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Nieto v. Ecker: Incorporation of Nonfiduciary Liability under ERISA

Julianne Joy Knox

Comment

Nieto v. Ecker: Incorporation of Nonfiduciary Liability Under ERISA

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] safeguards the financial integrity of employee benefit plans.[2] ERISA imposes strict standards on plan fiduciaries[3] to ensure that benefits are available when entitled participants need them.[4] ERISA also provides "appropriate remedies, sanctions, and ready access to the Federal courts" to prevent and

1. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1987) and scattered sections of the Internal Revenue Code at 26 U.S.C. (1982 & Supp. IV 1987)).

2. ERISA defines *employee benefit plan* or *plan* as an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." ERISA § 3(3), 29 U.S.C. § 1002(3) (1982). An employee benefit plan may sue or be sued as an entity under ERISA's civil enforcement provisions. *Id.* § 502(d)(1), 29 U.S.C. § 1132(d)(1). ERISA covers only private employee benefit plans and explicitly excludes "governmental plan[s]." *Id.* § 4(b)(1), 29 U.S.C. § 1003(b). A governmental plan is any plan established or maintained by the government of the United States, any state, or any political subdivision for the benefit of public employees. *Id.* § 3(32), 29 U.S.C. § 1002(32).

The increasing financial magnitude of private employee benefit plans in the United States indicates their importance. In 1975, 44.5 million employees participated in 340,000 retirement plans having a total value of $543 billion. In 1983, 67 million employees participated in 775,000 plans. The total amount of assets invested in these plans was $900 billion. One expert estimates that workers in the United States will have three trillion dollars invested in pension plans by 1995. *See* Lilly, *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603, 604 (1984).

3. Section 3(21)(A) defines a fiduciary with respect to a plan covered by ERISA:

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

ERISA, 29 U.S.C. § 1002(21)(A) (1982).

4. Plan fiduciaries must adhere to the standard of care established under ERISA section 404(a), which provides in relevant part:

remedy plan abuse.[5] ERISA's language does not expressly refer to nonfiduciaries or their potential liability for assisting fiduciary breaches of duty. Nonfiduciaries, however, often participate and profit from a plan fiduciary's breach of duty under ERISA.[6] Accordingly, many courts have protected plan funds and beneficiaries by incorporating the traditional trust principle of nonfiduciary liability into ERISA's remedial provisions.[7]

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so . . . .

Id. 29 U.S.C. § 1104(a).

5. *Id.* § 2(b), 29 U.S.C. § 1001(b). ERISA protects "the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts." *Id.*

6. *See, e.g.*, Nieto v. Ecker, 845 F.2d 868, 870 (9th Cir. 1988) (alleging that nonfiduciary unjustly profited from plan fiduciary's cover-up of unwarranted legal fees paid from plan resources).

7. *See* Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988) (holding liable under ERISA § 409(a) nonfiduciary assistant who received direct profit, along with fiduciary union representative, by soliciting plan business for group of dentists); Lowen v. Tower Asset Management, 829 F.2d 1209, 1220-21 (2d Cir. 1987) (finding nonfiduciary corporations liable along with plan trustee under ERISA § 409(a) for acting in concert to cause prohibited investments of plan assets); Thornton v. Evans, 692 F.2d 1064, 1078 (7th Cir. 1982) (holding plan attorney and attorney's law firm liable under ERISA § 409(a) for damages caused to plan by conspiracy to defraud plan of millions of dollars through insurance scam); Brock v. Gerace, 635 F. Supp. 563, 569 (D.N.J. 1986) (finding that third-party service providers, although not fiduciaries or parties in interest under ERISA, were potentially liable to dental plan for knowingly receiving excessive fees for services rendered); Donovan v. Daugherty, 550 F. Supp. 390, 410-11 (S.D. Ala. 1982) (holding attorney liable under ERISA § 409(a) for knowingly participating in decision of trustees to allow themselves to participate in plan and to extend coverage to attorney and pay him benefits from the plan); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 641-42 (W.D. Wis. 1979) (imposing liability under ERISA § 409(a) on nonfiduciary sellers in loan transactions for aiding trustees in causing all of plan's assets to be loaned back to sponsoring company in exchange for unsecured promissory notes); *see also* Fink v. National Sav. & Trust, 772 F.2d 951, 958 (D.C. Cir. 1985) (dicta) (approving nonfiduciary liability under ERISA); Fremont v. McGraw-

The Ninth Circuit, in *Nieto v. Ecker*,[8] held that a nonfiduciary who participates in a plan fiduciary's breach of trust is not liable for damages under any ERISA provision.[9] In *Nieto*, an attorney caused the dismissal of suits to recover mandatory plan contributions from delinquent employers by failing to try them within five years of filing the complaints in state court.[10] The attorney continued to charge the plan legal fees for services associated with the suits even after their dismissal.[11] Plan trustees discovered this fraud and struck a "sweetheart" deal[12] with the attorney.[13] The arrangement between the trustees and the attorney involved repayment of no more than one-fourth of the plan funds lost in contributions and unearned fees.[14] Although the attorney conspired with the plan's trustees to misappropriate funds, the Ninth Circuit found that no claim for damages existed against the nonfiduciary attorney

Edison Co., 606 F.2d 752, 759 (7th Cir. 1979) (recognizing third persons who conspire with trustee in breach of fiduciary duty may be liable under ERISA in ordinary civil action against trustee but concluding it would be improper to deprive nonfiduciary employee of vested pension rights even though he profited from participation in trustee's breach), *cert. denied*, 445 U.S. 951 (1980); Foltz v. U.S. News & World Report, 627 F. Supp. 1143, 1167-68 (D.D.C. 1986) (holding ERISA § 502(a)(3) equivalent to § 409(a) action against nonfiduciaries who participate in breach of trust by fiduciaries).

8. 845 F.2d 868 (9th Cir. 1988).

9. *Id.* at 873; *see infra* notes 106-11 and accompanying text.

10. Brief for Appellant at 7, Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988) (No. 87-5598) [hereinafter Appellant's Opening Brief]. Although the defendant filed lawsuits in state court to collect delinquent contributions from employers, his failure to bring them to trial within five years as state procedures required resulted in their dismissal. *Id.* Plan participants alleged that dismissal of these claims cost the plan funds some $300,000. *Id.*

11. Fees charged by the defendant in connection with these dismissed cases, including the period of concealment after dismissal, cost the plan approximately $250,000. *Id.*

12. "Sweetheart" deals are exchanges for personal favors or are related to conflicts of interests. Soffer, *Collective Bargaining and Federal Regulation of Government*, in REGULATING UNION GOVERNMENT 107 (M. Estey, P. Taft & M. Wagner eds. 1964). In the labor union context, "sweetheart" contracts sacrifice the interests of the employees to advance those of union leadership. J. GETMAN & B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 307 (1988). When plan fiduciaries engage in "sweetheart" deals, the interests of plan participants are subordinated to the interests of the fiduciaries or third parties. Under ERISA, a "sweetheart" deal violates the fiduciary's duties to act solely in the interest of plan participants and beneficiaries. *See infra* note 43 and accompanying text (discussing extent of fiduciary duty under ERISA).

13. Appellant's Opening Brief, *supra* note 10, at 8; *see infra* notes 101-03 and accompanying text.

14. *Id.*

under ERISA.[15]

This Comment examines whether ERISA permits recovery against a nonfiduciary who knowingly participates in a plan fiduciary's breach of duty. Part I discusses the common-law trust principles underlying ERISA's fiduciary standard and sets forth ERISA's operative remedial provisions. Part I also examines judicial interpretations of ERISA remedies prior to *Nieto*, including limitations the United States Supreme Court has imposed on the type of damages recoverable and recourse against nonfiduciaries, in light of the congressional intent and policies supporting ERISA. Part II analyzes the Ninth Circuit's holding in *Nieto v. Ecker* and argues that rejection of nonfiduciary liability under ERISA is inconsistent with the remedial purposes of the Act. The Comment concludes that federal courts should incorporate into ERISA a nonfiduciary liability standard for knowing participation in a fiduciary's breach of trust to provide employee benefit plans uniform and comprehensive relief.

I. ERISA AND THE COMMON LAW OF TRUSTS

A. DEVELOPMENT OF ERISA

Before ERISA, trustee abuse and corruption through self-dealing,[16] imprudent investments, and misappropriations of employee benefit plan funds prevented many participants from receiving their benefits.[17] Federal tax regulations punished

15. *Nieto*, 845 F.2d at 873; *see infra* notes 106-11 and accompanying text (discussing court's holding).

16. Self-dealing occurs when fiduciaries deal with themselves as individuals in a transaction. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 543 (1949). At common law, a trustee violated the duty of loyalty by acting on both sides of a transaction. *Id.* ERISA also recognizes that a fiduciary can violate the duty of loyalty in dealings with third persons. *See infra* notes 54, 153 and accompanying text (describing ERISA's proscription against self-dealing).

17. 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams, Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the Conference Report on H.R. 2) (noting that existing state and federal law has failed to prevent employee benefit plan abuse), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5117, 5186.

Congress intended ERISA to ensure that participants in employee benefit plans ultimately would receive their retirement benefits. *See* ERISA § 2(b), 29 U.S.C. § 1001(b) (1982). Before ERISA, management abuses and the absence of an effective and uniform means of regulating pension plans frequently resulted in the loss of participants' anticipated benefits. *Id.*; *see also* Note, *Fiduciary Responsibility: Prudent Investments Under ERISA*, 14 SUFFOLK U.L. REV. 1066, 1068-69 (1980) (describing misconduct by trustees which deprives participants of their pension plan benefits).

Congress included fiduciary standards in ERISA because full disclosure innocent plan participants along with their employers by disqualifying plans from tax benefits when the employer mismanaged plan funds.[18] Federal law also provided criminal penalties for those who abused plan assets, but did not provide for remedial relief, restoration of plan assets, or enforcement of fiduciary obligations.[19] Benefit plans often contained exculpatory clauses that insulated plan fiduciaries from liability and many state courts upheld the validity of these clauses.[20] The need to protect plan participants spurred the passage of ERISA and inspired the congressional mandate for the courts to develop a "federal common law" to govern ERISA disputes.[21] Congress

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and reporting requirements would not suffice to prevent abuse of employee benefit plans. *See* 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams) (noting full disclosure and reporting requirements are insufficient to prevent abuses), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5186.

18. *See* I.R.C. §§ 402-404, 501-503 (1982 & Supp. IV 1987) (prescribing tax treatment of qualified benefit plans). Pre-ERISA regulations thus afforded plan beneficiaries ineffective protection.

