ERISA REMEDIES: Background Materials and Update

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I. INTRODUCTION

There is no one set of ERISA remedies. Rather, each subsection of ERISA ' 502(a), 29 U.S.C. § 1132(a), describes both a cause of action and the remedies available under that cause of action. Several of these subsections are only rarely, if ever, invoked in litigation, and this outline does not discuss them in depth. For example, there is not significant litigation dealing with the causes of action under § 502(a)(4) (which authorizes suit for violation of the requirement of § 105(c) of ERISA relating to provision of notice to deferred vested participants in retirement plans); § 502(a)(7) (which authorizes suit by a State to enforce compliance with a qualified medical child support order); or § 502(a)(8) (which authorizes suit to compel information required to be provided by § 101(f) in order to comply with Medicare and Medicaid data bank requirements). While there are reported cases under § 502(a)(9), they merely confirm, as to remedy, the express intent of that subsection to provide a remedy to individuals who were formerly participants or beneficiaries in pension plans that purchased insurance contracts or annuities upon their termination. *See, e.g., Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1455 (9th Cir. 1994); *cert. denied,* 116 S. Ct. 301 (1995).

The remaining subsections of § 502(a), however, are frequently litigated. As discussed below, the remedial issues under these subsections can be grouped, as follows:

A. **Statutory penalties authorized in certain circumstances by Section 502(c) which can be collected in a suit under Section 502(a)(1)(A).**
B. **Claims relating to benefits under Section 502(a)(1)(B).**
C. **Remedies for breach of fiduciary duty obtainable under either Section 502(a)(2) or 502(a)(3) (or 502(a)(5) in the case of the Secretary of Labor).**
D. **Remedies for violation of other statutory provisions of plan provisions under Sections 502(a)(3) or (5).**

II. PENALTIES AVAILABLE UNDER SECTION 502(a)(1)(A)

ERISA does not have a general provision imposing penalties for violation of statutory provisions. Instead, it has a sprinkling of civil penalties, mostly for violation of specific reporting or disclosure requirements. Section 501 imposes criminal penalties for willful violation of the reporting and disclosure provisions of Title I of ERISA.

The most frequently litigated of the civil penalties stems from ERISA § 502(c)(1) which authorizes the imposition of a civil penalty on a plan administrator who fails, among other actions, to furnish within 30 days after a request by a participant or beneficiary, documents required to be furnished by ERISA. Section 502(a)(1)(A) confers standing on a participant or beneficiary to seek this penalty.

Most of the litigation involves documents required to be furnished by ERISA § 104(b)(4). The courts have divided over exactly what documents are required to be furnished under this section, as well as over whether ERISA's general fiduciary duty provision imposes independent or additional duties to furnish requested documents. Section 104(b)(4) requires furnishing various specific documents, such as the latest SPD and Form 5500, but also furnishing of "other instruments under which the plan is established or operated." In *Hughes Salaried Retirees Action Committees v.*

Administrator of the Hughes Non-Bargaining Retirement Plan, 72 F.3d 686 (9th Cir. 1995), the *en banc* court reversed a panel decision and held that a mailing list of plan participants was not a document required to be furnished under § 104(b)(4) but found it unnecessary to decide whether additional disclosure could ever be required by the general fiduciary duty provisions of ERISA § 404. *See also Hamilton v. Allen-Bradley Co*., 217 F.3d 1321 (11th Cir. 2000) (claims forms not required to be disclosed); *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 115 (1999) (same). In *Faircloth v. Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997) and *Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139 (2d Cir. 1997), the courts expressly held that § 404 duties did not provide a separate route to disclosure beyond § 104(b)(4) and held that specific key documents regarding a plan – an ESOP valuation report and other documents in *Faircloth* and actuarial valuation reports in *Weinstein* – were not documents required to be furnished under § 104(b)(4). Other courts, however, have reached opposite results. *See Bartling v. Freuhauf Corp.*, 29 F.3d 1062 (6th Cir. 1994) (actuarial report required to be disclosed); *Werner v. Morgan Equip. Co.*, 15 EBC 2295 (N.D. Ca. 1992) (ESOP valuation required to be disclosed).

The penalty imposed by § 502(c)(1) is within the court's discretion, both as to whether any penalty should be assessed and, if so, in what amount, up to a maximum of $100 per day for each day in which documents are wrongfully withheld after the 30 day period. Courts have considered a variety of factors in exercising their discretion, including the good faith of the administrator and any prejudice to the requesting participant or beneficiary. Appellate courts have affirmed district courts' decisions not to impose penalties in the absence of bad faith or prejudice. *See Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588-9 (1st Cir. 1993); *Goodwin v. Sun Life Assurance of Canada*, 980 F.2d 323, 326-7 (5th Cir. 1992). District Courts' decisions on penalty awards are reviewed only for abuse of discretion. *Deboard v. Sunshine Mining & Ref. Co*., 208 F.3d 1228 (10th Cir. 2000).

The weight of authority, however, is that prejudice and bad faith are not prerequisites to imposition of the § 502(c) penalty. In *Daughtrey v. Honeywell*, *Inc*., 3 F.3d 1488, 1494-95 (11th Cir. 1993), the court reversed a district court's decision not to award penalties in the absence of prejudice resulting from a substantial delay in responding to a document request. The appellate court remanded to the district to determine amount but held that some penalty must be imposed. *Id*. In *Moothart v. Bell*, 21 F.3d 1499 (10th Cir. 1994), the court affirmed an award of almost $30,000 in penalties despite the lack of any prejudice to the plaintiff.

III. BENEFIT CLAIMS UNDER SECTION 502(a)(1)(B)

Section 502(a)(1)(B) authorizes an action by a participant or beneficiary: to recover benefits due 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.

Claims under this provision typically seek recovery of benefits due under a plan. In addition to the benefits, courts will typically award prejudgment interest to compensate for the delay in obtaining benefits. Although courts sometimes refer to the general federal rule that an award of prejudgment interest is discretionary with the district court, the weight of authority favors such awards. *See Lutheran Medical Ctr. v. Contractors Health Plan*, 25 F.3d 616, 623 (8th Cir. 1994); *Rivera v. Benefit Trust Life Ins. Co*., 921 F.2d 692, 696 (7th Cir. 1991); *Drennan v. General Motors Corp*., 977 F.2d 246, 253 (6th Cir. 1992)*; cert. denied*, 113 S. Ct. 2416 (1993). District courts have broad discretion, however, over what interest rates to use and how to calculate a prejudgment interest award. *See Hansen v. Continental Ins. Co*., 940 F.2d 971, 983-5 (5th Cir. 1991) (no abuse of discretion in awarding interest at 10% rate prescribed by state law); *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990) (rate of return on court registry where disputed amounts were held applies to calculate prejudgment interest); *see also Nelson v. EG&G Energy Measurement Group*, Inc., 37 F.2d 1384, 1391 (9th Cir. 1994) (prejudgment rate under 28 U.S.C. § 1961 should normally be used); *Quesinberry v. Life Ins. Co.,* 987 F.2d 1017, 1030-31 (4th Cir. 1993) (whether to award prejudgment interest and what rate to use are within district court's discretion).

Besides awarding benefits due, courts may issue declaratory or injunctive orders requiring the payment of future benefits under either or both § 502(a)(1)(B) or the authorization for equitable relief in § 502(a)(3). Courts have uniformly held that other monetary or damage remedies are not available on this claim. *See Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987); *Sokil v. Bernstein*, 803 F.2d 532, 534-38 (9th Cir. 1986); *Harsch v. Eisenberg*, 956 F.2d 651, 754-61 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992).

The normal defendant on a claim under § 502(a)(1)(B) is the plan, and courts will frequently dismiss other defendants. *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1287 (9th Cir. 1990), *cert. denied*, 498 U.S. 1087 (1991). Section 502(d)(1) of ERISA expressly provides that a plan may sue or be sued under Title I of ERISA as an entity. Section 502(d)(2) provides that any money judgment under Title I against a plan shall be enforceable only against the plan and not against other persons unless liability in their individual capacities is established under Title I. Some courts, however, have permitted claims under § 502(a)(1)(B) to proceed against defendants other than a plan where the defendant controls the plan's decision or benefit claims. *See Sweet v. Consolidated Aluminum Corp*., 913 F.2d 268, 272 (6th Cir. 1990*); Bokunewicz v. Purolator Prods*., 907 F.2d 1396, 1402 (3d Cir. 1990) (holding that employer had waived its "dubious technical argument" that it was not a proper party).

IV. REMEDIES FOR BREACH OF FIDUCIARY DUTY

A. Causes of Action

Claims for breach of fiduciary duty under ERISA have been brought under two different causes of action. The remedies may vary depending on which cause of action is asserted.

1. Section 502(a)(2) provides a cause of action by the Secretary of Labor, a plan participant, beneficiary, or fiduciary to obtain "appropriate relief: under Section 409 to redress violations of the ERISA fiduciary responsibility provisions defined in Title I." The Supreme Court has held that this section authorizes relief for the benefit of a plan only, and relief cannot flow directly to individual plan participants. Individuals who sue under § 502(a)(2) may do so only on behalf of the plan as a whole. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). All circuits deciding the issue have followed *Russell* and refused to allow § 502(1)(2) actions that requested recovery by an individual. *See, e.g., Adamson v. Armco, Inc*., 44 F.3d 650, 654 (8th Cir.), *cert. denied*, 116 S. Ct. 58 (1995); *Lee v. Burkhart*, 991 F.2d 1004, 1007 (2d Cir. 1993); *Hozier v. Midwest Fasteners, Inc*., 908 F.2d 1155 (3d Cir. 1990); *Bryant v. International Fruit Prods. Co*., 886 F.2d 132, 135 (6th Cir. 1989) (*per curiam*); *Drinkwater v. Metropolitan Life Ins. Co*., 846 F.2d 821, 824 (1st Cir.), *cert. denied*, 488 U.S. 989 (1988); *Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986).

2. Section 502(a)(3) provides a cause of action by a participant, beneficiary or fiduciary to enjoin an act or practice which violates a provision of Title I of ERISA or of the terms of the plan, or to obtain any other appropriate equitable relief to redress such violation.

a. Prior to the Supreme Court's decision in *Varity Corp. v. Howe*, the circuits had split on the issue of whether a participant could obtain an individual remedy under Section 502(a)(3) for breach of fiduciary duty. *Compare Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991) (individual relief not authorized by Section 502(a)(3)) with *Anweiler v. American Elec. Power Service Corp*., 3 F.3d 986 (7th Cir. 1993); *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993). A number of other courts had awarded individual relief without discussion. *See Eddy v. Colonial Life Ins. Co*., 919 F.2d 747 (D.C. Cir. 1990); *Berlin v. Michigan Bell Tel. Co*., 858 F.2d 1154 (6th Cir. 1988).

b. In *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1077-78 (1996), the Supreme Court resolved the split. Finding support in ERISA's "basic purposes" and the statutory language itself, the Court held that Section 502(a)(3) authorizes lawsuits for individualized equitable relief for breach of fiduciary obligations, at least "for injuries caused by violations that Section 502 does not elsewhere adequately remedy." The Supreme Court did caution, however, that in fashioning "appropriate" equitable relief, courts should "keep in mind the special nature and purpose of employee benefit plans, and … respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others." *Id*. at 1079 (citations and quotations omitted). Where Congress otherwise had provided for appropriate relief of the injury suffered by a beneficiary, further equitable relief ought not to be provided.

3. In *Harley v. Minnesota Mining and Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 872 (2003), the Eighth Circuit held that participants in an overfunded defined benefit plan did not have the right under ERISA Sections 409 and 502(a)(2) to bring an action for breach of fiduciary duty. The court believed that a broader interpretation of ERISA's remedial provisions would raise Constitutional standing concerns.

B. Remedies Available from the Breaching Fiduciary

1. ERISA § 409(a) imposes liability on a breaching fiduciary to a) make restitution to the plan of losses resulting from the breach, b) disgorge profits obtained by the fiduciary through breach of duty, and c) be subject to other equitable or remedial relief deemed appropriate by the court, including removal of the fiduciary.

