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Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy To Prevent Unjust Enrichment

American workers largely depend on the private pension system for their retirement income. Nearly 900,000 pension and benefit plans comprise the nation's nongovernmental retirement security system, providing coverage to over seventy-six million employees.¹ Collectively these plans post assets in excess of \$1.7 trillion,² controlling twenty to twenty-five percent of the equity and forty percent of the outstanding corporate bonds in the United States.³ Because of the market leverage they exert, commentators have described private pension funds as "the largest single pool of capital in the world."⁴ The declining ability of the Social Security system to serve as an exclusive source of retirement security,⁵ coupled with the strain placed upon public programs by a disproportionately aging population,⁶ amplify the continuing importance of private sector sponsorship of retirement benefits.⁷

This vast scheme to care for retired employees depicts the archetypal tension between the benefits of public regulation and the reduction in private initiative such curatives frequently engender. In response to abuses within the private pension system, Congress enacted the sweeping Employee Retirement Income Security Act of 1974

1. *Pensions at Risk: Can the Department of Labor Effectively Audit Private Retirement Funds? Hearings Before the Subcomm. on Employment and Housing of the House Comm. on Govt. Operations*, 101st Cong., 1st Sess. 2 (1989) [hereinafter *Pensions at Risk*] (statement of Chairman Lantos).

2. See Swoboda, *Official Urges Hands-off Private Pension System*, Wash. Post, Feb. 8, 1990, at A8, col. 3 (quoting David Ball, Asst. Secretary of Labor). Experts predict that this amount will nearly double by the turn of the century, reaching almost \$3 trillion. See *Pensions at Risk*, supra note 1, at 8 (testimony of Raymond Maria, Inspector General, U.S. Dept. Labor). To put this figure in perspective, the U.S. national debt is approximately \$3.2 trillion. See Curry, *Budget Pact's Secret — Biggest Deficit Ever*, San Francisco Chron., Nov. 5, 1990, at A1, col. 5.

3. Rifkin, *Pension Power*, Wash. Post, Apr. 15, 1990, at D3, col. 4.

4. *Id.* As Rifkin observes, "U.S. pension funds are a reservoir of wealth that has emerged as an economic force within the last 40 years . . . Pension funds are now the largest source of investment income for the American capitalist system." *Id.*

5. See S. REP. NO. 294, 101st Cong., 2d Sess. 15 (1990); *Employee Pension Protection Act of 1989: Hearings on S. 685 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 1 (1989) [hereinafter *Pension Protection Act of 1989*] (comments of Chairman Metzenbaum).

6. See S. REP. NO. 294, supra note 5, at 3 (Americans living longer and retiring earlier).

7. The Bush administration has reaffirmed the nation's reliance on the private pension system. See Uchitelle, *Company-Financed Pensions Are Failing to Fulfill Promise*, N.Y. Times, May 29, 1990, A1, col. 5, at D5, col. 5 ("Our goal is that private pensions should provide a significant share of retirement income, and for many more people.") (quoting Ann Combs, Deputy Asst. Secy. Labor for pension and welfare benefits).

(ERISA).⁸ ERISA promulgated a reticulated structure of vesting, disclosure, reporting, and fiduciary requirements that apply to nearly all private pension plans.⁹ In contrast to its array of regulatory requirements, however, the Act also features exemptions and inducements that encourage employers to establish private plans. ERISA is in fact a carefully designed compromise. Sensitive to the need for vitality in the private pension sector, Congress sought to minimize the disincentives that unduly burdensome or costly regulation poses to pension plan formation and maintenance. ERISA thus exhibits a balancing act between the necessity of governmental oversight of pensions and the imperative of private sector initiative.

Section 403, the “exclusive benefit rule,” best illustrates this tension within ERISA.¹⁰ Determined to prevent abuse of pension funds by imposing a strict fiduciary standard, Congress also sought to avoid the negative incentives to pension plan formation fostered by inequitable treatment of employers. Declaring in one breath that “*the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants,*”¹¹ Congress immediately carved an exception for employer contributions made by mistake of fact or law. As tempered by the mistaken contribution provision, section 403(c)(2)(A), the exclusive benefit rule “shall not prohibit” the refund of certain erroneously paid contributions.¹²

The complexities of modern pension arrangements provide fertile ground for contribution mistakes.¹³ Employers make clerical and

8. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 and in scattered sections of titles 5, 18, 26, 31 and 42 U.S.C.) (1988) [hereinafter ERISA].

9. The narrow categories of exceptions to ERISA’s purview are outlined in ERISA § 4, 29 U.S.C. § 1003(b) (1988).

10. ERISA § 403, 29 U.S.C. § 1103 (1988).

11. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (1988) (emphasis added).

12. ERISA § 403(c)(2)(A), 29 U.S.C. § 1103(c)(2)(A) (1988), states:

In the case of a contribution, or a payment of withdrawal liability . . .

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

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

13. Although this Note primarily discusses cases dealing with errors made in contributions to the pension plan, mistakes may also occur in the payment of the withdrawal liability assessed when employers exit pension plans. See, e.g., *Huber v. Casablanca Indus.*, 916 F.2d 85 (3d Cir. 1990). By its terms, § 403 applies to both kinds of mistake. The escalating frequency of employer termination, see *infra* notes 216-18 and accompanying text, may increase the refund demands for mistaken withdrawal liability payments.

arithmetic errors,¹⁴ misunderstand their contribution obligations,¹⁵ incorrectly assume an employee is covered under the terms of the pension plan,¹⁶ contribute on behalf of ineligible employees,¹⁷ make payments on behalf of the wrong employee,¹⁸ and contribute pursuant to invalid agreements.¹⁹ Interpretation of section 403, applicable to these types of errors, has divided the federal courts of appeals due to an ambiguity in its wording. Courts diverge over whether to construe section 403's "shall not prohibit" language as permissive, as suggestive of a statutory cause of action, as supportive of common law relief, or as totally superfluous.

Three circuits — the First,²⁰ Third,²¹ and Sixth²² — have ruled that employers have a federal common law remedy, based on an unjust

14. *See, e.g., Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 814 F.2d 79 (2d Cir. 1987) (clerical mistake); *Ethridge v. Masonry Contractors*, 536 F. Supp. 365 (N.D. Ga. 1982) (accounting mistake compounded by computer error); *Service Employees Intl. Union Local 82 Labor Management Trust Fund v. Baucom Janitorial Serv.*, 504 F. Supp. 197 (D.D.C. 1980) (accounting error).

15. *See, e.g., Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39 (2d Cir. 1990) (unclear whether principal employer responsible for contributions for independent contractor's employees), *cert. denied*, 111 S. Ct. 515 (1990); *Carter v. CMTA-Molders & Allied Health & Welfare Trust*, 736 F.2d 1310 (9th Cir. 1984) (successor employer followed predecessor's collective bargaining agreement); *Central States, S.E. & S.W. Areas Union & Welfare Fund v. Borden*, 736 F. Supp. 788 (N.D. Ill. 1990) (employer not notified by union of lower contribution requirement); *Carpenters Local 1471 v. Bar-Con, Inc.*, 668 F. Supp. 560 (S.D. Miss. 1987) (mistaken belief that plan was employer-funded).

16. *See, e.g., Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052 (3d Cir. 1989) (employee's job classification outside coverage of collective bargaining agreement); *Electricians Health, Welfare, & Pension Plans v. Gulino*, 594 F. Supp. 1265 (M.D. La. 1984) (employee withdrawn from union not entitled to benefits); *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 478 F. Supp. 884 (D. Minn. 1979) (contributions on behalf of employee not covered by agreement), *aff'd.*, 611 F.2d 694 (8th Cir. 1979) (*per curiam*).

17. *See, e.g., Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (sole shareholder not permitted to receive benefits); *South Cent. United Food & Commercial Workers Unions v. C & G Markets*, 836 F.2d 221 (5th Cir. 1988) (payments on behalf of probationary employees), *cert. denied*, 486 U.S. 1056 (1988); *Chase v. Trustees of the W. Conference of Teamsters Pension Fund*, 753 F.2d 744 (9th Cir. 1985) (owner-drivers of taxicabs not eligible); *Peckham v. Board of Trustees of Intl. Painters*, 719 F.2d 1063 (10th Cir. 1983) (sole proprietors not eligible), *modified*, 724 F.2d 100 (10th Cir. 1983); *Plumbers & Steamfitters Local Union No. 152 v. Bland*, 745 F. Supp. 1172 (N.D. W. Va. 1990) (self-employed employer).

18. *See, e.g., Airco Indus. Gases v. Teamsters Health & Welfare*, 618 F. Supp. 943 (D. Del. 1985) (contributions to truck driver fund erroneously made on behalf of maintenance employees), *modified*, 850 F.2d 1028 (3d Cir. 1988).

19. *See, e.g., Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981) (expired agreement); *Teamsters Local 639 Employers Health Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865 (4th Cir. 1981) (same); *R.V. Cloud Co. v. Western Conference of Teamsters Pension Trust Fund*, 566 F. Supp. 1426 (N.D. Cal. 1983) (same); *E.M. Trucks, Inc. v. Central States, S.E. & S.W. Areas Pension Fund*, 517 F. Supp. 1122 (D. Minn. 1981) (employees' participation in plan terminated by new collective bargaining agreement).

20. *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989).

21. *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052 (3d Cir. 1989).

22. *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986), *cert. denied*, 479 U.S. 1007 (1986).

enrichment theory, to recapture overpayments. The Eleventh²³ and Fifth Circuits²⁴ have ruled that federal common law does not provide relief to employers who err. Other circuits that permit employers to recover monies paid by mistake fail to articulate the precise basis of the cause of action.²⁵ The Fourth Circuit recently created an unjust enrichment remedy in a factually similar setting,²⁶ and the language and precedent on which it relied²⁷ arguably support a restitutionary remedy for employer contributions as well.²⁸

Finally, the Ninth Circuit deems the debate over federal common law irrelevant, contending that ERISA evinces an intent to return erroneously paid contributions. The court construes a cause of action directly from the statutory phrase, "shall not prohibit the return of such contribution or payment."²⁹ Because of its reliance on an implied cause of action, the Ninth Circuit summarily dismisses as irrelevant the question whether a common law remedy might be appropriate.³⁰

Often, courts have settled upon an interpretation of section 403 without full investigation. Moreover, courts have decided the unjust enrichment question when the issue was not squarely presented or vigorously pursued by the parties,³¹ yielding elliptical examination of the

23. *Dime Coal Co. v. Combs*, 796 F.2d 394 (11th Cir. 1986).

24. *South Cent. United Food & Commercial Workers Union v. C & G Mkts.*, 836 F.2d 221 (5th Cir. 1988), *cert. denied*, 486 U.S. 1056 (1988).

25. *See, e.g., Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 814 F.2d 79 (2d Cir. 1987) (return permitted only when trustee abuses discretionary refund authority); *Peckham v. Board of Trustees of Intl. Bhd. of Painters*, 719 F.2d 1063 (10th Cir. 1983) (same), *modified*, 724 F.2d 100 (10th Cir. 1983); *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 611 F.2d 694 (8th Cir. 1979) (*per curiam*) (affirming employer offset under § 1103(c)(2)(A)).

26. *See Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 512 (1990).

27. *See Provident Life*, 906 F.2d at 993 (citing the Third Circuit's *Plucinski* decision and relying on the mistaken contribution section, 29 U.S.C. § 1103(c)(2)(A), for analogous support).

28. *See, e.g., Plumbers & Steamfitters Local Union No. 152 v. Bland*, 745 F. Supp. 1172, 1174 (N.D.W.V. 1990) (reading *Provident Life* as authorizing federal common law relief for mistaken payments).

29. *Award Serv., Inc. v. Northern Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986).

30. *See British Motor Car Distrib. v. San Francisco Auto. Indus. Welfare Fund*, 882 F.2d 371, 377 (9th Cir. 1989) (refusing to entertain discussion about federal common law of restitution "particularly where this court does allow employers to bring suit under ERISA for restitution of mistaken contributions").

31. *See, e.g., Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 964-65 (1st Cir. 1989) ("[R]efund rights were mentioned below only in passing. Nevertheless, since . . . the case law is in some disarray, we take this opportunity to offer a modicum of guidance on the subject.") (footnote omitted). The court closed by admitting that it "realize[d] that plaintiff did not plead a claim for restitution *per se*," but nonetheless remanded the case for proceedings consistent with the court's newly announced unjust enrichment views. 879 F.2d at 968 n.10. *See also Dime Coal Co. v. Combs*, 796 F.2d 394, 399 n.7 (11th Cir. 1986) ("Although the question

policy implications of refund decisions.³² This Note investigates more fully the policies animating ERISA in order to ascribe an appropriate construction to the mistaken contribution section.

Part I analyzes the Ninth Circuit's anomalous implied cause of action theory. Searching the legislative history as well as ERISA's language and structure, this Part finds lacking the requisite expression of congressional intent to support a statutorily implied remedy. As an alternative, Part II explores the appropriateness of common law relief. Part II defends the creation of common law relief by the federal courts as consistent with the direct and indirect evidence suggesting that Congress envisioned judicial supplementation of ERISA. ERISA generally seeks the protection of employees' interests. Part III identifies two subcomponents that comprise this goal: expansion of private pension coverage and protection of pension fund assets. Recognizing the potential tensions between these considerations, Part III argues that letting employers recoup overpayments optimizes achievement of both goals. Part IV contends that this remedy should be typed an unjust enrichment action. This Note embraces an equitable model for the recovery of mistaken payments, capturing both statutory and traditional equitable concerns. Each of the circuits which permit recovery, whether under the statute or common law, make equitable balancing the touchstone of their analysis.³³ Part IV canvasses a range of considerations that bear on the refund decision and assesses their comparative weight.

I. EXPRESS WEAKNESSES OF THE IMPLIED REMEDY THEORY

Before examining the merits of a common law remedy for mistaken contributions, it is first necessary to determine whether ERISA provides a statutory remedy. If it does afford recourse, then a com-

[was] not well presented [and] not seriously pursued . . . we hold that no federal common law right to recovery of the disputed contributions . . . exists.") (emphasis added).

Nonetheless, lower courts in these circuits adhere to these pronouncements as controlling authority. See, e.g., *Florida W. Coast Operating Engr. Local 925 Welfare Fund v. Sunbelt Sales & Rentals*, 732 F. Supp. 1135, 1145 (M.D. Fla. 1990) (both *South Central* and *Dime Coal* preclude federal common law recovery of mistaken payment); *Carpenters Local 1471 v. Bar-Con, Inc.*, 668 F. Supp. 560, 568 (S.D. Miss. 1987) (citing *Dime Coal*).

32. See, e.g., *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 233-36 (6th Cir. 1986) (announcing common law remedy without explaining relationship to ERISA policy objectives), *cert. denied*, 479 U.S. 1007 (1986).

33. See, e.g., *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1057 (3d Cir. 1989) (common law relief governed by "general equitable considerations"); *Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 637 F. Supp. 529, 532 (N.D.N.Y. 1986), *modified*, 814 F.2d 79 (2d Cir. 1987) ("whether the cause of action derives from federal common law or is implied by the statute," return of mistaken contributions guided by "general principles of equity"); *Award Serv. v. Northern Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066, 1069 (9th Cir. 1985) (plaintiff praying for statutory relief "will have to establish that the equities favor restitution in order to succeed on the merits"), *cert. denied*, 474 U.S. 1081 (1986).

mon law remedy is not only unnecessary, but inappropriate. ERISA explicitly grants relief to a variety of actors in certain situations. For example, the civil enforcement provision permits actions by the Secretary of Labor or by a plan participant, beneficiary, or fiduciary.³⁴ Despite the conspicuous absence of employers from the list of enumerated parties in section 403, at least one court, as well as some commentators,³⁵ maintain that a remedy may be implied directly from ERISA. In *Award Service, Inc. v. Northern California Retail Clerks Unions*,³⁶ the Ninth Circuit construed ERISA section 403(c)(2)(A)³⁷ as indicating a congressional intent to provide statutory relief for employers who mistakenly contribute to pension plans.

This Part of the Note addresses the merits of the Ninth Circuit's distinctive implied cause of action. Section A delineates the appropriate legal inquiry for implied rights of action, framing the controlling question as one of legislative intent. Section B finds the language of the statute itself devoid of any congressional purpose to imply a remedy. Section C draws a similar conclusion by evaluating the structure of ERISA and comparing different sections of the statute. Finally, section D traces ERISA's subsequent legislative history, finding further support from the amendment process that no remedy should be implied. Part I concludes that the refusal of most courts to permit a statutory remedy is supported by a proper reading of congressional intent in passing ERISA.

A. *The Operative Question: Legislative Intent*

By implying a remedy under section 403 of ERISA, the Ninth Circuit arguably overlooked the forest for the trees. *Award Service, Inc. v. Northern California Retail Clerks Unions* involved a delinquency action against an employer by a multiemployer pension fund. The employer defended on the ground that it was entitled to a refund for prior contributions made in error.³⁸ Interpreting section 403(c)(2)(A), the court concluded that although this section provided no express cause of action, an implied right of action was appropriate.³⁹ The court rested its decision on the four-pronged test of *Cort v. Ash*,⁴⁰ which

34. ERISA § 502(a), 29 U.S.C. § 1132(a) (1988).

35. See Note, *An Employer's Implied Cause of Action for Restitution Under Section 403 of ERISA*, 54 FORDHAM L. REV. 225 (1985) [hereinafter *An Employer's Implied Cause of Action*]; Note, *Implying a Statutory Right for Employers for the Return of Mistaken Overcontributions to a Multiemployer-Employee Benefit Plan*, 62 NOTRE DAME L. REV. 396 (1987) [hereinafter *Implying a Statutory Right*].

36. 763 F.2d 1066, 1068 (9th Cir. 1985), cert. denied, 474 U.S. 1081 (1986).

37. ERISA § 403(c)(2)(A), § 29 U.S.C. § 1103(c)(2)(A)(1988). For the text of § 403, see *supra* note 12.

38. 763 F.2d at 1067.

39. 763 F.2d at 1068.

40. 422 U.S. 66 (1975). The *Cort* test asks:

governs the implication of statutory remedies. Although the *Award Service* court methodically addressed each of the *Cort* factors,⁴¹ the preeminent focus of its analysis should have been congressional intent. The four factors are not entitled to equal weight; Supreme Court cases subsequent to *Cort* uniformly treat the other issues as incidental to the determinative question of congressional intent.⁴²

Courts imply statutory remedies to execute legislative intent; thus, the relevant determination is whether Congress affirmatively intended to confer such a cause of action in favor of employers. *Award Service* applied an inappropriate standard by asking the wrong question. *Award Service* relied on an earlier Ninth Circuit opinion, *Fentron Industries v. National Shopmen Pension Fund*,⁴³ in analyzing the intent

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted).

41. Even assuming *arguendo* that each *Cort* factor merits equal consideration, the *Award Service* resolution of them fails to make a persuasive case for an implied statutory remedy. For instance, the court is not necessarily correct that the 1980 Multiemployer Pension Plan Amendment Act (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, amending § 403(c)(2)(A) to expand the scope of permissible recovery for employers who contribute by mistake, was intended for the benefit of employers. See 763 F.2d at 1068. The MPPAA, like ERISA, was designed to protect the economic interests of pension plan participants. See, e.g., *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 311 (E.D. Pa. 1982) ("1980 . . . amendments were designed specifically to provide pension benefits for long-time employees and their beneficiaries. . . . The legislative history of [§ 403] does not indicate that the expansion of circumstances under which excess contributions could be returned to employers was intended to create a right to such contributions."), *affd. without opinion*, 720 F.2d 661 (3d Cir. 1983); 126 CONG. REC. 20,176 (1980) (explanation of Sen. Williams) (MPPAA protects participants and beneficiaries).

Moreover, the *Cort* test asks whether the *statute*, not a specific provision, was passed for the benefit of a particular class. Even if § 403 does operate in isolation to the benefit of employers, it does so only as an incident to the overall purposes of ERISA. See 29 U.S.C. § 1001 (1988) (congressional findings and declaration of policy for ERISA); see also *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 233 (6th Cir. 1986) ("[T]he statute was passed to benefit employees, not employers, despite the specific provision of § 403(c)(2)(A)(ii). . . . That an employer might benefit from that subsection does not establish a federal right and to so hold would ignore the thrust of ERISA and its purpose."), *cert. denied*, 479 U.S. 1007 (1986). More than mere benefit to the class must be granted by the statute, and courts typically demand a showing that "Congress intended to confer federal rights upon these beneficiaries." *Whitworth*, 794 F.2d at 229 (quoting *Howard v. Pierce*, 738 F.2d 722, 724 (6th Cir. 1984)). Such a showing is not tenable for employers under ERISA. See *Central States, S.E. & S.W. Areas Pension Fund v. Admiral Merchants Motor Freight*, 511 F. Supp. 38, 47 (D. Minn. 1980) (ERISA was "enacted for the especial benefit of participants" and "not for the especial benefit of employers"), *affd.*, 642 F.2d 1122 (8th Cir. 1981).