Because Congress designed the taxing of pension plans to produce revenue and prevent evasion of tax obligations, it provided a weak safeguard for securing anticipated benefit rights. S. REP. NO. 383, 93d Cong., 2d Sess. 94-95, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4978. Tax rules, although still important under ERISA, no longer represent the primary regulation of employee benefit plans. *Id.* ERISA focuses on the protection of employee rights and benefits and the fiduciary obligations of those handling employee benefit plan assets. *Id.*

19. *See, e.g.*, 18 U.S.C. § 664 (1982) (providing maximum penalties of five years imprisonment or $10,000 fine or both against "[a]ny person who embezzles, steals, or unlawfully and willfully" misuses employee welfare benefit plan funds). The Welfare and Pension Plan Disclosure Act ("WPPDA") required plan administrators to file plans with the Secretary of Labor and send a description and annual report of the plan to participants on written request, but did not enforce fiduciary obligations. *See* 29 U.S.C. §§ 301-309 (1970) (repealed 1974). WPPDA's limited disclosure requirements coupled with its complete lack of substantive fiduciary standards failed to protect plan participants. WPPDA also relied on the initiative of individual employees to police management of pension plans. *See* S. REP. NO. 127, 93d Cong., 2d Sess. 4 (noting Act's "chief procedural weakness [is] its reliance upon the initiative of the individual employee to police the management of the plan"), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4841.

20. *See, e.g.*, Drueding v. Tradesmen's Nat'l Bank & Trust, 319 Pa. 144, 156, 179 A. 229, 234 (1935) (exempting trustee from liability for loss under trust containing exculpatory clause); *see also* RESTATEMENT (SECOND) OF TRUSTS § 222 (1959) (stating exculpatory clause in trust instrument may relieve fiduciary of personal liability). ERISA invalidates exculpatory clauses relieving fiduciaries of personal liability. *See* ERISA § 410(a), 29 U.S.C. § 1110(a) (1982); *see infra* note 58 and accompanying text (discussing status of exculpatory clauses under ERISA).

21. *See supra* note 17 (discussing abuses under prior law as impetus for ERISA). Congress envisioned that a "body of [f]ederal substantive law [would] be developed by the courts to deal with issues involving rights and obligations

also directed the courts to incorporate traditional trust law into this federal common law by accommodating its principles to fit the "nature and purposes of employee benefit plans."[22]

1. Common-Law Protection of Trust Beneficiaries

Under common law, a fiduciary is one who acts not for personal benefit, but for the benefit of another—the beneficiary.[23] Thus a benefit plan trustee serving in this fiduciary capacity has a common-law duty to act with a high degree of good faith in response to the beneficiary's great confidence and trust.[24] The crux of the trust relationship therefore lies in the trustee's obligation to act for the benefit of the beneficiary.[25]

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under private welfare and pension plans." 120 CONG. REC. 29, 942 (1974) (statement of Sen. Javits). Furthermore, Congress intended ERISA's fiduciary provisions to reflect traditional principles of trust law. *See* S. REP. NO. 127, 93d Cong., 2d Sess. 29 (declaring that fiduciary sections of ERISA codify and adopt certain principles of trust law), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS, 4838, 4865; *see also* Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1499 (9th Cir. 1984) ("But Congress realized that the bare terms, however detailed, of these statutory provisions [ERISA] would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans.").

In addition, ERISA § 514 preempts all state laws that "relate to any employee benefit plan" covered by its provisions. ERISA, 29 U.S.C. § 1144(a) (1982). This broad preemption provision, along with the development of a federal common law interpreting ERISA, provides uniformity in the interpretation and enforcement of ERISA's provisions. *See* H.R. REP. NO. 533, 93d Cong., 2d Sess. 12 (stating that ERISA was designed to foster uniformity of decisions, which will help fiduciaries and participants predict legality of proposed actions without necessity of referring to varying state laws), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4650.

22. S. REP. NO. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4865; H.R. REP. NO. 533, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4650. Congress recognized that employee benefit plans are quite different in "purpose and in nature" from the testamentary and inter vivos trusts that trust law governs. *Id.* Congress therefore directed the courts to interpret ERISA's fiduciary standards bearing in mind the special nature and purpose of employee benefit plans. H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 302, *reprinted in* 1974 U.S. CONG. & ADMIN. NEWS 5038, 5083; *see also* Free v. Briody, 732 F.2d 1331, 1337-38 (7th Cir. 1984) (acknowledging that Congress intended to "codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans").

23. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 540 (1949) (describing fiduciary as one who undertakes to act in interest of another).

24. RESTATEMENT (SECOND) OF TRUSTS § 2 comment b (1959).

25. *See* Williams v. Griffin, 35 Mich. App. 179, 183, 192 N.W.2d 283, 285 (1971) (stating fiduciary relationship exists when there is a "reposing of faith,

The common-law duty of loyalty requires a trustee to administer the trust solely in the interest of its beneficiaries.[26] In carrying out this duty, a trustee must exercise the care and skill of a reasonably prudent person and exercise any greater-than-ordinary skill actually possessed.[27] In contrast to relations free from fiduciary obligations, courts require strict adherence to this standard of trust because of the high degree of confidence the beneficiary places in the trustee.[28]

Nonfiduciary third persons often participate in a trustee's breach of fiduciary duty.[29] Under common law, a beneficiary

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confidence, and trust, and the placing of reliance by one upon the judgment and advice of another"); *see also* Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949) (noting that scope of fiduciary's duty increases with amount of independent authority fiduciary exercises).

26. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

27. *Id.* § 174.

28. *See, e.g.*, Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928). In *Meinhard*, Chief Judge (later Justice) Cardozo articulated his famous description of the stringent standard of behavior imposed on fiduciaries:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

Id. at 464, 164 N.E. at 546.

29. *See* Jackson v. Smith, 254 U.S. 586, 589 (1921) (third party participated in trustee's sale of trust property); Carter Oil Co. v. Crude Oil Co., 201 F.2d 547, 551 (10th Cir. 1953) (nonfiduciary who knew co-tenant intended to misappropriate payments that should be shared by another co-tenant may be liable for participating in breach of trust); Marshall v. Lovell, 19 F.2d 751, 753 (8th Cir. 1927) (trustee bribed by nonfiduciary), *cert. denied*, 276 U.S. 616 (1928); Blankenship v. Boyle, 329 F. Supp. 1089, 1096 (D.D.C. 1971) (union participated in conspiracy with employee welfare fund trustees and bank president knowingly allowed plan funds to be held in interest-free accounts); Malmud v. Blackman, 278 N.Y. 658, 658, 16 N.E.2d 391, 391 (1938) (per curiam) (nonfiduciary borrower who accepted usurious loan from trustee held liable for all loss caused to estate); Zagrans v. Cohn, 404 Pa. 315, 319, 172 A.2d 291, 293 (1961) (nonfiduciary sellers who induced trustee to make illegal investment held jointly and severally liable for losses of trust property, when they knew or ought to have known of breach of trust although purchase was in name of trustee without trust label); Whitford v. Reddeman, 196 Wis. 10, 24-25, 219 N.W. 361, 366 (1928) (third party aided trustee in deceiving beneficiaries of investment trust regarding financial stability of trust); *see also* Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 9 (1934) (arguing departures from fiduciary principles usually do not occur without active assistance of bar members).

has a reasonable expectation that third persons will not knowingly join the trustee in a breach of trust and third persons have a corresponding duty not to join in such breaches.[30] Presumably, the common law recognizes that beneficiaries may be unable to obtain full relief without recovering against a nonfiduciary who knowingly participates in a fiduciary violation.[31] For example, if a violating trustee is judgment-proof and a participating nonfiduciary is not subject to liability, trust beneficiaries are left without a remedy. Traditional trust principles therefore allow beneficiaries to hold nonfiduciaries liable for knowingly participating in a fiduciary's breach of duty.[32]

This liability is limited to situations in which a nonfiduciary knew or should have known that the fiduciary was violating the trust.[33] Thus, a beneficiary must prove two elements to recover in a suit against a nonfiduciary. First, the beneficiary

30. *See* G. BOGERT & G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 901 (rev. 2d ed. 1982) (recognizing beneficiary enjoys expectation that third persons will not knowingly join with trustee in breach of trust); 4 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 326.4 (1989) (same); RESTATEMENT (SECOND) OF TRUSTS § 326 (1959) (stating that third person who, although not transferee of trust property, has notice that trustee is committing breach of trust and participates therein is liable to beneficiary for any loss caused by breach); Scott, *Participation in a Breach of Trust*, 34 HARV. L. REV. 454, 481 (1921) (arguing that trust law places liability on third person for knowingly participating with fiduciary in breach of his obligations but does not compel third person to supervise conduct of fiduciary or hold third person liable for failing to do so).

31. For example, an unavailable or judgment-proof fiduciary would leave a plan and its participants without relief. *See, e.g.*, Brock v. Gerace, 635 F. Supp. 563, 569 (D.N.J. 1986) (finding that plan participants and beneficiaries would be denied full relief if nonfiduciaries, who unjustly reaped substantial financial rewards from their knowing participation in breaches of fiduciary duties, could not be held liable to plan under ERISA); *see also* Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-21 (2d Cir. 1987) (recognizing necessity of nonfiduciary liability under ERISA to pierce corporate form and prevent channeling of profits from fiduciary breaches to nonfiduciary entities to insulate them from liability under ERISA).

32. *See* Jackson v. Smith, 254 U.S. 586, 589 (1920) (holding nonfiduciaries who joined fiduciary in sale of trust property to trustee jointly and severally liable for profits obtained); Lawrence Warehouse Co. v. Twohig, 224 F.2d 493, 498 (8th Cir. 1955) (stating that third person who colludes with fiduciary in committing breach of duty is under duty of restitution to beneficiary); Whitford v. Reddeman, 196 Wis. 10, 22-23, 219 N.W. 361, 365-66 (1928) (recognizing court's power to enforce trust, compel trustee accounting, and hold liable those who assist trustee in violation of trust); Massie v. Barth, 634 S.W.2d 208, 211 (Mo. Ct. App. 1982) (holding that third party who has notice that trustee is committing breach of trust and participates with trustee is liable to beneficiary for any loss caused by breach of trust).

