

---

## Warren v. Society National Bank: Fiduciary Duties and Recovery of Damages for Breach under ERISA

Charles M. Dyke

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Charles M. Dyke, *Warren v. Society National Bank: Fiduciary Duties and Recovery of Damages for Breach under ERISA*, 41 DePaul L. Rev. 515 (1992)

Available at: <https://via.library.depaul.edu/law-review/vol41/iss2/8>

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

**WARREN v. SOCIETY NATIONAL BANK: FIDUCIARY  
DUTIES AND RECOVERY OF DAMAGES FOR BREACH  
UNDER ERISA**

**TABLE OF CONTENTS**

INTRODUCTION .....	516
I. ERISA BENEFIT PLANS .....	518
A. <i>Welfare Benefit and Pension Benefit Plans</i> .....	518
B. <i>Defined Benefit and Defined Contribution Pension Plans</i> .....	518
C. <i>The Summary Plan Description</i> .....	519
D. <i>What is a Benefit?</i> .....	520
II. NATIONAL TAX POLICY AND ERISA .....	523
A. <i>National Retirement Goals</i> .....	523
B. <i>The Rollover Rules</i> .....	524
III. ERISA FIDUCIARY STANDARDS .....	526
A. <i>Trust Law</i> .....	531
B. <i>Prior Federal Law</i> .....	533
1. <i>The Tax Code</i> .....	533
2. <i>The Labor Management Relations Act</i> .....	534
3. <i>The Arbitrary and Capricious Standard Under             ERISA</i> .....	535
C. <i>De Novo Review Under Firestone</i> .....	537
IV. ERISA REMEDIES .....	540
A. <i>Recovery on Behalf of the Plan</i> .....	541
B. <i>Recovery for Individuals</i> .....	543
1. <i>Trust Law Principles of Recovery</i> .....	544
2. <i>Justice Brennan's Approach</i> .....	547
3. <i>Justice Stevens' Approach</i> .....	549
V. WARREN v. SOCIETY NATIONAL BANK .....	551
A. <i>Facts and Procedure of Warren</i> .....	551
B. <i>The Sixth Circuit Opinions</i> .....	553
1. <i>Judge Lively's Opinion</i> .....	553
2. <i>Judge Nelson's Concurrence</i> .....	555
3. <i>Judge Wellford's Dissent</i> .....	555
VI. ANALYSIS .....	556
A. <i>Duty and Breach Under ERISA</i> .....	556
1. <i>The Nature of the Duty</i> .....	557
a. <i>Dr. Warren's claim</i> .....	560
b. <i>The hypothetical pensioner's claim</i> .....	563
2. <i>Appropriate Equitable Relief</i> .....	564

a.	Collapse of the general equitable principles theory	564
b.	Trust principles and equitable relief . . . . .	565
c.	The scope of equitable relief . . . . .	569
B.	<i>A Claim Against the Plan for Benefits</i> . . . . .	570
VII.	IMPACT . . . . .	571
	CONCLUSION . . . . .	572

## INTRODUCTION

Imagine a worker who, upon leaving his employer, opts to receive his vested pension benefit<sup>1</sup> in the form of a lump sum,<sup>2</sup> which he intends to roll over tax-free into an Individual Retirement Account.<sup>3</sup> The pension plan fiduciary administering the claim distributes the worker's lump sum in two disbursements over two taxable years, the first disbursement being smaller than the second. Because of the administrator's handling of the claim, the first disbursement is ineligible for rollover treatment and taxed as though it were income for that year. Only the second distribution continues to earn interest tax-free. The worker has just lost a substantial portion of his retirement savings. Does the worker have a remedy? If so, is it against the pension plan? Against the fiduciary?

In *Warren v. Society National Bank*,<sup>4</sup> plaintiff Dr. Warren faced a similar, though subtly different,<sup>5</sup> set of circumstances and sued the professional fiduciary for damages. The Sixth Circuit held that, in principle, such damages were recoverable under the Employee Retirement Income Security Act of 1974 ("ERISA").<sup>6</sup> Although the Sixth Circuit's decision that ERISA fiduciaries can be sued for personal damages in such circumstances probably is correct, its rationale is unpersuasive. Its finding that the fiduciary in the case breached a contractual rather than fiduciary duty is doctrinally unsound and, this Note argues, inconsistent with a proper reading of *Firestone Tire & Rubber Co. v.*

1. A benefit is vested when the pension plan participant acquires a legal claim to that benefit against the plan. *See infra* notes 42-45 and accompanying text.

2. A lump-sum distribution is defined under the Internal Revenue Code as the payment within one taxable year of the balance owed to an employee benefit plan participant. I.R.C. § 402(e)(4) (1988 & Supp. I 1989). Under some circumstances, a payment of less than the participant's plan balance will constitute a lump-sum payment. *Id.* § 402(a)(5).

3. Ordinarily, pension benefits are taxed as income at the time they are distributed to a beneficiary. *See infra* note 56 and accompanying text. When a worker receives pension benefits in the form of a lump-sum payment, however, the Internal Revenue Code allows the worker to avoid paying income taxes by redepositing, or "rolling over," the funds into a tax-free savings vehicle such as an Individual Retirement Account. *See infra* notes 60-65 and accompanying text.

4. 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

5. In *Warren*, the pension plan fiduciary also distributed Dr. Warren's lump sum over two taxable years, but the first disbursement was larger than the second. *Id.* at 976. Dr. Warren's case is discussed in Part V of this Note. *See infra* notes 232-68 and accompanying text.

6. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (substantially codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. I 1989) and in various provisions of the Internal Revenue Code).

*Bruch*,<sup>7</sup> which addressed the issue of fiduciary duty under ERISA. In addition, the *Warren* court's articulation of the appropriate scope of equitable relief available under ERISA is too broad and would encourage suits to recover damages that ERISA does not and ought not allow. The Sixth Circuit also ignored a potential cause of action against the plan for denial of benefits.<sup>8</sup>

As greater numbers of workers acquire pension benefits through their employers,<sup>9</sup> the potential for misadministration of worker claims for those benefits increases.<sup>10</sup> This Note explores the nature of the ERISA fiduciary's duties in handling benefit claims and examines the scope of equitable relief available to participants when those duties are breached.

Part I of this Note introduces the reader to employee benefit plans and defines the concept of a benefit. Part II briefly examines the tax-related motivations behind benefit plan formations and explains the tax consequences of receiving a pension benefit in the form of a lump sum. Part III considers the present state of ERISA fiduciary law in cases alleging breach of fiduciary duty through wrongful benefit denials by examining the law of trusts prior to the enactment of ERISA and the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch*.<sup>11</sup> Part IV examines ERISA's equitable remedies for damages caused by breaches of fiduciary duty. Part V presents Dr. Warren's case. Considerable attention is devoted to the Sixth Circuit's opinion, which offered a dual rationale for holding that Dr. Warren's damages were recoverable. Part VI analyzes the Sixth Circuit's dual rationale and finds that neither of the court's approaches comports with established precedent. An appropriate framework for analyzing fiduciary duties and recovery of damages for breach is then presented. Applying this framework to Dr. Warren's claim, an argument is made that the fiduciary in *Warren* complied with ERISA. The hypothetical pensioner's claim is also analyzed, but the opposite conclusion is reached. Two solutions are proposed for the pensioner. The first proposes that where a fiduciary breaches his duty in administering a claim for benefits, the injured pensioner should be permitted to sue the fiduciary for damages equal to the participant's lost pecuniary interest in the plan. The second solution proposes that the lump sum be treated as a benefit owed under the terms of the plan. This lost benefit could be recoverable in a suit against the plan as the difference between the value of the benefit promised and the value of the benefit received.<sup>12</sup>

---

7. 489 U.S. 101 (1989).

8. ERISA § 502(a)(1)(B) permits plan participants to bring an action for recovery of benefits due under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B).

9. In 1987, more than 40 million workers were covered by employer-sponsored benefit plans. RICHARD A. IPPOLITO, AN ECONOMIC APPRAISAL OF PENSION TAX POLICY IN THE UNITED STATES 17 (tbl. 1-4) (1990).

10. For a collection of ERISA cases dealing with claims of misadministration and benefit denials, see CHARLES B. WOLF & JOHN J. JACOBSEN, ERISA CLAIMS AND LITIGATION 79-81 (1988).

11. 489 U.S. 101 (1989).

12. A participant may sue a fiduciary under ERISA § 502(a)(3) for "appropriate equitable relief" to redress violations of fiduciary duty and the terms of the plan. 29 U.S.C. § 1132(a)(3). A

## I. ERISA BENEFIT PLANS

### A. Welfare Benefit and Pension Benefit Plans

ERISA divides benefit plans into two fundamental groups: welfare benefit plans and pension benefit plans.<sup>13</sup> A welfare benefit plan is a program established by an employer, an employee organization, or both, for the purpose of providing medical, disability, vacation, or other current-consumption benefits.<sup>14</sup> A pension benefit plan, by contrast, is a scheme designed to provide retirement income to employees, regardless of whether the employer alone or the employer and employee together contribute to the plan.<sup>15</sup> Both types of plans are similar in that they create a reasonable expectation in participants and beneficiaries of regular payment of benefits.<sup>16</sup> They differ in that ERISA's stringent funding and vesting rules<sup>17</sup> do not apply to welfare benefit plans.<sup>18</sup> Because this Note deals primarily with ERISA's fiduciary, tax, and enforcement provisions, it frequently will be convenient to refer to both types of plans at one time. Accordingly, the shorthand "benefit plan" will be employed in such situations.

### B. Defined Benefit and Defined Contribution Pension Plans

Pension plans are of two types: defined benefit and defined contribution.<sup>19</sup> Under a defined benefit plan, the most common type,<sup>20</sup> the employee is promised a specific level of retirement income based upon one of several employer-contribution formulas.<sup>21</sup> The most frequently used formulas make use of either the employee's length of service or salary level in the final years of employment.<sup>22</sup> A defined benefit plan, unlike a defined contribution plan, offers employers the ability to meet specific retirement income objectives for targeted

participant may also sue a benefit plan under ERISA § 502(a)(1)(B) to recover *benefits* owed under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B).

13. ERISA § 3(1)-(2), 29 U.S.C. § 1002(1)-(2).

14. 29 U.S.C. § 1002(1).

15. *Id.* § 1002(2).

16. Jay Conison, *The Federal Common Law of ERISA Plan Attorneys*, 41 SYRACUSE L. REV. 1049, 1056 (1990) (citing *Brundage Peterson v. Compare Health Serv. Ins. Corp.*, 877 F.2d 509, 510-11 (7th Cir. 1989)).

17. 29 U.S.C. §§ 1051-1086.

18. *Id.* §§ 1051(1), 1081(1). ERISA's fiduciary standards, however, apply to any employee benefit plan. ERISA § 401, 29 U.S.C. § 1101.

19. 29 U.S.C. §§ 1002(34)-(35).

20. Defined benefit plans are estimated to hold approximately 70% of all pension assets. RICHARD A. IPPOLITO, *PENSIONS, ECONOMICS AND PUBLIC POLICY* 81 (1986).

21. EMPLOYEE BENEFIT RESEARCH INSTITUTE, *FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS* 46 (3d ed. 1987) [hereinafter EBRI].

22. *Id.* at 46-47. Employee Benefit Research Institute identifies a third formula known as career averaging. *Id.* at 46. Under this approach, the level of retirement benefits is based upon one of two calculations: The employer makes annual contributions on behalf of the employee based upon either a percentage of the employee's salary each year or upon a percentage of the employee's career average salary. *Id.*

employees while offering long-term employees the security of a specified level of risk-free retirement income.<sup>23</sup>

In contrast to the defined benefit plan is the defined contribution plan, where the employer establishes a separate account for each employee and makes periodic contributions to these accounts.<sup>24</sup> The plan may be one where only the employer contributes, or it may be one where both employer and employee contribute.<sup>25</sup> An example of the former is a profit-sharing plan, where the employer allocates a percentage of profit to the employee's account; an example of the latter is a 401(k) savings plan,<sup>26</sup> where the employer matches employee contributions to the account, up to a specified percentage.

### C. The Summary Plan Description

ERISA requires that every benefit plan be established and maintained according to a written document<sup>27</sup> and that all participants and beneficiaries be provided a summary plan description ("SPD").<sup>28</sup> The SPD must explain in ordinary language the rights and obligations of the participants and beneficiaries under the plan.<sup>29</sup> In addition, it must explain key provisions relating to benefit claims, such as eligibility requirements, claims procedures, and circumstances that result in the loss of benefits.<sup>30</sup> When the actual plan document and the SPD conflict over a provision that affects an employee's right to benefits under the plan, courts generally have held that the SPD prevails.<sup>31</sup>

---

23. *Id.* at 66. Obviously the employee bears some risk in a defined benefit pension plan. For example, if the employer terminates the plan, *nonvested* participants and beneficiaries may receive no retirement benefits. See *infra* notes 42-45 and accompanying text for an explanation of vested benefits. The same is true when a nonvested employee separates from the employer. Even vested workers covered by termination insurance through the Pension Benefit Guaranty Corporation, 29 U.S.C. § 1302 (1988 & Supp. I 1989), may not receive all of their vested benefits if those benefits exceed the statutorily defined claims limit, as defined at 29 U.S.C. § 1322. See EBRI, *supra* note 21, at 37. Prior to the enactment of ERISA, defined benefit pensions were anything but risk-free to employees. See *infra* notes 72-75 and accompanying text (noting that, prior to the enactment of ERISA, many workers were denied benefits by their employers, and others lost their benefits through fiduciary incompetence and fraud).

24. EBRI, *supra* note 21, at 46.

25. *Id.*

26. I.R.C. § 401(k) (1988 & Supp. I 1989).

27. ERISA § 402(a), 29 U.S.C. § 1102(a) (1988 & Supp. I 1989).

28. ERISA § 102, 29 U.S.C. § 1022.

29. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1).

30. ERISA § 102(b), 29 U.S.C. § 1022(b).

31. See *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985); *Rhodon v. Central States, Southeast & Southwest Areas Pension Fund*, 717 F.2d 988, 989-91 (6th Cir. 1983); see also *Govoni v. Bricklayers, Masons & Plasterers Int'l Union*, 732 F.2d 250, 252 (1st Cir. 1984) (stating that reliance on faulty plan summary is ground for relief); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984) (stating that misleading summary plan description and management representations preclude summary judgment in favor of employer); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 2-3 (1st Cir. 1978) (enforcing summary plan description), *cert. denied*, 440 U.S. 913 (1979). But see *O'Brien v. Sperry Univac*, 458 F. Supp. 1179, 1180-81

### D. What Is a Benefit?

Although the term "benefit" is used countless times throughout ERISA, nowhere in the statute is the term explicitly defined.<sup>33</sup> ERISA instead describes different *types* of benefits and then ascribes different characteristics to those benefit types. By examining the different characteristics of ERISA's benefit types, important principles can be discerned and used to determine whether a given feature of a benefit plan is or is not a benefit within the contemplation of the statute.

The two basic benefit types under ERISA are: (1) retirement income provided by pension benefit plans,<sup>34</sup> and (2) child-care services or medical, dental, or other payment schemes offered under welfare benefit plans.<sup>35</sup> Pension plan benefits frequently are described as "nonforfeitable"<sup>36</sup> and "accrued,"<sup>36</sup> while welfare plan benefits sometimes are described as "ancillary."<sup>37</sup> Because this Note focuses primarily on pension benefits, the discussion of benefits in this section will focus on those that are nonforfeitable and accrued.

ERISA forbids any amendment to a pension benefit plan that decreases a participant's accrued benefits under the plan.<sup>38</sup> The substance of this employee

---

(D.D.C. 1978) (refusing recovery because summary plan description is not part of plan documents).

32. Early versions of the statute defined a "pension benefit" as "the aggregate, annual, monthly, or other amounts to which a participant has or will become entitled upon retirement or to which any other person is entitled by virtue of such participant's death." H.R. 462, 93d Cong., 1st Sess. § 3(30) (1973), *reprinted in* 1 SENATE COMM. ON LABOR OF THE COMM. ON LABOR & PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 76 (1976) [hereinafter LEGISLATIVE HISTORY]; S. 4, 93d Cong., 1st Sess. § 3(30) (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 103-04; H.R. 2, 93d Cong., 2d Sess. § 502(a)(22) (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 3745. Webster's Third New International Dictionary defines a benefit as "a cash payment or service provided for under an annuity, pension plan, or insurance policy." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 204 (1981) [hereinafter WEBSTER'S].

33. See ERISA § 3(2)(A)(i), 29 U.S.C. § 1002(2)(A)(i) (1988 & Supp. I 1989) (stating that a pension benefit plan is one that provides retirement income to employees).

34. See ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A). Webster's definition of "benefit" is consistent with this understanding of ERISA's benefit types. See WEBSTER'S, *supra* note 32, at 204.

35. See ERISA § 3(19), 29 U.S.C. § 1002(19).

36. See *id.* § 1002(23).

37. ERISA itself does not define the term "ancillary benefit." The legislative history, however, gives meaning to the term by offering medical insurance and life insurance as examples of such benefits, and distinguishing them from "accrued benefits," which can only be pension or retirement benefits. H.R. REP. NO. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 32, at 3180. Ancillary benefits do not serve the primary function of providing retirement income. See *id.*; see also *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1463 (9th Cir.) (discussing ERISA's legislative history and the distinction between accrued and ancillary benefits), *cert. denied*, 471 U.S. 1137 (1985); *Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977 (3d Cir.) (citing H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 273 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5054), *cert. denied*, 474 U.S. 845 (1985).

38. ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). The exception to this rule is where the Secretary of Labor approves a benefit-reducing amendment due to business hardship. 29 U.S.C. §

protection is grounded in the term "accrued benefits," and the employee's protection depends upon how broadly or narrowly the term is defined. The definitions section in ERISA explains that an accrued benefit is the balance of a participant's pension account, in the case of a defined contribution plan, or "the annual benefit commencing at normal retirement age" as determined under the plan, in the case of a defined benefit plan.<sup>39</sup> This definition, however, is not exhaustive. The same provision that forbids benefit-reducing amendments to plans also explains that an amendment eliminating "an optional form of benefit" that was available during a participant's period of employment is to be treated as a reduction in accrued benefits.<sup>40</sup> An example of an optional form of benefit is a provision in a defined benefit pension plan that permits each participant to choose between receiving his pension in the form of a lump-sum payment or an annuity. Under this section, then, ERISA identifies not only a participant's account balance and annual payment amount—two very conventional conceptions of benefits—as accrued benefits, but also the option to choose between the two methods of payment as an accrued benefit. This is an important distinction because it demonstrates that ERISA itself recognizes that a benefit may take more than one form.<sup>41</sup>

An accrued pension benefit becomes nonforfeitable when, based upon the participant's length of service to the sponsor employer, the participant acquires a legal claim to that benefit against the plan.<sup>42</sup> The length-of-service requirements are spelled out in ERISA's two vesting schedules, between which the employer may choose. The vesting provisions state that a worker either becomes legally entitled to his full pension benefit after five years of service, or to twenty percent of his pension benefit per year after three years of service,

---

1082(c)(8).

39. ERISA § 3(23), 29 U.S.C. § 1002(23).

40. 29 U.S.C. § 1054(g)(2)(B).

41. Labor Department regulations specifying which benefits are guaranteed by the Pension Benefit Guaranty Corporation ("PBGC"), ERISA §§ 4001-4023, 29 U.S.C. §§ 1301-1461, describe benefits similarly:

If a benefit which is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid *as such*, but the PBGC will guarantee *the alternative benefit*, if any, under the plan which provides for the payment of equal periodic installments for the life of the recipient.

29 C.F.R. § 2613.8(a) (1991) (emphasis added).

The House Conference Report employs similar wording to explain that the term "accrued benefit" does not apply to "life insurance benefits payable as a lump sum." H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 273 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 32, at 4540. Lump-sum pension benefits are discussed in more detail in Part II(B) below. *See infra* notes 60-71 and accompanying text.

