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A SQUARE PEG IN A ROUND HOLE: WHETHER TRADITIONAL TRUST LAW "MAKE-WHOLE" RELIEF IS AVAILABLE UNDER ERISA SECTION 502(A)(3)

SUSAN HARTHILL*

Introduction

In June 2008, the Supreme Court denied a petition for writ of certiorari in the case of *Amschwand v. Spherion Corp.*[1] *Amschwand* involved a recurring remedial issue under ERISA[2]—whether a participant or beneficiary in an employee welfare benefit plan is entitled to individualized monetary relief for losses caused by a fiduciary breach.[3] The controversy stems from ERISA's detailed remedial scheme, which requires participants and beneficiaries to squeeze their request for relief into one of the statutorily defined categories.[4]

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1. 128 S. Ct. 2995 (2008) (mem.). The Supreme Court simultaneously declined to review another case involving the same issue on the scope of ERISA's remedial relief in *Goeres v. Charles Schwab & Co., Inc.*, 128 S. Ct. 2994 (2008) (mem.). Mr. Goeres was the beneficiary of a decedent participant's ERISA-covered retirement plan. Goeres v. Charles Schwab & Co., Inc., No. C 04-01917 CRB, 2004 WL 2203474, at *1 (N.D. Cal. Sept. 28, 2004), *aff'd*, 220 F. App'x 663 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2994 (2008) (mem.). Mr. Goeres alleged that the plan fiduciary repeatedly and incorrectly advised him that he was not the beneficiary. *Id.* Between the time that Mr. Goeres began seeking control of the plan and the time that the fiduciary acknowledged that he was the beneficiary, the value of the plan had dropped from $1.2 million to $565,000. *Id.*

2. Employee Retirement Income Security Act of 1974 §§ 2-4096, 29 U.S.C. §§ 1001-1369 (2000).

3. Brief for The United States as Amicus Curiae Supporting Appellants, Amschwand v. Spherion Corp., 128 S. Ct. 2995 (2008) (No. 07-841), 2008 WL 2185730, at *2 [hereinafter DOL *Amschwand* Brief].

4. *See generally* 29 U.S.C. § 132, ERISA § 502. Rather than parallel citing to both the United States Code and the ERISA code section, this Article will follow the less cumbersome

Participants and beneficiaries like the plaintiff in *Amschwand* are relegated to obtaining only "appropriate equitable relief" under ERISA section 502(a)(3),[5] which the Supreme Court has interpreted so narrowly as to effectively preclude relief in many instances where a fiduciary breach has clearly caused a loss.[6]

To determine whether the relief sought constitutes "equitable relief" within the meaning of section 502(a)(3), the Supreme Court has ruled that courts must examine the historical practice of the equity courts in the days of the divided bench[7] and look to whether the relief was "typically available" as an equitable remedy for the type of fiduciary breach at issue.[8] The Supreme Court optimistically observed that courts unfamiliar with the distinctions between legal and equitable relief need look no further than the "standard current works" for guidance.[9] Those concerned that such an inquiry might be

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convention of citing only to the ERISA code section.

5. ERISA § 502(a)(3).

6. *See infra* Part II. ERISA fiduciaries are subject to strict duties of prudence and loyalty, and participants and beneficiaries aggrieved by a fiduciary's breach of such duties may sue for redress under ERISA's "carefully crafted and detailed enforcement scheme." Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (noting that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'") (quoting Mass. Mut. Life Ins. Co. v. Russell, 413 U.S. 134, 146-47 (1985)). Spherion, the defendant in the *Amschwand* case, likely breached its fiduciary duty by communicating false and misleading information to Mr. Amschwand, thereby violating ERISA. *See* Varity Corp. v. Howe, 516 U.S. 489, 506 (1996). The *Variety* Court explained that ERISA section 404(a) requires a fiduciary to

> "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act "solely in the interest of the participants and beneficiaries."

Id. (quoting ERISA § 404(a)). The Court further recognized the participant's right to sue a fiduciary under ERISA section 502(a)(3) for the harm to the individual, as opposed to harm to the plan, for such a breach. *Id.*

7. Prior to the 1930s, state and federal court systems in the United States were divided into separate law and equity courts, following the English tradition. Law and equity courts had different jurisdictions, with different procedures and remedies, with trust law cases typically falling within the jurisdiction of equity courts. *See* 1 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 158, at 214 (5th. ed. Belknap 1941). The states merged law and equity courts at varying times, but in the federal system, law and equity courts were merged by the Federal Rules of Civil Procedure in 1938. The terms "divided bench" and "pre-fusion" used herein refer to the separate system of law and equity courts before the two systems were joined.

8. Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 365 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002); *Mertens*, 508 U.S. at 254; *see* discussion *infra* Part III.A.

9. *Great-West*, 534 U.S. at 217 (distinguishing between legal and equitable forms of restitution by reference to the "standard current works such as Dobbs, Palmer, Corbin, and the

"antiquarian" can feel reassured that the "standard current works" will nevertheless "make the answer clear."[10]

The Department of Labor has consistently taken the position that monetary relief is available under ERISA section 502(a)(3) because "equitable relief" encompasses a form of relief available under traditional trust law—make-whole relief. This Article seeks to assess both the arguments in favor of the Department of Labor's position and the counter arguments, and attempts to reconcile the competing views of make-whole relief by revisiting the common law of trusts as articulated in the "standard current works" and as formulated by case law. The Article first concludes that make-whole relief was a form of equitable relief that was traditionally available in trust law for breaches of trust. The counter arguments that such relief was limited to cases where the trust corpus was harmed, and that any recovery must be paid into the trust corpus, have some support in the cases, but ultimately are irrelevant in the context of modern-day ERISA welfare benefit plans. The Article recognizes, however, that these counter arguments gained traction because the make-whole remedy was designed to provide redress in traditional trust situations and is simply a bad fit for modern employee welfare benefit plans. In conclusion, ERISA section 502(a)(3) does support the availability of make-whole relief, but make-whole relief is a square peg in a round hole.

The *Amschwand* case provides a unifying theme for this Article because it squarely addressed the central issue of make-whole relief and produced perhaps the most refined articulations to date of the arguments and counter arguments against such relief under current Supreme Court precedent. The district court dismissed Mrs. Amschwand's claim on the basis that her requested monetary relief against the breaching fiduciary was a form of legal relief (damages) unavailable under ERISA's narrow remedial scheme.[11] But,

Restatements.")

10. *Id.* (Scalia, J., responding to Justice Ginsburg's criticism that the majority's analysis requires an "antiquarian inquiry" into what court would have entertained the fiduciary claim in the days of the divided bench).

11. Amschwand v. Spherion Corp., No. H-02-4836, 2005 U.S. Dist. LEXIS 21007, at **16-17 (S.D. Tex. Aug. 24, 2005), *aff'd*, 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2995 (2008). The district court subsequently granted summary judgment to Mrs. Amschwand on her claim for an award of statutory penalties and attorneys' fees for Spherion's failure to provide requested plan documents, a violation of ERISA sections 502(c)(1)(B) and (g)(1). Amschwand v. Spherion Corp., No. H-02-4836, 2006 U.S. Dist. LEXIS 12247 (S.D. Tex. Mar. 6, 2006). Although Mrs. Amschwand sued individually and on behalf of the estate of Thomas Amschwand, for the sake of brevity, this Article will refer to Mrs. Amschwand individually. Similarly, although Mrs. Amschwand sued Spherion Corporation, the Trustees of the Interim Health Benefits Trust, and the Group Life and Accidental Dismemberment Insurance Plan, this Article collectively refers to the *Amschwand* defendants as "Spherion."

if a participant or beneficiary's requested relief does not squarely fall within ERISA's prescribed categories of relief, she has no relief at all. Any state law claims that Mrs. Amschwand might otherwise assert against the breaching fiduciary are foreclosed by ERISA's preemption provision, which provides that Title I and Title II of ERISA "supersede any and all State laws" so far as the State laws "relate to any employee benefit plan."[12] ERISA's preemption provision has been broadly interpreted by the Supreme Court, ostensibly to carry out the congressional objective of national uniformity for laws governing employee benefits programs.[13]

The problem created by the Court's broad interpretation of the preemption provision, coupled with its narrow interpretation of equitable relief under ERISA section 502(a)(3) using the law-equity distinction, has been variously described as a "vacuum,"[14] "betrayal without a remedy,"[15] a "gaping hole,"[16] a "judicial paradox"[17] and a problem of "intersectionality."[18] Not surprisingly, the existence of a cognizable injury without any remedy has led to a "rising judicial chorus urging that Congress and [the Supreme] Court revisit what is an unjust and increasingly tangled ERISA regime."[19]

12. ERISA § 514(a).

13. John R. Kirk & Marguerite J. Slagle, *ERISA Preemption: A Survey of the Kentucky Courts' Interpretation of the Sixth Circuit's Preemption Analysis*, 34 N. KY. L. REV. 575, 577-79 (2007) (summarizing Supreme Court preemption decisions).

14. Aetna Health, Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 456-57 (3d Cir. 2003) (Becker, J., concurring)).

15. Allinder v. Inter-City Prods. Corp. (USA), 152 F.3d 544, 553 (6th Cir. 1998), *cert. denied*, 525 U.S. 1178 (1999) (mem.) (noting the "betrayal without a remedy" left by the *Mertens* decision).

16. *The Supreme Court, 2003 Term - Leading Cases*, 118 HARV. L. REV. 456, 461 (2004) (reviewing *Davila*, 542 U.S. 200).

17. Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827 *passim* (2006) (describing how the judicially created paradox of "equitable" relief under section 502(a)(3) operates in a variety of contexts, including breach of fiduciary duty cases but extending to other types of claims brought under section 502(a)(3)).

18. Paul Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. (forthcoming 2009).

19. *Davila*, 542 U.S. at 222 (Ginsburg, J., concurring) (quoting *DiFelice*, 346 F.3d at 453 (Becker, J., concurring)); *see also* Cicio v. Does, 321 F.3d 83, 106-07 (2d Cir. 2003) (Calabresi, J., dissenting in part) (stating that the Supreme Court should "start over" in its analysis of the availability of consequential damages under ERISA), *vacated*, 542 U.S. 933 (2004); Shannon P. Duffy, *Becker Calls on Congress, Justices to Fix ERISA*, THE LEGAL INTELLIGENCER, Oct. 16, 2003, http://www.law.com/jsp/article.jsp?id=900005536910 (noting that Judge Becker sent his opinion to the committee chairs, ranking members, chief majority counsel, and the minority counsel of both the Senate Committee on Health, Education, Labor and Pensions and the House

Specifically, Justice Ginsburg has called for the Court's "fresh consideration of the availability of consequential damages under § 502(a)(3)" by reference to traditional trust law remedies.[20] Commentators and litigants have likewise attempted to fill this remedial gap by reference to equitable remedies available under the common law of trusts and trustees.[21] One such remedy that the equity courts historically awarded to redress a breach of fiduciary duty was to put the trust beneficiary in the position she would have been in were if not for the breach—this is referred to as the "make-whole doctrine."[22]

The argument that section 502(a)(3) equitable relief includes make-whole relief is not novel, having been propounded by leading trust scholar Professor Langbein,[23] and advocated by the Department of Labor for many years.[24] Further, Professor Medill has cogently and comprehensively presented the theoretical case for the Department of Labor's litigation position.[25] Conversely, plan fiduciaries have forcefully made their case, arguing that make-whole relief, to the extent that it was available under traditional trust law principles, was only available for fiduciary breaches that harmed the trust

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Committee on Education and the Workforce). For a collection of judicial and scholarly authorities voicing this concern, see Eichorn v. AT&T Corp., 489 F.3d 590, 593-94 (3d Cir. 2007) (Ambro, J., concurring) (citations omitted).

20. *Davila*, 542 U.S. at 223 (Ginsburg, J., concurring).

21. *See, e.g.*, John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003) [hereinafter Langbein, *What ERISA Means by "Equitable"*]; Medill, *supra* note 17, at 830; *see also* Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 713 (1994). In addition to expanded use of federal common law, Professor Zanglein proposed that Congress "must exempt from ERISA's preemption provision unfair claims practices regulated by state insurance law, tort claims of fraudulent misrepresentation, and tort claims of negligence relating to the administration of an employee benefit plan." *Id.* at 722.

22. Justice Ginsburg suggested that make-whole relief might be an appropriate form of relief traditionally available in trust law in her concurring opinion in *Davila*. 542 U.S. at 222 (Ginsburg, J., concurring).

23. Langbein, *What ERISA Means by "Equitable," supra* note 21. Professor Langbein traced the Supreme Court's decisions that interpreted the remedies available under ERISA section 502(a)(3), limiting relief to equitable remedies such as injunction, mandamus, and restitution. *Id.* Professor Langbein explained why the Supreme Court's jurisprudence in this area has been mistaken—for example, mandamus was not even an equitable remedy. *Id.* at 1353.

24. The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of ERISA. See *infra* note 150 for a partial listing of Department of Labor briefs. Professor Medill has traced the Department's position beginning with *Mertens*. Medill, *supra* note 17, at 832-33.

25. *See* Medill, *supra* note 17.

corpus, and that any monetary recovery went to the trust corpus, not to the individual beneficiary.[26] These arguments gained traction because pre-fusion breach of trust cases are not a direct analogue to the breaches of fiduciary duty that occur in the context of today's employee welfare benefit plans. Pre-fusion fiduciary breaches typically involved maladministration of a trust corpus, whereas, because ERISA welfare benefit plans are typically not funded through a trust, there is no trust corpus. The most comparable pre-fusion cases involve trustee breaches of promises to pay money to a beneficiary, but again, these payments were typically paid from the trust corpus. This lack of a direct analogue is the apparent source of the counter arguments against application of the make-whole doctrine to section 502(a)(3).

These counter arguments have not been thoroughly evaluated in the scholarly literature to date. Building on the work of Professors Langbein, Medill, and others who have placed the concept of make-whole relief on the agenda, this Article seeks to assess both the arguments in favor of the Department of Labor's litigation position and the counter arguments. The goal is modest—to attempt to reconcile the competing views of make-whole relief described above by revisiting make-whole relief under the common law of trusts as articulated in the "standard current works"[27] and pre-fusion trust law cases.