33. *See* G. BOGERT & G. BOGERT, *supra* note 30, § 901, at 262 (recognizing that issue in third-party liability suits is whether third person knew or should have known breach of trust was being committed).

must prove that the nonfiduciary acted or failed to act in a way that furthered or completed the trustee's breach of trust.[34] Second, the beneficiary must prove that the nonfiduciary knew or should have known that the trustee's action constituted a breach of trust.[35] Courts always will impose liability for knowing participation in any fiduciary breach of duty.[36] Thus, at common law, joint and several liability imposed on the fiduciary and a participating nonfiduciary adequately compensated beneficiaries for damages to the trust.[37]

2. ERISA

Title I of ERISA[38] protects employee benefit plan participants by establishing reporting and disclosure requirements,[39] minimum participation requirements,[40] vesting[41] and funding

34. *See* Donovan v. Schmoutey, 592 F. Supp. 1361, 1396 (D. Nev. 1984) (holding nonfiduciary borrowers who knowingly assisted in fiduciary breach of duty under ERISA liable because their acts furthered breach and they knew or should have known transaction was breach); G. BOGERT & G. BOGERT, *supra* note 30, § 901, at 262.

35. *See supra* note 34.

36. *See supra* note 30; RESTATEMENT (SECOND) OF TRUSTS § 326 (1959); *see also* Scott, *Participation in a Breach of Trust*, 34 HARV. L. REV. 454, 455, 481-82 (1921) (asserting that transferee of trust property who knows transfer is in breach of trust unquestionably is liable to trust under trust law and arguing that this principle should apply equally to persons who deal with trustees in other capacities).

37. *See* Jackson v. Smith, 254 U.S. 586, 589 (1920) (holding that persons who knowingly join fiduciary in breach of trust become jointly and severally liable with fiduciary); Whitford v. Reddeman, 196 Wis. 10, 22-23, 219 N.W. 361, 365-66 (1928) (acknowledging that third party who knowingly assists trustee in breach of trust is liable to same extent and in same manner as trustee).

38. ERISA §§ 2-515, 29 U.S.C. §§ 1001-1145 (1982). ERISA has three other titles. Title II, codified at scattered sections of 26 U.S.C. (1982), describes the tax consequences of ERISA as an amendment to the Internal Revenue Code, including the tax treatment of individual retirement accounts (IRAs) and Keogh plans. Title III clarifies the jurisdiction of federal agencies and establishes procedures for the joint enforcement of ERISA by the Labor and Treasury Departments. ERISA §§ 3001-3043, 29 U.S.C. §§ 1201-1242 (1982). Title IV creates a retirement plan termination insurance program administered by the Pension Benefit Guaranty Corporation (PBGC). *Id.* §§ 4001-4070, 29 U.S.C. § 1301-1370.

39. ERISA requires the disclosure of understandable and accurate descriptions of plan terms and of information on the financial status and operation of plans to participants and to the federal government. *Id.* §§ 101-111, 209, 29 U.S.C. §§ 1021-1031, 1059.

40. ERISA establishes permissible age and service conditions, including waiting periods, for beginning participation in benefit accruals under pension plans. *Id.* §§ 201-211, 29 U.S.C. §§ 1051-1061. Generally, a plan cannot exclude employees on account of age or service if they are at least 21 years old or have had at least one year of service. *Id.* § 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A);

standards,[42] stringent fiduciary standards,[43] and criminal and civil liability for violations of its provisions.[44] It is ERISA's

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see, e.g., H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 262, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5044-46.

41. ERISA specifies rules for the vesting of pension benefits, most significantly preretirement vesting for significant periods of service, and restrictions on break-in-service rules that can cancel periods of service toward vesting. ERISA §§ 203-207, 29 U.S.C. §§ 1053-1057 (1982). A vested or "nonforfeitable" right to accrued benefits gives a participant a claim to payment, on either an immediate or deferred basis, of at least a percentage of benefits arising from the participant's service. *Id.* § 3(19), 29 U.S.C. § 1002(19); *see also* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 363 & n.4 (1980) (finding that Congress used terms *vested* and *nonforfeitable* synonymously in drafting ERISA).

Before ERISA, many plans required long periods of continuous service for vesting or provided vested benefits only upon retirement, causing "countless numbers of American [workers to be] tragically victimized by unreasonable vesting provisions." 119 CONG. REC. 30,042 (1973) (statement of Sen. Bentsen), *reprinted in* 2 ERISA LEG. HIST. 1634. "Vesting is the cornerstone of pension reform" because a vested, or nonforfeitable, right is crucial to the actual receipt of benefits. 119 CONG. REC. 30,373 (1973) (statement of Sen. Hartke), *reprinted in* 2 ERISA LEG. HIST. 1773.

42. ERISA imposes funding standards for defined benefit plan obligations. ERISA §§ 301-306, 29 U.S.C. §§ 1081-1086 (1982). A defined benefit plan promises a participant a specific amount of pension benefits at retirement. *Id.*

Funding refers to the accumulation of sufficient assets in a plan to assure the availability of funds for payment of benefits to entitled participants. H.R. REP. NO. 533, 93d Cong., 2d Sess. 7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4645. Congress intended to fulfill the promise and commitment of a pension plan by ensuring the availability of plan funds owed to participants. *Id.*

43. ERISA defines a fiduciary in terms of functional realities regardless of the title or position of the acting person. ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1982). Anyone who has "discretionary authority or discretionary control" over "management of such plan," "management or disposition of its assets," the "administration of such plan," or "investment advice . . . with respect to any moneys or other property," of the plan is a fiduciary under ERISA. *Id.* § 3(21)(A), 29 U.S.C. § 1002(21)(A).

Plan fiduciaries must discharge their duties "solely in the interest of participants and beneficiaries." *Id.* § 404(1), 29 U.S.C. § 1104(1). A professional standard of conduct governs any exercise of discretionary authority under an employee benefit plan. ERISA requires a fiduciary to act with "the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* Thus, under ERISA, "a pure heart and an empty head are not enough." Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983).

44. ERISA §§ 501-515, 29 U.S.C. §§ 1131-1145 (1982). Section 501 authorizes criminal penalties against any person who willfully violates any of ERISA's reporting and disclosure requirements. *Id.* § 1131. Section 502 permits participants and beneficiaries to enforce their rights under the terms of plans and their statutory rights under ERISA. *Id.* § 1132. Plan fiduciaries, as advocates for the interests of participants and beneficiaries, may seek to enjoin or

broad fiduciary responsibility standards that provide the most visible protection for plan participants.

ERISA defines a fiduciary as a person who "exercises any discretionary authority or discretionary control respecting management or disposition of its [plan] assets."[45] ERISA imposes extensive affirmative duties on plan fiduciaries to act solely in the best interest of the plan.[46] It also requires fiduciaries to act for the exclusive purpose of "providing benefits to [plan] participants and their beneficiaries."[47] This "exclusive purpose" rule reflects the common-law duty of loyalty[48] and attempts to curb self-dealing in the management of plan funds.

Congress attempted to provide employee benefit plans greater protection, however, by imposing a stricter standard of care on fiduciaries than that existing under the common law of trusts.[49] ERISA holds plan fiduciaries to the standard of conduct of a prudent person "acting in like capacity and familiar with such matters."[50] Unlike the common law, which requires only that the trustee act in accordance with the skills and knowledge the trustee actually possesses,[51] ERISA requires the trustee to have a minimum level of skill and knowledge.

ERISA also attempts to curb self-dealing and ensure that plan fiduciaries act exclusively in the interest of plan partici-

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obtain other appropriate equitable relief for a violation of the terms of a plan or a violation of Title I. *Id.* The Department of Labor has the authority to bring an action to enjoin or obtain other appropriate relief for any violation of Title I. *Id.* Under section 502(a)(2), the Secretary of Labor, along with participants, beneficiaries, and fiduciaries, can seek appropriate relief for a fiduciary's breach of duty as provided in section 409. *Id.*

45. ERISA, § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1982). Fiduciary status under ERISA does not depend on a person's title or position but on whether the person's actions, or lack of action, fall within the confines of section 3(21)(A). *See supra* notes 3, 43.

46. *See, e.g.,* ERISA § 404(a), 29 U.S.C. § 1104(a) (1982).

47. *Id.*; *see also* Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984) (declaring that fiduciary must act under "unwavering duty . . . to make decisions with single-minded devotion to a plan's participants and beneficiaries"); RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959) (imposing duty on trustee to administer trust solely in beneficiary's interest).

48. *See supra* notes 26-28 and accompanying text.

49. "Any comprehensive program to prevent abuses in our private retirement system must also focus on the area of fiduciary responsibility . . . . Workers' pension funds deserve strong fiduciary protections to insure that their interests are not subordinated to ['insiders' of the plan]. This bill will establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." 120 CONG. REC. 29,951 (1974) (statement of Sen. Bentsen).

50. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (1982).

51. *See supra* note 27 and accompanying text.

pants by prohibiting fiduciaries from engaging in certain dealings with "parties in interest."[52] Under ERISA, parties in interest include plan administrators, fiduciaries, persons providing services to the plan, employers, employee organizations covered by the plan, and certain relatives and partners of parties in interest.[53] Fiduciaries may not involve the plan in a transaction if they know or should know that the transaction directly or indirectly constitutes a prohibited transaction with a party in interest.[54]

Transactions between plans and parties in interest prohib-

52. H.R. REP. NO. 533, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4651; S. REP. NO. 127, 93d Cong., 2d Sess. 30-31, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4866-67; *see* Marshall v. Kelly, 465 F. Supp. 341, 352-53 (W.D. Okla. 1978) (holding that loan of plan assets to party in interest was prohibited transaction regardless of actual harm to plan because ERISA was intended to prevent transactions that present high risk of loss to plan).

53. ERISA § 3(14), 29 U.S.C. § 1002(14) (1982). ERISA generally prohibits fiduciaries from dealing on the plan's behalf with parties in interest. ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1) (1982). ERISA's definition of a party in interest as to an employee benefit includes:

> (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
> (B) a person providing services to such plan;
> (C) an employer any of whose employees are covered by such plan;
> (D) an employee organization any of whose members are covered by such plan[.]

ERISA § 3(14), 29 U.S.C. § 1002(14) (1982).

54. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 306-307, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5087. A fiduciary is liable for losses to a plan from prohibited transactions only if a prudent person would have known that ERISA prohibited the transaction. *Id.*; *see infra* note 56 and accompanying text.