42. The terms "nonforfeitable" and "vested" are used interchangeably throughout ERISA. *Nachman v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 376 (1980). A nonforfeitable pension benefit is defined by the statute as "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." ERISA § 3(19), 29 U.S.C. § 1002(19).



reaching full entitlement at the end of seven years.<sup>43</sup> The nonforfeitability characteristic of pension benefits is one of ERISA's most important features because it provides qualified workers with a legal claim to their expected benefits.<sup>44</sup> If a plan is terminated and cannot pay all the vested benefits it has promised workers, the federally chartered Pension Benefit Guaranty Corporation, a rough analogue to the banking industry's Federal Deposit Insurance Corporation, pays the outstanding vested benefits.<sup>45</sup>

To recap, an accrued pension benefit can be simply a plan participant's account balance or annuity payment amount, or it can be an option to choose between the two. Such an accrued benefit becomes vested, and therefore nonforfeitable, once the participant meets ERISA's vesting schedule requirements. These distinctions between benefits will be important to keep in mind below when analyzing the nature of Dr. Warren's and the hypothetical pensioner's benefits, because one possible course of recovery for the pensioners would allow them to claim that they were denied benefits under the terms of their plans.

43. ERISA § 203, 29 U.S.C. § 1053; I.R.C. § 411(a)(2) (1988 & Supp. I 1989).

44. The lack of minimum vesting standards was one of the fundamental flaws in pre-ERISA pension practices that Congress sought to correct. Congress found "that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans. . . . [Therefore,] minimum standards [should] be provided [to] assur[e] the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a).

An example of the kind of slippery or nonexistent vesting standards common to some pre-ERISA plans is found in the pension plan discussed in *Wilson v. Rudolph Wurlitzer Co.*, 194 N.E. 441 (Ohio Ct. App. 1934). There, the Wurlitzer Company's "pension system" was described as such:

To employees of good standing, who *in the opinion of the officers of the company*, have been loyal and faithful to our company over a period of 10 years or more, and who have grown old in our service, we will pay 2% on the entire amount earned each year, which will be paid in monthly installments for life. The largest pension we pay anyone is \$100.00 per month, \$1,200 per year. For example, an employee that has earned \$900 per year:

Worked 10 years at \$900.00 a year—\$9,000.00. Pension, \$15.00 per month.

Worked 15 years at \$900.00 a year—\$13,500.00. Pension, \$22.50 per month.

Worked 20 years at \$900.00 a year—\$18,000.00. Pension, \$30.00 per month.

*Id.* at 442 (emphasis added).

Other plans required lengthy periods of service—20 years and more—before vesting would occur and demanded continuous service before employees could qualify. For a collection of personal tragedies caused by these and other pension plan practices, see RALPH NADER & KATE BLACKWELL, *YOU AND YOUR PENSION* (1973).

45. ERISA § 4022(a), 29 U.S.C. § 1322(a); *Nachman v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). Labor Department regulations, *see supra* note 41, explain that one form of nonforfeitable benefit, the lump-sum pension, is not insured as such; rather it is the alternative benefit, an annuity pension (if the plan provides for one), that is insured. 29 C.F.R. § 2613.8 (1991). The PBGC distinguishes the two for cash flow and actuarial reasons. Most defined contribution plans provide for lump-sum pensions, with an annuity pension being the optional benefit form. IPPOLITO, *supra* note 9, at 7. Obviously, the financial burden on the PBGC to meet the vested liabilities of a terminated and underfunded defined contribution plan, where a substantial number of participants select a lump-sum pension, could be overwhelming.

## II. NATIONAL TAX POLICY AND ERISA

### A. National Retirement Goals

National retirement security goals are achieved through a tripartite system of pension and savings plans.<sup>46</sup> At one end of the spectrum is Social Security,<sup>47</sup> a publicly financed program that provides some minimal level of retirement income for workers. At the other end are individual savings and family resources used for retirement. These savings generally are considered a matter of private concern, except to the extent that they are facilitated and encouraged through such tax-favored devices as Individual Retirement Accounts ("IRAs")<sup>48</sup> and Keogh Plans (for the self-employed).<sup>49</sup> Falling somewhere in the middle are employer-sponsored pension plans, which aim to fill the void between many workers' subsistence-level Social Security old-age payments and the amount of private resources they need but lack to sustain their present standard of living in retirement.<sup>50</sup>

In 1987, more than forty million workers participated in private pension plans that contained \$1.3 trillion in assets.<sup>51</sup> The enormous popularity of these plans is largely attributed to the favorable tax treatment they receive from the Internal Revenue Code ("Code").<sup>52</sup> Under the Code, employer contributions to qualified pension plans<sup>53</sup> are deductible by the employer as ordinary and necessary business expenses at the time they are made.<sup>54</sup> In addition, the interest and investment income earned by pension plans is exempt from taxation.<sup>55</sup> Furthermore, participants in the plan are not taxed on the employer contributions made on their behalf until the savings are distributed.<sup>56</sup> This favorable treatment generally is referred to as a tax expenditure, or subsidy.<sup>57</sup> Obvi-

46. See generally EBRI, *supra* note 21; Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851 (1987).

47. See 42 U.S.C. §§ 401-431 (1988 & Supp. I 1989).

48. I.R.C. § 219(b) (1988 & Supp. I 1989).

49. *Id.* § 404(e)(1). IRAs and Keoghs permit individuals and the self-employed to obtain, in principle, the same tax advantages on savings that are afforded participants in employer-sponsored pension plans. See *infra* notes 51-58 and accompanying text (discussing the tax advantages of these plans). Contributions to IRAs, however, are limited to \$2000 annually. I.R.C. § 408. For a general discussion of IRAs and Keoghs, see John Lucas, *IRAs, SEPs and KEOGHs*, 18 AKRON L. REV. 609 (1985).

50. Daniel I. Halperin, *Retirement Security and Tax Equity: An Evaluation of ERISA*, 17 B.C. INDUS. & COM. L. REV. 739, 739 (1976).

51. IPPOLITO, *supra* note 9, at 17 (tbl. 1-4), 99 (tbl. A-1).

52. For a detailed discussion of the Code's impact on benefit plans, see William J. Chadwick & David S. Foster, *Federal Regulation of Retirement Plans: The Quest for Parity*, 28 VAND. L. REV. 641, 645-68 (1975).

53. The specific criteria that pension plans must meet to "qualify" for preferential tax treatment are examined in Part III(B)(1). See *infra* notes 105-14 and accompanying text.

54. I.R.C. § 404(a) (1988 & Supp. I 1989).

55. *Id.* § 501(a).

56. *Id.* § 402(a).

57. Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 421 & n.16 (1984). The 1976 Senate Budget Com-

ously, it is a subsidy to the employer because the employer may reduce its tax liability by an amount commensurate with its contribution. To employees, the subsidy works in two ways. First, pension earnings will accumulate at a significantly faster rate in a tax-preferred plan than in a conventional savings device, because the pension earnings are permitted to accumulate tax-free.<sup>58</sup> Second, no income tax is assessed until the funds are withdrawn, which paradigmatically occurs at retirement when the retiree is in a lower tax bracket.

Keeping these fundamental aspects of national tax policy in mind—particularly who is benefitted and to what degree by the current tax laws—is important to understanding the scope of ERISA's fiduciary provisions that are examined below.<sup>59</sup>

### B. The Rollover Rules

Although many employees remain with the same company until retirement, many others leave their employer when partially or fully vested, choosing to take their pension benefits in the form of a lump sum. ERISA accommodates these employees by offering them tax-free rollovers for their lump sums.<sup>60</sup> The rollover rules are technical and have been altered several times since ERISA was passed in 1974. Some understanding of the rule changes is important to understanding the legal controversy surrounding our hypothetical pensioner and Dr. Warren, because both requested their pension funds for the purpose of rolling them over. The Analysis section below discusses how to interpret plan terminology borrowed from tax law—specifically the phrase lump-sum payment of benefits.<sup>61</sup>

Generally speaking, an employee who receives her pension or profit-sharing benefits from a qualified plan in the form of a lump-sum payment may continue to defer income taxes on that payout by rolling it over into an IRA or another qualified employer plan.<sup>62</sup> In some instances, a partial distribution of pension funds also will qualify for rollover treatment. In the case of lump-sum distributions, the recipient must effect the rollover within sixty days of receiving the funds.<sup>63</sup> A lump-sum distribution is defined under the Code as the payment "within one taxable year" of a participant's plan balance, which has

---

mittee defined tax expenditures as "revenue losses that occur as a result of Federal tax provisions that grant special tax relief to encourage certain kinds of activities by taxpayers or to aid taxpayers in special circumstances." SENATE BUDGET COMM., FIRST CONCURRENT RESOLUTION ON THE BUDGET—FISCAL YEAR 1977 AND THE BUDGET FOR THE TRANSITION QUARTER, S. REP. NO. 731, 94th Cong., 2d Sess. 8 (1976). For an economic argument that tax code provisions favoring private pension plans do not amount to a tax subsidy, see IPPOLITO, *supra* note 9, at 25-27.

58. For an illustration of this compounding effect, see IPPOLITO, *supra* note 9, at 13-16.

59. See *infra* notes 72-91 and accompanying text.

60. I.R.C. §§ 402(e)(4), 402(a) (1988 & Supp. I 1989); see H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 341 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 32, at 4608.

61. See *infra* notes 298-312 and accompanying text.

62. I.R.C. § 402(e)(4) (1988 & Supp. I 1989); see Committee Report on Pub. L. No. 94-267, 90 Stat. 365, [1991] 5 Stand. Fed. Tax Rep. (CCH) ¶ 2618A, at 36,026.

63. [1991] 5 Stand. Fed. Tax Rep. (CCH) ¶ 2618A, at 36,027.

become payable because of the employee's death, separation from service, attainment of age fifty-nine and a half, or disability.<sup>64</sup> Thus, a lump-sum distribution need not be a one-transaction payment; it can be two or more payments made within one taxable year. But such multiple distributions will not constitute a lump sum unless the taxable-year payouts amount to the entire balance of the participant's vested interest in the plan.<sup>65</sup>

Prior to 1984, the relevant year for Dr. Warren, lump-sum distributions were the only distributions eligible for rollover treatment. The Tax Reform Act of 1984<sup>66</sup> altered the original ERISA rules by permitting rollovers for partial distributions. Under the 1984 rules, a distribution that was less than the entire balance of the participant's pension or profit sharing benefit could still qualify for a tax-free rollover, provided that: (1) the distribution equaled at least fifty percent of the balance to the credit of the participant; (2) the distribution was not part of a series of periodic payments; (3) the participant elected tax-free rollover treatment; and (4) the rollover was effected within sixty days after receipt.<sup>67</sup> The partial distribution could only be rolled over into an IRA, not another qualified plan.<sup>68</sup>

The Tax Reform Act of 1986 changed the 1984 partial distribution rules.<sup>69</sup> Those changes, however, were subsequently repealed in 1988.<sup>70</sup> As the 1988 House Committee Report explained:

[I]t is not uncommon for an employer to make a lump-sum distribution to an employee in one taxable year and discover a calculation error in the following taxable year that requires another distribution to the employee. It is further intended, in these circumstances, that the first distribution is to be

---

64. I.R.C. § 402(e)(4).

65. As an alternative to rolling over her lump sum, the recipient can choose to take advantage of special forward averaging rules, which permit her to receive her pension in a lump sum while declaring only a portion of that sum as income in each of a specified number of years. This reduces her tax liability by subjecting the income to lower tax rates than if it were taxed at one time. See H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 348 (1974), *reprinted in 3 LEGISLATIVE HISTORY, supra* note 32, at 4615 (discussion of 10-year forward averaging); Committee Report on Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, [1991] 5 Stand. Fed. Tax Rep. (CCH) ¶ 2618A, at 36,023 (noting that the Tax Reform Act of 1986 replaces 10-year forward averaging with five-year forward averaging).

66. Tax Reform Act of 1984, Pub. L. No. 98-369, § 522(e), 98 Stat. 494, 868-71.

67. Committee Reports on Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, [1991] 5 Stand. Fed. Tax Rep. (CCH) ¶ 2618A, at 36,025.

68. *Id.* In addition, any subsequent distribution from the plan was ineligible for forward averaging. *Id.*

69. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended at 26 U.S.C.).

70. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1985) (codified as amended at I.R.C. § 402(a) (1988 & Supp. I 1989)). The 1988 Act altered the 1984 eligibility requirements by stipulating that the distribution had to be made on account of the employee's death, separation from service, or disability. No longer can the second distribution qualify for rollover status if the distribution is made because the employee reaches age 59½. House Committee Report on the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, [1991] 5 Stand. Fed. Tax Rep. (CCH) ¶ 2618A, at 36,022.

treated as a lump-sum distribution (as under present law) and the second distribution is to be treated as a partial distribution eligible for rollover treatment. The partial distribution rules were *originally* enacted because of employer errors in calculating the lump-sum distributions to which employees are entitled . . . .<sup>71</sup>

The House committee report is excerpted here because it clearly explains when a partial distribution is treated as a lump-sum distribution and when a partial distribution is treated simply as an incomplete distribution, as well as the rationale for the differing treatments. Remember that both Dr. Warren and the hypothetical pensioner requested lump-sum distributions for the purpose of rolling them over.

### III. ERISA FIDUCIARY STANDARDS

ERISA was adopted to ensure that workers receive the benefits they are promised under private benefit plans.<sup>72</sup> The legislative history shows that prior to ERISA, less than five percent of workers who left employers that provided pension benefits ever received any benefits.<sup>73</sup> Employers denied workers their expected benefits in a number of ways. Many workers lost their benefits because vesting standards were overly stringent, or because employers terminated benefit plans.<sup>74</sup> More important to this discussion, many lost their bene-

---

71. House Committee Report on Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, [1991] 5 Stand. Fed. Tax Rep. (CCH) ¶ 2618A, at 36,021 (emphasis added). One reason an employer might have difficulty calculating a participant's lump-sum benefit is that a majority of employees participate in defined benefit plans, which, unlike defined contribution plans, do not maintain separate accounts for each employee. Under a defined benefit plan, a participant's lump-sum benefit is calculated by converting his annuity benefit into a lump sum. See *supra* Part I(B), notes 19-26 and accompanying text.

72. See S. REP. NO. 127, 93d Cong., 1st Sess. 1 (1973), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 32, at 587. "[This legislation addresses] the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives. It responds by mandating protective measures, and prescribing minimum standards for promised benefits." *Id.*

73. 1 LEGISLATIVE HISTORY, *supra* note 32, at 208 (Remarks of Senator Ribicoff, discussing findings of *The Private Welfare and Pension Plan Study, 1971*, discussed in *Interim Report of Activities of the Private Welfare and Pension Plan Study, 1971*, S. REP. NO. 634, 92d Cong., 2d Sess. 65 (1971)).

74. See *supra* note 44 (describing the types of vesting problems employees faced). Plan terminations frequently resulted in loss of or severe reduction of pension benefits. In one of the most celebrated termination cases, Studebaker ceased operations in 1963 and terminated its employees' pension plans. Over 4000 workers received barely 15 cents on the dollar for their promised benefits. See Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, in SENATE COMM. ON AGING, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE, S. REP. NO. 221, 98th Cong., 2d Sess. 8 (1984) [hereinafter Gordon]. ERISA now provides for mandatory plan termination insurance through the Pension Benefit Guaranty Corporation. 29 U.S.C. §§ 1301-1461 (1988 & Supp. I 1989).

For a summary of the testimony before Congress on vesting standards and termination problems, see 3 LEGISLATIVE HISTORY, *supra* note 32, at 4749-50 (remarks of Senator Javits).

fits through fiduciary incompetence and fraud.<sup>75</sup>

To regulate fiduciary conduct, ERISA imposes upon fiduciaries<sup>76</sup> two basic duties borrowed from the common law of trusts—the duties of loyalty and care.<sup>77</sup> In addition, ERISA imposes a duty to diversify plan assets and a duty

---

75. The problem of fraud seemed especially acute in union-dominated plans. For example, in the mid-1960s, a Senate investigation of two local New Jersey unions revealed that the trustee for the pension plans of both unions had established a benefits consulting firm to manage the plans. In addition to charging exorbitant fees for the firm's services, the trustee also managed to divert over \$4 million in union assets to offshore "charities," of which the trustee was the principal shareholder. See Gordon, *supra* note 74, at 11.

76. Unlike the common law of trusts, ERISA defines a fiduciary as one who "exercises any discretionary authority or discretionary control" in the management of the plan, or who "exercises any authority or control" over the management or disposition of the plan's assets, or who "has any discretionary authority or discretionary responsibility in the administration" of the plan. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

The three types of ERISA fiduciaries important to this Note are the named fiduciary, the trustee, and the administrator. Every plan must have a named fiduciary, in whom rests the "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). In addition, where the plan assets are held in trust, the plan or named fiduciary shall specify a trustee, in whom rests the "exclusive authority and discretion to manage and control the assets of the plan," unless the plan makes the trustee subject to the named fiduciary's direction. ERISA § 403(a), 29 U.S.C. § 1103(a). Finally, every plan must have an administrator who fulfills certain statutorily imposed duties that relate to reporting and disclosure. 29 U.S.C. §§ 1002(16)(A), 1021-1025, 1132(c), 1166(a)(4), 1341, 1343, 1346, 1365-1366.

77. RESTATEMENT (SECOND) OF TRUSTS §§ 170 (duty of loyalty), 174 (duty of care) (1959) [hereinafter RESTATEMENT]. These common law duties are discussed further in Part III(A). See *infra* notes 92-104 and accompanying text.

In adopting ERISA, Congress intended to "provide rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." 3 LEGISLATIVE HISTORY, *supra* note 32, at 4781 (remarks of Senator Long). Although the rules and remedies are similar to those in trust law, they are not always the same. A House report explains why:

[E]ven where the funding mechanism is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and *inter vivos* trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

H.R. REP. NO. 533, 93d Cong., 1st Sess. 12 (1973), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 32, at 2359. Congress expected "that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 302 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 32, at 4569.

to follow plan documents.<sup>78</sup> The basic duties of loyalty and care are spelled out in broad, general terms. The duty of loyalty requires a fiduciary to perform his duties "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying costs.<sup>79</sup> The duty of care requires him to use "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity" would use.<sup>80</sup> Both of these general duties are shaped by other, more specific provisions in ERISA that affect their scope. For example, the prohibited transaction rules<sup>81</sup> serve to strengthen the duties of loyalty and care by eliminating

78. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Section 404 provides:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1104(a)(1).

79. ERISA § 404(a)(1) - (a)(1)(A), 29 U.S.C. § 1104(a)(1) - (a)(1)(A).

80. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Section 404(a)(1)(B) actually requires a general duty of care in performing plan functions and a duty of prudence in managing plan assets.

81. ERISA § 406, 29 U.S.C. § 1106. The prohibited transaction rules forbid fiduciaries from engaging in transactions with so-called parties in interest. *See* ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1). ERISA § 3(14) provides a long list of persons who are parties in interest, including fiduciaries, persons who provide services to the plan, the employer-sponsor of the plan, the union representing employees covered by the plan, and relatives of individual parties in interest. ERISA § 3(14), 29 U.S.C. § 1002(14).

The legislative history shows that the prohibited transaction rules were considered vital to upholding strict fiduciary standards. They were also a major issue of contention between the House and Senate in reaching a compromise bill in the conference committee:

**FIDUCIARY RESPONSIBILITY**

One of the major points of contention between the House and Senate conferees was the degree to which party-in-interest transactions by fiduciaries should be barred. The House bill would have barred such transactions only if they were not for adequate consideration.

\* \* \* \*

The Senate provision prevailed and the bill is now universally regarded as having closed what otherwise would have been a major loophole in the Federal effort to protect the integrity of employee pension and welfare funds against "raiding" by insiders.

3 LEGISLATIVE HISTORY, *supra* note 32, at 4765-66 (statement of Senator Javits).

potential conflicts of interest and *per se* risky investments.<sup>82</sup> The duty of loyalty is further bolstered by the noninurement rule, which states that, with certain exceptions, "the assets of the plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants."<sup>83</sup> By contrast, the duties of loyalty and care would seem to be constricted somewhat by an exception to the prohibited transaction rules that permits officers, employees, agents, or other representatives of employers to serve as fiduciaries.<sup>84</sup>

---

82. In addition to the transactions prohibited in § 406, ERISA also places strict limitations on the amount of employer property and securities that a plan may hold. ERISA § 407, 29 U.S.C. § 1107. This provision not only strengthens the duties of loyalty and prudence in asset management, it also strengthens the duty to diversify assets.

