that knowing participation liability cannot exist absent some actual knowledge of the underlying fiduciary breach. At most, one can conclusively say that the Second and Sixth Circuits apparently would permit the "knowledge" requirement to be satisfied by something short of proving actual knowledge while the Third and Fifth Circuits would apparently require a showing of actual knowledge on the part of the nonfiduciary.

In similar fashion, lower courts have reached differing conclusions as to what constitutes "participation" in a fiduciary breach where the nonfiduciary...
ciary’s conduct failed to reach the level of fraud. At one end of the spectrum, it has been suggested that a nonfiduciary’s “participation” in a fiduciary breach could be shown by evidence of activities that ordinarily may be considered far removed from the breach itself. In Donovan v. Schmoutey, for instance, the District Court of Nevada proposed that “an act or omission in furtherance of a breach” may be found where the service provider merely receives trust assets from fiduciaries who themselves are liable for breach in contracting for the provider’s services.\footnote{110}

In Diduck v. Kaszycki & Sons Contractors, Inc., one of the few recent decisions where a court analyzes the substantive elements of the knowing participation cause of action, the Second Circuit indicated that the “participation” aspect of a fiduciary breach is satisfied where the nonfiduciary “affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables [the breach] to proceed.”\footnote{111} Although this standard for liability, vis-a-vis that suggested in Schmoutey, would seem to require a closer connection between the conduct of the nonfiduciary and the fiduciary activity underlying the breach (the first two of these Diduck elements suggest a need to prove intent, or arguably recklessness or gross negligence, on behalf of the nonfiduciary), it should be noted that the third item—“participation by omission”—would apparently be satisfied by a showing of simple negligence.

Other courts have favored a more literal reading of the “participation” element and have required that a nonfiduciary undertake a more active role in a fiduciary breach to be held liable under the knowing participation theory. Thus, for example, in Pappas v. Buck Consultants, Inc., the Seventh Circuit Court of Appeals held that mere negligence on the part of the nonfiduciary is an insufficient basis upon which to allege ERISA liability, even if the negligence furthers the breach.\footnote{112}

Despite this lack of clarity coming in federal court decisions prior to Mertens, a plaintiff might reasonably expect that after Mertens, the most that can be hoped for—insofar as concerns some semblance of uniform treatment among the federal courts of the “knowing participation” ele-

\footnote{110. 592 F. Supp. at 1396 ("[T]he receipt of trust assets by a third party resulting from a fiduciary breach constitutes sufficient participation for purposes of establishing knowing participation"). But see \textsc{Scott}, supra note 109, at § 326 ("a third person is liable for participation in a breach of trust where he receives a transfer of trust property... if he has notice that the transfer is made in breach of trust").}

\footnote{111. 974 F.2d at 284; see also \textsc{Whitney} v. Citibank, 782 F.2d at 1117 (2nd Cir. 1986) (in which the court stated that the lower court's finding of knowing participation was supported by such actions or omissions).}

\footnote{112. 923 F.2d 531, 540 (7th Cir. 1991). Compare \textsc{Painters of Philadelphia Dist. Council v. Peat Marwick Main & Co.,} 10 E.B.C. (BNA) 1503 (E.D. Pa. 1988) (mere negligence by an auditor cannot support a claim for knowing participation) with Framingham Union Hosp., Inc. v. Travelers Ins. Co., 721 F. Supp. 1478 (D. Mass. 1989) (finding that an accountant would be liable under the Painters standard if he or she actively assisted in the wrongdoing at issue); see also \textsc{Kral}, 800 F. Supp. at 1429 (motion for summary judgment granted where facts show an absence of knowing and active participation); \textsc{Bogert & Bogert, supra note 42, at § 901 (1967).}
ments—is that the old, muddled ways have not changed. For if Mertens has added any measure of certainty to the substantive "knowing participation" discussions that preceded it, that certainty is likely to hurt plaintiff's case.