Part I provides an overview of the *Amschwand* case, which frames the litigation posture in this sub-set of breach of duty to inform cases. Part II reviews the pertinent provisions of ERISA's regulatory scheme. Part III summarizes the major Supreme Court decisions that forced ERISA commentators and litigants into the pre-fusion trust world and examines how make-whole relief fits into this emerging jurisprudence. Parts IV and V line up the arguments for and against the availability of make-whole relief under ERISA section 502(a)(3) and analyze the viability of these competing views by digging more deeply into traditional trust law using the only tools

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26. Brief In Opposition, Amschwand v. Spherion Corp., 128 S. Ct. 2995 (2008) (No. 07-841), 2008 WL 261212, at *10 [hereinafter *Amschwand* Opp. Cert.]. The first argument was not novel, apparently having been developed in the *Enron* litigation. *See* Reply on Behalf of Certain Administrative Committee Defendants to Plaintiffs' Opposition to Their Motion to Dismiss ERISA Claims, Tittle v. Enron Corp., (No. H 01-3913), 2002 WL 32155515 (S.D. Tex. June 24, 2002) [hereinafter Fiduciaries' *Enron* Brief]. The second argument appears to have been developed, or at least to have reached its clearest articulation, in the *Amschwand*/*Goeres* litigation.

27. Great-West Life & Annuity Ins. Co v. Knudson, 534 U.S. 204, 217 (2002) (instructing courts to look to "standard current works" when determining what equitable remedies were available under ERISA section 502(a)(3)).

available, the major trust law treatises and pre-fusion trust law cases that addressed individualized remedies for analogous fiduciary breaches.

The Article first concludes that equity courts recognized two types of make-whole relief, one of which contemplated recovery to the trust and is echoed in ERISA section 502(a)(2) and one which contemplated recovery to the aggrieved beneficiary and is echoed in ERISA section 502(a)(3). The Article also concludes with the argument that make-whole relief's required harm to the trust corpus is irrelevant. The traditional trust law corpus finds its analogue in the present day employee welfare benefit plan context in the promised benefit, such as Mr. Amschwand's life insurance proceeds. Thus, to the extent that harm to the corpus is required, such harm exists in the loss or depreciation of the benefit. And, in any event, make-whole relief in the traditional trust law context was available even where there was no trust corpus, usually because it had ceased to exist, or there was no harm to the trust corpus itself.

This Article concludes, therefore, that make-whole relief was an equitable remedy available to individual beneficiaries to redress breaches of fiduciary duty, even in the absence of harm to the trust corpus. Under the Supreme Court's precedents, such relief should be available to Mrs. Amschwand.[28]

I. The Unifying Theme: The Amschwand *Case*

Mr. Amschwand was employed by Spherion Corporation and participated in a life insurance employee benefit plan offered by Spherion through Prudential.[29] While Mr. Amschwand was on medical leave, Spherion replaced Prudential with Aetna as its life insurance provider under the employee

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28. The breach of the fiduciary duty of loyalty at issue in *Amschwand* was a misrepresentation and/or failure to inform the plan participant of plan eligibility or plan terms, which resulted in a total loss of benefits, referred to hereinafter as "*Amschwand*-type cases." Amschwand v. Spherion Corp., No. H-02-4836, 2005 U.S. Dist. LEXIS 21007, at **16-17 (S.D. Tex. Aug. 24, 2005), *aff'd*, 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2995 (2008). Because the focus of this Article is the trust law basis for make-whole relief in the type of situation presented by the *Amschwand* case, it does not seek to categorize the universe of cases where such relief might also be "appropriate." *See* ERISA § 502(a)(3) (providing for "other *appropriate* equitable relief") (emphasis added). For a comprehensive analysis of the categories of cases where make-whole relief might be appropriate, refer to Professor Medill's work in this area. *See generally* Medill, *supra* note 17. It bears noting that neither the Department of Labor nor their protagonists appear to take the position that their arguments for or against the availability of make-whole relief are limited to the duty to inform context.

29. Petition for Writ of Certiorari, Amschwand v. Spherion Corp., No. 07-841 (Dec. 21, 2007), 2007 WL 4618420, at *2, *cert. denied*, 128 S. Ct. 2995 (2008) [hereinafter *Amschwand* Cert. Petition].

welfare benefit plan.[30] Aetna's insurance policy had an "Active Work Rule" that provided that if an employee was ill, injured, or absent on the date that his coverage would become effective, effective coverage would not begin until that employee returned to work for one full day.[31]

When Mr. Amschwand died, Aetna denied life insurance coverage to his widow because he had failed to comply with the Active Work Rule during his medical leave.[32] During his leave, however, Mr. Amschwand had contacted Spherion in its capacity as plan administrator and a named plan fiduciary, and was repeatedly assured that he was covered under the new Aetna plan and that he was entitled to the same benefits as under the Prudential plan.[33] Spherion never told Mr. Amschwand about the Active Work Rule and failed to provide him with plan documents that would have put him on notice of the rule, despite his repeated requests.[34]

Mrs. Amschwand sued Spherion, the plan, and the plan trustees under ERISA section 502(a)(3) seeking the life insurance benefits that she had lost.[35] She claimed that defendants breached their fiduciary duty by failing to tell Mr. Amschwand about the Active Work Rule, by failing to give him the documents that would have put him on notice of the rule, and by making affirmative misrepresentations that he was covered under the Aetna plan.[36]

Mrs. Amschwand's claim is typical of that group of plaintiffs falling into the "regulatory vacuum" described in the Introduction. Other illustrative examples abound.[37] These hapless plaintiffs are referred to in the remainder of this Article as *Amschwand*-type plaintiffs, for no other reason than the *Amschwand* case provides an excellent—and timely—vehicle for consideration of whether make-whole relief is available to fill the gaping hole in ERISA's regulatory scheme caused by the interplay of the restrictive civil

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30. *Id.*

31. *Id.*

32. *Id.* at *3.

33. *Id.* at *2.

34. *Id.* at *2-3. As explained, *infra* Part II.D., because of ERISA's detailed and exclusive remedial scheme, Mrs. Amschwand's only available remedial option was ERISA section 502(a)(3).

35. *Id.* at *1, 3.

36. *Id.* at *3.

37. *See generally* Medill, *supra* note 17, at 896-904. Professor Medill conducts a modeling exercise adapted from the Guido Calabresi and A. Douglas Melamed modeling technique to identify six categories of defendants and related claims possible under section 502(a)(3). *Id.* at 867, 884 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1989 (1972)). Professor Medill categorizes breach of fiduciary duty claims as "Category III" claims, with claims involving a breach of the duty to inform as a sub-set of Category III claims. Medill, *supra* note 17, at 899.

enforcement scheme and the broad preemption provision. It is to those pertinent parts of ERISA that this Article now turns, before returning in more detail to Mrs. Amschwand's claims.

II. ERISA's Regulatory Scheme and Remedial Relief

ERISA is oft-described as a "comprehensive and reticulated statute."[38] Its regulatory scheme governs employee benefit plans, which include both pension and welfare plans.[39] Both pension plans and employee welfare benefit plans must conform to ERISA's reporting, disclosure, and fiduciary requirements,[40] and ERISA provides a detailed, but narrow, civil enforcement scheme for violations of the statutory requirements.[41] Rather than attempt to comprehensively set forth all of ERISA's statutory goals, provisions, and relevant implementing regulations, for present purposes a brief summary should suffice.[42]

A. ERISA's Purpose

Enacted in 1974, ERISA's primary aim was to protect individuals who participate in employee benefit plans.[43] Congress noted that these plans affect the "well-being and security of millions of employees . . . and their dependents"[44] and are central to "the national economy, and . . . the financial security of the Nation's work force."[45] Congress was particularly focused on pension plan assets.[46] Pension plans usually have large assets which had been subject to abuse prior to the enactment of ERISA. Workers who had relied upon their employer's pension promises often found themselves without their

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38. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) (describing ERISA as a "comprehensive and reticulated statute"); LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct 1020, 1027 (2008) (Roberts, C.J., concurring) (same, quoting Mass. Mut. Life Ins. Co. V. Russell, 473 U.S. 134, 146 (1985)); *see also* Boggs v. Boggs, 520 U.S. 833, 841 (1997) ("ERISA is an intricate, comprehensive statute.").

39. *Boggs*, 520 U.S. at 841.

40. ERISA §§ 101-11, 401-14. Pension plans are also subject to complex participation, vesting, and funding requirements. *See id.* §§ 201-06.

41. *Id.* § 502.

42. For a full discussion of ERISA, see generally PAUL J. SCHNEIDER & BARBARA W. FREEDMAN, ERISA: A COMPREHENSIVE GUIDE § 3.02 (2d. ed. 2003).

43. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).

44. ERISA § 3(a)(3).

45. Boggs v. Boggs, 520 U.S. 833, 839 (1997) (holding that ERISA preempted state community property law).

46. Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 398, nn.59, 60 (2000) [hereinafter Muir, *Fiduciary Status*] (citing to legislative history).

promised retirement income because the plan was terminated[47] or because assets were mismanaged by poor investments, wasting, or even fraud.[48] ERISA addressed these concerns with asset funding in several ways, such as imposing minimum funding requirements,[49] establishing the Pension Benefit Guaranty Corporation to insure the obligations of pension plans,[50] and requiring that plan assets be held in trust.[51]

In contrast to congressional concern over underfunding and mismanagement of pension plan assets, Congress paid less attention to problems of benefit administration involved in pension benefits or other forms of employee welfare benefits such as health care plans.[52] That is not to suggest that Congress did not address issues of benefit administration; on the contrary, Congress established several mechanisms to ensure administrative fairness. These included the adoption of strict fiduciary standards of conduct,[53] reporting and disclosure requirements,[54] and fiduciary liability for breach of these standards,[55] discussed more fully in Part II.C.

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47. *Id.* at 398. An oft-cited precipitant for ERISA was the closing of the Studebaker plant and the termination of its underfunded pension plan. *See id.* at 401; *see also* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 726 (2001).

48. Muir, *Fiduciary Status*, *supra* note 46, at 399-400.

49. ERISA §§ 301-08.

50. Muir, *Fiduciary Status*, *supra* note 46, at 400-01. Professor Muir discusses other ERISA provisions designed to address the problem of plan termination, asset depletion, and other pension plan asset abuses. *See generally id.* at 400-04 (discussing "[o]pportunistic [b]ehavior and [a]sset [a]dministration"). Professor Muir argues that commentators, courts, and legislators should unpack benefit plan operation into its two "axes," one made up of plan assets and the other made up of the payment of benefits. *Id.* at 399. By separating plan operation into these two different components, plan administration could be more effective. *Id.* Although an analysis of the distinctions between plan asset and benefit administration is beyond the scope of this Article, the distinction is significant when considering the effectiveness of the current ERISA remedial scheme, in that it fails to adequately protect participants and beneficiaries from fiduciary breaches in benefit administration of the type the Amschwands experienced. Further, this distinction between plan asset administration and the provision of plan benefits comes into play when attempting to draw out the conditions under which traditional trust law make-whole relief was available and whether these conditions are met for ERISA section 502(a)(3) plaintiffs. Specifically, as discussed *infra* Part IV, the lack of a trust and/or trust assets in the types of benefit plans that are prevalent today has led to the argument that traditional make-whole relief is not available under ERISA.

51. Muir, *Fiduciary Status*, *supra* note 46, at 404.

52. *Id.* (noting that health care plans received almost no attention beyond investigation into malfeasance and self-dealing).

53. ERISA § 404.

54. *Id.* §§ 101-111.

55. *Id.* §§ 409, 502.

Nevertheless, Congress was largely driven by underfunding and maladministration of pension plan assets and less concerned, although certainly cognizant of, benefit plan administration. Since 1974, there have been significant changes in the ERISA landscape[56] which have resulted in the "intersectionality" problem that has taken center stage today. First, employers have largely replaced defined benefit plans with defined contribution plans.[57] Second, health and fringe benefits have replaced pensions as the most significant benefit for present-day employees.[58] Because congressional focus when enacting ERISA in 1974 was on asset administration, not benefit administration, ERISA's 1974 iteration of remedies is not necessarily suitable for today's landscape.[59]

The growth of health and fringe benefits and their replacement of traditional pension plans as a significant component of employee compensation results in disputes over benefit administration becoming more prevalent today than they were in 1974.[60] While a simple wrongful denial of benefits can be remedied through ERISA section 502(a)(1)(B), a participant who is ineligible for benefits because of a fiduciary misrepresentation or other fiduciary breach is compelled to seek relief under section 502(a)(3)—the catch-all provision for "other appropriate equitable relief."[61]

The regulatory vacuum referred to in the Introduction to this Article occurs when a participant is injured by a fiduciary breach that cannot be remedied

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56. This reference to the "ERISA landscape" is borrowed from Justice Stevens' opinion in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1024-25 (2008).

57. A defined contribution plan provides an individual account for each employee's contributions, but usually provides no promise of a monthly pension benefit amount; the benefit is based on the amount in the participant's account. A 401(k) plan is a defined contribution plan. A defined benefit plan typically pays a fixed benefit based on a percentage of the employee's salary. *See generally* Russell v. Mass. Mut. Life Ins. Co., 722 F.2d 482, 486 (9th Cir. 1983) (describing defined benefit plans). For an explanation of the difference between defined benefit plans and defined contribution plans, see Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).

58. *See LaRue* 128 S. Ct. at 1025 (citing, *inter alia*, David Rajnes, An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans, Employee Benefit Research Institute (EBRI) Issue Brief No. 249 (Sept. 2002), http://www.ebri.org/pdf/briefspdf/0902ib.pdf; Facts from EBRI: Retirement Trends in the United States Over the Past Quarter-Century (June 2007), http://www.ebri.org/pdf/publications/facts/0607fact.pdf).

59. *See generally* Muir, *Fiduciary Status*, *supra* note 46. The Supreme Court recently acknowledged one such change in the employee benefit plan "landscape" since 1974, highlighting the decline of defined benefit plans and their replacement with defined contribution plans. *LaRue*, 128 S. Ct. at 1024-25 (citing, *inter alia*, JOHN H. LANGBEIN, SUSAN J. STABILE, & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 58 (4th ed. 2006)); *see also* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 471 (2004).

60. *See generally* Muir, *Fiduciary Status*, *supra* note 46.

61. ERISA § 502(a)(3)(B).

under any other applicable remedial provision, but the court finds that section 502(a)(3) does not provide for the requested relief. When this occurs, the participant is barred from asserting applicable state law claims by ERISA's preemption provision. This gaping hole in ERISA's remedial scheme needs to be filled, and this is the hole that commentators and the Department of Labor have attempted to fill with the common law doctrine of make-whole remedial relief.