2. The Supreme Court held in *Mertens v. Hewitt Assoc*., 508 U.S. 248 (1993), that § 502(a)(3) provided only for traditional "equitable" relief – e.g., injunctive remedies and the monetary remedies of disgorgement and restitution – and not for legal "damages." The courts have struggled to define what is "equitable" relief under *Mertens* as well as what is "appropriate" relief under *Varity*.

a. Courts have found individual relief warranted under § 502(a)(3) in many situations. For example, in *Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997), the Third Circuit held that an individual beneficiary could recover his account balance from a profit sharing plan directly from a breaching fiduciary under Section 502(a)(3) after it allowed the plan's assets to be converted by another fiduciary. Citing *Varity* and its admonition to provide individual relief under § 502(a)(3) only where § 502 "does not elsewhere adequately remedy," the court held that the plaintiff was in a position similar to that of the plaintiffs in *Varity* in that he had suffered "direct, clearly defined personal loss from the [fiduciary's] conduct" and had no other source of recovery. "We emphasize, therefore, that a court must apply ERISA § 502(a)(3)(B) cautiously when an individual beneficiary seeks 'appropriate equitable relief.'" *See also In re Unisys Corporation Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1265 (3d Cir. 1995) (although not entitled to money damages, plaintiffs were entitled to injunction ordering specific performance of assurances to lifetime benefits and restitutionary reimbursement for back benefits), *cert. denied*, 116 S. Ct. 1316 (1996); *Varity Corp. v. Howe*, 36 F.3d 746 (8th Cir. 1994) (plaintiffs, though held not entitled to compensatory damages under ERISA for breach of fiduciary duty, were held entitled to "restitution for benefits of which they were deprived", and were awarded the amount of their past-due benefit; dissent argued that some of this relief constituted "damages"), *aff'd on other grounds*, 116 S. Ct. 1065 (1996).

b. Other courts have taken a narrow view of the scope of equitable relief. In *Buckley Dement, Inc. v. Travelers Plan Administrators,* 39 F.3d 784 (7th Cir. 1994), the Seventh Circuit held that a suit against a claims administrator under § 502(a)(3) who had failed to timely process claims forms such that they fell outside the coverage window could not recover payment of the participant's medical bills which were incurred because such relief was "damages", not "appropriate equitable relief." *See also McLeod v. Oregon Lithoprint Inc*., 102 F.2d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997) (award of the amount of benefits that plaintiff would have been paid had she elected coverage under a cancer policy, which she claims she would have elected had the plan administrator informed her of her eligibility for it, was compensatory damages and thus not recoverable); *Slice v. Sons of NolWay,* 34 F.3d 630 (8th Cir. 1994) (recovery of pension benefit amount previously promised by administrator, but not provided for in plan, was not allowable under 502(a)(3) since it is extra-contractual money damages, not an equitable remedy); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11 (1st Cir. 1994) (plaintiffs could not seek reimbursement from plan fiduciary of lump-sum tax amount which they were required to pay following fiduciary's alleged failure to properly advise them of tax rules).

c. The Supreme Court has granted certiorari in *Great-West Life* & *Annuity Ins.* Co. *v. Knudson*, 2000 U.S. App. LEXIS 1771 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 876 (2001) on the question of whether a plan's recovery of benefits from a participant under the plan's subrogation agreement constitutes equitable relief under ERISA § 502(a)(3)(B). Although it does not involve a suit against a fiduciary, the Court's interpretation of the remedial section should be applicable to fiduciary claims as well. The *Great-West* case is discussed below in the section on "Remedies for Violation of Other Statutory Provisions or Plan Provisions."

d. In addition to being "equitable," relief must also be "appropriate." Although the Supreme Court in *Varity Corp. v. Howe* allowed individual relief to be obtained on a breach of fiduciary duty claim, it also noted that where an alleged breach of fiduciary duty relates to "the interpretation of plan documents and the payment of claims," § 502(a)(1)(B) provides a remedy "that runs directly to the injured beneficiary." Responding to arguments that permitting individuals to obtain "appropriate equitable relief on claims for breach of fiduciary duty under § 502(a)(3) would encourage them to "complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing," the Court stated that "we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" In response to this admonition, several courts have refused to allow claims for breach of fiduciary duty which merely seek the same remedy otherwise requested under a § 502(a)(1)(B) claim for benefits under the terms of a plan. *See Wald v. Southwestern Bell Corp. Customcare Medical Plan,* 83 F.3d 1002 (8th Cir. 1996); *Forsyth v. Humana Inc.*, 114 F.3d 1467 (9th Cir.); *cert. denied,* 522 U.S. 996 (1997); *Blahuta-Glover v. Cyanamid Long Term Disability Plan,* No. 95-7069,1996 U.S. Dist. LEXIS 5786 (E.D. Pa. May 1,1996); *Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan,* No. 95-C-7543, 1996 U.S. Dist. LEXIS 5664 (N.D. III. Apr. 26, 1996); *Eisenegger v. Pacific Telesis,* No. 95-2736,1996 U.S. Dist. LEXIS 5395 (N.D. Cal. Apr. 16, 1996).

3. Section 409(a) makes a fiduciary responsible only for losses resulting from a breach of duty. If no loss results from a breach, then no monetary liability exists. *See In re Unisys Savings Plan Litigation,* 74 F.3d 420, 445 (3d Cir.), *cert. denied,* 117 S. Ct. 56 (1996); *Kuper v. Lovenko,* 66 F.3d 1447 (6th Cir. 1995) ("a plaintiff must show a causal link between the [breach] and the harm suffered to the plan"); *Roth v. Sawyer-Cleator Lumber* Co., 16 F .3d 915 (8th Cir. 1994); *Friend v. Sanwa Bank Cal.,* 35 F.3d 466 (9th Cir. 1994) ("ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach"); *Diduck v. Kaszycki* & *Sons Contractors, Inc.,* 974 F.2d 270, 279 (2d Cir. 1992) ("Proof of a causal connection. . . is required between a breach of fiduciary duty and the loss alleged"); *Ironworkers Local No.* 272 *v. Bowen,* 695 F.2d 531, 536 (11th Cir. 1983) (loss existed but did not result from alleged breach); *Brandt v. Grounds,* 687 F.2d 895,898 (7th Cir. 1982) (Section 409 "clearly indicates that a causal connection is required between the breach of fiduciary duty and the losses incurred by the plan").

a. Courts have applied a variety of measures for determining losses. In *Donovan v. Bierwirth,* 754 F.2d 1049 (2d Cir. 1985), the court held that the measurement of "loss" requires a court to determine what a plan actually earned on a challenged investment compared to what would have been earned if the assets had been available for other plan purposes. *Accord, GIW Indus. v. Trevor, Stewart, Burton* & *Jacobsen, Inc.,* 895 F .2d 729, 733 (11th Cir. 1990); *Dardaganis v. Grace Capital, Inc.,* 889 F.2d 1237, 1243-4 (2d Cir. 1989). Other courts have compared the loss on imprudent investments to other measures of investment return, including prevailing interest rates or the return originally anticipated on the imprudent investment. *See Katsaros v. Cody,* 744 F.2d 20, 281 (2d Cir.), *cert. denied,* 469 U.S. 1072 (1984); *Donovan v. Mazzola,* 716 F.2d 1226, 1232-33 (9th Cir. 1983). In *Reich v. Valley National Bank* of *Arizona,* 17 EBC 1257 (S.D. N.Y. 1993), the court held that the losses recoverable as a result of an imprudent purchase of stock by a leveraged ESPO equaled the total payments made by the ESOP on its loan.

b. The *Donovan v. Bierwirth* court determined that any ambiguities in measuring losses should be resolved against the breaching fiduciaries. 754, F .2d 1049, 1056 (2d Cir. 1985); *see also, Roth v. Sawyer-Cleator LumberCo.,* 61 F.3d 599, 602 (8th Cir. 1995); *Kim v. Fujikawa,* 871 F .2d 1427, 1430-31 (9th Cir. 1989) (burden is on breaching fiduciaries to transactions); *Leigh v. Engle,* 727 F .2d 113, 138-39 (7th Cir. 1984) (doubts as to amount of disgorgement should be resolved against breaching fiduciaries).

c. Prejudgment interest is frequently awarded but is discretionary with the court. *Diduck v. Kaszycki* & *Sons Contractors Inc.,* 974 F .2d 270, 286 (2d Cir. 1992) ("a court has wide discretion. . . to award prejudgment interest"); *Shaw v. International Ass'n* of *Machinists* & *Aerospace Workers Pension Plan,* 750 F.2d 1458, 1465 (9th Cir. 1985) (whether to award prejudgment interest to an ERISA plaintiff is "a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities"), *cert. denied,* 471 U.S. 1137 (1986); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied,* 469 U.S. 1072 (1984); *Donovan* V. *Bryans,* 566 F. Supp. 1258, 1264-66 (E.D. Pa. 1983); *Donovan v. Tricario* , 5 EBC 2057 (S.D. Fla. 1984) (declining to award interest); *Leigh v. Engle,* 669 F. Supp. 1390, 1405-6 (N.D. III. 1987), *aff'd,* 858 F.2d 361 (7th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (declining to award interest).

4. Disgorgement of profits obtained through a fiduciary breach has also been ordered by courts. *Lowen v. Tower Asset Management,* 829 F.2d 1209, 1221 (2d Cir. 1987); *Leigh v. Engle,* 727 F.2d 113, 122, 137 (7th Cir. 1984) *(but see* the same case on remand, 669 F. Supp. 1390,1404, *aff'd,* 858 F.2d 361 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989) (finding that no profits arose through use of plan assets and thus that no disgorgement was required)); *Brink v. Da Lesio,* 496 F. Supp. 1350, 1385 (D. Md. 1980), *aff'd in part and rev'd in part*, 667 F.2d 420 (4th Cir. 1981); *Donovan v. Tricario,* 5 EBC 2057, 2065-6 (S.D. Fla. 1986). In *Amalgamated Clothing* & *Textile Workers Union v. Murdock,* 861 F.2d 1406 (9th Cir. 1988), the court held that a constructive trust could be imposed for the benefit of former plan participants and beneficiaries on profits allegedly obtained through fiduciary breaches, even though the plan had terminated and the participants had received distributions of their full accrued defined benefits.

5. Both preliminary and permanent injunctive relief can be awarded against breaching fiduciaries. *Marshall v. Teamsters Local* 282 *Pension Trust Fund,* 458 F. Supp. 986, 987, 992 (E.D.N.Y. 1978); *Marshall v. Glass/Metal Ass'n* & *Glaziers* & *Glassworkers Pension Plan,* 507 F. Supp. 378, 385 (D. Haw. 1980); *Donovan v. Bierwirth,* 754 F.2d 1049, 1055-6 (2d Cir. 1985); *Schwartz v. Interfaith Medical Center,* 715 F. Supp. 1190 (E.D. N.Y. 1989) (preliminary injunction requiring compliance with ERISA); *Beck v. Levering,* 947 F.2d 639 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 1937 (1992) (upholding permanent injunction against principals of investment firm from ever serving as fiduciaries or service providers to ERISA plans); *Martin v. Feilen,* 965 F.2d 660 (8th Cir. 1992), *cert. denied,* 506 U.S. 1054 (1993) (holding that it was an abuse of discretion for district court *not* to issue injunction barring individuals from providing fiduciary or other services to ERISA plans); *Reich v. Lancaster,* 843 F. Supp. 194 (N.D. Tex. 1993) (permanent injunction against service as a fiduciary or service provider), *aff''d,* 55 F.3d 1034 (5th Cir. 1995). Injunctive relief may be appropriate even if no loss to the plan has occurred. *Brock v. Robbins,* 830 F. 2d 640, 646-47 (7th Cir. 1987); *Fink v. National Sav.* & *Trust* Co., 772 F .2d 951, 962 (D.C. Cir. 1985) (opinion of then-Judge Scalia, concurring and dissenting).

6. Removal of the fiduciary and appointment of a receiver or successor trustee may be appropriate in cases of serious breaches of trust, depending on the circumstances. *See Birdsell v. UPS* of *America,* 94 F.3d 1130 (8th Cir. 1996); *Reich v. Lancaster,* 55 F.3d 504 U.S. 909 (1992) ("ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction"). *Compare Marshall v. Snyder,* 572 F.2d 894, 901 (2d Cir. 1978) (receiver appointed) *with Donovan v. Bierwirth,* 680 F.2d 263,276 (2d Cir.), *cert. denied,* 459 U.S. 1069 (1982) (receivership not warranted on facts). Since removal is an appropriate equitable remedy, courts also have power to adopt lesser remedies, such as power to appoint plan investment managers or administrators. *Donovan v. Mazzola,* 716 F.2d 1226, 1338-39 (9th Cir. 1983); *Katsaros v. Cody,* 744 F.2d 270, 281-83 (2d Cir.), *cert. denied,* 469 U.S. 1072 (1984).

7. Rescission of illegal transactions may also be an appropriate remedy for a breach of trust. *Eaves v. Penn,* 587 F.2d 453, 462-62 (10th Cir. 1978). If a transaction would create an illegal prohibited transaction, a court will not enforce it. M & R *Inv.* Co. *v. Fitzsimmons,* 685 F .2d 283, 287 (9th Cir. 1982).

8. In *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365 (1990), the Supreme Court resolved a conflict in the circuits by holding that ERISA § 206(d) prohibited alienation of the pension benefits of an ex-union official who had embezzled union funds. The Court expressly left open the issue whether a plan could alienate benefits of a fiduciary who had breached a duty to that plan. Most courts addressing this issue have followed the holding of *Crawford v. La Boucherie Bernard Ltd.,* 815 F.2d 117 (D.C. Cir.), *cert. denied,* 484 U.S. 943 (1987), in which the D.C. Circuit applied trust law principles to permit such an alienation. *See Parker v. Bain*, 68 F.3d 1131, 1140 (9th Cir. 1995); *Coarv. Kazimir,* 990 F.2d 1413 (3d Cir. 1993); *Reich* v. *Davidson Lumber Sales,* 154 Bankr. 324 (D. Utah 1993), *rev'd on other grounds sub nom.,* 73 F.3d 1027 (10th Cir. 1995), *cert. denied,* 117 S. Ct. 48 (1996); *Friedlander v. Doherty,* 851 F. Supp. 515 (N.D.N.Y. 1994); *In re: Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson* & *Casey,* 160 Bankr. 882 (S.D.N.Y. 1993); *Pension Ben. Guaranty Corp. v. Solmsen,* 743 F. Supp. 125 (E.D.N.Y. 1990). *But see Herberger v. Shanbaum,* 897 F.2d 801 (5th Cir.), *cert. denied,* 498 U.S. 817 (1990) (such an alienation is not permissible under the rationale of *Guidry); In re Loomer,* 198 Bankr. 755 (D. Neb. 1996). In 1997, Congress codified a limited exception in ERISA § 206(d)(4), which permits plans to offset benefits in the following circumstances: (1) the participant is convicted of a crime involving the plan; (2) an action for breach of ERISA's fiduciary provisions result in a civil judgment, consent order, or decree; or (3) the participant has entered into a settlement agreement resulting from an allegation of fiduciary breach brought by the DOL or PBGC.