Third, Mertens makes clear that even if the "knowing participation" cause of action is available under ERISA and the plaintiff can adequately establish a service provider's knowledge and participation in a fiduciary breach under the statute, the relief available is limited to "typical" forms of equitable relief.\footnote{Mertens v. Hewitt Assoc., 113 S. Ct. 2063, 2069 (1993).} This includes injunctive relief and restitution, but not money damages.\footnote{Id.} To the ERISA plaintiff, the inability to obtain compensatory (and/or punitive) damages from a nonfiduciary service provider seriously undermines the usefulness of the knowing participation cause of action. The trademark fiduciary litigation involves a suit seeking "make whole" damages from the fiduciary alleged to have committed improprieties resulting in loss to the plan. To the ERISA plaintiff, the prospective correction available through an injunction and the return of proceeds unjustly obtained may not assure adequate redress. The perceived shortfall is especially apparent if the breaching fiduciary is itself unable to cover the entire plan loss. Thus, to the extent that a nonfiduciary participant in the breach cannot be called upon to assure attainment of the compensatory goal, the efficacy of the "knowing participation" cause of action is, at best, limited.

In most cases, after Mertens the most significant relief a plaintiff is likely to obtain from a service provider on a knowing participation claim is restitution (combined, perhaps, with an injunction preventing further harmful activity and/or the imposition of a constructive trust to ensure repayment).\footnote{See Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988). For discussions dealing with the imposition of a constructive trust under ERISA § 502(a)(3), see Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1414-19 (9th Cir. 1988); Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383 (7th Cir.), cert. denied, 479 U.S 1008 (1986).} Given that restitution is aimed toward preventing unjust enrichment, the monetary relief obtainable through this form of relief in a knowing participation context would likely be limited to the return of profits gained by the service provider for its knowledge of, and participation in, the improper conduct underlying the fiduciary breach.\footnote{See \textit{Restatement of Restitution} § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").} This recovery would most likely include those fees paid to the service provider directly or indirectly from the plan(s) affected by the breach and which are allocable to

\begin{enumerate}
\item Id.
\item See Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988). For discussions dealing with the imposition of a constructive trust under ERISA § 502(a)(3), see Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1414-19 (9th Cir. 1988); Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383 (7th Cir.), cert. denied, 479 U.S 1008 (1986).
\item See \textit{Restatement of Restitution} § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").
\end{enumerate}
the activities relating to the breach. In addition, an interest factor may be applied to the funds to be repaid.

A plaintiff may wish to argue that the pool of funds from which restitution from the service provider should be made includes those fees of the service provider paid directly from the plan sponsor, similarly allocated, on the theory that at least a portion of these employer-provided fees relate to improper activities and are, therefore, ill-gotten gains which are the proper subject of the restitution remedy. However, as a “bottom-line” proposition, the recovery available as restitution may still fall considerably short of the “make-whole” recovery sought by a plaintiff. This will occur, for example, where the fees of the service provider which are allocable to the breach-related activities (with interest, as appropriate), do not approximate the full amount of the loss, less any recovery obtained from the breaching fiduciary(ies). It is probably safe to say that the Mertens plaintiffs’ realization of this limitation on recovery provided them with the incentive to press their compensatory relief claim to decision before the Nation’s highest court.

In certain cases, the dollar value of equitable restitution may be significant. Putting to the side evidentiary concerns, the existence of the following factors are likely to increase the odds of a plaintiff obtaining significant relief in restitution:

1. The fiduciary breach in which the service provider is alleged to have participated involves one or more large plans (such as the Kaiser Steel plan at the center of the Mertens litigation);
2. Such breach is in connection with one or more transactions that are “service provider intensive” (such as the termination of a qualified defined benefit plan or the coordination of benefit plans following corporate mergers and acquisitions); and
3. Payment of service provider fees are made from plan assets.

