Equitable Remedies for Breach of Fiduciary Duty under ERISA after Varity Corp. v. Howe

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The United States Supreme Court has issued two decisions in recent years concerning the relief available for breach of fiduciary duty under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA). In Mertens v. Hewitt Associates, the Court held in a 5-4 decision that such relief is limited to traditional equitable remedies and does not include damages. Last year, in Varity Corp. v. Howe, the Court added that participants in covered employee benefit plans can recover such relief for themselves individually and not just on behalf of the plan. A question remains as to which specific equitable remedies are available to plan participants in actions under ERISA section 502(a)(3) for breach of fiduciary duty. The author suggests that potential relief in such actions should correspond to that relief available in equity for breach of trust. The article notes that while the Supreme Court has not relied on this approach, its decisions in this area are nonetheless consistent with it. The author also demonstrates that this approach appears to be consistent with the structure and purpose of ERISA. Under this construction, monetary awards would be appropriate in some cases, even though damages are not available in such actions under Mertens.

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I
INTRODUCTION

In Varity Corp. v. Howe, the U.S. Supreme Court held that participants in a covered employee benefit plan can recover individually in actions for breach of fiduciary duty under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA).2 Previously, based on a 1985 Supreme Court decision involving a different subsection of section 502(a),3 some courts of appeals had held that plan participants could recover only on behalf of the plan.4 Varity thus clarifies an important issue regarding remedies under ERISA for breach of fiduciary duty and other violations. However, fundamental questions remain.

One question is which specific forms of relief are available to plaintiffs in actions under section 502(a)(3). This provision authorizes actions by plan participants, beneficiaries, and fiduciaries to enjoin certain ERISA violations and to obtain "other appropriate equitable relief" to redress such violations or enforce certain statutory duties.5 What constitutes equitable relief within the meaning of this provision was not before the Court in Varity,6 but in a 1993 decision, Mertens v. Hewitt Associates,7 the Court held that equitable relief under section 502(a)(3) does not include dam-

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6. See Varity, 116 S. Ct. at 1068:
[We] consider three legal questions. First, . . . was the employer acting in its capacity as an ERISA "fiduciary" when it significantly and deliberately mislead the beneficiaries? Second, in misleading the beneficiaries, did the employer violate the fiduciary obligations that ERISA § 404 imposes upon plan administrators? Third, does ERISA § 502(a)(3) authorize ERISA plan beneficiaries to bring a lawsuit, such as this one, that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary obligations?
See also Brief for Respondents at 12, n.5, Varity ("[t]he form of equitable relief granted for petitioner's breach of fiduciary duty is not among the questions presented in this certiorari proceeding").
ages. The Court construed “equitable” as used in the section to mean equitable as opposed to legal; thus, damages—the classic form of legal relief—are not available. Since plaintiffs in that case sought to recover only damages (on behalf of the plan), the Court did not elaborate further as to which specific remedies might be encompassed by the section’s provision for equitable relief.

From Varity and Mertens, then, it is clear that plan participants suing for breach of fiduciary duty under section 502(a)(3) can recover equitable relief for themselves individually, but that such relief does not include legal remedies such as damages. However, a question still exists as to which particular equitable remedies constitute “appropriate” equitable relief within the meaning of section 502(a)(3). In particular, whether a monetary claim is equitable or legal in nature is not always clear.

The latter point is illustrated by the division in the Eighth Circuit Court of Appeals over the monetary remedy awarded in Varity. In that case, former employees alleged that their former employer and plan administrator, Varity Corporation, deceitfully induced them to transfer to a new subsidiary, and to a new employee benefit plan, knowing that the new subsidiary would fail. The district court found that the scheme was designed to permit Varity to reduce its wage and benefit obligations, and Varity, insofar as it acted as plan administrator, violated its fiduciary duties under ERISA. The remedy, as modified by the Eighth Circuit, was an injunction ordering the plaintiffs to be reinstated to the Varity plan and a monetary award equivalent to the benefits that plaintiffs would have received had they remained in the original plan. Nevertheless, the three-judge appellate panel was divided on the issue of the monetary award. The majority labelled it as equitable relief “in the nature of restitution” while the partial dissent characterized the award as compensatory damages impermissible under Mertens. Since the Supreme Court did not review the remedy, the contours of equitable relief under section 502(a)(3) remain unclear.

8. See id. at 256-58.
9. See id.
12. See id. at 748-50.
13. See id. at 753-55. Among the duties that ERISA imposes on plan fiduciaries is the duty to act solely in the interest of plan participants and beneficiaries. See ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), discussed infra at note 36 and accompanying text. ERISA permits an employer to serve as plan administrator despite the potential for conflict of interest. An employer that does so is generally subject to ERISA’s fiduciary requirements only when it performs discretionary acts of plan administration. See ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), discussed infra at note 34 and accompanying text.
14. See Howe, 36 F.3d at 756-57.
15. Id. at 756.
16. See id. at 757 (Hansen, J., concurring in part and dissenting in part).
The purpose of this article is to determine the specific remedies available to individual plan participants who recover for breach of fiduciary duty under section 502(a)(3). I will begin by outlining the regulatory and enforcement provisions of ERISA. Next, I review the remedies available at common law for breach of trust, for ERISA's legislative history establishes that the statute's fiduciary provisions are modelled on those of traditional trust law. I will then go on to consider the extent to which such remedies are consistent with the structure and purpose of ERISA.

I will show that the remedies generally available to plan participants and beneficiaries under section 502(a) for breach of fiduciary duty track those remedies available in equity to trust beneficiaries for breach of trust. Therefore, section 502(a)(3)'s provision for "other appropriate equitable relief" should be construed to refer to those equitable remedies available for breach of trust not otherwise provided for in section 502(a). While the Supreme Court has not relied on these trust-law remedies in construing section 502(a), its decisions are nonetheless consistent with the notion that the relief afforded under section 502(a) may consist of such remedies. Thus, equitable relief for plan participants under section 502(a)(3) should be able to take the form of a monetary award, even though damages per se are unavailable through that section under Mertens.

II
REGULATORY AND ENFORCEMENT PROVISIONS OF TITLE I OF ERISA

A. Purpose, Scope, and Construction of Title I

Section 2(b) of ERISA declares that the policy of the Act is to protect . . . the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries

17. In general, ERISA remedies cannot be supplemented by relief under state law as a consequence of ERISA pre-emption. In Varity, for example, the lower courts found that plaintiffs' state law claim for damages based on fraudulent misrepresentation was pre-empted by ERISA. See Howe, 36 F.3d at 752-53. ERISA's pre-emption provision is discussed infra at notes 25-26 and accompanying text.