9. One of the most significant unresolved questions is the extent to which ERISA incorporates traditional trust law remedies. Numerous courts have noted the codification in ERISA of trust law principles. *See Central* States, *Southeast* & *Southwest Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 570 (1986) ("Rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *but see Howe v. Varity Corp.*, 116 S. Ct. 1065 (1996) ("w]e also recognize, however, that trust law does not tell the entire story"). In addition, several Supreme Court decisions refer to the power conferred on federal courts under ERISA to fashion federal common law, in the same manner as recognized under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 in order to supplement the express provisions of ERISA. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 24, n.26 (1983); *Pilot Life Ins.* Co. *v. Dedeaux,* 481 U.S. 41, 52 (1987); *Metropolitan Life Ins.* Co. *v. Taylor,* 481 U.S. 58, 65-66 (1986). On the other hand, the Supreme Court has also warned in the context of benefits litigation against judicial interference with "ERISA's finely crafted enforcement scheme" by implying remedies not expressly provided for in the statute. *Massachusetts Mut. Life Ins.* Co. *v. Russell,* 473 U.S. 134, 146 (1985); *Pilot Life Ins.* Co. *v. Dedeaux,* 481 U.S. 41, 52 (1987). Relying on this latter line of authority, the court in *Nieto v. Ecker,* 845 F.2d 868, 874-75 (9th Cir. 1988) held that ERISA did not incorporate all trust law remedies and declined to supplement the express statutory language by implying a remedy available in trust law against a non-fiduciary who knowingly participated in a fiduciary breach. In the same decision, however, the court upheld a remedy against a party in interest, although that remedy is not expressly mentioned in the statute *(id.* at 875), and noted that ERISA's authorization of "equitable relief" would encompass certain traditional remedies, such as rescission and constructive trust. *Id.* at 874. *See also Amalgamated Clothing* & *textile Workers Union v. Murdock,* 861 F.2d 1406, 1419 (9th Cir. 1988) (court authorized the imposition of a constructive trust remedy if fiduciary violations were proven); *Waller v. Blue Cross,* 32 F.3d 1337 (9th Cir. 1994) (same).

10. Numerous cases describe the liability of breaching fiduciaries to make restitution as joint and several. *In* re *Masters, Mates* & *Pilots Pension Plan* & *IRAP Litig.,* 957 F .2d 1020 (2d Cir. 1992); *Donovan v. Robbins,* 752 F.2d 1170, 1185 (7th Cir. 1985) (Coffey, J., Concurring); *Donovan v. Mazzola,* 716 F.2d 1226, 1235 (9th Cir. 1983); *District* 65 *Retirement Trust v. Prudential Securities, Inc.*, 925 F. Supp. 1551 (N.D. Ga. 1996); *Davidson v. Cook,567 F. Supp. 225, 240 (E.D. Va. 1983), aff'd mem.,* 734 F.2d 10 (4th Cir.), *cert. denied,* 469 U.S. 899 (1984). Thus, plaintiffs may bring an action against some fiduciaries without bringing an action against all of them. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund,* 732 F .2d 325, 332 (3d Cir. 1984) (in breach of fiduciary duty action, unsued trustees were not indispensable parties because multiple trustees may be held jointly and severally liable); *Jennings v. Pierce,* No. 93-C-2539, 1995 U.S. Dist. LEXIS 2385, *2-3 (N.D. III. Mar. 1, 1995). In *Donovan v. Tricario,* 5 EBC 2057 (S.D. Fla. 1984), the court held a defendant trustee liable to restore all losses not previously restored through a settlement with other defendants.

11. A few cases discuss the principle of *respondeat superior* as providing a basis for imposition of liability, with widely varying results.

a. Several cases have adopted the common law doctrine that a non-fiduciary employer may be liable for a breach of fiduciary duty committed by its employee, if the breach was committed while the employee acted in the course and scope of his employment. *See National Football Scouting Inc. v. Continental Assurance* Co., 931 F.2d 646 (10th Cir. 1991) (recognizing doctrine of *respondeat superior* against principal where agent embezzled plan assets): *McMahon v. McDowell,* 794 F.2d 100, 109 (3d Cir.) (stating, without direct mention of their duties), *cert. denied,* 479 U.S. 971 (1986); *Stuart Park Assoc. Limited Partnership v. Ameritech Pension Trust,* 846 F. Supp. 701 (N.D. III. 1994) ("It is well-established that an employee's actions within the scope of employment are imputed to the employer, even in the context of ERISA litigation"); *Stanton v. Shearson Lehman/American Express, Inc.*, 631 F. Supp. 100, 104 (N.D. Ga. 1986) (finding that "the broad protective purpose of ERISA calls for such liability"). The Sixth Circuit considered this issue in *Hamilton v. Carell,* et *al,* 2001 U.S. App. LEXIS 4252 (6th Cir., March 22, 2001), and rejected the "active and knowing participation" requirement established by the Fifth Circuit in *American Federation of Unions* (see b) below), finding confusion in the case law between direct (or co-fiduciary) liability, and derivative liability of an employer for acts of its employee(s). The Sixth Circuit concurred with the Seventh Circuit's formulation in a non-ERISA case *(Konradi v. United States,* 919 F .2d 1207, 1210 (7th Cir. 1990), that *respondeat superior liability* is a form of "strict liability", and held that for *respondeat superior* liability to attach in the ERISA context "the agent must have breached his or her fiduciary duties while acting in the course and scope of employment."

b. Other courts, although purporting to adopt the common law doctrine of *respondeat superior,* nevertheless introduced additional requirements into the doctrine such as that the employer can be liable only if "actively and knowingly participating" in the employee's breach of fiduciary duty. *See, e.g., American Federation of Unions v. Equitable Life Assur Soc.*, 841 F.2d 658, 665 (5th Cir. 1988); *Accord Kral, Inc. v. Southwestern Life Ins.* Co., 999 F.2d 101, 103 (5th Cir. 1993) (expressly adopting *American Federation's* requirements). This liability appears not to be based on principles of *respondeat superior* but rather on co-fiduciary liability.

c. At least one court has found that the liability may be imposed through a theory of *respondeat* liability on the employer of a non-fiduciary. In *Contract Cleaning Maintenance, Inc. v. Marks,* No. 94-C-7204, 1996 U.S. Dist. LEXIS 6650 (N.D. III. May 15, 1996), the court held that Equitable Life Assurance Society, as a non-fiduciary employer of another non-fiduciary defendant, could be held liable to plaintiff under a *respondeat superior theory if its employee/agent was found liable under ERISA as a non-fiduciary.*

d. Other courts have expressly rejected the *respondeat superior* liability theory. *See Moreland v. Behl,* No. C-92-1238, 1996 U.S. Dist. LEXIS 5652 (N.D. Cal. Apr. 17, 1996) (finding that *Nieto v. Ecker,* 845 F.2d 868 (9th Cir. 1988) precluded a finding of non-fiduciary liability through *respondeat superior); Walsh v. Emerson,* No. 88-952, 1989 U.S. Dist. LEXIS 18289 (D. Ore. Oct. 3, 1989) (same).

12. One area in which the question of ERISA's incorporation of trust law has been actively litigated has involved the right of a breaching fiduciary to obtain contribution or indemnity from other defendants. Trust law principles provide a right of contribution under various conditions. *See* Restatement (Second) of Trusts § 258 (1959).

a. Following these equitable principles, a number of early ERISA decisions stated that a right to contribution existed under ERISA. *Free v. Briody,* 732 F .2d 1331, 1337 (7th Cir. 1984); *Alton Memorial Hosp. V. Metropolitan Life Ins.* Co., 656 F.2d 245, 250 (7th Cir. 1982); *Brock v. Self*, 632 F. Supp. 1509, 1524 (W.D. La. 1986); *Schaffler v. McDowell Nat'l Bank,6* EBC 2485 (W.D. Pa. 1985) (contribution action against non-fiduciaries); *Freund v. Marshall* & *Ilsley Bank*, 485 F. Supp. 629, 640 (W.D. Wis. 1979).

b. A later line of decisions held that no such right exists under ERISA. *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989); *Call v. Sumitomo Bank of Californi*a, 689 F. Supp. 1014 (N.D. Cal 1988), *aff'd in part and rev'd in part,* 881 F.2d 626 (9th Cir. 1989); *Narda, Inc. v. Rhode Island Hosp. Trust Nat'l Bank,* 744 F. Supp. 685 (D. Md. 1990); *Mutual Life Ins. Co. v. Yampol*, 706 F. Supp. 596 (N.D. III. 1989); *Franklin v. Aetna Life Ins. Co.,* 10 EBC 1022 (D.S.C. 1988); *McClendon v. Continental Group, Inc.,* 7 EBC 2403 (D.N.J. 1986); *see also Whitfield v. Lindemann,* 853 F.2d 1298, 1303 (5th Cir. 1988) (reversing an award of indemnity of fiduciary by non-fiduciary); *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (expressing doubt about a right to contribution); *McLaughlin v. Biasucci*, 688 F. Supp. 965 (S.D.N.Y. 1988) (no right of contribution against a non-fiduciary); *Brock v. Gillikin,* 677 F. Supp. 398 (E.D.N.C. 1987) (same). In part, these decisions rely on Supreme Court authority in *Massachusetts Mutual Life Ins. Co. v. Russell* as holding that non-express remedies should not be implied under ERISA; in part, they rely on non-ERISA Supreme Court authority that the federal courts should generally not imply a right of contribution.

c. More recently, it appears that the pendulum may be swinging back in favor of a right of contribution. In *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16 (2d Cir. 1991), *cert. denied*, 508 U.S. 959 (1992) the Second Circuit held that a right of contribution exists and creates a conflict in the circuit courts. *Chemung* has been eagerly followed by some district courts. *See Maher v. Strachan Shipping Co.,* 817F. Supp. 43,43 (E.D. La. 1993); *Emmons v. Equitable Life Assurance Soc.,* 799 F. Supp. 1123 (D.N.M. 1992); *Jones v. Trevor, Stewart Burton* & *Jacobsen, Inc.*, 15 EBC 2573 (N.D. Ga. 1992). Although its future was placed in doubt in light of the Supreme Court's rejection of wholesale importation of trust law remedies in *Mertens v. Hewitt Assoc.,* 508 U.S. 248 (1993), most post- *Mertens* district courts addressing the issue continue to apply its logic. In fact, in *Harris Trust* & *Say. Bank v. John Hancock Mutual Life Ins. Co.,* 122 F. Supp. 444 (S.D.N. Y. 2000), which was on remand from the Supreme Court, the district court refused Hancock's request for contribution only because "Hancock was more substantially at fault than its co-fiduciaries." *See Duncan v. Santaniello,* 900 F. Supp. 547 (D. Mass. 1995) (found right to contribution among fiduciaries); *Cohen v. Barker*, 845 F. Supp. 289, 291 (E.D. Pa. 1994) (right to contribution among breaching fiduciaries is right of federal common law); *Harris Trust* & *Savings Bank v. Salomon Bros., Inc.*, 832 F. Supp. 1169, 1177-79 (N.D.

III. 1993) (same); cf. *Wells Fargo Bank v. Bourns, Inc.*, 860 F. Supp. 709, 714 (N.D. Gal. 1994) (indemnification agreements not otherwise violating ERISA are enforceable under federal common law). *But see North Carolina Life* & *Accident* & *Health Ins. v. Alcatel*, 876 F. Supp. 748, 756 (E.D.N.C.) (refusing to find either an express or implied right to indemnification between a plan fiduciary and a non-fiduciary), *aff'd* mem., 72 F .3d 127 (4th Cir. 1995). One post- *Varity* case, *Youngberg v. Bekins Co.*, 930 F. Supp. 1396 (E.D. Cal. 1996), held that *Varity* requires that contribution and indemnity actions under § 502(a)(3) be allowed.

13. ERISA prohibits, as against public policy, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part." ERISA § 410(a).

a. The courts have interpreted this provision as indicating that Congress established the minimum standards of care appropriate for ERISA fiduciaries, intending their fiduciary obligations to be mandatory and fixed by law rather than subject to modification. *Fujikawa v. Gushiken*, 823 F.2d 1341, 1345 (9th Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988); *see also IT Corp. v. General American Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997) ("a contract exonerating an ERISA fiduciary from fiduciary responsibilities is void as a matter of law"); *Kayes v. Pacific Lumber Co.*, 51 F .3d 1449, 1460 (9th Cir.), *cert. denied*, 116 S. Ct. 302 (1995) ("any interpretation of the Plan which prevents individuals acting in a fiduciary capacity from being found liable as fiduciaries is void"); *Chicago Housing Authority v. J.A. Hannah Investment Advisory Service, Inc.*, No. 95-C-5251 , 1996 U.S. Dist. LEXIS 8046 (N.D. III. May 9, 1996) (refusing to uphold exculpatory clause in investment manager's contract); *Martin v. Nationsbank of Georgia, N.A.*, 16 EBC 2138 (N.D. Ga. 1993) (refusing to enforce provision of trust agreement which provided complete of a trustee that followed precisely the "participant direction" provisions of the plan document).

b. This provision has been interpreted to forbid a plan from advancing legal expenses to a fiduciary prior to the determination of liability. *See Spickerman v. Central States, Southeast and Southwest Areas Health* & *Welfare Fund*, 801 F.2d 257, 263 & n.3 (7th Cir. 1986) (although failing to reach issue, implied that advancement of legal fees from plan to fiduciary defending breach claim may violate ERISA's fiduciary rules); *Matin v. Walton*, 773 F. Supp. 1524, 1527 (S.D. Fla. 1991) (refusing to allow reimbursement of legal defenses to allegedly breaching fiduciaries pursuant to indemnification agreements because such expenditure would not constitute a reasonable expense properly incurred in administering the plan). *But see Moore V. Williams*, 902 F. Supp. 957, 966-67 (N.D. Iowa 1995) (interpreting *Spickerman* the opposite way, held that Section 410 "does not prevent advancement of expenses [by the fund] until liability is determined"). Cf. *Donovan v. Sciarra*, 5 EBC 2409, 2414 (D.N.J. 1984) (prohibiting plan payment of criminal defense fees unless determination is made that no civil breach of duty occurred). Section 410 does, however, allow a plan to reimburse a fiduciary for his legal expenses after he has been vindicated. *See Packer Engineering, Inc. v. Kratville*, 965 F.2d 174, 175 (7th Cir. 1992) ("[m]aking a faithful fiduciary whole hardly 'relieves' the fiduciary of responsibility or liability").

c. Although the Department of Labor interprets Section 410(a) as prohibiting "any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan," its interpretive bulletins clearly anticipate and permit *corporations* to indemnify their employees who serve as fiduciaries of corporate plans, as opposed to indemnification from the plan itself. *See* 29 C.F.R. § 2509.75-4 (1988); *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1243 (2d Cir. 1989), citing 20 C.F.R. § 2509.75-4); *Donovan v. Cunningham*, 541 F. Supp. 276, 289 (S.D. Tex. 1982), *rev'd in part on other grounds,* 716 F.2d 1455 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984) (although ERISA will not allow indemnification of a plan fiduciary by the plan itself, ERISA does not preclude another party from satisfying a liability incurred by a fiduciary in the same manner as insurance under Section 410(b)(3)).

d. An issue that has been frequently litigated involves the requirement that plan participants sign a release of any known or unknown claims against a plan fiduciary or administrator in return for receiving enhanced or early retirement benefits. Courts have generally upheld such releases, reasoning that they are not "agreements or instruments" within the meaning of Section 410(a) and that they do not "diminish the statutory obligations of a fiduciary" or relieve the fiduciary of any responsibility or obligation imposed by ERISA. *Leavitt v. Northwestern Bell Tel.* Co., 921 F.2d 160, 161 (8th Cir. 1990). As long as the claims are "knowingly and voluntarily released," the releases will be upheld. *See also Miller v. General Motors Corp.*, 845 F.2d 326 (6th Cir. 1988) (plaintiffs who were forced to sign a release discharging employer from any claims arising from transfer of the employee to new subsidiary in exchange for participation in ESOP were barred from bringing action); *Dooley v. American Airlines, Inc.*, No. 81-C-6770, 1993 U.S. Dist. LEXIS 15667 (N.D. III. Nov. 4, 1993).