---

117. But see Kyle Rys. Inc. v. Pacific Admin. Servs., Inc., 990 F.2d 513 (9th Cir. 1993) (requiring plaintiff to allege and prove that the service provider received something in addition to the agreed-upon compensation for services to satisfy a claim for relief because of unjust enrichment); Reich v. Rowe, 20 F.3d 25, 33 (1st Cir. 1994) (no restitution remedy where defendant never received or controlled ERISA plan assets); Mertens, 948 F.2d at 612. Such unjust enrichment might be present, for example, in a case where the service provider retained plan assets for its own use.


119. This position was advanced by Mertens before the Ninth Circuit Court of Appeals. Mertens v. Hewitt Assoc., 948 F.2d 607, 612 (1993). The court rejected this argument on the basis that elimination of the distinction based on the source of the fees would “obliterate the already blurry distinction” between the equitable remedy of restitution and the legal remedy of money damages. Id. Query whether a different result might be obtained by alleging that, as a result of the improper conduct, the fees paid to the service provider by the employer for services to the plan were in excess of “reasonable compensation” for such services and, therefore, such excess should be subject to recovery by the employer. See Benvenuto v. Schneider, 678 F. Supp. 51 (E.D.N.Y. 1988). If the employer is a party alleged to have been involved in the fiduciary breach, the fee returned may be a stake from which recovery on the breach claim can be made. However, the plaintiff in such a case must establish to the satisfaction of the court, his or her right to bring the “reasonable compensation” claim of the employer.
In many cases involving a fiduciary breach one or more of these factors will not be present. Even if present, any one of these factors is not guaranteed to ensure the plaintiff of his requested relief because the link between the service provider and the fiduciary breach required by the "knowing participation" cause of action may be difficult or impossible to establish. Even if the necessary link is established, the relief obtainable (through restitution) is likely to be small. Thus, the threshold at which a plaintiff's "knowing participation" claim loses viability may be startlingly low. For when the plaintiff balances the prospect of a modest return with the costs of maintaining what may likely be the sole claim for relief against the service provider, the plaintiff may conclude that the action is just not worth it.

In summary, although Mertens clearly discourages plaintiffs from bringing "knowing participation" claims against professional service providers, the holding of the case did not establish that the cause of action was unavailable under ERISA. That said, the plaintiff who decides to sue the service provider under such a theory is likely to find a cool reception after Mertens. Some evidence suggests that the lower courts have already taken up the banner against the common law claim. In jurisdictions that may continue to entertain the cause of action, the plaintiff will face a formidable task in proving the common law elements of "knowledge" and "participation." The uneven treatment that precedent has given to these substantive components does not provide a plaintiff with a well-lit path for his foray into the furthermost stretches of ERISA litigation. Finally, lest our zest for the theoretical propel us ahead of the mundane purposes of litigation, we must ask, "What, in the way of hard dollars, can we expect from a successful knowing participation lawsuit?" After Mertens, an ERISA plaintiff may find recovery under typical forms of equitable relief to be something short of equitable.

IV
FIDUCIARY LIABILITY OF SERVICE PROVIDERS AFTER MERTENS

Apart from any ERISA liability under "knowing participation" theory, a service provider may be found liable under ERISA if the service provider assumed the status of fiduciary in connection with one or more transactions involving an ERISA plan and if his conduct in the transaction(s) at issue failed to satisfy the standards required of the ERISA fiduciary.120 For a party to establish the fiduciary liability of a service provider, that party must show that the service provider engaged in activities which are, of their nature, fiduciary activities under ERISA.121 In some cases, proof of this prop-

120. Mertens, 113 S. Ct., at 2066, 2071-72.
121. See Mertens, 948 F.2d at 610 (9th Cir. 1991) (reviewing authorities) and Useden, 947 F.2d at 1577-78 (11th Cir. 1991).
osition may not be difficult. It is more likely, however, that the question of whether the service provider is a de facto fiduciary will involve a fact-intensive inquiry into, among other things, the professional services contracted for and performed, the responsibilities assumed by the professional, and, perhaps, the subjective state of mind of the person hiring the service provider (usually one or more representatives of the plan sponsor).