18. See infra notes 28, 180 and accompanying text. But the legislative history offers relatively little guidance on the scope of equitable relief available for violations of ERISA's fiduciary requirements. See infra notes 182-84 and accompanying text.

19. ERISA includes four titles. 29 U.S.C. § 1001 et seq. Title I establishes rules for the operation of employee benefit plans. Id. Title II includes the tax-qualification rules for qualified retirement plans. Id. Title III relates to the federal government's administration and enforcement of ERISA. Id. Title IV establishes plan termination insurance and creates the Pension Benefit Guaranty Corporation to administer it. Id. This article deals only with the provisions of Title I, and mostly with the provisions by which a plan participant or beneficiary can enforce the fiduciary requirements of Title I.
of employee benefit plans, and by providing for appropriate remedies, sanc-
tions, and ready access to the Federal courts.\textsuperscript{20} The Supreme Court has found that "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits."\textsuperscript{21} To achieve this purpose, ER-
ISA does not mandate particular benefits but rather governs the administra-
tion of employee benefit plans.\textsuperscript{22}

Title I applies to any employee benefit plan established or maintained by an employer or by an employee organization such as a labor union.\textsuperscript{23} ERISA defines the term "employee benefit plan" to include both pension plans and welfare plans.\textsuperscript{24} The regulatory and enforcement provisions of Title I pre-empt "any and all State laws insofar as they may now or hereaf-
after relate to any employee benefit plan."\textsuperscript{25} However, state laws that regu-
late insurance, banking, or securities are exempt from ERISA pre-emption, as are generally applicable state criminal laws.\textsuperscript{26}

The Supreme Court has determined that Congress intended for federal courts to develop a "federal common law of rights and obligations under ERISA-regulated plans" to be used as an aid in the application of ERISA.\textsuperscript{27} The Court has also concluded that ERISA's legislative history grounds the statute in the common law of trusts, and it has declared that the principles of trust law should guide courts in construing the terms of ERISA, particularly its fiduciary provisions.\textsuperscript{28} Nevertheless, the Court has added that in some cases "trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its struc-

\begin{itemize}
\item \textsuperscript{20} ERISA § 2(b), 29 U.S.C. § 1001(b).
\item \textsuperscript{21} Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) (quotation marks and cita-
tions deleted).
\item \textsuperscript{22} See Shaw v. Delta Airlines, 463 U.S. 85, 91 (1983).
\item \textsuperscript{23} ERISA § 4(a), 29 U.S.C. § 1003(a). ERISA § 4(b) exempts governmental plans, church
plans, and select other plans. 29 U.S.C. § 1003(b).
\item \textsuperscript{24} ERISA § 3(3), 29 U.S.C. § 1002(3). An "employee welfare benefit" plan includes any pro-
gram that provides benefits to employees for contingencies such as illness, accident, disability, death, or
unemployment. ERISA § 3(1), 29 U.S.C. § 1002(1). An "employee pension benefit" plan is a plan that
provides retirement income to employees or results in a deferral of income by employees to the termina-
tion of employment or beyond. ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). ERISA incorporates the
common-law definition of "employee." Nationwide Mutual Life Insurance Co. v. Darden, 503 U.S. 318
\item \textsuperscript{25} ERISA § 514(a), 29 U.S.C. § 1144(a). The term "State law" includes "all laws, decisions,
rules, regulations, or other State action having the effect of law of any State." ERISA § 514(c)(1), 29
U.S.C. § 1144(c)(1). On the scope of ERISA pre-emption, see Shaw, 463 U.S. 85; New York State
\item \textsuperscript{26} ERISA §§ 514(b)(2)(A) and (b)(4), 29 U.S.C. §§ 1144(b)(2)(A) and (b)(4).
\item \textsuperscript{27} Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 56 (1987).
\item \textsuperscript{28} See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989); see also Central
States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570-72
(1985).
\end{itemize}
ture, or its purposes require a departure from common-law trust requirements. 29

B. Regulatory Provisions of Title I

Some regulatory provisions of Title I apply only to pension plans while others apply to both pension and welfare plans. The regulatory requirements that apply to all employee benefit plans include reporting and disclosure mandates and rules of fiduciary responsibility. For pension plans, ERISA imposes additional requirements concerning employee participation, vesting of benefits, and funding of benefits. 30

The reporting rules require an administrator of a welfare or pension plan to file with the Department of Labor an annual report containing financial and other information regarding plan operations. 31 Under the disclosure rules, a plan administrator must furnish plan participants and beneficiaries with certain information about the plan, including a summary that describes in understandable terms their rights, benefits, and responsibilities under the plan. 32

ERISA imposes strict fiduciary obligations on virtually any person charged with discretionary authority over administration of an employee benefit plan. 33 A person is a plan fiduciary to the extent that the person exercises any discretionary authority or discretionary control over administration of a plan, or to the extent that he or she exercises any authority or

30. The participation, vesting, and funding rules of Title I are substantially similar to those that apply to tax-qualified retirement plans under the Internal Revenue Code. See I.R.C. § 401(a), 26 U.S.C. § 401(a). For qualified plans, the Code permits a current deduction to the employer for its contribution to the plan without requiring inclusion of the employer’s contribution in the employee’s income until the plan makes a distribution to the employee. See I.R.C. §§ 404(a)(1)-(3) (deductibility) and I.R.C. § 402(a) (taxation of employee). Also, a qualified plan’s interest income is exempt from taxation. I.R.C. § 501(a). See generally Michael J. Canan, Qualified Retirement and Other Employee Benefit Plans (1995).


31. ERISA § 101(b), 29 U.S.C. § 1021(b). Other reports must be filed with the Department of the Treasury and the Pension Benefit Guaranty Corp. See I.R.C. §§ 6057-59; ERISA §§ 4041, 4043, 4065. By interdepartmental agreement, a plan files a single report with the IRS (IRS Form 5500), and the IRS supplies relevant portions to the various agencies. Id.

32. ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1). The Department of Labor’s regulations on various reporting and disclosure requirements are set forth at 29 C.F.R. § 2520.


control over disposition of plan assets. As the Supreme Court has observed, this functional definition of fiduciary substantially expands the universe of persons subject to fiduciary duties and liabilities; in traditional trust law, only a trustee was subject to such duties and liabilities.

Title I requires a fiduciary to discharge plan duties solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing them benefits while defraying reasonable administrative expenses, and with the care, skill, and diligence of a prudent person familiar with the duties undertaken. A fiduciary who breaches this duty is personally liable to the plan, both to make good any losses resulting from the breach and to restore any profits realized by the fiduciary through the use of plan assets.