42. See, e.g., *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 535-36 (1984) ("focus must be on the intent of Congress when it enacted the statute in question"); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 13 (1981) ("key to the [implied remedy] inquiry is the intent of the Legislature"); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 91 (1981) (touchstone is "whether Congress intended to create the private remedy").

43. 674 F.2d 1300 (9th Cir. 1982).

issue. *Fentron* permitted an employer injured by a pension plan's failure to pay benefits to bring suit against the fund.⁴⁴ The *Fentron* panel interpreted ERISA to provide an implied remedy by asking whether "Congress intentionally omitted employers" from section 502.⁴⁵ The court concluded that Congress did not, and held that "the statute *does not prohibit* employers from suing to enforce its provisions."⁴⁶ Drawing heavily on the reasoning of *Fentron*, the *Award Service* court ruled that employers were not affirmatively barred from seeking a refund for mistaken payments; accordingly, it concluded that they possessed a statutory cause of action.⁴⁷

Award Service's finding that section 403 did not forbid this cause of action ended its inquiry; the court erred by not attempting to determine whether such relief was actually intended. As the Second Circuit aptly objected in *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*,⁴⁸ the focus is "not on whether the legislative history reveals that Congress intended to *prevent* actions by employers or other parties, but instead on whether there is any indication that the legislature intended to *grant* subject matter jurisdiction over suits by employers, funds, or other parties not listed in § 1132(e)(1)."⁴⁹

The *Award Service* court should have ascertained whether Congress included an unjust enrichment remedy in ERISA itself. The remainder of Part I more closely investigates the indicia of congressional intent slighted by the court in *Award Service*. Among the aids available in determining congressional intent are the language, structure, and legislative history of the statute.⁵⁰ Examining these circumstantial indicators of intent, this Part concludes that Congress did not intend to provide a remedy for employers in ERISA.

44. 674 F.2d at 1303.

45. 674 F.2d at 1305 (footnotes omitted).

46. 674 F.2d at 1305 (footnote omitted) (emphasis added).

47. *Award Service*, 763 F.2d at 1068.

48. 700 F.2d 889 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983).

49. 700 F.2d at 892; *accord* *Tuvia Convalescent Center v. National Union of Hosp. & Health Care Employees*, 717 F.2d 726 (2d Cir. 1983), *cert. denied*, 463 U.S. 1233 (1983); *see also* *International Union of Bricklayers & Allied Craftsmen Local #1 v. Menard & Co. Masonry Bldg. Contractors*, 619 F. Supp. 1457, 1460 (D.R.I. 1985):

Fentron, however, appears to stand logic on its head. Given the natural constraints on the scope of federal jurisdiction . . . the question is not whether the national legislature affirmatively intended to bar suits by employers, trust funds, and others not specifically identified in § 1132(a)'s laundry list, but whether Congress affirmatively intended that unnamed others should be permitted access to a federal forum.

50. *See* *Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77, 91 (1981). The *Cort* test cannot be invoked persuasively without an affirmative showing that one of these factors suggests affirmative congressional intent. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-23 (2d ed. 1987).

B. Statutory Language

The cardinal indicator of legislative intent is, of course, the language chosen by the legislature to express itself.⁵¹ Nothing in the text of section 403 suggests a congressional desire to give employers a cause of action. Congressional election of merely permissive language, *i.e.*, "shall not prohibit the return of such contribution or payment," implies no affirmative intention to create a remedy.⁵² The legislative history's description of this provision speaks in equally unavailing terms.⁵³ Congress ordinarily does not employ such tepid language when granting a right of action.⁵⁴

In instances where Congress did intend to create an explicit cause of action for employers, it found no difficulty expressing itself clearly. Section 4301, dealing with withdrawal liabilities, authorizes a "plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle" to seek relief.⁵⁵ Comparison of the language of these two sections, both granting causes of action to specified parties, suggests that Congress harbored no intent to give employers a statutory remedy in section 403.⁵⁶ The use of permissive language, rather than more direct or forceful terminology, strongly argues against implying a remedy under section 403.

51. See 2A SUTHERLAND STAT. CONST. §§ 46.01-07 (4th ed. 1984).

52. See *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989) ("[T]he language of § 403(c)(2)(A)(ii) of ERISA is permissive, simply allowing pension funds to refund monies. Merely giving permission does not imply that Congress also wanted employers to be able to force the refund of contributions."); *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 311 (E.D. Pa. 1982) ("Congress apparently chose not to use the word 'may,' a word which might suggest, arguably, a direction to the trustees to take affirmative steps to determine and return mistaken contributions. . . . [T]he use of the phrase, 'are not prohibited' expresses an intent to allow, but not require, the trustees to return contributions . . ."), *affid. without opinion*, 720 F.2d 661 (3d Cir. 1983).

53. As the House Conference Report explained, § 403 "allows an employer's contributions to be returned . . . in certain limited situations." H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5083 (emphasis added).

54. See *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 949 (D. Del. 1985) (less than equivocal language suggests no intention to grant action), *modified*, 850 F.2d 1028 (3d Cir. 1988); *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 311 (E.D. Pa. 1982) (same), *affid. without opinion*, 720 F.2d 661 (3d Cir. 1983).

55. ERISA § 4301(a)(1), 29 U.S.C. § 1451(a)(1) (1988) (emphasis added).

56. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1984) (the "carefully integrated" provisions of ERISA "provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly"); *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 228 (6th Cir. 1986) (in light of reference to "employer" in § 1451, "Congress' failure to specifically mention the term 'employer' in § 502 can, therefore, be construed as meaning that Congress intended to exclude employers from the provisions of that section"), *cert. denied*, 479 U.S. 1007 (1986); *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund of Philadelphia*, 618 F. Supp. 943, 949 (D. Del. 1985) ("In other parts of ERISA, Congress has specifically included employers . . . in listing persons entitled to bring actions . . ."), *modified*, 850 F.2d 1028 (3d Cir. 1988); see also *Grand Union Co. v. Food Employers Labor Relations Assn.*, 808 F.2d 66, 71 (D.C. Cir. 1987) (employer "may not fit a Title IV handle on a Title I claim").

C. Structural Obstacles

ERISA's structure similarly fails to demonstrate the predicate of an intended statutory remedy. Section 403, granting the putative refund right to employers, does not appear in the subtitle of ERISA authorizing causes of action, but rather among the fiduciary duty provisions.⁵⁷ Had Congress intended to give employers a cause of action, logically it would have placed it with the sections creating causes of action. Furthermore, permitting employers to sue requires a malleable interpretation not only of section 403, but also a relaxation of section 502's civil enforcement provision.⁵⁸ Section 502 explicitly lists the parties empowered to bring a civil action to enforce ERISA's provisions, including section 403. Thus implying a cause of action under section 403 requires, *sub silentio*, expansion of section 502. Judicial manipulation of section 502 must be approached cautiously for a variety of reasons.

The first reason not to expand section 502 derives from the maxim of statutory construction that the enumeration of some parties implicitly excludes any others.⁵⁹ Second, the listing at issue in section 502 informs a number of other provisions of ERISA. ERISA frequently makes reference to "participants, beneficiaries, and fiduciaries."⁶⁰ Expanding the strict boundaries of this listing for purposes of recovering mistaken contributions could have unanticipated repercussions throughout ERISA's superstructure.⁶¹

The jurisdictional aspects of section 502 offer a third reason not to tamper with it. Section 502(e)(1) confers exclusive jurisdiction on federal courts to hear cases brought under that subchapter.⁶² In analo-

57. See *Soft Drink Indep. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743, 747 (N.D. Ill. 1988) (implied remedy textually insupportable due to location in fiduciary duty section). Compare Title I.B, Part 4, captioned "Fiduciary Responsibility," 29 U.S.C. §§ 1101-14 with Title I.B, Part 5, captioned "Administration and Enforcement," 29 U.S.C. §§ 1131-45 (1988).

58. ERISA § 502(a), 29 U.S.C. § 1132(a) (1988).

59. *Expressio unius est exclusio alterius*. See 2A SUTHERLAND STAT. CONST., *supra* note 51, at §§ 47.23-47.25 (designation of certain persons may raise inference that omissions are deliberate exclusions). For ERISA cases applying this rule to bar suit by unenumerated parties, see, e.g., *Giardano v. Jones*, 867 F.2d 409, 413 (7th Cir. 1989); *Pfefferle v. Solomon*, 718 F. Supp. 1413, 1419 (E.D. Wis. 1989); *In re Estate of Sheppard*, 658 F. Supp. 729, 734 (C.D. Ill. 1987).

60. See, e.g., ERISA § 502(b)(1)(B), 29 U.S.C. § 1132(b)(1)(B) (actions against Internal Revenue Code qualified plans); ERISA § 502(c), 29 U.S.C. § 1132(c) (actions to compel administrative disclosure); ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (federal court jurisdiction); ERISA § 502(g), 29 U.S.C. § 1132(g) (recovery of attorney fees); ERISA § 502(h), 29 U.S.C. § 1132(h) (service of process requirements); ERISA § 502(k), 29 U.S.C. § 1132(k) (suits against the Secretary of Labor) (1988).

61. See *International Union of Bricklayers & Allied Craftsmen Local #1 v. Menard & Co. Masonry Bldg. Contractors*, 619 F. Supp. 1457, 1461 (D.R.I. 1985) (§ 1132 listing pivotal to other clauses of statute).

62. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1988). Part I of this Note limits itself to examination of whether Congress reposit relief in the statute. The failure of § 1132 to confer specific jurisdiction on federal courts to hear suits by employers does not totally foreclose the

gous situations, courts have refused to expand the scope of statutory remedies to parties beyond those enumerated in section 502.⁶³ Thus pension funds,⁶⁴ unions,⁶⁵ and health care providers⁶⁶ have all been

possibility of a federal cause of action for unjust enrichment. Although plaintiffs would be precluded from claiming jurisdiction under ERISA's specific statutory grant, two arguable bases of jurisdiction would still exist to decide whether a statutory or common law cause of action existed.

The first, and cleanest, ground for jurisdiction is general federal question jurisdiction. The federal courts are, of course, empowered to hear "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988). It seems sufficient for a finding of federal question jurisdiction to require, as the Fourth Circuit has, that the "issue presented, whether it be the creation of federal common law or the interpretation of a specific ERISA provision" be "of 'central concern'" to ERISA. *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 991 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 512 (1990). An action for the return of mistakenly paid monies to a pension fund easily meets the "central concern" test. *See Aircro Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1033 (3d Cir. 1988).

Federal question jurisdiction poses one interesting question, although beyond the scope of this Note's full consideration. Section 502(e) of ERISA, 29 U.S.C. 1132(e)(1) (1988), grants federal courts exclusive jurisdiction over actions arising under it. Although federal common law definitively will support § 1331 jurisdiction, *see Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972), it is an open question whether jurisdiction over the common law claim would also be exclusive.

An alternative basis of jurisdiction could conceivably be 28 U.S.C. § 1337 (1988), conferring jurisdiction on the federal courts to hear claims arising under an Act of Congress regulating interstate commerce. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 n.7 (1983) (suggesting that § 1337 jurisdiction might support ERISA claims) (dictum). ERISA declares as one of its many purposes the protection and facilitation of interstate commerce. *See ERISA* § 2, 29 U.S.C. §§ 1001(a), 1001(b), 1001(c), 1001a(c), and 1001b(c) (1988) (findings and declaration of policy). The legislative history also suggests that protection of commerce partially motivated ERISA's passage. *See, e.g.*, S. REP. NO. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4849; H.R. REP. NO. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4640, 4646-7. Premising jurisdiction on § 1337, however, engenders one serious obstacle not found if § 1331 is used instead. Although the test for when an action "arises under" is the same for both §§ 1331 and 1337, technically § 1337 has not yet been held to support common law actions. *See Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia*, 549 F. Supp. 307, 310 n.3 (E.D. Pa. 1982), *affid. without opinion*, 720 F.2d 661 (3d Cir. 1983); *Wong v. Bacon*, 445 F. Supp. 1177, 1186 n. 12 (N.D. Cal. 1977). Hence common law actions might enjoy § 1331 but not § 1337 jurisdiction.

63. Independent of attempts to expand the array of parties capable of bringing suit by arguing that they are implicitly included in ERISA's specific enumeration, some plaintiffs have also tried to stretch beyond ordinary meaning the definitions of parties specified in the statute. Despite this creativity, courts have refused to consider employers, for purposes of ERISA, to be "beneficiaries," *see, e.g.*, *R.M. Bowler Contract Hauling Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 547 F. Supp. 783, 784 (S.D. Ill. 1982); or "employees," *see, e.g.*, *Modern Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000 (D. Conn. 1982).

64. *See, e.g.*, *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 987 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 512 (1990); *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 153 (6th Cir. 1985); *Carpenters Dist. Council of Kansas City Pension Fund v. Bowlus School Supply, Inc.*, 716 F. Supp. 1232, 1233-35 (W.D. Mo. 1989). *See generally* Annotation, *Right of Pension Plan, As Entity, to Bring Civil Enforcement Action Under § 502 of Employee Retirement Income Security Act of 1974*, 67 A.L.R. FED. 947 (1984).

65. *See, e.g.*, *New Jersey State AFL-CIO v. State of N.J.* 747 F.2d 891, 893 (3d Cir. 1984); *District 65, UAW v. Harper & Row Publishers*, 576 F. Supp. 1468, 1476 (S.D.N.Y. 1983).

66. *See, e.g.*, *Lifetime Medical Nursing Serv. v. New England Health Care Employees Welfare Fund*, 730 F. Supp. 1192, 1195 (D.R.I. 1990); *Pritt v. Blue Cross & Blue Shield*, 699 F.

denied the privilege to sue under ERISA.⁶⁷ The express jurisdictional grant in the statute represents Congress' judgment as to which parties' access to the federal courts effectuates ERISA's purposes.⁶⁸

As the Supreme Court has observed, ERISA is for better or worse, "a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans."⁶⁹ ERISA provides oversight and investigative authority to monitor compliance with its scheme.⁷⁰ It features specifically enumerated civil remedies⁷¹ and criminal penalties⁷² for violations of its commands. Where Congress endows a statute with an elaborate enforcement structure, courts should not imply additional rights of action.⁷³ Declining to imply a private remedy under ERISA section 409,⁷⁴ the Supreme Court in

Supp. 81, 84 (S.D.W.V. 1988); *Cameron Manor, Inc. v. United Mine Workers*, 575 F. Supp. 1243, 1245-46 (W.D. Pa. 1983).

67. Parties that perform two different roles under ERISA, one of which would enable them to litigate and one that would not, are not thereby precluded from bringing suit. *See, e.g.*, *Great Lakes Steel v. Deggendorf*, 716 F.2d 1101 (6th Cir. 1983) (employer performing fiduciary role as administrator of plan permitted to litigate); *U.S. Steel Corp. v. Commonwealth of Pa. Human Relations Commn.*, 669 F.2d 124, 128 (3d Cir. 1982) (same).

68. *Franchise Tax Bd. v. Construction Laborer's Vacation Trust*, 463 U.S. 1, 21 (1983); *see also Giardano v. Jones*, 867 F.2d 409, 413 (7th Cir. 1989) (cannot imply a cause of action for any non-enumerated parties); *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289 (5th Cir. 1988) (hewing "to a literal construction of § 1132(a)"); *International Union of Bricklayers & Allied Craftsmen Local #1 v. Menard & Co. Masonry Bldg. Contractors*, 619 F. Supp. 1457, 1460 (D.R.I. 1985) ("Where Congress has carefully catalogued a select list of persons eligible to sue in a federal forum under ERISA, it seems gratuitous — and wrong — for the courts to override that policy judgment by expanding the array.").

69. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

70. *See* ERISA §§ 504-07, 29 U.S.C. §§ 1134-37 (1988).

71. *See* ERISA § 502, 29 U.S.C. § 1132 (1988).

72. *See* ERISA § 501, 29 U.S.C. § 1131 (1988).

73. *See Giardano v. Jones*, 867 F.2d 409, 413 (7th Cir. 1989); *Bishop v. Osborn Transp.*, 838 F.2d 1173, 1174 (11th Cir.) ("Congress' express inclusion of several specific remedies in [ERISA] represents an implicit exclusion of remedies not listed."), *cert. denied*, 488 U.S. 832 (1988); *Carpenters Local 1471 v. Bar-Con, Inc.*, 668 F. Supp. 560, 568 (S.D. Miss. 1987) ("[I]t would be inappropriate to imply a private right of action under 29 U.S.C. § 1103. ERISA contains detailed limitations and requirements as to which party to the agreement may sue for what."); *cf.* *Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77, 93-94 (1981) (comprehensive title VII remedial scheme counsels against judicial creation of additional private relief). According to Judge Posner, this injunction against judicial expansion of statutory remedies derives from democratic theory:

The whole question of "implied" rights of action is deeply vexed. It lies at the crux of a series of debates over statutory interpretation. Those judges who believe that most statutes are compromises between rival interest groups hesitate to create implied rights of action no matter how defective a statute's remedial scheme without them, for they believe that in all likelihood the absence of effective remedies was a part of a compromise that enabled the statute to be passed, and they rightly do not want to undo the compromise. Those who believe that a regulatory statute should be viewed not as the point of balance between conflicting interest groups but as a straightforward effort to eliminate abuses do not hesitate to enforce a statute by whatever means are expedient.

Bosco v. Serhant, 836 F.2d 271, 275 (7th Cir. 1987).

74. ERISA § 409, 29 U.S.C. § 1109 (1988).

Massachusetts Mutual Life Insurance Co. v. Russell adverted to the deference due congressional prerogative:

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

. . . .

We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.⁷⁵

The same conclusion follows with respect to restitutionary actions by employers. As the First Circuit reasoned in parting company with the Ninth Circuit on the implied cause of action theory, because "Congress has carefully catalogued a selected list of persons eligible to sue under ERISA, there is no plausible rationale for us gratuitously to enlarge the roster."⁷⁶ Although employers no doubt contribute to ERISA's overall success, Congress' considered judgment was that ERISA did not require that employers have a cause of action under the statute.⁷⁷ The interdependence of the statute's remedies with its substantive provisions should not be disturbed.⁷⁸

D. *Subsequent History*

Congress' handling of proposed amendments to ERISA also suggests that it did not intend a right to sue for return of overpayments. The Multiemployer Pension Plan Amendment Act of 1980⁷⁹ amended Title I of ERISA by broadening the scope of the mistaken contribution section to include mistakes of both fact and law.⁸⁰ Despite this relaxa-

75. 473 U.S. 134, 146-47 (1985).

76. *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 965 (1st Cir. 1989).

77. *See Estate of Sheppard*, 658 F. Supp. 729, 734 (C.D. Ill. 1987) ("[A]lthough Congress certainly felt employers and administrators were important to the proper functioning of ERISA's regulatory scheme, it provided them no power under the act to institute a civil action."); *cf. Bosco v. Serhant*, 836 F.2d 271, 275 (7th Cir. 1987) ("[T]he question is not whether the statute's ostensible purposes would be served by adding a private right of action to the remedies expressly provided, but whether Congress consciously intended (without bothering to say) that there should be a private right of action . . ."), *cert. denied*, 486 U.S. 1056 (1988).

78. The conclusion that the comprehensive legislative scheme forecloses the implication of statutory remedies should not, however, be read to obviate the creation of common law relief. As Justice Brennan pointed out in his *Russell* concurrence, "ERISA was not so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate [common law] rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it." 473 U.S. at 157; *see also infra* notes 132-67 and accompanying text (arguing that Congress intended judicial development of common law for ERISA).

79. Pub. L. No. 96-364, 94 Stat. 1296 (1980) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

80. *See* Pub. L. No. 96-364, § 410(a) (1980) (codified at 29 U.S.C. § 1103(c)(2)(A) (1988)).

tion of existing refund procedure, no effort was made to grant employers a cause of action to enforce section 403. The 1980 amendments *did*, however, give employers a right of action against plans for claims involving mistaken payments of withdrawal liabilities,⁸¹ further weakening the argument that Congress intended, but forgot, to include a cause of action for employers in section 403.⁸²

The Ninth Circuit stands alone in its adherence to the implied remedy; all of the other circuits to address the theory have rejected it.⁸³ Strong textual, structural, and historical arguments rebut any suggestion of congressional intent to give employers a cause of action under section 403. As the balance of this Note makes clear, however, congressional silence as to a statutory cause of action leaves open the possibility of common law relief for employers.