Congress did not intend to impose liability on a plan fiduciary where the other party to a transaction happens, by chance, to be a party in interest. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 307, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5087. For example, if a transaction involves an ordinary "blind" purchase or sale of securities through an exchange where neither buyer nor seller knows the identity of the other party involved, a court should not hold the plan fiduciary liable just because the other party turns out to be a party in interest. *Id.*

Section 502(i) of ERISA imposes civil penalties on parties in interest, referred to as "disqualified persons" under ERISA's tax provisions, who participate in prohibited transactions. ERISA, 29 U.S.C. § 1132(i) (1982). ERISA inflicts an initial excise tax of five percent of the amount involved in a prohibited transaction against the party in interest. *Id.* Upon notice from the Secretary of Labor, the party in interest must correct the prohibited transaction or face additional taxes up to 100% of the prohibited transaction. *Id.* To correct the prohibited transaction, a party in interest must undo the prohibited transaction to the extent possible and allow the plan to receive the benefit of the ited under ERISA include direct or indirect sale, exchange, or lease of property, lending of money or exchange of credit by a plan on behalf of a party in interest, and direct or indirect transfer of any plan income or assets to or for the benefit of a party in interest.[55] Before engaging the plan in any transaction, plan fiduciaries must investigate prudently whether such trans-

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bargain realized in the transaction. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 322, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5102.

Thus, Congress intended to regulate parties in interest under tax law and through its consequences rather than through potential liability to employee benefit plans. This different treatment makes sense because a party in interest who takes part in a prohibited transaction incurs a tax penalty regardless of whether the violation was inadvertent, while plan fiduciaries face liability under ERISA only if they knew or should have known the transaction involved a party in interest. *Compare* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 321 (stating that initial excise tax on party in interest is imposed without regard to whether party in interest knew transaction violated ERISA), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5101 *with* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 306 (declaring fiduciaries liable for losses to plan from prohibited transaction only if they knew the transaction was prohibited), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5087.

55. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 307, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5087. Congress designed ERISA's prohibited transaction provisions to prevent plan fiduciaries from engaging in transactions that afford a high potential for loss or insider abuse. *Id.*

Under ERISA § 406(a), a fiduciary with respect to a plan

> "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> (B) lending of money or other extension of credit between the plan and a party in interest;
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

ERISA, 29 U.S.C. § 1106(a)(1) (1982); *see supra* note 52 and accompanying text.

To avoid disrupting established business practices, ERISA provides both statutory and administrative exemptions from its prohibited transaction provisions. *Id.* § 408, 29 U.S. § 1108. Under § 408(b), a plan can make a loan to a participant or beneficiary, a party in interest may provide necessary services to a plan if no more than reasonable compensation is paid, and parties in interest can extend credit to an employee stock ownership plan if they charge a reasonable interest rate. *Id.* § 1108(b); *see generally* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 309-16 (stating financial institutions that perform fiduciary functions often provide adequate safeguards for plans and describing transactions allowed under section 408(b)), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5092-97.

Moreover, the Secretary of Labor may grant administrative variances if a transaction between a plan and a party in interest is in the best interests of the plan and furnishes substantial protection to plan participants and beneficiaries. ERISA § 408(a), 29 U.S.C. § 1108(a) (1982). Such variances may be abactions would involve a party in interest.[56] This duty to investigate whether such a relationship exists varies with the significance and frequency of the contemplated transactions.[57] ERISA's description of parties in interest and prohibited transactions thus allows a plan fiduciary to determine whether the statute restricts a contemplated transaction. ERISA also prohibits the use of exculpatory clauses to circumvent its stringent fiduciary provisions.[58] By creating a wide variety of remedies under ERISA, Congress clearly sought to provide meaningful relief for plan participants as well as to deter deviation from ERISA's fiduciary standards.[59]

a. *Relief for Plans and Plan Participants*

Congress enacted several provisions to ensure strict compliance with ERISA in order to protect plan participants.[60] Sec-

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solute or conditional and may apply to a particular transaction or to a class of transactions. *Id.*

Congress stressed, however, that statutory exemptions and administrative variances would not affect application of ERISA's fiduciary responsibilities. *See, e.g.,* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 310-11 (stating that ERISA's fiduciary rules requiring prudent action, diversification of investments, and actions exclusively for benefit of participants and beneficiaries apply even to transaction exempted by the Secretary), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5092.

56. *See, e.g.,* Marshall v. Kelly, 465 F. Supp. 341, 351 (W.D. Okla. 1978) (stating that fiduciary has duty reasonably to investigate whether party in interest relationship exists).

57. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 307, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5087.

58. ERISA § 410(a), 29 U.S.C. § 1110(a) (1982) (invalidating exculpatory clauses insulating fiduciaries from personal liability under ERISA). For common-law treatment of exculpatory provisions in trust instruments, see *supra* note 20 and accompanying text. Section 410(b) permits fiduciaries to purchase liability insurance, either at their own or the plan's expense, provided the policy allows recourse against the fiduciary who violates a fiduciary duty. *Id.* § 1110(b).

59. *See, e.g.,* 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams) (declaring prevention of transactions that deplete or endanger plan assets a goal of ERISA's fiduciary provisions), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5186.

Moreover, § 502(a)(3) authorizes appropriate relief for fiduciary breaches of duty. ERISA, 29 U.S.C. § 1132(a)(2) (1982). Section 405 subjects a fiduciary to liability for certain breaches of fiduciary responsibility by another fiduciary. *Id.* § 1105. Section 409 imposes liability for breaches of any fiduciary responsibilities, obligations, or duties created by Title I. *Id.* § 1109.

60. *See* S. REP. NO. 127, 93d Cong., 2d Sess. 33-34 (declaring ERISA's enforcement provisions designed specifically to give Secretary of Labor, participants, and beneficiaries broad remedies to redress or prevent violations of ERISA), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4871. Furthermore, Congress intended to provide the full range of legal and equitable

tion 502(a)(2) creates a cause of action for either the plan, a beneficiary, or a participant to obtain relief on behalf of the plan for fiduciary breaches of duty.[61] ERISA therefore entitles plans covered by the Act to collect damages from a fiduciary who violates a fiduciary duty.[62] Specifically, section 409(a), cited in section 502(a)(2), imposes liability on a fiduciary for any losses incurred by the plan resulting from a breach of fiduciary duty.[63] In addition to redressing the harm the fiduciary violation caused the plan,[64] a fiduciary must return any profits gained from the misuse of plan assets.[65] Finally, the court may also award "appropriate relief" if the court deems such relief necessary.[66]

Individual plan participants and beneficiaries can obtain plan-related equitable relief under section 502(a)(3) of ERISA for fiduciary actions that do not amount to a breach of fiduciary duty.[67] A plan participant or beneficiary also may bring a civil

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remedies available in both state and federal courts and to enforce fiduciary responsibilities by removing jurisdictional and procedural obstacles. *Id.*; *see also* 120 CONG. REC. 29, 929 (1974) (statement of Sen. Williams) (discussing ERISA's protective provisions, including judicial remedies designed to assure compliance), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5177-78.

61. Section 502(a)(2) states:

> (a) A civil action may be brought . . .
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title[.]

ERISA, 29 U.S.C. § 1132(a)(2) (1982).

ERISA § 409 consists of two subsections: § 409(a) establishes liability for breaches of fiduciary duty, while § 409(b) protects fiduciaries from liability for breaches committed either before or after they served as fiduciaries. *Id.* § 1109; *see supra* note 44. Courts often cite § 409 generally when they intend to cite to § 409(a).

62. *See supra* note 61 (quoting § 502(a)(2)); *infra* note 63 (quoting § 409(a)).

63. ERISA § 409(a) provides in relevant part:

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

ERISA, 29 U.S.C. § 1109(a) (1982).

64. *See* Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978) (recognizing that trust law method for redressing fiduciary breach is to put trust in position it occupied prior to violation); *infra* note 131.

65. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1982).

66. *See supra* note 63 and accompanying text.

67. ERISA § 502 provides in part:

> Persons empowered to bring a civil action

suit under section 502(a)(3) to enjoin activities that violate any ERISA provision, and for other equitable relief to redress violations or enforce the plan or ERISA.[68] Thus, the courts can, under congressional mandate, grant "appropriate equitable relief" to protect plans and plan participants by fashioning additional remedies to complement ERISA's enforcement provisions.[69]

b. *The Remedial Sections and Nonfiduciaries*

Taken together, the remedial provisions of ERISA provide extensive relief against breaches of fiduciary duty. When construed strictly, however, these remedial provisions leave plans and participants without recourse to recover lost funds when a nonfiduciary participates in a fiduciary violation.[70] Section

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(a) A civil action may be brought —
(1) by a participant or beneficiary —
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . . .
(3) by a participant, beneficiary, or fiduciary,
(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or
(B) to obtain other appropriate equitable relief
(i) to redress such violations or
(ii) to enforce any provisions of this title or the terms of the plan; . . .

ERISA, 29 U.S.C. § 1132(a)(1)(B) (1982).

68. Congress restricted the coverage of § 502(a)(3) to equitable relief for general violations of ERISA that are not breaches of fiduciary duty. 29 U.S.C. § 1132(a)(3) (1982). General violations of ERISA include variation from minimum reporting, vesting, funding, and participation standards. *See supra* notes 39-43 (describing minimum standards ERISA established to protect employee benefit plans); *see also* Hillis v. Waukesha Title Co., 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) (refusing to enforce undisclosed forfeiture provision as "appropriate equitable relief" under § 502(a)(3)).

69. *See* Gilliam v. Edwards, 492 F. Supp. 1266-67, 1287 (D.N.J. 1980) (acknowledging that "ERISA grants the court wide discretion in fashioning legal and equitable relief to make the plan whole and protect the rights of beneficiaries, including recission of unlawful transactions and recovery of monetary loss to the plan"). *See supra* notes 16, 21 and accompanying text; *infra* notes 90-93 and accompanying text.

70. *See infra* notes 106-11 (illustrating how Ninth Circuit's narrow reading of ERISA's remedies led to rejection of nonfiduciary liability principle). *But see* Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984) (stating that ERISA "like the Civil Rights Acts . . . is remedial legislation which should be liberally construed in favor of protecting participants"); Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 n.54 (D.C. Cir. 1984) (giving ERISA's remedial purpose "due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations"); Leigh v. Engle, 727 F.2d 113, 126 (7th Cir. 1984) (expressing reluctance

409(a) imposes liability, including personal responsibility, for plan losses incurred due to a fiduciary's breach of duty.[71] Section 502(a)(2)[72] creates a representative cause of action to obtain equitable and legal plan-related relief against a fiduciary who is liable under section 409(a). Section 502(a)(3) also provides an individual participant or beneficiary a personal cause of action for equitable relief.[73] This section, however, does not require violators to reimburse losses sustained by the plan.