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

84. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). Without this exception, such a fiduciary would obviously violate his duty of loyalty to plan participants because of the simultaneous loyalty to the employer.

This provision generally is regarded as a necessary accommodation of most employers' desire to protect their interests by placing their own fiduciaries on the boards of trustees. Since the majority of plans are employer-funded defined benefit plans, the risks of plan investment and benefit payment inure to the employer. For an economic analysis that justifies section 408(c)(3) on the grounds that the employer is a beneficiary, see Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1126-28 (1988).

Professors Fischel and Langbein also argue that, because of the voluntary nature of the plans, a rule that *disallowed* employer fiduciaries could decrease the rate of plan formations. *Id.* at 1127. The legislative history provides support for this proposition:

Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to participate or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules 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 and related plans. At the same time, there are advantages in setting minimum standards in these areas both to serve as a guideline for employers in establishing or improving plans and also to prevent the promise of more in the form of pensions or related benefits than eventually is available.

S. REP. NO. 383, 93d Cong., 1st Sess. 18-19 (1973), *reprinted* in 1 LEGISLATIVE HISTORY, *supra* note 32, at 1086-87.

The Supreme Court, however, has rejected the argument that ERISA's fiduciary standards in claims-administration cases could be affected by potential administrative costs to employers. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court stated:

Firestone and its *amici* also assert that a *de novo* standard would contravene the spirit of ERISA because it would impose much higher administrative and litigation costs and therefore discourage employers from creating benefit plans. . . . [T]he threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard that we have already explained.

*Id.* at 114-15.

In effect, the Court was saying that despite § 408(c)(3), the presumptive standard for reviewing



The case law interpreting these duties of loyalty and care has split into two areas: cases on the one hand dealing with asset management and investment, and cases on the other hand dealing with benefit claims administration. An example of a management-investment type of case would be a suit brought by a participant against a plan trustee alleging defalcation. Another such example would be a suit brought by the Secretary of Labor against the plan trustees for misinvestment of plan assets in the sponsor company.<sup>86</sup> An example of the second type of case—claims-administration—would be a suit brought by a participant against a plan fiduciary for failure to properly administer the participant's claim for benefits under the plan.

Under the management-investment line of cases, courts have strictly construed the fiduciary's duties of loyalty and prudence. Thus, in the leading case of *Donovan v. Bierwirth*,<sup>86</sup> the Second Circuit held that ERISA's duties of loyalty and prudence required the plan trustees, who were also officers of the sponsoring company, to act "with an eye single to the interests of the participants and beneficiaries."<sup>87</sup> In practice, this meant that the trustees' use of pension assets to purchase stock in the sponsor corporation to defeat a hostile takeover attempt was a breach of fiduciary duty.<sup>88</sup> The court reached this conclusion over the trustees' objections that section 408(c)(3) moderates ERISA's fiduciary duties by expressly authorizing corporate officers to serve as plan trustees.<sup>89</sup>

In cases involving benefit claims, the type of claim that Dr. Warren and our hypothetical pensioner have, courts have held fiduciaries accountable to lesser standards of loyalty and care. Until recently, fiduciaries were measured by the so-called "arbitrary and capricious" standard.<sup>90</sup> Under that standard, the re-

a fiduciary's administration of a claim is *de novo*. This is a significant departure from previous practice. See the discussions of the arbitrary and capricious test and *Firestone*, *infra* Parts III (B) & (C), notes 127-60 and accompanying text.

ERISA § 408(c)(3) also resembles a feature of the Labor Management Relations Act ("LMRA"), discussed *infra* Part III(B)(2), which requires that certain union benefit plans be jointly administered by equal numbers of representatives of employers and employees. See *infra* notes 115-26 and accompanying text.

85. *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1067 (1982).

86. 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982).

87. *Id.* at 271.

88. *Id.* at 276.

89. The trustees argued that despite the use of the words "solely" and "exclusive" in ERISA's loyalty provision, the statute permitted corporate officers to serve as trustees and did not forbid trustee actions that had the incidental effect of benefitting the corporation. The court agreed with this proposition in general but held that section 404 imposed "a duty on the trustees to avoid placing themselves in a position where their acts *as officers or directors of the corporation* will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." *Id.* at 271 (emphasis added). Thus, in the management-investment context, § 408(c)(3) simply accommodates an employer's desire to protect his interests, but never at the expense of the participants.

90. This standard originally was developed in cases arising under the Labor Management Relations Act, 29 U.S.C. § 186 (1988 & Supp. I 1989), and is discussed *infra* Part III(B)(2), notes 115-26 and accompanying text.

viewing court simply asks whether the claims administrator's denial of benefits, which usually is based upon an interpretation of the plan, is arbitrary and capricious. After the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch*,<sup>91</sup> however, courts review a denial of benefits either de novo or for an abuse of discretion by the administrator, depending on whether the benefit plan confers discretionary authority upon the administrator. Although a *Firestone* de novo review imposes higher standards of loyalty and care upon fiduciaries in some claims cases than did the arbitrary and capricious test, a de novo review still is substantially more lenient than the stringent standard used in the management-investment cases.

Before ERISA was enacted, an ineffective patchwork of state and federal laws regulated the conduct of benefit-plan fiduciaries. For example, fiduciary conduct was regulated at the state level by trust law. But these rules were considered inadequate because they only regulated plans established pursuant to a trust. At the federal level, fiduciary conduct was only marginally affected by tax laws and certain labor union regulations because those rules were designed primarily to achieve goals other than regulation of fiduciary conduct. The remainder of this part will trace the genesis of the current de novo standard of review in the law of trusts and federal law prior to ERISA, then explore the current de novo standard.

#### A. Trust Law

In trust law, a trust is "a fiduciary relationship" whereby one party holds title to property for the benefit of another.<sup>92</sup> Three parties are involved in this relationship: the settlor, the beneficiary, and the trustee. The settlor is the person who establishes the trust; the beneficiary is the person for whose benefit the trust is created; and the trustee is the person obligated to use the property for the benefit of the beneficiary.<sup>93</sup> As indicated above, the two primary duties of common law trustees are the duties of loyalty and care. Of these, the duty of loyalty is the most fundamental. It is designed to prevent self-dealing by the trustee at the beneficiary's expense.<sup>94</sup> The Second Restatement of Trusts explains that "[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."<sup>95</sup> The duty of care requires the trustee to administer the trust with the care and skill that persons of ordinary prudence would exercise when dealing with their own property.<sup>96</sup> Although these standards greatly restrict the behavior of trustees, the standards are subject to modification.

---

91. 489 U.S. 101 (1989).

92. RESTATEMENT, *supra* note 77, § 2; GEORGE BOGERT, TRUSTS § 1, at 1 (6th ed. 1987); 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 2.3, at 41 (4th ed. 1987).

93. BOGERT, *supra* note 92, § 1, at 1.

94. See 2A SCOTT & FRATCHER, *supra* note 92, § 170, at 311.

95. RESTATEMENT, *supra* note 77, § 170. ERISA's "solely in the interest" language is borrowed directly from this common-law formulation.

96. *Id.* § 174.

Because the common law of trusts is concerned primarily with effecting the intent of the settlor,<sup>97</sup> the terms of the trust instrument are permitted to alter these common law duties.<sup>98</sup> For example, the Restatement provides: "By the terms of the trust the requirement of care and skill may be relaxed or modified."<sup>99</sup> In addition, the common law defers to grants of discretionary authority to trustees.<sup>100</sup> Where the trustee is granted discretion to exercise a power, courts will not interfere with the exercise of that power unless the trustee has abused his discretion.<sup>101</sup> Where the trustee is given the power to construe uncertain terms of the instrument, the trustee's interpretation is reviewable only for reasonableness.<sup>102</sup> The common law duties are subject to such modification that the instrument may even provide an exculpatory provision that will insulate the trustee from liability for what would otherwise be a breach of trust.<sup>103</sup>

One exception to the general rule of deference to the trust instrument is the case involving interpretations of law. In such a setting, even if the trust document authorizes the fiduciary to construe terms of the plan, courts will not defer to the trustee's interpretations of law.<sup>104</sup>

ERISA's trust-law antecedents, in particular the common law duties of loyalty and care, played an important role for the statute's drafters. Much of the important language defining ERISA's fiduciary duties, discussed below, is borrowed from trust law.

97. See *supra* note 77 (discussing ERISA's legislative history). See generally GEORGE G. BOGERT & GEORGE T. BOGERT, *LAW OF TRUSTS AND TRUSTEES* § 41, at 426-31 (rev. 2d ed. 1980) (discussing the settlor and his intent).

98. RESTATEMENT, *supra* note 77, § 164; 1 SCOTT & FRATCHER, *supra* note 92, § 4, at 53-54; 2A *id.* §§ 164, 174, at 250, 472.

99. RESTATEMENT, *supra* note 77, § 174 cmt. d. The same section also cautions that "[a] provision in the terms of the trust fixing a standard of care or skill lower than that which would otherwise be required of a trustee is strictly construed." *Id.* In addition, although trust law fixes a minimum standard to which fiduciaries are held, the law also holds fiduciaries of higher ability to higher standards. Thus, a corporate trustee is held accountable to a greater duty of care than an individual nonprofessional trustee. 2A SCOTT & FRATCHER, *supra* note 92, § 174.1, at 472-73.

100. RESTATEMENT, *supra* note 77, § 187.

101. *Id.*; BOGERT & BOGERT, *supra* note 97, § 560, at 193-99.

102. BOGERT & BOGERT, *supra* note 97, § 559, at 170-71.

103. RESTATEMENT, *supra* note 77, § 222. Exculpatory clauses generally will not be enforced, however, to the extent that they would absolve the trustee of liability in cases of reckless, intentional, or bad faith breaches of trust. BOGERT & BOGERT, *supra* note 97, § 542, at 193-94.

104. See, e.g., 3 SCOTT & FRATCHER, *supra* note 92, § 201, at 221. Scott and Fratcher note:

Where the trustee makes a mistake of law as to the extent of his duties or powers as trustee, it is no defense that he relied upon the advice of an attorney, even though the attorney was competent or the trustee reasonably believed that he was competent. It is immaterial whether the mistake is as to a statutory or common law rule of law or as to the interpretation of the trust instrument. The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or his attorney.

## B. Prior Federal Law

### 1. The Tax Code

Prior to ERISA, one of the ways Congress regulated pension plans, and thereby indirectly regulated pension-plan fiduciaries, was through the Internal Revenue Code. Under the Code, tax deductions and deferments were and still are offered to employers and employees for employer contributions to "qualified" benefit plans.<sup>105</sup> In order for a plan to be qualified, it must meet several criteria aimed at protecting the integrity of fund assets and achieving certain nondiscrimination goals.<sup>106</sup> To meet the first aim, all plans must be established for the "exclusive benefit" of employees and their beneficiaries.<sup>107</sup> In addition, plans must be written<sup>108</sup> and permanent,<sup>109</sup> and plan assets must be used to satisfy benefit claims before being applied to other purposes.<sup>110</sup> To meet the second aim, plans must not discriminate in favor of highly compensated employees, officers, stockholders, or supervisory personnel,<sup>111</sup> and they must cover a minimum percentage of employees.<sup>112</sup>

The Code's requirement that plans be for the "exclusive benefit" of employees was, prior to ERISA and the Labor Management Relations Act discussed below, the only way the federal government exercised any control over benefit plan fiduciaries. However, because the Code's exclusive benefit rule spoke to plans instead of fiduciaries directly, its usefulness as a fiduciary regulating device was limited. First, it only regulated fiduciary *investment behavior*, and then only in a very broad way.<sup>113</sup> Second, the consequence of noncompliance

---

105. I.R.C. § 401(a) (1988 & Supp. 1989). The tax benefits available to qualified plans are explained *supra* Part II, notes 46-71 and accompanying text.

106. For a discussion of how the Tax Code affected fiduciary investment decisions prior to ERISA, see Earl Herbert, *Investment Regulation and Conflicts of Interest in Employer-Managed Pension Plans*, 17 B.C. INDUS. & COM. L. REV. 127, 139-143 (1976). For a discussion of how the tax rules affect plan coverage provisions, see generally Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419 (1984).

107. I.R.C. § 401(a)(2). This requirement was first incorporated into the Revenue Act of 1921, Pub. L. No. 42-98, § 219(f), 42 Stat. 227, 247. It was subsequently adopted in amended form by the Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 302(c)(5), 61 Stat. 136, 157 (codified as amended at 29 U.S.C. § 186(c)(5) (1988 & Supp. I 1989)) (discussed *infra* Part III(B)(2), notes 115-26 and accompanying text) and in ERISA's noninurement provision, ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (discussed *supra* note 83 and accompanying text).

108. I.R.C. § 401(a).

109. *Id.* § 401(a)(2).

110. *Id.*

111. *Id.* § 401(a)(4).

112. *Id.* § 401(a)(3).

113. For example, plan investments could satisfy the exclusive benefit requirement as long as the investment yielded a fair return, the investment cost did not exceed its fair market value, the investment did not drain the fund of equity necessary to make benefit payments, and the investment met general standards of prudence. Rev. Rul. 73-380, 1973-2 C.B. 124-25; Rev. Rul. 69-494, 1969-2 C.B. 88-89. As a practical matter, this meant that secured loans by a plan to an employer were not *per se* invalid; such loans were invalid only where substantially all of the assets

with the Code was plan disqualification from favorable tax treatment, a penalty that tended to harm the very employees the Code sought to help.<sup>114</sup>

## 2. *The Labor Management Relations Act*

In conjunction with the Internal Revenue Code, Congress also regulated fiduciaries prior to the enactment of ERISA through the Labor Management Relations Act of 1947 ("LMRA" or "Act").<sup>115</sup> The LMRA was passed to prevent union officials from exploiting benefit funds over which they have exclusive control.<sup>116</sup> Under the Act, employer contributions to unions are to be held in trust only for genuine welfare benefit plans<sup>117</sup> that are established for the "sole and exclusive benefit" of participants and their families,<sup>118</sup> and jointly administered by equal numbers of management and union trustees.<sup>119</sup>

The "sole and exclusive benefit" requirement, like its counterpart in the Internal Revenue Code,<sup>120</sup> was part of a statutory scheme designed to influence certain types of behavior through restrictions on the use of plan assets. While the LMRA may have successfully stymied the corrupt practices at which it was directed, it afforded plan participants relatively little protection. The reason for this was that the statute provided no standards directly governing fiduciary behavior, and courts were reluctant to exercise their equity jurisdiction in cases of alleged fiduciary misconduct.<sup>121</sup> Courts were generally of the opinion that the regulation of fiduciaries was intended by Congress to be the province of state trust law.<sup>122</sup>

were loaned to the employer and the employer was unable to redeem the note in time for the retirement of a large number of employees. Rev. Rul. 73-380, 1973-2 C.B. 124-25. See generally Herbert, *supra* note 106, at 140-41 (discussing the "exclusive benefit" rule and noting that its standards were basically unenforceable except for the most extreme cases of abuse).

114. S. REP. No. 383, 93d Cong., 1st Sess. 3-4, 17-18 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 32, at 1071-72, 1085-86.

115. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

116. Congress had become alarmed by the practice of some union officials, most notably United Mine Workers president John L. Lewis, of extracting promises from employers to contribute to union funds, presumably in exchange for labor peace. For a discussion of these congressional concerns, see John McCreary, Jr., Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 DUQ. L. REV. 1033, 1036-37 (1985); see also S. REP. No. 105, 80th Cong., 1st Sess. 52 (1947); SUBCOMM. ON WELFARE AND PENSION FUNDS OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, WELFARE AND PENSION PLAN INVESTIGATION, S. REP. No. 1734, 84th Cong., 2d Sess. 17 (1956).

117. 29 U.S.C. § 186(c)(5)(A) (1988 & Supp. I 1989).

118. *Id.*

119. *Id.* § 186(c)(5)(B).

120. See *supra* Part III(B)(1), notes 105-14 and accompanying text.

121. Section 302(e), 29 U.S.C. § 186(e), grants courts jurisdiction to hear suits brought under the Act.

122. For a discussion of the reluctance of courts to hear fiduciary breach cases, see McCreary, *supra* note 116, at 1038 n.17 (quoting *Haley v. Palatnik*, 378 F. Supp. 499, 505 (S.D.N.Y. 1974), *rev'd on other grounds*, 509 F.2d 1038 (2d Cir. 1975)) (explaining that the majority of courts considering the issue have concluded "that § 302 of the Act does not prohibit breaches of fiduci-

In some claims-administration cases, however, LMRA courts were willing to exercise jurisdiction over the controversy, employing what was known as the "structural defect" test.<sup>123</sup> In these cases, a plaintiff alleged that a provision in the plan "arbitrarily and capriciously" denied her benefits to which she otherwise was entitled.<sup>124</sup> If the court sided with the plaintiff, the arbitrary and capricious provision was deemed a structural defect in the plan. That finding, in turn, meant that the plan had not been established for the sole and exclusive benefit of the participants, and the court could exercise its jurisdiction.<sup>125</sup> Once it had jurisdiction, the court then reviewed the fiduciary's denial of benefits to see if it was arbitrary or capricious.<sup>126</sup>

### 3. *The Arbitrary and Capricious Standard Under ERISA*

Despite several crucial differences between the LMRA and ERISA, courts hearing benefit denial cases after ERISA took effect in 1976 continued to apply the LMRA arbitrary and capricious test. One important difference between the LMRA and ERISA is that ERISA's requirement of statutory fiduciaries to act "solely in the interest" of participants and "for the exclusive purpose of providing benefits" to the participants<sup>127</sup> applies directly to the fiduciaries, while the LMRA's "sole and exclusive benefit" requirement<sup>128</sup> applies only to the plan funds. Another difference is that ERISA's fiduciary requirements regulate all benefit plans, not just union plans.<sup>129</sup> A third difference is that ERISA explicitly authorizes participant and beneficiary suits to recover benefits and redress fiduciary misconduct<sup>130</sup> while the LMRA does

---

ary duty, diversion of trust funds, or similar allegations which relate solely to the maladministration of trust funds"); Herbert, *supra* note 106, at 148-49.

123. See Bradley R. Duncan, Note, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986, 993 (1986); McCreary, *supra* note 116, at 1038-40.

124. Duncan, *supra* note 123, at 993; McCreary, *supra* note 116, at 1040.

125. Duncan, *supra* note 123, at 993; McCreary, *supra* note 116, at 1039-40; see *Insley v. Joyce*, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971) ("It seems obvious . . . that arbitrary and capricious eligibility provisions might be violative of the structural requirement that the trust be for the sole and exclusive benefit of the employees.").

126. See Duncan, *supra* note 123, at 993; McCreary, *supra* note 116, at 1039-40.

127. ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. I 1989); see *supra* note 78 and accompanying text.

128. See *supra* Part III(B)(2), notes 115-26 and accompanying text.

129. ERISA § 501(a), 29 U.S.C. § 1101(a). ERISA's provisions not only apply to all welfare and pension benefit plans, but the duties apply regardless of whether or not the plan funds are held in trust. *Id.* This is an important feature of the statute because it closes one of the loopholes under prior regulation: if the funds of a nonunion, nonqualified benefit plan were held outside of a trust, they were not subject to federal or state regulation. S. REP. NO. 127, 93d Cong., 1st Sess. 29 (1973), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 32, at 615.