II. SUPPLEMENTING ERISA WITH FEDERAL COMMON LAW

Despite the lack of express or implied statutory relief, employers making excess payments to pension funds are not necessarily without a remedy. Some lower federal courts recognize that since “the contract between the parties, the pension plan and incorporated provisions of the collective bargaining agreement, and the rights and remedies implicit therein or necessary to the enforcement thereof”⁸⁴ are governed by federal law, employers may make a claim for restitution, based on unjust enrichment, under federal common law. This Part maintains that ERISA’s purpose and structure invite federal courts to augment the statutory framework by crafting such common law remedies where necessary to effectuate ERISA’s objectives. An examination of ERISA’s preemption of state law is taken up in section A. Section B chronicles congressional expectation that the federal courts would embellish ERISA with a body of federal common law; section C critiques the reasoning of those courts that have failed to fashion common law accordingly. Section D outlines the uniquely federal interests served by the statute, arguing that a federal decision rule is needed to administer section 403 of ERISA.

81. See Pub. L. No. 96-364, § 104(2) (1980) (codified at 29 U.S.C. § 1451(a)(1) (1988)).

82. See *Grand Union Co. v. Food Employers Labor Relations Assn.*, 808 F.2d 66, 71 (D.C. Cir. 1987) (addition of title IV cause of action for employers proves none intended under title I); *Dime Coal Co. v. Combs*, 796 F.2d 394, 399 n.5 (11th Cir. 1986) (failure to give employer cause of action under original ERISA, or under 1980 Amendments, proves deliberate congressional choice).

83. See, e.g., *Dime Coal Co. v. Combs*, 796 F.2d 394 (11th Cir. 1986) (rejecting both statutory and common law remedy); *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221 (6th Cir.) (disagreeing with *Award Service*, but finding common law relief), *cert. denied*, 479 U.S. 1007 (1986).

84. *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 233 (6th Cir. 1986).

A. Preemption of State Unjust Enrichment Actions

Restitution actions premised on unjust enrichment are traditionally creatures of state common law.⁸⁵ Prior to ERISA's enactment, employers could recapture erroneous pension payments through an unjust enrichment action under state law.⁸⁶ Congress concluded ERISA, however, with a sweeping declaration that it had created an exclusively federal sphere of interest by displacing all state laws⁸⁷ re-

85. See, e.g., *Hancock-Hazlett Gen. Constr. Co. v. Trane Co.*, 499 So. 2d 1385 (Ala. 1986); *Alaska Sales & Serv. v. Millet*, 735 P.2d 743 (Alaska 1987); *Blue Ridge Sewer Improvement Dist. v. Lowry & Assocs., Inc.*, 149 Ariz. 373, 718 P.2d 1026 (Ct. App. 1986); *Frigillana v. Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979); *Dinosaur Dev., Inc. v. White*, 216 Cal. App. 3d 1310, 265 Cal. Rptr. 525 (Ct. App. 1989); *Mt. Sneffels Co. v. Estate of Scott*, 789 P.2d 464 (Colo. Ct. App. 1989); *Connecticut Natl. Bank v. Chapman*, 153 Conn. 393, 216 A.2d 814 (1966); *Home Ins. Co. v. Honaker*, 480 A.2d 652 (Del. 1984); *Williams v. Department of Health & Rehabilitation Servs.*, 522 So. 2d 951 (Fla. Dist. Ct. App. 1988); *Fleming v. Citizens & S. Natl. Bank*, 243 Ga. 144, 253 S.E.2d 76 (1979); *Hong v. Kong*, 5 Haw. App. 174, 683 P.2d 833 (Ct. App. 1984); *Jones v. Whitley*, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987); *Charles Hester Enters. v. Illinois Founders Ins. Co.*, 114 Ill. 2d 278, 499 N.E.2d 1319 (1986); *Monroe Fin. Corp. v. DiSilvestro*, 529 N.E.2d 379 (Ind. Ct. App. 1988); *Newman v. Newman*, 451 N.W.2d 843 (Iowa 1990); *Sampson v. Hunt*, 233 Kan. 572, 665 P.2d 743 (1983); *Codell Constr. Co. v. Commonwealth*, 566 S.W.2d 161 (Ky. Ct. App. 1977); *Edmonston v. A-Second Mortgage Co.*, 289 So. 2d 116 (La. 1974); *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974); *First Natl. Bank of Md. v. Shpritz*, 63 Md. App. 623, 493 A.2d 410 (Ct. Spec. App. 1985), *cert. denied*, 304 Md. 297, 498 A.2d 1184 (1985); *Barry v. Covich*, 332 Mass. 338, 124 N.E.2d 921 (1985); *Schwanderer v. Huron-Clinton Metro. Auth.*, 329 Mich. 258, 45 N.W.2d 279 (1951); *TCF Banking & Sav. v. Loft Homes, Inc.*, 439 N.W.2d 735 (Minn. Ct. App. 1989); *First Natl. Bank of Jackson v. Huff*, 441 So. 2d 1317 (Miss. 1983); *Farmers New World Life Ins. Co. v. Jolley*, 747 S.W.2d 704 (Mo. Ct. App. 1988); *Rust v. Kelly*, 228 Mont. 220, 741 P.2d 786 (1987); *Wendell's, Inc. v. Malmkar*, 225 Neb. 341, 405 N.W.2d 562 (1987); *Nevada Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987); *Patey v. Peaslee*, 101 N.H. 26, 131 A.2d 433 (1957) (per curiam); *Farese v. McGarry*, 237 N.J. Super. 385, 568 A.2d 89 (Super. Ct. App. Div. 1989); *Albuquerque Natl. Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982); *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337 (1916); *Thompson-Arthur Paving Co. v. Lincoln Battleground Assocs.*, 95 N.C. App. 270, 382 S.E.2d 817 (Ct. App. 1989); *Johnson v. Estate of Kent, In re Estate of Zent*, 459 N.W.2d 795 (N.D. 1990); *Aviation Sales, Inc. v. Select Mobile Homes*, 48 Ohio App. 3d. 90, 548 N.E.2d 307 (Ct. App. 1988); *McBride v. Bridges*, 202 Okla. 508, 215 P.2d 830 (1950); *Ying v. Lee*, 65 Or. App. 246, 671 P.2d 114 (Ct. App. 1983); *D.A. Hill Co. v. Clevetrust Realty Investors*, 524 Pa. 425, 573 A.2d 1005 (1990); *Jonklaas v. Silverman*, 117 R.I. 691, 370 A.2d 1277 (1977); *Harper v. McCoy*, 276 S.C. 170, 276 S.E.2d 782 (1981); *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259 (S.D. 1988); *Roach v. Underwood*, 192 Tenn. 378, 241 S.W.2d 498 (1951); *Bryan v. Citizens Natl. Bank in Abilene*, 628 S.W.2d 761 (Tex. 1982); *Southern Title Guar. Co. v. Bethers*, 761 P.2d 951 (Utah Ct. App. 1988); *Norfolk & Dedham Fire Ins. Co. v. AETNA Casualty & Sur. Co.*, 132 Vt. 341, 318 A.2d 659 (1974); *Belcher v. Kirkwood*, 238 Va. 430, 383 S.E.2d 729 (1989); *Eaton v. Engelcke Mfg.*, 37 Wash. App. 677, 681 P.2d 1312 (Ct. App. 1984); *Prudential Ins. Co. of Am. v. Couch*, 376 S.E.2d 104 (W. Va. 1988); *Hendricks v. MCI, Inc.*, 152 Wis.2d 363, 448 N.W.2d 289 (Ct. App. 1989); *Pancratz Co. v. Kloefkorn-Ballard Constr. Dev., Inc.*, 720 P.2d 906 (Wyo. 1986).

86. See, e.g., *Reuther v. Trustees of Trucking*, 575 F.2d 1074 (3d Cir. 1978) (claim arising before ERISA's enactment); *McHugh v. Teamsters Pension Trust Fund*, 638 F. Supp. 1036, 1048 (E.D. Pa. 1986) (same); *Hardy v. National Kinney*, 565 F. Supp. 1027, 1030 (N.D. Cal. 1983) (same); *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 478 F. Supp. 884, 887 (D. Minn.) (same), *aff'd.*, 611 F.2d 694 (8th Cir. 1979) (per curiam).

87. State laws will be used throughout this Note to mean either statutory or common law rules. As defined by ERISA, "state law" includes all laws, decisions, rules, regulations, or other state action having effect of law" ERISA § 514(C)(1), 29 U.S.C. § 1144(c)(1) (1988). For preemption cases treating common law causes of action under the 'state law' rubric of § 514, see,

lating to pensions. The facial expanse of ERISA's preemption provision, contained in section 514, immodestly "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"⁸⁸ Despite the Supreme Court's candid description of the preemption provision as "perhaps . . . not a model of legislative drafting,"⁸⁹ one unifying theme can be distilled from the Court's treatment of it: state laws of general application are preempted when their application has reference to or connection with an ERISA plan.⁹⁰ State unjust enrichment actions, in the context of mistaken contributions, exhibit the requisite connection to pension plans to be preempted.

1. Preemptive Language

In deciding whether ERISA preempts a state law cause of action, the Court determines whether Congress intended to supplant relevant state law. The Court looks to ERISA's explicit language as well as its structure and purpose.⁹¹ Examining first ERISA's statutory language, the sweep of section 514's "relate[s] to" formulation reaches broadly. The precise language chosen underscores the breadth of the provision; Congress rejected earlier versions of the preemption clause limited to the specific subject matters covered by ERISA.⁹² Congress also resisted suggested wording changes by the executive branch that would have made the preemption language much more specific and hence, narrow.⁹³ Congress gave the 'State law' preempted by ERISA an in-

e.g., *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990) (wrongful discharge); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (tort & contract); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (same).

88. ERISA § 514(a), 29 U.S.C. § 1144(a) (1988) (emphasis added).

89. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

90. See *infra* notes 97-106 and accompanying text.

91. See *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990); *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983).

92. Compare H.R. 2, 93d Cong., 2d Sess., § 514(a), 120 CONG. REC. 4717, 4742 (1974) (limiting preemption to areas expressly covered by bill) and S. 4, 93d Cong., 2d Sess., § 699(a), 120 CONG. REC. 4977, 5002 (1974) (preempting only those state laws dealing with subject matter of ERISA) with ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

For an explanation of the changes, see 120 CONG. REC. 29,942 (1974) (account of Sen. Javits) ("Both [original] House and Senate bills provided for preemption of State law, but . . . defined the perimeters of preemption in relation to the areas regulated by the bill."). As the Court pointed out in *Shaw v. Delta Airlines*, 463 U.S. 85, 98 (1983), the earlier, specific preemption provision was "rejected . . . in favor of the present language" indicating that the "section's preemptive scope was as broad as its language." See also *FMC Corp. v. Holliday*, 111 S. Ct. 403, 408 & n.3 (1990) (affixing significance to the rejection of more narrow phraseology).

93. See ADMINISTRATION RECOMMENDATIONS TO THE HOUSE AND SENATE CONFEREES ON H.R. 2 TO PROVIDE FOR PENSION REFORM, Apr. 1974, reprinted in 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 94th Cong., 2d Sess. 5047, 5145 (Comm. Print 1976). The recommended changes that were ultimately rejected were urged initially because the administration expressed concern that "[t]he preemption provisions under the House bill are extremely vague, while the Senate bill is too broad" *Id.* at 5146.

clusive definition, further signifying preference for federal law.⁹⁴ As the Court concluded early in its attempt to define ERISA's reach, Congress expressed its desire that the preemption language be liberally construed by its stated intention to "establish pension plan regulation as exclusively a federal concern."⁹⁵

Unquestionably, ERISA by its terms preempts state laws that directly involve and regulate employee pension funds.⁹⁶ In *Shaw v. Delta Airlines*,⁹⁷ however, the Court refused to confine the ambit of ERISA's preemption "to state laws specifically designed to affect employee benefit plans."⁹⁸ The Court reasoned that even a state law of general application "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."⁹⁹ Although *Shaw* dealt only with statutory law, the Court's subsequent treatment of common law causes of action has remained faithful to this expansive interpretation of ERISA's language.

For example, in *Pilot Life Insurance Co. v. Dedeaux*,¹⁰⁰ the Court held that state common law actions were preempted to the extent that they related to ERISA. The Court inquired whether the plaintiff's state law claim required a determination of issues of central concern to ERISA.¹⁰¹ Although state common law ordinarily governed tort and contract actions, the unanimous Court concluded that the claims "undoubtedly" were preempted as they were "based on alleged improper processing of a claim for benefits under an employee benefit plan. . . ."¹⁰² The Court viewed as salient the relation of the state law, as applied to the facts of a particular claim, to an ERISA-regulated transaction or relationship.¹⁰³

The Court's recent treatment of *Ingersoll-Rand Co. v. McClen-*

94. For the text of ERISA's definition of "state law," § 514(c)(1), 29 U.S.C. § 1144(c)(1) (1988), see *supra* note 87.

95. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981); see also Dept. of Labor Op. Letter No. 75-153 (Oct. 15, 1975) (ERISA's preemption of state law "essentially without precedent").

96. See, e.g., *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 829 (1988) (Georgia garnishment statute specifically directed at employee benefit plans); *Shaw v. Delta Airlines*, 463 U.S. 85, 97-100 (1983) (New York law prohibiting employers from structuring employee benefit plans in a discriminatory manner).

97. 463 U.S. 85 (1983).

98. 463 U.S. at 98.

99. 463 U.S. at 97 (footnote omitted).

100. 481 U.S. 41 (1987). The same day that it decided *Pilot Life*, the Court also held that state common law tort and contract actions for denial of benefits were not only preempted, but also automatically removable to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

101. The *Pilot Life* plaintiff, denied pension benefits, sued the plan on common law contract and tort theories. 481 U.S. at 43-47.

102. 481 U.S. at 48.

103. See 481 U.S. at 47-48.

*don*¹⁰⁴ further illustrates its willingness to permit ERISA to override state law. In *McClendon*, the Court considered whether ERISA preempted an employee's state common law claim for wrongful discharge. Reversing the Texas Supreme Court, a unanimous Court had "no difficulty in concluding that . . . a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to or paying benefits under the employee's pension fund—'relate[s] to' an ERISA-covered plan within the meaning of § 514(a)"¹⁰⁵ The cause of action referred to and was premised on the existence of a pension plan; ERISA therefore superseded it. "Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' an ERISA plan."¹⁰⁶

As these cases demonstrate, the Court employs a functional definition of 'relates to,' analyzing whether the state law as applied in a particular case makes ERISA, or an area of concern to ERISA, a substantive element of the claim.¹⁰⁷ State common law actions adjudicating claims involving an ERISA plan, transaction, or relationship typically meet this test.¹⁰⁸

These principles point to the conclusion that ERISA's preemption provision comprehends state unjust enrichment actions for mistaken contributions, because they implicate issues of primary importance to the entire ERISA scheme. First, although ostensibly brought under a state's general common law, the gravamen of the employer's complaint would necessarily make ERISA a substantive element of the

104. 111 S. Ct. 478 (1990).

105. 111 S. Ct. at 483.

106. 111 S. Ct. at 483.

107. See *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985), cert. denied, 474 U.S. 888 (1985):

Although *Authier's* claim is predicated technically upon the Michigan common law cause of action for discharge . . . as applied in this case, the action relates to an ERISA plan. . . . [H]e was terminated for fulfilling his obligations under ERISA. ERISA created the public policy element of the common law action. . . . [E]ven though the Michigan cause of action regulates ostensibly employment relationships and not pension plans, preemption is not precluded in this specific application.

757 F.2d at 800; see also *Lee v. E.I. Dupont de Nemours & Co.*, 894 F.2d 755, 756 (5th Cir. 1990) ("Pre-empted state law includes any cause of action that relates to an employee benefit plan, even if the action arises under a general state law that in and of itself has no impact on employee benefit plans."); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (same); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985) (preemption turns on whether challenged conduct is "part of the administration of an employee benefit plan").

108. See, e.g., *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1263 (10th Cir. 1988) (breach of contract and negligent misrepresentation regarding pension plan); *Shiffler v. Equitable Life Assurance Socy.*, 838 F.2d 78, 81-82 (3d Cir. 1988) (common law claim for denial of death benefits relates to benefit plan, "no matter how [the action was] characterized"); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 875 (8th Cir. 1987) (contract); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987) (state law causes of action for benefit denial); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1469-70 (11th Cir. 1986) (fraudulent failure to disclose retirement benefit information), cert. denied, 481 U.S. 1016 (1987); *Pane v. R.C.A. Corp.*, 667 F. Supp. 168, 172-73 (D.N.J. 1987) (breach of contract and infliction of emotional distress claims); *Justice v. Bankers Trust Co.*, 607 F. Supp. 527, 531 (N.D. Ala. 1985) (fraud and misrepresentation by fiduciary).

cause of action.¹⁰⁹ Second, any attempt by a participant, especially an employer, to reach pension monies strikes at the heart of what ERISA protects: the assets of the fund.¹¹⁰ Third, the terms of the employee benefit plan create the rights and obligations at issue in the lawsuit. Determination of whether the employer should receive a refund necessitates examination of the pension agreement.¹¹¹ Fourth, because common law remedies must be crafted in view of advancing statutory aims, unjust enrichment actions require ascertainment of ERISA's policy objectives, as well as assessment of how best to advance them.¹¹² Fifth, the decision whether to allow an employer to recover such funds will influence the relationship between the employer, employees, and administrator of the fund. Refused demands may generate resentment by employers; successful requests may lead employees to suspect employer motivations. Securing harmony among participants is at the core of ERISA.¹¹³ Finally, the return of mistakenly paid funds implicates the trustee's fiduciary responsibilities, since re-funding overpayments is the sole instance when trustees may transfer

109. See, e.g., *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 990 (4th Cir. 1990) (unable to "see how a different result could ensue from a claim of unjust enrichment" in light of *Pilot Life and Taylor*), *cert. denied*, 111 S. Ct. 512 (1990); *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 235 (6th Cir. 1986) ("clear that federal, and not state, law applies" to refund of overpayments), *cert. denied*, 479 U.S. 1007 (1986); *Chase v. Trustees of the W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 746 (9th Cir. 1985) (ERISA preempts any state claim for the restitution of contributions").

110. See *Pension Fund — Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 170 (D.N.J. 1990) ("If a plaintiff seeks recovery of pension fund monies, the claim 'relates to' the benefit plan, no matter how the claim is characterized."); *Simmons v. Prudential Ins. Co.*, 641 F. Supp. 675, 679 (D. Colo. 1986) ("It is difficult to imagine a situation arising out of a claim under an employee benefit plan invoking a state law which would fall outside of this definition [of 'relates to']"). *But cf.* *Lifetime Medical Nursing Serv. v. New England Health Care Employees Welfare Fund*, 730 F. Supp. 1192, 1196 (D.R.I. 1990) (should "only apply the preemptive powers of ERISA when a designated party brings suit" because "[p]reemption depends on the civil enforcement provision.").

111. *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 233-35 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986). Because the restitution claim "inevitably requires interpretation of the documents executed by the parties and the provisions made therein for payment and refund of contributions," such a claim "relates to" an ERISA plan, and therefore "federal, and not state, law applies" to such a claim. 794 F.2d at 234. See also *Kentucky Laborers Dist. Health Council v. Hope*, 861 F.2d 1003, 1005 (6th Cir. 1988) (common law fraud and restitution claims require interpretation of plan agreement and are preempted even when no interpretive dispute arises); *cf.* *Cefalu v. B.F. Goodrich*, 871 F.2d 1290, 1294 (5th Cir. 1989) (computation of damages requiring reference to ERISA plan); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986) (fraud claim requiring interpretation of fiduciary duties), *cert. denied*, 481 U.S. 1016 (1987).

112. *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 991 (4th Cir.), *cert. denied*, 111 S. Ct. 512 (1990).