Under the common law of trusts, nonfiduciaries are jointly and severally liable, along with fiduciaries, for losses resulting from knowing participation in a fiduciary breach of duty.[74] Although ERISA does not explicitly provide for liability against nonfiduciaries, the overall remedial purpose of ERISA and Congress's intention to incorporate the common law of trusts into ERISA[75] permits courts to impose such liability on nonfiduciaries to reimburse affected plans.

B. Judicial Construction of ERISA's Remedies

1. The Limits of Fiduciary Liability — *Massachusetts Mutual Life Insurance Co. v. Russell*

The United States Supreme Court has restricted fiduciary liability under ERISA to claims brought on behalf of a plan.[76] In *Massachusetts Mutual Life Insurance Co. v. Russell*,[77] an individual beneficiary sued a plan fiduciary for untimely processing of benefits claims and requested punitive damages under

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to construe narrowly ERISA's protective provisions in light of Congress's overriding concern with protection of plan participants).

At common law, courts afforded relief to protect the rights of beneficiaries as the situation required. *See, e.g.*, Stone v. Stone, 230 Md. 248, 255, 186 A.2d 590, 594 (1962) (holding that court may mold relief to suit circumstances and is not bound by any particular rule).

ERISA's remedial provisions may provide complete relief to a plan, its participants, and beneficiaries if a fiduciary is financially responsible and not judgment-proof. When a plan fiduciary is judgment-proof, however, participants cannot, under a strict reading of the Act's remedial provisions, recover plan losses from nonfiduciaries who join in a breach of duty unless the courts are willing to incorporate the traditional standards of liability under trust law. *See supra* notes 29-37 and accompanying text.

71. *See supra* notes 63-65 and accompanying text.

72. *See supra* notes 61-62 and accompanying text.

73. *See supra* notes 66-67 and accompanying text.

74. *See supra* notes 33-37 and accompanying text.

75. *See supra* notes 21-22, 69 and accompanying text.

76. *See, e.g.*, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985).

77. *Id.*

section 409(a).[78] The Court held that a plan participant cannot claim extra-contractual damages against a fiduciary under section 502(a)(2)[79] as "appropriate relief under section 409[a]"[80] for a breach of fiduciary duty.[81]

The Court first found that because section 409(a) requires a fiduciary who violates a fiduciary duty to restore "losses to the plan," section 409(a) authorizes relief to protect the plan but not individuals benefiting under the plan.[82] The Court reasoned that this result was mandated by the language of section 409(a) and, moreover, was consistent with Congress's focus on preventing the misuse of plan assets and providing remedies to protect the financial integrity of the plan as a whole.[83] The Court also noted a stark absence of support for punitive damages in ERISA and its legislative history, in contrast to the self-evident congressional concern for safeguarding contractually defined benefits under plans covered by ERISA.[84] Because the complaining participant received all the benefits to which she was contractually entitled under the plan, the Court declined to imply an individual claim for extra-contractual damages because of the "comprehensive and reticulated" statutory scheme of ERISA.[85]

2. Federal Courts and Nonfiduciary Liability Under ERISA

Congress intended ERISA's remedial provisions to "make applicable the law of trusts" to employee benefit plans.[86] Under traditional trust principles, courts may hold third persons liable for knowingly participating in a fiduciary's breach of duty.[87] Incorporating nonfiduciary liability promotes compli-

78. *Id.* at 137.

79. *See supra* note 61 and accompanying text.

80. *See supra* notes 61-66, 71 and accompanying text.

81. 473 U.S. at 148.

82. *Id.* at 140-42.

83. *Id.* at 140, 142 n.9 (noting that financial integrity of plan is common interest shared by all parties authorized to bring actions on behalf of employee benefit plans under section 502(a)(2)).

84. *Id.* at 140, 141 n.8 (describing attention Congress gave to prevention of pension fund abuse in legislative history of ERISA).

85. *Id.* at 147-48 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)). *But see infra* note 119 and accompanying text.

86. 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5186. The goals of the fiduciary provisions, as stated by Senator Williams, are "to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust." *Id.*

87. *See supra* notes 30-37 and accompanying text.

ance with ERISA and protects plan funds and participants. Many federal courts thus have resolved the question of nonfiduciary liability under ERISA's remedial provisions in favor of employee benefit plans.[88] These courts uniformly impose liability on nonfiduciaries for knowingly assisting a fiduciary in a breach of fiduciary duty imposed by ERISA.[89] Because Congress intended to federalize and apply the common law of trusts, these courts reason that they should incorporate the basic trust principle that enforces nonfiduciary liability into ERISA's fiduciary duty provisions.[90]

In the seminal case *Freund v. Marshall & Ilsley Bank*,[91] the District Court for the Western District of Wisconsin determined that ERISA permitted federal courts to award the relief available under traditional trust law principles against nonfiduciaries who knowingly participate in a breach of trust.[92] Other federal courts later followed *Freund* and adopted this principle, arguing that it furthers the statute's purpose of providing to plan beneficiaries the broadest relief possible under ERISA.[93] The Ninth Circuit in *Nieto v. Ecker*,[94] however, re-

88. *See* cases cited *supra* note 7; *infra* note 93 and accompanying text. *But see infra* note 95 and accompanying text.

89. *See* cases cited *supra* note 7.

90. Congress designed ERISA "to make applicable the law of trusts . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust." 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5186.

91. 485 F. Supp. 629, 641-42 (W.D. Wis. 1979). In *Freund*, plan fiduciaries permitted the plan to loan all of its assets back to sponsoring companies in exchange for unsecured promissory notes. *Id.* at 636. Nonfiduciary sellers furthered the fiduciaries's breaches and completed the breaches by directly participating with plan trustees in the sale of the business in which the breaches occurred and by accepting the benefits of the fiduciaries's breach. *Id.* at 642. Although the nonfiduciary sellers were aware, prior to the consummation of the sale, of the actual harm to the plan, they continued with the transaction. *Id.*

92. *Id.* at 635. The court recognized that effectuation of ERISA's fiduciary standards is best accomplished by consistent application of traditional trust law. *Id.* The court also stated that, because ERISA is a remedial statute designed to protect participants, courts should enforce remedies which best carry out plans' purposes and are most advantageous to plan participants. *Id.* at 641-42. *But see* Nieto v. Ecker, 845 F.2d 868, 871-72 (9th Cir. 1988) (criticizing reasoning of *Freund* and admonishing other courts for uncritically accepting *Freund's* rationale and thus building very much on very little).

93. Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-21 (2d Cir. 1987) (finding that nonfiduciary liability, authorized by trust law principles and ERISA's remedial provisions, is necessary to prevent parties from shifting fiduciary obligations to one legal entity while channeling self-dealing profits to separate legal entity under their control); Thornton v. Evans, 692

fused to grant relief under ERISA against a nonfiduciary who participated in a fiduciary's breach of duty.[95]

II. *NIETO V. ECKER:* RECOVERY AGAINST A NONFIDUCIARY WHO PARTICIPATES IN A FIDUCIARY BREACH OF DUTY

A. THE NINTH CIRCUIT'S REJECTION OF NONFIDUCIARY LIABILITY

In *Nieto v. Ecker*, the trustees of multiemployer employee benefit plans[96] ("Funds") financed by mandatory employer contributions[97] hired an attorney, the defendant, to collect delinquent employer contributions.[98] Plan participants filed an action and alleged that the defendant continued to charge legal fees for his services[99] even after the court had dismissed the claims against the defaulting employers for lack of prosecution.[100]

F.2d 1064, 1079 (7th Cir. 1982) (finding remedy under ERISA against nonfiduciary who conspires in fiduciary breach of trust, because Congress did not expressly address all issues that might arise under ERISA and thus courts should develop substantive law of ERISA to accommodate its remedial purposes); Brock v. Gerace, 635 F. Supp. 563, 569 (D.N.J. 1986) (holding that uncontradicted legislative intent to provide full equitable and legal remedies for plans and plan participants supports imposition of nonfiduciary liability); Donovan v. The Unicorn Group, 3 Employee Benefits Cas. (BNA) 1665, 1667 (S.D.N.Y. 1982) (reasoning that ERISA allows civil actions against nonfiduciaries because no equitable explanation or inconsistent legislative history requires courts to preclude such relief).

94. 845 F.2d 868 (9th Cir. 1988).

95. *Id.* at 874.

96. *See* ERISA § 210, 29 U.S.C. § 1060 (1982) (describing participation and vesting requirements for multiemployer plans). Plans financed by more than one employer's contributions are multiple-employer plans, regardless of whether a collective bargaining agreement established the plan. Internal Revenue Code, 26 U.S.C. § 413(b)-(c) (1986). ERISA defines multi-employer plans as those requiring more than one employer to contribute pursuant to collective bargaining agreements. ERISA § 3(37)(A), 29 U.S.C. § 1002 (37)(A) (1982); *see generally* S. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 27-29 (BNA 1987) (describing four characteristics distinguishing multi-employer plans from single-employer plans: union's appointment of half of plan trustees; plan trustee's determination of levels of benefits and terms for benefit eligibility; participants' ability to piece together service with different employers under one plan in determining accrued benefits and vesting; and plan's relative financial security).

97. *See* ERISA § 2(37)(A), 29 U.S.C. § 1002(37)(A) (1982); *see also supra* note 96.

98. *Nieto*, 845 F.2d at 870.

99. *See supra* note 11.

100. *See supra* note 10.

On discovering the defendant's deceptions, the plan trustees concealed the fraudulent fee charges.[101] Rather than demand full reimbursement, the trustees allowed the defendant to repay only a portion of his unearned fees in monthly installments.[102] In addition, the trustees retained the defendant's legal services and permitted him to pad his subsequent bills to offset these payments to the Funds.[103] The plan participants brought suit on behalf of the Funds to recover losses from the trustees and the defendant.[104] The District Court for the Central District of California dismissed the ERISA claims against the defendant because the complaint failed to show that he was a Fund fiduciary.[105]

The Ninth Circuit agreed that the defendant was not a fiduciary of the Funds under ERISA.[106] The court further held that ERISA section 409(a)[107] does not extend to one who conspires or acts to assist a fiduciary in a breach of duty.[108] The

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101. Appellant's Opening Brief, *supra* note 10, at 7-8. Plan participants alleged that the trustees of the Funds concealed the scope of the defendant's fraud in four ways: failing to report the matter to the United States Department of Labor; failing to report defendant's actions to the California State Bar; failing to discharge defendant and continuing to use his services; and failing to investigate fully the number of cases actually dismissed and lost. *Id.*

102. *Id.* Plaintiff participants contended that the trustees of the Fund and the defendant struck a "sweetheart" deal. This agreement required the defendant to repay only $150,000 of the approximately $550,000 lost by the Funds in contributions and attorney fees. The terms of the deal required the defendant to repay with a $15,000 down payment and monthly installments of $3000 thereafter. The trustees also did not charge interest on the $150,000 and did not secure the balance. *Id.*

103. Plan participants alleged that the Funds would recover none of the $550,000 in lost contributions and fraudulent attorney fees because the deal allowed the defendant to charge excessive future fees. *Id.*

104. *Nieto*, 845 F.2d at 870.