B. Some ERISA Basics

Although most readers will likely be familiar with ERISA, an ERISA primer is likely required for any brave souls dipping their toes into ERISA's regulatory regime for the first time. Articulated simply, ERISA governs employee pension plans, including 401(k) plans[62] and employee welfare benefit plans such as health care coverage and life insurance. An employee welfare benefit plan means "any plan, fund, or program" typically established and funded by an employer,[63] to provide certain benefits, such as:

> medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.[64]

Welfare plans may be self-funded by the employer or funded through the purchase of insurance.

An employee pension benefit plan is also a "plan, fund, or program," typically funded by the employer through a trust, that:

> (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.[65]

As indicted by the definition of a pension plan, there are two types of benefit plans. First, under a defined benefit plan, a participant is entitled to

62. 26 U.S.C. § 401(k) (2006).

63. The entity establishing and maintaining the plan (ERISA § 3(1)(A)) is called the plan "sponsor" (ERISA § 3(16)(B)), or the "settler" of the plan, following the traditional trust law term for the person establishing and funding the trust corpus.

64. ERISA § 3(1)(A).

65. *Id.* §3(2)(A).

benefits as calculated using the formula specified in the plan.[66] This is the traditional pension plan arrangement where the sponsor pays a specified amount in retirement benefits. Second, under a defined contribution plan, each participant is entitled to the amount in that participant's plan account, such as a 401(k) plan.[67]

A "fiduciary" under ERISA is any person that has discretion over the assets, management, or administration of a benefit plan.[68] An employer may be both the sponsor of the plan (the "settlor" in trust terminology) and a fiduciary, but only wears the fiduciary hat when exercising discretionary authority over the plan.[69] A plan "participant" means any employee or former employee "who is or may become eligible to receive a benefit of any type from an employee benefit plan."[70] A "beneficiary" means a person designated by either the participant or the terms of the plan "who is or may become entitled to a benefit" under the plan.[71]

As noted, plans can be self-funded or funded through an insured arrangement. Welfare benefit plans can be established through a trust document but frequently are not.[72] Although ERISA provides that employee benefit plan assets must be held in trust,[73] there are important statutory exemptions, including assets that are funded through insurance policies.[74] Most welfare benefit plans are, however, administered through a trust account

66. *Id.* §3(35); Muir, *Fiduciary Status*, *supra* note 46, at 404-05.

67. ERISA § 3(34); Muir, *Fiduciary Status*, *supra* note 46, at 404-05.

68. *See* ERISA § 3(21)(A). An ERISA fiduciary, therefore, includes persons who might not be considered trustees under traditional trust law, which defines a trustee as "[t]he person holding property in trust." RESTATEMENT (SECOND) OF TRUSTS § 3(3) (1959).

69. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). The Court explained that "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.* (citations omitted). Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90-91 (1983).

70. ERISA § 3(7). A plan participant may include a former employee with a colorable claim for benefits. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1026 n.6.

71. ERISA § 3(8).

72. As explained by Professor Dana M. Muir, most pension plan assets are held in trust, but there is no need to establish a trust to fund most welfare benefit plans, such as health care plans, because they are typically self-funded through the plan sponsor's general funds or are insured arrangements. Muir, *Fiduciary Status*, *supra* note 46, at 395-96 (explaining the role of the ERISA fiduciary and identifying the regulatory vacuum that has led to the perverse result that courts do not hold ERISA fiduciaries liable for breach of their duties under current judicial interpretation of section 502(a)).

73. ERISA § 403(a).

74. *Id.* § 403(b).

established by the sponsor, from which the trustee pays the insurer or other provider.[75] The absence of an identifiable trust res, or trust corpus, does not abrogate ERISA's fiduciary standards or liability for fiduciary breach. Regardless of whether the plan is funded through a trust or not, a person is held to ERISA's fiduciary standards and is subject to ERISA's remedial scheme if they have the requisite "discretion over the assets, management, or administration of a benefit plan or are paid to provide investment advice to a plan."[76] As explained in Part V, because ERISA does not condition remedial relief on the presence of a trust and/or trust corpus, the absence of an identifiable trust res therefore should not bar a participant's recovery under ERISA section 502(a)(3).

ERISA was primarily focused on deterring "the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."[77] ERISA was concerned with protecting the interests of participants and beneficiaries from such mismanagement, and in part achieved that goal by establishing standards of conduct for fiduciaries.[78] In codifying the common law fiduciary standards, "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA.[79] The duties of prudence and loyalty are based on trust law principles and are the central part of ERISA's fiduciary obligations.[80]

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75. The author thanks Professor John Langbein for this insight.

76. Muir, *Fiduciary Status*, *supra* note 46, at 395.

77. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 326-27 (1997) (internal quotation marks omitted) (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)); *see also* Mass. Mut. Life Ins. Co. V. Russell, 473 U.S. 134, 141 n.8 (1985) (referring to ERISA's legislative history that "the crucible of congressional concern [in sections 409 and 502(a)(2)] was misuse and mismanagement of plan assets by plan administrators.").

78. ERISA § 2(b).

79. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985). As the legislative history makes clear, "[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." H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

80. An early English articulation of the extent of the trustee's duty of care can be found in Learoyd & Carter v. Whitely [1887] UKHL 1, 12 App. Cas. 727 (Ch. D. 1886) (appeal taken from Eng.) (U.K.) ("As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs.").

C. Fiduciary Duties Under ERISA and Traditional Trust Law

To effectuate the goals outlined above, Congress established "strict standards" of conduct for employee benefit plan fiduciaries.[81] Indeed, ERISA expands fiduciary obligations and liability not just to trustees, but to all persons who exercise the requisite discretion over the plan or its assets.[82] The fiduciary duty standard under ERISA is a high one, mirroring the general duties of loyalty and trust established under the common law of trusts.[83] First, the common law fiduciary duty of loyalty, also known as the exclusive benefit rule, requires that a trustee act "solely in the interest of the beneficiary."[84] The Restatement of Trusts explains:

> The fiduciary duty of undivided loyalty in the trust context . . . is particularly intense so that, in most circumstances, its prohibitions are absolute for prophylactic reasons. The rationale begins with a recognition that it may be difficult for a trustee to resist temptation when personal interests conflict with fiduciary duty. In such situations, for reasons peculiar to typical trust relationships, the policy of the trust law is to prefer (as a matter of default law) to remove altogether the occasions of temptation rather than to monitor fiduciary behavior and attempt to uncover and punish abuses when a trustee has actually succumbed to temptation. This policy of strict prohibition also provides a reasonable circumstantial assurance (except as waived by the settlor or an affected beneficiary) that beneficiaries will not be deprived of a trustee's disinterested and objective judgment.[85]

The fiduciary duty of prudence requires that, in investing trust assets, a trustee must comport with the standard of a prudent investor.[86] While administering the trust, a trustee must act in accordance with a standard of ordinary prudence.[87] The duties of loyalty and prudence are among the

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81. *Cent. States, Se. & Sw. Areas Pension Fund*, 472 U.S. at 570.

82. ERISA § 3(21)(A).

83. *See id.* at 570-71; *see also* RESTATEMENT (SECOND) OF TRUSTS §§ 170, 174 (1959).

84. RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959); *accord* RESTATEMENT (THIRD) OF TRUSTS § 78 (2007); *see also* UNIF. TRUST CODE § 802(a) (amended 2004), 7C U.L.A. 588 (2006). *See generally* 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§ 170–170.25 (4th ed 1987) (1939).

85. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b.

86. RESTATEMENT (SECOND) OF TRUSTS § 227.

87. *Id.* § 183. If, however, the trustee represents himself as having skills that meet a higher standard, the trustee will be held to that higher standard. *Id.* § 174.

"highest known to the law."[88] A well known and oft-quoted enunciation of the fiduciary standard was an opinion by Justice Cardozo:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[89]

This strict common law standard was incorporated into ERISA's fiduciary standard, which mirrors traditional trust law as described above. First, the duty of loyalty requires that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[90] Indeed, the plan fiduciary discharges his duties solely in the interests of the participants and beneficiaries, "and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries; and . . . defraying reasonable expenses of administering the plan."[91] Courts have explained that an ERISA plan administrator's duty of loyalty requires that all decisions regarding an ERISA plan "'must be made with an eye single to the interests of the participants and beneficiaries.'"[92] A fiduciary is also prohibited from engaging in self-dealing,[93] and from transacting with interested parties.[94]

ERISA similarly mirrors traditional trust law by utilizing the prudent man standard. ERISA requires that the plan fiduciary execute his duties "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."[95]

Under traditional trust law principles, a trustee must also furnish to the beneficiary "complete and accurate information as to the nature and amount of the trust property."[96] Likewise, ERISA's fiduciary administration functions encompass such activities as communicating plan terms and choices to plan

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88. Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

89. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

90. ERISA § 404(a)(1). Thus plan assets generally cannot "inure to the benefit of any employer." *Id.* § 403(c)(1).

91. *Id.* § 404(a)(1)(A)(i)-(ii).

92. Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988) (quoting *Donovan*, 680 F.2d at 271).

93. ERISA § 406(b)(1).

94. *See id.*

95. *Id.* § 404(a)(1)(B).

96. RESTATEMENT (SECOND) OF TRUSTS § 173 (1959).

participants and beneficiaries.[97] This is the duty that is often implicated in section 502(a)(3) claims, such as the *Amschwand* situation.

Thus, ERISA has a broad remedial purpose of protecting participants and beneficiaries from plan mismanagement. To effectuate these goals, Congress imported the strict fiduciary standards of trust law and extended fiduciary duties to persons beyond the trustee. In contrast to these broad remedial goals and the use of trust law's strict fiduciary standards, the Supreme Court has adopted a textualist approach to the statute, interpreting it narrowly in the context of providing relief to participants aggrieved by fiduciary breach. This tension between congressional purpose and Supreme Court interpretation is illustrated by cases involving remedies of breaches of fiduciary duty under ERISA section 502(a)(3).

D. ERISA's Remedial Scheme and the "Gaping Hole"

As discussed throughout the earlier sections of this Article, ERISA's uniform regulatory scheme is a set of very specific civil enforcement remedies for participants and beneficiaries, found in Part I of ERISA. Specifically, participants and beneficiaries are limited to bringing a civil action only for the following types of relief in the following situations and for the specific relief identified. First, a participant or beneficiary may bring a civil action under section 502(a)(1) if an Administrator refuses to supply certain information, "or to recover benefits due . . . under the terms of [the] plan, [or] to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[98] The available relief under section 502(a)(1) includes the benefits due and a statutory penalty for failure to provide information—the most typical action under this section is a plan participant's appeal of a plan's denial of benefits.

Amschwand-type plaintiffs cannot bring their claims under section 502(a)(1) because they are not complaining of a refusal to supply information regarding the plan, nor are they able to claim benefits or enforce rights under the plan, simply because they are ineligible for any benefits or rights under the plan. The fiduciary misrepresentation in *Amschwand*, for example, resulted in Mr. Amschwand's ineligibility under the terms of the new Aetna life insurance policy, so he was never a participant in that plan and his wife was never a beneficiary of that plan.[99] Similarly, although Mrs. Amschwand claimed that her husband had asked for, and had been refused, plan

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97. *See* Varity Corp. v. Howe, 516 U.S. 489, 502-03 (1996).

98. ERISA § 502(a)(1)(A)-(B).

99. Amschwand v. Spherion Corp., No. H-02-4836, 2006 U.S. Dist. LEXIS 12247, at *10 (S.D. Tex. Mar. 6, 2006).

documents, the relief for that violation is a per diem penalty which would not provide the remedy she sought—the life insurance proceeds.[100]

Under section 502(a)(2), "a participant, beneficiary, or fiduciary" may also bring a civil action "for appropriate relief" under ERISA section 409.[101] ERISA section 409(a) provides that any person who is a fiduciary to a plan and violates an ERISA fiduciary duty

> 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.[102]

Reading section 409(a) in conjunction with section 502(a)(2), therefore,

allows a participant or beneficiary to bring a civil action against a fiduciary and makes a fiduciary personally liable—but only *for losses to the plan*.[103] The *Mertens* Court explained that under section 409(a), a fiduciary's personal liability has three components: (1) "[t]he fiduciary is personally liable for damages" that result in plan losses, *payable to the plan*[104]; (2) the fiduciary is liable for restitution *to the plan* of "'any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary'"; and (3) "for 'such other equitable or remedial relief as the court may deem appropriate,' including removal of the fiduciary."[105]

A fair reading of section 409 is that the third clause—allowing "other equitable or remedial relief"[106]—is a catch-all remedy potentially encompassing monetary damages to individual participants. However, in *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court held that section 409(a) authorizes relief *only for the benefit of the entire plan*.[107]

100. *Id.* Mrs. Amschwand was successful on her separate claim for statutory penalties based on Spherion's failure to provide requested plan documents, including related attorneys' fees and costs. *Id.*

101. ERISA § 502(a)(2). It should be noted that the Secretary of Labor and plan fiduciaries also have the power to bring a civil enforcement action under certain of these remedial provisions, but since the focus of this Article is the relief available to participants and beneficiaries for fiduciary breach, reference herein will be limited to this group of ERISA actors.

102. *Id.* § 409(a) (emphasis added).

103. Mertens v. Hewitt Assocs., 508 U.S. 248, 252 (1993).

104. *Id.*

105. *Id.* (quoting ERISA § 409(a)).

106. ERISA § 409(a).

107. 473 U.S. 134, 139-44 (1985). The Court reasoned that allowing individual relief under section 409(a) "would divorce [the catchall language] from its context and construct an entirely

The Court rejected any interpretation that the catchall remedy in section 409(a) permits courts to award what the Court termed "extracontractual damages"[108] to participants individually.

Amschwand-type plaintiffs, of course, are not seeking relief on behalf of the plan and are not asking the fiduciary to make good to the plan any losses, or to restore any profits. It is clear that the *Amschwand*-type plaintiffs are seeking to hold a fiduciary personally liable for individualized monetary relief. Hence, these plaintiffs cannot proceed under section 502(a)(2).

Congress recognized that plans and participants might not be able to shoehorn a claim into one of the specific remedies listed in sections 502(a)(1) or (a)(2), and it provided a "catch-all" provision which provides injunctive and equitable relief for plans and participants to enforce ERISA's provisions "or the terms of the plan."[109] Specifically, section 502(a)(3) provides that a participant or beneficiary (or fiduciary) may bring a civil action: "(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."[110] As discussed in Part II.D, this provision, section 502(a)(3), may be the only avenue into federal court for *Amschwand*-type plaintiffs and their only available remedy. Indeed this was the provision under which Mrs. Amschwand sought relief. With the ERISA landscape as a backdrop, it is to section 502(a)(3) that we finally turn our attention.