113. See *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter.*, 793 F.2d 1456, 1468-70 (5th Cir. 1986) (more willing to preempt state law "if it affects relations among the principal ERISA entities — the employer, the plan, the plan fiduciaries, and the beneficiaries — than if it affects relations between one of these entities and an outside party . . ."), *cert. denied*, 479 U.S. 1034 (1987); *accord* *Pane v. RCA Corp.*, 667 F. Supp. 168, 173 (D.N.J.), *aff'd.*, 868 F.2d 631 (3d Cir. 1987).

fund assets to employers.¹¹⁴ Policing such transactions is clearly a matter of federal concern.¹¹⁵

2. Uniformity Demands Preemption

The purpose underlying ERISA's preemption provision buttresses the conclusion that the provision reaches state unjust enrichment actions for overpayment. Congress wanted to eliminate the possibility that the law governing pension funds would differ from state to state.¹¹⁶ For instance, in the floor debate, Senator Jacob Javits, a member of the Senate Committee on Labor and Public Welfare and one of ERISA's chief sponsors, expressed concern about "[m]ultiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme."¹¹⁷ The fact that single pension plans often covered employees in several states made it even more imperative to standardize pension obligations.¹¹⁸ In addition, the practical effects of a patchwork scheme on the nation's pension system argued for uniformity; as the bill's legislative history makes clear, Congress wanted to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."¹¹⁹

Most immediately, disparities in state laws pose the danger of less-

114. Mistaken contributions are the lone exception to the rule requiring fund assets to be used for the exclusive benefit of employees. See *supra* notes 10-12 and accompanying text.

115. See ERISA § 2, 29 U.S.C. § 1001(b) (1988) (declaration of policy to "establish[] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans"); see also *Wong v. Bacon*, 445 F. Supp. 1177, 1185-88 (N.D. Cal. 1977) (refunds implicate fiduciary duties).

116. The necessity of uniformity also lends support to the case for the creation of a body of federal common law under ERISA. See *infra* notes 168-75 and accompanying text.

117. 120 CONG. REC. 29,942 (1974). Compare the remarks of Senator Harrison Williams, Jr., the Chair of the Senate Committee on Labor and Public Welfare and the bill's other manager in the Senate:

[T]he substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. *This principle is intended to apply in its broadest sense* to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 CONG. REC. 29,933 (1974) (emphasis added); see also Kilberg & Heron, *The Preemption of State Law Under ERISA*, 1979 DUKE L. J. 383, 391 ("clear that Congress wished to protect plans subject to ERISA from the additional burden of varying and possibly conflicting applications of state law").

118. See ERISA § 2, 29 U.S.C. § 1001(a) (1988) (congressional findings of need for minimum national standards); see also S. REP. NO. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4871 ("Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform system of law . . ."); H.R. REP. NO. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4655.

119. H.R. REP. NO. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4650; see also S. REP. NO. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4865.

ened employee benefits. The Supreme Court recently held in *FMC Corp. v. Holliday*¹²⁰ that ERISA preempted a state law forbidding employee welfare benefit plans from exercising subrogation rights on a claimant's tort recovery. The Court worried that requiring "plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits."¹²¹ Either the costs of tailoring plans to the disparate laws of different states or the desire to eliminate classes of benefits subject to state requirements with which it was unwilling to comply might prompt the employer to reduce benefits.¹²² As an alternative to reducing benefits, employers might retard the rate of retirement plan formation.¹²³ Employers could likewise attempt to recoup costs immediately by reducing wages.¹²⁴ Such concerns have led the Court to conclude that a unitary, national system of pension regulation best coheres with ERISA's needs.¹²⁵

When employers have multistate operations or employees, uniformity would be defeated by differing state common law approaches to unjust enrichment.¹²⁶ Disuniformity would hold pension plans hostage to precisely the types of conflicting regulatory authority and uncertainty ERISA sought to avoid.¹²⁷ Refund policy discrepancies would force variations in the administrative and accounting practices

120. 111 S. Ct. 403 (1990).

121. *Holliday*, 111 S. Ct. at 408; see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits. . . .").

122. *Shaw v. Delta Airlines*, 463 U.S. 85, 105 n.25 (1983).

123. *Fort Halifax Packing Co.*, 482 U.S. at 11.

124. *Shaw*, 463 U.S. at 105 n.25.

125. See, e.g., *Holliday*, 111 S. Ct. at 409 (application of state subrogation laws frustrates "administrators' continuing obligation to calculate *uniform benefit levels nationwide*") (emphasis added); *Fort Halifax Packing Co.*, 482 U.S. at 11 ("Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a *single set of regulations*.") (emphasis added); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (Congress "meant to establish pension plan regulation as *exclusively a federal concern*.") (emphasis added).

As Representative John Dent, ERISA's House sponsor championed, "I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans." 120 CONG. REC. 29,197 (1974). See also Dept. of Labor Op. Letter No. 76-90 (July 14, 1976) (available in LEXIS, Labor library, ERISA file) [hereinafter Dept. of Labor Op. Letter] (pervasive federal interest in pension regulation).

126. See *Martin v. Hamil*, 608 F.2d 725, 729-30 (7th Cir. 1979) ("in order to provide for uniform regulation of employee benefit plans . . . ERISA preempts any state law permitting refund of [improperly paid] contributions") (footnotes omitted); cf. *Gilbert v. Burlington Indus.*, 765 F.2d 320, 327 (2d Cir. 1985) (state common law applied to employees in sixteen different states defeats "[t]he policy favoring national uniformity"), *affid.*, 477 U.S. 901 (1986); *Authier v. Ginsberg*, 757 F.2d 796, 802 (6th Cir. 1985) (recourse available to discharged fiduciaries should not depend on fortuitous state law interpretation of ERISA), *cert. denied*, 474 U.S. 888 (1985).

127. See, e.g., *Shaw v. Delta Airlines*, 463 U.S. 85 (1983) (New York employee pension anti-discrimination law preempted due to possible inconsistency with other states' law); *Alessi v.*

of multistate plans, leading to considerable inefficiencies.¹²⁸ Pension plans and, ultimately, pensioners, would bear the burden of cost and delay in protracted preemption¹²⁹ and choice of law¹³⁰ litigation. Finally, substantial temptation for opportunistic forum shopping would arise as multistate employers sought to recover overpayments in the most favorable jurisdictions.¹³¹ The threat of inconsistent or conflicting state rules regarding unjust enrichment suggests that state laws should be preempted.

ERISA cannot rely on state law for supplementation; the breadth of its preemption provision forecloses that possibility. Congress foresaw this problem and gave federal courts the ability to augment ERISA where appropriate. A congressional authorization of the power to create federal common law complements ERISA's invalidation of state laws.

B. *Delegated Lawmaking for ERISA*

Courts generally hesitate to supplement acts of Congress with common law, supposing that most legislative enactments warrant no further fine-tuning.¹³² In a few limited instances, however, courts develop legal rules in the common law tradition. Where Congress directs the courts, either explicitly or implicitly, to build upon the rules provided by a statutory framework, courts may develop substantive

Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981) (New Jersey statute that forbid certain benefit calculations permitted under federal law preempted by ERISA).

128. See *Fort Halifax Packing Co.*, 482 U.S. at 9:

An employer that makes a commitment systematically to pay certain benefits undertakes a host of [administrative] obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records The most efficient way to meet these responsibilities is to establish a uniform administrative scheme Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; . . . to process claims in a certain way in some States; . . . and to comply with certain fiduciary standards in some States but not in others.

129. See 120 CONG. REC. 29,942 (1974) (prediction of Sen. Javits) (anticipating "endless litigation over the validity of State action that might impinge on Federal regulation"); Dept. of Labor Op. Letter, *supra* note 125 (broad preemption language averts "litigation that would result from piecemeal preemption").

130. Cf. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 712-13 (1966) (White, J., dissenting) (concern, in LMRA context, over "which of several competing state statutes is to be applied and whether such application is reasonable when tested by the federal labor policy").

131. Cf. *Mason v. Continental Group, Inc.*, 474 U.S. 1087 (1986) (White, J., dissenting from the denial of certiorari) (differing administrative exhaustion requirements raise the "troubling effect of encouraging forum shopping" particularly where "the coverage of particular ERISA plans frequently extends to beneficiaries in more than one State — and, no doubt, in more than one judicial circuit").

132. See, e.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (no contribution right in Sherman Act cases); *Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77 (1981) (no common law right of contribution in title VII cases); *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) (no cause of action for abuse of statutory subpoena power).

law consistent with the statute's goals.¹³³ ERISA provides direct and indirect evidence that Congress envisioned such lawmaking power for the federal courts in the area of pensions.

The clearest case for the evolution of federal common law arises where Congress explicitly calls upon the courts to fulfill this role.¹³⁴ The paradigmatic example of such wholesale assignment of the legislative role to the judiciary is the Labor Management Relations Act (LMRA).¹³⁵ In *Textile Workers Union v. Lincoln Mills*,¹³⁶ the Supreme Court held that the jurisdictional grant contained in the statute did more than confer upon the district courts the power to hear cases arising under the Act. Rather, the legislation expressed an intention on the part of Congress that the federal courts develop substantive law to supplement the statutory framework.¹³⁷ Commentators regard this "wholesale" creation of substantive common law as the broadest statement of the courts' ability to create such rules.¹³⁸

ERISA's legislative history evinces a similar congressional desire to vest the courts with lawmaking authority. Numerous references to the LMRA model punctuated ERISA's passage through Congress. In the debate over ERISA, Senator Harrison Williams, Jr., one of ERISA's sponsors, explicitly invoked the LMRA doctrine as the appropriate model for ERISA: "It is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act."¹³⁹ Senator Javits, ERISA's other principal sponsor,

133. See generally 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4514 (1984) [hereinafter WRIGHT, MILLER & COOPER].

134. See E. CHEREMINSKY, FEDERAL JURISDICTION § 6.32 (1989); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40 (1985) (express delegation of lawmaking function to courts "consistent with internal norm of legitimacy").

135. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (1988)).

136. 353 U.S. 448 (1957).

137. See 353 U.S. at 456-57:

[T]he substantive law to apply in suits under section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law.

(citations omitted).

138. See 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 133, § 4514 (1984). Another area where Congress has requested the Courts to develop a body of federal law is the antitrust sphere. See, e.g., *National Socy. of Professional Engrs. v. United States*, 435 U.S. 679, 688 (1978) (Sherman Act calls for common law supplementation and interpretation).

A similarly uninhibited license, although of different origin, derives from article III's creation of a federal admiralty jurisdiction. See U.S. CONST. art. III, § 1; *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (recognition of cause of action for wrongful death vindicates constitutionally based principle of uniform, national law of admiralty).

139. 120 CONG. REC. 29,933 (1974).

echoed similar sentiments: "It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."¹⁴⁰ The committees authoring and recommending the bill's passage shared a similar understanding.¹⁴¹

Many courts have considered these definitive references to the LMRA as a sufficient signal to develop federal common law.¹⁴² Courts have developed, for instance, common law remedies for employers,¹⁴³ employees,¹⁴⁴ and pension funds,¹⁴⁵ where necessary to effectuate ERISA's purposes.

Substantial indirect evidence supports this conclusion. ERISA frequently uses common law terms in defining its commands. For example, the use of the word "trust"¹⁴⁶ and the phrase "mistake of fact or law"¹⁴⁷ incorporate common law concepts into ERISA. As Professor Merrill points out, when "Congress has, in effect, federalized a body of common law principles, then it would seem that in all probability it intended that federal courts would continue to develop that body of law in the common law tradition."¹⁴⁸ Congressional election of language embodying common law precepts indicates "that the enacting body has delegated common law powers to federal courts."¹⁴⁹ In light of the express and implied congressional authorization of lawmaking power, courts have full license to develop a federal common law of pensions under ERISA.

140. 120 CONG. REC. 29,942 (1974) (emphasis added).

141. See, e.g., H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5107 (Joint Explanatory Statement of the Committee of Conference).

142. See, e.g., *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-56 (1987); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 877 (8th Cir. 1987) ("Congress intended that a body of federal substantive law be developed to fill in the gaps left by ERISA's express provisions"); *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 234-35 (6th Cir.), cert. denied, 479 U.S. 1007 (1986); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) (ERISA contemplates common lawmaking identical to LMRA); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

143. *Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters & Employers Pension Fund*, 847 F.2d 113, 122 (3d Cir. 1988) (federal common law permits employer's claim for fraudulent assessment of withdrawal liability), cert. denied, 488 U.S. 1041 (1988).

144. See, e.g., *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237-39 (3d Cir. 1980) (federal common law permits employees to recover contractually obligated benefits), cert. denied, 454 U.S. 1142 (1982).

145. See, e.g., *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 157 (3d Cir. 1985) (federal common law permits suits by one fund against another).

146. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (inclusion of trust concept supports "federal common law of rights and obligations under ERISA-regulated plans") (citation omitted).

147. See *infra* note 190 and accompanying text.

148. Merrill, *supra* note 134, at 44.

149. *Id.*

C. *Evading Common Lawmaking*

Despite clear congressional intention that a federal common law of pensions evolve, some courts, while grudgingly acknowledging the obligation to create common law, have nonetheless done so in a cramped and narrow fashion.¹⁵⁰ The hesitance to fashion common law misreads Congress' intent and misapplies common law principles. These refusals misapprehend the distinction between implication of statutory remedies and judicial creation of common law ones. The determination that Congress has not directly reposit relief for employers in ERISA¹⁵¹ does not foreclose the possibility of relief altogether.¹⁵² As the Third Circuit observed in *Plucinski v. I.A.M. National Pension Fund*,

[W]e do not believe that by enacting section 403 of ERISA, which simply permits funds to refund mistaken contributions, Congress intended to foreclose the courts from investing employers with a remedy. The existence of section 403 shows that Congress reached a consensus that pension funds should be allowed to return such contributions; but it does not demonstrate any consensus by Congress against judicial recognition of a common law action allowing employers to sue for equitable restitution.¹⁵³

Courts may nonetheless create common law relief for employers because the relevant inquiries for ascertaining the existence of statutory and common law remedies differ.¹⁵⁴ Proof of explicit legislative approval of a particular remedy is not demanded where Congress dele-

150. See, e.g., *National Benefit Admin. v. Mississippi Methodist Hosp. & Rehabilitation Center*, 748 F. Supp. 459, 462 (S.D. Miss. 1990) ("While Congress did intend that the courts develop federal common law to be applied in ERISA cases . . . Congress did not authorize the courts to develop or allow *causes of action or remedies* not expressly provided for in § 1132 . . . Either plaintiff's ERISA claim arises under the express provisions of the Act, or it does not exist.") (citations omitted); *Florida W. Coast Operating Engrs. Local 925 Welfare Fund v. Sunbelt Sales & Rentals*, 732 F. Supp. 1135, 1145 (M.D. Fla. 1990); *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1301 (E.D. La. 1989), *affd.*, 914 F.2d 83 (5th Cir. 1990).

151. See *supra* Part I.

152. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969) (courts may fashion relief to effectuate vindication of statutory rights, even where statute silent as to remedy).

153. 875 F.2d 1052, 1058 (3d Cir. 1989). As one lower court commented, "in saying that ERISA 'does not prohibit' a refund . . . Congress implicitly left open the possibility that some other law might compel [one]. As we have concluded that Congress did not . . . create a [statutory] right of action . . . this can only have been a common law equitable action." *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743, 751 (N.D. Ill. 1988); *accord* *Central States, S.E. & S.W. Areas Pension Fund v. Houston Pipe Line Co.*, 713 F. Supp. 1527, 1534 (N.D. Ill. 1989) (lack of implied remedy does not close door on equitable common law relief); see also *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 951 (D. Del. 1985) ("[T]he result of the *Cort v. Ash* analysis . . . was not that Congress intended to forbid this cause of action [unjust enrichment], but only that there is insufficient evidence that Congress intended to provide a remedy under § 1103(c)(2)(A)(ii)."), *modified*, 850 F.2d 1028 (3d Cir. 1988).

154. Recent Supreme Court opinions treat the questions discretely. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 4 (1981); *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 633 (1981); *Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77, 79 (1981).

gates to the courts the responsibility of creating substantive common law.¹⁵⁵ Courts should not ask whether Congress specifically intended the proposed remedy, but instead should determine whether granting relief furthers the purposes of the statutory scheme.¹⁵⁶ By confusing the two very separate analytic inquiries, those courts hesitating to create common law have abridged the obligation imposed upon them by ERISA.

A related deficiency in the reasoning of courts refusing to graft common law onto ERISA stems from the ascription of significance to its comprehensive regulatory structure. Some courts will not fashion common law remedies under ERISA, reasoning that courts should not upset the balances struck in federal statutes.¹⁵⁷ For instance, the Second Circuit in *Amato v. Western Union International*¹⁵⁸ displayed extreme deference to the explicit statutory framework in deciding whether to permit an action for unjust enrichment brought by employees against an employer. While acknowledging that “[i]n appropriate circumstances, courts may develop a federal common law under ERISA,”¹⁵⁹ the court nonetheless concluded that a common law remedy was inappropriate:

“[W]here Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, federal courts will not lightly create additional rights under the rubric of federal common law.” Such is the case with the ERISA provisions before us here, which are “comprehensive and reticulated.” . . . [W]e find no need in the circumstances of this case to supplement these specific statutory sections with an ERISA common law of unjust enrichment.¹⁶⁰

The internal logic of this reasoning is not pertinent in the context of the ERISA provisions involved here. Congress often legislates broadly, leaving the courts the task of filling in the interstices of a statute. As Professor Chemerinsky notes, “[t]his type of federal common law is easily justified. In adopting statutes, Congress cannot foresee every possibility. Inevitably, statutes have gaps and the application of statutes to specific situations requires the development of rules not created within the laws.”¹⁶¹ ERISA was not intended to

155. See *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989).

156. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

157. See, e.g., *Dime Coal Co. v. Combs*, 796 F.2d 394, 399 n.7 (11th Cir. 1986); *Techmeier ex rel. Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 390-91 (7th Cir.), cert. denied, 479 U.S. 1008 (1986).

158. 773 F.2d 1402 (2d Cir. 1985).

159. 773 F.2d at 1419.

160. 773 F.2d at 1419 (citations omitted).

161. E. CHEMERINSKY, *supra* note 134, § 6.3.1 (1989); see also *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (“Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.”); L. TRIBE, *supra* note 50, at § 3-23 (recognizing “the development of judicial rules

address every issue that might arise, relying instead on courts to fashion new rules as necessary.¹⁶² Furthermore, the mistaken contribution section does not contain a complex or interrelated web of remedies; indeed, the interpretation dispute centers on how best to interpret its lack of remedial mechanism.¹⁶³ The legislative history is devoid of suggestion that the refund section is the product of any compromise or debate.¹⁶⁴

Timidity in creating federal common law for ERISA also ignores the relationship between the broad preemptive effect of ERISA¹⁶⁵ and the need for federal decision rules. When a federal statute so pervasively governs an area of the law, federal common law must be relied upon to determine legal relations.¹⁶⁶ Because ERISA preempts state law in areas even where it substitutes no explicit rule of its own,¹⁶⁷ federal common law must fill the resultant gaps in the statute lest a void be created. The reach of the preemption clause compels the development of a common law of pensions.

to cover gaps in the existing framework of federal constitutional and statutory law"); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957) ("effective constitutionalism requires [of] federal courts . . . 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress").

162. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) ("[C]ongress realized that the bare terms . . . would not be sufficient . . . [and] empowered the courts to develop . . . a body of federal common law governing employee benefit plans. . . . First, it supplements the statutory scheme interstitially. Second and more generally, it serves to ramify and develop the standards that the statute sets out in only general terms.") (citations omitted); see also *Thornton v. Evans*, 692 F.2d 1064, 1079 (7th Cir. 1983):

ERISA is a comprehensive statute intended by Congress to federalize the law relating to employee insurance and benefit plans As with many other like statutes, Congress obviously did not expressly address all the issues that might arise. Therefore, we ought, where unanticipated problems are presented, to develop substantive legal principles that accommodate the purposes of the statute.

(citations omitted).

163. See *Award Serv. v. Northern Cal. Retail Clerks Union*, 774 F.2d 1391 (9th Cir. 1985) (no remedial ecology to refund provisions), *cert. denied*, 474 U.S. 1081 (1986); *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743, 750-51 (N.D. Ill. 1988) (ERISA not so comprehensive as to "actually determine[] an employer's right to restitution"); see also *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) (unjust enrichment action "will fill in the interstices of ERISA and further . . . [its] purposes"); *Airco Ind. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 951 (D. Del. 1985) (equitable unjust enrichment action necessary to fill in interstices of ERISA framework), *modified*, 850 F.2d 1028 (3d Cir. 1988).

164. *Cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 818-19 (1980) ("[I]n light of the tempestuous legislative proceedings that produced [title VII] . . . the ultimate product reflects other . . . purposes that some members of Congress sought to achieve. The present language was clearly the result of a compromise.").