105. *Id.* The district court's decision is an unpublished opinion and the Ninth Circuit's opinion does not describe the specific allegations of the complaint. Thus, for purposes of addressing whether ERISA provides a claim against a nonfiduciary, this Comment accepts as accurate the appellants' recitation of facts supporting their claim against the defendant. Beyond this limited scope, this Comment does not express an opinion on the truth of the allegations.

106. *Nieto*, 845 F.2d at 871. The court rejected the claim that an attorney who fails to collect delinquent employer contributions is a fiduciary under section 3(21)(A) of ERISA, and held that the complaint did not allege sufficient facts to find the defendant possessed any authority other than professional duties toward the Funds. *See also* Yeseta v. Baima, 837 F.2d 380, 385 (9th Cir. 1988) (excluding from fiduciary status under ERISA attorney who renders professional services to plan if attorney does not exercise any authority over plan beyond usual professional functions).

107. *See supra* note 63 and accompanying text.

108. *Nieto*, 845 F.2d at 871-73. The *Nieto* court found that § 409(a)'s plain

court additionally held that the equitable remedies of section 502(a)(3)[109] did not provide a claim for damages against a nonfiduciary because such recovery would render the damages provision of section 409(a) superfluous.[110] The court reasoned that if Congress had intended section 502(a)(3) to provide recovery for damages, it would not have allowed explicitly for such recovery in section 409(a).[111]

The defendant was a "party in interest"[112] under ERISA, however, because he provided legal services to the Funds. As a party in interest, the Ninth Circuit held, the defendant could be liable under ERISA for engaging in prohibited transactions with a plan fiduciary.[113] The court therefore remanded the case to determine the defendant's equitable obligations as a party in interest under section 502(a)(3).[114]

The Ninth Circuit's rejection of nonfiduciary liability contravenes ERISA's broad remedial purpose.[115] Moreover, because nonfiduciaries who are not parties in interest often assist

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language limited its coverage to fiduciaries. *Id.* at 871. The Ninth Circuit also concluded that nothing in the statute provided support for extending liability to other parties under § 409(a). *Id.* The Ninth Circuit further held that ERISA's legislative history did not justify incorporation of nonfiduciary liability into its remedial provisions. *Id.*

The *Nieto* court characterized the participant's complaint against the defendant as a simple malpractice suit under state law. *Id.* at 871. This characterization, however, jeopardizes ERISA's goal of uniform enforcement by forcing plan participants to seek a mixture of state and federal remedies. *See supra* note 21.

109. *See supra* notes 66-68 and accompanying text.

110. *Nieto*, 845 F.2d at 873. Section 502(a)(3) allows only equitable relief while § 502(a)(2) permits both equitable and legal relief. If legal remedies were available under § 502(a)(3), then the provisions would be identical and § 409 would be rendered impotent because § 502(a)(3) would encompass an action for breach of fiduciary duties.

111. *Id.*

112. *See supra* note 53 and accompanying text.

113. *Nieto*, 845 F.2d at 873-74. Although § 406(a), *see supra* note 55, prohibits only certain transactions by fiduciaries and does not expressly bar parties in interest from engaging in these transactions, the court relied on its equitable powers to redress ERISA violations by imposing limited liability on the defendant as a party in interest. 845 F.2d at 874; *see also* McDougall v. Donovan, 539 F. Supp. 596, 598-99 (N.D. Ill. 1982) (holding that court may order equitable relief under § 502(a)(3) against party in interest who participates in prohibited transaction). In addition to ignoring the tax penalties ERISA imposes on parties in interest for engaging in prohibited transactions, *see supra* note 54, the Ninth Circuit effectively deprived the Funds of a remedy under ERISA for damages against the defendant, a nonfiduciary.

114. *Nieto*, 845 F.2d at 874.

115. *See supra* note 59 and accompanying text.

fiduciaries in violating ERISA,[116] the Ninth Circuit decision effectively removes a traditional trust law remedy essential for safeguarding employees and their benefit plans.

B. ERISA'S REMEDIES AND THE RATIONALE OF THE *NIETO* COURT

1. The Ninth Circuit's Misinterpretation of *Russell*

The Ninth Circuit's decision in *Nieto* upset the building consensus among federal courts that nonfiduciaries, as well as fiduciaries, face liability under section 409(a) for knowing participation in a breach of fiduciary duty.[117] The Ninth Circuit reached its conclusion by rigidly applying the Supreme Court's dictum in *Massachusetts Mutual Life Insurance Co. v. Russell*,[118] suggesting that courts should be reluctant to tamper with the "comprehensive and reticulated" statutory scheme of ERISA.[119] The Ninth Circuit ignored the significant differences between extra-contractual damages claimed by a beneficiary, which was the *Russell* court's concern,[120] and

116. *See* cases cited *supra* note 7.

117. *See supra* notes 88-93 and accompanying text.

118. 473 U.S. 134 (1985); *see id.* at 149-52 (Brennan, J., concurring) (characterizing that portion of *Russell* decision as dicta).

119. *Id.* at 146-47 (1985) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)). *But see id.* at 156-57 (Brennan, J., concurring) (rejecting language suggesting that Congress created ERISA with carefully integrated remedies preventing courts from fashioning appropriate relief); S. BRUCE, *supra* note 96, at 299-303 (arguing that broad preemptive power of ERISA and congressional mandate to create federal common law authorizes courts to develop participant protections to deal with full range of problems Congress intended to address under ERISA).

The scope of this "reluctance" has caused confusion regarding the availability of extra-contractual and punitive damages under ERISA. Justice Brennan's concurrence in *Russell* emphasizes that lower courts should not read the majority's broad language against implied remedies of extra-contractual damages under ERISA to resolve whether such damages are available under § 502(a)(3). *Russell*, 473 U.S. at 150-51 (Brennan, J., concurring); *see also infra* note 134 and accompanying text (suggesting that Supreme Court restricted § 409(a) to plan-related relief because § 502(a)(3) already provides adequate relief for plan participants and beneficiaries).

Accordingly, post-*Russell* decisions have differed on the availability of extra-contractual damages under § 502(a)(3). *Compare* Haytcher v. ABS Indus., Inc., 7 Employee Benefit Cas. (BNA) 2158, 2163 (N.D. Ohio 1986) (upholding individual claim for extra-contractual damages under § 502(a)(3) where "willful" contract violation alleged) *with* Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986) (holding that *Russell* decision precludes any claim for extra-contractual damages in § 502(a)(3) action).

120. The Ninth Circuit contended that the Supreme Court's decision in *Russell* supports restricting § 409(a) to fiduciaries. Nieto v. Ecker, 845 F.2d

reimbursement of funds to an employee benefit plan protected by ERISA.[121]

ERISA's remedial provisions distinguish relief granted on behalf of employee benefit plans from relief awarded to individual participants or beneficiaries.[122] Recovery against nonfiduciaries who participate with a plan fiduciary in a breach of duty is a plan-oriented remedy because the entire plan suffers from the violation.[123] In *Russell*, the participant sought punitive damages as an individual under an ERISA provision—section 409(a)—that is limited to plan-oriented relief.[124] *Nieto*, however, involved participants seeking relief on behalf of their plans for damages caused by a nonfiduciary conspiring with plan trustees to breach a fiduciary obligation.[125] Although the question of nonfiduciary liability involves construction of ERISA's enforcement provisions,[126] the Ninth Circuit did not rec-

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868, 872 (9th Cir. 1988). The court dismissed pre-*Russell* decisions extending § 409(a) liability to nonfiduciaries by indicating these holdings may be bad law "in light of the guidance provided by *Russell*." *Id.* at 872-73. This argument, however, does not explain post-*Russell* opinions such as *Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988), which imposed nonfiduciary liability under ERISA. *Id.* at 342.

121. Equity principles traditionally govern trust law, and courts therefore apply equitable remedies to redress a trustee's breach of duty. *See* RESTATEMENT (SECOND) OF TRUSTS § 197 (1959). Equity principles require courts to place beneficiaries in the position they would have occupied but for the trustee's breach of trust. *See* G. BOGERT & G. BOGERT, *supra* note 30, § 863. Despite the merger of trust and equity, the majority of courts deny punitive damages in breach of trust cases under a strict procedural approach. *See* Carter Equip. Co. v. John Deere Indus. Equip. Co., 681 F.2d 386, 396 (5th Cir. 1982) (stating that "fiduciary duties are creatures of equity . . . and . . . punitive damages are not recoverable in a court of equity").

Other courts have relied on trust principles to deny punitive claims against a trustee. *See* Powell v. Chesapeake & Potomac Tel. Co. of Va., 780 F.2d 419, 424 (4th Cir. 1985) (limiting recovery to loss caused to trust because punitive damages are not generally available in action by beneficiary against trustee), *cert denied*, 476 U.S. 1170 (1986). *But see* Goggin v. Moss, 221 F. Supp. 905, 920 (N.D. Tex. 1962) (assessing punitive damages against trustee for fraudulent and flagrant misconduct).

122. *See supra* notes 61-68 and accompanying text (discussing ERISA's remedial provisions).

123. *See* Thornton v. Evans, 692 F.2d 1064, 1079-80 (7th Cir. 1982) (stating that recovery against nonfiduciaries must be sought on behalf of plan or by beneficiaries in class action because claim touches interest of every beneficiary).

124. *Russell*, 473 U.S. at 141-42. Although the plan fiduciaries in *Russell* eventually paid the participant all benefits to which she contractually was entitled, she also sought punitive damages under § 409(a). *Id.* at 137; *see also supra* notes 77-85 and accompanying text (discussing *Russell* decision).

125. *Nieto*, 845 F.2d at 870.