ERISA also prohibits a plan fiduciary from causing a plan to engage in certain transactions with a “party in interest.” A party in interest includes a plan fiduciary, an employer whose employees are covered by the plan, a labor union whose members are covered by the plan, and others. Prohibited transactions include loans, the transfer of plan assets, and the sale, exchange, or leasing of any property. Such transactions, unless they meet the criteria for a statutory or administrative exemption, are barred on the

34. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). A person also is a fiduciary to the extent that he or she renders investment advice for a fee. Id. Under Department of Labor Interpretive Bulletin 75-5, June 25, 1975, attorneys, accountants, actuaries, and consultants performing their usual professional functions will ordinarily not be considered fiduciaries solely on the basis of such services. See 29 C.F.R. § 2509.75-5 D-1.

Varity illustrates the Supreme Court’s approach to applying ERISA’s functional definition of fiduciary status. In that case, the district court found and the Supreme Court agreed that “when the misrepresentations regarding employee benefits were made, Varity was wearing its ‘fiduciary’ as well as its ‘employer’ hat.” 116 S. Ct. at 1071. The Court found that the provision of information about plan benefits was an act of plan administration, and that it was performed by someone with authority to communicate as a fiduciary with plan participants. The Court concluded that Varity had engaged in a discretionary act of plan administration and had acted as a fiduciary to that extent. See id. at 1072-73.


36. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). A fiduciary is also required to diversify plan investments, unless it is clearly prudent not to do so, and to act in accordance with the terms of plan documents insofar as such documents are consistent with ERISA. Id. Under ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), every employee benefit plan must be established and maintained pursuant to a written instrument. Also, subject to certain exceptions, plan assets must be held in trust by one or more trustees. ERISA § 403(a), 29 U.S.C. § 1103(a).

In Varity, the Court found that to “participate knowingly and significantly in deceiving a plan’s beneficiaries in order to save the employer money at beneficiaries’ expense, is not to act ‘solely in the interest of the participants and beneficiaries.’” 116 S. Ct. at 1074.

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


39. ERISA § 3(14), 29 U.S.C. § 1002(14). Others include, for example, a counsel or employee of the plan, an owner of a controlling interest in an employer or union whose employees or members are covered by the plan, relatives of certain parties in interest, and a person providing services to the plan. Id.

40. ERISA § 406(a), 29 U.S.C. § 1106(a). Parallel provisions are included in the Internal Revenue Code at I.R.C. § 4975, 26 U.S.C. § 4975. A fiduciary who engages in a prohibited transaction is subject to fiduciary liability under Title I of ERISA; a party in interest who does so is subject to a penalty tax under I.R.C. § 4975.
basis of an inherent conflict of interest. A fiduciary is further required to refrain from self-dealing.

C. Civil Enforcement Provisions of Title I

ERISA's civil enforcement provisions constitute "one of the essential tools for accomplishing the stated purposes of ERISA." The "detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." Section 502(a) authorizes a number of actions that may be brought by various parties. Some actions may be brought by a plan participant or beneficiary, some by a fiduciary, and some by the Secretary of Labor. The discussion here will focus on the civil enforcement actions that may be brought by plan participants and beneficiaries.

42. ERISA § 406(b), 29 U.S.C. § 1106(b).
43. ERISA also provides for criminal penalties for the willful violation of the Act's reporting and disclosure requirements. ERISA § 501, 29 U.S.C. § 1131.
45. Id. at 54.
46. ERISA does not authorize enforcement actions by a plan, but it does provide that a plan may sue or be sued as an entity. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1).
47. Section 502(a) provides in its entirety:
(a) A civil action may be brought —
(1) by a participant or beneficiary —
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);
(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;
(6) by the Secretary to collect any civil penalty under paragraph (2), (4), or (5) of subsection (c) of this section or under subsection (i) or (l) of this section;
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A));
(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the par-
Under section 502(a)(1)(B), a participant or beneficiary can sue to recover benefits due under the terms of the plan, to enforce his rights under the plan, or to clarify his rights to future benefits under the plan. The Supreme Court has suggested in dictum that relief under this provision may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, and an injunction against a plan administrator's improper refusal to pay benefits. Courts have differed on the question of whether a recovery of benefits under this provision is a legal or an equitable remedy.

Section 502(a)(1)(A) authorizes a participant or beneficiary to bring an action for the relief provided for in section 502(c).

Under section 502(a)(2), an enforcement action may be brought by a participant, beneficiary, fiduciary, or the Secretary for "appropriate relief under section 409." Section 409 states that a fiduciary who breaches a fiduciary duty is personally liable "to make good to the plan any losses to the plan resulting from each such breach" and to restore to the plan any ill-gotten gains. It also subjects such a fiduciary to "such other equitable or

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48. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This action may be brought in either state of federal court. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Federal district courts have exclusive jurisdiction over all other ERISA civil enforcement actions that can be brought by a plan participant or beneficiary. Id.

49. Pilot Life, 481 U.S. at 53.

50. Compare Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989) (recovery of benefits under § 502(a)(1)(B) is "equitable in nature"), and Novak v. Anderson Corp., 962 F.2d 757, 759 (8th Cir. 1992) (recovery of benefits under § 502(a)(1)(B) is a "legal remedy")


52. ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1). Also, the court may in its discretion order such other relief as it deems proper. Id.


54. ERISA § 409(a) 29 U.S.C. § 1109(a).
remedial relief as the court may deem appropriate, including removal of such fiduciary."

The Supreme Court construed section 502(a)(2) in Massachusetts Mutual Life Insurance Co. v. Russell. The Court found that the provision permits a plan participant to bring an action against a fiduciary for breach of fiduciary duty, but it does not provide for recovery by the plaintiff individually; rather, it authorizes relief only for the plan. In Russell, a plan participant sued a plan fiduciary under section 502(a)(2) for extra-contractual compensatory and punitive damages for injuries allegedly sustained as a result of the improper termination of her disability benefits and the improper processing of subsequent benefit claims. The district court granted summary judgment for the defendant, finding that damages were unavailable under ERISA for the wrongful denial of benefit claims. The Ninth Circuit reversed in pertinent part. It concluded that the plaintiff could recover individually under section 502(a)(2). The Ninth Circuit further held that section 409's authorization of "such other equitable or remedial relief as the court may deem appropriate" gave courts the discretion to award compensatory and punitive damages.

The Supreme Court then reversed the Ninth Circuit on the ground that "Congress did not intend [section 409] to authorize any relief except for the plan itself." The Court based this conclusion on section 409's emphasis on fiduciary liability to the plan:

[N]ot only is the relevant fiduciary relationship characterized at the outset [of section 409] as one "with respect to a plan," but the potential personal liability of the fiduciary is "to make good to such plan any losses to the plan . . . and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan . . . ." However, the Court expressly reserved for future decision the extent to which section 409 may authorize recovery from a fiduciary of extra-contractual compensatory or punitive damages for a plan itself.