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new class of relief available to entities other than the plan." *Id.* at 142 (emphasis omitted).

108. *Id.* at 144. The Court has also termed these damages "consequential damages" and has recently arguably narrowed the holding in *Russell*. *See* LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1022 (2008) (stating that *Russell* held "that a participant in a disability plan that paid a fixed level of benefits could not bring suit under § 502(a)(2) . . . to recover consequential damages arising from delay in the processing of her claim."). The plaintiff in *LaRue* alleged that his employer failed to carry out his 401(k) plan investment instructions, depleting his account by approximately $150,000. *Id.* The Court held "that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, [it] does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual [401(k) retirement savings plan] account." *Id.* at 1026. *LaRue* distinguished between a defined benefit plan like the plan at issue in *Russell* and a defined contribution plan, like the 401(k) plan at issue in *LaRue*. *Id.* at 1024-25. For a discussion of the distinctions between these types of plans and the availability of individualized relief under section 502(a)(2), see Justice Stevens' cogent opinion, writing for the majority, in *LaRue*. The plaintiff in *LaRue* also sought make-whole relief under section 502(a)(2), but the Court did not reach the section 502(a)(3) issue. *Id.* at 1023.

109. ERISA § 502(a)(3).

110. *Id.*

III. The Supreme Court's Great-West *Time Warp*

A. Professor Langbein, the Supreme Court's "Trail of Error" and the Great-West *Time Warp*

As explained in Part II, ERISA's enforcement scheme constrains *Amschwand*-type plaintiffs to seek only "appropriate equitable relief" under section 502(a)(3). Because ERISA does not define what constitutes "equitable relief," the Supreme Court's interpretation of that category of relief has become pivotal. Professor Langbein has explained why the Court's interpretation of section 502(a)(3) is erroneous, starting with the *Mertens* decision and working through one of the Court's more recent decisions, *Great-West*.[111] Rather than replicating Professor Langbein's article here, the reader is directed to review the article in its entirety. Nevertheless, a brief summary of the relevant Supreme Court decisions is necessary to orient the reader to the gap that make-whole relief is argued to fill.

Although the Supreme Court had rejected in *Russell* the argument that individualized relief for fiduciary breaches could be awarded under section 502(a)(2), the possibility that such relief might still be available under section 502(a)(3) remained open. *Russell* was decided in 1985, and the Court did not address this open question until several years later, in the 1996 decision of *Varity Corp. v. Howe*.[112] To the dismay of plan attorneys and the delight of plaintiffs' attorneys, the *Varity* Court held that section 502(a)(3) does indeed allow participants and beneficiaries to sue for "appropriate equitable relief" for breaches of fiduciary duty that cause them *individual* harm.[113] In *Varity*, the Court held that reinstatement back into a plan was "appropriate equitable relief" for plan participants that had been misled into transferring out of the plan and forfeited benefits as a result.[114]

The plaintiffs' attorneys' delight was tempered, however, by confusion over what other types of "equitable relief" might be available as individualized relief in the context of fiduciary breach claims. In 1993, prior to *Varity*, the Court had addressed the types of relief available under section 502(a)(3), but in the context of relief against a non-fiduciary. In *Mertens v. Hewitt*

111. Langbein, *What ERISA Means by "Equitable," supra* note 21.

112. 516 U.S. 489 (1996).

113. *Id.* at 490. In its decision, the Court pointed to the word "appropriate" as a limitation on remedies available under section 502(a)(3) when it stated that if a plaintiff's claim could be brought under another, more specific provision of section 502 with a more limited remedy than section 502(a)(3), the catch-all relief under the more generous section 502(a)(3) would not be "appropriate." *Id.*

114. *Id.*

Associates,[115] the Court held that plaintiffs seeking relief under section 502(a)(3) can only obtain "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[116] In *Mertens*, the plan participants sued a non-fiduciary actuary whom they alleged had knowingly participated in the employer-fiduciary's breach of duty.[117] The alleged fiduciary breach was the employer's underfunding of the plan, resulting in monetary losses to the plan.[118] The plaintiffs sought recovery of the plan losses from the actuary under section 502(a)(3) because they could not proceed under section 502(a)(2).[119]

The Court refused to classify the money sought against the actuary non-fiduciary as "equitable relief" under section 502(a)(3), reasoning that the participants did not seek a remedy "traditionally viewed as 'equitable,' such as injunction or restitution" but were in fact seeking "nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief."[120] The Court highlighted congressional choice of only "equitable" remedies in section 502(a)(3) and concluded that "equitable relief" must refer only to "those types of relief that were typically available in equity."[121] The plaintiffs, and Justice White in dissent, argued that since a court of equity could award monetary relief in a breach of trust case brought in an equity court, then monetary relief was similarly available in this case.[122] The Court, per Justice Scalia, rejected this

115. 508 U.S. 248 (1993).

116. *Id.* at 255-56 (rejecting plaintiffs' claim for monetary relief because it sought only compensatory damages) . Moreover, only "equitable restitution" may be awarded under section 502(a)(3), and not restitution "at law." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215-16 (2002). "[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

117. *Mertens*, 508 U.S. at 248.

118. *Id.* at 250.

119. *Id.* at 253. By its terms, section 504(a)(2) only applies to fiduciaries and the accountant-defendants in *Mertens* were non-fiduciaries. *Id.*

120. *Id.*

121. *Id.* at 248.

122. *Id.* at 266 (White, J., dissenting). Justice White explained that compensatory damages were available as an equitable remedy to a trust beneficiary because "[e]quity 'endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed.'" *Id.* (quoting JAMES HILL, A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES, THEIR POWERS, DUTIES, PRIVILEGES, AND LIABILITIES *522 (4th ed. T. & J.W. Johnson & Co. 1867) (1845) (* indicating pagination in original edition)). According to Justice White, this included make-whole relief. *Id.* at 273 n.7.

argument, explaining that courts of equity sometimes granted purely legal remedies, and the money damages sought from the defendant in *Mertens* was just that—legal relief that would have been available in a court of equity under the common law of trusts.[123]

Although the *Mertens* Court held that section 502(a)(3) relief is limited to "those categories of relief that were typically available in equity," it gave little guidance on how to make this determination beyond listing the examples of injunction, mandamus, and restitution.[124] The Court did not flesh out this analysis for almost a decade, until its decision in *Great-West*.

In *Great-West*, the Court reaffirmed the *Mertens* holding that ERISA's equitable relief is typically limited to that available in equity. Explaining that Congress could not have used the modifier "equitable" if it meant to allow all relief a court could provide, the Court concluded that Congress must have decided to revive the obsolete distinctions of law and equity in defining what relief is available under ERISA.[125] The Supreme Court held that because money damages are not an equitable remedy, section 502(a)(3) does not authorize suits by a plan to impose personal liability on a beneficiary based on a breach of contractual obligation to pay money.[126]

The Supreme Court applied a two-prong test to determine whether section 502(a)(3) relief is available, examining both the nature of the cause of action and the remedy sought.[127] The causes of action under ERISA section 502(a)(3) are breaches of trust, which were typically brought in courts of equity, but such claims could be also be brought in courts of law.[128] Hence, the focus of the debate has been the *nature* of the remedy sought under section 502(a)(3) claims.

Unlike the *Amschwand*-type plaintiffs who are participants or beneficiaries suffering a monetary loss due to a fiduciary breach, the *Great-West* plaintiff was an ERISA fiduciary, a health insurance company, seeking reimbursement of monies from a beneficiary under a health insurance contract.[129] The fiduciary-insurer sought relief under section 502(a)(3), seeking to enforce a provision in the health insurance contract that obligated the beneficiary to

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123. *Id.* at 256. Professor Langbein has explained why Justice Scalia is wrong on this point. This remark by Justice Scalia was an apparent reference to the clean-up doctrine, which has nothing to do with equitable remedies. Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1350.

124. 508 U.S. at 256 (emphasis added).

125. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214-17 (2002).

126. *Id.* at 205.

127. *Id.* at 212-14; *accord* Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 365 (2006).

128. Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1350-51.

129. *Great-West*, 534 U.S. at 208-09.

reimburse Great-West from her third-party personal injury recovery for health care payments Great-West had made on her behalf.[130] Great-West sought such relief as "equitable restitution."[131]

Although the *Mertens* Court had listed restitution as a category of equitable relief available under section 502(a)(3), Justice Scalia now explained that the monies sought by Great-West were in fact a form of legal restitution and, therefore, not available as "other equitable relief."[132] In order to reach this somewhat strained conclusion,[133] the Court was required to enter a time warp and examine the historical practice in the "days of the divided bench" to see when particular remedies were available at law and when at equity.[134] Responding to Justice Ginsburg's criticism of resurrecting the past, the Court explained that to determine the availability of a remedy in equity, courts should rely on standard treatises:

> It is easy to disparage the law-equity dichotomy as an "ancient classification" and an "obsolete distinctio[n]." Like it or not, however, that classification and distinction has been specified by the statute; and there is no way to give the specification meaning . . . except by adverting to the differences between law and equity to which the statute refers. The dissents greatly exaggerate, moreover, the difficulty of that task. . . . Rarely will there be need for any more "antiquarian inquiry," than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear.[135]

Reviewing these treatises to distinguish between money damages as the classic form of legal relief and equitable restitution, which required that a specific *res* be in the defendant's hands, the Court concluded that the plan impermissibly sought to impose personal liability for a contractual obligation to pay money owed, and thus sought legal and not equitable relief.[136]

Professor Langbein has explained why the Court's conclusion in *Mertens* was erroneous, and how that decision has led to a "trail of error" up to and

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130. *Id.*

131. *Id.*

132. *Id.* at 216-17.

133. This conclusion was forecast by Professor Dana M. Muir as early as 1995. *See* Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1 (1995) (examining equitable relief under section 502(a)(3) after *Mertens*, correctly predicting that courts would limit relief to equitable restitution, and calling for congressional amendments modeled on the Civil Rights Act of 1991).

134. *Great-West*, 534 U.S. at 210-13.

135. *Id.* at 216-17 (citations omitted).

136. *Id.* at 210.

including the 2002 decision in *Great-West*.[137] Nevertheless, even within the narrow confines of these existing precedents, Professor Langbein presented the argument for a form of monetary relief called make-whole relief that was available in the courts of equity to redress breach of trust.[138]

B. Fitting Amschwand *into ERISA's Statutory Constraints—Mrs. Amschwand's Claim Falls Through the Gaping Hole*

As explained in Part II.D, Mrs. Amschwand's only available remedy under ERISA would be for "other equitable relief" under ERISA section 502(a)(3).[139] The United States District Court for the Southern District of Texas granted defendants' motion for summary judgment, and the Fifth Circuit affirmed, holding that equitable relief under section 502(a)(3) does not include make-whole relief equal to the insurance benefits that she would have been entitled absent the alleged fiduciary breach.[140] In granting summary judgment, both the district and appellate courts held that the relief requested constituted "money damages," which were not available as "equitable damages" under section 502(a)(3), as interpreted by the Court's opinions in *Great-West*.[141] Mrs. Amschwand's attorney attempted to pull Mrs. Amschwand out of ERISA's gaping hole by arguing that make-whole relief is a form of equitable relief that was available under traditional trust law.[142] It is to the make-whole doctrine that we now turn.

C. Fitting Make-Whole Relief Into the ERISA Framework and Supreme Court Precedents—An Attempt to Fit a Square Peg into a Round Hole Instead of Filling the Gaping Hole

Part II of this Article reviewed ERISA's statutory framework, and identified the "regulatory vacuum" whereby plaintiffs seeking monetary relief for a

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137. Langbein, *What ERISA Means by "Equitable*," *supra* note 21.

138. *Id.*

139. Because the plan administrator and named fiduciary had repeatedly but incorrectly assured Mr. Amschwand that he was covered under the plan, his widow had a cognizable claim for breach of fiduciary duty under ERISA. *Amschwand* Cert. Petition, *supra* note 29, at *2-3.

140. Amschwand v. Spherion Corp., 505 F.3d 342, 345-46 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2995 (2008).

141. *Id.* at 348; *Amschwand v. Spherion Corp.*, No. H-02-4836, 2005 U.S. Dist. LEXIS 21007, at **20-21 (S.D. Tex. Aug. 24, 2005). The Fifth Circuit incorrectly analyzed the make-whole relief requested as *restitution* and summarily dismissed any meaningful distinction between these two types of relief. *Amschwand*, 505 F.3d at 347 (stating that "Amschwand seeks relief—whether characterized as make-whole or restitutionary—that is legal in nature"). As previously discussed, make-whole relief is not the same as restitutionary relief and should not be analyzed under the same standards. *See infra* note 165 and accompanying text.

142. *Amschwand*, 505 F.3d at 347.

fiduciary breach are forced to assert their claims under ERISA section 502(a)(3). Part III summarized the Supreme Court's decisions that result in plaintiffs like Mrs. Amschwand being limited to seeking only those types of relief "typically available in equity," looking to pre-fusion equity practice to locate a suitable analogue. Assuming that such an inquiry is necessary,[143] the Department of Labor and preeminent scholars such as Professor Langbein have identified make-whole relief as a viable contender for the title of "relief typically available in equity."[144]

In its simplest iteration, make-whole relief is "monetary relief against breaching fiduciaries [which] is equitable when it restores the beneficiary to 'the position [in which] he would have been if the trustee had not committed the breach of trust.'"[145] The idea that monetary relief might be available as "equitable relief" under section 502(a)(3) is not new. Justice Brennan identified the possibility in his concurring opinion in *Russell*.[146] Justice Brennan recognized that ERISA's legislative history demonstrates that "Congress intended to engraft trust-law principles onto the enforcement scheme" and that "a fundamental concept of trust law is that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests.'"[147] Thus, Justice Brennan had no difficulty in concluding that ERISA explicitly directed the courts to develop appropriate remedies, including the possibility of awarding extracontractual damages under section 502(a)(3).[148] Of course, Justice Scalia's textualist approach in *Mertens* and

143. The author does not presuppose that Congress or the Supreme Court will fix the problem any time soon. Attempts to amend ERISA have so far fallen flat. And, the Supreme Court's denial of the writ of certiorari in *Amschwand* indicates that the Court either thinks the circuits are not split or that it has made its position clear in *Great-West* and *Sereboff*. That being the state of the law at the present time, courts, commentators, and litigants are all forced to squeeze their square pegs into the round hole.