As for members of the accounting, actuarial, consulting, and legal professions, the question most often raised in these contexts is whether the professional has exercised discretionary authority, responsibility, or control in regard to the management or administration of an ERISA plan. Given the accepted view that one's status as a fiduciary is determined under a "functional" test, courts, not surprisingly, liberally construe ERISA's fiduciary definition. In their analyses, these courts emphasize ERISA's purpose of protecting plan participants and beneficiaries.

Cases from the late 1970s through the mid-1980s which decided questions of a service provider's status as a fiduciary frequently displayed an expansive conception of what constitutes discretionary authority, responsibility, or control in the management or administration of a plan. Thus, for example, in Eaton v. D'Amato, the district court for the District of Columbia held that a consulting firm and its officers were fiduciaries in part due to their role in establishing and supervising plan record-keeping systems. Interpreting ERISA § 3(21) such that "any" discretionary authority regarding a plan's management or administration is enough to make the person exercising the authority a fiduciary, the court reasoned that a more restrictive interpretation of the term "would, in effect, enable trustees to transfer important responsibilities to a largely immunized 'administrative' entity." This, the court remarked, would conflict with a Congressional ex-

122. See, e.g., Brandt v. Grounds, 687 F.2d 895 (7th Cir. 1982) (bank providing investment advice for a fee). But see, Bradshaw v. Jenkins, 5 E.B.C. 2754 (W.D. Wash. 1984) (trustee not a fiduciary where it fails to possess discretionary authority and control in performing its functions).

123. See supra notes 123 and 124 and accompanying text. ERISA's legislative history also speaks to this issue:

While the ordinary functions of consultants and advisers to employee benefit plans...may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets. In such cases they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.


124. See discussion at notes 11-26 and accompanying text.


127. Id. at 746.
pectation that the definition of fiduciary would "encompass consultants and advisors whose special expertise leads them to formulate and act on discretionary judgments while performing administrative functions not otherwise contemplated as fiduciary."128

Courts have had the least difficulty in finding that a service provider had bridged the gap between fiduciary and nonfiduciary where a service provider was serving as a third party administrator of a covered plan—primarily in the health benefits area. In these cases, the defendant clearly had administrative responsibilities; the issue was thus whether the defendant exercised discretion in addition to performing exclusively ministerial functions.129 Where the third party has had a perceptible role in the granting or denial of claims, fiduciary status is likely to be found.130

Service providers shown to be responsible for the design and amendment of a plan have been held to be fiduciaries. In Brock v. Self, a consultant was found to have exercised discretionary authority and responsibility in the administration of a plan through his "admitted responsibility" to amend the plan to conform with ERISA and by providing, on several occasions, amendments and resolutions for the sponsor's board of directors.131 Service providers whose advice or recommendations were automatically "rubber-stamped" by plan administrators have also been held to have exercised the requisite discretionary authority and control as to render them fiduciaries.132

Some of the cases finding a service provider liable as a plan fiduciary have placed significant weight on the degree to which it is perceived that the plan sponsor "relies" on the advice given by the service provider. In one early case, a plan sponsor's "heavy reliance" on the advice of a plan consultant regarding plan management led to the court's holding the con-

128. 1d.

129. See, e.g., Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 129 (7th Cir. 1992) ("ERISA makes the existence of discretion a sine qua non of fiduciary duty.").


sultant a fiduciary on account of his exercise of discretionary authority. In \textit{Self}, the court buoyed its finding that a consultant was an ERISA fiduciary by stressing the plan sponsor’s “heavy reliance” upon the consultant to answer any and all questions regarding the administration and management of the plan.