In a concurring opinion in Russell, Justice Brennan, joined by Justices White, Marshall, and Blackmun, expressed the view that the Court's holding should not be construed to suggest that damages would not be available

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55. Id.
56. 473 U.S. 134 (1985). See also supra note 4 and accompanying text.
57. Id. at 140-42.
58. Id. at 136-37. Plaintiff also brought various state law claims. The term "extra-contractual damages" in this context has been interpreted to mean "damages other than the payment of benefits owed under a plan." Howe v. Varity Corp., 36 F.3d 746, 754 (8th Cir. 1994).
59. Russell, 473 U.S. at 137. The district court also found that plaintiff's state law claims were pre-empted by ERISA. Id.
60. Id. at 137-38.
61. Id. at 144.
62. Id. at 140 (emphases and ellipses in original).
63. Id. at 144, n.12.
to a plan participant suing for breach of fiduciary duty under a different provision, namely section 502(a)(3). The Justices construed this section to authorize the award of appropriate equitable relief directly to a plan participant to redress any violation of Title I. The Justices also argued that such relief should include damages because ERISA incorporates the fiduciary standards of trust law, and equitable trust-law remedies include monetary damages.

Section 502(a)(3) permits civil enforcement actions by a plan participant, beneficiary, or fiduciary to "enjoin any act or practice which violates any provision of [Title I] or of the terms of the plan" or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [Title I] or the terms of the plan."

In *Mertens*, decided eight years after *Russell*, the Supreme Court ruled five to four that section 502(a)(3) authorizes the recovery of equitable relief only, and that such relief does not include damages. *Mertens* involved an action by former plan participants against a plan actuary—a nonfiduciary—for knowing participation in a breach of fiduciary duty. The plaintiffs alleged that the defendant caused plan losses by permitting the plan sponsor, employer Kaiser Steel Corporation, to select the plan's actuarial assumptions at a time when Kaiser was phasing out its steel operations and prompting a large number of early retirements. The plaintiffs sought to hold the plan actuary liable for losses suffered by the plan as a result of Kaiser's alleged breach of fiduciary duty. The district court dismissed the complaint and the Ninth Circuit affirmed in relevant part. Plaintiffs sought certiorari on the question of whether section 502(a)(3) authorizes suits for damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty.

The Court decided the matter by holding that even if section 502(a)(3) authorizes suits against nonfiduciaries—a question the Court reserved—it...
does not authorize relief in the form of money damages. This holding was based on the Court’s interpretation of “equitable relief” as used in section 502(a)(3) to refer to equitable as opposed to legal relief. Monetary damages, the Court noted, are the classic form of legal relief. The Court found that equitable relief refers to those categories of relief typically available in equity, such as injunction and restitution, but not compensatory damages.

In dissent, Justice White, joined by Chief Justice Rehnquist and Justices Stevens and O’Connor, took a position similar to the Brennan concurrence to Russell. First, the dissenting Justices argued that the phrase “appropriate equitable relief” as used in section 502(a)(3) should be construed to refer to that relief available in equity for breach of trust. Second, they asserted that such relief included compensatory damages. Third, they argued that under trust law a nonfiduciary was liable for knowing participation in a breach of trust; therefore, a nonfiduciary ought to be liable for similar conduct under ERISA as well. Finally, the dissent suggested that by providing for only “equitable relief” in section 502(a)(3), Congress meant to exempt, not all legal relief, but only punitive damages.

In Varity, the Court was presented with the question of whether section 502(a)(3) authorizes relief for plaintiffs individually. The district court had found that defendant Varity Corporation, acting as a plan fiduciary, had fraudulently induced its employees to leave the plan in order to save money, and thus Varity’s actions constituted a breach of fiduciary duty. The remedy, as modified by the court of appeals, was both an injunction requiring Varity to reinstate plaintiffs to the plan and a monetary award.

On certiorari, the Court considered three questions: 1) whether Varity, in misleading the plaintiffs, acted as an ERISA fiduciary; 2) if so, whether Varity’s acts were a breach of its fiduciary duties under ERISA; and 3)
whether section 502(a)(3) authorizes relief for individual plan participants. The Court ruled in favor of the plaintiffs on all three questions. The Court did not consider the question of whether the particular relief awarded by the court of appeals was “appropriate equitable relief” within the meaning of section 502(a)(3).

Varity had argued that since section 502(a)(2) does not authorize relief for individuals under Russell, section 502(a)(3) cannot either, for the third subsection of 502(a) cannot be read to include the very relief excluded by the second subsection. The Court rejected this argument by noting that section 502(a)(2) authorizes only “appropriate relief under section 409” and that section 409(a) emphasizes a fiduciary’s liability to the plan. Section 502(a)(3), on the other hand, does not cross-reference section 409. The Court concluded that section 502(a)(3)’s provision for appropriate equitable relief to redress any violation of Title I was broad enough to cover individual equitable relief for breach of fiduciary duty.

In dissent, Justice Thomas, joined by Justices O’Connor and Scalia, argued that section 502(a)(3) does not authorize any relief for breach of fiduciary duty because “Congress intended §§ 409 and 502(a)(2) to provide the exclusive mechanism for bringing claims of breach of fiduciary duty.” This argument was based on the canon of statutory construction that the specific governs the general—section 502(a)(2) specifically refers to relief for breach of fiduciary duty (by reference to section 409), but section 502(a)(3) does not. Since section 502(a)(2) provides for relief for a plan only, the dissenters concluded that Congress intended “to protect individuals by creating a single remedy on behalf of the plan rather than authorizing piecemeal suits for individual relief.”

84. Id. at 1068.
85. Id.
86. Id. See also supra note 6.
87. Varity, 116 S. Ct. at 1076.
88. Id.
89. Id.
90. Id. The Court noted that this conclusion was supported by the structure and purpose of ERISA. Id. The Court observed that the structure of § 502(a) suggests that § 502(a)(3) was intended as a “safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.” Id. at 1078. The Court also noted that it is a general purpose of ERISA to protect the interests of plan participants and beneficiaries, and that ERISA specifically requires plan fiduciaries to discharge their duties solely in the interest of participants and beneficiaries. Id. “Given these objectives,” the Court concluded, “it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.” Id.
91. Id. (Thomas, J., dissenting).
92. Id. at 1084 (Thomas, J., dissenting).
D. Summary

In Mertens, the Court was divided five to four on whether equitable relief under section 502(a)(3) includes monetary damages.93 The dissenters argued that because of ERISA's roots in the common law of trusts, equitable relief should be construed to refer to those remedies available in equity for breach of trust.94 Such remedies, they asserted, include money damages.95 The majority acknowledged that damages were available in equity for breach of trust, but it found that equitable relief under section 502(a)(3) should be limited to the relief typically available in equity, citing injunction and restitution as examples.96 The majority stated that to interpret the provision otherwise would render the modifier "equitable" superfluous.97

Mertens has not entirely resolved the issue of whether monetary relief is available under section 502(a)(3). A year after that decision, a divided panel of the Eighth Circuit Court of Appeals found that such relief was available under that provision as restitution.98 The Supreme Court affirmed on other grounds, but in doing so, the Court did not discuss the kinds of equitable relief that are available under section 502(a)(3).