130. ERISA § 502(a)(1)(B) (authorizing participants and beneficiaries to recover benefits), (a)(2) (authorizing suits against breaching fiduciaries under ERISA § 409, 29 U.S.C. § 1109, to recover on behalf of plan), (a)(3) (authorizing participants and beneficiaries to recover appropriate equitable relief to redress fiduciary breaches), 29 U.S.C. § 1132(a)(1)(B), (a)(2), (a)(3).

not.<sup>131</sup> ERISA courts, nonetheless, focused on the similarity in wording between the LMRA's "sole and exclusive benefit" mandate and ERISA's "solely in the interest" and "for the exclusive purpose" language to determine that ERISA incorporated the same standard of review.<sup>132</sup>

Importantly, ERISA courts recognized that by adopting the arbitrary and capricious standard in claims cases, they were defining the scope of the fiduciary's duty.<sup>133</sup> That is, a reviewing court in a claims-administration case did not examine the fiduciary's conduct to determine whether he acted with the exclusive loyalty and great care that ERISA's very terms prescribe. Rather, such a court endeavored to determine whether the fiduciary's handling of the claim was arbitrary or capricious; in other words, whether the fiduciary acted unreasonably. Courts also recognized that they were holding fiduciaries accountable to lesser standards in the claims context than in the investment-management context.<sup>134</sup> This was justified on the ground that fiduciaries in the investment-management context were faced with conflicts of interest between the participants and third parties—the employer-sponsors of the plans—while fiduciaries in the claims context were faced with competing interests among different classes of beneficiaries.<sup>135</sup> Some courts, however, continued to defer to the decisions of fiduciaries to deny participants' claims to benefits, even though the fiduciaries making the decisions were operating under essentially the same

---

131. See *supra* note 123 and accompanying text (noting that LMRA courts have been willing to exercise jurisdiction over some claims-administration cases).

132. See *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984). The court stated:

The "arbitrary and capricious" standard derives from section 302(c)(5) of the LMRA. That section imposes a duty of loyalty on section 302 trustees by permitting employer contributions to a welfare trust fund only if the contributions are used "for the sole and exclusive benefit of the employees . . ." Section 1104 of ERISA imposes a similar duty of loyalty, and not surprisingly the courts have applied the "arbitrary and capricious" standard under ERISA as well.

*Id.*; see also *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1049 (7th Cir. 1987) (citing cases and law review articles on the subject).

133. See, e.g., *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982) ("The fiduciary standards enacted by ERISA conform to the standard of care found in the Labor Management Relations Act. Under that standard, the trustees' decision will not be overturned unless it is arbitrary and capricious." (citations omitted)). Although the arbitrary and capricious standard prototypically was invoked under ERISA to review allegations of disloyalty, it also applied to the duty of care, ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), and the duty to follow plan documents, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), in claims-administration cases. The claim in *Fentron* alleged a breach of duty to follow plan documents. *Fentron*, 674 F.2d at 1300; see also *Varhola v. Doe*, 820 F.2d 809, 812-13 (6th Cir. 1987) (alleging breach of the duty of loyalty and duty to follow plan documents); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985) (same); *Struble*, 732 F.2d at 331 (claiming breach of the duties of loyalty and care).

134. See *Struble*, 732 F.2d at 333. The *Struble* court stated, "Although the courts have described the applicability of the arbitrary and capricious standard in rather overbroad language, they nonetheless have limited the use of the standard to cases involving personal claims for benefits. In other cases they have consistently applied the standards set forth explicitly in ERISA." *Id.*

135. See *id.* at 333.

conflicts of interest as the employer-trustees in the investment-management case of *Donovan v. Bierwirth*.<sup>136</sup> Other courts, rather than follow a conflict-of-interest rationale, may simply have believed that ERISA's fiduciary provisions were not intended to apply to the claims context,<sup>137</sup> or that the fiduciary's duties ran to the plan, not to the individual beneficiaries.<sup>138</sup>

Many courts became sensitive to potential fiduciary conflicts of interest in administering claims and formulated less deferential versions of the arbitrary and capricious standard. In *Van Boxel v. Journal Co. Employees' Pension Trust*,<sup>139</sup> for example, the Seventh Circuit announced a "sliding scale" of deference to fiduciary decisions, depending upon the degree of impartiality of the decision-maker.<sup>140</sup> The Third Circuit, in *Bruch v. Firestone Tire & Rubber Co.*,<sup>141</sup> went even further and held that where there was an economic conflict of interest present courts should review the fiduciary's denial under a *de novo* standard.<sup>142</sup>

Against this history of evolving statutory regulation and varying judicial interpretation of the scope of fiduciary duties, the Supreme Court overturned the Third Circuit's ruling and announced a new standard of review.

### C. *De Novo* Review Under Firestone

The Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*<sup>143</sup> is remarkable in some respects and hardly noteworthy in others. It is remarkable in that it permits the plan parties to bargain as to what the scope of fiduciary duties shall be in the claims context.<sup>144</sup> It is unexceptional in that, where the plan gives the fiduciary discretionary authority to determine benefit eligibility or construe the plan's terms, a deferential standard of reasonableness

---

136. 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982); *see also* *Severs v. Allied Constr. Servs.*, 795 F.2d 649, 650 (8th Cir. 1986) (finding that company's decision to offer lump-sum payment of employee's profit sharing account contingent upon employee's signing noncompetition covenant was not arbitrary or capricious); *Jung v. FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) (finding that, upon sale of firm, interested fiduciary's construal of plan so as to deny severance benefits to employees who remained with new company was "reasonable" and made in "good faith"); *see supra* notes 86-89 and accompanying text (discussing *Bierwirth*).

137. *See, e.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (discussed *infra* Part IV, notes 168-75 and accompanying text).

138. *See, e.g.*, *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (discussed *infra* Part IV, notes 213-30 and accompanying text).

139. 836 F.2d 1048 (7th Cir. 1987).

140. *Id.* at 1052-53; *see also* *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (stating that factors to be considered in applying the arbitrary and capricious standard to plan interpretations include: uniformity of construction, reasonableness of reading, unanticipated costs, internal consistency of plan under interpretation, relevant regulations, and factual background, including indications of good faith).

141. 828 F.2d 134 (3d Cir. 1987), *aff'd in part, rev'd in part*, 489 U.S. 101 (1989).

142. *Id.* at 144-45.

143. 489 U.S. 101 (1989).

144. *Id.* at 115.



continues to apply.<sup>145</sup>

Recognizing that the jurisdictional roots of the arbitrary and capricious standard are not present in ERISA,<sup>146</sup> the *Firestone* Court approached the review question with a clean slate. Because Congress intended to codify, with some differences, the basic fiduciary rules developed in the law of trusts,<sup>147</sup> the Court turned to trust law for guidance. Under the law of trusts, when a trustee exercises discretionary authority vested in him by the trust instrument, courts will not overturn the trustee's decision unless he has abused his discretion.<sup>148</sup> Upon this principle, the Court fashioned an ERISA rule that permits fiduciary decisions in claims-denial<sup>149</sup> cases to be reviewed only for reasonableness when the fiduciary is exercising a plan-granted discretionary power to make benefit-eligibility determinations or construe plan terms.<sup>150</sup> If the fiduciary is laboring under an apparent conflict of interest, the Court held, then the reviewing court

145. *Id.* at 111, 115.

146. *Id.* at 110; see *supra* Part III(B)(3), notes 127-42 and accompanying text. The Court also noted that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and 'to protect contractually defined benefits,' *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. [134,] 148 [(1985)]." *Firestone*, 489 U.S. at 113. Because the arbitrary and capricious standard was lower than the trust law *de novo* standard in place prior to ERISA's enactment, enforcing such a standard would not be in the spirit of ERISA's purposes. *Firestone*, 489 U.S. at 113-14.

147. *Id.* at 110 (quoting H.R. REP. NO. 533, 93d Cong., 1st Sess. 11 (1973), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 32, at 2358, for the proposition that "[t]he fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts"); see also *supra* note 77 (discussing same).

148. See *supra* text accompanying note 101.

149. The Court explicitly limited its ruling to cases alleging wrongful denial of benefits under § 502(a)(1)(B). *Firestone*, 489 U.S. at 108, 115.

150. *Id.* at 111, 115. Scott and Fratcher explain:

[T]he court will not permit [the trustee] to abuse the discretion. This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of reasonable judgment, the court will not interfere; but the court will interfere if he acts outside the bounds of reasonable judgment. In other words, although there is a field, often a wide field, within which the trustee may determine whether to act or not and when and how to act, beyond that field the court will control him. How wide that field is depends upon the terms of the trust, the nature of the power, and all the circumstances.

3 SCOTT & FRATCHER, *supra* note 92, § 187, at 14-15. Scott and Fratcher go on to list five factors important to determining the reasonableness of the trustee's action:

- (1) the extent of discretion intended to be conferred upon the trustee by the terms of the trust;
- (2) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged;
- (3) the circumstances surrounding the exercise of the power;
- (4) the motives of the trustee in exercising or refraining from exercising the power;
- (5) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

*Id.* The Restatement lists an additional factor: the purposes of the trust. RESTATEMENT, *supra* note 77, § 187 cmt. d.

may take that into consideration.<sup>151</sup> Where no discretionary authority is vested in the fiduciary, the Court held that de novo review is appropriate.<sup>152</sup>

Under *Firestone's* de novo standard, courts review fiduciary interpretations of benefit-eligibility provisions without deferring to the fiduciary; courts look "to the terms of the plan and other manifestations of the parties' intent" to decide whether a participant is entitled to benefits.<sup>153</sup> Even though de novo review might impose higher administrative costs on plan sponsors, in the form of increased litigation, those potential costs could not dissuade the Court from adopting the higher standard.<sup>154</sup> The *Firestone* Court held that "[n]either general principles of trust law nor a concern for impartial decision-making . . . forecloses parties from agreeing upon a narrow standard of review."<sup>155</sup> The remarkable aspect of the decision is now apparent: By permitting parties to "agree[] upon a narrow standard of review," the Court explicitly created an exception to the rule that ERISA preempts contractual language that is inconsistent with statutory language.<sup>156</sup>

Courts reviewing benefit claims after *Firestone* have generally approached claims in a straightforward manner. Courts have sought first to determine whether the plan expressly confers discretion upon the fiduciary.<sup>157</sup> This is accomplished by examining the language of the plan itself. If the plan does not confer discretion, the court undertakes a de novo review.<sup>158</sup> If the instrument does confer discretion, courts apply the abuse of discretion standard.<sup>159</sup> Some courts, however, have continued to use the phrase "arbitrary and capricious" to describe the review they are undertaking when employing "abuse of discretion" analysis, because they consider the two standards substantively

---

151. *Firestone*, 489 U.S. at 115.

152. *Id.* at 112-13, 115.

153. *Id.* at 112-13.

154. *Id.* at 114-15.

155. *Id.* at 115.

156. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1988 & Supp. I 1989), requires fiduciaries to perform their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter." The Supreme Court's decision overrules the Third Circuit's decision in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), where the court addressed a contractual clause much like the one the Supreme Court proposed: "The Agreement in this case set forth a different and lower standard of fiduciary duty, providing that the trustees would only be liable for 'willful misconduct, bad faith, or gross negligence.' ERISA [§ 404(a)(1)(D)], however, preempts contractual language insofar as it is inconsistent with the statutory language [in § 404(a)(1) that spells out duties of loyalty and care]." *Struble*, 732 F.2d at 333 n.8.

157. *Cathey v. Dow Chem. Co. Medical Care Program*, 907 F.2d 554, 558-59 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 964 (1991); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990); *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1559 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991); *Moon v. American Home Assurance Co.*, 888 F.2d 86, 88 (11th Cir. 1989).

158. *Matuszak v. Torrington Co.*, 927 F.2d 320, 322 (7th Cir. 1991); *Moon*, 888 F.2d at 89.

159. *Baker v. United Mine Workers of Am. Health & Retirement Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991); *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 87-88 (5th Cir. 1990).

identical.<sup>160</sup>

#### IV. ERISA REMEDIES

ERISA authorizes participant and beneficiary suits in three contexts relevant here. First, under section 502(a)(1)(B), participants may sue the *plan* to recover *benefits* owed them under the terms of the plan.<sup>161</sup> The majority of claims-administration cases, which courts now review after employing the discretion test discussed above, is brought under this section.

Second, under section 409(a), participants may sue *fiduciaries* personally, *on behalf of the plan*, to recover plan losses due to the fiduciary's breach of duty, to recover any fiduciary profits gained through the use of plan assets, or to obtain other "equitable or remedial relief" as the court deems appropriate.<sup>162</sup>

Third, under section 502(a)(3), participants may sue *fiduciaries* personally for "appropriate equitable relief" to redress fiduciary violations of duty.<sup>163</sup> This Note focuses primarily on the scope of recovery authorized by the "appropriate equitable relief" provision of section 502(a)(3). The crucial question is whether "equitable relief" authorizes recovery of money damages, and if so, to what extent. In order to better understand how courts have approached

160. See, e.g., *Lister v. Stark*, 942 F.2d 1182, 1188 (7th Cir. 1991) (stating that the court was not willing to "split semantic hairs" in applying the *Firestone* standard); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100 & n.2A (5th Cir. 1990) (refusing to distinguish between "arbitrarily or capriciously" and "abuse of discretion" because under either standard the result would have been identical); *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1563 & n.4 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991) (holding that the "abuse of discretion" or "arbitrary and capricious" standard applied to this case, but failed to distinguish between the two).

161. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides that "A civil action may be brought (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . ." *Id.*

162. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides that a civil action may be brought by "the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 409 of this title . . ." *Id.*

Section 409(a) provides that:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 ["Persons prohibited from holding certain positions"] of this title.

ERISA § 409(a), 29 U.S.C. § 1109(a).

163. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a civil action by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

*Id.*

section 502(a)(3) suits, a brief look at the Supreme Court's treatment of section 409(a) suits is necessary.

Prior to the Supreme Court's 1985 decision in *Massachusetts Mutual Life Insurance Co. v. Russell*,<sup>164</sup> courts were divided on whether the broad language of section 409(a), which subjects breaching fiduciaries to 409(a)'s other "equitable or remedial relief" provision, authorized participant recovery of damages for personal injury *in addition* to damages recovered on behalf of the plan.<sup>165</sup> The *Russell* decision made clear, however, that recovery under section 409(a) could only be granted on behalf of the plan, not on behalf of individual participants.<sup>166</sup> The *Russell* case is important for two reasons. First, it eliminated a potential avenue of recovery for aggrieved participants by restricting section 409(a) suits to those brought on behalf of the plan. Second, although the Court expressly limited its holding to section 409(a),<sup>167</sup> the language used by the majority suggested to lower courts how suits for "equitable relief" under section 502(a)(3) should be handled. The majority's suggestions, however, were rebutted in an emphatic concurrence by Justice Brennan. This part briefly discusses the *Russell* Court's treatment of section 409(a) suits, then examines the majority and concurrence's competing views of section 502(a)(3) suits in light of the way those views have manifested themselves in the lower courts.

#### A. Recovery on Behalf of the Plan

In *Massachusetts Mutual Life Insurance Co. v. Russell*,<sup>168</sup> the plaintiff, Russell, sued her employer for compensatory and punitive damages in a dispute over the company's handling of her claim for disability benefits. Russell alleged that Massachusetts Mutual's excessive delay in processing her claim while she was on disability leave forced her husband to cash out his retirement savings, causing her emotional distress and aggravating her disability.<sup>169</sup> Russell argued that section 409(a) authorized recovery of personal injury damages

---

164. 473 U.S. 134 (1985).

165. Compare *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 489-92 (9th Cir. 1983) (allowing compensatory and punitive damages under section 409), *rev'd*, 473 U.S. 134 (1984) with *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.) (stating that punitive damages are not available under ERISA), *cert. denied*, 454 U.S. 968 and 454 U.S. 1084 (1981).

166. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). The concurring justices agreed with this point. *Id.* at 150 (Brennan, White, Marshall, and Blackmun, JJ., concurring). The Court expressly limited its holding to suits brought under section 409: "Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3), we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." *Id.* at 139. The Court also refused to decide the extent to which a plan might recover extracontractual compensatory or punitive relief. *Id.* at 144 n.12.

167. *Id.* at 139 n.5. The Court stated: "Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3), we have no occasion to consider whether any provision of ERISA authorizes recovery of extra-contractual damages." *Id.*

168. 473 U.S. 134 (1985).

169. *Id.* at 136-37.

in either of two ways. First, although the statute dealt primarily with recovery on behalf of the plan, the open-ended "other equitable or remedial relief" clause near the end of section 409(a) expressly contemplated compensatory and punitive damages for individuals.<sup>170</sup> In the alternative, Russell argued, even though the statute did not expressly refer to compensatory and punitive damages, Congress nonetheless intended such damages to be recoverable under section 409(a).<sup>171</sup>

Russell's first claim was rejected on the ground that section 409(a), when read as a whole, only permitted relief for the plan.<sup>172</sup> Her second claim was rejected on the ground that there was no discernible congressional intent<sup>173</sup> to imply an action for "extracontractual"<sup>174</sup> damages in section 409(a). Thus,

170. *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 489-91 (9th Cir. 1983).

171. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985).

172. *Id.* at 139-42.

173. When a statute does not explicitly provide a cause of action, a remedy may nonetheless be implied if the statute survives the four-pronged test of *Cort v. Ash*, 422 U.S. 66 (1975). Under *Cort*, the interpreting court must inquire whether: (1) the plaintiff is in the class for whose special benefit the statute was enacted; (2) Congress intended to create the desired remedy; (3) implying such a remedy is consistent with the underlying legislative scheme; and (4) the cause of action is one "traditionally relegated to state law." *Russell*, 473 U.S. at 145 (citing *Cort*, 422 U.S. at 78).

Applying this test, the Court found that although Russell was a member of the class for whose benefit the statute was enacted, and although ERISA preempted her state law causes of action, congressional intent to imply the remedy was nowhere to be found in the legislative history or the structure of ERISA. *Id.* The Court pointed out that while an early version of the statute permitted recovery of "legal or equitable" relief, the term "legal" was not included in the statute as finally passed. *Id.* at 146. Thus, the legislative history was of little value in determining whether Congress intended to imply Russell's remedy. Furthermore, the structure of the statute argued against implying a remedy of extracontractual damages. *Id.*

174. The Court defined extracontractual damages as those above and beyond the loss of plan benefits:

According to the Court of Appeals, the award of compensatory damages shall "remedy the wrong and make the aggrieved individual whole," which meant *not merely contractual damages for loss of plan benefits*, but relief "that will compensate the injured party for *all losses and injuries* sustained as a direct and proximate cause of the breach of fiduciary duty," including "damages for mental or emotional distress."

*Russell*, 473 U.S. at 138. By negative inference, *extracontractual* damages are those beyond "contractual damages for loss of plan benefits." *Id.*; *see also id.* at 144 n.12 ("In light of this holding, we do not reach any question concerning the extent to which § 409 may authorize recovery of *extracontractual compensatory or punitive damages* from a fiduciary by a plan." (emphasis added)). The use of the term "extracontractual" as an adverb to modify "compensatory" and "punitive" suggests that extracontractual damages encompass the universe of damages beyond what is lost in benefits, including those that are compensatory or punitive.

One author, however, has assumed that the Court used the term "extracontractual damages" to mean "special damages," a narrow class of compensatory damages that includes only remote losses peculiar to an individual plaintiff. The author also argues that "contractual damages" are the same as "general damages," which are "the natural, necessary, and usual result" of the wrong." Diane M. Sumoski, Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014, 1016-17 & nn.12, 15, 16 & 18 (1986).

while section 409(a) did not expressly limit itself to recovery on behalf of the plan, the Court was unwilling to step beyond a common-sense interpretation of a statutory section that primarily concerned itself with plan-related relief. The entire Court was especially comfortable with this reading in light of the fact that ERISA specifically addressed recovery on behalf of individuals in section 502(a)(3).<sup>175</sup>

### B. Recovery for Individuals

After the *Russell* decision foreclosed actions on behalf of individuals under section 409(a), courts were visited by a flurry of suits for extracontractual damages under section 502(a)(3)'s broad "appropriate equitable relief" provision. Two competing frameworks, parallel to those suggested in the *Russell* majority and concurring opinions, emerged for analyzing these claims. Interestingly, regardless of which approach post-*Russell* courts have taken, they generally have not granted extracontractual relief for individuals.

Justice Stevens argued for the majority in *Russell* that ERISA's fiduciary standards were intended to apply primarily in the investment-management context, not in the claims-administration context; therefore, allowing participants to recover damages beyond the benefits they were promised—that is, extracontractual damages—would be unjustified absent explicit congressional authorization.<sup>176</sup> The thrust of Justice Stevens' argument was that the level of recovery permissible for participants should be commensurate with the level of obligation imposed upon the fiduciaries. Because fiduciaries have lesser duties of loyalty and care when administering participant claims than when managing the investment of plan assets, Justice Stevens argued, participants should be limited in their ability to recover against fiduciaries.<sup>177</sup>

Justice Brennan, on the other hand, argued in a separate concurrence that courts were to define "appropriate equitable relief" by looking to trust law remedies.<sup>178</sup> Under this approach, ERISA allowed recovery of extracontractual damages to the extent that trust law allowed such recovery. According to the law of trusts, damages beyond the loss of benefits are allowed to the extent they are necessary to make the beneficiary whole in his pecuniary interest in the trust.