144. *See generally* Langbein, *What ERISA Means by "Equitable," supra* note 21, *passim*; *see also infra* note 150.

145. Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss at 51, *In re* Enron Corp., No. H-01-3913 (S.D. Tex. Mar. 28, 2002), 2002 WL 34236027 (citing RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a. (1959)) [hereinafter DOL *Enron* Brief]. The author notes that she was previously Special Counsel with the law firm of Steptoe & Johnson, LLP when the firm represented some of the defendants in the Enron ERISA litigation.

146. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 154, n.10 (1985) (Brennan, J., concurring) ("Trust-law remedies are equitable in nature, and include provision of monetary damages.") (citing GEORGE G. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS AND TRUSTEES § 862 (2d ed. 1982); RESTATEMENT (SECOND) OF TRUSTS §§ 199, 205 (1959)).

147. *Id.* at 156-57 (Brennan, J., concurring).

148. *Id.* at 157-58 (Brennan, J., concurring). (delineating the court's inquiry as, first, ascertaining the extent to which state and federal law of trusts and pensions allows recovery

his resurrection of arcane pre-fusion inquiry in *Great-West* effectively sidelined Justice Brennan's suggested analysis.

From the government's perspective, Justice Brennan had it right. The Department of Labor's position is squarely in favor of the availability of monetary relief under section 502(a)(3). The Department of Labor is a crucial voice on this issue because, although the majority of claims against breaching fiduciaries are brought by private litigants, ERISA also authorizes the Secretary of Labor to bring civil actions to redress violations of ERISA and to obtain "appropriate equitable relief" under ERISA section 502(a)(3).[149] Thus, it can be argued that the Court's interpretation of what constitutes "equitable relief" under section 502(a)(3) also impacts the Secretary's enforcement authority. The Department of Labor has advocated the availability of make-whole damages for several years as *amicus curiae* in *Amschwand*-type cases.[150]

Although the Department of Labor's position has been rejected by the lower courts,[151] at least one Supreme Court Justice believes that it may be a viable theory of recovery. In her concurring opinion in *Davila*, Justice Ginsburg stated that the "Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue."[152]

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beyond the withheld benefit, second, if such a remedy is available under state law, considering whether such relief would conflict with other ERISA provisions, and, third, including the ultimate consideration of whether allowing the relief would effectuate ERISA's underlying purpose, "enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries."). Justice Brennan went so far as to state that the absence of monetary relief in state trust law was not dispositive of the question whether monetary relief is available under ERISA because Congress intended ERISA to have more "exacting" fiduciary standards. *Id.* at 157 n.17 (Brennan, J., concurring) (citations omitted).

149. ERISA § 502(a)(e).

150. *See, e.g.*, DOL *Enron* Brief, *supra* note 145, at *51. The Department has also filed briefs in the Supreme Court wherein it takes the same make-whole position. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at *27 n.13, Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) (Nos. 02-1845, 03-83), 2003 WL 23011479 (ERISA may "allow[] at least some forms of 'make whole' relief against a breaching fiduciary in light of the general availability of such relief in equity at the time of the divided bench."). A listing of amicus briefs that the Department deems significant can be found at the Department of Labor's website. U.S. Dep't of Labor, Office of the Solicitor, SOL Briefs, http://www.dol.gov/sol/media/briefs/main.htm (last visited May 21, 2009).

151. *See, e.g.*, Supplemental Brief of Respondents in Reply to Brief for the United States as Amicus Curiae at *1, Amschwand v. Spherion Corp., No. 07-841 (U.S. June 2, 2008), 2008 WL 2305819, *cert. denied*, 128 S. Ct. 2995 (2008) [hereinafter *Amschwand* Respondents' Supp. Brief].

152. *Davila*, 542 U.S. at 224 (Ginsburg, J., concurring).

Make-whole relief has also been the subject of many scholarly articles, all in support of the argument that it is an equitable remedy under the common law of trusts.[153] Since these developments, however, the two sides of the make-whole debate have each refined their arguments.

IV. Lining up the Arguments for and Against Make-whole Relief as "Equitable Relief" Under ERISA Section 502(a)(3)

A. The Stage Is Set—The District Court and the Fifth Circuit Opinions

The defendant plan fiduciaries in *Amschwand*, not surprisingly, responded to Mrs. Amschwand's lawsuit by moving for summary judgment on the basis that ERISA section 502(a)(3) did not entitle her to relief.[154] The United States District Court for the Southern District of Texas granted summary judgment, and the Fifth Circuit affirmed, holding that equitable relief under section 502(a)(3) does not include make-whole relief equal to the insurance benefits that she would have been entitled absent the alleged fiduciary breach.[155]

Predictably, both the district and appellate courts held that the relief requested constituted "money damages" and, therefore, was not available as "equitable damages" under section 502(a)(3), as interpreted by the Court's opinions in *Great-West* and *Sereboff*.[156] In the lower courts, Mrs. Amschwand focused on the argument that the Court's holding in *Mertens* was narrowly confined to the unavailability of extra-contractual damages against *non-fiduciaries* under section 502(a)(3).[157] Under this argument, *Mertens* is distinguishable from claims brought by participants and beneficiaries because make-whole relief against *fiduciaries* was available as an equitable remedy.[158]

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153. *See* Medill, *supra* note 17, at n.121 (cataloguing scholarly literature on ERISA section 502(a)(3)). *See also generally* Langbein, *What ERISA Means by "Equitable," supra* note 21. Professor Langbein dissected the Supreme Court's reasoning behind the *Mertens* holding that Congress intended to resurrect the ancient law-equity dichotomy in section 502(a)(3), and identified the sources of make-whole relief, ultimately endorsing the Department of Labor's position. Langbein, *"What ERISA Means by Equitable," supra* note 21, at nn. 110, 111, 112, 115 (citing BOGERT & BOGERT, *supra* note 146, § 862, at 34, 38-39, § 701, at 198); *see also* Langbein, *What ERISA Means by "Equitable," supra* note 21, at nn. 196 197, 204 (citing 1 POMEROY, *supra* note 7, at 215).

154. Amschwand v. Spherion Corp., 505 F.3d 342, 344 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2995 (2008).

155. *Id.*

156. *Id.* at 347-48.

157. *Id.* at 346.

158. *Id.*

This status-of-the-defendant distinction was not a novel argument, having been propounded in several other cases and by other commentators.[159] The Department of Labor had also previously focused on the argument that the courts must consider the status of the defendant and the nature of the claim in determining the remedies available under section 502(a)(3). Unfortunately for the plaintiffs, the Department of Labor's position had been rejected several times.[160]

Not surprisingly, the Fifth Circuit rejected this argument, buttressing its decision by relying on sister circuit decisions which had also rejected the fiduciary-distinction argument.[161] The court also reasoned that the statutory text did not support any such distinction between fiduciaries and non-fiduciaries, instead focusing on the requirement in *Great-West* to look only to the nature of the claim and the relief sought.[162]

Focusing on the relief requested, the court's characterization is pivotal. The Fifth Circuit analyzed Amschwand's request for relief as a request for *restitution*, which is unavailable to claimants like Mrs. Amschwand because, under equitable principles as interpreted by *Great-West*, restitutionary relief requires that the defendant (Spherion) be in possession of the wrongfully withheld funds, which it was not.[163] Of course, this resort to restitutionary analysis neatly side-steps the question of whether, and under what conditions, make-whole relief was typically available as equitable relief, and this fall-back to a restitution analysis is simply inapposite.[164] Make-whole relief is simply

159. Medill, *supra* note 17, at 832.

160. *See, e.g.*, Supplemental Brief of Respondent in Reply to Brief for the United States as Amicus Curiae at 7-9, LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008) (No. 06-856), 2007 WL 1624842 (citations omitted).

161. *Amschwand*, 505 F.3d at 347. Other courts that have rejected the make-whole argument are: Goeres v. Charles Schwab & Co., Inc., 220 Fed. Appx. 663 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2994 (2008); Todisco v. Verizon Commc'ns., Inc., 497 F.3d 95, 99-100 (1st Cir. 2007); Coan v. Kaufman, 457 F.3d 250, 262-64 (2d Cir. 2006) (abrogating Srom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999)); Calhoon v. Trans World Airlines, 400 F.3d 593, 596-98 (8th Cir. 2005); Callery v. U.S. Life Ins. Co. in the City of N.Y., 392 F.3d 401, 408-09 (10th Cir. 2004); Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001); Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 943-44 (8th Cir. 1999). *Cf.* Pereira v. Farace, 413 F.3d 330, 338-40 (2d Cir. 2005) (in a state law breach of trust case, court holds that monetary relief from a breaching fiduciary is legal relief entitling defendants to jury trial).

162. *Amschwand*, 505 F.3d at 347.

163. *Id.* at 348. The only appropriate restitutionary remedy for Spehrion's alleged fiduciary breach would be return of the "ill-gotten profits, i.e., refund of the policy premiums." *Id.* (citations omitted).

164. Medill, *supra* note 17, at 925-28.

not a form of restitutionary relief, but when characterized as such, the request is doomed.[165] The Fifth Circuit then resorted to *Mertens* to characterize the lost insurance proceeds as make-whole *damages*. Characterizing make-whole relief as "damages" also dooms such relief, because *Mertens* teaches that money damages are only available in actions at law.[166] Blindly applying *Mertens* and *Great-West* without carefully considering the availability of make-whole relief as a stand-alone equitable remedy has resulted in a lack of jurisprudence on this question. Mrs. Amschwand's attorney was therefore faced with refining the make-whole argument for the next round.

B. The Debate Sharpens—Briefing in the Amschwand Petition for Certiorari

In their petition for certiorari, the plaintiffs took the position that *Mertens* supports a distinction between money damages at law and money damages at equity. They agreed with the *Great-West* logic that a remedy such as restitution or money damages that was available both in law and equity could not fall within the meaning of "equitable" relief because all legal remedies were occasionally available in equity courts.[167] However, such a remedy—one that was available in both law and equity courts—could still "constitute equitable relief if law and equity attach *different conditions* to the remedy and the *special conditions* attached by equity are satisfied."[168] The "special conditions" for make-whole relief are: (1) that standard equitable defenses were unavailable and (2) that monetary relief was necessary to cure the "maladministration" of a trust.[169] The Department of Labor similarly framed the relevant inquiry under *Great-West*—under what conditions was the make-

165. Unfortunately, characterizing make-whole relief as a form of restitutionary relief is not unusual at the circuit court level. Typical of the circuit courts' failure to distinguish between make-whole relief and equitable restitution and blind application of the *Great-West* restitutionary analysis where it does not belong, is *Fox v. Herzog Heine Geduld, Inc.*, 232 Fed. Appx. 104, 106 (3d Cir. 2007) (holding that, under *Great-West*, "[i]n order to award equitable relief under § 502(a)(3), 'money or property identified as belonging in good conscience to the plaintiff [must] clearly be traced to particular funds or property in the defendant's possession.'") (citations omitted).

166. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

167. *Amschwand* Cert. Petition, *supra* note 29, at *8.

168. *Id.* (emphasis added). The Petitioner in *Amschwand* argued that the distinction was illustrated by restitution, and as the Court explained in *Great-West*, restitution was both a legal and equitable remedy depending on the conditions attached. *Id.* at **8-9.

169. *Id.* at *9.

whole remedy historically available in equity?[170]

These arguments are subtle, but theoretically sound, and the big question is whether they are sufficient to distinguish *Amschwand* from *Mertens*? Perversely, prior to *Great-West* and *Sereboff*, the answer was probably "no." After these decisions, however, the plaintiffs have precedent for the argument. After all, if *Great-West* teaches us to unearth arcane distinctions between legal and equitable forms of restitution, then a good student would follow that lesson and do exactly what the Amschwand attorneys did—distinguish legal damages and equitable make-whole monetary relief by looking to special conditions that equity attached to such relief.

The inquiry thus sharpened, the plan fiduciary's stand-by defenses came into play in full force. The two-prong attack is that even if make-whole relief was historically "typically" available as a remedy against a breaching fiduciary: (1) the duty was only to make *the trust corpus whole* and therefore any relief would run to the trust, not to the individual beneficiary; and (2) it was only available where the trustee mismanaged the trust and/or resulted in harm to the trust corpus.[171] Naturally, if the Respondents are correct that harm to the trust corpus was historically required, and recovery runs only to the trust, then *Amschwand*-type plaintiffs can never recover individualized monetary relief under the make-whole doctrine. There is no harm to the trust corpus, and recovery cannot run to the trust, because the types of employee welfare benefit plans typically at issue in these cases do not have a trust, and there simply is no trust corpus as existed in traditional trust law cases.[172]

The Supreme Court, however, declined the invitation to resolve the debate. So, the questions still remain: Was make-whole relief typically available in equity or not? Who is right, the Department of Labor on the one hand or the nay-sayers on the other hand? Heeding the instruction of Justice Scalia to consult the "standard current works," the remainder of this Article will attempt to answer this question.

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170. Recall that, under *Great-West*, the determination of whether a remedy is legal or equitable involves a two part test: "'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (citing Reich v. Cont'l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.)). Respondents in *Amschwand* also argued that Amschwand did not satisfy the first part of the *Great-West* test because the nature of her claim was contract-based. *Amschwand* Opp. Cert., *supra* note 26, at *7.

171. *Amschwand* Opp. Cert., *supra* note 26, at **10, 14; *see also* Fiduciaries' *Enron* Brief, *supra* note 26.

172. *See supra* Part II.B.

V. The Make-Whole Relief and Surcharge Argument

A. Distinguishing Between Surcharge and Make-Whole Relief

"Surcharge" is frequently used as a synonym for make-whole relief,[173] leading to confusion about the availability of make-whole monetary relief in equity.[174] Bogert identifies two *separate* procedures for pursuing a claim against a breaching fiduciary: (1) a separate action in equity for make-whole relief, or (2) the claim in surcharge on the trustee's accounting.[175] Thus, they were two procedurally distinguishable mechanisms for a beneficiary to pursue in obtaining monetary relief against a breaching fiduciary. The two remedies are, however, similar in that they both resulted in the same outcome—the trustee paid money to the beneficiary.