The Court did, however, reaffirm ERISA's roots in the common law of trusts. Nevertheless, the Court added that in some cases "trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements."99

The following section will examine the remedies traditionally available in equity for breach of trust. Section IV will then consider the extent to which the provision of such remedies under section 502(a)(3) is consistent with the purpose and structure of ERISA.

III

Remedies in Equity for Breach of Trust

A. Origin of English Equity

English equity originated in the 14th and 15th centuries as a response to shortcomings in the administration of the common law.100 These short-

94. Id. at 264-67 (White, J., dissenting).
95. Id. at 266-67 (White, J., dissenting).
96. Id. at 256.
97. Id. at 258.
98. Howe v. Varity Corp. 36 F.3d 746, 756 (8th Cir. 1994).
comings included an inability of the courts to act against powerful defendants and access to the courts for only those cases that met the formalistic requirements of particular writs.101 Subjects who could not get relief in the courts petitioned the king for relief.102 The petitions were referred by the king to his premier aid, the chancellor, who was usually a bishop.103 As the volume of such petitions grew, the chancellor developed a formal process for hearing the cases, borrowing procedures used by the ecclesiastical courts for the suppression of heresy.104

Under these procedures, the defendant was served with a writ of subpoena which ordered him to appear or face punishment. The defendant was obligated to give evidence under oath. The chancellor decided questions of fact; there was no jury.105 These procedures were considerably more flexible than those used in the courts of law, where parties could not be examined, facts could be ascertained only by a jury, and actions were tied to a rigid scheme of writs.106

At the outset, it was established that a plaintiff could not bring his case before the chancellor if he had redress in the courts of law.107 The chancellor’s equitable jurisdiction was limited to instances where the common law courts could not act or where application of the common law produced an unduly harsh result.108 Also, a plaintiff had no legal right to any particular relief before the chancellor, so any remedy granted was purely discretionary.109 The chancellor’s orders took the form of in personam orders to a losing defendant to perform an act or refrain from an act, as the rules of equity required.110 These orders were backed by the threat of imprisonment for failure to comply.111

system of three courts consisting of the King’s Bench, the Common Bench, and the Exchequer. MAITLAND, supra, at 2. In addition, local courts administered local rules and customs and ecclesiastical courts applied canon law. 1 Story, supra, at 35-36.

101. See MAITLAND, supra note 100 at 3-5; 1 Story, supra note 100, at 40-45; PLUCKNETT, supra note 100, at 177-78, 676.
102. See MAITLAND, supra note 100, at 3. Such petitions could be addressed to the king on the theory that the king maintained a residuum of judicial power that had not been vested in the courts. Id.
103. See id. at 2-3. Early chancellors were ecclesiastics “for none else were then capable of an office so conversant in writings.” 3 WILLIAM T. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (1844).
104. See MAITLAND, supra note 100, at 5.
105. See id.
107. See id. § 50, at 64-65; 1 Story, supra note 100, at 46; MAITLAND, supra note 100, at 7.
108. See 1 WILLIAM S. HOLDsworth, HISTORy OF ENGLISH LAW 405 (1922).
109. See 3 BLACKSTONE, supra note 103, at 54; 1 POMEROY, supra note 106, § 33, at 38-39.
110. See 1 HOLDsworth, supra note 108, at 458.
111. See id. at 458 n.5.
It was said that the source of substantive law applied by the chancellor was the king's conscience. In addition to the dictates of conscience, the early chancellors also relied on canon law and ancient Roman law.

B. Development of the Laws of Trusts

Equity established exclusive jurisdiction over the law of trusts due to the refusal of the courts of law to enforce trusts of land—and the chancellor's willingness to do so.

The trust has its roots in the ancient English practice or custom of "use." The use involved the transfer of money or goods from A to B for delivery to C in the manner of agency or bailment. B was said to hold to the use of C, and B's right to possession was only temporary. Where B violated his obligation to deliver to C, common law recognized an action against B, by either A or C, for detinue in the case of goods, or for account in the case of money.

Early application of uses to land involved conditional conveyances and reconveyances whereby the grantor sought to create new estates. For example, A transferred to B on condition that B retransfer to A in the form of different estates as prescribed by A. In such cases, the conditions were enforceable at common law, but only by A and not by other intended beneficiaries.

The first English example of the permanent transfer of land to one party for the use of another likely involved Franciscan friars in the 13th century. Their vows of communal and personal poverty prohibited their abbeys from receiving donations of land. The use was adopted and a parcel of land was donated to the village upon the village's promise to hold the land for the benefit of the local order. The practice of uses upon land

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112. 3 Blackstone, supra note 103, at 47.
113. Henry S. Maine, Ancient Law 26 (1861); 1 Pomeroy, supra note 106, § 55, at 71; Maitland, supra note 100, at 13.
114. See 1 Pomeroy, supra note 106, § 38, at 43; Plucknett, supra note 100, at 689; 3 Blackstone, supra note 103, at 51.
115. See Maitland, supra note 100, at 23-24.
116. Id. at 24.
117. See James B. Ames, Lectures on Legal History 238-39 (1913); 4 Holdsworth, supra note 108, at 413.
118. See Maitland, supra note 100, at 24-25.
119. See id. at 25. The early history of uses involved uses of land because large accumulations of capital did not yet exist. 4 Holdsworth, supra note 108, at 421.
120. See Maitland, supra note 100, at 25.
later spread throughout England during the 14th century as a means of avoiding feudal levies on land.\footnote{121}

Despite its widespread employment, a use upon land was not enforceable in the courts of law.\footnote{122} Common law regarded the transferee, known as the "feoffee to use," as the legal owner. The beneficiary, or "cestui que use," could bring no action to enforce the use since such a claim did not fit within any recognized writ. Thus, wronged beneficiaries turned to the chancellor for help, and in the 15th century the chancellor began to enforce such uses.\footnote{123}