C. Voluntary Fiduciary Correction Program

In March 2000, the DOL announced a Voluntary Fiduciary Correction Program intended to encourage plan sponsors to perform reviews of their plans' compliance with ERISA's fiduciary requirements, and to provide mechanisms and guidance for self-corrections. 65 Fed. Reg. 14164 (March 15, 2000). The program covers thirteen specific financial transactions. The program also is very specific in outlining appropriate ways in which defects may be corrected. Among other things, participation in the VFCP requires plan sponsors to notify plan participants and beneficiaries of the plan's violation of ERISA's fiduciary provisions. The plan also must file an application with the PWBA, and the application must include documentation evidencing the corrections. Full compliance with VFCB entitles the applicant to a No-Action letter from the PWBA, but does not protect against civil claims from participants and beneficiaries. Because of the compliance burdens and the limited nature of the relief, it is unclear whether plan sponsors will choose to participate in the VFCP.

D. Co-Fiduciary Liability

1. Section 405(a) imposes co-fiduciary liability on any fiduciary who participates "knowingly in, or knowingly undertakes to conceal. . . [a breach] knowing [it] is a breach" (Section 405(a)(1)); fails to comply with his own duties under Section 404(a)(1) and thus enables another fiduciary to commit a breach (Section 405(a)(2)); or knows that a breach has occurred but fails to make reasonable efforts to remedy it (Section 405(a)(3)). Courts have imposed co-fiduciary liability under each of these provisions.

2. In *Davidson v. Cook,* 567 F. Supp. 225, 233 (E.D. Va. 1983), *aff'd* mem., 734 F.2d 10 (4th Cir), *cert. denied,* 469 U.S. 899 (1984), the court said that both Section 405(a)(2) and (a)(3) require **actual** knowledge that a breach is occurring or has occurred. Although finding that "in many instances at least some of the fiduciaries should have known of breaches," the court declined to impose any co-fiduciary liability on certain plan trustees without actual knowledge. In *Diduck v. Kaszycki* & *Sons Contractors, Inc.,* 974 F.2d 270, 283 (2d Cir. 1992), however, the Second Circuit, relying principally on the Restatement of Trusts, held that a "defendant who is on notice that conduct violates a fiduciary duty is chargeable with constructive knowledge of the breach if a reasonably diligent investigation would have revealed the breach."

3. In *Freund v. Marshall* & *Ilsley Bank,* 485 F. Supp. 629, 635 (W.D. Wis. 1979), a plan administrator who had imprudently resigned was held liable for a successor's breaches of which he had actual knowledge. In *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan* & *Trust* 650 F. Supp. 359, 369-70 (N.D. Ga. 1986), the court, while holding a fiduciary liable for the imprudent manner of his resignation as plan trustee, nonetheless held that he was not directly liable, as a co-fiduciary, for another fiduciary's failure to respond to participants' requests for information of which the resigning trustee had no knowledge.

4. Some courts have read into Section 405(a)(3) a duty to remedy breaches of fiduciary duty by prior fiduciaries. This duty was discussed in a concurring opinion in *Morrissey v. Curran,* 567 F.2d 546, 549-51 (2d Cir. 1977); the majority opinion held that the duty to review prior investments was part of the basic duty of prudence. See also *Weisler v. Metal Polishers Union,* 3 EBC 2339, 2346 (S.D.N.Y. 1982) (duty to re-examine and undo, if necessary, decisions of prior fiduciaries).

5. In a number of cases, fiduciaries have been held liable under Section 405(a)(2) because they enabled the breaches of other fiduciaries. *Free v. Briody,* 732 F.2d 1331, 1335 (7th Cir. 1984); *Freund v. Marshall* & *Ilsley Bank,* 485 F. Supp. 629,640 (W.D. Wis. 1979); *Donovan v. Williams,* 4 EBC 1237,1246 (N.D. Ohio 1983); *Brock v. Self,* 632 F. Supp. 1509, 1524 (W.D. La. 1986); *Sandoval v. Simmons,* 622 F. Supp.1174, 1215 (C.D. III. 1985). *See also Pension Ben. Guaranty Corp. v. Ross,* 781 F. Supp. 415, 419-20 (M.D.N.C. 1991) (declining to award summary judgment to a co-fiduciary because of material disputed facts and noting that, because Section 405(a)(2) does not require that the co-fiduciary have knowledge of l the breach in order to be liable, "[c]o-fiduciary liability is significantly broader than non-fiduciary liability").

6. In *Brandt* v. *Grounds,* 502 F. Supp. 598, 599 (N.D. III.1980), *aff'd,* 687 F.2d 895 (7th Cir. 1982), the court held that liability under Section 405(a)(2) required a causal connection between the defendant's fiduciary status and the harm suffered by a plan. The rationale of this decision was extended to cover liability under Sections 405(a)(1) and (3) in *Pension Fund-Mid Jersey Trucking Industry-Local 701 v. OmniFunding Group*, 731 F. Supp 161,175-6 (D.N.J. 1990); *but see Landry v. AirLine Pilots Assn. In'l,* 901 F.2d 404, 422-23 (5th Cir.).

E. Liability of Non-Fiduciaries

1. In 2000 the Supreme Court determined that non-fiduciary parties in interest can be held liable for participating in prohibited transactions. *Harris Trust* & *Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000). This decision followed several recent cases that held or suggested that liability against a nonfiduciary that benefits from a transaction with a plan as a party in interest is available as an alternative to liability for participation in a fiduciary breach. In *Reich v. Compton,* 57 F.3d 270, 285-87 (3d Cir. 1995), the court held that Section 502 (a)(5) authorized the Secretary of Labor to sue a nonfiduciary who participated as a party in interest in a transaction prohibited by Section 406(a)(1). Similarly, the First Circuit in *Reich v. Rowe,* 20 F.3d 25, 31 (1st Cir. 1994), while refusing to accept the argument that the Secretary could sue a non-fiduciary for knowingly participating in a breach, suggested that the Secretary could maintain a suit against a party in interest who participated in a transaction prohibited under Section 406(a)(1). *See also Reich v. Stangl,* 73 F.3d 1027, 1032 (10th Cir.) ("[i]n the absence of an express limitation as to who may be named as a defendant in an equitable action filed by the Secretary, we read the statutory prohibition of certain kinds of transactions to offer some protection for ERISA plans from the misdeed of both parties to the prohibited transaction"), *cert. denied,* 117 S. Ct. 48 (1996); *Concha v. London,* 62 F.3d 1493 (9th Cir. 1995), *cert: dismissed,* 116 S. Ct 1710 (1996) (nonfiduciaries may be held liable for equitable relief under ERISA if they are "parties in interest" and engage in transactions prohibited by ERISA); *Landwehr v. Dupree,* 72 F .3d 726, 734 (9th Cir. 1995) (finding liability even if party in interest was "innocent recipient" of plan funds); *Reich v. Polera,* 20 EBC 1100 (S.D.N.Y. 1996).

2. It is unclear though whether non-fiduciaries who are not parties in interest can be held liable under ERISA. In the 1980's and early 1990's a conflict developed among the circuits over this issue. *Compare Useden v. Acker*, 947 F .2d 1563 (11th Cir. 1991), *cert. denied,* 508 U.S. 959 (1993) (knowing participation by a non-fiduciary in a fiduciary breach cannot result in ERISA liability for the non-fiduciary); *Nieto v. Ecker,* 845 F.2d 868 (9th Cir. 1988) (relying on the exclusivity of ERISA's specified remedies to hold that no cause of action existed against a non- fiduciary attorney alleged to have knowingly participated in the trustee's breach of duties in failing to supervise him), *with Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991) (recognizing principle but holding that liability requires proof of more than "innocent but careless" acts by non-fiduciaries); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (non-fiduciary liable for assisting fiduciary co-defendant in scheme to cause plans to use assets in ways which benefited defendants); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988); *Lowen v. Tower Asset Management,* 829 F.2d 1209, 1220 (2d Cir. 1987) (principals in, and affiliates of, corporation which breached fiduciary duties held liable as knowing participants in breach); *Thornton v. Evans,* 692 F.2d 1064, 1078 (7th Cir. 1982) (holding, on a motion to dismiss, that a non-fiduciary, alleged to have conspired with a fiduciary to mislead other fiduciaries into taking action which harmed plan, can be held liable under ERISA); *Fink v. National SA.* & *Trust Co.*, 772 F.2d 951, 955, 958 (D.C. Cir. 1985) (dictum).

3. The Supreme Court had an opportunity to resolve this conflict in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), but declined to specifically address the issue. The opinion, however, strongly suggested that a majority of Justices would not find non-fiduciary liability under ERISA. Indeed, in *Central Bank* of *Denver, N.A. v. First Interstate Bank* of *Denver*, 511 U.S. 164 (1994), the Court cited *Mertens* as rejecting non-fiduciary liability.

a. *Post-Mertens* but pre-Harris *Trust* decisions, refusing to find non-fiduciary liability for knowing participation in a breach of fiduciary duty included *Reich v. Compton,* 57 F.3d 270 (3d Cir. 1995) ("we are not prepared to disregard the Supreme Court's discussion of this issue in *Mertens"); Reich v. Rowe,* 20 F.3d 25 (1st Cir. 1994) (ERISA provides no cause of action to sue a non-fiduciary in connection with a breach of fiduciary duty); *Florin v. Nationsbank* of *Georgia,* 60 F. 3d 1245, 1248 (7th Cir. 1996) ("the Supreme Court decided the issue in favor of non-liability of non-fiduciaries" in *Mertens); Reich v. Continental Casualty Co.*, 33 F.3d 754 (7th Cir. 1994) (equitable relief in the form of restitution was not available against a non-fiduciary who participated in a fiduciary's breach), *cert. denied*, 115 S. Ct. 1104 (1995); *Buckley Dement, Inc. v. Travelers Plan Administrators,* 39 F.3d 784, 790 (7th Cir. 1994) (the court held that it was "without authority to entertain a claim for relief against a non-fiduciary based on [the] fashioning of a federal common-law remedy"); *Harris Trust* & *Savings Bank v. Salomon Brothers Realty Corp.*, 20 EBC 1449 (N.D. III. 1996); *Beddall v. State Street Bank* & *Trust,* 1996 U.S. Dist. LEXIS 1844 (D. Mass. Feb. 14, 1996); *Gerzog v. London Fog Corp.,* 907 F. Supp. 590 (E.D.N.Y. 1995); *Communications Workers* of *America v. Nynex Corp.*, No. 93-Civ-5329, 1995 U.S. Dist. LEXIS 14596, *10 (S.D.N.Y. Oct. 5, 1995); *Farris v. Century Planners,* 858 F. Supp. 150 (D. Kan. 1994) (dismissing, in light of *Mertens*, a claim against a non-fiduciary); *Blevins Screw Prod. v. Prudential Bache Sec.,* 835 F. Supp. 984 (E.D. Mich. 1993) (same); *McLaughlin v. Compton,* 834 F. Supp. 753 (E.D. Pa. 1993) (same). *Cf. Airparts Co. v. Custom Benefits Services,* 28 F.3d 1062 (10th Cir. 1994) (ERISA does not preempt state law tort claims against non-fiduciaries); *Clayton v. KPMG Peat Marwick,* 18 EBC 2200 (D. CA. 1994) (same); *Berlin City Ford v. Roberts Planning Group,* 864 F. Supp. 292 (D.N.H. 1994); *Colleton Regional Hospital v. MPS Medical Review Sys., Inc.*, 866 F. Supp. 896 (D. S.C. 1994).

b. Several *post-Mertens* and *pre-Harris Trust* district court decisions refused to dismiss claims for knowing participation in a breach of fiduciary duty, either because the governing court of appeals had not yet ruled on the issue *post-Mertens* or the court simply failed to cite *Mertens.* See *DeLaurentis v. Job Shop Technical Services, Inc.,* 912 F. Supp. 57 (E.D.N.Y. 1996) (refusing to diverge from Second Circuit precedent based on *Mertens* dicta); *Carpenters' Local Union No.* 946 *Pension fund v. Silverman,* 1995 U.S. Dist. LEXIS 8663 (S.D.N.Y. June 22, 1995) (same); *Central States Health* & *Welfare Fund v. Comprehensive Care Corp.,* 864 F. Supp. 831 (N.D. III. 1944) (refusing to dismiss claim against nonfiduciary, the court failed to mention *Mertens* or recognize controlling precedent in *Reich v. Continental Casualty Co.); Schiffli Embroidery Workers Pension Fund v. Ryan, Beck* & *Co.,* 869 F. Supp 278 (D.N.J. 1994)(citing only *pre-Mertens* cases, court recognized an implied cause of action against nonfiduciaries who knowingly participated in the wrongdoing of fiduciaries); *Gruby v. Brady,* 838 F. Supp. 820 (S.D.N.Y. 1993) (refusing to diverge from *Lowen v. Tower Asset Management*, 8329 F.2d 1209 (2d Cir. 1987), a *pre-Mertens* case allowing non-fiduciary liability, until the Second Circuit so instructed).

c. In contrast to *Mertens*, the logic of *Harris Trust* appears to extend liability even to non-fiduciaries who are not parties in interest. *Rudowski v. Sheet Metal Workers Int'l Ass'n.,* 113 F. Supp. 2d 1176, 1180 (S.D. Oh. 2000) (stating that "[d]efendant's *Mertens-based* argument is eviscerated by the Supreme Court's decision in *Harris Trust..."* and "non-fiduciary liability could derive from section 502(a)(3), even where such non-fiduciaries would not face liability under a specific substantive provision of ERISA."). However, their liability may be limited to situations where they have "actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Attorneys Ponder Non-fiduciary Liability in Aftermath* of *Harris Trust Ruling*, Pension & Benefits Daily (BNA) (June 19, 2000); *see also Laborer's Pension Fund v. Arnold*, No. C4113, 2001 U.S. Dist. LEXIS 2062, at *22-23 (N.D. II. Feb. 27, 2001) (stating that the prohibition from *Harris Trust* applies to "transactions in which the fiduciary and the party in interest have actual or constructive knowledge that the transaction at issue is unlawful.").