Make-whole relief was available in an independent equitable action, but surcharge was only available as part of an accounting.[176] In equity courts, an accounting was a substantive duty of the fiduciary to account for "receipts, disbursements, and property on hand."[177] The trustee was required to render accounts at regular intervals,[178] or the beneficiary could initiate an accounting procedure in the equity court.[179] Although the trustee was entitled to compensation for services in administering the trust,[180] the beneficiary could hold the fiduciary liable for a variety of charges.[181] These charges would be placed on the debit side of the trustee's account, but the trustee was personally liable for the amounts—the amount owed to the fiduciary for serving the account could be reduced by these charges, or to rephrase, the fiduciary was "surcharged."[182] Although some commentators have declared that the surcharge remedy in an accounting was measured by the fiduciary's ill-gotten profits—not by the beneficiary's losses[183]—Bogert identifies many types of

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173. *See, e.g.*, Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1352-53; *cf.* E. Daniel Robinson, Note, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 MINN. L. REV. 1447, 1469-70 (2006) (arguing that surcharge is distinguishable from make-whole relief).

174. *Id.*

175. BOGERT & BOGERT, *supra* note 146, § 701, at 193, nn.10-11 (citing §§ 861, 862, and 870 for the separate action in equity, and citing § 970 for the claim of surcharge).

176. *Id.*

177. *Id.* § 963, at 41.

178. *Id.* § 963, at 40-41.

179. *Id.* § 970, at 360.

180. *Id.* § 975, at 3.

181. *Id.* § 971, at 414-20.

182. *See id.*

183. Dobbs describes the term "accounting" as an accounting for profits and essentially "a

surcharges, including damages or losses to the beneficiary caused by a breach of trust.[184]

The confusion between surcharge and make-whole relief may appear to be inconsequential, but it may have had far-reaching consequences for *Amschwand*-type plaintiffs. Professor Langbein suggests that Justice Scalia may have overlooked money damages as a classic form of equitable relief in *Mertens* because of this "terminological oddity. Damages in equity . . . are sometimes called 'surcharge.'"[185] Indeed, this nomenclature problem persists today. Courts, commentators, the Restatement, and the Uniform Trust Code continue to refer to monetary relief against a breaching fiduciary as a "charge" or "surcharge." But, as the previous discussion illustrates, the outcome is the same—monetary relief—and the measure of that relief includes losses to the beneficiary.[186]

There may also be a second side-effect of the nomenclature problem. The fact that an accounting surcharge would result in a credit on the balance side of the trust estate[187] could be the source of the belief that make-whole monetary relief was payable only to the trust. In an accounting action to impose a surcharge, payment of the surcharge was in effect payment to the trust only, since the surcharge was a *reduction* of the fees payable to the trustee from the trust account. Further, because it was typically payable to the trust estate, surcharge rendered through an accounting was a form of make-whole relief that seems to find its natural analogue in section 502(a)(2).[188] The surcharge/make-whole nomenclature problem is an important backdrop in any attempt to understand and apply the treatises and cases that involve monetary relief because, as will be evident in the following discussion, these standard current works are anything but clear.

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restitutionary remedy based upon avoiding unjust enrichment." 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(5) (2d ed. 1993). For an examination of the different types of accounting, including the accounting against a breaching fiduciary, see generally Joel Eichengrun, *Remedying The Remedy of Accounting*, 60 IND. L.J. 463 (1985).

184. BOGERT & BOGERT, *supra* note 146, § 971, at 418.

185. Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1352-53.

186. BOGERT & BOGERT, *supra* note 146, § 971, at 418.

187. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 525 (Melville M. Bigelow 13th ed. 2000) (1886) ("A surcharge is appropriately applied to the balance of the whole account, and supposes credits to be omitted which ought to be allowed.").

188. *But see* Mertens v. Hewitt Assocs., 508 U.S. 248, 269 n.3 (White, J., dissenting) (stating that an *accounting* does not have an ERISA analogue). It may be more helpful to think of make-whole relief and surcharge as the same remedy, but utilizing a different collection method.

B. Consulting the Applicable "Standard Current Works"

In resurrecting the law-equity distinction in *Great-West*, Justice Scalia acknowledged the dissent's argument that lower courts would need to determine whether relief was available in equity, but he was unconcerned that such a determination would cause confusion—lower courts simply need to consult the "standard current works."[189] Like Justice Ginsburg, "I question the Court's confidence in the ability of 'the standard works' to 'make the answer clear.'"[190] Justice Ginsburg complained that the majority had failed to indicate what rule prevailed "when those works conflict, as they do on key points."[191] The surcharge/make-whole nomenclature problem is another example of the lack of clarity in this area.

This section of the Article seeks to review the text of the "standard current works" to specifically identify the historical practice and tradition of awarding make-whole relief against breaching trustees in order to more accurately determine whether such relief is available under section 502(a)(3), and, if so, whether any conditions attached to such relief.[192] In doing so, this Article is following the strictures of Justice Scalia to determine the historical equitable tradition of make-whole relief with specificity rather than generality because "such general traditions provide such imprecise guidance."[193] The inquiry

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189. Great-West Life & Annuity Life Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002).

190. *Id.* at 232 (Ginsburg, J., dissenting).

191. *Id.* (Ginsburg, J., dissenting) (referring to conflicting rules in the context of delineating legal and equitable restitution) (citations omitted). In general, Justice Ginsburg recognized that courts have found the law-equity method "'difficult to apply.'" *Id.* (Ginsburg, J., dissenting) (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (calling for analysis that "may seem to reek unduly of the study"); Damsky v. Zavatt, 289 F.2d 46, 48 (2d Cir. 1961); *id.* at 59 (Clark, J., dissenting) ("'if not of the museum'")). Indeed, the need for a comprehensive analysis of the availability of make-whole relief under traditional trust law principles is illustrative of the fact that the Court's method forces scholars, courts, and litigants to engage in the "'recondite controversies better left to legal historians.'" *Great-West*, 534 U.S. at 234 (Ginsburg, J., dissenting) (quoting Teamsters v. Terry, 494 U.S. 558, 576 (Brennan, J., concurring in part and concurring in judgment)).

192. Justice Scalia relied upon such treatises as Dan B. Dobbs' *Law on Remedies* and George E. Palmer's *Law of Restitution*, as well as "the Restatements." *Great-West*, 534 U.S. at 213. Since *Great-West* was concerned with the distinction between legal restitution and equitable restitution, these same standard current works are not necessarily applicable to a determination of whether make-whole relief was available in equity. The standard current works on trust law relief are: RESTATEMENT (SECOND) OF TRUSTS (1959); RESTATEMENT (THIRD) OF TRUSTS (1995); BOGERT & BOGERT, *supra* note 146; 1 POMEROY, *supra* note 7.

193. Brief for the United States as Amicus Curiae Supporting Appellants at *22, Goeres v. Charles Schwab & Co., Inc., No. 05-15282 (U.S. July 11, 2005), 2005 WL 6184707, [hereinafter DOL *Goeres* Brief] (quoting Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion)).

demonstrates that, contrary to Justice Scalia's assertion, delineating make-whole relief with any specificity under these texts is an invitation to enter the "Serbonian bog" of confusion.[194]

1. Restatement (Second) of Trusts

A careful analysis of trust law remedies must begin with the Restatement (Second) of Trusts, as "the most authoritative source for American trust law at the time of the enactment of ERISA."[195] Any analysis of the applicability of the Restatement of Trusts to ERISA must, however, be mindful of the caution that traditional trust law principles do not always fit within ERISA's statutory scheme. Indeed, the reporter for the Restatement (Second) of Trusts, Austin W. Scott, excluded commercial trusts from the Restatement.[196] The draft Restatement (Third) of Trusts acknowledges that grafting trust law principles onto the statutory scheme is possible by stating that the principles of the Restatement are "generally appropriate" to ERISA actions both by analogy and to the extent that ERISA "expressly or impliedly incorporate[s] rules of the general trust law."[197] Nevertheless, the Reporter recognized that one size does not always fit all:

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194. DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453-54 (3d Cir. 2003) (Becker, J., concurring); *see also* Aetna Health, Inc. v. Davila, 542 U.S. 200, 222 (Ginsburg, J., concurring) (quoting Judge Becker's concurrence in *DiFelice*). "A Serbonian bog is a mess from which there is no way of extricating oneself." DiFelice, 346 F.3d at 454 n.1 (Becker. J., concurring).

195. Langbein, *What ERISA Means by "Equitable*,*" supra* note 21, at 1347; *see also* Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997) [hereinafter Langbein, *The Secret Life*] (referring to the Restatement (Second) of Trusts as "the most authoritative exposition of American trust law"). The American Law Institute revisions of the Restatement (Third) of Trusts has been in progress since the 1980s, with only certain sections published and other sections still in draft form. *See* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 147-48 (2002). Of significance to this article, the Restatement (Third) of Trusts, Prudent Investor Rule was published in 1992, including the revised sections relating to breach of fiduciary duty. RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) §§ 205-213 (1992). This Article focuses on both the 1959 and 1992 versions of the Restatement because the 1959 version was the version in existence when Congress enacted ERISA, and the 1992 revision is the version that constitutes "standard current works," *Great-West*, 534 U.S. at 216, at least until the corresponding sections of the Restatement (Third) are finalized.

196. Langbein, *The Secret Life*, *supra* note 195, at 166 (citing RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. b (1959)). Professor Langbein has argued that Scott was simply incorrect and that neither the official comments nor reporter's notes to the Restatement (Second) supplied any authority for the proposition that many of the rules of trusts do not apply to business trusts. *Id.* at 166.

197. RESTATEMENT (THIRD) OF TRUSTS §1, cmt. a(1) (2003).

> Specific provisions and special circumstances or relationships involved in the application of those statutory rules, however, often present fundamentally different considerations, thus expressly or impliedly calling for application of different rules that are not within the scope of this Restatement except as similar circumstances are taken into account in the elaboration of general trust-law principles.[198]

With this caution in the forefront, a journey through the Restatement (Second) of Trusts to find an explanation of make-whole relief takes the traveler on a circuitous route. The Restatement does not expressly reference the term "make-whole" relief because that term refers to the more generalized concept that the trust and/or trust distributions should be made whole or restored to what they should have been absent a breach; the Restatement instead attempts to delineate more specifically the types of remedy that might be appropriate for different types of breach.[199]

As an initial matter, section 197 of the Restatement addresses the *nature* of the beneficiary's remedies and states the traditional rule that "the remedies of the beneficiary against the trustee are *exclusively equitable*."[200] Comment (a) explains that an exclusively equitable remedy "is a remedy given by a court of chancery" or its equivalent.[201] The exception to the equitable nature of remedies referred to in section 197 is that the beneficiary has a concurrent right to maintain an action at law in certain cases.[202]

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198. *Id.* Indeed, the Reporter's Notes for section 1 of the Restatement (Third) of Trusts refer to ERISA plans as "*Trusts qualifiedly included*." RESTATEMENT (THIRD) OF TRUSTS § 1, Reporter's Notes, § 1(a).

199. Telephone Interview with Edward C. Halbach, Jr., Professor of Law, University of California Berkeley Boalt Hall School of Law, in Jacksonville, Fla. (June 10 & 22, 2009) [hereinafter Halbach Interview]. Professor Halbach serves as the Reporter for the Restatement (Third) of Trusts. The author expresses her appreciation to Professor Halbach for his comments and assistance in understanding and navigating the Restatement of Trusts, specifically sections 205 and 211 and the comments and illustrations thereto.

200. RESTATEMENT (SECOND) OF TRUSTS § 197 (emphasis added).

201. *Id.* § 197 cmt. a.

202. The beneficiary's concurrent right to maintain an action at law occurs where the trustee is under a duty to the beneficiary to pay money or to transfer a chattel immediately and unconditionally. *Id.* § 198. Professor Langbein explains that "[i]n such a case the formerly equitable right has become a matured legal obligation, that is, simply a collection case that no longer involves issues of trust law." Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1319-20 n.11; *see also* RESTATEMENT (SECOND) OF TRUSTS § 198 cmt. d (beneficiary who does not have right to immediate and unconditional payment can bring "a suit in equity to compel the trustee to restore the money . . . and to hold it in trust or to pay it to a new trustee.").

Having established that the beneficiary's remedies against a breaching fiduciary are *equitable*, the Restatement then proceeds to set forth these equitable remedies in sections 199 and 205. Restatement section 199 explains the beneficiary has the right to file 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 and administer the trust;
>
> (e) to remove the trustee.[203]

The Restatement, therefore, does not expressly identify make-whole relief as a form of "redress" against a breaching trustee. It does, however, reiterate that "[i]f the trustee has committed a breach of trust, the beneficiary can maintain a suit to compel the trustee to redress the breach of trust. See § 205."[204] Cross-referencing section 205, then, one hopes to locate a clear articulation of the make-whole doctrine. The 1959 version of section 205—the version in effect when Congress enacted ERISA in 1974—simply provided that a trustee who commits a breach of trust 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.*[205]

The 1992 *revised* version of Restatement section 205 provides that a breaching trustee is:

> (a) accountable for any profit accruing to the trust through the breach of trust; or

203. RESTATEMENT (SECOND) OF TRUSTS § 199 (emphasis added). Comment (f) to section 199 further explains the jurisdiction of the court as either *quasi in rem* to affect interests in the trust property, or *in personam* "to subject the trustee to personal liability, or to enjoin him from committing a breach of trust, or to compel him to *make specific reparation for a breach of trust*, or to remove him." *Id.* § 199 cmt. f (emphasis added).

204. *Id.* § 199 cmt. c.

205. *Id.* § 205 (emphasis added). The *Amschwand* plaintiffs relied on section 205(c) as incorporating the doctrine of make-whole relief. *See Amschwand* Cert. Petition, *supra* note 29, at *11.

> (b) *chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered*.[206]

The 1992 version of the Restatement section 205(b) is a clearer articulation of what we have termed "make-whole" relief.[207] It is noteworthy that the Reporter for the Restatement (Third) of Trusts, Professor Edward C. Halbach, Jr., confirms that the 1992 revisions to Section 205 were not intended to substantively change the remedies available against a breaching fiduciary available under the 1959 version; both the 1959 and 1992 versions restate the common law approach which had always included the amount necessary to restore the trust and/or trust distributions to what they should have been absent the breach.[208]

To recap, the Restatement's view of the beneficiary's equitable remedies against a breaching trustee can be summarized as follows. A beneficiary's remedies against a breaching fiduciary are exclusively equitable,[209] and include holding the trustee liable to redress such breach,[210] either by charging the trustee with any profit made from the breach[211] or charging the trustee

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206. RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) § 205 (1992) (emphasis added); *see also id.* § 213 cmt. b (1992) ("The loss from a breach of trust is the amount necessary to restore the value of the beneficiaries, interests to what their value would have been if the trust had been properly administered."). In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 206. Section 206 clarifies that section 205 liability applies where the trustee "otherwise violates his duty of loyalty." *Id.* The duty of loyalty includes the duty to (1) "administer the trust solely in the interest of the beneficiary" and (2) "to deal fairly with [the beneficiary] and to communicate to him all material facts in connection with the transaction which the trustee knows or should know." *Id.* § 170.