165. See *supra* notes 85-131 and accompanying text.

166. See *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (legal relations must be determined by policy and content of federal law where area so dominated by sweep of federal statute).

167. See *White Farm Equip. Co. v. White Motor Corp.*, 788 F.2d 1186, 1191 (6th Cir. 1986).

D. Common Law Content: State or Federal?

In support of the preemption of state laws, this Note has advanced a range of considerations implying a need for consistent national pension regulation.¹⁶⁸ Those arguments also urge the establishment of a body of uniform federal rules.¹⁶⁹ The decision to formulate a uniform rule, rather than adopting state rules for federal purposes, must reflect the federal substantive need for uniformity.¹⁷⁰ Rather than absorbing state law as the appropriate federal common law,¹⁷¹ ERISA demands remedies appropriate to its role as the sole federal statement of pension policy.

The LMRA model, from which ERISA derives,¹⁷² informs the decision whether to use state or federal rules. The LMRA required predictability in the negotiation of interstate labor contracts; thus, uniform federal rules comprise its common law.¹⁷³ ERISA also requires predictability because the uncertainty attendant upon multiple and conflicting regimes of law would unduly complicate decisionmaking and planning for pension plans.¹⁷⁴ The need for uniformity has led many courts to discard state decision rules, adopting instead uniform federal pension standards.¹⁷⁵

Thus Congress left to the courts the task of creating federal com-

168. See *supra* notes 116-31 and accompanying text.

169. See P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 895-96 (3d ed. 1988) (interstitial common lawmaking "shades into — and is of necessity often indistinguishable from — the pervasive question of the extent to which federal regulation displaces or preempts pre-existing state law"); WRIGHT, MILLER & COOPER, *supra* note 133, § 4514 (declaring that "many of the factors that are relevant to choosing between state law and an independent federal standard as a matter of federal common law also are relevant to deciding whether state law has been preempted by a federal statute").

170. The need for a uniform regime of law in an area has historically spurred the evolution of federal common law. See, e.g., *Moragne v. States Marine Lines*, 398 U.S. 375, 401 (1970) (admiralty); *International Assn. of Machinists v. Central Airlines*, 372 U.S. 682, 691-92 (1963) (Railway Labor Act). Compare *Mishkin*, *supra* note 161, at 813 (arguing that too often demands for uniform rules mask "implicit judgment[s] about the relative value of federalism" rather than an identifiable substantive need for predictability).

171. Federal common law may absorb state substantive law as the appropriate rule of decision, even though federal law technically applies. See, e.g., *United States v. Yazell*, 382 U.S. 341 (1966) (state substantive law absorbed where no identifiable federal interest present); *DeSylva v. Ballentine*, 351 U.S. 570 (1956) (more convenient to adopt "ready-made body of state law to define the word 'children' " in federal statute); *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950) (congressional intent to incorporate state law).

172. See *supra* notes 139-45 and accompanying text.

173. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("The interests of interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation."); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-05 (1962).

174. See *supra* notes 116-31 (importance of uniformity in securing benefit levels).

175. See, e.g., *Provident Life & Accident. Ins. Co. v. Waller*, 906 F.2d 985, 990 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 512 (1990); *White Farm Equip. Co. v. White Motor Corp.*, 788 F.2d 1186, 1191 (6th Cir. 1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985).

mon law. Entirely separate is the question of which common law remedies are appropriate. Although many of the factors relevant to the need for common law guide the shaping of common law relief, the formulation of appropriate common law rules requires a full and searching inquiry into ERISA's purposes and aims. Part III identifies ERISA's various policy objectives and suggests a common law remedy that optimizes their advancement.

III. FURTHERING ERISA'S AIMS BY PREVENTING UNJUST ENRICHMENT

General principles of federal common law, as well as the explicit and implicit purposes of the statute, should inform common lawmaking under ERISA.¹⁷⁶ When fashioning common law remedies, courts should examine ERISA's broad purposes rather than focusing narrowly on isolated provisions.¹⁷⁷ In its broadest formulation, ERISA seeks to maximize retirement security for individuals. It advances that general goal by increasing the number of pension plans and the number of employees covered by those plans, and by guaranteeing a stable level of benefits to participants.¹⁷⁸ This Part argues that ERISA's twin strategies of maximal employer participation and maximal protection of fund assets can best be secured by recognizing a federal common law action for unjust enrichment.

A. *Maximizing Pension Participation*

Undoubtedly, ERISA's *raison d'être* was the protection of employee pension rights. But Congress also recognized that an absolute preference for protecting employees, at the expense of employers, was not feasible. In a system of voluntary pension plan participation, ERISA's drafters acknowledged that draconian pension regulations could discourage employers from participating. Ensuring that employers' costs do not exceed the anticipated benefits derived from offering retirement benefits best furthers the congressional goal of maximal participation. Contributions paid by mistake represent needless costs

176. *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir. 1990) (en banc) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits. In making such rules, we must of course look to the statute itself for guidance . . .") (citations omitted), *cert. denied*, 111 S. Ct. 67 (1990); *U.S. Steel Mining Co. v. District 17, United Mill Workers*, 897 F.2d 149, 153, (4th Cir. 1990) (in crafting common law, court is "constrained to fashion only those remedies that are appropriate and necessary to effectuate the purposes of ERISA"); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (common law must be consistent with ERISA's regulatory scheme).

177. See *U.S. Steel Mining Co.*, 897 F.2d at 153 (necessary to read specific sections of ERISA "in the broader context of the statute and not in isolation").

178. ERISA's stated "objective is to increase the number of individuals participating in employer-financed retirement plans [and] to make sure to the greatest extent possible that those who do participate in such plans actually receive benefits . . ." S. REP. NO. 383, 93d Cong., 2d Sess. 10, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4898.

that discourage the maintenance and growth of private pensions. Permitting employers to recapture erroneous payments eliminates these disincentives to plan growth.

1. *Encouraging Employer Participation*

ERISA's legislative history records an unmistakable congressional intention to expand the scope and quality of private pension coverage.¹⁷⁹ One Senate report justified ERISA by predicting that "[t]he enactment of progressive and effective pension legislation" would "restore credibility and faith in the private pension plans . . . and this should serve to encourage . . . efforts by management and industry to expand pension plan coverage and to improve benefits for workers."¹⁸⁰ In addition, indirect evidence emerges from the debates surrounding enactment of particular regulatory standards. The burdens placed on employers by additional regulations received careful attention, as Congress was "constrained to recognize the *voluntary* nature of private retirement plans."¹⁸¹ Because employers need not sponsor pension plans,¹⁸² ERISA's costs to employers required full consideration:

[T]he cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels [U]nduly large increases in costs could impede the growth and improvement of the private retirement system. . . . [T]he committee has sought to . . . strike a balance between providing meaningful reform and keeping costs within reasonable limits.¹⁸³

179. See H.R. REP. NO. 807, 93d Cong., 2d Sess. 15, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4682 ("One of the major objectives of the new legislation is to extend coverage under retirement plans more widely."); H.R. REP. NO. 533, 93d Cong., 2d Sess. 1-2, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4640 ("In broad outline, the bill is designed to . . . promote a renewed expansion of private retirement plans and increase the number of participants receiving retirement benefits."); 126 CONG. REC. 20,176 (1980) (statement of Sen. Williams) ("We passed ERISA in order to encourage the growth and maintenance of private pension plans."); 120 CONG. REC. 29,198 (1974) (statement of Rep. Ullman) (all requirements "carefully designed to provide adequate protection and, at the same time, provide a favorable setting for the growth and development of private pension plans"); 120 CONG. REC. 29,211 (1974) (comment of Rep. Rostenkowski) ("committee and conferees were necessarily cognizant of the need to encourage the continued existence of these [private pension] plans").

180. S. REP. NO. 127, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4849.

181. H.R. REP. NO. 533, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639 (emphasis added); see also S. REP. NO. 383, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890 (Although legislation "encourages provision for the retirement needs of many millions of individuals," it also "recognized that private retirement plans are voluntary on the part of the employer."); 120 CONG. REC. 29,211 (1974) (observation of Rep. Rostenkowski) ("necessary to remember that . . . pension plans are voluntarily set up by employers as an inducement to attract employees").

182. See, e.g., ERISA § 4, 29 U.S.C. § 1003(a) (1988) ("this subchapter shall apply to any employee benefit plan *if is established or maintained*") (emphasis added).

183. H.R. REP. NO. 807, 93d Cong., 2d Sess. 14, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4682; see also S. REP. NO. 383, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4904; S. REP. NO. 533, 93d Cong., 2d Sess., reprinted in

The benefits of each additional requirement were carefully weighed against the disincentives to plan formation created by them, to ensure the enactment of only net beneficial reforms. As one committee report concluded, "[i]f employers respond to more comprehensive coverage . . . by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions"¹⁸⁴

The passage of the 1980 amendments to ERISA further demonstrated the core objective of maximizing participation. Many of ERISA's original provisions retarded plan growth and encouraged employers to withdraw from pension plans.¹⁸⁵ The remedial Multiemployer Pension Plan Amendments Act (MPPAA)¹⁸⁶ was designed to ameliorate these disincentives.¹⁸⁷ Furthermore, inducements to new plan creation were established.¹⁸⁸ The 1980 changes also explicitly re-

1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4643; 120 CONG. REC. 4278 (1974) (statement of Rep. Perkins) ("Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result.").

For example, the committee resisted proposals that gave employees *complete* vesting protection since "it is generally recognized that such a requirement for immediate and full vesting would not be feasible because it would involve such substantial additional costs for the financing of pension plans that it would tend to impede the adoption of new plans and the liberalization of existing ones." S. REP. NO. 383, 93d Cong., 2d Sess. 19, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4904.

184. S. REP. NO. 383, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4904; *see also* 120 CONG. REC. 29,198 (1974) (statement of Rep. Ullman):

It is axiomatic . . . that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed. For this reason, we have been extremely careful to keep the additional costs very moderate.

This concern over sub-optimal regulation also resurfaced during the debates over the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, (amending ERISA). *See, e.g.*, 126 CONG. REC. 20,177 (1980) (observation of Sen. Williams) (necessity of phasing in new requirements); 126 CONG. REC. 20,181 (1980) (concern of Sen. Dole) (overburdening employers leads to termination).

185. *See* H.R. REP. NO. 869, 96th Cong., 2d Sess., part I, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2928 (then current rules encouraged withdrawals and penalized remaining employers); 126 CONG. REC. 20,176 (1980) (remarks of Sen. Williams) (due to lack of penalties for and inequitable distribution of costs of withdrawal, "[t]he present system encourages employers to abandon a weak plan at the first sign the industry is in trouble").

186. Pub. L. No. 96-364, 94 Stat. 1208 (1980).

187. *See* 126 CONG. REC. 20,176-77 (1980) (statement by Sen. Williams) ("In order to carry out the policy of . . . encouraging the growth and maintenance of multiemployer plans," the bill makes changes in current law "to remove the incentives for employers to withdraw . . ."); 126 CONG. REC. 20,178 (1980) (statement of Sen. Javits) ("Two basic purposes of the bill are to protect participants and beneficiaries . . . and to eliminate problems that impede the maintenance and growth of such plans."); *see also* Pub. L. No. 96-364, § 3 (1980) (codified at 29 U.S.C. § 1001a(c)(2) (1988)) (policy of act "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans"); H.R. REP. NO. 869, 96th Cong., 2d Sess., pt. I, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2919, 2933 (discussing remedial rationale for MPPAA).

188. For instance, the so-called "free look provision" encouraged employers to start new pension plans by providing them with a grace period, within which they incurred no withdrawal

affirmed ERISA's commitment to the expansion of the private pension system.¹⁸⁹

The MPPAA also amended the mistaken contribution section itself in one noteworthy respect. It broadened the mistake of fact provision to include mistakes of law for multiemployer pension funds, and eliminated harsh time limitations on refunds.¹⁹⁰ The Joint Committee statement explained that the liberalization responded to concern that the prior refund rule was "too narrow,"¹⁹¹ suggesting that the changes deliberately made refunds more accessible.¹⁹²

Thus Congress had two goals: maximum retirement protection for pensioners and maximum opportunities for pension plan growth. Congress evidently understood that these aims were in tension to a certain extent. The legislative history of ERISA chronicles an effort to optimize the goals served by these regulations. The creation of a federal common law of pensions must proceed against the backdrop of this legislative purpose of increasing participation.¹⁹³

2. Paths to Employer-Sponsored Pension Plan Formation

The legislative history provides little conclusive evidence whether Congress intended the mistaken contribution section to compel refunds.¹⁹⁴ The language of section 403(c)(2)(A) on its face appears entirely permissive, employing language such as "shall not prohibit."¹⁹⁵ The Department of Labor, which is charged with enforcing and inter-

liability for termination. See STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., S. 1076, THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980: SUMMARY AND ANALYSIS OF CONSIDERATION 17 (Comm. Print 1980) [hereinafter S. 1076: SUMMARY AND ANALYSIS OF CONSIDERATION].

189. See H.R. REP. NO. 869, 96th Cong., 2d Sess., pt. I, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2933 ("The basic policy of the Act is that the retirement income security of multiemployer plan participants is best assured by fostering the growth and continuance of multiemployer plans."). Similar changes were enacted in 1986. Among other things, they too restated ERISA's commitment to private pensions. See Pub. L. No. 99-272, 100 Stat. 238, § 11002 (1986) (codified at 29 U.S.C. § 1001b(c)(2) (1988)) (policy of Act "to encourage the maintenance and growth of single-employer defined benefit pension plans").

190. Pub. L. No. 96-364, § 410(a), 94 Stat. 1208, 1308 (1980).

191. JOINT EXPLANATION OF S. 1076: MULTIEMPLOYER PENSION PLAN AMENDMENT ACT OF 1980, *reproduced at* 126 CONG. REC. 20,189, 20,208 (1980).

192. See, e.g., *Chase v. Trustees of the W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 750 n.5 (9th Cir. 1985) ("The mistake of law provision was added [to] . . . encourage more employer and employee pension plan participation," consistent "with MPPAA's intent to foster plan continuation and growth."); *accord Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 814 F.2d 79, 81 (2d Cir. 1987); *Award Serv., Inc. v. Northern Cal. Retail Clerks Unions*, 763 F.2d 1066, 1068 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986).

193. *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289 n.13 (5th Cir. 1988); *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1131 (E.D. Penn. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978).

194. See, e.g., S. 1076: SUMMARY AND ANALYSIS OF CONSIDERATION, *supra* note 188, at 43 ("contributions must be returned, *if at all*, within six months") (emphasis added).

195. ERISA § 403(c)(2)(A), 29 U.S.C. § 1103(c)(2)(A) (1988).

preting ERISA, has declined several opportunities to clarify whether return of overpayments is mandatory.¹⁹⁶ Some courts have viewed section 403(c)(2)(A) of the Act as entirely discretionary, subject to the views of the administrator of the plan;¹⁹⁷ other courts have viewed the language as indicating a duty to return the funds when the equities favor it.¹⁹⁸

Those courts holding that the language of this section is merely permissive reason that it protects administrators from breaching their fiduciary duties should they elect to refund contributions to employers. Although those courts would permit a trustee to disgorge overpaid funds as a matter of discretion, they would not compel the trustee to grant a refund. Treating the refund section as purely permissive, however, raises serious problems. Most notably, this approach provides no incentive for plan administrators to return overcontributions.¹⁹⁹ Justifiable reasons, such as fear of legal liability, may inhibit administrators from responding to refund requests.²⁰⁰ Less honorable trustee agendas, such as fraudulent assessment of contribution liability, would also be protected under a purely discretionary system.²⁰¹ Finding that a federal common law remedy was required to effectuate congressional purpose, the First Circuit noted the impotence of a purely permissive refund system: "Since there would be no incentive to return mistaken payments voluntarily, the permissive refund mechanism . . . would be like a permanently-shut window: decorative, but of no assistance in letting in a breath of fresh air. We will not lightly assume that Congress intended to enact a self-nullificatory refund provision."²⁰²

Not all courts have been persuaded by the intuitive appeal of this

196. See, e.g., Dept. of Labor Op. Letter, No. 81-30A (Mar. 16, 1981) (available in LEXIS, Labor library, ERISA file). Responding to a direct inquiry whether mistaken payments must be returned to employers, the Department merely noted that ERISA's exclusive benefit rule "*recognizes an exception . . . in the case of certain employer contributions,*" and then proceeded to quote verbatim the language of § 1103(c)(2)(A), without ever taking a position on whether such a refund was mandatory. *Id.* (emphasis added).

197. See, e.g., *Dime Coal Co. v. Combs*, 796 F.2d 394, 399 (11th Cir. 1986); *Hardy v. National Kinney*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983).

198. See, e.g., *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989).

199. See *Ethridge v. Masonry Contractors*, 536 F. Supp. 365, 368 (N.D. Ga. 1982); *E.M. Trucks, Inc. v. Central States, S.E. & S.W. Areas Pension Fund*, 517 F. Supp. 1122, 1124 (D. Minn. 1981).

200. *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp 743, 750 (N.D. Ill. 1988).

201. See, e.g., *Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters & Employers Pension Fund*, 847 F.2d 113, 120-22 (3d Cir. 1988) (trustees' fraudulent assessment of \$589,239 in withdrawal liability); see also *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) (worrying that, if employers lack judicial remedy, "a trustee could extort extra money from the employer by force or fraud").

202. *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989).

argument. The Eleventh Circuit, in *Dime Coal Co. v. Combs*,²⁰³ noted in passing that because both employers and employees must be equally represented on the board of trustees of an employee benefit fund,²⁰⁴ arbitrary or capricious withholding of mistaken funds is deterred.²⁰⁵ Such reliance on equal representation assumes confluent interests among all of the employers on the board, a dubious assumption. Even if their interests did coincide, equal representation can result in deadlock and inaction.²⁰⁶

The better reasoned approach is to view this section as requiring a refund only where equitable principles favor it.²⁰⁷ Failure to construe broadly the refund provision creates precisely the type of employer disincentives that Congress sought to avoid.²⁰⁸ The First Circuit in *Kwatcher v. Massachusetts Service Employees Pension Fund* explained how a niggardly construction of the refund provision would deter participation:

We are . . . loathe to think that Congress meant either to craft a heads-I-win, tails-you-lose matrix, or to institutionalize a one-sided windfall permitting employee-participants to sponge off an employer's good-faith bevvies. In the long run . . . refusing to refund . . . excess contributions could frustrate ERISA's goal of expanding pension plan coverage. Manifest inequity is one effective way of discouraging employers from sponsoring ERISA-qualified plans at all.²⁰⁹

Not only might a cramped reading of the refund provision drive employers to withdraw from pension plans, it might, for the same reasons, slow the pace of their growth.²¹⁰

If courts read the mistaken contribution section too restrictively, employers may also reduce the level of benefits afforded to partici-

203. 796 F.2d 394 (11th Cir. 1986).

204. See S. 1076: SUMMARY OF ANALYSIS AND CONSIDERATION, *supra* note 188, at 8.

205. *Dime Coal*, 796 F.2d at 399 n.6 (1986).

206. *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743, 750 (N.D. Ill. 1988).

207. See, e.g., *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 950-51 (D. Del. 1985), *modified*, 850 F.2d 1028 (3d Cir. 1988); *Teamsters Local 639-Employers Health Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865, 867-68 (4th Cir. 1981). For a full discussion of the equitable considerations attending the return of such funds, see *infra* Part IV.

208. See *supra* notes 179-93 and accompanying text.

209. 879 F.2d 957, 966 (1st Cir. 1989); *accord* *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 512 (1990); *Chase v. Trustees of the W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 750 n.5 (9th Cir. 1985); *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743, 751 (N.D. Ill. 1988); *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 950 (D. Del. 1985), *modified*, 850 F.2d 1028 (3d Cir. 1988).

210. See *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) ("It must be remembered that it is optional for an employer to establish an ERISA qualifying pension plan. The ERISA statute . . . encourage[s] broad participation. If we put the burden of mistaken payments wholly on employers, we may discourage some employers from operating ERISA qualifying plans.") (citation omitted).

pants. Although ERISA enacts stringent procedural requirements, private parties decide how generous the benefits of a particular plan will be.²¹¹ Employers who cannot recapture mistaken contributions could pass on the higher costs to pensioners.²¹² Little of ERISA's purpose would be secured if employers responded to the increased protection afforded workers with correspondingly reduced benefit levels.²¹³

Concerns about the health of the private pension sector are particularly apposite today. Despite great strides made in extending pension participation, nearly half of the nation's full-time private wage and salary workers do not participate in an employer-sponsored plan.²¹⁴ Private pensions still control a massive stake in the retirement income equation,²¹⁵ but current trends portend danger. Employers have curtailed dramatically the rate of private plan formation.²¹⁶ Not one multiemployer pension plan has been created in the United States since 1980;²¹⁷ thousands of plans were terminated during the past decade.²¹⁸

Although the disputed amounts may be quite large, they are often modest sums.²¹⁹ The fact that these mistakes are small in relative terms, however, is not a basis for reassurance. The greatest gaps in private pension coverage exist in the small business sector and among part-time employees.²²⁰ Small companies, precisely the sector that the

211. *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits."); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-13 (1981) (benefits determination left to private parties, not government).