Because Justice Brennan's approach to remedies under section 502(a)(3) relies heavily upon trust law principles of recovery, an overview of those principles is presented below.

---

175. See, e.g., *Russell*, 473 U.S. at 146 (stating that the "enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly").

176. *Id.* at 142-48.

177. See *id.* at 142-43.

178. *Id.* at 156-58 (Brennan, J., concurring).

### 1. Trust Law Principles of Recovery

Trusts originated in and were governed exclusively by courts of equity.<sup>179</sup> Except where the trustee is under an unconditional duty to immediately pay money or transfer property to the beneficiary, a beneficiary's remedy for a breach of trust is exclusively equitable.<sup>180</sup> The range of equitable remedies available to an aggrieved beneficiary is broad. She may seek an injunction to compel the trustee to perform his duties or enjoin him from committing a breach.<sup>181</sup> She also may seek to have a receiver appointed to take possession of the trust or seek to have the trustee removed.<sup>182</sup> In addition she may compel the trustee to redress a breach of trust.<sup>183</sup> In seeking redress under this last option, the beneficiary generally may recover money for injury to her interests in the trust estate<sup>184</sup> or she may compel the trustee to do some act, such as relinquish title to former trust property that the trustee obtained through impermissible self-dealing.<sup>185</sup>

The Second Restatement of Trusts explains the general rule for recovery of money by the beneficiary:

- If the trustee commits a breach of trust, he is chargeable with
- (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
  - (b) any profit made by him through the breach of trust; or
  - (c) any profit which would have accrued to the trust estate if there had been no breach of trust.<sup>186</sup>

Each of these is potentially available in a given case.<sup>187</sup> Providing alternative remedies gives courts flexibility in allowing one or the other remedy to match the circumstances of the case before it. The equitable purposes of the remedies are spelled out in the Restatement: Permitting recovery of loss or

179. See BOGERT & BOGERT, *supra* note 97, §§ 1, 7; 3 SCOTT, *supra* note 92, § 197, at 188; *supra* Part III(A), notes 92-104 and accompanying text (discussing fiduciary duties under trust law).

180. See RESTATEMENT, *supra* note 77, §§ 197-98; see also BOGERT, *supra* note 92, § 157. Bogert explains that a suit for breach of trust "was originally recognized in a court of equity only, and under modern codes is generally treated as having an equitable nature, but occasionally relief is granted on a legal theory." *Id.*

The Restatement explains that where the trustee is under an unconditional duty to immediately pay money or transfer property to the beneficiary, a legal action may be brought against the breaching trustee. RESTATEMENT, *supra* note 77, § 198; 3 SCOTT & FRATCHER, *supra* note 92, § 198.1, at 195. Scott and Fratcher explain that an action at law in such situations is permitted because the trustee's liability is clearly established and no accounting is necessary. *Id.* § 198, at 194.

181. RESTATEMENT, *supra* note 77, § 199(a)-(b).

182. *Id.* § 199(d)-(e).

183. *Id.* § 199(c).

184. *Id.* § 205; 3 SCOTT & FRATCHER, *supra* note 92, §§ 199.3, 205, at 206, 238.

185. 3 SCOTT & FRATCHER, *supra* note 92, § 208.4, at 271.

186. RESTATEMENT, *supra* note 77, § 205.

187. *Id.* § 205 & cmt. a; 3 SCOTT & FRATCHER, *supra* note 92, § 205, at 240.

depreciation in value of the trust aims to put the beneficiary in the position she was in prior to the breach;<sup>188</sup> permitting recovery of profits made by the trustee on account of his breach prevents the trustee from benefitting by his own misdeeds;<sup>189</sup> permitting recovery of profits that would have accrued to the trust but for the breach seeks to put the beneficiary in the position she would have been in had the breach not occurred.<sup>190</sup> Bogert and Bogert note that the purpose of permitting interest awards, a form of recovery under Restatement section 205(c), is to make "whole" the beneficiary—"to place him in the position he would have been in if the trustee had performed his duty."<sup>191</sup>

One important aspect of this remedial scheme is that the courts do not fashion just *any* remedy to make the beneficiary "whole." Rather, courts make available one or a combination of the three described remedies to redress the injuries of the beneficiary *qua* beneficiary, that is, to make whole the beneficiary's *pecuniary* interest in the trust. Thus, the remedy specified in section 205(a) of the Restatement—any loss or depreciation in value of the trust estate—and in Bogert and Bogert—loss in the value of the trust estate<sup>192</sup>—focuses upon damage to the trust corpus and authorizes recovery of money if the beneficiary's pecuniary interest in the *trust res* is damaged.<sup>193</sup> The remedy identified in section 205(c) of the Restatement—any profit that would have accrued to the trust estate—is made specifically applicable to the beneficiary's pecuniary interest in the *income* of the trust.<sup>194</sup> In both of these types of cases, courts do not seek to redress every injury that the beneficiary suffers after a breach has occurred. Rather, courts seek to make whole the beneficiary's pecuniary interest in the trust. While generally this means that extracontractual damages are not available in the law of trusts, there nonetheless are some situations where such recovery is allowed to make whole the beneficiary's pecuniary interest.<sup>195</sup>

188. RESTATEMENT, *supra* note 77, § 205 cmt. a.

189. 3 SCOTT & FRATCHER, *supra* note 92, § 205, at 239.

190. RESTATEMENT, *supra* note 77, § 205; 3 SCOTT & FRATCHER, *supra* note 92, § 205, at 240.

191. BOGERT & BOGERT, *supra* note 97, § 863, at 48.

192. "Where a trustee is held liable for damages he is usually charged merely with the loss in the value of the trust estate." *Id.* § 862, at 42.

193. RESTATEMENT, *supra* note 77, § 205(a) cmt. c.

194. *Id.* § 205(c) cmt. i. Comment (i) provides:

If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust. This rule is applicable where the trustee in breach of trust sells or otherwise disposes of trust property which it was his duty to retain (see § 208), and where the trustee in breach of trust fails to purchase property which it was his duty to purchase for the trust (see § 211).

This rule is applicable to income as well as principal. Thus, if the trustee in breach of trust fails to make the trust property productive he is liable for the amount of income which he would have received if he had not committed the breach of trust.

*Id.*

195. Both Scott and Fratcher and Bogert and Bogert agree that this is the general rule of recovery. 3 SCOTT & FRATCHER, *supra* note 92, § 205, at 240; BOGERT & BOGERT, *supra* note 97, § 862, at 39-44. Both also seem to agree that allowing punitive damages where the fiduciary's



With these trust principles of recovery in mind, we now focus upon the

---

behavior is especially egregious, such as when malice or fraud is involved, is an exception to this rule. 3 SCOTT & FRATCHER, *supra* note 92, § 205 n.2, at 238-39; BOGERT & BOGERT, *supra* note 97, § 862 n.12, at 41-42. As Bogert and Bogert explain:

In suits to collect money from a trustee for breach of trust, the direct damages will usually be measured by the difference between the value of the beneficiary's rights to principal and income before and after the breach, but consequential damages may also be awarded, and exemplary or punitive damages may be awarded where malice or fraud is involved.

BOGERT & BOGERT, *supra* note 97, § 862, at 39-41.

Scott and Fratcher and Bogert and Bogert appear to disagree, however, over the degree of protection afforded to the beneficiary's pecuniary interest in the income of the trust. Bogert and Bogert, in the above quoted material, point out that some courts have allowed recovery for consequential damages to income. *Id.* § 862 n.11, at 41. One case cited by Bogert and Bogert, where the court allowed the disputed form of damages, presents a set of facts peculiarly appropriate to this Note.

In *In re Talbot's Estate*, 296 P.2d 848 (Cal. Dist. Ct. App. 1956), the trustee breached his duty of prudent investment when he sold a large portion of the trust's assets. Rather than making an independent decision as to the prudence of the sale, he relied upon the advice of one of the three income beneficiaries. *Id.* at 849-52. One of the nonadvising income beneficiaries sued to recover one-third of the consequential capital gains taxes assessed at the time of the sale. The court construed a state statute, which required fiduciaries who breach in good faith to "make good whatever is lost to the beneficiary," in conjunction with Restatement §§ 205, 206 and 208, to mean that the fiduciary should be liable for the tax consequences. *Talbot's Estate*, 296 P.2d at 856-59. It is not clear how this case would have been decided had the statute not been present.

Other cases offered by Bogert and Bogert in support of awards of consequential damages involve fraud, see, for instance, *In re Whitney's Estate*, 11 P.2d 1107 (Cal. Dist. Ct. App. 1936); or highly unusual circumstances, see, for example, *Merrick v. Mercantile-Safe Deposit & Trust Co.*, 855 F.2d 1095 (4th Cir. 1988) (allowing recovery on third-party beneficiary theory). BOGERT & BOGERT, *supra* note 97, § 862 n.11, at 41 (rev. 2d ed. & Supp. 1991).

Scott and Fratcher cite two cases that appear to argue against recovery where there are consequential damages to the beneficiary's income interest. However, a close examination suggests that the cited cases do not stand for such a proposition. In one case involving a claim for consequential tax damages due to a single payment of accumulated income, *In re Wanamaker's Trust*, 17 A.2d 380 (Pa. 1941), the court found that the trustee had not breached his duties of loyalty and prudence in managing the trust assets. But rather than deny the claim on the ground that there can be no recovery when there is no breach of trust, see 3 SCOTT & FRATCHER, *supra* note 92, § 204, at 234, the court held that the claim was too uncertain and speculative. *Wanamaker's Trust*, 17 A.2d at 382.

In the second case, *In re Comstock's Will*, 17 N.W.2d 656 (Minn. 1945), the trustee breached his duty of loyalty in investing trust assets and was forced to pay the beneficiary: (a) profits and interest that the trustee had improperly earned through his self-dealing with the trust estate, and (b) the difference between what the trustee in fact earned through the improper transactions and what the trust should have earned. *Id.* at 660-61, 664. The beneficiary alleged that when the trustee paid the surcharge (assessed because of the breach) in one payment, she was forced to pay higher taxes than if the money had been paid each year when due. The court rejected her claim based upon the rule of damages in contract law that permits recovery of interest only, not consequential damages, for failure to pay money. *Id.* at 664. This rule is inapposite, however, because it was intended to apply to money owed on a *contract debt*, not money held in trust. The nature of the trustee's duties, see *supra* Part III(A), notes 92-104 and accompanying text, are quite different from the contractor's. See RESTATEMENT, *supra* note 77, §§ 12-14. While it is true that when the trustee is under an unconditional duty to immediately pay money to the beneficiary, the beneficiary may recover on a legal theory, see *supra* note 180 and accompanying text, this is merely a

trust-law approach to recovery under ERISA outlined in Justice Brennan's concurrence in *Russell*.

## 2. Justice Brennan's Approach

Justice Brennan's methodology for handling "equitable relief" claims in section 502(a)(3) cases, as set forth in *Massachusetts Mutual Life Insurance Co. v. Russell*,<sup>196</sup> is exemplified by the Fourth Circuit's opinion in *Powell v. Chesapeake & Potomac Telephone Co.*<sup>197</sup> Under this approach, courts begin with the proposition that Congress intended to import trust law principles into ERISA's fiduciary and remedial provisions.<sup>198</sup> As we have seen, the law of trusts redresses fiduciary breaches in courts of equity.<sup>199</sup> Because section 502(a)(3) permits "equitable relief," the theory goes, courts should look to trust principles of recovery to determine what that relief should be in a given case.<sup>200</sup>

The *Powell* case presents a common fact pattern in 502(a)(3) cases. Plaintiff Powell received disability benefits for several years through an unfunded welfare benefit plan that was sponsored by her employer and administered by an insurance company.<sup>201</sup> Powell alleged that she was harassed by her employer and the administrator when they made repeated demands for medical

---

*procedural* convenience for the beneficiary and does not alter her substantive rights as a beneficiary. See 3 SCOTT & FRATCHER, *supra* note 77, § 198.1, at 195-96. In addition, the manner in which the trustee paid the beneficiary was not the breach of duty; the breach was in the self-dealing. Insofar as the tax liability is an injury to the trust income of the beneficiary, and insofar as the injury is caused by the trustee's breach of duty in handling the trust, a plausible argument is made that § 205(c) permits recovery of the taxes. The problem, however, is in the remoteness of the damages. See DAN DOBBS, REMEDIES § 3.2, at 139 (1973) (stating that remoteness is a limitation on recovery of special damages). A different case might be presented where the breach consisted of the manner in which the income was paid. Interestingly, neither pair of authors resolves the issue persuasively. The appropriate remedy in any given case depends upon the circumstances.

The common feature of these cases is that regardless of what the measure of recovery is in a particular case, the debate focuses upon the measure of recovery by the beneficiary *qua* beneficiary, that is, measuring her pecuniary interests in the trust.

At least one commentator, however, has suggested that the principles of recovery enunciated in Restatement § 205 and Bogert & Bogert § 863, discussed *supra* notes 186-91 and accompanying text, stand for the proposition that ERISA courts should fashion whatever compensatory remedy is necessary to make the beneficiary whole, including emotional distress damages. The theory is that the court should compensate the beneficiary for her general emotional interest, as opposed to her pecuniary interest, in the financial security that comes with being a beneficiary. Sumoski, *supra* note 174, at 1028-29 & nn.107-09, 1034-35.

196. 473 U.S. 134 (1985).

197. 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

198. *Id.* at 424 (citing H.R. REP. NO. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 32, at 2358, which states: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."). See also *supra* note 77 and accompanying text for additional discussion of congressional intent to incorporate traditional trust principles in ERISA.

199. See *supra* text accompanying note 179.

200. *Powell*, 780 F.2d at 424.

201. *Id.* at 420-21.

records, refused to provide her attorney with copies of her claim file, and twice withheld disability payments unfairly.<sup>202</sup> Although Powell received all of the benefits she was due under the terms of the plan, she alleged that the constant harassment caused her mental anguish, led to her divorce, gave her physical problems and caused her son to suffer emotional distress.<sup>203</sup> Claiming that this behavior was a breach of the administrator's duty of loyalty,<sup>204</sup> she sued for \$5 million in extracontractual and punitive damages under section 502(a)(3) and under several state law theories of recovery.<sup>205</sup> Her state law claims were preempted by ERISA,<sup>206</sup> and the court analyzed her damage claims under section 502(a)(3).

Turning to the law of trusts for guidance in construing the remedial scope of "other appropriate equitable relief," the *Powell* court examined the general rule for recovery of money. The court noted that under Restatement section 205,<sup>207</sup> a beneficiary suing for breach of trust may recover the loss in value to the trust estate, any wrongfully earned profits by the trustee and any profits the trust estate would have earned had there been no breach.<sup>208</sup> The court also noted that an action at law by a beneficiary against a breaching trustee is not maintainable unless the trustee is under an unconditional duty to pay money to the beneficiary.<sup>209</sup> Without indicating whether the administrator had in fact breached its duty under ERISA, the court stated that "the provision for 'other appropriate equitable relief,' whatever it embraces, cannot be held to authorize extracontractual or punitive damages for the breach of a plan administrator's

---

202. *Id.*

203. *Id.* at 424.

204. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988 & Supp. I 1989); see *supra* Part III, notes 77-91 and accompanying text (discussing ERISA's duties of loyalty and care). The plaintiff also alleged that the conduct violated the duty of ERISA fiduciaries to disclose certain information to participants, ERISA § 101, 29 U.S.C. § 1021, and violated 29 U.S.C. § 1133(1)'s requirement that written notice for benefit denial be provided to beneficiaries. *Powell*, 780 F.2d at 420 & n.1.

205. *Powell*, 780 F.2d at 420.

206. *Id.* at 421-24. ERISA § 514, 29 U.S.C. § 1144, broadly preempts all state laws that "relate to" employee benefit plans, except those laws that "regulate[]" insurance, banking, or securities. A considerable body of case law interpreting this section has developed over the years. For a recent discussion of ERISA's preemptive effect, see Lawrence L. Vranka, Comment, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607 (1989). For a discussion of pre-ERISA concerns with the efficacy of welfare benefit plan regulation under state insurance laws, see Raymond Goetz, *Regulation of Uninsured Employee Welfare Plans Under State Insurance Laws*, 1967 WIS. L. REV. 319 (1967).

207. See *supra* Part IV(B)(1), notes 179-95 and accompanying text (discussing trust-law principles of recovery).

208. *Powell*, 780 F.2d at 424.

209. *Id.* The court did not distinguish between the procedural and substantive impact that permitting an action at law in such circumstances has upon the beneficiary's rights. Thus, even in circumstances where a beneficiary may bring a suit at law, the beneficiary may only recover the money owed and does not suddenly acquire, because she is in a court of law, the right to remedies additional to those available in a court of equity. For a discussion of this subject, see *supra* note 180 and accompanying text. See also *supra* note 195 (discussion of *Comstock's Will*).

fiduciary duties under ERISA."<sup>210</sup>

This statement by the *Powell* court, while accurately reflecting the general rule of recovery under trust law, and while accurately reflecting a proper application of that law to the claim for emotional distress and punitive damages then before the court, was unfortunately overbroad. The court completely ignored situations such as Dr. Warren's and the hypothetical pensioner's where a beneficiary may have received his benefits as provided by the plan yet suffered damage to his pecuniary interest in the plan. Contrary to the *Powell* court's broad and confident statement that the law of trusts would not authorize recovery to make such a beneficiary whole in his pecuniary interest, the above discussion of trust principles indicates that the Restatement remedies are deliberately flexible enough to accommodate such an aggrieved beneficiary.<sup>211</sup> This is an important point that will resurface in the Analysis section below.<sup>212</sup>

### 3. Justice Stevens' Approach

In *Sokol v. Bernstein*,<sup>213</sup> the Ninth Circuit adopted the approach urged by Justice Stevens on behalf of the majority in *Massachusetts Mutual Life Insurance Co. v. Russell*.<sup>214</sup> Recall that Justice Stevens argued that participant claims for damages beyond the benefits promised in the plan were unrecoverable for two reasons: first, ERISA fiduciaries could not be held liable for such damages because their duties of loyalty and care were lessened when administering claims; second, ERISA did not explicitly authorize extracontractual recovery.<sup>215</sup> Engaging in both a "textual exegesis" of *Russell* and an independent analysis of ERISA's legislative history, the *Sokol* court found that only contractually defined benefits were recoverable under ERISA.<sup>216</sup>

The dispute in *Sokol* centered around a pension-plan beneficiary's claim for emotional distress damages caused by the plan administrator's mishandling of her interest in the pension. Contrary to a written agreement between the plan and the plaintiff beneficiary (*Sokol*), the administrator (*Bernstein*) ordered the trustee to disburse the beneficiary's benefits.<sup>217</sup> Faced with an unwelcome potential tax liability, *Sokol* ordered *Bernstein* to redeposit the funds.<sup>218</sup> *Bernstein* refused to do so unless *Sokol* agreed to waive a claim for fiduciary breach

---

210. *Powell*, 780 F.2d at 424. The Fifth Circuit employed essentially the same analysis to conclude that punitive damages are not recoverable by a *plan* against a breaching fiduciary under section 502(a)(3). *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters.*, 793 F.2d 1456 (5th Cir.), *cert. denied*, 479 U.S. 1034 and 479 U.S. 1089 (1986).

211. *See supra* notes 179-95 and accompanying text.

212. *See infra* Part VI(A)(2)(b), notes 321-43 and accompanying text.

213. 803 F.2d 532 (9th Cir. 1986).

214. 473 U.S. 134 (1985).

215. *See supra* note 176 and accompanying text.

216. *Sokol*, 803 F.2d at 534-38.

217. *Id.* at 533-34.