126. *See* Lowen v. Tower Asset Management, Inc. 829 F.2d 1209, 1220 (2d

ognize the separate treatment of plan remedies on the one hand and participant remedies on the other. As a result, the court erroneously applied the rationale of *Russell*[127] to *Nieto*, and rejected plantiffs' proposal that plans covered by ERISA may recover against nonfiduciaries who participate in a fiduciary violation.[128]

Under ERISA, restoration of plan losses caused by fiduciary violations is necessary to protect participants and their employee benefit plans.[129] Unlike the propriety of granting punitive damages,[130] federal courts uniformly authorize restoration of plan losses under ERISA's remedial scheme.[131] Although punitive damages may deter variance from ERISA,[132]

Cir. 1987) (deriving authority for recovery against nonfiduciaries from trust law principles and ERISA's remedial provisions); Brock v. Gerace, 635 F. Supp. 563, 566-67 (D.N.J. 1986) (analyzing remedial provisions of ERISA and concluding that imposition of nonfiduciary liability is consistent with congressional intent behind ERISA); McDougall v. Donovan, 539 F. Supp. 596, 599 (N.D. Ill. 1982) (stating that ERISA's remedial provisions should not be construed so narrowly as to defeat traditional principles of common law of trusts).

127. "In light of this holding, we do not reach any question concerning the extent to which § 409[a] may authorize recovery of extra-contractual compensatory or punitive damages from a fiduciary by a *plan*." *Russell*, 473 U.S. at 144 n.12 (emphasis in original); *see also supra* notes 81-85, 124 and accompanying text.

128. *Nieto*, 845 F.2d at 874; *see supra* notes 95, 106-11 and accompanying text.

129. Congress created minimum standards to ensure the equitable character and financial soundness of employee benefit plans and thus protect participants and their interests. ERISA § 2, 29 U.S.C. § 1001 (1982). The policy of ERISA further provided plan participants and their beneficiaries with "appropriate remedies, sanctions, and ready access to the Federal courts" to safeguard their interests in their plans. *Id.* § 2(b), 29 U.S.C. § 1001(b). Furthermore, the Supreme Court in *Russell* recognized the importance ERISA's drafters placed on protecting contractually defined benefit rights under employee benefit plans. *See* 473 U.S. at 148.

130. *See supra* note 121.

131. Courts agree that the remedial goal of ERISA is to make participants whole and restore plans to the position they would have occupied had ERISA not been violated. *See Russell*, 473 U.S. at 142 n.9 (indicating "Congress's intent that actions for breach of fiduciary duty be brought" to assure financial integrity of plan as a whole); Brock v. Gerace, 635 F. Supp. 563, 566 (D.N.J. 1986) (noting ERISA must be liberally construed in order to carry out its purposes of "protecting the employees' interests and preserving the integrity of plan assets"). Courts reach different conclusions, however, on the extent of relief necessary to accomplish this goal. *See supra* note 121.

132. Punitive damages serve the three related purposes of punishing the defendant, deterring the defendant from repeating the injurious act, and deterring others from repeating the defendant's acts. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 9 (5th ed. 1984). Another purpose associated with punitive damages is to reimburse the plaintiff for damages not otherwise legally compensable, in order to enforce established norms

they do not directly relate to replenishing contractually defined benefits depleted by a fiduciary breach. Punitive damages necessarily go beyond contractually protected benefit rights and therefore are not critical to restoring plans and plan participants to the positions they would have occupied but for the breach of trust. In contrast, imposing liability for plan losses on nonfiduciaries who assist a fiduciary breach is essential to compensating plans injured by fiduciary violations.[133]

The *Russell* decision did not produce gaps in the protection afforded employee benefit plans under ERISA. As the concurring opinion contended, limiting section 409(a) to plan relief did not reduce employee protection because section 502(a)(3) already provides adequate individual recovery for plan participants.[134] The "party in interest" theory of liability adopted in *Nieto*, however, diminishes employee safeguards under ERISA by refusing to afford employee benefit plans and their participants the protection of nonfiduciary liability.

Interpretive questions involving ERISA's fiduciary provisions require courts to look to traditional trust law for guidance.[135] The *Russell* court did not address trust principles in its examination of section 409(a) because it focused on the degree of authorized damages rather than on whether statutory standards had been violated.[136] The *Nieto* court, when faced with the issue of nonfiduciary liability, misunderstood *Russell* as rejecting the incorporation of trust law to develop and ram-

of conduct. *Id.*; *see also* Note, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743, 755 (1985) (arguing that deterrence is primary justification for allowing punitive damages under ERISA).

133. *See Brock*, 635 F. Supp. at 569 (concluding that participants and beneficiaries would not obtain full relief if denied recovery from nonfiduciaries who knowingly participated in breaches of fiduciary duties).

134. *Russell*, 473 U.S. at 151 (Brennan, J., concurring). "[S]ince § 502(a)(3) already provides participants and beneficiaries with 'other appropriate equitable relief . . . to redress [ERISA] violations,' there is no reason to construe § 409[a] expansively" to afford these individuals relief. *Id.* at 150.

135. *See supra* note 22 and accompanying text (stating ERISA's provisions must be construed in light of the special nature and purposes of employee benefit plans); *see also* Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 641-42 (W.D. Wis. 1979) (concluding, in light of congressional intent that ERISA "make applicable the law of trusts," that ERISA empowers federal courts to award relief available in traditional trust law against nonfiduciaries who knowingly participate in fiduciary breach of trust).

136. *See generally Russell*, 473 U.S. 134 (analyzing whether § 409(a) remedies inure to entire plan rather than to individual participants or beneficiaries, rather than whether actions of plan fiduciaries violated § 409(a)); *see also supra* notes 77-85 and accompanying text (discussing *Russell* decision).

ify ERISA's fiduciary standards.[137] This conclusion led the Ninth Circuit wrongly to reject nonfiduciary liability under ERISA and to hinder achievement of ERISA's remedial goals.

2. *Nieto's* Construction of ERISA

Although recovery against a party in interest, like nonfiduciary liability, is not expressly provided for in ERISA, the Ninth Circuit allowed recovery under section 502(a)(3) against a party in interest who engages in a prohibited transaction with a fiduciary.[138] The *Nieto* court held that ERISA's definition of parties in interest[139] with respect to a plan gives them a "status defined by the Act" and distinguishes them from nonfiduciaries.[140] Moreover, ERISA prohibits plan fiduciaries from engaging in certain transactions with parties in interest.[141] Thus, "party in interest" liability is necessary, according to the Ninth Circuit, to facilitate redress of prohibited transactions by enveloping all parties to such actions within the scope of ERISA's remedies.[142]

The Ninth Circuit's reasoning behind allowing party in interest liability equally supports permitting recovery against a nonfiduciary under ERISA. Nonfiduciaries, although not expressly defined in the Act, also occupy a status under ERISA as *persons* with respect to a plan who do not fit within ERISA's definition of a plan fiduciary.[143] ERISA proscribes both fiduci-

137. 845 F.2d at 872 (concluding that § 409(a) provides remedy only against fiduciaries after noting that Supreme Court's holding in *Russell* rejects any remedies not incorporated expressly in ERISA).

138. *See supra* notes 113-14 and accompanying text.

139. ERISA § 3(14), 29 U.S.C. § 1002(14) (1982); *see also supra* note 53 and accompanying text.

140. *Nieto*, 845 F.2d at 873-74; *see also* McDougall v. Donovan, 539 F. Supp. 596, 598-99 (N.D. Ill. 1982) (permitting equitable relief under § 502(a)(3) against party in interest who engages in prohibited transaction; court did not address nonfiduciary liability).

141. ERISA § 406(a), 29 U.S.C. § 1106(a) (1982). The Ninth Circuit concluded that because such prohibited transactions are illegal under ERISA, § 502(a)(3) empowers federal courts to redress such violations. *Nieto*, 845 F.2d at 873; *see supra* note 53-55 and accompanying text.

142. *Nieto*, 845 F.2d at 874. The Ninth Circuit noted that § 406(a) prohibits only certain transactions by fiduciaries and does not specifically bar parties in interest from engaging in such transactions. *Id.* Although the Internal Revenue Code provides an explicit penalty for parties in interest who participate in prohibited transactions, the Ninth Circuit concluded that Congress would not have left participants without recourse against parties clearly covered by ERISA who violate its provisions. *Id.* at 874 n.6; *see also supra* note 54 (discussing taxes imposed on parties in interest who participate in prohibited transaction).

143. ERISA defines a plan fiduciary in § 3(21)(A). ERISA, 29 U.S.C.

ary involvement in prohibited transactions and commission of fiduciary breaches.[144] The *Nieto* court reasoned that relief under ERISA against all parties involved in a prohibited transaction is essential to enforcement of the statute.[145] Recovery against all parties, including nonfiduciaries, who knowingly participate in a fiduciary breach of duty follows from this interpretation of ERISA.[146] Thus, both the Ninth Circuit's own rationale and feasible construction of ERISA's remedial provisions warrant judicial imposition of nonfiduciary liability.

3. Implications of the *Nieto* decision

By resting liability standards on defined classes of parties and transactions under ERISA, the Ninth Circuit weakens rather than reinforces ERISA's remedial provisions. Under the holding of *Nieto*, nonfiduciaries who fall outside ERISA's "party in interest" definition can conspire knowingly with a fiduciary without fear of liability under the Act. Nonfiduciaries therefore can harm a benefit plan, and plan participants as well as the plan are denied relief.[147]

ERISA is a remedial statute entitled to liberal construction by the courts.[148] Nonfiduciary liability for knowing participa-

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§ 1002(21)(A) (1982); *see supra* note 3 and accompanying text. Because ERISA defines *persons*, one can make an argument, under the Ninth Circuit's own reasoning, that ERISA gives persons a status under the Act. ERISA § 3(9) defines a person as any "individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1003(9) (1982).

144. *See supra* notes 53-55 and accompanying text (regarding proscription of fiduciary participation in certain transactions); 43, 61, 63 and accompanying text (regarding language of ERISA that establishes fiduciary duties and provides for relief from fiduciary breaches).

145. *Nieto*, 845 F.2d at 874 (acknowledging that courts may be unable to address transactions in violation of ERISA unless they have jurisdiction over all parties who allegedly participated in such violations).

146. Nonfiduciaries often injure employee benefit plans by assisting fiduciaries in breaching their obligations under ERISA. *See* cases cited *supra* note 7. To redress such infractions, courts must be able to impose liability on nonfiduciaries to restore losses to plans harmed by a fiduciary violation. *See* cases cited *supra* note 93.

147. The Ninth Circuit concedes that some actions by plan attorneys may fall outside the definition of prohibited transactions and thus, under their "party in interest" approach, be beyond ERISA's remedial provisions. *Nieto*, 845 F.2d at 874 n.7.