212. See *An Employer's Implied Cause of Action*, *supra* note 35, at 245 (costs passed on in form of lower benefits).

213. Offsetting reductions in benefits as a result of rigorous regulation was another frequently voiced concern throughout the bill's legislative history. See S. REP. NO. 383, 93d Cong., 1st Sess. 18-19, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS, 4890, 4904; H.R. REP. NO. 807, 93d Cong., 2d Sess. 14-15, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4682.

214. *Portability of Pension Plan Benefits and Investment of Pension Plan Assets: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 2d Sess. 54 (1988) [hereinafter *Portability of Pension Plan Benefits Hearings*] (testimony of David Walker, Assistant Secretary of Labor). Since 1979, the percentage of workers covered by pension plans has actually fallen, from 55.7% in 1979 to approximately 49% today. Stern, *Beware: Pensions Are an Endangered Species*, L.A. Times, July 30, 1990, at D5, col. 3.

215. See *supra* notes 1-7 and accompanying text.

216. See Stern, *supra* note 214; Uchitelle, *supra* note 7.

217. See *Employee Pension Protection: Hearings on H.R. 1661 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. 14 (1989) [hereinafter *Employee Pension Protection*] (testimony of Rep. Erlenborn).

218. See *Pension Protection Act of 1989*, *supra* note 5, at 1 (comment of Chairman Metzbaum).

219. Compare *Central States, S.E. & S.W. Areas Pension Fund v. Houston Pipe Line Co.*, 713 F. Supp. 1527, 1533 (N.D. Ill. 1989) (\$3,539,889) with *Dime Coal Co. v. Combs*, 796 F.2d 394, 395 (11th Cir. 1986) (\$79,624.31) and *Plumbers & Steamfitters Local Union No. 152 v. Bland*, 745 F. Supp. 1172, 1174 (N.D. W. Va. 1990) (\$42,936.87).

220. *Portability of Pension Plan Benefits Hearings*, *supra* note 214, at 54 (testimony of David Walker, Assistant Secretary of Labor); see also *Labor Secretary Seeks to Require Workers to Save*, N.Y. Times, May 17, 1990, at A20, col. 4 (Secretary of Labor Elizabeth Dole's call for "expansion of pension coverage for employees of small businesses").

private pension system depends upon for its future success, are least able to absorb the cost of mistaken contributions.²²¹

Deadweight losses to these smaller companies negatively impact the *type*, as well as the scope, of pension protection. Defined benefit plans are preferable to defined contribution plans, primarily due to the guarantee of stable retirement income they provide.²²² Yet employers increasingly elect defined-contribution, rather than defined-benefit, arrangements.²²³ Small businesses in particular appear unwilling to offer defined-benefit pensions.²²⁴ Experts cite the cost of administering defined-benefit plans as the chief reason for this phenomenon.²²⁵ Forcing employers to bear the full risk of mistaken payments will only further inflate these prohibitive costs.

When deciding to create common law rules for ERISA, the federal courts must, as Congress did in enacting the statute, evaluate the practical effect of such rules on participation in employee benefit plans. Refusing to let employers recover mistakenly paid contributions creates disincentives for them to participate. Therefore, courts should allow employers to bring unjust enrichment actions against pension funds that withhold mistaken contributions, thereby furthering the statute's purpose of inducing employer participation.

B. Safeguarding Pension Fund Assets

The other clear congressional intention in passing ERISA was the protection of pension assets for the benefit of employees. This section contends that a rule hampering full and prompt refund of mistaken overcontributions thwarts this objective because it encourages employers to "set off" against due contributions the amount they believe they

221. See Garland, *Congress Has That Lean and Hungry Look*, BUS. WEEK, Nov. 6, 1989, at 160 (marginal benefits of pensions to employers increasingly outweighed by costs); Kladder & Durose, *Considerations in Negotiating Alternatives to Participation in Multiemployer Pension Plans*, 12 J. PENSION PLANNING & COMPLIANCE 271, 284 (1986) (high costs dissuade pension plan formation by private employers); Stern, *supra* note 214, at D5, col. 3 ("many companies see the costs of running a pension plan as too high to justify them"); Uchitelle, *supra* note 7, at A1, col. 5 (pensions cost-prohibitive for small companies).

222. See, Uchitelle, *supra* note 7, at D5, col. 1 (defined-contribution plans invariably provide lower retirement benefits). For other criticisms of defined-contribution plans, see Nathans, *The New Breed of Pensions That May Leave Retirees Poorer*, BUS. WEEK, Nov. 6, 1989, at 164. See generally E. ALLEN, JR., J. MELONE & J. ROSENBLUM, PENSION PLANNING 86-104 (5th ed. 1984) (comparing and assessing various contribution and benefit arrangements).

223. See Drew & Tackett, *Record Number of Pension Plans Dropped in '89*, Chi. Trib., Feb. 9, 1990, at 1, col. 2 (net loss of 10,395 defined-benefit plans in 1989; steepest decline in history); Stern, *supra* note 214, at D5, col. 3 (37% increase in defined-benefit terminations, coupled with 67% decrease in their creation); *Employee Pension Protection*, *supra* note 217, at 14 (testimony of former Rep. John N. Erlenborn) (voicing concern over movement out of defined-benefit plans).

224. *Pension Protection Act of 1989*, *supra* note 5, at 64 (observation of Karen Ferguson, Exec. Dir. Pension Rights Center, that "smaller employers tend to go to defined contribution plans").

225. See Stern, *supra* note 214; *Pension Protection Act of 1989*, *supra* note 5, at 102 (testimony of Chester S. Labeledz, Jr., Compensation & Benefits Counsel for Textron, Inc.).

are entitled to by reason of past mistake. The better approach would be to allow a separate remedy for these employers, reducing their incentive to try to recoup overpayments by means of self-help. Mitigating the frequency of set-offs would protect the financial integrity of the plan.

1. ERISA's Protection of Fund Assets

ERISA seeks to guarantee retirement security for all working Americans by ensuring their right to retrieve, upon retirement, the pension benefits to which they are entitled. To that end, rigorous protection and regulation of pension plan assets is one of its cornerstones.²²⁶ This objective manifests itself in congressional insistence on timely contributions by employers. As the Supreme Court pointed out in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*,²²⁷ "one of the principal congressional concerns motivating the passage of the Act [was] that plans should assure themselves of adequate funding by promptly collecting employer contributions."²²⁸

The 1980 Multiemployer Pension Plan Amendments Act (MPPAA)²²⁹ further illustrates ERISA's reliance on prompt employer contributions for its success.²³⁰ The MPPAA created for the first time a statutory obligation requiring full and prompt payment of contribution obligations.²³¹ Provisions of the MPPAA concerning the pay-

226. See, e.g., 29 U.S.C. § 1001b(e)(3) (1988) (policy of the Act is "to increase the likelihood that participants . . . will receive their full benefits"). See generally ERISA Subchapter I, "Protection of Employee Benefit Rights," 29 U.S.C.A. §§ 1001-1168 (West Supp. 1991) (comprehensive vesting, disclosure, and reporting requirements).

227. 472 U.S. 577 (1985).

228. 472 U.S. at 580 (emphasis added); see also S. REP. NO. 127, 93d Cong., 1st Sess. 9-10, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4846 ("The pension plan which offers full protection to its employees is one which is funded with accumulated assets which at least are equal to the accrued liabilities, and with a contribution rate sufficient to maintain that status at all times.") (emphasis added); H.R. REP. NO. 533, 93d Cong., 1st Sess. 14, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4652 (envisioning system in which "[a]ll current accruals of benefits based on current service . . . [would] be paid for immediately.").

229. Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified as amended at 29 U.S.C.A. §§ 1381-1461 (West Supp. 1991)).

230. See 126 CONG. REC. 23,039 (1980) (declaration of Rep. Thompson) (intent of MPPAA "is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies"); see also *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547 (1988) ("The legislative history of [MPPAA] explains that Congress added these strict remedies to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts.").

231. See MPPAA § 306, Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified as ERISA § 515, 29 U.S.C. § 1145 (1988)) ("Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan . . . shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement."); see also S. 1076: SUMMARY AND ANALYSIS OF CONSIDERATION, *supra* note 188, at 44 ("The public policy of this legislation . . . mandates that provision be made to discourage delinquencies and simplify delinquency collec-

ment of withdrawal liability also demonstrate ERISA's solicitude toward prompt receipt of payment obligations. Under the "pay now, dispute later" policy of the MPPAA, the withdrawing employer must make interim payments of withdrawal liability until the discrepancy is definitively resolved,²³² permitting the fund to make immediate use of the payment.²³³

2. Ensuring Prompt Contribution

An undeniable relationship exists between the employers' access to an effective refund remedy and their timely payment of contributions. Employers who believe they have contributed more money to a pension fund than necessary often will withhold that amount when making future payments.²³⁴ Furthermore, the absence of an effective remedy may dampen the willingness of employers to contribute promptly in marginal cases. As one lower court observed, "if employers cannot recover mistaken contributions, they . . . may withhold payments when they have any doubt that the payments are required, for fear that those payments could not be recovered."²³⁵

Some courts permit employers to set-off mistaken payments;²³⁶ curiously, a few courts further encourage employers to withhold payment by allowing set-offs yet *refusing* to entertain separate actions for return of overcontributions. In *South Central United Food & Commercial Workers Unions v. C & G Markets*, the Fifth Circuit condoned just this type of contradictory result:

[W]e hold that there is a right to offset mistakenly overpaid contributions against a delinquency owed. We wish to make absolutely clear that we are not establishing any affirmative right of action in favor of the

tion. The bill imposes a federal statutory duty to contribute on employers" (emphasis added).

232. See ERISA § 4219 (c)(2), 29 U.S.C. § 1399(c)(2); ERISA § 4221, 29 U.S.C. § 1401(d) (1988).

233. See *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1244 (3d Cir. 1987) (interim payment of withdrawal liability mandatory); *Banner Indus. v. Central States, S.E. & S.W. Areas Pension Fund*, 663 F. Supp. 1292, 1297-98 (N.D. Ill. 1987) (preference to let pension retain money during dispute); *Dorn's Transp., Inc. v. I.A.M. Natl. Pension Fund*, 578 F. Supp. 1222, 1232 (D.D.C. 1984) (1980 changes evince "concern with the adverse effects of non-payment of liability"), *affid. without opinion*, 753 F.2d 166 (D.C. Cir. 1985).

234. Because of this perverse incentive structure, employers frequently assert entitlement to refunds as a counterclaim in delinquency proceedings, rather than in a separate suit. See, e.g., *Robbins v. Lynch*, 836 F.2d 330, 334 (7th Cir. 1988); *Plumbers & Steamfitters Local Union No. 152 v. Bland*, 745 F. Supp. 1172 (N.D.W.V. 1990); *Central States, S.E. & S.W. Areas Pension Fund v. Borden*, 736 F. Supp. 788 (N.D. Ill. 1990); *Florida W. Coast Operating Engrs. Local 925 Welfare Fund v. Sunbelt Sales & Rentals*, 732 F. Supp. 1135 (M.D. Fla. 1990); see also Comment, *A Path of No Return: Employer Overpayments into Employee Benefit Plans*, 8 INDUS. REL. L.J. 68, 82 (1986) (employers set-off mistaken payments).

235. *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 950 (D. Del. 1985), *modified*, 850 F.2d 1028 (3d Cir. 1988).

236. See, e.g., *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 611 F.2d 694, 695 (8th Cir. 1979) (*per curiam*).

employer under ERISA. We are simply applying ERISA to permit a refund of mistakenly overpaid contributions.²³⁷

Aside from the logical and conceptual inconsistency of allowing set-offs but not permitting separate actions to recover precisely the same overpayments, set-offs are undesirable for a variety of other reasons. First, set-offs place the responsibility for resolving the disputed claim on the pension fund, rather than the employer. It seems inequitable to place the burden on the pension fund when the employer's mistake created the dispute, particularly because the cost of identifying and prosecuting delinquencies can be substantial.²³⁸ As Representative Frank Thompson, Jr., one of the sponsors of the 1980 amendments, commented, "[s]ome simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions."²³⁹ If the collection burden imposed on the fund exceeds the amount in question the administrator may ultimately decide not to pursue the delinquency.²⁴⁰ Any collection costs or losses incurred by the fund are really losses in benefits to the individual pensioners; in this light, the costs of settling the dispute should be borne by the employer.²⁴¹

The second disadvantage to the use of set-offs surfaces when the employer ultimately is not due a return. In such cases the employer will have profited unjustly from the retention of the disputed amount. More immediately, the fund will be denied the ability to use the money productively during the pendency of the dispute.²⁴² Employee benefits will be adversely affected, as the passage debate of the MPPAA recognizes:

237. 836 F.2d 221, 225 (1988), *cert. denied*, 486 U.S. 1056 (1988); *see also* *Ethridge v. Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982) (limiting employer's remedy to set-offs).

238. The failure of employers to make timely contributions presently concerns many pension plans. *See* Cohen & Gaines, *Industry Heavies Weigh in on Pension Shortfall List*, Chi. Trib., May 9, 1990, § 3, at 1, col. 2 (speculating that current underfunding trends could lead to a "crisis similar to the one that has engulfed the savings and loan industry"); Swoboda, *A Spotlight on Pension Funding: Amount of Shortfall Put at \$14 Billion*, Wash. Post, May 8, 1990, at C1, col. 2.

239. 126 CONG. REC. 23,039 (1980). Representative Thompson also pointed out that "additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts." *Id.* Dissatisfaction with these costs have led commentators to argue that the range of permissible employer defenses in collection actions should be severely restricted. *See* Comment, *Employment Law - Imposing Individual Liability to Simplify Collection and Discourage Delinquencies Under Section 1145 of the Multiemployer Pension Plan Amendments Act*, 15 J. CORP. L. 135, 155-57 (1989).

240. *See* Comment, *supra* note 234, at 82-83.

241. *Cf.* *Dorn's Transp., Inc. v. I.A.M. Natl. Pension Fund*, 578 F. Supp. 1222, 1239 (D.D.C. 1984) (costs associated with employer withdrawals), *affd. without opinion*, 753 F.2d 166 (D.C. Cir. 1985).

242. *See* *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988); *Dorn's Transp. v. I.A.M. Natl. Pension Fund*, 578 F. Supp. 1222 (D.D.C. 1984), *affd. without opinion*, 753 F.2d 166 (D.C. Cir. 1985).

Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. . . .

These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries . . . bear the heavy cost of delinquencies in the form of lower benefits²⁴³

Unfunded liabilities caused by delinquent payments also pose the specter of perpetual noncollection due to insolvency.²⁴⁴

The third objection to the use of set-offs derives from the unfair burdens placed on the other employers in a multiemployer pension plan. Those employers no longer participating in the plan lack the ability to recoup overpayments via the set-off mechanism, because only employers still participating have obligations against which to set off the overpayment. Whether an employer is still participating in the plan should bear no relationship to the equitable entitlement to a return of the mistaken contributions. At the same time, the burden of making up the shortfall due to the set-offs of the other employers falls squarely on those employers that *are* still participating.²⁴⁵ It would be better to rationalize the refund process within the ERISA structure than to let delinquent employers shift the costs onto those that promptly comply with their payment obligations.

An amalgamation of prudential considerations comprises the fourth argument for forcing employers to litigate separately to recover overpayments. The complexity of collecting delinquencies would only be exacerbated if the separate issues concerning mistakes were also litigated concurrently.²⁴⁶ The use of set-offs might unduly complicate the mandatory award of interest²⁴⁷ and/or liquidated damages²⁴⁸ that

243. S. 1076: SUMMARY AND ANALYSIS OF CONSIDERATION, *supra* note 188, at 43-44; *see also* Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 580 (1985) (delinquencies create "unfunded liabilities [that] jeopardize the participants' and beneficiaries' interests").

244. *See* Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 580 (1985).

245. *See*, Cohen & Gaines, *supra* note 238 (underfunding liability falls on pension insurance system and its premium payers); S. 1076: SUMMARY AND ANALYSIS OF CONSIDERATION, *supra* note 188, at 44 (unfair to other employers); *cf.* Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 373 (1984) (allowing individual employers to negotiate more liberal arbitration procedures disproportionately harms other contributing employers). Similar concerns over equity prompted the withdrawal liability provisions of the MPPAA. *See* Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 545 (1988) (MPPAA "primarily concerned about the burden placed upon the remaining contributors to a multiemployer fund when one or more of them withdraw").

246. For a description of the expense, delay, and complexity of delinquency proceedings, *see supra* notes 238-41 and accompanying text.

247. ERISA § 502(g)(2)(B), 29 U.S.C. § 1132 (g)(2)(B) (1988).

248. ERISA § 502(g)(2)(C)(ii), 29 U.S.C. § 1132 (g)(2)(C)(ii) (1988).

are calculated by the amount of delinquency.²⁴⁹ The delays spawned by such complications only heighten the manifest unfairness to the pension fund, which is without possession of the assets during the litigation.²⁵⁰ Finally, a separate action would permit a more searching focus on the full panoply of equitable considerations necessary to permit a return of such contributions.²⁵¹

By refusing to allow separate recovery for overpayments, some courts unwittingly encourage employers to utilize *sub rosa* techniques such as set-offs. Although this Note contends that permitting employers to recover such mistaken contributions ultimately advances the purposes of ERISA, set-offs are an undesirable vehicle for effectuating these goals because of the unacceptable costs they pose to pension funds. The better reasoned approach prevents employers from setting off funds against legally due contributions.²⁵² If employers seek return of mistaken contributions, they should be forced to bring a separate unjust enrichment action at federal common law.

C. *The Exclusive Benefit Rule: Invitation to Unjust Enrichment?*

The issues surrounding refunds of overpayments inescapably intersect with interpretation of section 403(c)(1),²⁵³ known as the exclusive benefit rule, which states that plan assets may not inure to the benefit of employers but rather must solely benefit participants. Because ERISA permits refunds as an exception to the exclusive benefit rule,²⁵⁴ allowing discretionary refunds by plan administrators does not violate any express provision of ERISA. Construing section 403 to grant a judicially enforceable remedy, however, requires greater caution. Common law doctrine must conform to the express provisions of the legislation.²⁵⁵ Strict attention must be paid to whether a proposed remedy meshes with the aims of the exclusive benefit rule, and with the intended purposes of the statutory scheme as a whole.²⁵⁶

249. See *Teamsters Pension Trust Fund v. Philadelphia Fruit Exch.*, 603 F. Supp. 877 (E.D. Pa. 1985) (admitting possibility of separate refund proceedings but refusing to entertain unified suit because of imprecise derivation of total damages due to commingling effects).

250. See *supra* notes 242-44 and accompanying text.

251. See *infra* Part IV.

252. See, e.g., *Robbins v. Lynch*, 836 F.2d 330, 334 (7th Cir. 1988) ("Given that the funds are entitled to the full contributions called for by the collective bargaining agreement, it follows that Lynch is not entitled to recoup sums already paid against this obligation.").

253. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (1988).

254. See ERISA § 403(c)(2)(A), 29 U.S.C. § 1103(c)(2)(A) (1988). For the text of this section, see *supra* note 12.

255. See *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (courts may not permit oral modification of pension plans where statute demands written agreements); *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986) (same).