218. *Id.* at 534.

against him.<sup>219</sup> After the funds were redeposited, Sokol sued for interest and other damages, including emotional distress.<sup>220</sup>

In its explication and adoption of the *Russell* majority's analysis, the *Sokol* court first looked to the nature of the duties ERISA imposes upon fiduciaries.<sup>221</sup> It found that the statute is primarily concerned with protecting the assets of the plan, not directly protecting the interests of the participants.<sup>222</sup> This meant that ERISA fiduciaries owed their duties to the plan, not to the individual participants, the consequence of which was that no suit could be brought under ERISA on behalf of an individual personally.<sup>223</sup> The court based its finding upon the following excerpt from *Russell*:

It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.<sup>224</sup>

Further examining Sokol's claim in light of *Russell*, the court turned to the language of section 502(a)(3) to observe a "glaring omission" of any provision for extracontractual damages.<sup>225</sup> Finally, the logic of *Russell* required that a cause of action for emotional distress based upon an implied remedy within ERISA must fail.<sup>226</sup> Because ERISA provided "an 'interlocking, interrelated, and interdependent remedial scheme'" with several alternative remedies, it appeared that Congress considered and included all the remedies it intended to include.<sup>227</sup>

Undertaking an independent analysis of section 502(a)(3), the *Sokol* court scrutinized the legislative history to reach the conclusion that the phrase "equitable relief" was used by Congress to mean injunctive or declaratory relief.<sup>228</sup> In addition, the court expressly rejected the idea that the phrase "equi-

---

219. *Id.*

220. *Id.*

221. *Id.* at 535.

222. *Id.* at 535-36.

223. *Id.* at 536.

224. *Id.* at 535-36 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985)). It is interesting to note that, despite the *Sokol* court's reading of *Russell*, and *Sokol*'s explicit adoption of this reading ("It should be noted that nothing in the above-quoted passage limits the rationale of *Russell* to § 409." *Sokol*, 803 F.2d at 536), the court nonetheless found that the administrator had "breached his fiduciary duty to Sokol" by acting arbitrarily and capriciously. *Id.* at 534.

225. *Id.* at 536.

226. See *Russell*'s discussion of implied remedies, *supra* note 173.

227. *Sokol*, 803 F.2d at 536.

228. *Id.* at 537-38. The court cited two congressional reports in the legislative history indicating that ERISA's remedies are intended to protect the plan and that the phrase "equitable relief" refers to nonmonetary relief for the plan. *Id.* (citing H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 320 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 32, at 4587; S. REP. NO. 383,

table relief" was an instruction to courts to turn to trust law for its meaning. The court explained that ERISA's preemption section<sup>229</sup> was designed to bring uniformity and predictability to judicial decision-making. Referring to state law would undermine that goal.<sup>230</sup>

Other courts have presented similar though less detailed analyses of the measure of recovery under section 502(a)(3). Courts often adopt the logic of the *Russell* majority and sometimes adopt the *Sokol* court's argument that equitable relief does not include money damages.<sup>231</sup>

With this ERISA background now in mind, an examination and analysis of Dr. Warren's case is appropriate.

## V. WARREN V. SOCIETY NATIONAL BANK<sup>232</sup>

### A. Facts and Procedure of Warren

Society National Bank ("SNB") was trustee of two retirement plans—a pension plan and profit sharing plan—sponsored and administered by Dr. Robert Warren's employer, Westgate Medical Anesthesia Group.<sup>233</sup> Dr. Warren was a participant in both plans, where his accrued benefits, totaling just over \$556,000 by September 1984, were vested.<sup>234</sup> Dr. Warren and other participants were provided with summary plan descriptions ("SPDs") for the plans, each of which permitted participants to opt to receive their benefits in the form of a lump sum.<sup>235</sup> In October 1984, Dr. Warren opted to receive the monies accumulated in both retirement accounts in a lump sum so he could roll them over tax-free into his Individual Retirement Account ("IRA"). He directed SNB to transfer his account balances to the investment banking firm that managed his IRA. SNB distributed Dr. Warren's funds in several disbursements: approximately \$388,000 was transferred in December 1984 in two disbursements; the remaining \$168,000 was transferred again in two disbursements, part in January 1985 and part in May 1985.

93d Cong., 1st Sess. 105-06 (1973), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 32, at 1173-74).

229. ERISA § 514, 29 U.S.C. § 1144 (1988 & Supp. I 1989) (discussed *supra* note 206).

230. *Sokol*, 803 F.2d at 538 n.6.

231. See, e.g., *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 696 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1924 (1990); *Amos v. Blue Cross/Blue Shield, Inc.*, 868 F.2d 430, 431 (11th Cir.), *cert. denied*, 110 S. Ct. 158 (1989); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306-07 (9th Cir. 1986).

232. 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

233. *Id.* at 976. Not only was Westgate Dr. Warren's employer, but it also was a closely held professional corporation in which Dr. Warren was a shareholder. Brief for Appellant at 7 n.7, *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990) (No. 89-3331), *cert. denied*, 111 S. Ct. 2256 (1991).

234. See discussion of accrued and vested (nonforfeitable) benefits, *supra* Part I(D), notes 32-45 and accompanying text. Mrs. Warren was a beneficiary of the plans. *Warren*, 905 F.2d at 976.

235. *Warren*, 905 F.2d at 976, 977.

Dr. Warren filed suit<sup>236</sup> in the United States District Court for the Northern District of Ohio alleging that the bank's distribution of the retirement funds over two taxable years caused the 1985 distributions to become ineligible for rollover treatment, which in turn caused Dr. Warren to suffer damages in the amount of \$375,000. The damages allegedly derived from two sources: nearly \$100,000 in taxes that otherwise would not have been due, and the remainder in lost income that would have been earned through the compounding of principal and income had the 1985 distributions been eligible to join the 1984 distributions in Dr. Warren's IRA. Dr. Warren's suit raised three issues.<sup>237</sup>

The first issue was whether SNB was obliged to pay Dr. Warren his retirement funds within one year. Dr. Warren argued that the provision for lump-sum benefits in the SPDs imposed a duty upon SNB to distribute the funds within one taxable year.<sup>238</sup> He alleged that SNB's failure to perform this duty was a result of either the bank's desire to earn extra fees as trustee or its negligence, which in either case meant the bank had breached a fiduciary duty under ERISA.<sup>239</sup> SNB responded that only the SPDs, not the plan documents, provided for lump-sum distributions. Because the summary plan description was prepared by the plan administrator (Westgate) and not the trustee (SNB), the bank was not bound by the SPD.<sup>240</sup> That contention notwithstanding, SNB further argued that the term "lump sum" did not impose a duty on SNB to distribute the funds within the year.<sup>241</sup>

The second issue was whether the option in the SPDs to choose a lump-sum payment was itself a benefit. Dr. Warren argued that this option was a benefit of his retirement plans. The bank argued to the contrary, claiming that Dr. Warren had been paid all of his contractually defined benefits.<sup>242</sup>

The final issue raised in Dr. Warren's suit was whether his claimed damages were recoverable under ERISA. SNB claimed that Dr. Warren's alleged damages were extracontractual, in that the doctor already had received all of the assets in his retirement accounts.<sup>243</sup> Dr. Warren responded that the damages he sought were in fact contractual, insofar as contractual damages can be equated with general damages.<sup>244</sup>

---

236. Mrs. Warren, as a beneficiary of the plans and a joint tax filer, joined Dr. Warren as a plaintiff. *Id.* at 976.

237. *Id.* at 976-77.

238. Dr. Warren based this argument upon his interpretation of the Code's definition of a lump-sum payment. *Id.* at 976.

239. The allegation of self-interested conduct went to ERISA's duty of loyalty, and the negligence to ERISA's duty of care.

240. Brief of Appellees at 38, *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990) (No. 89-3331), *cert. denied*, 111 S. Ct. 2256 (1991).

241. *Id.*

242. *Warren*, 905 F.2d at 976-77.

243. *Id.* at 976. This argument was based upon the Supreme Court's use of the term in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985). *Warren*, 905 F.2d at 976 See a discussion of *Russell's* use of the term "extracontractual damages," *supra* note 174.

244. Dr. Warren's argument on this point appears to have come directly from a law review

The district court granted SNB's motion to dismiss for failure to state a claim on two grounds. First, the court agreed with SNB that the term "lump sum" did not impose a duty upon the bank to distribute the funds within the taxable year. Second, the court held that the damages sought by Dr. Warren were extracontractual within the meaning of *Russell*, and therefore unrecoverable under ERISA.<sup>245</sup>

On appeal to the Sixth Circuit, a three-judge panel reviewed Dr. Warren's case.<sup>246</sup> Two judges wrote separately to reach the conclusion that Dr. Warren's claim for damages could survive a motion to dismiss. One judge dissented on the ground that the damages sought were not recoverable under ERISA.

## B. The Sixth Circuit Opinions

### 1. Judge Lively's Opinion

Writing the opinion of the court in *Warren*, Judge Lively found that the plans imposed a *contractual* duty upon the bank to distribute the funds within the taxable year. Although the judge acknowledged Dr. Warren's allegation of a breach of *fiduciary* duty,<sup>247</sup> and although the judge's analysis of the existing law dealt entirely with fiduciary duties,<sup>248</sup> the judge nonetheless found a breach of contractual duty. The judge explained that "Dr. Warren brought this action to redress a violation of the terms of the plans—the alleged failure of the bank to perform a contractual duty."<sup>249</sup> Implicit in the judge's finding of a breach of duty, whether it was contractual or fiduciary, was a finding that the duty derived from the SPDs. Judge Lively went on to note that this breach of duty resulted in "the loss of one of the most significant benefits available under ERISA," namely the tax deferral status.

On the issue of damages, Judge Lively found Dr. Warren's injuries compensable under the "appropriate equitable relief" language of section 502(a)(3) of ERISA. The judge discussed the Supreme Court's decision in *Russell*, then

---

student note, Diane M. Sumoski, Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014 (1986), which suggested that the *Russell* court used the term "extracontractual" to mean special damages and "contractual" to mean general damages. *Id.* at 1023-27. This subject is discussed *supra* note 174.

245. *Warren*, 905 F.2d at 977-78.

246. *Id.* at 975-76.

247. *Id.* at 980.

248. For example, the judge cited Justice Brennan's concurrence in *Russell* for the proposition that Congress intended to import trust law principles of fiduciary conduct into ERISA's fiduciary provisions. In addition, "it is proper to apply 'black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits.'" *Id.* at 981 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53 (1985) (Brennan, J., concurring)).

249. *Id.* at 982. In the preceding paragraph, Judge Lively stated: "Dr. Warren alleged that SNB breached a duty imposed upon it by the plans, and that ERISA provides for a complete remedy . . ." *Id.* The judge then quoted the portion of ERISA section 502(a)(3) that indicates equitable relief is available to redress violations of the terms of the plan. *Id.*



surveyed the two approaches to recovery under section 502(a)(3) that post-*Russell* courts have taken.<sup>250</sup> Finding Justice Brennan's approach to defining the scope of equitable relief "instructive," the judge held that trust law principles governing beneficiary redress of fiduciary breaches should also govern ERISA participant redress of fiduciary breaches. According to Judge Lively, trust principles authorize remedies "that will put [the beneficiary] in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages."<sup>251</sup> The judge also sought to distinguish the damages Dr. Warren was seeking from those sought by plaintiffs in post-*Russell* cases denying recovery under 502(a)(3). Those cases involved claims for emotional distress and sometimes punitive damages, while Dr. Warren was seeking recovery of "a benefit to which he was entitled under the plans."<sup>252</sup>

Curiously, the judge then changed his focus from one clause in section 502(a)(3) to another. Recall that Section 502(a)(3) authorizes recovery of "equitable relief" for violations of ERISA's fiduciary provisions.<sup>253</sup> But the section is not limited to redressing those violations; it also authorizes equitable relief to redress violations of *the terms of the plan*.<sup>254</sup> Judge Lively highlighted this additional protection offered under the "equitable relief" language of section 502(a)(3), and then noted that general equitable principles outside the trust context support an award of monetary damages "to afford complete relief."<sup>255</sup>

Although Judge Lively's opinion is difficult to follow on a first reading, it does contain an internally coherent structure. While the judge did not come out and explicitly say so, he appeared to have been offering two alternative theories of recovery, the one alternative being a hedge against the Supreme Court's rejection of the other should the case be appealed. Under the first theory, the judge analyzed ERISA precedent on the issue of fiduciary duty in an attempt to suggest, but not explicitly state, that SNB breached its fiduciary duties.<sup>256</sup> The judge then undertook a corresponding analysis of ERISA remedies for breach of fiduciary duty, wherein he was willing to find that section 502(a)(3)'s "equitable relief" provision, which he determined was grounded in trust law, would provide Dr. Warren with the remedy he sought.<sup>257</sup> This way the judge could pair the breach of fiduciary duty with the proper ERISA remedy designed to redress such a breach.

Under the second theory, Judge Lively took great pains to find that it was

---

250. *Russell* and its progeny are discussed *supra* Part IV, notes 164-231 and accompanying text.

251. *Warren*, 905 F.2d at 982.

252. *Id.*

253. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988 & Supp. I 1989); *see also supra* note 163 (quoting this section).

254. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

255. *Warren*, 905 F.2d at 982.

256. *Id.* at 981.

257. *Id.* at 982.

the ERISA plan, not the statute itself, that imposed a duty—in particular, a contractual duty—upon SNB. Dr. Warren's redress for a breach of this duty was found in section 502(a)(3)(B), which permitted equitable relief to redress violations of the terms of the plan.<sup>258</sup> This relief was shaped by traditional concepts of equity rather than trust principles.

Each theory, then, offered an internal symmetry that Judge Lively seemed to find appealing. These theories will be important to keep in mind in the Analysis section below,<sup>259</sup> where the contractual-duty theory will be disputed.

## 2. Judge Nelson's Concurrence

Judge Nelson concurred with Judge Lively's view that Dr. Warren's complaint should survive a motion to dismiss,<sup>260</sup> but added several additional factors for further consideration by the trial court. For Judge Nelson, the key issue for the trial court was whether the bank's distribution in fact resulted in a loss of tax deferral status for Dr. Warren.<sup>261</sup> The judge noted that the issue of tax-free rollovers had not been briefed by the parties, and it was possible that rollovers were not limited to single-year distributions. Furthermore, since the plans were separate, it was not clear from the pleadings whether funds from an individual plan had been distributed in more than one taxable year.<sup>262</sup>

From these observations, the judge went on to note that if rollovers could only be accomplished in one year, and if the bank had in fact made multiple-year distributions, then the disposition of the case turned largely upon a number of factual considerations. The first was whether the bank was under a fiduciary duty "to minimize the exposure of plan beneficiaries to taxation."<sup>263</sup> The second was whether the bank distributed the funds in several payments to earn additional fees or for some other reason. The third was whether Dr. Warren actually opted for a lump sum in his request to receive his plan benefits. And the fourth consideration was whether SNB was bound by the terms of the SPDs.<sup>264</sup> Because these issues remained unresolved, it was impossible to say whether the damages Dr. Warren sought were recoverable.<sup>265</sup> Thus, Judge Nelson agreed that the motion to dismiss should be denied.

## 3. Judge Wellford's Dissent

Judge Wellford argued that the damages sought by Dr. Warren were extracontractual within the meaning of *Russell*, and as such were unrecoverable.

---

258. *Id.* ERISA § 502(a)(3)(B)(i), 29 U.S.C. § 1132(a)(3)(B)(i) provides in relevant part that a beneficiary of a plan may bring an action "(B) to obtain other appropriate equitable relief (i) to redress . . . violations [of the terms of the plan]." *Id.*

259. See *infra* Part VI(A)(2), notes 313-37 and accompanying text.

260. *Warren*, 905 F.2d at 983 (Nelson, J., concurring).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

Contrary to Judge Lively's view that Justice Brennan's approach in *Russell* to interpreting "equitable relief" should control, Judge Wellford argued that Justice Stevens' approach, the majority approach in *Russell*, should be followed by lower courts. He pointed out that the Sixth Circuit, in a previous case, had followed Justice Stevens' approach to find extracontractual punitive damages unavailable under section 502(a)(3).<sup>266</sup> He also argued that virtually all courts, regardless of their approach, had held extracontractual compensatory damages unrecoverable.<sup>267</sup> Finally, he cited an unpublished opinion by the Sixth Circuit where the court had found that even if permitting recovery of extracontractual damages would in some sense make the plaintiff whole, general trust principles and the majority's holding in *Russell* prevented the court from making such an award.<sup>268</sup>

## VI. ANALYSIS

In concluding that Dr. Warren's cause of action should not be dismissed for failure to state a claim, the Sixth Circuit panel decided two of the three issues raised in the suit: (1) the nature of the duty, if any, that SNB owed to Dr. Warren, and (2) whether ERISA provided a remedy for the alleged breach. The third issue—whether the option in the SPDs to choose a lump-sum payment was itself a benefit—was never decided by the court. This issue is taken up below. In addition, although the issue was never discussed by the Sixth Circuit in *Warren*, an argument will be made in favor of recovery against the plan, under section 502(a)(1)(B), for denial of benefits.<sup>269</sup>

### A. Duty and Breach Under ERISA

Recall that Judge Lively appeared to suggest on behalf of the court that two alternative theories of recovery were available to Dr. Warren.<sup>270</sup> Under the first theory, the judge seemed to suggest that SNB's handling of Dr. Warren's claim for benefits constituted a breach of SNB's fiduciary duties.<sup>271</sup> To redress that breach, the judge reasoned that the "equitable relief" provision of section 502(a)(3), which was grounded in trust law, provided Dr. Warren with the remedy he sought.<sup>272</sup> Under the second theory, Judge Lively found that SNB breached a contractual duty imposed upon it by the plan. As a consequence, SNB was to be held liable under the clause of section 502(a)(3) that permitted equitable relief, as traditionally understood outside trust law, to redress

266. *Id.* at 984 (Wellford, J., dissenting) (citing *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987)).

267. *Id.* at 984-85 (Wellford, J., dissenting).

268. *Id.* at 985 (citing *International Union UAW Local 91 v. Park-Ohio Indus.*, 876 F.2d 894 (6th Cir. 1989) (plaintiffs seeking damages for mental distress)).

269. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B) (discussed *supra* note 161 and accompanying text).

270. See *supra* notes 253-58 and accompanying text.

271. See *supra* notes 253-58 and accompanying text.

272. See *supra* notes 253-58 and accompanying text.

violations of the terms of the plan.<sup>273</sup>

This Note argues that while Judge Lively's second theory is supported by neither the language nor the case law of ERISA, his first theory is in fact sound. To support this argument, an exploration of the nature of the duty involved is undertaken and an explanation of why SNB necessarily was acting in a fiduciary, not a contractual, capacity is offered. In addition, an examination of ERISA's remedial provisions will explain why the remedies available under the rubric "appropriate equitable relief" are grounded in trust law rather than general equitable principles of recovery.

### 1. *The Nature of the Duty*

When the *Warren* court suggested that SNB was under a contractual rather than fiduciary duty to distribute the requested funds within one year, it misidentified the nature of SNB's obligation. Under ERISA, a plan fiduciary will always be under a fiduciary rather than contractual duty to fulfill the mandates of the plan.<sup>274</sup> To see why this is so, a clarification of terminology is in order.

Both ERISA and a plan may impose "duties" upon a trustee. ERISA, for example, imposes "duties" of loyalty and care. Dr. Warren's retirement plans imposed a "duty" to distribute funds in a lump sum when the participant so opted to receive them. Although the statute and the plan both imposed duties, the term "duty" was used in two different senses. Plan-imposed duties are *quantitative*, or secondary, obligations—perhaps best thought of as chores—that the fiduciary must carry out. The ERISA-imposed duties of loy-

---

273. See *supra* note 258 and accompanying text.

274. Perhaps Judge Lively offered the contractual-duty theory because he believed that the fiduciary-duty theory was contrary to how Justice Stevens, writing for the majority in *Russell*, suggested that individual claims against fiduciaries should be handled. Justice Stevens, recall, suggested that ERISA's fiduciary provisions were aimed primarily at regulating fiduciary conduct in the management-investment context, not the benefit-claims context. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985). That is, ERISA fiduciaries were under heightened duties of loyalty and care when handling plan assets but diminished or nonexistent duties of loyalty and care when administering participant claims for benefits. Further recall that some courts of appeal, such as *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), seized upon that suggestion, or a variation thereof, and used it as a partial basis for denying recovery of extracontractual damages in section 502(a)(3) benefit claims cases. *Id.* at 535.