148. *See* Kross v. Western Elec. Co., 701 F.2d 1238, 1242 (7th Cir. 1983) (stating ERISA is remedial statute that should be liberally construed in favor of employee benefit plan participants); Duchow v. New York Teamsters Pension Fund, 691 F.2d 74, 78 (2d Cir. 1982) (recognizing that ERISA is remedial statute designed to protect plan beneficiaries by reducing risk of losing plan

tion in a fiduciary violation advances ERISA's remedial purpose. Recovery against a party in interest under section 502(a)(3) is restricted to equitable relief[149] and therefore does not ensure full restoration of plan losses resulting from a prohibited transaction.[150] Nonfiduciary liability under section 409(a), however, provides both equitable and legal relief to ensure that the plan is compensated fully for harm caused by a fiduciary violation.[151]

The Ninth Circuit's "party in interest" approach imposes liability based simply on a person's defined status and actions under ERISA.[152] ERISA defines parties in interest to give fiduciaries notice regarding the people with whom they may and may not deal on the plan's behalf.[153] Similarly, ERISA proscribes certain transactions to inform fiduciaries of the limits placed on their dealings with parties in interest.[154] Thus, these definitions do not serve as useful mechanisms for imposing liability or compensating injured plans under ERISA.

The *Nieto* "party in interest" theory, applied literally, could impose liability on a third person induced by a plan fiduciary unwittingly to participate in a prohibited transaction. In this situation, placing liability on a party in interest, unaware of its relation to the plan, is unjust to the third person and detracts from the deterrent force of ERISA's remedial provi-

benefits), *cert. denied*, 461 U.S. 918 (1983); *see also* Peyton v. Rowe, 391 U.S. 54, 65 (1968) (following well-settled principle that courts should liberally construe remedial statutes to effectuate their purposes); cases cited *supra* note 70 (recognizing that courts should construe broadly ERISA's remedial provisions).

149. *See supra* notes 67-69 and accompanying text.

150. *See supra* note 147.

151. *See supra* note 63.

152. *See supra* notes 141-42 and accompanying text.

153. *See* H.R. CONF. REP. NO. 1280, 93d Cong, 2d Sess. 306 & n.2 (recognizing prohibited transaction rules focus on fiduciary in accordance with traditional trust law emphasis on self-dealing, and defining prohibited transactions as same type of transaction that constitutes prohibited self-dealing under common law), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5087 & n.2; *see also supra* note 54 and accompanying text (comparing ERISA's treatment of plan fiduciaries and parties in interest who participate in prohibited transactions).

154. Because plan fiduciaries are liable only if they knew or should have known that an action consitituted a prohibited transaction, ERISA sets forth certain actions in which a plan fiduciary may not engage with persons described as parties in interest. *See* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 306-07 (stating that fiduciaries are generally prohibited under Title I from engaging in specified transactions with parties in interest, but refusing to punish fiduciary when unaware of other party's status as party in interest), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5087; *see supra* note 54 and accompanying text.

sions.[155] Courts could enhance compliance with ERISA by requiring the fiduciary, who knowingly transgressed ERISA's standards, to provide full equitable and legal relief to the plan. Nonfiduciary liability complements enforcement of ERISA by limiting accountability to those persons who *knowingly* commit or assist a fiduciary breach of duty.[156]

C. INCORPORATION OF NONFIDUCIARY LIABILITY UNDER ERISA

ERISA's enforcement provisions protect the welfare of plans by restraining fiduciary breaches and providing for restoration of plan losses that such violations cause.[157] While deterring variation from ERISA's stringent standards is desirable, section 409(a) primarily seeks to compensate plans harmed by fiduciary breaches of duty.[158] A fiduciary who violates "any fi-

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155. Congress intended to reduce the incentive for plan trustees to act in their own commercial interest by imposing stricter fiduciary duties under ERISA. Construing ERISA's remedies to allow nonfiduciaries to participate in a breach of fiduciary obligations without incurring personal liability does not effectively remove the economic appeal of commercial gain by third persons. Without imposition of personal liability under ERISA, a nonfiduciary can be accountable only for profits gained from misuse of plan assets. The temptation for third persons to participate in a breach thus still exists. *Cf.* Scott, *Participation in a Breach of Trust*, 34 HARV. L. REV. 454, 481 (1921) (stating that trustee or other fiduciary occupies position in which great temptation exists to pursue personal interests rather than interests of beneficiaries for whom trustee acts).

Furthermore, because ERISA imposes liability on a fiduciary only for knowingly engaging in a prohibited transaction with a party in interest, imposing liability on third persons because they fall within ERISA's definition of *parties in interest* is inequitable. *See supra* note 54 (discussing different consequences ERISA imposes on fiduciary and party in interest for participating in prohibited transaction).

156. *Cf.* Scott, *Participaton in a Breach of Trust*, 34 HARV. L. REV. 454, 481 (1921) (recognizing propriety of third person liability for knowingly conspiring with fiduciary in breach of obligations, but arguing imposition of such liability without actual knowledge of breach of trust makes it dangerous for third persons to deal with fiduciary and seriously interferes with proper fiduciary performance).

157. *See supra* notes 60-68 and accompanying text (discussing various remedies available under ERISA).

158. *See* ERISA § 409(a), 29 U.S.C. § 1109(a) (1982) (requiring reimbursement of plan losses resulting from breach of fiduciary obligations and restoration of profits from misuse of plan assets, as well as authorizing "other equitable or remedial relief" as the court deems necessary); *see also supra* notes 63-65 and accompanying text (discussing plan-related relief against fiduciaries under § 409(a); *Russell*, 473 U.S. at 141-43 & n.9 (stating that ERISA is primarily concerned with preventing misuse of plan assets and limiting § 409(a) to remedies which ensure financial integrity of entire plan rather than protection of individual participants).

duciary duty" under section 409(a), knowingly or otherwise, must place the plan in the position it would have occupied but for the breach of trust.[159] In the event a fiduciary is judgment-proof, nonfiduciary liability becomes instrumental in restoring plans injured by a fiduciary breach of duty under section 409(a).

Congress designed ERISA to protect employees and their benefit plans.[160] ERISA's strict fiduciary standards and various remedies effectuate this goal.[161] ERISA's stated policy gives participants "appropriate remedies, sanctions, and ready access to the Federal courts."[162] Congress directed courts to supplement the language of ERISA by developing a federal common law to govern disputes under the Act.[163] Thus, Congress did not intend to limit "appropriate" remedies to those expressly included in ERISA. Remedies under ERISA should carry out the purpose for which Congress created the substantive law.[164] When a nonfiduciary participates in a fiduciary breach of trust, courts must look beyond the statutory text and formulate remedies adequately to compensate plans and participants for their violated rights.

Congress envisioned judicial formulation of remedies to achieve comprehensive employee benefit plan protection. In construing ERISA's protective provisions, Congress instructed courts to rely on common-law trust principles for guidance.[165] Because Congress intended to increase the protection afforded employee benefit plans by common law,[166] wholesale adoption of trust law concepts is inappropriate. Rather, Congress advised courts to shape trust law to complement the special na-

159. *See supra* notes 63-65, 131, 158 and accompanying text.

160. *See supra* note 5 and accompanying text.

161. *See supra* notes 4, 43, 45-49 and accompanying text (describing fiduciary duties ERISA imposes); notes 60-68 and accompanying text (discussing ERISA's remedial provisions).

162. ERISA § 2(b), 29 U.S.C. § 1001(b) (1982).

163. *See supra* notes 21-22 and accompanying text; *see also* cases cited *supra* note 93 and accompanying text (acknowledging Congress's intent to federalize common law of trusts under ERISA).

164. *See* cases cited *supra* note 148.

165. *See* Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1499 (9th Cir. 1984) (stating Congress did not intend courts to restrict regulation of employee benefit plans to terms of ERISA's provisions, but empowered courts to develop body of federal common law).

166. *See supra* notes 18-22 and accompanying text (discussing ineffective pre-ERISA regulation of employee benefit plans that inspired passage of statute); notes 43, 45-49 and accompanying text (describing fiduciary duties ERISA imposes and comparing statute with obligations enforced under common law of trusts).

ture of employee benefit plans in light of ERISA's remedial purpose.[167] Incorporation of traditional trust principles that enhance plan and participant protection is consistent with ERISA's goal and therefore should remain applicable under the statute. Courts should incorporate nonfiduciary liability for knowing participation in a fiduciary breach, as recognized under trust law,[168] to ensure uniform application of ERISA's standards.

CONCLUSION

Prior to the Ninth Circuit's decision in *Nieto*, federal courts uniformly imposed liability on persons who knowingly assisted a fiduciary breach of duty under ERISA.[169] The Ninth Circuit rejected nonfiduciary liability based on the Supreme Court's opinion in *Russell*.[170] The Supreme Court's holding in *Russell*, however, does not require lower federal courts to reduce or diminish plan-related recovery expressly authorized by section 409(a).[171] In *Russell*, the Court interpreted ERISA to deny claims for individual relief under section 409(a).[172] As the Court noted, Congress intended ERISA to safeguard participants' contractually defined benefits under their plans.[173] The *Russell* opinion did not decide the propriety of punitive damages under other ERISA remedies,[174] nor preclude recovery by a plan against a nonfiduciary who joins in a fiduciary breach of duty.

Courts should afford employee benefit plans and their participants comprehensive relief for violations of fiduciary duties under ERISA. Full recovery from fiduciary breaches is essential to ensure the financial integrity of plans and to protect the interests of participants. While ERISA provides extensive recovery against a fiduciary who breaches a duty, plans and participants may not obtain comprehensive relief unless courts allow relief from nonfiduciaries who aid such breaches. Nonfiduciary liability furthers the remedial goals of ERISA by block-

167. *See supra* note 22 and accompanying text.

168. *See supra* notes 29-30 and accompanying text.

169. *See supra* notes 106-14 and accompanying text (describing Ninth Circuit's decision).

170. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985); *see supra* notes 79-85 (discussing Supreme Court's decision).

171. *See supra* note 127 and accompanying text.

172. *See supra* notes 81-85 and accompanying text.

173. *See supra* notes 84-85 and accompanying text.

174. *See supra* note 119 and accompanying text.

ing a potential loophole through which nonfiduciaries could abuse plan funds. In addition to providing plans with essential relief under ERISA, nonfiduciary liability for participation in a breach of fiduciary duty enhances compliance with ERISA's standards by reducing the incentive for persons knowingly to assist fiduciary violations.

Julianne Joy Knox