207. The fact that this articulation was not available to Congress in 1974 might render the availability of the relief less persuasive if the inquiry were focused solely on congressional intent in 1974, but since *Great-West* instructs that we focus on the standard *current* works, *Amschwand*-type plaintiffs can plausibly rely on the 1992 version.

208. Professor Halbach confirmed with the author that the 1992 revisions were not meant to limit the nature of the remedies available to redress a breach of trust, but did render a substantive change in allowing profit or loss to be attributable to the trustee if the amount of profit or loss was speculative. Halbach Interview, *supra* note 199.

209. RESTATEMENT (SECOND) OF TRUSTS § 198.

210. *Id.* § 199.

211. *Id.* § 205(a). Comment (c) provides that if trust property is lost or destroyed as result of the trustee's breach, "the trustee is chargeable with the value of the property so destroyed or lost. If as a result of his breach of trust property depreciates in value, the trustee is chargeable with the amount of such depreciation." *Id.* § 205 (a) cmt. C. If plan benefits such as life insurance proceeds are viewed as the trust property, or corpus, the Amschwand family should be able to charge the plan fiduciary with the value—$426,000.

with the amount required to restore the values of the trust estate and/or trust distributions to what they would have been absent the breach.[212]

Nowhere does the Restatement state that equity attached any particular conditions to this form of "redress" such as a requirement that monetary awards are payable only to the trust. To the contrary, the Restatement clearly contemplates situations where monetary awards are appropriately made directly to the beneficiary, thereby refuting the argument that monetary awards can run only to the trust corpus. Not only does section 205(b) expressly provide for restoration of the trust to what it would have been absent the breach, but it expressly provides for restoration of *trust distributions* as a form of redress. Restoration of trust distributions—or income—would necessarily be *to the beneficiary*, not to the trust corpus, and "the amount necessary to restore the value of" such distributions would of course be a *monetary* amount.[213] Illustrative of this point is a comment to Restatement (Third) section 211, which provides an example of monetary redress payable directly to a beneficiary in an appropriate case: "[i]f the income of the trust is to be distributed to [beneficiary], any income recovery from [trustee] belongs to [beneficiary]."[214]

Further, comment (a) to section 205 explains that "the beneficiaries may *surcharge* the trustee for the amount necessary to compensate fully for the consequences of the breach."[215] This reference to surcharge, unfortunately, confuses the matter. If the beneficiary is to be made whole, must it be through a "surcharge"? As explained in Part V.A, surcharge and make-whole relief are often used interchangeably, and the accounting context for surcharge seems to have been lost in modern day trust terminology, but they result in the same outcome—the payment of money by the fiduciary. Monetary relief awarded as a *surcharge* in an accounting action would appear to have run to the trust as a practical matter—when the trustee settles the account, he is charged with any liabilities and thus, payment of commission from the trust estate would be reduced by that amount. Surcharge in an

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212. RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) § 205.

213. The author expresses thanks to Professor Halbach for this point. Professor Langbein also asserts that "[m]oney damages are the routine mode of redress." Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1352.

214. RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) §211 Illust. 1, at 162 (1992).

215. *Id.* § 205 cmt. a. The 1959 version of the Restatement (Second) of Trusts section 205 comment (a) provided that the beneficiary has the option of "pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust. . . . The situations under which the various remedies are available are considered in the Comments to the three clauses of this Section." RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a.

accounting action would therefore have typically been paid through the trust estate. ERISA section 502(a)(2) and section 409(a)—which require that losses to the plan be paid to the plan—appear to mirror the typical surcharge-through-accounting action. But, surcharge through an accounting was not the only procedure through which a fiduciary paid monetary awards to a beneficiary.[216] An aggrieved beneficiary could also seek "redress" through an independent action in equity.[217] Just as surcharge was not the only mechanism for obtaining make-whole relief under traditional trust law, ERISA section 502(a)(2) is not the only mechanism for obtaining relief under ERISA. ERISA section 502(a)(3) is also available for seeking "redress" against a breaching fiduciary.

Neither does the Restatement limit recovery to situations where the trust corpus is harmed. Granted, in a typical breach of trust case, the corpus will be harmed, but harm to the trust corpus is nowhere stated in the Restatement as a condition for recovery. If the beneficiary of a trust is an income beneficiary and his distribution or income is harmed, he would be entitled to recover his losses.[218] The comments and illustrations provide further support for the proposition that "loss" is not limited to direct harm to the trust corpus, but includes less tangible harm to a beneficiary's interests in trust assets. Restatement section 213, comment (b) provides: "[t]he loss from a breach of trust is the amount necessary to restore the value of the beneficiaries' interests to what their value would have been if the trust had been properly administered."[219] The illustrations following comment (b) indicate that such loss may include less tangible losses that are more analogous to the *Amschwand*-type claim than the typical harm-to-corpus claim. For example, illustrations 2 and 3 explain that a *claim* can be a trust asset, and if the trustee negligently fails to collect on the claim, he is liable for the amount of the claim.[220] The failure to collect on a claim is analogous to a failure to preserve an asset such as a life insurance policy.

Other illustrations can be found in the Restatement that demonstrate the rule that liability extends to situations where there is less direct harm to a trust corpus. Thus, a trustee who receives a bonus or commission from a third party for an act done by the trustee in connection with trust administration is liable for breach of the duty of loyalty.[221] Examples include a bonus from a

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216. *See infra* Part V.B.

217. *Id.*

218. RESTATEMENT (THIRD) OF TRUSTS § 205(b).

219. *Id.* § 213 cmt. b. Note that although section 213 was not revised in 1992, the comments were revised.

220. RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. c, illus. 2-3.

221. *Id.* § 170 cmt. o.

third party for making a sale of trust property, or receiving a commission for placing trust insurance with his employer insurance company.[222] The trustee is accountable to the beneficiary for the amount of the bonus.[223] Although the corpus is harmed in the sense that a loyal trustee would have paid the gain to the trust, the Restatement simply does not *condition* trustee liability for these types of breaches of the duty of loyalty on any resultant harm to trust corpus.

Additional clarification—indeed, confirmation—of the rights of the beneficiary against a breaching trustee is forthcoming in the most recently approved revisions to the Restatement. Restatement (Third) of Trusts section 95 provides a general statement that the "remedies of trust beneficiaries are equitable in character"[224] and expressly states:

> If a breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries are entitled to restitution and may have the trustee surcharged for the amount necessary to compensate fully for the consequences of the breach.[225]

The Restatement could not, therefore, be more clear on this point; the Department of Labor's litigation position is that the Restatement squarely provides that monetary relief is available against a breaching fiduciary,[226] and as demonstrated above, the language of the Restatement seems to support this view with a relatively clear articulation of the general doctrine of make-whole relief. Simply put, nothing in the Restatement supports the view that harm to the trust corpus is required or that section 205 monetary remedies run only to the trust, not to the individual beneficiary.

2. The Uniform Trust Code of 2000

Proponents of the make-whole remedy also rely heavily on the Uniform Trust Code of 2000.[227] The Uniform Trust Code is a codification of the law

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222. *Id.*

223. *Id.* § 206 cmt. k.

224. RESTATEMENT (THIRD) OF TRUSTS § 95 (approved May 2009).

225. *Id.*

226. *See* DOL *Enron* Brief, *supra* note 145 ("As stated in the Restatement on Trusts . . . monetary relief against breaching fiduciaries is equitable when it restores the beneficiary to 'the position [in which] he would have been if the trustee had not committed the breach of trust.'" (citing RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a)); *see also* DOL *Amschwand* Brief, *supra* note 3.

227. *See, e.g.*, Langbein, *What ERISA Means by "Equitable," supra* note 21, at 16. Reliance on The Uniform Trust Code and the 1992 revisions to the Restatement (Third) of Trusts (Prudent Investor Rule) section 205 reveals the internal inconsistency in the debate about make-whole relief discussed, *infra* Part V.B. On the one hand, Justice Scalia instructed courts to

of trusts, drawing largely upon the Restatement (Second) of Trusts, as well as Bogert and Scott.[228] Of particular interest in the uniform code is section 1001(b)(3), which expands on Restatement section 199(c) by providing: "[T]he court may . . . compel the trustee to redress a breach of trust *by paying money*."[229] Section 1002 further provides that a breaching trustee may be held liable "to the beneficiaries affected for . . . the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred."[230]

Although not a source that Congress would have relied upon in 1974 when enacting ERISA, the Uniform Trust Code is, however, informed by the Restatement and the common law of trusts.[231] Specifically, the uniform code provides that the remedies identified in section 1001(b)(3) are derived from Restatement (Second) of Trusts section 199 and that "[t]he reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge."[232] The comment to section 1002 explained:

> Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule Section 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. . . . For extensive commentary on the determination of damages, traditionally known

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consult the "standard current works" in deciding whether a remedy is equitable. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002). Uniform laws and the Restatement certainly fit that description. On the other hand, since the inquiry at hand is to ascertain whether a particular remedy was typically available in pre-fusion equity courts, it is anomalous to consult modern sources to assist in that inquiry. Of course, therein lays the fallacy of Justice Scalia's law-equity distinction in understanding congressional intent in 1974 and beyond.

228. English, *supra* note 195, at 144-48 (reviewing the drafting project, rationale, and process and setting forth the provisions of the Uniform Trust Code).

229. UNIF. TRUST CODE § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

230. *Id.* § 1002; *see also* Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1336-37 (asserting that the Uniform Trust Code section 1002(a)(1) codifies the standard of Restatement (Second) of Trusts, reaffirmed in Restatement (Third) of Trusts (Prudent Investor Rule) section 205 (1992)).

231. *See* UNIF. TRUST CODE § 1001 cmt. ("The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity.").

232. *Id.*

> as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule Sections 205-213 (1992).[233]

The Uniform Trust Code, then, is somewhat circular in that it brings us back to the Restatement, specifically section 205. And, like the Restatement, the Uniform Trust Code is supportive of the general availability of make-whole relief but does not address the pivotal questions of whether any conditions attached to this form of relief.[234] The Uniform Trust Code was also informed by the treatises of George C. Bogert and Austin W. Scott, and it is to these "standard current works" that we now turn.

3. Bogert, Scott and Other Trust Law Treatises

Underlying both the Restatement and the Uniform Trust Code are the great trust law treatises written by Bogert and Scott.[235] It is noteworthy that neither Bogert nor Scott, both authorities on traditional trust law principles, including remedies, believed that trust rules applied to commercial trusts.[236] This might be a partial explanation for the paucity of cases in those treatises dealing with beneficiary remedies for the types of commercial trusts that ERISA governs. The other explanation is that ERISA's commercial trust model was unknown at the time these treatises were first written.[237] It does not follow, however, that traditional equitable remedies against breaching trustees were not grafted into ERISA section 502(a)(3)—but we should recognize that it is not a perfect fit and that, as the reporters of the Restatement (Third) advised, we must look

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233. *Id.* The Uniform Code appears to mis-cite the Restatement (Third). The Restatement (Third) of Trusts is in progress and not all sections have been published. Sections 205-211 of Restatement (Third) have not yet been published, but these sections of Restatement (Second) were revised in 1992.

234. Richard Wellman was the Chair of the Drafting Committee, Reporter, or Member of the Committee for the Uniform Trust Code.

235. BOGERT & BOGERT, *supra* note 146; 2A SCOTT & FRATCHER, *supra* note 84.

236. Langbein, *The Secret Life*, *supra* note 195, at 166. Professor Langbein explains that although Scott excluded commercial trusts from his treatise, Scott was incorrect in his belief that trust law did not apply to commercial trusts. *Id.* at 166 n.7 (citing 1 SCOTT & FRATCHER, *supra* note 84, § 2.2, at 40 (4th ed. 1987)). George C. Bogert's treatise at least introduced the concept that trust law applied to certain types of business trusts. Langbein, *The Secret Life*, *supra* note 195, at 166 n.8 (citing BOGERT & BOGERT, *supra* note 146, at 247-51, 255). The Uniform Trust Code also recognizes that trust law typically applies in the estate planning or donative context and notes that commercial trusts may depart from the usual trust law rules. UNIF. TRUST CODE § 102 cmt.

237. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637-43 (1995) (discussing how the trust device was originally a device for conveying freehold land but shifted to a management device for holding financial assets).

to "similar circumstances" when applying general trust-law principles to ERISA's statutory scheme.[238]

a) Bogert

Proponents of make-whole relief rely on Bogert sections 701 and 862.[239] Bogert section 701 addresses trustee liability for breach of investment duties, with an emphasis on money damages as a remedy,[240] and it lays out some general underlying principles that are reiterated in section 862.[241] Although section 701 addresses remedies only for a subset of fiduciary breaches—breach of investment duties—Bogert explains that the remedies available for investment breaches are "determined by *the general rule* that the object of damages is to make the injured party whole, that is, to put him in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty."[242] Further, Bogert states that "[b]oth direct and consequential damages may be awarded."[243] Bogert therefore provides the clearest acknowledgment and support for the notion of make-whole relief as a traditional trust law remedy.

Nevertheless, opponents of the doctrine also rely on Bogert section 701 for the counter argument that the harm sought to be remedied by make-whole

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238. RESTATEMENT (THIRD) OF TRUSTS § 1, reporter's notes, cmt. a (1992). As Justice Scalia noted, courts should look to "standard current works" when determining what equitable remedies were available. Great-West Life & Annuity Life Ins. Co., 534 U.S. 204, 217 (2002); *see also* E. Daniel Robinson, Note, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 MINN. L. REV. 1447, 1467-68 (2006) (discussing the Court's reliance on standard treatises in support of author's argument that surcharge is a form of equitable relief that is *distinguishable* from make-whole relief). In *Great-West*, Justice Scalia stated that the Court consulted such works as "Dobbs, Palmer, Corbin, and the Restatements." 534 U.S. at 217. Because the remedy at issue in *Great-West* was restitution, Justice Scalia referred to *Corbin on Contracts*, Dobbs's *Law of Remedies*, Palmer's *Law on Restitution*, and the Restatements of Contracts and Restitution. *Id.* at 211-212, Justice Scalia's passing reference to the Restatement (Second) of Trusts sections 252, 255 (1959) was only to reject the Department of Labor's reliance on these sections as authority for the proposition that a trustee could enforce an agreement by a beneficiary to pay money. *Id.* at 718. Justice Scalia's analysis of the Department of Labor's position evidences his impatience with litigants' attempts to squeeze a square peg (monetary remedies akin to breach of contract made payable from other monies) into a round hole (the equitable right of a trustee to set-off monies due to trustee from amounts due under the trust).