Justice Stevens' suggestions, then, if representative of the views of a majority of the Supreme Court today, would counsel against holding SNB accountable to the fiduciary-duty standard suggested by Judge Lively in his first theory. As is spelled out further in the text below, the Supreme Court's ruling in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), explicitly backs away from the view espoused by Justice Stevens in *Russell*. As is also made clear below, the *Warren* court never took cognizance of this fact. Thus, Judge Lively's "contractual duty" can be viewed as a proxy for Justice Stevens' view of diminished fiduciary responsibility in the benefit-claims context.

Regardless of what motivated the judge to offer his dual rationale, he nonetheless muddled the issue of whether ERISA imposes fiduciary duties of loyalty and care in the benefit-claims context. For the reasons set out below, an appropriate analysis of *Warren* results in a finding that SNB was under a fiduciary obligation to distribute Dr. Warren's funds.

alty and care, on the other hand, are *qualitative*, or primary, obligations that affect the *way* the fiduciary must carry out his chores. Because ERISA's fiduciary provisions apply to both pension and welfare benefit plans, regardless of whether a trust instrument is used, the ERISA fiduciary must always carry out her plan-imposed chores in the *way* that ERISA prescribes. In addition to ERISA's qualitative duties, the statute itself imposes quantitative duties, such as the duty to follow plan documents and, in the investment-management context, the duty to diversify plan assets.<sup>276</sup> The relevant question for the *Warren* court, then, was not simply *whether* the plan imposed an obligation, but how and to what extent ERISA compelled SNB to carry out that obligation.

On its face, ERISA provides a straightforward solution to this problem. The statute imposes a duty upon fiduciaries to comply with the terms of the plan,<sup>276</sup> and it requires them to do so with loyalty and with care.<sup>277</sup> According to the language of ERISA, then, the trustee's duties are by *nature* fiduciary.

As was explained previously in the text, however, ERISA's fiduciary duty provisions have never been as stringently applied in the benefit-claims context as they have in the management-investment context.<sup>278</sup> The Supreme Court's recent opinion in *Firestone Tire & Rubber Co. v. Bruch*<sup>279</sup> has set forth the standard to be applied to ERISA fiduciary conduct in the benefit-claims context. An examination and analysis of *Firestone* reveals why SNB's conduct in administering Dr. Warren's claim must be viewed in a fiduciary rather than contractual light.

Justice Stevens' suggestion that ERISA fiduciaries ought to be held accountable to lesser standards in the benefit-claims setting than in the management-investment setting did not materialize out of thin air; rather it was an outgrowth of the then prevailing "arbitrary and capricious" standard of review for benefit denials.<sup>280</sup> Recall, however, that in 1989 *Firestone* changed the ar-

275. ERISA § 404(a)(1)(D) & (C), 29 U.S.C. § 1104(a)(1)(D) & (C) (1988 & Supp. I 1989).

276. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

277. ERISA § 404(a)(1)-(B), 29 U.S.C. § 1104(a)(1)-(B).

278. See *supra* notes 90-160 and accompanying text.

279. 489 U.S. 101 (1989).

280. The *Russell* court explicitly found that although the fiduciary in the case had taken greater time than permitted by regulation to review plaintiff *Russell's* claim, the fiduciary's denial of benefits had not been "willful" or "part of a larger systematic breach of fiduciary obligations." *Russell*, 473 U.S. at 147. This language is reminiscent of that used in determining whether a fiduciary's denial of benefits was arbitrary or capricious. See *supra* Parts III(B)(2), (3) & III(C), notes 115-60 and accompanying text. The *Russell* court also stated:

Nothing in the regulations or in the statute, however, expressly provides for recovery from either the plan itself or from its administrators if greater time is required to determine the merits of an application for benefits. Rather, the regulations merely state that a claim may be treated as having been denied after the 60- or 120-day period has elapsed. This provision therefore enables a claimant to bring a civil action to have the merits of his application determined, *just as he may bring an action to challenge an outright denial of benefits.*

Significantly, the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan—§ 502(a)(1)(B)—says nothing about the

bitrary and capricious standard in a pivotal way.<sup>281</sup> *Firestone* recognized for the first time that ERISA, unlike the Labor Management Relations Act, required courts to undertake review of benefit denials de novo, unless the plan granted the fiduciary discretionary authority to determine participant eligibility or interpret the terms of the plan, in which case an abuse of discretion standard was to be employed.<sup>282</sup> This was a profound change because, as we have seen, the standard of review used by a court provided substance to the fiduciary's statutorily imposed duties.<sup>283</sup> *Firestone* required courts to look to the terms of the plan for language that modified ERISA's basic qualitative duties. This was a substantial departure from the view espoused by Justice Stevens in *Russell* just four years earlier.

Thus, if the holding in *Firestone* applies to the facts of *Warren*, then the plan fiduciary was necessarily acting in a fiduciary capacity. This is a big "if," however, that requires examination.

Justice O'Connor, who authored the *Firestone* decision, was careful to limit the Court's holding to claims brought under section 502(a)(1)(B)—claims against *the plan for denial of benefits*.<sup>284</sup> She explicitly left open the question of the appropriate standards of fiduciary care and loyalty in cases brought under other ERISA sections.<sup>285</sup> Dr. Warren, recall, brought his suit under section 502(a)(3) against the *fiduciary*. This Note proposes that the same principles of fiduciary standards that already apply in cases brought under section 502(a)(1)(B) (benefit denial claims) based upon alleged fiduciary misconduct should also be employed to analyze fiduciary conduct in cases brought under section 502(a)(3) (claims for "appropriate equitable relief") based upon alleged fiduciary misconduct. To think that the scope of the fiduciary's duties of loyalty and care would be defined differently depending upon which section of ERISA was being invoked would exceed the bounds of reason. The real question is not whether more than one standard ought to govern fiduciary behavior in similar circumstances, but whether a fiduciary should be subject personally to liability for his breach of duties. This issue is taken up in the discussion of "equitable relief" below.<sup>286</sup>

---

recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim.

*Russell*, 473 U.S. at 144 (citations omitted).

281. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

282. *Id.* at 115.

283. See *supra* notes 133-60 and accompanying text.

284. See *supra* note 149 and accompanying text.

285. *Firestone*, 489 U.S. at 110, 115.

286. Perhaps one reason the *Firestone* Court was adamant about limiting its discussion of the standard of review to section 502(a)(1)(B) cases was a concern that its adoption of a de novo standard (implicit in which was the recognition of higher standards of loyalty and care in administering claims than hitherto acknowledged by the judiciary) might be an overwhelming incentive for participants to sue for extracontractual damages for breach of duty under section 502(a)(3). As this Note explains, such a concern would be unfounded if courts would recognize that "equitable relief" in section 502(a)(3) only affords participants trust law remedies for damage to their *pecuniary* interests in their benefit plans. See *infra* Part VI(B). Note that the proposal in the text

Thus, it now seems clear that the plan fiduciary in *Warren* was acting in a fiduciary capacity. But consider one additional factor. Recall that the tax code subsidizes employer payments to qualified employee benefit plans as part of a national retirement policy.<sup>287</sup> This expense is justified on the ground that it works directly in favor of millions of employees.<sup>288</sup> But while the subsidy is busy working to the advantage of covered employees, it also provides employers with a substantial savings in payroll costs.<sup>289</sup> The primary aim of national retirement strategy is to assist workers in preparing to meet their living needs in old age, not to cushion employers' personnel budgets.<sup>290</sup> To that end, ERISA's fiduciary provisions can be viewed as part of a social compact, negotiated by Congress, between employer and worker. In exchange for reduced payroll expenses, the employer agrees to comply with fiduciary rules when handling plan assets and participant claims. Surely this is an equitable bargain. This point loses none of its force when it is the employer's designated professional fiduciary that administers the plan. Both the employer and the professional fiduciary can procure adequate insurance to protect themselves.

In light of the above considerations, then, the *Warren* court should have used the same principles enunciated in *Firestone* to measure SNB's conduct as an ERISA fiduciary. A second look at *Warren*, with an eye toward the appropriate degree of deference to the fiduciary's interpretation of the plan, is illuminating.

#### a. Dr. Warren's claim

In *Warren*, the doctor alleged that the provision in the summary plan description for lump-sum benefits imposed a duty upon SNB to distribute the funds within a single year, once a participant so opted to receive his benefit.<sup>291</sup> By alleging that SNB made multiple distributions over two taxable years, either to earn extra commissions or because of negligence, Dr. Warren was claiming that the way the bank performed its plan-imposed duties violated ERISA's duty of loyalty or duty of care provision. If Dr. Warren were to prevail on these allegations, SNB would be found to have violated its fiduciary duties under a *Firestone*-type analysis. SNB defended this charge on the ground that it was not under a duty to distribute the funds within one calendar year.<sup>292</sup> If SNB were to prevail on this claim, then any damage suffered by Dr.

---

does not seek to employ the same heightened fiduciary standards governing the management-investment context. Rather, it simply seeks to treat all claims-administration cases alike.

287. See *supra* notes 46-58 and accompanying text.

288. See *supra* notes 51-52 and accompanying text (noting that private pension plans receive favorable tax treatment from the Internal Revenue Service).

289. See *supra* notes 53-58 and accompanying text (discussing the favorable tax treatment employees receive from the Internal Revenue Service by contributing to employee pension plans).

290. See *supra* note 50 and accompanying text.

291. *Warren v. Society Nat'l Bank*, 905 F.2d 975, 976, 980 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

292. *Id.* at 976-77.

Warren could not be attributed to an improper handling of Dr. Warren's benefit claim by SNB.

In support of its defense, SNB offered two arguments. The first argument was that lump-sum distributions were not offered in the plan documents, only in the summary plan descriptions.<sup>293</sup> Because the SPDs were prepared by the plan administrator (Westgate) and not the trustee (SNB), the bank argued that SNB was not bound by the summary description.<sup>294</sup> Therefore, if the bank was not bound by the SPD, and the only authority for imposing a duty on the bank to pay the retirement funds within one year was the term "lump sum" found in the SPD, then, the bank argued, it could not be faulted for any failure on its part to pay within the year. The court never explicitly addressed this contention but simply seemed to have assumed that the terms of the summary description controlled.<sup>295</sup> The case law does indeed support this assumption by providing that where the plan documents and summary plan description conflict over a participant's right to benefits, the summary plan description prevails.<sup>296</sup>

SNB's second argument was that, assuming the SPD did apply and the bank was required to transfer Dr. Warren's pension benefits in a lump sum, the term "lump sum" could not be interpreted to require SNB to disburse the funds within the year.<sup>297</sup>

The court's task at this point, under a *Firestone*-type analysis, should have been to determine whether the document conferred upon SNB discretionary authority to interpret the terms of the plan. The reason for this is that SNB was offering its own interpretation of the term "lump sum," which was contrary to the meaning asserted by Dr. Warren. If, after an examination of the plan, the court had found that discretionary authority was conferred upon SNB to interpret language in the plan, the general rule of deference to the fiduciary's interpretation should have been applied, unless one of two exceptions were properly invoked: either the fiduciary's interpretation was unreasonable or, as is explored below, the disputed term was not subject to discretionary interpretation.

Rather than undertaking this analysis, the court seemed to treat Warren's definition of "lump sum" as an allegation of fact, and therefore true, given the Rule 12(b)(6) posture of the case.<sup>298</sup> This was unfortunate because the proper

---

293. *Id.* at 983.

294. Brief of Appellees at 38, *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990) (No. 89-3331), *cert. denied*, 111 S. Ct. 2256 (1991).

295. *Warren*, 905 F.2d at 977, 980.

296. *See supra* Part I(C), notes 27-31 and accompanying text.

297. Brief of Appellees at 38, *Warren* (No. 89-3331). The basis for this argument seems to have been that there was no reason to think that the term as used in the plan incorporated the Internal Revenue Code's definition of the term. But this argument is really self-defeating, because if the technical Code definition doesn't apply, the common sense interpretation of the phrase would argue against multiple distributions, regardless of whether the distributions occurred within one or more taxable years.

298. FED. R. CIV. P. 12(b)(6). The court cited *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,



definition of "lump sum," which was borrowed directly from the Code,<sup>300</sup> should have been a question of law, not a question of fact.<sup>300</sup> Courts undertake for themselves to decide questions of law.<sup>301</sup> Assuming that the plan had granted SNB discretionary authority to interpret terms of the plans—a best-case scenario for SNB—the court could not defer on a question of law.<sup>302</sup> Thus, when the term "lump sum" became an issue in the case, the court could neither defer to SNB's discretionary interpretation of the term nor treat Dr. Warren's asserted meaning of the term as true. The court should have interpreted the term itself.<sup>303</sup>

Because the term "lump sum" is borrowed directly from the Code, the court should have looked there for a definition. It would have found that the term means a payment of the participant's balance within one taxable year, not necessarily in a single disbursement.<sup>304</sup> The court also would have found that in some circumstances a partial distribution is a lump-sum distribution.<sup>305</sup> This occurs when an employer makes what it believes to be a lump-sum distribu-

245 (1986), for the well established rule that factual allegations in cases being reviewed for failure to state a claim under Rule 12(b)(6) are treated as true. *Warren*, 905 F.2d at 983.

299. See *supra* notes 60-65 and accompanying text (discussing lump-sum benefits).

300. The term "lump sum" derives directly from the Internal Revenue Code. It is defined in I.R.C. § 402 (1988 & Supp. I 1989) and discussed in the text below. The SPDs not only provided an option to receive benefits in the form of a lump sum, but also discussed distributions with reference to the tax code:

(6) TREATMENT OF DISTRIBUTIONS

Whenever you receive a distribution from the Plan, it will normally be subject to income taxes. However, you may reduce, or defer entirely, the tax due on your distribution through the use of one of the following methods:

(a) The rollover of all or a portion of the distribution to an IRA or another qualified employer plan. This will result in no tax being due until you begin withdrawing funds from the IRA or other qualified employer plan. BUT, the rollover of the distribution must be made within strict time frames (normally, within 60 days after you receive your distribution). Further, under certain circumstances all or a portion of a distribution may not qualify for this rollover treatment.

*Warren*, 905 F.2d at 977.

SNB's argument that the term lump sum could not be interpreted in accordance with the Internal Revenue Code's definition runs counter to SNB's status as a corporate professional trustee, see *supra* note 99, and to the basic tax structure with regard to benefit plans. See *supra* Part II, notes 46-71 and accompanying text.

301. See *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990) (stating that fiduciary's interpretation of statutory term incorporated in plan is owed no deference and must be reviewed de novo).

302. *Id.*

303. Note that where the plan incorporates a statutory term, the court may not defer to either party's interpretation. The court applies a de novo review of the fiduciary's reading of the plan, which in effect holds the fiduciary to higher standards of care and loyalty than if the court simply deferred to the fiduciary's own interpretation. This makes sense because allowing private parties to interpret statutory terms in private agreements would result in hopelessly inconsistent and self-serving interpretations, which would frustrate the governmental policies behind the statute.

304. See *supra* notes 60-65 and accompanying text.

305. See *supra* notes 64-71 and accompanying text (discussing the Code's definition of lump sum).

tion, only to discover the following tax year that there was an error and another distribution is necessary.<sup>306</sup> In such circumstances, if the first distribution is at least fifty percent of the total amount owed the participant, then that distribution is treated as a lump sum, while the subsequent distribution is eligible for a rollover.<sup>307</sup> Based upon the latter definition, it would appear that even though SNB did distribute the funds over the course of two taxable years, the second distribution was still eligible for rollover treatment.

This would necessarily mean that although SNB was being held to moderately high fiduciary standards of loyalty and care—the court reviewed SNB's actions *de novo*—the bank did not breach those duties by distributing Dr. Warren's retirement funds within the strictures of the Code. The adverse tax consequences suffered by Dr. Warren may well have been due to bad tax advice.<sup>308</sup> Whatever the reason behind Dr. Warren's misfortune with the IRS, the bank seems blameless. As long as the bank's actions comported with the Code's requirements to effect a lump-sum distribution, which the bank agreed to provide Dr. Warren, then the bank cannot be faulted, unless of course Dr. Warren could show on remand that SNB did in fact make multiple distributions in order to generate extra fees. But even then, Dr. Warren would have to show that his claimed damages were caused by SNB's breach of loyalty.

Thus, the *Warren* court failed to analyze SNB's conduct under the proper framework and reached what was probably an erroneous conclusion about SNB's potential liability. But, as Judge Nelson noted in his concurrence, the issues of lump-sum distributions and tax-free rollovers were subjects properly taken up by the trial court below.<sup>309</sup>

#### b. The hypothetical pensioner's claim

This still leaves unresolved the hypothetical pensioner's complaint for breach of fiduciary duty. The pensioner, like Dr. Warren, chose to receive his retirement funds in the form of a lump sum.<sup>310</sup> Unlike Dr. Warren, however, the pensioner's first distribution was less than fifty percent of the balance owed him by the fund; his second distribution, received in the second tax year, was the balance.<sup>311</sup> As the term "lump sum" is defined under the Code, however, the pensioner's first distribution would not qualify as either a lump sum or as a partial distribution eligible for rollover treatment, while the second would.<sup>312</sup>

---

306. See *supra* notes 66-71 and accompanying text.

307. See *supra* notes 66-71 and accompanying text.

308. Dr. Warren paid approximately \$75,000 to the IRS and nearly \$13,000 to the state of Ohio, allegedly due to SNB's delay in distributing the funds. *Warren v. Society Nat'l Bank*, 905 F.2d 975, 976 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991). Dr. Warren's decision to pay the taxes may have been prompted by the advice of his accountant when preparing his 1985 tax returns.

309. *Id.* at 983 (Nelson, J., concurring).

310. See *supra* text accompanying note 3.

311. See *supra* text following note 3.

312. See *supra* notes 64-71 and accompanying text (discussing the Internal Revenue Code's definition of "lump sum").

In this hypothetical, then, the fiduciary's failure to comply with the IRS's requirements for rollover eligibility, which the fiduciary promised the pensioner in the plan, would clearly be a compensable breach of fiduciary duty. The precise scope of such a recovery is explored below.

## 2. *Appropriate Equitable Relief*

Recall again the two alternative approaches offered by Judge Lively in *Warren*. Under the first approach, the court implied that SNB may have breached a fiduciary duty, the statutory remedy for which was the provision in section 502 (a)(3) for "equitable relief," as understood in trust law.<sup>313</sup> Under the second approach, the court claimed that SNB had breached a contractual duty to distribute Dr. Warren's funds. The remedy for this breach was "equitable relief" under section 502(a)(3) to redress violations of the terms of the plan.<sup>314</sup> The phrase "equitable relief" in the second theory is based upon general equitable principles outside trust law.<sup>315</sup> Judge Lively's dual analysis presents several problems.

The first problem is Judge Lively's implicit suggestion that either theory might be an appropriate basis for deciding the case. In fact, only the first theory, dealing with fiduciary duty and trust law principles of equitable recovery, is doctrinally sound. The second problem is the court's failure to convincingly explain why, if its first theory is sound, trust principles should guide courts in defining the scope of "appropriate equitable relief." The third problem is the court's adoption of a broad reading, by trust law standards, of the scope of "equitable relief."

This section explores each of these problems and concludes that "equitable relief" is properly interpreted as deriving from trust law, while the appropriate scope of that relief is limited to protecting participants' pecuniary interests in the plan. As a practical matter, damages recoverable by participants generally will be what Justice Stevens termed "contractual" damages.<sup>316</sup> Yet there are some scenarios where Justice Stevens' narrow concept of relief would not comport with trust principles or ERISA's purposes, and would deny an injured plaintiff appropriate redress for breach of fiduciary duty. The hypothetical pensioner's case is such a scenario.