256. This section deals only with the question of whether the return of the amount in question violates the fiduciary standards of ERISA. Quite separate are the issues surrounding the payment of interest on overcontributions. Even courts permitting refunds of the contribution amounts forbid the assessment of interest against the fund, because allowing interest would make

Some courts take the language of section 403 as evidence that Congress did not envision the remedial approach offered by this Note. For example, the Second Circuit, in *Amato v. Western Union International, Inc.*,²⁵⁷ concluded that the purposes of the exclusive benefit rule rendered a common law remedy inappropriate. "Given [its] interpretation of ERISA section 403(c)(1)'s anti-inurement provision," the court found no need "to supplement these specific statutory sections with an ERISA common law of unjust enrichment."²⁵⁸

Such analysis is shortsighted. First, a restrictive interpretation of the exclusive benefit rule misreads its intended purpose. Congress passed ERISA's stringent regulatory requirements due to concern that employers might loot the assets of their employees' pension funds.²⁵⁹ The exclusive benefit rule serves as a prophylaxis to prevent such abuses.²⁶⁰ Because the remedy advanced by this Note will only be obtained through legal process, an unjust enrichment remedy in no way compromises this objective.²⁶¹ Second, employees and the unions that represent them have a strong financial incentive to perform a watchdog function in scrutinizing the activities of employers.²⁶² Employees and employers frequently take a long-term view of their relationships in structuring pension agreements,²⁶³ yielding an element of self-deterrence on the part of employers and trustees. Ongoing rela-

the fund worse off than if the employer had never erred. This net loss to the fund flagrantly contravenes the exclusive benefit rule. See, e.g., *Plumbers & Steamfitters Local Union No. 152 v. Bland*, 745 F. Supp. 1172, 1175 (N.D. W. Va. 1990); *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 668 F. Supp. 893, 904-45 (D. Del. 1987) *modified*, 850 F.2d 1028 (3d Cir. 1988).

257. 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

258. 773 F.2d at 1419.

259. See ERISA § 2, 29 U.S.C. § 1001(a) (1988) (congressional finding "that owing to the lack of . . . adequate safeguards concerning the operational soundness and stability of plans . . . adequate funds to pay promised benefits may be endangered"); *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989) (mismanagement of funds a primary concern of ERISA); S. REP. NO. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4892 (misuse of funds motivated ERISA's passage).

260. See *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 960-61 (1st Cir. 1989).

261. See H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5083 (although "plan assets generally are not to inure to the benefit of the employer," ERISA permits "an employer's contributions to be returned in cases of mistake"); see also *An Employer's Implied Cause of Action*, *supra* note 35, at 244-45 (§ 403 "intended to prevent misconduct, insider abuse and corruption" but "not enacted to prevent the legitimate return of money mistakenly contributed") (footnote omitted); cf. *Deiches v. Carpenters' Health & Welfare Fund*, 572 F. Supp. 766, 773-74 (D.N.J. 1983) (Actions by bankruptcy receivers to recover conveyances by insolvent employers to pension plans, although technically beyond § 403, are permitted. The absence of corruption risk means exclusive benefit rule is malleable.).

262. Fischel & Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1119 n.58 (1988).

263. *Id.* at 1132. For a game theory discussion of the positive behavioral incentives involved in long-term relations, see R. AXELROD, *THE EVOLUTION OF COOPERATION* 126-32 (1984) (increasing frequency and durability of interactive relationship fosters mutual cooperation).

tions and mutual opportunities for reprisal characterize these settings. Employers, or trustees appointed by them, have a particularly strong self-interest in preserving employee morale; concern over the appearance of corruption helps to restrain any potential impropriety by the employer.²⁶⁴

Most fundamentally, a literalist interpretation of the exclusive benefit rule fails to comprehend the relationship between employer participation and the recapture of mistaken contributions. An inescapable nexus exists between the interests of employers and employees; if employers' interests are insufficiently protected, they may reduce the scope or quality of pension coverage for their employees.²⁶⁵

Legal rules resolving conflicts among participants, *e.g.*, employers and employees, that assume the existence of a pension arrangement undervalue the interests of all parties by failing to consider the critical interdependence of participants' interests. Professors Fischel and Langbein make this point by classifying the operation of ERISA rules as either *ex ante* or *ex post*.²⁶⁶ Rules that do not solely benefit employees may seem inconsistent with the exclusive benefit rule, when viewed in the context of an extant pension fund; viewed, that is, *ex post*. The better conceptual approach appraises the benefits of new rules *ex ante*; that is, it constructs rules that "approximate the bargain the parties would have struck had they been able to anticipate and resolve" the conflict in advance.²⁶⁷ By assessing a rule *ex ante*, as Fischel and Langbein urge, any inconsistency "abates when we come to understand that a contrary rule might lower the rate of plan formulation. Employees will not be well served by a legal rule that decreases the incentive to form plans in the first instance."²⁶⁸

Pension funds are not created by employers for the sole benefit of employees; as rational utility maximizers, employers establish pension funds for their own benefit.²⁶⁹ Both employees *and* employers should be deemed *ex ante* beneficiaries of the pension trust.²⁷⁰ A rule that attempts to maximize the welfare of one at the expense of the other will make *both* worse off.²⁷¹ Congressional inclusion of the refund sec-

264. Fischel & Langbein, *supra* note 262, at 1132 (employers averse to "a reputation for sharp practice that would harm morale").

265. See *supra* notes 179-225 and accompanying text.

266. Fischel & Langbein, *supra* note 262, at 1127.

267. *Id.* at 1116; see also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 82 (1986) (judicial resolution of unforeseen contingencies that approximates contractual arrangements to which parties would have assented *ex ante* maximizes joint welfare).

268. Fischel & Langbein, *supra* note 262, at 1127.

269. See *Pension Protection Act of 1989*, *supra* note 5, at 54 (testimony that pension plans are established to benefit employers as well as workers); E. ALLEN, JR., J. MELONE & J. ROSEN-BLOOM *supra* note 222, at 11, 26 (discussing employer motivations for pension creation).

270. Fischel & Langbein, *supra* note 262, at 1119, 1128.

271. *Id.* at 1158. The effect resembles a Prisoner's Dilemma. In the classic Dilemma, two players are faced with a choice, either cooperate or defect. Each must make his or her decision

tion evinces awareness of this economic reality. Courts, too, should interpret the exclusive benefit rule realistically; construing the rule to allow refund of overpayments best captures the duality of interests that it serves.²⁷²

IV. EVALUATING EMPLOYERS' EQUITABLE ENTITLEMENT TO REFUNDS

This Note has contended that allowing employers to recoup sums mistakenly paid to employee pension plans will advance the congressional objectives embodied in ERISA. It has maintained that an action for a refund, although not grounded specifically in the statute, is justified by the broad common law license given to the federal courts by ERISA. Part IV argues that these claims should be styled unjust enrichment actions under federal common law.

The blanket refusal of some courts to permit the return of mistakenly paid monies ignores the beneficial effects refunds may have in certain situations.²⁷³ It would be equally unwise, however, to grant employers a refund in all instances. Courts should make case-by-case determinations whether to allow return of overpayments,²⁷⁴ relying on a variety of equitable factors borrowed from general restitutionary considerations. Section A discusses the particular applicability of equitable precepts in the context of an unjust enrichment action under

without knowing the other's. The payoff for unilateral defection is higher than for unilateral cooperation. If both defect, both will be worse off than if both had cooperated. Thus, the Dilemma: each player's self-interest motivates him or her to try to take advantage of the other (defection); only if each is willing to accept the risk (and lower payoff) of cooperation do they maximize their aggregate utility. For a fascinating application of the Dilemma concept, see R. AXELROD, *supra* note 263 (repeated computer simulation of Dilemma proves cooperative strategies most survivable).

272. As Fischel and Langbein conclude,

[w]e believe that ERISA permits the courts to be more forthright in recognizing the employer's interest as beneficiary. ERISA empowers the employer or other sponsor to create, amend, and terminate plans, to name the fiduciaries, and to recapture excess assets. These statutory powers evince that pension and benefit plans embody the interests of employers as well as employees. Moreover, it is a mistake to view a pension plan as a zero sum game, in which an action that benefits the employer automatically harms the employees. On the contrary, from the *ex ante* perspective, the interest of employer and employees converge. The correct interpretation . . . is the rule that maximizes the joint welfare of both.

Fischel & Langbein, *supra* note 262, at 1158 (footnote omitted).

273. See generally *supra* Part III (common law remedy increases participation and protects fund assets).

274. If the court ultimately finds an unjust enrichment remedy unwarranted in a particular case, then that would be a disposition on the merits; jurisdiction still exists to determine whether a cause of action is colorable. See *Bell v. Hood*, 327 U.S. 678, 682 (1945). Compare *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1032 (3d Cir. 1988) (affirming jurisdiction, but not reaching the ultimate question on the merits) with *Dime Coal Co. v. Combs*, 796 F.2d 394, 396 (11th Cir. 1986) (finding jurisdiction while refusing to permit federal common law remedy) and *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 235-36 (6th Cir. 1986) (answering both the jurisdiction and the merits questions affirmatively). See generally *supra* note 62 (discussing various jurisdictional theories).

ERISA. Section B tailors traditional equitable concepts to fit the situations typically arising in overpayment disputes. Although resolution of particular unjust enrichment claims will of necessity be highly fact-specific, this Part provides guidance in weighing the strengths of competing equitable claims certain to recur.

A. *Restitution Provides Recovery for Mistaken Payments*

The intuition that a person should not profit because of another's mistake finds expression in the equitable tradition of the common law.²⁷⁵ Indeed, an entire legal discipline, premised on notions of justice and fair play,²⁷⁶ has sprung from the precept that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."²⁷⁷ According to Professor Palmer, the prototypical case of unjust enrichment arises where one party "has performed in the belief that he was obligated to do so, when in fact he either had no obligation or was not bound to the full extent of the performance rendered."²⁷⁸

Such mistaken performance may arise where one party makes a computational or clerical error,²⁷⁹ misconstrues the terms of the agreement,²⁸⁰ incorrectly assumes the existence of a condition precedent to performance,²⁸¹ mistakenly pays money to a third party on behalf of another,²⁸² or performs pursuant to an invalid agreement.²⁸³ These mistakes in performance typically present compelling cases for restitution of the money.²⁸⁴

The traditional unjust enrichment model provides a useful departure point for analyzing the return of contributions under ERISA. Many overpayment scenarios involving ERISA plans²⁸⁵ resemble the

275. See, e.g., *Osborn v. Phelps*, 19 Conn. 63, 76 (1848) (Ellsworth, J., dissenting) ("Errors are incident to human affairs; and there must somewhere rest a power to grant relief, or there is a great defect in the administration of justice.").

276. See 1 G. PALMER, *THE LAW OF RESTITUTION* § 1.1 (1978) (moral justification for restitution).

277. See *RESTATEMENT OF RESTITUTION* § 1 (1937).

278. G. PALMER, *MISTAKE AND UNJUST ENRICHMENT* 21 (1962).

279. See 3 G. PALMER, *supra* note 276, § 14.8; *RESTATEMENT OF RESTITUTION* § 20 ("Mistake as to Extent of Duty or Amount Paid in Discharge Thereof") (1937); 13 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1574 (W. Jaeger 3d ed. 1970).

280. See 3 G. PALMER, *supra* note 276, § 14.8.

281. See G. PALMER, *supra* note 278, at 27-28; *RESTATEMENT OF RESTITUTION* § 18 ("Mistaken Belief in Duty Under a Contract With Payee") (1937).

282. See *RESTATEMENT OF RESTITUTION* § 22 ("Mistake as to Payee") (1937).

283. See *RESTATEMENT OF RESTITUTION* § 15 ("Mistaken Belief in Existence of Contract with Payee") (1937); 3 G. PALMER, *supra* note 276, § 14.15.

284. See 2 G. PALMER, *supra* note 276, § 11.5. See generally 66 AM. JUR. 2D *Restitution and Implied Contracts*, §§ 118-44 ("Money Paid by Mistake") (1973 & Supp. 1990) [hereinafter *Restitution & Implied Contracts*] (collecting cases in support of "firmly established general rule that money paid to another under the influence of a mistake of fact . . . may be recovered").

285. See *supra* notes 14-19 and accompanying text (canvassing gamut of factual predicates).

paradigmatic restitution situations depicted in the preceding paragraph. Equitable considerations are particularly relevant in determining whether it is unjust to allow the fund to retain the mistaken payments, because the language of ERISA frequently alludes to the lexicon of equity. ERISA's initial statement of policy proclaims that the purpose of the act is to improve "the equitable character and soundness of such [pension] plans."²⁸⁶ As one Senate committee explained, ERISA seeks "to provide the full range of legal and equitable remedies available in both state and federal courts . . ."²⁸⁷ The statute also uses terminology that suggests restitutionary considerations should be the linchpin of the remedy urged by this Note. ERISA provides for the return of contributions made under mistakes of fact or law.²⁸⁸ "Mistake of fact" and "mistake of law" are legal terms of art traditionally thought of as restitutionary in nature.²⁸⁹ Given the equitable nature of ERISA pension plans, concerns about unjust enrichment are particularly apposite.²⁹⁰

The interest of the employer in return of the money should be weighed against the interest of the pension fund in its retention.²⁹¹ This calculus, made case-by-case, should comprehend all of the equities on both sides. The First Circuit's bellwether analysis in *Kwatcher v. Massachusetts Service Employees Pension Fund*²⁹² alluded to the careful balancing required in such cases:

286. ERISA § 2(c), 29 U.S.C. § 1001(c) (1988).

287. S. REP. NO. 127, 93d Cong., 2d Sess. 35, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4871. To that end, the statute authorizes the courts to grant "appropriate equitable relief." ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (1988).

288. See ERISA § 403(c)(2)(A), 29 U.S.C. § 1103 (c)(2)(A)(i-ii) (1988).

289. See *Teamsters Local 639 Employers Health Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865, 867 (4th Cir. 1981) (mistake of fact section meant to incorporate traditional equity definition); see also RESTATEMENT OF RESTITUTION § 44 (1937) (test for restitutionary entitlement identical for "mistake of law" and "mistake . . . of fact"); 3 CORBIN ON CONTRACTS §§ 616-617 (1960); 13 S. WILLISTON, *supra* note 279, § 1574; cf. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (ERISA's use of word trust invokes common law and equitable fiduciary principles); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp.*, 472 U.S. 559, 570 (1985).

290. See *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir. 1990) ("§ 1103(c)(2)(A) indicates a desire to ensure that plan funds are administered equitably and that no one party, not even plan beneficiaries, should unjustly profit"), *cert. denied*, 111 S. Ct. 512 (1990); *Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters & Employers Pension Fund*, 847 F.2d 113, 121 (3d Cir. 1988) ("It is axiomatic that . . . a party should not be allowed to profit from its own wrongs," especially since "Congress has emphasized the 'equitable character' " of pension plans.), *cert. denied*, 488 U.S. 1041 (1989); *Luby v. Teamsters Health & Welfare Fund*, No. 89-5989, 1990 WL 181053 (E.D. Pa. Nov. 14, 1990) (1990 WL 181053) (federal common law of unjust enrichment appropriate for ERISA where plan paid benefits to wrong beneficiary).

291. See *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1057-58 (3d Cir. 1989); *Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 814 F.2d 79, 83 (2d Cir. 1987); *Teamsters Local 639 Employers Health Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865, 868 (8th Cir. 1981); *Central States, S.E. & S.W. Areas Pension Fund v. Houston Pipe Line Co.*, 713 F. Supp. 1527, 1534-45 (N.D. Ill. 1989).

292. 879 F.2d 957 (1st Cir. 1989).

Because no two sets of circumstances are apt to be identical, we offer no catalog of the many other considerations which will be subject to equitable weighing, save to say that they comprise essentially the type and kind to which chancery courts, historically, have looked in restitutionary actions. The trial court should consider whatever factors it may reasonably believe shed light on the fairness of reimbursement . . . [including] general equitable considerations and the guiding principles and purposes of ERISA. Equity, after all, is meant to be flexible.²⁹³

After all relevant interests have been considered, an employer should receive a refund of the mistaken contributions only when the equities weigh in its favor.²⁹⁴

B. *Translating ERISA Interests into Equitable Language*

Articulation of these general principles proves easier than their concrete application. Expressing the interests of employees and employers under ERISA in equitable terms often proves problematic.²⁹⁵ Section B attempts to convert into the parlance of equity the interests to be evaluated in an unjust enrichment action. Section B.1 translates the statutorily created interest in the pension fund's financial stability into equitable nomenclature, arguing that it deserves great weight. The relationship of the parties' contractual agreements to the quasi-contract model of restitution is taken up in section B.2. Finally, section B.3 explores the behavioral implications of allowing refunds.

1. *Pension Plan's Financial Stability*

The most important equitable consideration is the pension plan's interest in financial stability. Pension plans may develop reliance interests that deserve extreme deference in light of ERISA's clear preference for protecting pension assets. Obsession with the stability of the fund has driven some courts to adopt a per se refusal to refund over-contributions.²⁹⁶ This section argues that such an overreaction ignores the potentially beneficial effects of such refunds and gives short shrift to the inherent flexibility of the remedy this Note advances. The

293. 879 F.2d 957, 967 (1st Cir. 1989); see also 2 G. PALMER, *supra* note 276, § 11.6 (Where "just relief cannot be fitted" into a general restitution model, "it becomes necessary to mold the relief so as to do substantial justice in the case at hand.").

294. *Award Serv. v. Northern Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066, 1069 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986).

295. See, e.g., *Airco Indus. Gases v. Teamsters Pension Trust Fund*, 668 F. Supp. 893, 901 (D. Del. 1987) (struggling to find a "simple balancing of the equities," confounded because "the basis of the cause of action is ERISA," limited because "the court is not acting solely as a court in equity," and groping for a legal standard that can "include the policies of ERISA"), *modified*, 850 F.2d 1028 (3d Cir. 1988).

296. See, e.g., *Kann v. Keystone Resources*, 575 F. Supp. 1084, 1091 (W.D. Pa. 1983) (all contributions irrevocable); *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 311-12 (E.D. Pa. 1982) (exclusive benefit rule absolute bar to restitution), *affd. without opinion*, 720 F.2d 661 (3d Cir. 1983).

prudent course would allow a refund only when doing so poses no threat of financial hardship to the pension plan.

Protection of the financial integrity of the pension plan is of paramount importance under ERISA.²⁹⁷ This concern is demonstrated by the imposition of strict fiduciary duties,²⁹⁸ vesting requirements,²⁹⁹ reporting and disclosure rules,³⁰⁰ and withdrawal liability.³⁰¹ Attempts by any person to reach fund assets are viewed suspiciously. As one court remarked early in ERISA's history, "[t]he actuarial soundness of pension funds is . . . too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."³⁰² This objective might be compromised by the return of overcontributions. To the extent that return of the mistaken contributions would jeopardize the financial stability of a pension plan, it cannot fairly be characterized as equitable.

First, pension plans may change their position in expectation of retaining these assets. The contributions may have been put toward the payment of direct benefits, or used to reduce the obligations of defined-benefit employers. Second, refunds still may injure the fund even where the money has not been spent. Pension funds must make long range actuarial decisions that might be upset by unanticipated refunds.³⁰³ Stability and predictability are essential to guarantee that those entitled to pension benefits receive them.³⁰⁴ Finding substantial reliance interests present, one lower court explained that "[t]o impose a right to restitution in favor of employers could severely undermine the fund's integrity. Mistaken contributions, once invested, may be just as essential to the funds' integrity and stability as non-mistaken contributions"³⁰⁵ Neither the employer nor the fund may realize that the plan is not legally entitled to these contributions before considerable reliance interests have attached.

The concern about the financial stability of pension funds finds an analog in the common law of restitution and is prudent, to an extent.

297. See *supra* notes 226-33 and accompanying text.

298. See ERISA §§ 401-14, 29 U.S.C. §§ 1101-14 (1988).

299. See ERISA §§ 201-11, 29 U.S.C. §§ 1051-61 (1988).

300. See ERISA §§ 101-11, 29 U.S.C. §§ 1021-31 (1988).

301. See ERISA §§ 4201-25, 29 U.S.C. §§ 1381-1405 (1988).

302. *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976); cf. *Central States, S.E. & S.W. Areas Pension Fund v. Admiral Merchants Motor Freight*, 511 F. Supp. 38, 47 (D. Minn. 1980) (damage actions by employers against trustees precluded since they would "deplete the Funds' assets and thus hinder the achievement of a primary goal of ERISA, protection of the interests of participants in employee benefit plans").

303. *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1301 (E.D. La. 1989), *affid.*, 914 F.2d 83 (5th Cir. 1990).

304. *Techmeier ex rel. Cummings v. Briggs & Stratton*, 797 F.2d 383, 389 (7th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

305. *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 312 (E.D. Penn. 1982), *affid. without opinion*, 720 F.2d 661 (3d Cir. 1983).