4. In *Taylor v. Peoples Natural* Gas Co., 49 F.3d 982 (3d Cir. 1995), the Third Circuit held that a plan administrator can be held liable for a breach of fiduciary duty under ERISA for misrepresentations made by the plan administrator's non-fiduciary agents. *See also Steinberg v. Mikkelson,* 901 F. Supp 1433, 1438 (E.D. Wis. 1995) (adopting the "federal common law of agency imputing the knowledge of an agent to its principal" in adjudicating breach of fiduciary duty claim).

F. Penalties for Breach of Fiduciary Duty

1. ERISA does not have a general penalty provision but imposes penalties on an odd assortment of specific violations. Two of those penalties arise in the context of fiduciary litigation brought by the Secretary of Labor but have not yet resulted in significant litigation.

2. Section 502(I) of ERISA imposes a civil penalty that is the mirror of the Internal Revenue Code § 4975 excise tax on prohibited transactions involving qualified pension plans. The excise tax has been the subject of a significant amount of litigation, principally in the Tax Court. See, *e.g., Lambos v. Commissioner,* 88 T.C. 1140 (1987); *Rutland v. Commissioner,* 89 T.C. 1137 (1987); *O'Malley* v. *Commissioner,* 96 T.C. 644 (1991) *aff'd,* 972 F.2d 150 (7th Cir. 1992); *Zabolotny v. Commissioner,* 97 T.C. 385 (1991), *aff'd in part and rev'd in party,* 7 F.3d 774 (8th Cir. 1993); *Westoak Realty* & *Inv. Co. v. Commissioner,* 999 F.2d 300 (8th Cir. 1993). Some of the more technical prohibited transactions in ERISA, such as the Section 407 rules relating to "qualifying employer real property", appear likely to be litigated in the context of the § 4975 excise tax. Section 502(I) applies to plans not subject to Code § 4975, i.e., welfare plans and non qualified pension plans. The basic penalty is up to 5 percent of the amount involved in the prohibited transaction, with a second stage penalty of up to 100 percent if the transaction is not corrected within 90 days after notice of the 5 percent penalty is provided. DOL regulations provide for a proceeding before an administrative law judge to impose or to challenge the penalty. Section 502(a)(6) of ERISA provides an express cause of action for the Secretary of Labor to sue in federal court to collect the penalty. This penalty appears to be imposed by DOL in situations presenting small or technical violations that might otherwise not warrant district court litigation. The first Section 502(I) penalty assessed by DOL was in the amount of $15,000 and involved the donation of property by an apprenticeship plant to the plan's sponsoring union. *See* U.S. Department of Labor News Release 91-51. The first administrative proceeding adjudicating the imposition of a Section 502(I) penalty was *In the Matter* of U. S. *Dept.* of *Labor, PWBA v. Taggart* (Office of Admin. Law Judges, U.S. Dept. of Labor, Aug. 25, 1995), in which an administrative law judge upheld the Department's assessment of a $42,500 penalty against a consultant for engaging in a prohibited transaction when he entered into a consulting agreement with a railroad health and welfare plan.

3. In 1989, Section 502(I) was added to ERISA. It imposes an across-the-board 20 percent penalty (offset by an prohibited transaction excise tax or civil penalty) on amounts recovered for a plan by the Secretary of Labor through either litigation or out-of-court settlement. In *Rodrigues v. Herman,* 1997 U.S. App. LEXIS 21865 (9th Cir. Aug. 19, 1997), the Ninth Circuit held that the Secretary must prove that there has been a fiduciary breach in order to collect a § 502(I) penalty. Therefore, in cases where the Secretary obtains a settlement agreement from the fiduciary in which the fiduciary does not admit to having committed a breach, a § 502(I) penalty cannot be collected unless further litigation proves the breach. Any other holding, said the court, would give the Secretary unchecked authority to impose a penalty, so long as some recovery had been gained through a settlement agreement. On the other hand, the DOL takes the position that § 502(I) "is a mandatory penalty that applies in the case of settlement agreements..." Kurt J. Ritterpusch, *Labor Department Does Not Support Substituting Disclosure for Transactions Rules,* Pens. & Ben. Daily (BNA), Sept. 22, 2000 (quoting Alan Lebowitz, PWBA Deputy Assistant Secretary for Program Operations).

V. REMEDIES FOR VIOLATION OF OTHER STATUTORY PROVISIONS OR PLAN PROVISIONS

Section 502(a)(3) of ERISA gives a participant, beneficiary, or fiduciary standing to seek an injunction or "other appropriate equitable relief" to enforce provisions of a plan or of Title I of ERISA or to remedy violations of these provisions. Section 502(a)(5) provides an identical cause of action for the Secretary of Labor. The Secretary's standing to sue under § 502(a)(5), however, is subject to § 502(b) which permits the Secretary to sue with respect to violations of parts 2 and 3 of Title I relating to participation, vesting and funding as to a qualified plan only if requested to do so by the Secretary of Treasury or by written request of one or more participants, beneficiaries, or fiduciaries of the plan.

Most of the case law regarding what constitutes "appropriate equitable relief" under §§ 502 (a)(3) and (5) has arisen in the context of breach of fiduciary claims, following the Supreme Court's decision in *Mertens v. Hewitt* Assoc., 508 U.S. 248 (1993). (discussed in the section on Remedies for Breach of Fiduciary Duty, above and in Part VII on ERISA and Trust Remedy Law, below).

However, a split arose in the circuits over the ability of a plan to recover benefits paid to a participant who later recovered damages in tort from the individual who caused her injuries. The Seventh, Eighth, and Eleventh Circuits held that the claim for reimbursement is an equitable claim under § 502(a)(3)(B). *Administrative* Comm. *v. Gauf;* 188 F .3d 767 (7th Cir. 1999); *Blue Cross* & *Blue Shield of Ala. v. Sanders,* 138 F.3d 1347 (11th Cir. 1998); *Southern Council of Indus. Workers v. Ford,* 83 F .3d 966 (8th Cir. 1996). In contrast, the Ninth Circuit determined that reimbursement claims are not equitable claims under § 502(a)(3)(B). *Reynolds Metals* Co. *v. Ellis,* 202 F.3d 1246 (9th Cir.), *cert. dismissed,* 121 S. Ct. 74 (2000); *FMC Medical Plan v. Owens,* 122 F.3d 1258 (9th Cir. 1997).

The Supreme Court granted certiorari in the Ninth Circuit case of *Great-West Life* & *Annuity Ins.* Co. *v. Knudson,* 2000 U.S. App. LEXIS 1771 (9th Cir. 2000), *cert. granted,* 121 S.Ct. 876 (2001), *affm'd,* 524 U.S. 204 (2002). The case involved a plan participant who was paralyzed in a car accident, whose health care plan paid In excess of $400,000, and who later settled a tort claim based upon the accident. *Id.* The facts of the case are complicated by questions over the relatively small portion of the settlement allocated to past medical expenses. *Id*. For a discussion of the Court's decision in *Great-West, see* Part VII on ERISA and Trust Remedy Law, below.

Another significant area in which § 502(a)(3) is invoked is to challenge alleged violations of § 510 which prohibits, among other things, interference with the attainment of benefit rights. In *Spinelli v. Gaughan,* 12 F.3d 853 (9th Cir. 1993), the Court relied on *Mertens* to hold that no *jury trial right existed in an action invoking § 510 since only the "equitable relief" available under § 502(a)(3) could be obtained; see also Zimmerman v. Sloss Equip.,* 72 F.3d .822, 829-30 (10th Cir. 1995 (discussing, but declining to resolve Issue)). In *Schwartz v. Gregori,* 45 F.3d 1017, 1021-23 (6th Cir.), *cert. denied,* 116 S. Ct.

77 (1995), the court held that both back pay and front pay could be awarded as equitable relief for a retaliatory discharge in violation of § 510. The court expressly stated that while equitable restitution "generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case." *Id.* at 1022. For a discussion of the difference between equitable restitution and legal restitution, *see* Dana M. Muir, ERISA Remedies: Chimera or Congressional Compromise? 81 Iowa L. Rev. 1, 32-38 (1995). In the widely watched case of *Millsap v. McDonnell Douglas*, the Tenth Circuit recently held that back pay did not constitute equitable restitution for purposes of ERISA section 502(a)(3)(B) and, thus, was unavailable to remedy a § 510 violation. No. 03-5124, 2004 U.S. App. LEXIS 10092 (10th Cir. May 21, 2004).

VI. OTHER AVAILABLE REMEDIES UNDER ERISA

A. Prejudgment Interest

1. ERISA does not expressly provide for an award of prejudgment interest, except with respect to actions under § 515 and § 502(g)(2} to collect delinquent employer contributions to a multi-employer plan. However, by operation of common law, the courts have ruled that an award of prejudgment interest is within their discretion in other ERISA cases, including benefit claims, fiduciary breach claims and § 510 claims. (See *Nelson v. EG&G Energy Measurements Group, 37 F.3d 1384 (9th Cir. 1994) ("prejudgment interest is intended to cover the lost* investment potential of funds to which the plaintiff was entitled, from the time of entitlement to the date of judgment"); *Lutheran Medical Center v. Contractors, Laborers, Teamsters* & *Eng'rs Health* & *Welfare Plan,* 25 F.3d 616 (8th Cir. 1994); *Quesinberry v. Life Ins.* Co., 987 F.2d 1017 (4th Cir. 1993); *Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999 (3d Cir. 1992)(and cases collected therein) ("Thus, prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable."); *Diduck v. Kaszycki* & *Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992); *Drennan v. General Motors Corp.,* 977 F.2d 246 (6th Cir. 1992), *cert. denied,* 113 S. Gt. 2416 (1993); *Biggins v. Hazen Paper Co.,* 953 F.2d 1405 (1st Cir.), *cert. denied,* 112 S. Ct. 3035 (1992).

2. The purpose of prejudgment interest is to compensate the harmed party – to restore him to his status quo ante – not to punish the violator; hence there is no need to show wrongdoing or bad faith. *See, Albanese v. Pfizer, Inc.,* 1996 U.S. Dist. LEXIS 7047 (D. Kan. 1996); *Boston Children's Heart Foundation v. Nadal Ginard,* 73 F.3d 429 (1st Cir. 1996); *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Drennan v. General Motors,* 977 F.2d 246 (6th Cir. 1992); *Diduck v. Kaszycki* & *Sons Contractors Inc.,* 974 F.2d 270 (2d Cir. 1992). *Garber v. Provident Life and Accident Insurance Company*, 1999 U.S. App. LEXIS (6th Cir. 1999) (unpublished) (overturning the district court denial of prejudgment interest because bad faith is not necessary as basis of award).

3. As to the amount of interest, *see Nelson v. EG&G Energy Measurements Group*, 37 F.3d 1384 (9th Cir. 1994) (Treasury bill rate from the time of entitlement to date of judgment is pertinent, not the Treasury bill rate at time of judgment); *Kinek v. Paramount Communications Pension Plan*, 22 F.3d 503 (2d Cir. 1994) (court did not abuse discretion in not selecting interest rate equal to "market" rate, which would have caused the plan to be over funded); *Quesinberry v. Life Ins.* Co., 987 F.2d 1017 (4th Cir. 1993) (awarding post-judgment interest on the entire amount of due benefits, including pre-judgment interest); *Diduck v. Kaszycki* & *Sons Contractors Inc.*, 974 F.2d 270 (2d Cir. 1992) (should not automatically use IRS statutory rate; rather look to what is needed to restore victim to his former position); *Martin v. Harline*, 15 E.B.C. 1138 (D. Utah 1991) (adopted interest rates and compounding methods contained in 26 U.S.C. §§6621 and 6622); *Foltz v. U.S. News* & *World Report Inc.*, 613 F. Supp. 634 (D.D.C. 1985). *Rybarczyk v. TRW, Inc.*, 235 F.3d 975 (6th Cir. 2000) (approving the use of the actual interest rate realized by the defendant to avoid unjust enrichment); *Cottrill v. Sparrow, Johnson* & *Ursillo, Inc.*, 100 F.3d 220 (1st Cir. 1996) (upholding the district court selection of the federal statutory rate as appropriate, but noting the district court has broad judgment in choosing a rate).