In 1535, the Statute of Uses was enacted. The statute abolished uses of land that involved no active duties on the part of the feoffee, for such uses appeared to have the sole purpose of evading feudal levies on land.\footnote{124} Uses that imposed duties upon the feoffee were unaffected by the statute. In order to distinguish these uses from the passive ones barred by the statute, the active duty-imposing uses became known as trusts.\footnote{125}

\section*{C. Duties of Trustees and Remedies for Their Breach}

As the early trusts were uses of land, the early duties of trustees/feoffees were to deliver any profits from the land to the cestui que use, to grant estates as directed by the cestui que use, and to defend title to the land in any actions brought with respect to it.\footnote{126} If the feoffee failed in his duties, the cestui que use could bring a suit in equity. By an in personam order, the

\begin{footnotes}
\item 121. See id. at 26-27. For example, if a landowner died and left a minor heir, the lord who granted the estate was entitled to a payment. One could avoid the possibility of such levies by transferring his land to trusted friends to hold to the use of the transferor and his heirs. Id.

The device was also used to evade the common law prohibition on the devise of land by will. Id. at 25-26. A landowner could accomplish a testamentary disposition of land by transferring it to his own use and to the use of his intended beneficiary. This prohibition was abolished by the Statute of Wills in 1540. Id. at 35.

122. See 4 Holdsworth, supra note 108, at 415. It has been suggested that one reason the courts of law refused to recognize uses upon land was because juries were unfamiliar with them. Id. ("[o]f seisin and its livery the jury could speak, but uses were beyond their ken. Therefore the judges declined to recognize any right save that of the person seised"). The chancellor did not employ a jury. See supra note 105 and accompanying text.

123. See Matland, supra note 100, at 27-29; Plucknett, supra note 100, at 617. Once equity jurisdiction was established for uses upon land, it also superseded common law jurisdiction in account over uses involving money. Ames, supra note 117, at 117; 1 Holdsworth, supra note 108, at 458-59.

124. See Matland, supra note 100, at 34-38; 1 Thomas Lewin, A Practical Treatise on the Law of Trusts *6-*7 (8th ed. 1888).

125. See Lewin, supra note 124, at *6. Uses upon chattels were also unaffected by the statute. Id. The statute operated by vesting the legal estate in the cestui que use. But, in the 17th century, the chancellor determined that where land was conveyed to A to the use of B to the use of C, the statute extinguished only the first use and B held in trust for C. 1 Holdsworth, supra note 108, at 455. The Statute of Uses was repealed in 1925. Matland, supra note 100, at 34, n.1.

126. See 4 Holdsworth, supra note 108, at 431. The most common directions were those given by a landowner as to the disposition of his land after his death. Id. at 438.
chancellor would compel the feofee to perform his duty, or in some cases compel him to convey legal title to the cestui que use.\textsuperscript{127}

By the end of the 15th century, the cestui que use not only had personal rights against the feofee, but also rights of beneficial ownership that could be exercised against third parties.\textsuperscript{128} Equity determined that "not only was the conscience of the original feofee affected by the use, but also the conscience of his heir and of other persons taking the estate in the land through him."\textsuperscript{129} Anyone who obtained the estate with notice of the use, or even without notice if the estate was conveyed gratuitously, could be compelled to convey it to the cestui que use.\textsuperscript{130}

As economic conditions changed and funds were put in trust, equity assigned additional duties to trustees. A trustee was required to conduct his duties according to the standard of a prudent man of business.\textsuperscript{131} With respect to investments, the standard of prudence required cautious conservatism.\textsuperscript{132} In addition, a trustee was obligated to keep trust funds separate from his own and not mix them in a common account.\textsuperscript{133} A trustee also was prohibited from making a profit from the trust.\textsuperscript{134}

A trustee was personally liable to restore to the trust any property that he wrongfully alienated or diminished.\textsuperscript{135} A trustee was also personally liable for any profits lost by the trust as a result of his breach of duty, and for any profits realized by the trustee from the use of trust property.\textsuperscript{136}

A trust beneficiary could bring a suit in equity to compel the trustee to perform, or to enjoin him from violating, his duties.\textsuperscript{137} A trust beneficiary also could sue to enforce a trustee's personal liability for breach of trust\textsuperscript{138} as well as recover for the trust any proceeds held by the trustee from the wrongful sale of trust property.\textsuperscript{139} In addition, where the trustee had invested proceeds in other property, the beneficiary could follow the proceeds to recover such property.\textsuperscript{140} Finally, a trust beneficiary could petition for removal of a trustee for breach of trust.\textsuperscript{141}

\textsuperscript{127} See id. at 431; Ames, supra note 117, at 238.
\textsuperscript{128} See 4 Holdsworth, supra note 108, at 432; Maitland, supra note 100, at 112-15.
\textsuperscript{129} See 4 Holdsworth, supra note 108, at 432.
\textsuperscript{130} See id.; Maitland, supra note 100, at 112-15.
\textsuperscript{131} See 2 Story, supra note 100, at 617.
\textsuperscript{132} See id.
\textsuperscript{133} See id. at 616.
\textsuperscript{134} See Maitland, supra note 100, at 91-92.
\textsuperscript{135} See id. at 216-17.
\textsuperscript{136} See id.; 2 Story, supra note 100, at 617-19.
\textsuperscript{137} See 2 Lewin, supra note 124, at *853-55.
\textsuperscript{138} See id. at *900.
\textsuperscript{139} See Maitland, supra note 100, at 217-18.
\textsuperscript{140} See id. If the value of such property exceeded the loss to the trust, an equitable lien could be obtained against the property. See id. at 218.
\textsuperscript{141} See id. at 104.
D. Merger of Law and Equity; Contemporary Remedies for Breach of Trust

By the 19th century, the existence of separate courts with separate remedies came to be viewed as a deficiency in the administration of English law, and reforms were introduced to ameliorate the problem. In the early 1850s, common law courts were allowed a restricted power to grant injunctions while the Chancery Amendment Act of 1858 authorized the Court of Chancery to award damages in lieu of an injunction. In 1873, the Judicature Act merged the administration law and equity by creating a single court system to administer both bodies of law.

In the United States, where English common law and equity jurisprudence had been adopted by the 18th century, a similar merger was effected in state and federal courts over the second half of the 19th century and the early 20th century. The effect of the union has been to create a single set of procedures for all legal claims, with the important exception that jury trials are not available in actions asserting an equitable remedy.

In the United States, remedies now available for breach of trust are substantially the same as those available at common law. Contemporary remedies are exclusively equitable, with two exceptions where the beneficiary has concurrent remedies at law and in equity.