Furthermore, in the recent case of \textit{Martin v. Feiber}, the Eighth Circuit Court of Appeals held an accountant liable as a fiduciary in connection with certain transactions involving an employer stock ownership plan (ESOP). In rejecting the accountant’s claim that he performed only ministerial tasks with respect to the plan and therefore could not be found to be a fiduciary, the court noted that the plan’s named fiduciary had no real understanding of his ESOP duties and had “relied heavily” on the accountant’s advice.

\textit{Feiber}, however, may be distinguished from prior precedent on its facts: the accountant-fiduciary proposed and structured the leveraged buyout of the plan sponsor using the ESOP with virtually total lack of participation by the named fiduciary and had received, in addition to fees-for-service, profits from a series of self-dealing transactions he arranged. This case nevertheless represents a recent opinion by a Circuit Court of Appeals that emphasizes the role a plan sponsor’s reliance on a service provider’s expertise may play in determining whether the service provider is an ERISA fiduciary.

Taken at face value, this reasoning may have serious consequences. The administration of ERISA plans has always been complex and, over recent years, has become increasingly so. Faced with frequent changes in the laws governing their plans, sponsors, having themselves the final responsibility for plan administration, understandably seek to employ professionals with expertise in general or specific administrative areas. ERISA contemplates, and in some cases mandates, this engagement of professional service providers. In essence, a reconciliation is called for between the concept elucidated in 29 C.F.R. § 2509.75-5 and in ERISA’s legislative

\begin{itemize}
    \item 134. 632 F. Supp. 1509, 1521; \textit{see also Eaton}, at 746.
    \item 136. 965 F.2d at 663, 669.
    \item 137. “Complicated” sums up this entire area. My staff and I have made forays into the world of private pension plans and ERISA, and after several briefings, have come to the conclusion that for every assumption or rule, there are at least 200 exceptions.” Senator Barry Goldwater, 126 CONG. REC. 12179 (May 22, 1980) \textit{reprinted in} \textit{STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS} 2 (1988).
    \item In the 14 years since this statement was made, Congress has passed legislation at least 14 times that has significantly affected the administration of employee benefit plans and provided the catalyst for reams of regulation.
    \item 138. \textit{See, e.g.,} ERISA §§ 103(a)(3) and 103(a)(4), requiring services of a qualified public accountant and enrolled actuary, respectively. It is pertinent to note, however, that while ERISA confers certain duties on these professionals, the statute does not go so far as to confer fiduciary status on these persons.
\end{itemize}
history that service providers performing usual professional functions will not ordinarily be considered fiduciaries and the "heavy reliance" theory. While the regulations may be said to contain the "traditional" functional approach to the fiduciary question, liability under the "heavy reliance" view may not so much depend merely on the functions performed by the professional, as on how these functions are perceived to fit into the overall administrative scheme of the plan. Under a reliance view, the objective basis of the regulations' test merges with certain subjective elements. Clearly a focus in this approach will be the subjective reliance which plan representatives place on the expertise of the professional who is engaged to perform services for the ERISA plan. Also telling may be the state of mind of the professional himself, especially under circumstances in which he lends substantive administrative advice while knowing that plan officials will do no more than "rubber-stamp" and implement his counsel.139

The expansive "heavy reliance" theory suggested by cases such as Self and Brink v. DaLesio may logically lead to the conclusion that a service provider may be functioning as a fiduciary more often than not—if not virtually all the time. A sponsor will likely not hire a professional to provide only rote services and will typically rely heavily on the professional's expertise. Under a "heavy reliance" theory, it would seem that the more that plan personnel accept the advice of outside professionals, the closer these professionals come to crossing the vague boundary between fiduciary and nonfiduciary. This leads one to the absurd conclusion that the better a consultant (i.e., as judged by accurate advice which invites trust and reliance), the greater the danger that the consultant will be considered a plan fiduciary. It follows that, to answer this increased risk, the professional may decide to sabotage his skills and thereby make his counsel less reliable. This is, of course, a ridiculous response by a service provider, even ignoring malpractice considerations. The practical response for the professional is to raise his or her fee for services performed to meet the increased risk of doing business.140 Whether sponsors of ERISA plans will be willing to pay this cost is another question, however. The likely result is that plan sponsors may rationally decide to forego seeking professional assistance in cir-