B. Interest on pre-litigation recoveries.

1. Plan participants have sought to recover interest for the delayed payment of benefits under ERISA §§ 502(a)(1)(B) and 502(a)(3)(B), even where the claim for benefits has been granted during the claim review process. *See Senese v. Chicago Area I. B.* of *T. Pension Fund*, 237 F.3d 819 (7th Cir. 2001); *Holmes v. Pension Plan* of *Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000); *Clair v. Harris Trust and Savings Bank*, 190 F.3d 495 (7th Cir. 1999); *Kerr v. Charles F. Vatterott* & *Co.*, 184 F.3d 938 (8th Cir. 1999); *Fotta v. Trustees* of *the United Mine Workers* of *America, Health and Retirement Fund*, 165 F.3d 209 (3d Cir. 1998); *Miner v. Empire Blue Cross/Blue Shield*, No. 97 Civ. 6490 (LAP), 2001 U.S. Dist. LEXIS 952 (S.D. N.Y. February 5, 2001); *Gustafson v. Kennametal, Inc.*, No. 00 Civ. 7396 (RWS), 2001 U. S. Dist. LEXIS 173 (S.D. N.Y. January 11, 2001); *Jackson v. Fortis Benefits Insurance Co.*, 105 F. Supp. 2d 1055 (D. Minn. 2000) ; *Dunnigan v. Metropolitan Life Insurance Co.*, 99 F. Supp. 2d 307 (S.D. N.Y. 2000); *Walsh v. Eastman Kodak Co.*, 53 F. Supp. 2d 569 (W.D. N.Y. 1999); *DeVito v. Pension Plan* of *Local 8191.B.T. Pension Fund*, 975 F. Supp. 258 (S.D.N.Y. 1997); *Hizer v. General Motors Corp.*, 888 F. Supp. 1453 (S.D. Ind. 1995); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011 (W.D.N.Y. 1990); *Scott v. Central States, Southeast and Southwest Areas Pension Plan*, 727 F. Supp. 1095 (E.D. Mi. 1989).

2. A claim for pre-litigation interest on delayed benefit payments has generally not been recognized under ERISA § 502(a)(1)(B), in the absence of language in the plan document authorizing such recovery. *See Senese v. Chicago Area I. B.* of *T. Pension Fund*, 237 F.3d 819, 825 (7th Cir. 2001) (claim for interest not permitted since recovery under this section limited to benefits specified in the plan); *Kerr v. Charles F. Vatterott* & *Co.*, 184 F.3d 938, 942 (8th Cir. 1999) (denying claim for interest as extracontractual damages); *Clair v. Harris Trust and Savings Bank*, 190 F.3d 495, 497

(7th Cir. 1999) (denying claim for interest since only benefits specified in the plan can be recovered under this section); *Miner V. Empire, Blue Cross/Blue Shield,* No. 97 Civ. 6490 (LAP), 2001 U.S. Dist. LEXIS 952, at 9 (plaintiff must show plan recognizes a claim for interest on delayed payment of benefits to bring claim under this section); *But cf. Hizer v. General Motors Corp.,888* F. Supp. 1453, 1461 (S.D. Ind. 1995) (awarding interest on delayed benefit payment as analogous to award of prejudgment interest, but not specifying ERISA section).

3. Some courts have recognized the availability of a claim for interest on delayed benefit payments under ERISA § 502(a)(3)(b), where the participant can establish an underlying breach of ERISA or the plan document. *Senese v. Chicago Area I. B. of T. Pension Fund*, 237 F.3d 819, 825 (7th Cir. 2001); *Kerr v. Charles F. Vatterott* & Co., 184 F.3d 938, 944-945 (8th Cir. 1999); *Clair v. Hams Trust and Savings Bank,* 190 F.3d 495, 498 (7th Cir. 1999); *Miner v. Empire Blue Cross/Blue Shield,* No. 97 Civ. 6490 (LAP), 2001 U.S. Dist. Lexis 952 (S.D.N.Y. February 5,2001); *Gustafson v. Kennameta/, Inc.,* No. 00 Civ. 7396 (RWS), 2001 U.S. Dist. LEXIS 173 (S.D.N.Y. January 11,2001); *Jackson v. Fortis Benefits Insurance Company,* 105 F. Supp. 2d 1055 (D. Minn. 2000); *Dunnigan v. Metropolitan Life Insurance* Co., 99 F. Supp. 2d 307, 321 (S.D.N.Y. 2000); *See also. Fotta v. Trustees of the United Mine Workers* of *America, Health and Retirement Fund*, 165 F.3d 209, 213 (3d Cir. 1998) (recognizing claim as within the scope of equitable relief available).

4. Several courts have held that claims for interest are equitable in nature and must be based on the facts and circumstances applicable to each participant's claim. For that reason courts have specifically ruled that such claims may not be asserted on a class action basis. *See Holmes v. Pension Plan of Bethlehem Steel Corp.,* 213 F.3d 124 (3d Cir. 2000); *Miner v. Empire Blue Cross Blue Shield*, No. 97 Civ. 6490 (LAP), 2001 U.S. Dist. LEXIS 952, at 14-15 (S.D.N.Y. February 5, 2001); *Dunnigan v. Metropolitan Life Insurance* Co., 99 F. Supp. 2d 307, 325-326 (S.D.N.Y. 2000).

5. As to an appropriate method to determine the time period for which interest applies, *see Hizer v. General Motors Corp.,* 888 F. Supp. 1453, 1464 (S.D. Ind. 1995) (interest accrues from the date the benefit payment was due, in accordance with contract law).

6. As to an appropriate interest rate if pre-litigation interest is awarded, *see Holmes v. Pension Plan* of *Bethlehem Steel Corp.,* 213 F.3d 124 (3d Cir. 2000) (upholding the lower court ruling that the rate of interest is determined by 28 U.S.C. § 1961(a), the statutory rate for post-judgment interest, because the plan took increased risk to earn a higher rate and thus was not unjustly enriched); *Hizer v. General Motors Corp.,* 888 F. Supp. 1453 (S.D. Ind. 1995) (the rate of interest should be the prime rate); *Cefali v. Buffalo Brass* Co., *Inc.,* 748 F. Supp. 1011 (W.D.N.Y. 1990) (the rate of interest is determined by 28 U.S.C. § 1961(a)).

C. Attorneys Fees

1. ERISA §502(g) contains two separate provisions authorizing the courts to award attorneys fees and costs in §502(a) actions. The first, §502(g)(1), provides that in any action brought under Title I (except an action covered by §502(g)(2) "by a participant, beneficiary or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party" (Emphasis added). The second provision, §502(g)(2), requires a court to award attorneys'' fees (and other relief) to a prevailing plan fiduciary in a contribution collection action under ERISA §515, 29 U.S.C. §1145.

Note that under §502(g)(1) an award of fees and costs is discretionary, not mandatory; a prevailing party is not automatically entitled to a fee award. *See, Saltarelli v. Bob BakerGroup Medical Trust*, 35 F.3d 382 (9th Cir. 1994); *Florence Nightingale Nursing Service v. Blue Cross/Blue Shield*, 41 F.3d 1476 (11th Cir.), *cert. denied*, 115 S. *Ct.* 2002 (1995); *Schake v. Colt Industries Op. Corp.*, 960 F.2d 1188 (3d Cir. 1991); *Anthuis v. Colt Industries Op. Corp.*, 971 F.2d 999 (3d Cir. 1992). Also, a fee award can be made to either party; there is no limitation that fee awards be made only to "prevailing parties." *See, Morgan v. Independent Drivers Assn.. Plan*, 975 F.2d 1467 (10th Cir. 1992); *Oster v. Barco of Cal. Employee Retirement Plan*, 869 F.2d 1215 (9th Cir. 1989); *Sokol v. Bernstein*, 812 F.2d 559 (9th Cir. 1987). *But see Flanagan v. Inland Empire Elec. Workers Pension Plan*, 3 F.3d 1246 (9th Cir. 1993) (no recovery of fees under §502(g)(1) unless party "succeed[s] on a significant issue in litigation which achieves some of the benefit sought in bringing suit"). Fees can be awarded only to a "participant," "beneficiary," or "fiduciary," mirroring ERISA §502's standing and jurisdiction provisions. *See Downey Community Hospital v. Wilson*, 977 F.2d 470 (9th Cir. 1992).

2. In exercising their discretion under §502(g)(1), the courts tend to consider the following factors, although their application and relative weight tends to vary from jurisdiction to jurisdiction:

- the relative bad faith or culpability of the opposing parties;
- the ability of the opposing party to satisfy an award;
- the deterrent value of an award with respect to the offending party, and others similarly situated;
- the extent to which the party seeking fees sought to benefit all plan participants or to resolve a significant legal issue regarding ERISA; and;
- the relative merits of the parties' respective positions.

See generally Note, “Attorneys Fees Under ERISA: When Is An Award Appropriate?,” 71 Cornell L. Rev. 1037, (1986). *See also Cottril v. Sparrow, Johnson* & *Ursillo, Inc.,* 100 F.3d 220 (1st Cir. 1996); *Shade v. Panhandle Motor Servo Corp.*, 1996 U.S. App. LEXIS 16703 (4th Cir. 1996); *Bellaire Gen. Hosp.* v. *Blue Cross Blue Shield* of *Mich.,* 97 F.3d 822 (5th Cir. 1996); *Foltice v. Guardsman Prods.,* 98 F.3d 933 (6th Cir. 1996), *cert. denied,* 117 S. *Ct.* 1312, 3/24/97; *Wells v. U.S. Steel* & *Carnegie Pension Fund,* 76 F.3d 731 (6th Cir. 1996); *Maune v. IBEW Local No.1 Health* & *Welfare Fund,* 83 F.3d 959 (8th Cir. 1996); *Duggan v. Hobbs,* 99 F.3d 307 (9th Cir. 1996); *Canseco v. Construction Laborers Pension Trust,* 93 F.3d 600 (9th Cir. 1996), *cert. denied,* 117 S. Ct. 1250, 3/17/97; *Thorpe v. Retirement Plan* of *the Pillsbury Co.,* 80 F.3d 439 (10th Cir. 1996); *Quesinberry v. Life Ins. Co.,* 987 F.2d 1017 (4th Cir. 1993); *Ellison v. Shenago Inc. Pension Board,* 956 F.2d 1268 (3d Cir. 1992); *Schake,* 960 F.2d 1188 (3d Cir. 1991); *Anthuis,* 971 F.2d 999 (3d Cir. 1992); *Downey,* 977 F.2d 470 (9th Cir. 1992); *Losada v. Golden Gate Disposal* Co., 950 F.2d 1395 (9th Cir. 1991); *Davidson v. Canteen Corp.,* 957 F.2d 1404 (7th Cir. 1992); *Continental Assurance* Co. *v. Ceder Rapids Pediatric Clinic,* 957 F .2d 588 (8th Cir. 1992); *Tingley v. Prixley-Richards West, Inc.,* 958 F .2d 908 (9th Cir. 1992); *Salley v. E.I. Dupont de Nemours* & *Co.,* 966 F.2d 1011 (5th Cir. 1992); *Rodriguez v. MEBA Pension Trust,* 956 F.2d 468 (4th Cir. 1992); *National Companies Health Plan v. St. Joseph's Hospital,* 929 F.2d 1558 (11th Cir. 1991); *Armistead v. Vemitron Corp.,* 944 F.2d 1287 (6th Cir. 1991); *National Cos. Health Benefit Plan v. St. Joseph’s Hosp., Inc.,* 929 F.2d 1558 (11th Cir. 1991); *Meredith v. Navistar lnt’l Transportation Corp.,* 935 F.2d 124 (7th Cir. 1991); *Nichols v. Pullman Standard, Inc.,* 889 F .2d 115 (7th Cir. 1989); *Tesch v. General Motors Corp.,* 937 F.2d 359 (7th Cir. 1991); *Sweet v. Consolidated Aluminum Corp.,* 913 F.2d 268 (6th Cir. 1990); *Reinking v. Philadelphia American Life Ins. Co.,* 910 F.2d 1210 (4th Cir. 1990); *Gray v. New England Tel.* & *Tel. Company,* 792 F.2d 251 (1st Cir. 1986); *Miles v. N.Y.S. Teamsters Conference Plan,* 698 F.2d 593 (2d Cir.), *cert. denied,* 464 U.S. 829 (1983); *Ursic v. Bethlehem Mines,* 719 F.2d 670 (3d Cir. 1983); *Iron Workers Local* 272 *v. Bowen,* 624 F.2d 1255 (5th Cir. 1980) and 695 F.2d 531 (11th Cir. 1983); *Salley v. E.I. Dupont deNemours* & *Co.,* 966 F.2d 1011 (5th Cir. 1992); *Bittner v. Sadoff* & *Ruday Ind.,* 728 F.2d 820 (7th Cir. 1984); *Marquardt v. North American Car Corporation,* 652 F.2d 715 (7th Cir. 1981); *Janowski v. Teamsters Local No. 710 Pension Fund,* 673 F.2d 931 (7th Cir.), *cert. denied,* 459 U.S. 858 (1982); *Leigh v. Engle,* 858 F.2d 361 (7th Cir. 1988), *cert. denied sub. nom, Estate* of *Johnson v. Engle,* 489 U.S. 1078 (1989); *Groves v. Modified Retirement Plan,* 803 F.2d 109 (3d Cir. 1986); *Chambless v. M,M&P Pension Plan,* 815 F.2d 869 (2d Cir. 1987), *cert. denied,* 110 S. Ct. 2587 (1990); *Nachwalter v. Christie,* 805 F.2d 956 (11th Cir. 1986); *Monkelis v. Mobay Chemical,* 827 F.2d 935 (3d Cir. 1987); *Lawrence v. Westerhaus,* 749 F.2d 494 (8th Cir. 1984); *Hummell v. S.E. Rykoff & Company,* 634 F.2d 446 (9th Cir. 1980); *Eaves v. Penn,* 587 F.2d 453 (10th Cir. 1978); *Pratt v. Petroleum Production Mgt. Plan,* 920 F.2d 651 (10th Cir. 1990); *Graphic Communications Union v. GCIU-Employer Plan,* 917 F.2d 1184 (9th Cir. 1990)].