### a. Collapse of the general equitable principles theory

The first problem—Judge Lively's suggestion that the contractual-duty/general-equitable-principles theory of recovery might be an acceptable basis for deciding the case—was largely resolved against the judge in the section above analyzing ERISA's fiduciary duties. In that section, recall, both SNB and the hypothetical pensioner's fiduciary were found to be acting in a fiduciary rather

---

313. See *supra* text following note 255.

314. See *supra* text following note 255.

315. See *supra* text following note 255.

316. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

than contractual capacity.<sup>317</sup>

The contractual-duty/general-equitable-principles theory of recovery now collapses in *Warren*. The reason is that once the fiduciary is found to be operating under duties of loyalty and care, a remedy outside the law of trusts is inapposite. Reading the "equitable relief" provision of section 502(a)(3) in a way that permits a court to fashion whatever remedy it deems appropriate would vest greater discretion in the court than anything in the statute or the legislative history would support.<sup>318</sup> Furthermore, permitting recovery of damages for injuries beyond the participant's pecuniary interest in the plan would create an irresistible incentive for plaintiffs, and their contingency-fee attorneys, to sue for such things as emotional distress and punitive damages. And while it is true that the *Firestone* Court held that a potential increase in administrative and litigation costs could not dissuade it from adopting a de novo standard of review in claims-administration cases,<sup>319</sup> this was presumably based on the view that cost increases in those circumstances did not upset the congressional balance of employer and employee interests that ERISA seeks to strike.<sup>320</sup> Permitting recovery of damages beyond the participant's pecuniary interest, however, would surely upset that balance.

Still unresolved, though, is why state trust law principles, rather than independently minted federal common law principles, necessarily govern the phrase "equitable relief" in section 502(a)(3), and how broadly the scope of such equitable recovery extends.

#### b. Trust principles and equitable relief

Although the *Warren* court theorized that the scope of "equitable relief" to redress breaches of fiduciary duty under ERISA could be determined by looking to the law of trusts,<sup>321</sup> the court did not explain why section 502(a)(3)'s "equitable relief" provision might incorporate trust principles. The court simply agreed with the view espoused by Justice Brennan in *Russell*.<sup>322</sup> Justice Brennan's explanation, however, provided no answer either. The concurring Justice merely stated that "ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme."<sup>323</sup> But the legislative history to which Justice Brennan

---

317. See *supra* notes 291-312 and accompanying text.

318. See *infra* notes 329-43 and accompanying text (discussing the broadly worded nature of ERISA's "equitable relief" provision, and its adoption from the law of trusts).

319. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114-15 (1989).

320. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The Court stated: "In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 54.

321. *Warren v. Society Nat'l Bank*, 905 F.2d 975, 982 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

322. *Id.* (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 154 n.10, 157 n.16 (1985)).

323. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156-57 (1985).

referred spoke only to ERISA's fiduciary duty provisions, not to its remedial provisions.<sup>324</sup> Thus, if section 502(a)(3) does in fact incorporate trust-law remedies, a more compelling rationale is needed. This Note offers a rationale to support the above proposition as well as counter another proposed meaning of "equitable relief"—the argument in *Sokol v. Bernstein*<sup>325</sup> that the "equitable relief" provision of section 502(a)(3) allows only for injunctive or declaratory relief.<sup>326</sup>

Although the argument Justice Brennan proffered in *Russell* to support his view that "equitable relief" incorporated trust principles was unpersuasive, the Justice made another point that will be helpful in developing a convincing rationale. Justice Brennan argued that trust-law principles guide courts in defining the duties of ERISA plan fiduciaries.<sup>327</sup> This proposition was explicitly adopted in 1989 by the Supreme Court in *Firestone* on the ground that ERISA's fiduciary language and legislative history urge courts to develop a "federal common law of rights and obligations" based upon principles of trust law.<sup>328</sup> Under *Firestone*, then, an ERISA provision may be governed by trust-law principles if the broad language of the provision, confirmed by the legislative history, requires such a result. This same analysis should be employed to analyze ERISA's remedial provisions.

In the case of section 502(a)(3), which provides for "appropriate equitable relief to redress such violations," the phrase itself is nearly identical to section 205 of the Restatement, dealing with remedies.<sup>329</sup> Thus, the language used to

324. *Id.* at 152-53.

325. 803 F.2d 532 (9th Cir. 1986).

326. See *supra* notes 228-30 and accompanying text.

327. *Russell*, 473 U.S. at 152 & n.6 (Brennan, J., concurring).

328. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)); see *supra* Part III(C), notes 143-56 and accompanying text (discussing *Firestone*).

329. RESTATEMENT, *supra* note 77, § 199. The Restatement provides:

§ 199. Equitable Remedies of Beneficiary

The beneficiary of a trust can maintain a suit

- (a) to compel the trustee to perform his duties as trustee;
- (b) to enjoin the trustee from committing a breach of trust;
- (c) to compel the trustee to redress a breach of trust;
- (d) to appoint a receiver to take possession of the trust property;
- (e) to remove the trustee.

*Id.* (emphasis added). Compare this language with ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988 & Supp. I 1989), which provides in full:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

\* \* \* \*

- (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

*Id.* (emphasis added).

define one of ERISA's remedies, like the language used to define ERISA's duties of loyalty and care, is broadly worded and borrowed from the law of trusts.

The legislative history of ERISA's enforcement scheme suggests that Congress intended equitable relief, at the very least, to extend beyond injunctive and declaratory relief. The *Sokol* court confidently cited an early Senate report and the House Conference report for the proposition that equitable relief "clearly" is limited to injunctive and declaratory actions.<sup>330</sup> But neither of those reports stands for the proposition asserted.

*Sokol* offered the Senate report as "[p]erhaps the most telling indication of what Congress meant by 'appropriate equitable relief.'"<sup>331</sup> The court explained that "[t]he Committee's definition of such relief is worth reviewing at length:

Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries. Also, the bill specifically provides that a fiduciary may be removed through civil action . . . .<sup>332</sup>

This report, the court pointed out, did not mention recovery of money damages.<sup>333</sup> But the report's definition of equitable relief was not dispositive because the bill that the report accompanied expressly permitted participants and beneficiaries to recover "appropriate relief, *legal* or equitable, to redress or prevent any violation of subsections (b) and (c), including the removal of a fiduciary who has violated subsection (c)."<sup>334</sup> Thus, at the time the report was written, recovery of money damages was expressly contemplated under the rubric of "legal relief," and the report's limited discussion of equitable relief was quite natural. It is entirely possible, even likely, that as the early bills were refined, Congress recognized that the law of trusts already permitted recovery of money damages in what were entirely equitable proceedings. Thus, allowing "legal" damages might encourage federal courts to fashion remedies well beyond those contemplated in trust law. Therefore, the reference to legal relief was subsequently deleted.

*Sokol* also offered a portion of the House Conference report to suggest that "equitable relief" was restricted to injunctive or declaratory relief.<sup>335</sup> That portion of the report specified that a breaching fiduciary would be personally liable for losses to the plan, for restoring ill-gotten profits to the plan, and for "other appropriate relief (including removal) as ordered by a court."<sup>336</sup> The

---

330. *Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986).

331. *Id.* at 537-39.

332. *Id.*

333. *Id.*

334. S. 1179, 93d Cong., 1st Sess. § 501(d)(1)(A) (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 32, at 950.

335. *Sokol*, 803 F.2d at 537.

336. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 320 (1974), *reprinted in* 3 LEGISLATIVE

*Sokol* court noted that "removal" was an example of the "other relief," and thus by way of illustration Congress intended the relief to be limited to the injunctive or declaratory variety.<sup>337</sup> This is a plausible interpretation. But it is equally plausible that, because the committee specifically referred to "other relief" instead of "other appropriate equitable relief," the committee expressly contemplated a wide range of court-ordered remedies, injunctive and declaratory relief being but one type.

In addition, the court neglected to note that the excerpt it discussed was drawn from the portion of the report dealing with fiduciary duties, not remedies for breaches of those duties. In its discussion of enforcement, the conference committee explained that "[u]nder the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility."<sup>338</sup> Notice that there is no mention of "removal" or the word "equitable." The tenor of the last clause strongly suggests that something other than a declaration of rights or an injunction of fiduciary misconduct is contemplated.<sup>339</sup>

Regardless of whether one is persuaded that the legislative history commands the judiciary to look to the law of trusts for the substance of "equitable relief," the very least that can be said about the legislative history is that it can be read consistently with a trust-law approach to "equitable relief." This leads one to realize that courts are still faced with an open-ended remedial provision, closely resembling the broad trust-law concept of equitable redress for breach, whose contours need to be defined. A question remains as to where the courts will look to give the phrase meaning. The most doctrinally consistent approach is to look to the law of trusts.

It would be disingenuous to suggest that "equitable relief," which, like ERISA's fiduciary provisions, is broadly worded, employs phraseology derived from trust law, and explicitly incorporates ERISA's trust-law-based fiduciary duties by way of reference, is not also defined by trust law concepts. The alternative interpretation, that "equitable relief" is limited to injunctive and declaratory relief, would be contrary to ERISA's purposes.<sup>340</sup>

This alternative would, quoting from *Firestone*, result in "less protection to

HISTORY, *supra* note 32, at 4587.

337. *Sokol*, 803 F.2d at 537.

338. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 32, at 4594.

339. See also 3 LEGISLATIVE HISTORY, *supra* note 32, at 4745 (discussing remarks of Senator Williams). Senator Williams stated:

In addition to being able to request the Secretary of Labor to bring suit on their behalf in cases where benefits are denied in violation of the act, individual participants and beneficiaries will also be able to bring suit in Federal court in such instances, as well as to obtain redress of fiduciary violations.

*Id.* (emphasis added).

340. ERISA was enacted to prevent employees from losing promised benefits in private plans. See *supra* notes 72-75 and accompanying text.

employees and their beneficiaries than they enjoyed before ERISA was enacted."<sup>341</sup> The reason for this is that the only protection of a participant's pecuniary interest in his benefits, other than a direct action against the plan for denial of benefits,<sup>342</sup> is eliminated. And as the hypothetical pensioner's circumstances illustrate, there may be situations where a participant is literally paid all her benefits, but because of the fiduciary's breach, the benefits have suffered a decrease in value.<sup>343</sup>

c. The scope of equitable relief

Once trust-law principles of recovery are determined to define the contours of ERISA's equitable relief language, it remains to be seen how those principles would apply to the hypothetical pensioner's case. A brief recap of trust principles of recovery is in order.<sup>344</sup> Courts providing equitable relief for aggrieved beneficiaries do not fashion just any remedy to make the plaintiff "whole"; rather, courts apply one or more of three specific remedies to make whole the beneficiary's pecuniary interest in his trust. This is the point at which the *Warren* court took a wrong turn. Judge Lively argued in favor of fashioning *whatever* remedy was necessary to make the aggrieved participants

---

341. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113-14 (1989).

342. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988 & Supp. I 1989).

343. It is interesting to note that part of SNB's defense was that the damages Dr. Warren sought were extracontractual, insofar as Warren already had received all of the benefits he was promised under the terms of the plan. *Warren v. Society Nat'l Bank*, 905 F.2d 975, 976-77 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991). This was an argument in favor of Justice Stevens' approach to ERISA remedies. Dr. Warren's response to this argument, besides his basic contention that Justice Brennan's approach should prevail, was that even if Justice Stevens' approach were applied, the damages Warren sought were in fact contractual, insofar as contractual damages can be equated with general damages. *Id.* at 977. The *Warren* court never explicitly resolved this issue, instead simply finding that Dr. Warren was deprived of "a benefit to which he was entitled under the plans." *Id.* at 982. But on the narrow issue of whether contractual damages are the same as general damages, Dr. Warren should fail, for it seems beyond question that Justice Stevens used the term contractual damages to refer only to plan-provided benefits.

Dr. Warren, however, could have argued that the damages he sought were in fact contractual within Justice Stevens' intended meaning of the term. This argument is fleshed out in Part VI(B). This Note, however, explicitly argues in favor of applying trust principles in defining the scope of "equitable relief" because a strong possibility will always exist that a lump sum option, or other form of promised benefits, will not be recognized as "benefits" within Justice Stevens' strict concept of benefits embodied in the term "contractual damages." Such a finding would allow SNB and others to successfully argue that a vested participant such as Dr. Warren has received all the benefits he is owed, even though the value of those benefits may be substantially impaired. Such a result would directly contradict Congress's aim to protect the interests of participants in benefit plans. See ERISA § 2(b), 29 U.S.C. § 1001(b) (stating congressional findings and declaration of policy). And while there is no evidence that Congress meant to protect *every* interest that a participant has in a benefit plan, including emotional interests, it seems implausible that Congress did not intend to protect a participant's pecuniary interest in her benefit plan. See discussion of trust-law principles with respect to protecting beneficiaries' interests, *supra* note 191-95 and accompanying text.

344. See *supra* Part IV(B)(1), notes 179-95 and accompanying text, for a more complete discussion.



whole.<sup>345</sup>

The trust remedies are: (1) the difference in value of the trust before and after the breach; (2) any profit made by the breaching fiduciary; and (3) the profit that would have accrued to the trust but for the breach.<sup>346</sup> Although SNB, under a proper reading of ERISA, appears not to have violated its fiduciary duties, the hypothetical pensioner would have a remedy. For the pensioner, it would seem appropriate to apply remedies one and three. Remedy one would compensate him for the income taxes paid because of the breach of fiduciary duty. Remedy three would compensate him for the lost income that would have accrued to his IRA had the first distribution been eligible for a rollover.<sup>347</sup>

### B. *A Claim Against the Plan for Benefits*

The hypothetical pensioner might also have a cause of action against the plan for the fiduciary's wrongful denial of benefits under ERISA section 502(a)(1).<sup>348</sup> Assume for purposes of illustration that the facts in the pensioner's suit are the same as those in Warren's, save for the difference in the amounts of each disbursement described in the introduction.

In *Warren*, recall that SNB argued that the damages Warren sought were extracontractual, insofar as SNB had delivered all of the benefits Warren was entitled to under the terms of the plan.<sup>349</sup> In a suit for recovery of benefits, however, such an allegation by the bank would simply beg the question: What were the benefits that the plan sought to provide?

Remember that an accrued benefit is generally thought to be the balance in a participant's pension account, although an accrued benefit sometimes can be an "optional form of benefit."<sup>350</sup> In addition, accrued benefits become nonforfeitable when the participant has served long enough to acquire a legal claim to the benefits against the plan.<sup>351</sup> The hypothetical pensioner's option to receive his pension in a lump sum, according to these definitions, is both an accrued and a vested benefit. If the plan distributed his pension over the course of two taxable years, and the first disbursement was smaller than the second, then the *form* of benefit provided to the pensioner was not a lump sum under the normal rule or the partial distribution rules.<sup>352</sup> Therefore, it would seem that the pensioner could sue under section 502(a)(1) on a simple recov-

---

345. See *supra* notes 253-55 and accompanying text.

346. RESTATEMENT, *supra* note 77, § 205.

347. Obviously, expert testimony would be required to determine the present value of the benefits that the pensioner lost.

348. 29 U.S.C. § 1132(a)(1) (1988 & Supp. I 1989).

349. See *supra* note 240 and accompanying text.

350. See *supra* notes 32-45 and accompanying text (discussing the definition of a "benefit").

351. See *supra* note 42 and accompanying text (discussing when an accrued pension benefit becomes nonforfeitable).

352. See *supra* notes 62-71 and accompanying text (discussing the lump-sum distribution of benefits).

ery-of-benefits theory. The amount of benefit still owed to and recoverable by the pensioner would be the difference in value between the benefit distributed and the benefit promised.

Such a rule of recovery makes sense because if the trustee had originally denied that the pensioner was entitled to receive his pension in the form of a lump sum, the pensioner could have sued the plan under section 502(a)(1)(B) to compel the plan to pay his benefit in a lump sum.<sup>353</sup> The fact that the plan's cost of providing the benefit to the pensioner increases sharply when the plan fiduciary fails to administer a claim for benefits in accordance with the Internal Revenue Code—which it promised to do when it incorporated the term “lump sum” in the SPD—is simply a reflection of the true cost of the risk associated with promising to provide a lump sum.

## VII. IMPACT

As the analysis above emphasizes, the *Warren* court was mistaken on both critical issues in the case: the nature of the bank's duty under ERISA and the nature of recovery allowed under the rubric “equitable relief.” Each of the alternative theories offered by the court<sup>354</sup> contained elements that were either contrary to a proper reading of past precedent or unjustifiably broad in their reading of statutory language. The problems likely faced by future ERISA parties after *Warren* will be confusion as to the appropriate level of fiduciary responsibility in benefit claims cases and unjustified optimism concerning the level of recovery possible for aggrieved participants.

Confusion over the appropriate standards of fiduciary loyalty and care in the benefit claims context will ensue because of the court's suggestion that it was unwilling to decide whether SNB's obligation was contractual or fiduciary in nature. District courts hearing ERISA benefit claims cases are given no guidance as to what standard should be applied to ERISA fiduciaries. Similarly, employer-fiduciaries are in the dark as to what standard they will be held accountable in the future. The confusion could have been avoided, however, if the court had followed the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*,<sup>355</sup> which explained the scope of fiduciary obligations imposed upon plan fiduciaries when handling claims for benefits.

Under *Firestone*, the reviewing court should first look to the ERISA plan to ascertain whether it confers discretion upon the plan fiduciary to interpret the terms of the plan.<sup>356</sup> If so, then the fiduciary is generally held accountable to lesser standards of loyalty and care because the court will defer to the fiduci-

---

353. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (plaintiff suing under § 502(a)(1)(B) to compel payment of benefits); *Cathey v. Dow Chem. Co. Medical Care Plan*, 907 F.2d 554 (5th Cir. 1990) (plaintiff suing under § 502(a)(1)(B) to compel payment of benefits), cert. denied, 111 S. Ct. 964 (1991).

354. See *supra* text following note 255.

355. 489 U.S. 101 (1989).

356. See *supra* notes 146-52 and accompanying text.

ary's reading of the obligations imposed by the plan.<sup>357</sup> If, however, the plan confers no discretion upon the fiduciary, then the court will not defer to the fiduciary's interpretation, thereby holding the fiduciary accountable to higher standards of loyalty and care.<sup>358</sup> Certainly, these guidelines should be easier to follow than anything offered by the *Warren* court.

Regarding the nature of recovery authorized by the "appropriate equitable relief" provision in section 502(a)(3), the *Warren* court suggested two possible ways to read this language, both of which were overly broad. The first suggestion was that the "equitable relief" language derived from the law of trusts, which authorized recovery of the remedy necessary to make the beneficiary whole.<sup>359</sup> This reading was overbroad because the appropriate measure of recovery is that which is necessary to make whole the beneficiary's *pecuniary* interest in the trust.<sup>360</sup> The problem with the *Warren* court's reading is that it may suggest to future plaintiffs that damages beyond those to pecuniary interests are recoverable. Precisely the same problem exists with the court's other proffered meaning of "equitable relief": that general equitable principles, which also permit broad remedies to redress injury, govern the meaning of the phrase.

Thus, after *Warren*, the nature of the duties imposed upon ERISA fiduciaries is open to question, and the scope of possible recovery for breaches of duty is unjustifiably broad. For benefit-plan sponsors and participants alike, *Warren* says little about how the next ERISA fiduciary responsibility case will be decided. For district courts, *Warren* serves only to further cloud the already murky waters of ERISA fiduciary law.

#### CONCLUSION

ERISA was intended to make certain that participants in benefit plans, particularly retirement plans, receive the benefits they are promised. To achieve this goal, ERISA incorporated and sought to strengthen, where necessary, trust-law principles that previously regulated the fiduciaries who administered and managed such plans. ERISA's many prohibited transaction rules strengthened trust-law rules governing fiduciary behavior in the management-investment context. In the claims-administration context, however, the statute apparently incorporated most of the existing law as is. Courts hearing claims-administration cases should recognize these basic facts of ERISA and interpret the fiduciary and remedial provisions accordingly. If this approach is followed, ERISA's provisions will not be read so expansively as to create an irresistible incentive for participants to sue for damages in excess of their

---

357. See *supra* note 150 and accompanying text.

358. See *supra* note 158 and accompanying text.

359. *Warren v. Society Nat'l Bank*, 905 F.2d 975, 981-82 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

360. See *supra* notes 191-95 and accompanying text.

pecuniary interests in the plan. At the same time, such a reading will not be so cramped as to deprive participants of their full pecuniary interests in their plans.

*Charles M. Dyke*