139. Note that, in actions claiming that a service provider was in fact a plan fiduciary, named fiduciaries will themselves be defendants in virtually all cases. This presents some problems where "heavy reliance" is the standard of proof. For example, under this approach, the extent to which the fiduciary could show his subjective "reliance" on the professional's advice may significantly impact the ultimate recovery that may have to come from his pocket. Thus, the fiduciary will have the incentive to testify as to his subjective reliance on the professional's expertise. This leaves the professional in the awkward position of having to disprove the fiduciary's thoughts.

140. The resulting increase in cost to the plans served, the Supreme Court noted, was recognized by Congress and reflected in the "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs." Mertens, 113 S. Ct. at 2072 (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 515 (1981)); see also Pohl v. National Benefits Consultants, Inc., 956 F.2d at 128.
circumstances where it may be prudent to obtain the advice. Ironically, these circumstances may include areas directly implicating the sponsor’s own fiduciary duties.

For these reasons, perhaps, much of the recent case law suggests that courts are deciding questions of a service provider’s fiduciary status under the “traditional” functional approach. As noted above, the issue ordinarily entails a determination of whether a service provider has exercised discretionary authority, responsibility, or control in the management or administration of a plan. In these recent decisions, courts have looked toward whether, under the circumstances, the service provider has had actual decision-making powers affecting the plan. In Pappas v. Buck Consultants, Inc., the Seventh Circuit Court of Appeals rejected the argument that an actuary was a fiduciary on account of its use of an allegedly improper discount rate in determining the lump sum benefit to be paid from a defined benefit plan to a participant in connection with the buyout of the participant’s interest in the sponsoring employer.\(^\text{141}\) The lump sum payment left the plan severely underfunded, which in turn caused the sponsoring employer to incur large contribution liabilities. The court held that, although the actuary might be liable to the plan for professional malpractice under state law, any influence the actuary may have had over the decisions of plan fiduciaries was not sufficient to make the actuary a fiduciary with respect to the plan.\(^\text{142}\) The court concluded that the actuary merely performed its usual professional functions of advising the plan fiduciaries and did not exercise actual decision-making power over plan functions.\(^\text{143}\)

In Anoka Orthopedic Associates, P.A. v. Lechnor, the Eighth Circuit Court of Appeals held that an attorney and an accountant who designed a pension plan, filed government reports on the plan’s behalf, and performed other administrative and consulting services with respect to the plan were not fiduciaries by virtue of these functions and, therefore, could not be held answerable under ERISA for huge losses to the plan resulting from embezzlement by the plan’s business manager.\(^\text{144}\) Likewise, in Painters of Philadelphia District Council v. Price Waterhouse, the Third Circuit Court of Appeals found that an accounting firm which performed standard audits of
an ERISA plan, but which had no authority to administer day-to-day plan affairs, did not exercise the level of discretionary authority or responsibility in the administration of the plan that would require a finding of fiduciary status. Even in those cases involving a professional who is hired as a third-party administrator to deal with hands-on plan activities, most of the recent decisions reflect a reluctance on the part of courts to find service providers to be fiduciaries.

Thus, the case law during the decade preceding Mertens suggests that courts' views have evolved with respect to the issue of what kinds of activity will be considered sufficient to hold a service provider liable as a fiduciary. The reasons for this are varied. Paying heed to recent decisions of the U.S. Supreme Court, lower courts may be following lock-step implications from the Supreme Court's textual interpretation of ERISA's provisions. From the time the Russell court confessed its unwillingness to infer causes of action in the ERISA context, the lower courts may have opted to construe the criteria for fiduciary status more closely, with the result that fewer independent service providers were to be seen as falling within the "broad" definition of an ERISA fiduciary. Alternatively, one may reason that with the growth of alternative causes of action against outside professionals through the 1980s, the service provider-as-fiduciary claim became less important for the recovery of damages. Courts may also be more willing to find professional liability under state law malpractice theory than to try to force the square peg of the professional into the round hole of ERISA fiduciary liability. Of course, another reason for the decrease in decisions holding a professional to be a fiduciary may be an increased sensitivity on

---


146. See supra notes 129 and 130.

147. 473 U.S. 134, at 147 ("we are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.").