The 7th Circuit’s standards for granting fees and costs under §502(g)(1) seemed to vary from case to case. In *Production* & *Maintenance Employees’ Local 504 v. Roadmaster Corp.,* 954 F.2d 1397 (7th Cir. 1992), the court again attempted to harmonize the five-factor test set forth above with an “Equal Access To Justice Act-style” standard of awarding fees to a prevailing party unless the loser's litigation position was "substantially justified.” The court reaffirmed the *Meredith* approach that both standards have the same bottom line: was the losing party’s position substantially justified and taken in good faith, or was that party simply out to harass its opponent? But, the court explained that the party seeking fees need not actually show subjective bad faith to justify an award. *See also Hooper v. Demco, Inc.,* 37 F 3d 287 (7th Cir. 1994) (fees should not be awarded against losing party whose position was “substantially justified”); *Davidson,* 957 F 2d 1404 (7th Cir. 1992) (prevailing plaintiff denied fees because the defendants’ position was reasonably justifiable and the issue presented was novel).

The district court must consider and balance all of the factors to the extent they apply to the case. *See, Anthuis,* 971 F.2d 999 (3d Cir. 1992). The court can consider additional factors. *Id.; Hummell,* 634 F.2d 446 (9th Cir. 1980).

In practice, the application of these factors (at least up until recently) had tended to create a presumption that attorneys fees will be awarded to plaintiff-participants who successfully sue their plans for benefits, consistent with ERISA’s policies of enabling plan participants to obtain competent counsel and ready access to the courts. *See*, *e.g., Canseco v. Construction Laborers Pension Trust,* 93 F.3d 600 (9th Cir. 1996); *Cottrill v. Sparrow, Johnson* & *Ursillo,* 100 F.3d 220 (1st. Cir. 1996); *Rodriguez,* 956 F.2d 468 (4th Cir. 1992); *Reinking,* 910 F.2d 1210 (4th Cir. 1990); *Tesch,* 937 F.2d 359 (7th Cir. 1991); *Meredith,* 935 F.2d 124 (7th Cir. 1991); *McConnell v. MEBA Medical* & *Benefits Plan,* 759 F.2d 1403, *superseded,* 778 F.2d 521 (9th Cir. 1985); *Miele v. N.Y.S. Teamsters Plan,* 831 F.2d 407 (2d Cir. 1987); *Groves,* 803 F.2d 109 (3d Cir. 1986); *Marquardt,* 652 F.2d 715 (7th Cir. 1981); *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344 (8th Cir. 1980); *Birmingham v. Sogen-Swiss Int’l Corp. Plan,* 718 F.2d 515 (2d Cir. 1983); *Leigh,* 858 F.2d 361 (7th Cir. 1988), *cert. denied,* 489 U.S. 1078 (1989); *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587 (9th Cir. 1985). *But see Davidson*, 957 F.2d 1404 (7th Cir. 1992); *Kunin v. Benefit Trust Life Ins.,* 696 F. Supp. 1342 (C.D. Cal. 1988), *aff’d,* 898 F .2d 1421, as *amended,* 910 F .2d 534 (9th Cir. 1990). *But see Quesinberry v. Life Ins.* Co. of *North America,* 987 F. 2d 1017 (4th Cir. 1993) *(Reinking* does **not** establish a presumption in favor of a prevailing participant and adopting rule of other Circuits that ERISA does not require mandatory fee shifting).

Three Circuits (4th, 8th and 9th) have adopted a so-called “special circumstances rule” under which a prevailing plaintiff participant or beneficiary will be awarded attorneys’ fees absent special circumstances that would make such an award unjust. However, the Fourth Circuit then reversed itself on this issue. See, *e.g., Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters* & *Eng’rs Health* & *Welfare Plan*, 25 F.3d 616 (8th Cir. 1994); *Rodriquez v. General Motors Corp.,* 956 F.2d 468 (4th Cir. 1992); *Losada v. Golden Gate Disposal* Co., 950 F.2d 1395 (9th Cir. 1991); *Reinking v. Philadelphia American Life Ins.* Co., 910 F.2d 1210 (4th Cir. 1990); *Tesch v. General Motors Corp.,* 937 F.2d 359 (7th Cir. 1991); *Meredith v. Navistar Int'l Transp. Corp.,* 935 F.2d 124 (7th Cir. 1991); *McConnell v. MEBA Medical* & *Benefits Plan,* 759 F.2d

1403, *superseded,* 778 F.2d 521 (9th Cir. 1985); *Miele v. N.Y.S. Teamsters Plan,* 831 F.2d 407 (2nd Cir. 1987); *Groves v. Modified Retirement Plan,* 803 F.2d 109 (3rd Cir. 1989); *Marquardt v. North American* Car *Corp.,* 652 F.2d 715 (7th Cir. 1981); *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344 (8th Cir. 1980); *Birmingham v. Sogen-Swiss Int'I Corp. Plan,* 718 F.2d 515 (2nd Cir. 1983); *Leigh v. Engle,* 858 F.2d 361 (7th Cir. 1988); *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587 (9th Cir. 1985). *But see Davidson v. Canteen Corp.,* 957 F.2d 1404 (7th Cir. 1992); *Kunin v. Benefit Trust Life Ins.,* 696 F. Supp 1342 (C.D. Cal.1988), *aff'd,* 898 F.2d 1421, as *amended,* 910 F.2d 534 (9th Cir. 1990); *Quesinberry v. Life Ins. Co. of North America,* 987 F.2d 1017 (4th Cir. 1993) *(Reinking* does not establish a presumption in favor of a prevailing participant and adopting rule of other Circuits that ERISA does not require mandatory fee shifting).

Some courts put a heavy emphasis on whether the losing defendant acted in bad faith. *See e.g., Cottrill v. Sparrow, Johnson* & *Ursillo,* 100 F.3d 220 (1st Cir. 1996); *Shade v. Panhandle Motor Servo Corp.,* 1996 U.S. App. LEXIS 16703 (4th Cir. 1996); *Foltice v. Guardsman Prods.,* 98 F.3d 933 (6th Cir. 1996); *Raffv. Belstock,* 933 F. Supp. 909 (N.D. Cal. 1996); *Harrison v. Aetna Life Ins.* Co., 925 F. Supp. 744 (M.D. Fla. 1996); *GreaterBlouse, Skirt and Undergannent Ass'n v. Morris,* 1996 U.S. Dist. LEXIS 4836 (S.D.N.Y. 1996); *Santa Monica Culinary Welfare Fund v. MiramarHotel Corp.,* 920 F.2d 1491 (9th Cir. 1990), *cert. denied,* 501 U.S. 1232 (1991); *Maiuro v. Federal Express Corp.,* 843 F. Supp. 935 (D.N.J.), *aff'd without op.,* 43 F.3d 1461 (3d Cir. 1994); *Tiemegerv. Community Mut. Ins.* Co., 789 F. Supp. 894 (S.D. Ohio 1992), *aff'd in part, remanded in part,* 8 F.3d 1094 (6th Cir. 1993), *cert. denied,* 114 S. Ct. 1371 (1994); *Kidder v. H&B Marine, Inc.,* 925 F.2d 857 (5th Cir. 1991). *But see McPherson v. Employees' Pension Plan* of *America Re-lnsurance* Co., 33 F.3d 253 (3d Cir. 1994) (reversed district court's determination not to award fees and noting fee award could be made against losing defendant who had not acted in bad faith).

Where ERISA is only one aspect of the litigation, fees have been denied by at least one court. *See Bokunewicz v. Purolator Products, Inc.,* 907 F.2d 1396 (3d Cir. 1990).

There is also a tendency among the courts to not award fees to prevailing defendant plans and employers against plaintiff-participants. *See Tobin v. General Elect.* Co.. 1996 U.S. Dist. LEXIS 18645 (E.D. Pa. 1996) (losing plaintiffs inability to satisfy award is sufficient basis to deny fees); *Maune v. IBEW Local No.1 Health* & *Welfare Fund,* 83 F.3d 959 (8th Cir. 1996) (plaintiffs claim of sufficient merit to warrant additional action against fund); *Corder v. Howard Johnson* & Co., 37 F.3d 550 (9th Cir. 1994); *Izzarelli v. Rexene Products* Co., 24 F.3d 1506 (5th Cir. 1994); *Davidson,* 957 F.2d 1404; *Pritchard v. Rainfair, Inc.,* 945 F.2d 185 (7th Cir. 1991); *Hogan v. Kraft Foods,* 969 F.2d 142 (5th Cir. 1992); *Holder v. Prudential Ins.* Co., 951 F.2d 89 (5th Cir. 1992); *Tingley v. Pixley-Richards West, Inc.,* 958 F.2d 908 (9th Cir. 1992); *VanBoxel v. Journal* Co. *Pension Trust,* 836 F.2d 1048 (7th Cir. 1987); *Meredith,* 935 F.2d 124; *Tesch,* 937 F.2d 359; *Gray,* 792 F.2d 251; *Bittner,* 728 F.2d 820 (7th Cir. 1984); *Nachwalter,* 805 F.2d 820; *Lojek v. Thomas,* 716 F.2d 675 (9th Cir. 1983); *Hope v.*

IBEW, 785 F.2d 826 (9th Cir.1986). *But see Estate* of *Shockley v. Alyeska Pipeline* 21 EBC 2121 (9th Cir. 1997) (award of fees to employer/plan to compensate for defending meritless suit); *Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993) (because employees breached their covenants not to sue, employer is entitled to reasonable attorney fees); *Farris v. Century Planners, Ltd.*, 1994 U.S. Dist. LEXIS 10643 (D. Kan. 1994) (fees awarded against losing plaintiffs upon finding lack of merit in plaintiffs position to be significant); *Cefali v. Buffalo Brass* Co., 748 F. Supp. 1011 (W.D.N.Y. 1990) (fees awarded against losing plaintiffs who sued in bad faith); *Baker v. Greater Kansas City Laborers Welfare Fund*, 699 F. Supp. 210, *later op.*, 716 F. Supp. 1229 (W.D. Mo. 1989) (losing plaintiff order to pay part of defendant's fees and his attorney was ordered to pay the other part).

Fees may be awarded to successful defendants sued by benefit plans or other institutional plaintiffs. *See e.g., Credit Managers Ass'n v. Kennesaw Life* & *Accident Ins.* Co., 35 F.3d 743 (9th Cir. 1994) (normal rule against such awards applied only to individual, not institutional plaintiffs); *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984); *Schetterv. Prudential-Bache Securities, Inc.*, 695 F. Supp. 1077 (E.D.N.Y. 1988); *Anita Foundations, Inc. v. ILGWU Fund*, 902 F.2d 185 (2d Cir. 1990); *Jones v. O'Higgans*, 736 F. Supp. 1243 (N.D.N.Y. 1990). *But see Park South Hotel Corp. v. New York Hotel Trades Council Pension Fund*, 715 F. Supp. 596 (S.D. N.Y. 1989) (refusing to assess fees due to concern that a fee award would frustrate the purpose of MPPAA by deterring plans from seeking to impose withdrawal liability).

Of course, there are non-ERISA bases for an assessment of attorneys fees and costs against a party that can apply in ERISA litigation. *See, e.g., Etter v. J. Pease Const.* Co., 963 F.2d 1005 (7th Cir. 1992); *Salley v. E.I. Dupont de Nemours* & Co., 966 F.2d 1011 (5th Cir. 1992); *Malhoit v. So. Cal. Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984) (28 U.S.C. 1927); *Townsend v. Holman Consulting Corp.*, 1989 U.S. App. Lexis 11706 (9th Cir. 1989) (FRCP Rule 11); *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (same). *See also, Meredith*, 935 F.2d 124 (frivolous appeal sanctions).

Of course, ERISA § 502 provides for fee awards for appeals court work as well as trial court work. *See, e.g., Roadmaster*, 954 F.2d 1397 (7th Cir. 1991).

Once a court determines to award attorneys' fees to a party, it must decide on an amount. As to how to calculate a fee award, *see, e.g., Central States Pension Fund v. Central Cartage* Co., 76 F.3d 114 (7th Cir. 1996) (fund entitled to recover amount it would have paid if it had hired outside counsel); *Harsch v. Eisenberg;* 956 F.2d 651 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992); *Dutchak v. Central States Pension Fund*, 932 F.2d 511 (7th Cir. 1991); *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990); *PBGC v. Fletcher*, *12 E.B.C. 2518 (W.D. Tex. 1990); D'Emanuele v. Montgomery Ward* & Co. *Plan*, 904 F.2d 1379 (9th Cir. 1990); *Chambless v. Master, Mates* & *Pilots Pension Plan*, 885 F.2d 1053 (2d Cir. 1989); *Schueler v. Roman Asphalt Corp.*, 827 F. Supp. 247 (S.D.N.Y. 1993); *Egert v. Connecticut Gen. Life*

Ins. Co., 768 F. Supp. 216 (N.D. III. 1991); *Cefali,* 748 F. Supp. 1011; *Leigh v. Fingle,* 714 F. Supp. 1465, as *modified,* 723 F. Supp. 1272 (N.D. III. 1989); *Dasler v. E.F. Hutton* Co., 698 F. Supp. 172 (D. Minn. 1988) (including expert fees). The amount of fees, like award of fees, is reviewable under a clear abuse of discretion standard. *See Curry v. Contract Fab. Inc. Profit Sharing Plan,* 891 F.2d 852 (11th Cir. 1990); *Leigh v. Engle,* 858 F.2d 361 (7th Cir. 1988).