Defendants in unjust enrichment actions often counter that it would be inequitable to compel restitution since the recipient of the enrichment has detrimentally relied on the mistaken payment.³⁰⁶ Rather than barring refunds absolutely, however, reliance by the pension plan should be treated as one of the equities to be weighed when deciding whether to award restitution.³⁰⁷ Refunding mistaken payments does not necessarily result in an unambiguous loss for the pension plan. The refund may, in some situations, be ancillary to an overall reduction in the fund's liabilities. For example, suppose that an employer has contributed large sums in an employee's name to Plan A, under the mistaken assumption that the employee is enrolled in Plan A. The discovery that the employee is actually enrolled in Plan B, although it will cost Plan A the previous contributions, implies a concomitant reduction in liabilities for Plan A since it will no longer be required to pay that employee's benefits.³⁰⁸

Other structural factors may mitigate the potential injury to the financial health of pension plans. The time limitations in the statute for refund minimize the risk of long-term disruptions in financial planning,³⁰⁹ because administrators should be aware that claims to the fund may be made until the limitations period has run.³¹⁰ Refunds can also be effectuated without an actual disgorgement of funds. When the employer has an ongoing obligation, credits for future payments can be issued, thus giving the plan time to adapt to the reduction in assets.³¹¹

These observations suggest an approach superior to a categorical rejection of a remedy for employers. The court should determine

306. See J. CALAMARI & J. PERILLO, *CONTRACTS* § 9-30 (3d. ed. 1987); *RESTATEMENT OF RESTITUTION* § 69(1) (1937) ("The right of a person to restitution from another because of a benefit received because of mistake is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.").

307. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 11.9 (1973).

308. See *Peckham v. Board of Trustees of Intl. Bhd. of Painters*, 719 F.2d 1063 (10th Cir.), modified, 724 F.2d 100 (10th Cir. 1983). The court noted that

[t]he trustees complain that a refund will diminish the plan's assets but neglect to mention the corresponding decrease in the fund's liabilities because the individuals for whom these contributions were made will not be entitled to pensions. Under the circumstances, the fund clearly would be unjustly enriched if it retained these monies.

719 F.2d at 1066; see also *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 478 F. Supp. 884, 887 (D. Minn. 1979) (noting that "although funds may be reduced, the number of beneficiaries would also be reduced as a result of ineligibility"), *affid.*, 611 F.2d 694 (8th Cir. 1979) (per curiam).

309. Return of mistaken contributions to a single-employer pension plan may be had up to one year after payment; for multiemployer plans, a refund is allowed within six months of the administrator's determination of the overpayment. See *supra* note 12 for the full text of § 403(c)(2)(A).

310. See *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 478 F. Supp. 884, 887 (D. Minn.), *affid.*, 611 F.2d 694 (8th Cir. 1979) (per curiam).

311. See *Central States, S.E. & S.W. Areas Health & Welfare Fund v. Borden, Inc.*, 736 F. Supp. 788, 793 (N.D. Ill. 1990) (issuing credit avoids financial surprise, uncertainty).

whether a refund will threaten the fund's financial soundness. The employer should be given an opportunity to adduce evidence that the plan is actuarially sound, and hence, not susceptible to financial ruin if the money is returned.³¹² The court should take into account the impact a refund will have on the pension's stability and soundness,³¹³ and should grant the employer's request only if it does not injure the beneficiaries of the fund.³¹⁴ Judicial creativity in fashioning remedies may make accommodation of the employer's refund request possible without injuring the fund.

Before concluding that a pension's detrimental reliance on the overpayment precludes restitution, the court should also appraise the nature of the reliance. For instance, if the fund has already spent the money, the court might consider whether the expended funds procured any benefits for participants. If the money has merely been put toward ordinary expenses, then the pension plan should be required to return it to the employer.³¹⁵ If, however, the fund has procured benefits for participants, such as purchasing insurance for noncovered pensioners,³¹⁶ then requiring a return would make the plan worse off than it was before the employer's mistake. In such a case, the equities would more strongly favor the pension plan.³¹⁷

312. Some courts require the trustees to prove a detrimental effect on the fund's fiscal integrity. See *Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 637 F. Supp. 529, 533 (N.D.N.Y. 1986), *modified*, 814 F.2d 79 (2d Cir. 1987). This would seem to be the appropriate allocation of burdens under the traditional restitution model because it is a defense to the unjust enrichment claim. The policy objectives served by ERISA, however, to the extent that they favor the fund's stability, might assign these burdens differently. This Note expresses no view as to which party should bear this burden.

313. See *Award Serv. v. Northern Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066, 1069 (9th Cir. 1985) ("A principal equitable consideration is whether restitution would undermine the financial stability of the plan."), *cert. denied*, 474 U.S. 1081 (1986); see also *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989).

314. See *Plucinski v. I.A.M. Natl. Pension Fund*, 875 F.2d 1052, 1057-58 (3d Cir. 1989); *Chase v. Trustees of the W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985) (only grant restitution if no effect on fund's stability); *Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 637 F. Supp. 529, 533 (N.D.N.Y. 1986) (permitting refund after finding no risk of financial adversity), *modified*, 814 F.2d 79 (2d Cir. 1987).

315. See D. DOBBS, *supra* note 307, § 11.5 (courts unsympathetic to recipients when money put toward expenses that would have been incurred anyway); *Restitution & Implied Contracts*, *supra* note 284, § 136 (satisfaction of existing debts or obligations with erroneous payment no defense).

316. See Comment, *supra* note 234, at 74.

317. See *South Cent. United Food & Commercial Workers Union v. C & G Mkts.*, 836 F.2d 221, 225 (5th Cir.) (pension plan "entitled to full credit for benefits which were not required" but were disbursed to "employees for whom contributions were mistakenly received"), *cert. denied*, 486 U.S. 1056 (1988); *Teamsters Local 639 Employers Health Trust v. Cassidy Trucking*, 646 F.2d 865, 867-68 (4th Cir. 1981) (suggesting that expenditure of mistaken payments on employee benefits might be a defense to a restitution suit); *Florida W. Coast Operating Engrs. Local 925 Welfare Fund v. Sunbelt Sales & Rentals*, 732 F. Supp. 1135, 1145 (M.D. Fla. 1990) (equities favor fund, as against employer, where fund has furnished medical benefits to participants during dispute).

2. *Statutory Limits and Express Party Agreement*

When the pension agreement fails to specify any recourse for employers who overcontribute, permitting employers to attempt to recoup these payments furthers ERISA's interests. This section of the Note offers two limitations, however, on refunds under section 403. First, ERISA's explicit strictures provide an outer boundary that equitable remedies may not breach. Second, assuming that a refund falls within the range permitted by ERISA, this section contends that it must also conform to any contractual stipulations of the parties; in such cases, the parties' mutually assented provisions should control. As the Sixth Circuit has argued, "any federal common law cause of action . . . based on the doctrine of unjust enrichment would likewise be limited by the terms of the contract between the parties and federal law."³¹⁸

ERISA sets out parameters for the return of mistaken contributions that govern in the absence of effective party choice. In the case of a multiemployer pension plan, the statute allows return of mistaken payments made "by a mistake of fact or law . . . within six months after the plan administrator determines that the contribution was made by such a mistake."³¹⁹ In the case of a pension plan other than a multiemployer one, ERISA permits a refund for contributions made "by a mistake of fact . . . within one year after the payment of the contribution."³²⁰ Both the time limit provisions and the differentiation of mistake based on fact or law must be strictly followed, because Congress obviously intended unique meanings for these terms by its election of different language in analogous, adjacent provisions. Statutory requirements like these supply an outer limit on the relief available under common law.³²¹

The clearly expressed time limitations on refunds should not be malleable. Presumably, Congress imposed them to minimize the disruptions that stale refund claims can work upon the fund's reliance interests attaching to such contributions.³²²

The nature of the mistake also serves as a differentiating character-

318. *Crews v. Central States, S.E. & S.W. Areas Pension Fund*, 788 F.2d 332, 337 n.3 (6th Cir. 1986).

319. ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103 (c)(2)(A)(ii) (1988). It is significant that multiemployer plans may return contributions within six months after the error is *discovered*, which may in fact be much later than six months after the payment was made. For single employer plans, the rule permits return only within one year of *payment*.

320. ERISA § 403(c)(2)(A)(i), 29 U.S.C. § 1103 (c)(2)(A)(i) (1988).

321. *See Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (common law of estoppel due to oral modification of contract foreclosed because ERISA specifically requires written instruments to modify pension arrangements); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (same). *But see Reuther v. Trustees of Trucking Employees*, 575 F.2d 1074, 1079 (3d Cir. 1978) (invoking equitable precepts to permit refunds of mistaken payments after expiration of one year statutory limitation period).

322. *See supra* notes 303-11 and accompanying text.

istic between single and multiemployer plans. Mistake of fact should be distinguished from mistake of law, since Congress contemplated that in some cases a mistake of law does not deserve recompense. The distinction between mistake of fact and law is relevant only when dealing with a single employer pension plan; in the case of a multiemployer plan, either type of mistake suffices. The legislative history tersely distinguished mistakes of fact and law for purposes of the statute. One House Conference Report cites as an example of mistake of fact "an arithmetical error in calculating the amounts that were contributed to the plan."³²³ This limited example has been interpreted to imply few exceptions to the general rule.³²⁴ In practice, mistake of fact generally encompasses only computation errors or erroneously held beliefs that an employee is enrolled in, as opposed to legally covered by, a pension plan. Mistakes about the obligations imposed, or the coverage afforded, by a particular pension agreement are considered mistakes of law.³²⁵

The second limitation on employer refunds derives directly from the parties' agreed terms. Quasi-contractual remedies such as restitution may not be used where there is an express agreement of the parties that deals specifically with the contingency.³²⁶ Although ERISA has specific provisions dealing with recapture of overpayments, the employer and the pension fund are free to modify them in the pension agreement. Because ERISA evinces considerable deference to the right of parties to agree to the terms of pension agreements,³²⁷ the parties may agree to refund provisions substantially less generous than those contained in the statute.³²⁸ The agreement may limit the time in

323. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 303, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5083.

324. See *Audit Serv. v. Morning Star Enters.*, 881 F.2d 1083 (9th Cir. 1989) (text in WESTLAW) (knowing contributions on behalf of ineligible employee not mistake of fact or law; no setoff); *British Motor Car Distribs., Ltd. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989) (incorrect actuarial assumptions not a mistake of fact but rather an inherent uncertainty in pension agreements; employer not entitled to recover).

325. See *Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39, 41 (2d Cir.) (mistake of fact does not encompass disagreement over definitions of pension agreement terms), *cert denied*, 111 S. Ct. 515 (1990); *Crews v. Central States, S.E. & S.W. Areas Pension Fund*, 788 F.2d 332, 337 (6th Cir. 1986) (misconstruction of terms is mistake of law, not fact); *Martin v. Hamil*, 608 F.2d 725, 729 (7th Cir. 1979) (reliance on incorrect advice concerning propriety of contributions is "a mistake concerning the coverage of the agreement which is a mistake of law."); *Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co.*, 478 F. Supp. 884, 887 (D. Minn.) (coverage of plan is mistake of law), *aff'd*, 611 F.2d 694 (8th Cir. 1979) (per curiam).

326. See *infra* notes 332-36 and accompanying text.

327. See *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 511 (1981) (terms of pension agreements left to parties); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982) ("despite the extensive statutory scheme governing pension plans, Congress left many matters to the discretion of the parties").

328. See *Carpenters Local 1471 v. Bar-Con, Inc.*, 668 F. Supp. 560, 567 n.14 (S.D. Miss. 1987) ("Although ERISA allows for recovery under mistake of fact or mistake of law, the parties to the agreement are free to modify the circumstances under which a refund may be sought").

which refunds may occur,³²⁹ or it might restrict return to only certain categories of mistake.³³⁰ An outright prohibition on refunds of any kind could also be negotiated.³³¹

If both parties agree to restrictive refund policies, it is hard to make a claim that one was unjustly enriched at the other's expense.³³² The Seventh Circuit once observed that "[e]nrichment is not 'unjust' where it is allowed by the express terms of the pension plan."³³³ In the same spirit, the Third Circuit has commented that it is "particularly reluctant to fashion a federal common law doctrine of unjust enrichment when such a right would override a contractual provision," since "the presence of an agreement that has not been rescinded precludes application of the quasi-contractual remedy."³³⁴ Although federal courts have broad equitable powers under ERISA, they should not use them to override express contractual provisions.³³⁵ Quasi-contractual remedies seek to prevent unanticipated situations from working injustice. When the parties have in fact provided for such contingencies in the agreement, the law of quasi-contract has no place.³³⁶

329. *See, e.g.,* *Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683 (9th Cir. 1989); *Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 637 F. Supp. 529 (N.D.N.Y. 1986), *modified*, 814 F.2d 79 (2d Cir. 1987); *Fuller Cinder Co. v. Central States Pension Fund*, 2 Employee Benefits Cas. (BNA) 2458 (E.D. Mich. 1982).

330. *See, e.g.,* *Crews v. Central States, S.E. & S.W. Areas Pension Fund*, 788 F.2d 332 (6th Cir. 1986) (upholding agreement limiting refunds to mistake of fact only); *Electricians Health, Welfare, & Pension Plans v. Gulino*, 594 F. Supp. 1265, 1272-73 (M.D. La. 1984) (same).

331. *See, e.g.,* *Airco Indus. Gases v. Teamsters Pension Trust Fund*, 668 F. Supp. 893 (D. Del. 1987) (adoption of "no refund" policy absolute bar to § 1103 recovery) *modified*, 850 F.2d 1028 (3d Cir. 1988); *Trustees of Central Cal. Prod. Workers' Trust Fund v. Acosta*, 6 Employee Benefits Cas. (BNA) 2697 (N.D. Calif. 1985) (same).

332. *Cf.* RESTATEMENT OF RESTITUTION § 107 comment 1 (1937) ("[A] person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed . . . the other should give in return.").

333. *Techmeier ex rel. Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 390 (7th Cir. 1986), *cert. denied*, 479 U.S. 1008 (1986). The court was "particularly reluctant to fashion a federal common law doctrine of unjust enrichment when such a right would override a contractual provision in a pension plan." 797 F.2d at 390.

334. *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982).

335. *See* *Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683, 686 (9th Cir. 1989) (forbidding district court from "set[ting] aside rules affecting pension benefits where they are fixed by the terms of a collective bargaining agreement and violate no command of Congress"); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir. 1989) (despite ERISA's "ennobling purposes," courts should not "torture language in an attempt to force particular results . . . the contracting parties neither intended nor imagined"); *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1301 (E.D. La. 1989) (quasi-contractual damages forbidden; parties limited to only those termination benefits specified in written agreement), *aff'd.*, 914 F.2d 83 (5th Cir. 1990); *Searcy v. International Bhd. of Elec. Workers, Local 728 Pension Trust Fund*, 685 F. Supp. 241, 242 (S.D. Fla. 1988) (equitable latitude under ERISA constrained by express contractual provisions).

336. Even where the pension plan permits refunds pursuant only to an agreed procedure, employers are not totally without a remedy. The decision to deny a refund under the terms of the parties' agreement is reviewable under a deferential "arbitrary and capricious" standard. *See* *Dumac Forestry Serv. v. International Bhd. of Elec. Workers*, 814 F.2d 79, 83 (2d Cir. 1987);

3. Systemic ERISA Interests

Traditionally, restitution was granted to one who mistakenly enriched another without reference to the benefactor's fault.³³⁷ The *Restatement of Restitution* specifically forecloses the negligence of the transferor as a defense to an unjust enrichment action: "A person who has conferred a benefit upon another by mistake is not precluded by the fact that the mistake was due to his lack of care."³³⁸ Similarly, the mistake need not be mutual; the mistake of the payor was sufficient grounds to make a claim for restitution, even where the recipient had made no error.³³⁹ Finally, the traditional unjust enrichment action did not consider the size or importance of the mistake; the plaintiff did not need to show that the mistake was significant to be entitled to recovery.³⁴⁰

These traditional principles should be modified when applied to the ERISA setting. Mistakes do not occur in a sphere of completely private interest. The relationship is a statutorily created and regulated one, and therefore involves considerations of public policy. Furthermore, an ongoing relationship exists where similar situations may arise again. Thus, the equities to be taken into account should also capture the systemic interests served by the statute as well as notions of individual fairness.³⁴¹ Before deciding to return the money, courts should consider the type of the mistake, its causes, its avoidability, and the disincentives created by a refund.

Considerable expense, uncertainty, and acrimony attend overpayment disputes.³⁴² ERISA expresses an interest not only in reducing such wasteful expenditures by pension funds, but also in securing harmonious relations between employer and pension plan.³⁴³ One equitable consideration that should be evaluated is the effect a refund will have on the incentive of the employer to make such mistakes again in

Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund, 794 F.2d 221, 236 n. 24 (6th Cir.), cert. denied, 479 U.S. 1007 (1986); Peckham v. Board of Trustees of Intl. Bhd. of Painters, 719 F.2d 1063, 1066 (10th Cir.), modified, 724 F.2d 100 (10th Cir. 1983).

337. See D. DOBBS, *supra* note 307, § 11.7.

338. RESTATEMENT OF RESTITUTION § 59 (1937).

339. See J. CALAMARI & J. PERILLO, *supra* note 306, § 9-29; D. DOBBS, *supra* note 307, § 11.7 (1973); 3 G. PALMER, *supra* note 276, § 14.24.

340. See 3 G. PALMER, *supra* note 276, § 14.24. *But see Restitution & Implied Contracts*, *supra* note 284, § 131 (suggesting that "negligence may be relevant in determining whether it is equitable to allow a recovery").

341. See *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743, 751 (N.D. Ill. 1988) ("Equity provides the proper mediation between the principles embodied in the refund section and the overall command to which it is an exception."); see also *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989) (court should weigh all factors "against the backdrop of general equitable considerations and the guiding principles and purposes of ERISA").

342. See *supra* notes 226-52 and accompanying text.

343. See *supra* note 113 and accompanying text.

the future. As the Sixth Circuit commented, it is not unreasonable to demand punctiliousness on the part of employers because "Congress, in weighing the interests implicated in the context of employee benefit plans, has favored the financial soundness of the plan and held employers to high standards of accounting."³⁴⁴ Before permitting a refund, the court should consider whether the employer could have easily avoided the mistake with the exercise of minimal care.³⁴⁵ The court may inquire whether the employer was in sole control of the needed information, or was in the best position to determine if a mistake was being made.³⁴⁶ If the adoption of even rudimentary bookkeeping procedures would mitigate such risks in the future, then perhaps letting the employer bear the full extent of the loss will have a positive incentive effect. On the other hand, equity would more strongly favor the employer if the mistake were the fault of the trustees, as in the case where the trustees supply the employer with invalid contribution data.³⁴⁷ In sum, equity has a justifiable interest in trying to reduce the incidence of disputes over mistaken payments.

CONCLUSION

ERISA optimizes retiree welfare by engrafting onto private pension plans regulations with minimal disincentives to plan maintenance and growth. In a purely voluntary system, zealous protection of presently accrued benefits would be a Pyrrhic victory if purchased at the cost of inhibitions on the scope and quality of pension coverage offered. Irrecoverable payments made in error to pension funds detract from the utility employers derive from creating pension arrangements and therefore discourage employer participation. ERISA gives courts flexibility to address this disincentive through the mistaken contribution provision. This Note proposes a common law remedy that permits equitable return of erroneous contributions. The restitutionary model advanced by this Note, capturing traditional equitable precepts and statutory objectives, permits return of the money only when retention of the overpayment would be unjust.

Courts should interpret section 403 to permit employers to recover

344. *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 236 n.24 (6th Cir. 1986), *cert. denied*, 479 U.S. 1007 (1986); *see also* *Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1091 (W.D. Pa. 1983) (employer should bear full risk of mistake).

345. *See* *Carpenters Local 1471 v. Bar-Con, Inc.*, 668 F. Supp. 560, 569 (S.D. Miss. 1987) (no refund if mistake due to "haphazard management" by employer).

346. *See* *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 963 (1st Cir. 1989) (employer in best position to monitor own eligibility); *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 312 (E.D. Pa. 1982) (same), *affid. without opinion*, 720 F.2d 661 (3d Cir. 1983); *cf.* *Connors v. Beth Energy Mines*, 920 F.2d 205 (3d Cir. 1990) (trustees deprived of equitable tolling defense where they were in best position to realize employer's accounting method erroneous).

347. *See* *Comment, supra* note 234, at 75.

mistakenly paid contributions for two pragmatic reasons. Employers who must absorb the deadweight loss associated with mistaken payments either reduce the pension coverage offered, or attempt to offset the error by withholding subsequent payments owing to the fund. Both possibilities are inferior to a legal remedy that remits overpayments. Rational judicial supervision of the refund process is imperative. A system that relies so heavily on the private sector for its success cannot long survive if it turns a blind eye to the realities of the cost-benefit calculus employers face in deciding when to provide pension benefits, if at all.

— *J. Daniel Plants*