148. See supra notes 27-46 and accompanying text.

149. See Painters, 879 F.2d at 1152-53 ("[State law has traditionally prescribed the standards of professional liability and, in the absence of clear indicia in [ERISA] or its legislative history, we are reluctant to ascribe to Congress an intention to intrude in this area."); Pappas 923 F.2d at 540 (the court, in rejecting petitioner's claim for an implied malpractice action under ERISA, indicated that the interest to be served by such an action "is already vindicated by the availability of state law malpractice suits. . ."); see also Richards v. Union Labor Life Ins. Co., 804 F. Supp. 1101 (D. Minn. 1993) (state cause of action against actuary for professional malpractice is not preempted by ERISA); Carl Colvin v. Vans Dairy, Inc. v. Western Pa. Teamsters & Employers Pension Fund, 785 F. Supp. 536 (W.D. Pa. 1992) (ERISA does not preempt state law claims for fraudulent misrepresentation, negligence and conspiracy against accountant and actuaries); Framingham Union Hosp., Inc. v. Travelers Ins. Co., 721 F. Supp. 1478 (D. Mass. 1989) (ERISA does not preempt state law claims against accountants); Issacs v. Group Health, Inc., 668 F. Supp. 306 (S.D.N.Y. 1987) (ERISA does not preempt state law claims
the part of service providers to this issue and, in response, a redefining or restructuring of the way in which services are delivered to a plan or plan sponsor.

What effect is *Mertens* likely to have on the development of this line of ERISA litigation? One effect is that *Mertens* will likely result in an increase in litigation concerning the fiduciary status of service providers. The most obvious reason for this is that after *Mertens*, a plaintiff must prove the service provider acted in a fiduciary capacity in order to obtain any damages from the service provider under ERISA as currently structured. To support his claim, the plaintiff will have to show that the professional, in his delivery of services *in connection with a transaction which resulted in loss to the plan*, exercised discretionary authority, responsibility, or control.150

Second, *Mertens* may reinvigorate the issue of whether a plaintiff may have a right to a jury trial under ERISA. Because ERISA is silent on the availability of a jury trial, courts dealing with the question have applied Seventh Amendment doctrine to answer this question. The primary inquiry in such cases has been whether the remedy sought is legal or equitable in nature.151 Since ERISA Section 502 claims generally sound in equity, courts have had little trouble denying the right to jury trial in such cases.152

*Mertens*, however, decided that only equitable relief, in its traditional sense, is available under Section 502(a)(3) of ERISA. A plaintiff who wishes to bring an action for damages must make a claim under Section 502(a)(2), which permits a participant, beneficiary, or fiduciary to enforce the substantive protection of Section 409 through a suit against a fiduciary (including a service provider *qua* fiduciary) for breach of fiduciary duty. If, as it appears, the full *Mertens* Court recognizes a *legal* remedy under Section 502(a)(2), can a plaintiff bringing a claim under section 502(a)(2) characterize his claim as an action *at law* entitling him to a jury trial? If so, this procedural consequence of *Mertens* could make fiduciary—and alleged fiduciary—defendants more willing to settle ERISA claims out of court.