The Supreme Court in *City* of *Burlington v. Dague,* 112 S. Ct. 2638 (1992), has held that awards of attorneys fees pursuant to statute generally may not exceed the lodestar amount. *See also Bellaire Gen. Hosp. v. Blue Cross Blue Shield* of *Mich.,* 97 F.3d 822 (5th Cir. 1996); *Forbuch v. J.C. Penney* Co., 98 F.3d 817 (5th Cir. 1996); *Wells v. U.S. Steel &Carnegie Pension Fund,* 76 F.3d 731 (6th Cir.1996); *Citrin v. Erikson,* 918 F. Supp. 792 (S.D.N.Y.1996); *Williams v. Unum Life Ins.* Co. of *America,* 1996 U.S. Dist. LEXIS 4809 (N.D. Cal. 1996); *Elmore v. Cone Mills Corp.,* 23 F.3d 855 (4th Cir. 1994) (based on *City* of *Burlington* case, court held no enhancement for contingency under ERISA); *Cann v. Carpenters' Pension Trust Fund,* 989 F.2d 313 (9th Cir. 1993) (same); *Drennan v. General Motors Corp.,* 977 F.2d 246 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 2416 (1993). *But see Florin v. Nations Bank,* 34 F.3d 560 (7th Cir. 1994) (Seventh Circuit reversed district court's refusal to award multiplier; common fund, not fee shifting principles should be applied and, thus *City* of *Burlington* analysis does not apply). See also *Board* of *Trustees* of *the Hotel and Restaurant Employees Local* 25 *and Employers' Health And Welfare Fund* et *al. v. JPR, Inc.,* 136 F.3d 794 (D.C. Cir. 1998) (public spirited discount given to plaintiff by attorney not to benefit defendant. Market rates apply). *Accord: Board* of *Trustees* of *the Hotel and Restaurant Employees Local No.* 25 *and Employers Health and Welfare Fund V. Madison Hotel, Inc.,* 43 F.Supp. 8 (D. D.C. 1999). But see: *Central States, Southeast and Southwest Areas Pension Fund v. Depew Development, Inc.,* 1998 U.S. App. LEXIS 31989 (7th Cir. 1998).

For what services cannot be included in a fee award, *see Board of Trustees of the Hotel and Restaurant Employees Local* 25 *and Employers' Health And Welfare Fund et al. v. JPR, Inc.,* 136 F.3d 794 (D.C. Cir. 1998) (routine auditing fees not recoverable, in contrast to 5th Circuit precedent); *Aminoff v. Ally* & *Gargano Inc.,* 20 E.B.C. 2172 (S.D.N.Y. 1996) (no recovery of fees for settling dispute in which no litigation ever initiated); *Unum Life Ins.* Co of *America,* 1996 .U.S. Dist. LEXIS 4809 (N.D. Cal. 1996) (no recovery for work done in administrative phase of claims process); *Downey* 977 F.2d 470 (9th Cir. 1992) (State court litigation; litigation against other parties; expert witness fees). *But see Griffin v. Birch Brook Agency, Inc.,* 727 F. Supp. 142 (S.D.N.Y. 1989).

For the effect of contingent fee arrangements, *see, Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. denied,* 113 S.Ct. 2416 (1993). *But See Griffin v. Birch Brook Agency, Inc.,* 727 F. Supp. 142 (S.D.N.Y. 1989). For the timing of an application for fees, *see, Schake,* 960 F .2d 1187 (3d Cir. 1992).

VII. ERISA and Trust Remedy Law

One commentator has argued that the Employee Retirement Income Security Act in 1974 (ERISA) was essentially developed to resolve two risks that plan participants and beneficiaries encountered prior to its enactment. John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317 (2003). The two risks that ERISA sought to remedy were default risk and administration risk. *Id.* at 1322-1324. Congress adopted different regulatory regimes to regulate abuse resulting from each respective risk. *Id.* at 1324. Specifically, Congress intended to subject "plan administration to fiduciary duties and remedies derived from trust law." *Id.* at 1325.

Given that Congress intended for ERISA to apply trust remedy law, the victim of a breach of a fiduciary duty governed by ERISA should be afforded any relief available under trust remedy law. *Id*. at 1338. However, recent court decisions have interpreted ERISA sections 502(a)(2) and 502(a)(3) to preclude remedy for consequential damages which are routinely allowed under trust remedy law. *Id*. Provided that "virtually all claims by ERISA participants and beneficiaries are brought" under subsections (1), (2), and (3) of section 502(a), precluding relief for consequential injury under sections (2) and (3) greatly impairs a victim's ability to recover.

How have the courts then failed to follow "Congress's design to remedy under ERISA wrongs of the sort commonly remedied under trust law?" *Id.* at 1336-1337. The answer to this question begins with the Supreme Court case of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). In *Russell*, the Court unanimously reversed the Ninth Circuit's misapplication of ERISA's remedial provision section 502(a)(2) to create a cause of action for a beneficiary. *Id.* at 140. The text in 502(a)(2) afforded relief under § 409(a) to plans, not to beneficiaries. After reversing the sections misuse, the Court held that a beneficiary was not entitled to extra-contractual (consequential) damages resulting from improper or untimely processing of benefit claims by a fiduciary under ERISA § 409(a). *Id.* at 148.

The opinion in *Russell*, authored by Justice Stevens, did not limit its holding to excluding remedial relief from a beneficiary under § 502(a)(2), it "uttered broad dicta that would help mislead the Court" and lower courts in subsequent cases. *Langbein*, 103 Colum. L. Rev. at 1340. The dicta indicated that ERISA was only concerned with protecting the plan, not individuals, and that to remedy consequential injuries under § 502(a)(3) would require implying a cause of action, which the Court is reluctant to do under federal causes of action.

Two notable Supreme Court cases, *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great-West Life Ins. Co. v. Knudson*, 534 U.S. 204, have followed *Russell*, precluding monetary relief for consequential injury. In *Mertens*, the Court held that even if nonfiduciary liability was appropriate under ERISA § 502(a)(3) it did not authorize suits for money damages against nonfiduciaries who knowingly participated in a fiduciary's breach of a fiduciary duty. Justice Scalia, writing for the majority, held that compensatory (money) damages did not constitute "appropriate equitable relief" as defined by ERISA § 502(a)(3), but, rather, were a form of *legal* relief. *Mertens*, 508 U.S. at 255. Moreover, Justice Scalia held that ERISA intended to include only those types of relief that were typically available in equity such as injunctions, mandamus, and restitution. *Id.* at 256.

The rationale upon which Justice Scalia decided *Mertens* is flawed in a number of ways. Namely, Scalia's assertion that money (compensatory) damages are legal relief, not equitable, under ERISA, has been dismissed by the Department of Labor. *Langbein*, 103 Colum. L. Rev. at 1326. The Department of Labor noted that under trust law, "monetary relief from a breaching fiduciary was traditionally, typically, and exclusively available from courts of equity, and is therefore 'equitable.'" *Id.* It is noteworthy that the Department of Labor has been granted "extensive regulatory authority over ERISA fiduciary law" by Congress, and has also "produced an important body of regulations interpreting" ERISA. *Id.* at 1326.

Another flaw in *Mertens* involved Justice Scalia's attempt at providing an exhaustive list of what constituted "equitable relief." Among the remedies he claimed to be equitable, Justice Scalia mentioned mandamus. "Mandamus was a bench writ issued by the court of King's Bench in England and by equivalent courts of common law, hence never within the province of courts of equity." *Id.* at 1353. Another remedy Justice Scalia identified as "typically equitable" was restitution. In *Great-Wes*t, Justice Scalia abandons his assertion that restitution is entirely equitable, characterizing some restitution as legal. *Great-West*, 534 U.S. at 213. The last form of relief that Justice Scalia categorized as "typically equitable," injunction, was unnecessarily mentioned by him since it is already identified as such in the text of § 502(a)(3). Accordingly, Justice Scalia's list of "typically equitable" remedies were either "wholly or partially atypical," or unnecessarily identified. *Langbein*, 103 Colum. L. Rev. at 1354.

Justice Scalia relied on a commonly quoted phrase from Justice Stevens' *Russell* opinion, that ERISA is a "comprehensive and reticulated statute," to advance yet another flawed argument that monetary damages for consequential injuries were not authorized under § 502(a)(3). *Id.* at 1342. This phrase, known as the "specificity myth," refers to the idea that ERISA is so "carefully and comprehensively drafted" that any remedy provisions not explicitly included in the text should be treated as purposefully excluded by Congress. Id. (citing George L. Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 Ariz. L. Rev. 611, 638 (1994)). In other words, Justice Scalia argued that since monetary relief is not spelled out in the text of ERISA as a remedy available for fiduciary breaches, courts should not imply that it is a proper cause of action.

There are a number of reasons to suspect that ERISA § 502(a) may not be so comprehensively written "that Congress meant to omit any detail not explicitly articulated in the statutory text." *Langbein*, 103 Colum. L. Rev. at 1345. First, § 502(a) is duplicative in that a participant, beneficiary, or fiduciary may bring suit to enforce the terms of the plan under § 502(a)(1)(B) or § 502(a)(3)(B)(ii), or to enjoin a breach of fiduciary duty under § 502(a)(2) or § 502(a)(3)(A). *Flint Jr.*, 36 Ariz. L. Rev. at 638. Second, ERISA's procedure and remedy provisions suffer from many omissions that courts have had to supply from context. For example, ERISA drafters failed to provide a statute of limitations, they did not specify whether a jury trial was necessary, and they did not identify the standard for judicial review of plan decision-making. *Langbein*, 103 Colum. L. Rev. at 1345. Moreover, the Court constantly complains about the poor drafting of ERISA's preemption measure, § 514(a), despite the Court's claim that ERISA was "carefully and comprehensively" written. *Id.*

The second notable Supreme Court case that followed *Russell's* misleading dicta was *Great-West Life Ins. Co. v. Knudson*. *Great-West*, 534 U.S. 204. In *Great-West*, the Court rejected an attempt by a fiduciary to characterize as equitable relief a claim for monetary recovery as a restitution action under § 502(a)(3). *Id*. at 205. Although Justice Scalia, in *Mertens*, recognized restitution as a form of relief that is "typically available in equity," he nonetheless rejected that the restitution Great-West sought to impose here was a form of equitable relief authorized by § 502(a)(3)(B). *Id*. Specifically, Justice Scalia stated that restitution is legal, not equitable, relief when it seeks to impose personal liability for a contractual obligation to pay money (under a subrogation agreement). *Id*.

To arrive at the conclusion that monetary compensation through restitution is legal relief, Justice Scalia incorrectly interpreted ERISA "to unwind the fusion of law and equity in ERISA remedy matters." *Langbein*, 103 Colum. L. Rev at 1361 (discussing Justice Stevens' dissent in *Great-West*). According to pre-fusion practice, imposing personal liability for a contractual obligation is "quintessentially an action at law," and thus not "appropriate equitable relief" under § 502(a)(3). *Id*. at 1357.

Justice Ginsburg's dissent in *Great-West* questioned the need to determine "what court would have entertained Great-West's claim 'in the days of the divided bench.'" *Great-West*, 534 U.S. at 234. The dissent noted that Supreme Court cases had "invariably described restitutionary relief as equitable" without considering the "ancient classifications" of pre-fusion. *Id*. at 229. In addition, the dissent identified that Congress had included a provision in Title VII of the Civil Rights Act of 1964 that had been interpreted as a form of restitution, that was "substantially similar to the relief" sought here. *Id.* at 230. Justice Scalia's claim that Congress intended to "disinter the law/equity division" in order to deny monetary claims for restitution, is not persuasive since the Congress explicitly granted equitable relief through restitution in the Title VII measure. *Id.*

Justice Scalia also drew on "familiar language from *Russell* and his opinion in *Mertens*" to again maintain that "ERISA is so comprehensively drafted that the Court should treat the omission" of a remedial practice to enforce a monetary claim for restitution clause as "Congressionally intended." *Langbein*, 103 Colum. L. Rev at 1360. As noted above, there a variety of reasons to suspect that ERISA was not carefully and comprehensively drafted. Namely, the duplicity of § 502(a) is evident given that you can bring identical suits under different sections, the procedure and remedy provisions have omitted a number of details that courts have had to infer from context, and the poor drafting of particular sections are constantly being criticized. Because it is likely that Congress forgot to incorporate in ERISA provisions expressly affording certain forms of relief, the courts should not refuse to enforce remedies that are not itemized in the text. *Id.* at 1345. Rather, courts should refer to trust remedy law, after which Congress modeled ERISA, to determine if the relief sought has been routinely allowed. *Id*. at 1338.

The Supreme Court recently granted certiorari to review a pair of cases that asserted state court malpractice actions under the Texas Healthcare Liability Act (THCLA). *Roark v. Humana, Inc*., 307 F.3d 29 (5th Cir. 2003), rev'd and remanded, *2004 LEXIS 4571 (June 21, 2004)*. Adhering to the flawed rationale that § 502(a) is a remedial provision that provides all the remedies that Congress deemed appropriate, the lower federal district court ruled that the state tort actions were preempted because such causes of action are not included in ERISA's enforcement provisions. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, holding that because the THCLA claims were not "completely preempted" by ERISA § 502, these cases were improperly removed and should be remanded to state court.

In the *Roark* opinion, Judge E. Smith noted that three recent cases, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, *Cal. Div. of Labor Standards of Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, and *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, "established that traditional preemption rules apply under ERISA." *Roark*, 307 F.3d at 314-315. This means that ERISA will not interfere with or preempt areas such as health care regulation since protecting the health, safety, and welfare of their citizens is a classic exercise of state sovereignty. Given this recent trend curtailing the scope of preemption under ERISA, it seems probable that the Court will recognize the enactment of THCLA by the Texas legislature as an exercise of state sovereignty that is outside the preemptive powers of ERISA. However, the Court may rely on its decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), where it held that a tort claim that supplements the remedies provided by ERISA § 502 is preempted.

Whether the Court decides to allow relief for causes of action that are not articulated explicitly in ERISA is unclear. Past cases such as *Russell*, *Mertens*, and *Great-West* denied relief seeking consequential damages through remedies not provided for in ERISA. Nonetheless, recent cases have indicated that the Court may be relaxing the preemption of cases asserting causes of action not described in the text of ERISA's enforcement provisions. *Roark,* 307 F.3d at 314. Moreover, recent dissents have intimated that courts may allow remedies for consequential damages through make-whole relief that has long been recognized in trust law since ERISA was modeled after a trust remedy regime.