With respect to equitable relief, a trust beneficiary can maintain a suit to compel the trustee to perform his duties as trustee, to enjoin the trustee from committing a breach of trust, to compel the trustee to redress a breach of trust, to appoint a receiver to take possession of trust property and administer the trust, and to remove the trustee.

Regarding suits to compel a trustee to redress a breach of trust, a trustee who commits a breach of trust is personally liable for any loss to the trust resulting from the breach, any profit made by him through the breach, and any profit that would have accrued to the trust if there had been no breach of trust. A trust beneficiary can bring an action to enforce such liability, and recovery is in favor of the trust. Where a trustee has wrongfully used trust property to acquire other property, the beneficiary can reach

142. See id. at 14 n.1.
143. See id. at 15.
144. See 1 Story, supra note 100, at 54.
145. See 1 Pomeroy, supra note 106, §§ 40-42a, at 45-55.
146. See 1 Dobbs, supra note 10, § 2.1(1), at 58.
147. Restatement (Second) of Trusts § 197 (1959).
148. See id. § 199.
149. See id. § 205.
the property so acquired, and she is entitled to enforce a constructive trust of it or an equitable lien upon it.\textsuperscript{151}

With respect to legal remedies for breach of trust, if a trustee is under a duty to pay money immediately and unconditionally to a beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.\textsuperscript{152} Such an action is not for breach of contract.\textsuperscript{153} Rather, this action is in debt or general assumpsit, or the equivalent form of action.\textsuperscript{154} Similarly, if a trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary, and in breach of trust fails to transfer it, the beneficiary can maintain an action at law against the trustee.\textsuperscript{155} Alternatively, the beneficiary can proceed in equity with respect to either of these claims.\textsuperscript{156}

IV

EQUITABLE RELIEF UNDER ERISA SECTION 502(a)(3)

A. In General

The relief available under section 502(a) for breach of fiduciary duty consists of the same relief that is available in equity for breach of trust. Thus, section 502(a)(3)'s provision for "other appropriate equitable relief" to redress violations of Title I should be construed to refer to those remedies in equity for breach of trust not otherwise provided for in section 502(a). This construction of section 502(a) reflects ERISA's roots in the common law of trusts. Such a reading of section 502(a) is also consistent with the structure and purpose of ERISA.

B. Consistency with Structure of ERISA

With respect to the actions that can be brought by plan participants and beneficiaries, section 502(a) explicitly provides for many of the remedies that were available in equity for breach of trust.

Section 502(a)(1)(B) authorizes a plan participant or beneficiary to bring an action for recovery of benefits due.\textsuperscript{157} A trust beneficiary can bring a suit in equity or an action at law for the same remedy.\textsuperscript{158} Regarding the remedy under ERISA, there has been some question as to whether the

\textsuperscript{151} See Restatement (Second) of Trusts § 202 (1959). With a constructive trust or equitable lien, a trust beneficiary obtains priority over the general creditors of the trustee. \textit{Id.}
\textsuperscript{152} \textit{Id.} § 198(1).
\textsuperscript{153} \textit{Id.} § 197, comment b.
\textsuperscript{154} \textit{Id.} § 198, comment b. These forms of action, together with a suit in equity, superseded the old common law action of account which originally was available for this situation. \textit{Id.}
\textsuperscript{155} \textit{Id.} § 198(2).
\textsuperscript{156} \textit{Id.} § 198, comment a.
\textsuperscript{158} See supra notes 152 and 156 and accompanying text.
recovery of benefits due is a legal remedy or an equitable one. 159 Since a
trust beneficiary could bring either a suit in equity or an action at law for
this remedy, it appears that whether the remedy under ERISA is legal or
equitable should turn on the election of the plaintiff.

Section 502(a)(2) authorizes a participant or beneficiary to bring an
action for appropriate relief under section 409. 160 Section 409 makes an
individual who breaches a fiduciary duty personally liable, both to make
good to the plan any losses resulting from such breach and to restore to the
plan any profits the fiduciary has made through the use of plan assets. 161
These remedies were also available in equity for breach of trust. 162 Further-
more, although the Supreme Court did not discuss this point in Russell, the
Court’s construction of this provision in Russell conforms to the scope of
the remedy in equity for breach of trust. In that case, the Court held that the
liability of an ERISA fiduciary under section 409 was to the plan, and that
therefore a plan participant could not recover individually under section
502(a)(2). 163 Under this holding, the relief available through section
502(a)(2) conforms to that available in a similar suit under the law of trusts,
where a trustee’s liability for trust losses and ill-gotten gains is to the
trust. 164

Section 502(a)(3)(A) authorizes an action by a plan participant or ben-
eficiary to enjoin any act or practice that violates Title I or the terms of the
plan. 165 The relief provided for is in the form of a prohibitive injunction,
one of the early remedies used by the chancellor to prevent a breach of
trust. 166

Under section 502(a)(3)(B), a plan participant or beneficiary can sue to
obtain “other appropriate equitable relief” to enforce provisions of Title I or
terms of the plan, or to redress violations of such provisions or terms. 167 In
light of the way in which other remedies of section 502(a) correspond to
remedies in equity for breach of trust, it is a natural construction to read
“other appropriate equitable relief” to refer to those equitable remedies for
breach of trust not otherwise provided for in section 502(a). With respect to

159. See supra note 50 and accompanying text.
160. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). The Secretary of Labor or a plan fiduciary can
also bring this action. Id.
161. ERISA § 409(a), 29 U.S.C. § 1109(a). Such a fiduciary is also “subject to such other equita-
ble or remedial relief as the court may deem appropriate, including removal of such fiduciary.” Id.
162. See supra notes 149-50 and accompanying text.
163. See Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 144. See also supra
notes 159-60 and accompanying text.
164. See BOGERT & BOGERT, supra note 150, at 562. See also 1 GEORGE E. PALMER, LAW OF
RESTITUTION § 2.11, p. 142 (1978) (“the two principal means of imposing liability on a trustee for
breach of trust have been to grant recovery to the trust either for its losses or for gains received by the
trustee” (emphasis added)).
166. See supra note 137 and accompanying text.
relief for the enforcement of Title I or plan terms, such relief would include mandatory injunctive relief to compel a fiduciary to carry out his duties (other than the duty to pay benefits due, provided for in section 502(a)(1)(B)).168 Regarding relief for the redress of violations of Title I or plan terms, such relief would include mandatory injunction, tracing plan assets, and constructive trust.169

This construction of section 502(a)(3) is consistent with the Court's holding in Mertens that damages are not available under this provision. The Court in Mertens read "equitable" as used in section 502(a)(3) to mean equitable as opposed to legal, and concluded that damages, as the classic form of legal relief, can be excluded from the relief afforded by this provision.170 While the Court did not rely on the law of trusts to reach its holding, the holding is nonetheless consistent with that body of law.171

This interpretation of section 502(a)(3) is also consistent with the Court's decision in Varity. In this case, the Court found that the structure of section 502(a) suggests that section 502(a)(2) was not meant to afford the sole relief for breach of fiduciary duty,172 and that section 502(a)(3) was intended as a kind of "catchall" remedial measure that provides for appropriate relief not elsewhere provided for in section 502(a).173 The Court went on to hold that even though section 502(a)(2) authorizes recovery only for the plan, section 502(a)(3) authorizes recovery for participants individually.174 While the remedy of tracing plan assets would inure to the benefit of the plan, remedies involving mandatory injunction and constructive trust could certainly run to the benefit of plaintiffs individually.