150. See, e.g., F.H. Krear v. Nineteen Named Trustees, 810 F.2d at 1250 (2d Cir. 1987) ("[A]n attorney for an ERISA-governed fund is not necessarily a 'fiduciary' for all purposes within the meaning of ERISA"); Associates in Adolescent Psychiatry v. Home Life Insurance Co., 941 F.2d 561, 570 (7th Cir. 1991) ("[h]at lawyers, accountants and actuaries may render services to employers, plan trustees, and plan beneficiaries does not give them any decision-making authority over the plan or plan assets; the power to act from the plan is essential to status as a fiduciary under ERISA."); see also Martin v. Feiber, 965 F.2d 660, 669 (8th Cir. 1992).


Third, since the service provider’s status as fiduciary or non-fiduciary is legally significant, we should expect courts to express an interest in the appropriate construction to be given ERISA’s definition of “fiduciary.” Perhaps some courts, in light of the limitations on the “knowing participation” cause of action and the perception of a pre-emption handicap with respect to state-law negligence claims, will construe the ERISA definition of “fiduciary” so as to enlarge the scope of activity which is currently considered to be exercising discretionary authority or control over plan administration. These courts may look to cases such as Self and Eaton for guidance; however, in doing so, they will need to reconcile these cases with the Supreme Court’s comments in Mertens regarding the congressional balance struck in ERISA and the Court’s rejection of the notion that ERISA’s “basic purpose” can overcome the language committed in the statute’s text. In addition, as discussed earlier, an enlargement of the ERISA “fiduciary” classification may have unintended effects.\textsuperscript{153}

Thus, despite what seems to have been a recent slackening in the pace of decisions finding a service provider liable as an ERISA fiduciary, Mertens may have increased the incentive to the service provider to diligently protect against his becoming a \textit{de facto} fiduciary. It would seem—in these days in which courts are examining with a magnifying glass the relationship between the professional service provider and ERISA plan sponsors—that the careful service provider will, when giving advice or sharing his or her expertise, take substantial steps to ensure that he or she cannot, at some later date, be seen to have “made” a substantive decision regarding the administration of an ERISA plan. In practice, this might include taking reasonable steps toward ensuring that personnel at the appropriate level within the client organization are involved in significant plan decision-making. Perhaps it may include making suggestions toward enlisting additional professional expertise where, in the service provider’s opinion, such expertise is warranted by the circumstances. Further measures may include providing alternative courses of action, where appropriate, and scrupulously documenting what these alternatives are, and to whom they are communicated.

If it can be said that, of all those participating in the planning and implementation of a transaction involving an ERISA plan, the professional is most likely, by virtue of his expertise, to have the greatest understanding of what might be required to achieve the desired result (and the manner through which it might be achieved) then it is a small step for a court to find that the service provider had “exercised discretionary authority, responsibility or control in regard to the management or administration of an ERISA plan” and had, thereby, become a fiduciary with respect to the plan. Therefore, in addition to focusing his or her energies into providing valuable client service, the service provider should consider the manner in which these

\textsuperscript{153} See \textit{supra} discussion accompanying note 140.
services are delivered and, if necessary, take steps to structure the delivery of client work in a fashion which will limit the likelihood of being categorized as an ERISA "fiduciary."

V

Conclusion

In *Mertens v. Hewitt Associates*, the U.S. Supreme Court resolved the issue of whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. However, the wide difference in the approaches taken by the majority and dissenting justices in the 5-4 decision—a disparity manifested in both the discussion of the money damages issue and in the comments contained in each opinion regarding the undecided issue of whether the "knowing participation" claim underlying the *Mertens* litigation is available under ERISA in the first place—suggests a sharp split among members of the Court as to the appropriate construction to be given to ERISA's remedial provisions. To the employee benefits practitioner, *Mertens* is important not only because its holding reduces the risk that the professional will be subjected to tenuous suits aimed primarily at the perceived "deep pocket," but also because it raises new questions in connection with the theories most favored by ERISA plaintiffs seeking to recover from independent service providers: the "knowing participation" cause of action and the claim that the service provider is liable as an ERISA fiduciary for plan losses. Thus, while *Mertens* may provide closure on the damages issue, the decision is far from the last word on the ERISA liability of the professional providing services to ERISA plans.