For example, in Varity, the relief awarded by the district court, as modified by the court of appeals, was an order to the defendant to reinstate the

168. See supra note 148 and accompanying text.
169. See supra notes 148-51 and accompanying text.
171. See id. The Mertens majority rejected the contention of the dissenters that equitable relief under § 502(a)(3) should include damages because damages were available at common law for breach of trust. Such a reading of the provision, the majority found, would render the modifier "equitable" superfluous. Id. at 256-58. From the sources cited by the dissenters, it appears that they were referring to the fact that a beneficiary who sued a trustee for breach of trust at common law could recover for the trust any losses to the trust and any profits made by the trustee. See id. at 266 (White, J., dissenting) and sources cited. Of course, this remedy is provided for in ERISA § 502(a)(2). More generally, any monetary award that could be recovered by a trust beneficiary for breach of trust could be recovered in equity. Not all monetary claims are claims for damages. 1 Dobbs, supra note 10, § 2.6(3), at 157-58.
172. See Varity Corp. v. Howe, 116 S. Ct. 1065, 1077-78 (1996). Since § 502(a)(3) permits actions with respect to any violation of Title I, it, too, must be available to remedy a breach of fiduciary duty. Id.
173. Id. at 1078 ("[t]his structure suggests that these 'catchall' provisions [§§ 502(a)(3) and (a)(5)] act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy"). Section 502(a)(5) authorizes the Secretary of Labor to bring an action for violations of Title I in the same terms used in section 502(a)(3) for actions by participants. ERISA § 502(a)(5), 29 U.S.C. § 1132 (a)(5). However, section 502(a)(5) does not authorize the Secretary to sue for violations of plan terms. Id.
plaintiffs to Varity’s employee benefit plan and a restitutionary monetary award in the amount of benefits that plaintiffs would have received had they remained in the plan. Reinstatement is relief in the form of a mandatory injunction. A monetary award of restitution can be either a legal remedy or an equitable one. It is considered an equitable remedy when enforced through constructive trust. Thus, the relief approved by the court of appeals appears to be consistent with the scope of relief available under section 502(a)(3) as here construed.

It therefore appears that the structure of section 502(a) supports the notion that the remedies included there for breach of fiduciary duty consist of those remedies available in equity for breach of trust.

C. Consistency with the Purpose of ERISA

The purpose of ERISA is to protect the interests of participants in employee benefit plans. To do so, in part, ERISA provides for appropriate remedies and ready access to the federal courts.

ERISA’s legislative history makes it clear that the statute’s fiduciary requirements were intended to reflect those applicable in the common law of trusts. It is also clear that Congress intended to afford plan participants and beneficiaries the right to obtain redress through the courts for violations of fiduciary duties.

The legislative history does not indicate which particular remedies Congress intended to provide for in section 502(a)(3). The Senate bill as introduced and as reported from committee provided for “appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary.” The House bill as introduced authorized actions by plan participants and beneficiaries similar to those provided for in sections 502(a)(1) and (a)(2), and it also authorized the Secretary of Labor to sue “to enjoin any act or practice which appears to him to violate any provision of this title.”

175. See 1 Dobbs, supra note 10, § 2.1(2), at 59-60.
176. Id. § 2.6(3), at 157-58. The purpose of restitution is to prevent the unjust enrichment of the defendant. See also 1 Palmer, supra note 164, § 1.1 (describing the scope of restitution).
177. See 1 Dobbs, supra note 10, § 2.6(3), at 157-58; 1 Palmer, supra note 164, §§ 1.1, 1.3.
178. ERISA §§ 502(a)(1)(A) and (a)(4) authorize actions by plan participants and beneficiaries for violation of certain ERISA disclosure requirements. 29 U.S.C. §§ 1132(a)(1)(A) and (a)(4). See supra notes 51-52 and accompanying text. These provisions do not provide relief for breach of fiduciary duty and therefore do not fit within the scheme of remedies which were available in equity for breach of trust.
179. ERISA § 2(b), 29 U.S.C. § 1001(b).
182. S. 4, 93d Cong., 1st Sess., § 603 (1973), reprinted in 1 Legis. Hist. at 183 (as introduced), at 579 (as reported).
The language that emerged from the conference committee is included in section 502(a)(3). With respect to this provision, the explanatory statement that accompanied the conference bill states that "[u]nder the conference agreement, civil actions may be brought by a participant or beneficiary . . . for relief from breach of fiduciary responsibility" and that "the Secretary of Labor may bring an action for breach of a fiduciary duty or to enjoin any act or practice which violates the provision [sic] of title I . . . or to obtain any other appropriate relief to enforce any provision of that title."\(^{184}\)

The legislative history is not dispositive on the question of which particular remedies are available under section 502(a)(3). However, given Congress’s reliance on trust law in establishing ERISA’s fiduciary duties and its decision to limit relief to equitable relief, the legislative history is at least consistent with the notion that such remedies consist of those available at common law for breach of trust. At any rate, nothing in the legislative history is inconsistent with this proposition.

V

CONCLUSION

The remedies available to plan participants and beneficiaries under ERISA section 502(a) for breach of fiduciary duty generally track those remedies that were available in equity to trust beneficiaries for breach of trust. Therefore, section 502(a)(3)’s provision for “other appropriate equitable relief” can be construed to refer to those equitable remedies for breach of trust not otherwise specifically provided for in section 502(a). Such remedies include mandatory injunctive relief, tracing of plan assets, and constructive trust.

While the Supreme Court has not relied on trust-law remedies in construing section 502(a), the Court’s interpretations of the provision are nonetheless consistent with this reading. This construction of section 502(a) also appears to be consistent with the structure and purpose of ERISA. Under this interpretation of section 502(a), equitable relief for plan participants and beneficiaries under section 502(a)(3) may take the form of an equitable restitutionary monetary award, even though damages are not available through this provision under Mertens.

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