239. BOGERT & BOGERT, *supra* note 146, § 701, at 198.

240. *Id.* § 701, at 191 (discussing extent of trustee's financial liability for breach of duties in making (or failing to make), retaining, or selling trust investments).

241. Section 862 addresses the procedural aspects of claims against a breaching trustee for payment of money damages. *Id.* § 862, at 34.

242. *Id.* § 701, at 198.

243. *Id.*

relief is *harm to the trust corpus* because Bogert states the general rule that the beneficiary must prove that the trustee's act or omission "has caused a diminution of the trust income or principal."[244] The counter argument is that if we should simply accept the reality that the trust "income or principle" in an ERISA plan is the plan itself or the plan proceeds, then it follows that the trustee's acts or omissions in an *Amschwand*-type claim have in fact caused a diminution—actually a complete loss—of the "trust income or principal."[245] It is absurd to think that Congress would have extended the substantive duties and obligations of a trustee to ERISA plan fiduciaries but at the same time limit the remedies available under traditional trust law to those situations where the trust corpus is harmed.

Bogert section 862 addresses the procedural aspects of obtaining monetary relief against a breaching fiduciary and is perhaps the most oft-cited provision for the availability of make-whole relief.[246] Section 862's title, however, only serves to highlight the law-equity dilemma: "Decree Against the Trustee for the Payment of Money–Damages."[247] If a beneficiary's remedies against a breaching trustee are "exclusively equitable,"[248] then why does Bogert section 862 refer to such relief as "damages"—the quintessential form of *legal* relief? Once again, we must dig deeper into this particular standard current work to attempt to unravel this confusion between make-whole relief and legal damages.

Section 862 states: "For a breach of trust the trustee may be directed by the court to pay damages to the beneficiary out of the trustee's own funds . . . ."[249] In support, Bogert cites several cases that, while they support the general proposition that the court can order the trustee to pay money to the aggrieved beneficiary, are simply not analogous to the *Amschwand* plight.[250]

Moreover, Bogert section 862 further provides that the beneficiary may bring a separate action for damages, or can ask for surcharge on an accounting. Bogert listed the types of breach of trust that would give rise to either a separate suit or a surcharge on an accounting—none are analogues for

244. *Id.* § 701, at 199.
245. *See infra* Part V.C.1.
246. *See, e.g.*, Langbein, *What ERISA Means by "Equitable*,*" supra* note 21, at 1337; *see also* DOL *Amschwand* Brief, *supra* note 3.
247. BOGERT & BOGERT, *supra* note 146, § 862, at 34.
248. RESTATEMENT (SECOND) OF TRUSTS § 197 (1959).
249. BOGERT & BOGERT, *supra* note 146, § 862, at 34.
250. *See infra* Part V.C.

the *Amschwand*-type claims.[251] Again, this is hardly surprising since these types of claims were virtually unknown in the private trust world.

More troubling from the perspective of *Amschwand*-type plaintiffs is that Bogert elsewhere supports the argument that monetary awards are *payable to the trust*:

> A failure to perform any of the duties placed upon [the trustee] by common law, statute or trust instrument, if loss is caused thereby, will give the beneficiaries, a co-trustee or a successor trustee a right to secure from the court of equity a decree that the wrongdoing trustee pay into the trust fund the amount of damages suffered.[252]

Bogert is likely merely stating the practical reality of most private trusts that the trust fund was the obvious recipient of relief, but even in this light, section 157 is a stark reminder that *Amschwand*-type plaintiffs face significant hurdles analogizing their ERISA claims to the traditional trust law model. Thus, what can we learn from Bogert with respect to make-whole relief of the type sought by the *Amschwand* plaintiffs? At best, the generalized proposition that the law of trusts recognized monetary relief payable from the trustee's own funds to the beneficiary's trust fund. But with the caveat that the sources relied upon—even by Bogert—are not analogous to the situation at hand.

Since the Bogert treatise does not satisfactorily resolve the debate of what conditions attached to make-whole relief, an exploration of Bogert's sources is the next logical step in ascertaining whether make-whole relief is available in *Amschwand*-type claims.[253] Bogert section 862 relied upon the Restatement (Second) of Trusts section 197 and Restatement (Third) of Trusts section 205, discussed in Part V.B.1 Bogert's other sources were less well-known and it is to these sources that we now turn, digging deeper into the Serbonian bog.

251. BOGERT & BOGERT, *supra* note 146, § 862, at 36-39 (listing unauthorized payments to other beneficiaries, conversion of trust property, negligence in recording of instruments affecting trust property or obtaining security or collecting trust property, wrongful sale of trust property, or negligence or misconduct in investments).

252. *Id.* § 157, at 558 (cited in Fiduciaries' *Enron* Brief, *supra* note 26).

253. *Id.* § 862, at 34 n.1 (citing RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) § 205 (1992); RESTATEMENT (SECOND) OF TRUSTS § 197; *Liability for Breaches of Fiduciary Duties*, 1 PROF. LIABILITY RPTR. 116 (1977); Thomas J. McDermott, Jr., Note, *Liability of Trustee for Appreciation of Property*. 4 UCLA L. REV. 314 (1957); Russell D. Niles, *Contemporary View of Liability for Breach of Trust*, 29 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 573 (1974)).

(1) Professor Niles—An ERISA Contemporary

For the rule that monetary relief was available against a breaching trustee, Bogert also relied upon a published lecture given by Professor Russell D. Niles in 1973 regarding current developments in the law of trusts.[254] Professor Niles's lecture, therefore, reflected trust law developments contemporaneously with congressional drafting of ERISA. Professor Niles's lecture focused on New York trust law and cases involving the trustee's duty of "'undivided loyalty.'"[255] Professor Niles was particularly concerned with developments in trust law reflecting a modern judicial trend away from imposing strict liability on trustees towards a more relaxed view of liability whereby courts were starting to require a showing of causation and to base the amount of liability on the amount or degree of culpability.[256]

Of note, Professor Niles apparently saw nothing unusual or unique in the rule that trustees could be personally liable for monetary damages—he interchangeably referred to such remedial relief as compensatory damages or surcharge.[257] Although his choice of words is unfortunate, Professor Niles was simply referring to the make-whole remedy as a compensatory remedy.[258] Although acknowledging the existence of the make-whole remedy, Professor Niles did not, however, expand on whether it was only available where the trustee's breach resulted in harm to the corpus.[259] He did observe that New York courts were applying trust law principles to impose liability on corporate fiduciaries in insider-trading situations where there was no *harm to the corporation*,[260] but that was not the core focus of his article, and it offers

254. Niles, *supra* note 253.

255. *Id.* at 573 (quoting Meinhard v. Salmon, 164 N.E. 545 (1928) (Cardozo, J.)).

256. *Id.* at 573-74. Professor Niles noted that the Restatement (Second) of Trusts may also have adopted this more relaxed, contemporary standard. *Id.* at 581 (citing, *inter alia*, RESTATEMENT (SECOND) OF TRUSTS § 205(a)).

257. Niles, *supra* note 253, *passim*.

258. *Id.* at 598 (distinguishing between restitutionary remedy and compensatory remedy).

259. Professor Niles, however, commented on a California case that is remarkably similar to the *Goeres* case. In *Estate of Talbot*, 296 P.2d 848 (Cal. App. 1956), a beneficiary argued that a trustee breached his duty by improperly delegating his power of sale to another beneficiary, who sold trust securities instead of retaining them. Had the trust retained the securities, their value would have increased by $250,000. *Id.* at 856. The California court did not impose liability because the beneficiary could not establish a causal connection between the original breach and the loss. Niles, *supra* note 253, at 581-82 (noting the development in trust law away from imposing strict liability and toward a proximate cause requirement).

260. Niles, *supra* note 253, at 577-78 (citing Diamond v. Oreamuno, 248 N.E.2d 910 (1969) (discussing application of trust law principles to corporate fiduciaries)).

limited insight beyond the generalized proposition that make-whole monetary relief was available against a breaching fiduciary.

(2) Law Reviews

Bogert also relied on a law review note summarizing statutory and case law support for imposing individual liability on a trustee for appreciation of property.[261] The commentator, McDermott, noted the seemingly unremarkable rule that "[f]or a breach of any of these duties a trustee may be liable for damages."[262] Like Professor Niles, McDermott's explanation of these "damages"[263] reveals that he was in fact referring to surcharge or make-whole relief, explaining:

> The theory of these *surcharges* is to make the cestui *"whole" again*, and this usually results in awarding the beneficiary either the loss actually sustained by the trust (depreciation) or the profit which would have accrued had the trustee carried out his duties properly (appreciation). The type of breach, considered with the circumstances of the case, will generally determine the award.[264]

For this measure of "damages," McDermott relied on Restatement (Second) of Trusts section 205, which, as we have seen, allows the beneficiary to recover losses caused by the breach. As we have also seen, however, the Restatement does not definitively answer the vital questions—whether an action can only lie where the breach resulted in harm to the trust corpus and whether recovery must be payable to the trust corpus.

McDermott sought to explain the different measure of relief awarded by courts (depreciation versus appreciation) and concludes that different types of breach account for the difference.[265] The author concludes that

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261. BOGERT & BOGERT, *supra* note 146, § 862, at 34 n.1 (citing McDermott, *supra* note 249).

262. McDermott, *supra* note 253, at 315. The author noted that in addition to duties imposed by the trust instrument, other duties imposed by law include the duty to exercise ordinary care and skill, duty of loyalty, duty of good faith dealing with the cestui, duty to preserve trust property, and the duty to make the trust property productive. *Id.* at 314 n.4.

263. *Id.* As we have seen with the Bogert treatise and with Professor Niles's commentary, the tendency to refer to make-whole relief and surcharge as "damages" is, well, damaging. One could write this off as simply another nomenclature problem, but that explanation still would not answer the underlying question of what conditions, if any, attach to such relief, whatever it is called.

264. *Id.* at 315 (emphasis added, citations omitted).

265. *Id.* at 317-18. McDermott referred to the make-whole measure of damages as surcharge without explaining the procedural distinction between bringing a separate action on the breach or an action for an accounting. *See supra* Part V.A.

depreciation damages that are limited to restoration of the actual loss to the corpus are appropriate for "a 'good faith' mistake which amounts to a mere technical breach of an objective standard of conduct, as where a power of sale exists but the trustee does not properly exercise his discretion."[266] Relief (in the form of damages) is limited by the policy of avoiding making the trustee a "guarantor of profits."[267] In contrast, appreciation damages (which would include restoration of loss of income) may be awarded for "bad faith" breaches, such as self-dealing for the trustee's own gain, but could also include good faith breaches that involved a breach of the actual terms of the trust or breach of a "more serious fiduciary duty."[268]

McDermott's explanation of the measure of relief is illuminating because it seeks to explain the differing measures of relief actually awarded by pre-fusion equity courts to redress breaches of fiduciary duty. The "depreciation" and "appreciation" awards identified by McDermott (which echo the Restatement) can more easily be analogized to the modern ERISA *Amschwand*-type cases. Thus, depreciation damages were limited to restoration of actual loss to the trust corpus, did not include lost profits, and were available for "technical" breaches such as failing to exercise independent judgment in making a sale. This is the measure of damages that the plan defendants in *Amschwand* appear to identify in support of their argument that, to the extent the make-whole remedy is available, it is limited to a return of premiums paid.[269]

But, the type of breach, and, therefore, the correct measure of damages at issue in *Amschwand* is more appropriately characterized as more than a mere technical or good faith breach, it is a breach of "a more serious fiduciary duty"[270] such as breach of duty of loyalty.[271] Therefore, appreciation damages should be the amount of what the beneficiary would have accrued in the absence of the breach of trust—i.e., the insurance proceeds.[272]

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266. McDermott, *supra* note 253, at 316.

267. *Id.* at 317-18.

268. *Id.* at 315. McDermott's suggestion is echoed in Professor Medill's comprehensive categorization of the types of equitable relief depending on the type of claim or breach. *See generally* Medill, *supra* note 17.

269. *Amschwand* Opp. Cert., *supra* note 26, at *11.

270. McDermott, *supra* note 253, at 317.

271. *Id.* at 317 n.18.

272. The "appreciation" and "depreciation" measure of damages is echoed in Bogert section 862 and was codified by several states prior to the enactment of ERISA. Thus, the familiar measures were: (1) loss or depreciation in value of the trust estate resulting from the breach [depreciation]; (2) any profit made by the trustee through the breach; and (3) any amount that would have accrued to the trust estate *or the beneficiary* if there had been no breach of trust [appreciation].

To recap, digging deeper into the world of Bogert, which is arguably the gold-standard of the standard current works, has yielded mixed results. Like the Restatement and the Uniform Trust Code, Bogert generally supports the availability of make-whole relief but tells us little about what conditions might have attached in equity, except that Bogert section 157 supports the argument that recovery must run to the trust fund.

b) Pomeroy

Pomeroy's treatise on equity jurisprudence also typifies the confusion surrounding make-whole relief.[273] Like Bogert, Pomeroy makes seemingly contradictory statements about equity jurisdiction and remedies. In section 158, Pomeroy explained the nature of the equity court's jurisdiction over trust law cases. Pomeroy explained that equity courts had *exclusive* jurisdiction over trusts created by private owners of property[274] but that courts of law and equity had concurrent jurisdiction over other fiduciary relations, such as guardianships and corporate directors.[275] In those cases, Pomeroy wrote that the law "supplies the beneficiaries with sufficient remedies for many violations of such fiduciary relations."[276] This is problematic because it suggests that a court of law supplies the legal damages for commercial trust claims, such as ERISA claims.

Nevertheless, even in those cases, Pomeroy stated that "equity possesses a jurisdiction in many instances where its remedies are more effective, or its modes of procedure enable the court to do more complete justice by its decrees."[277] Pomeroy went on to explain that equity jurisdiction was independent of the nature of the remedies:

> The actual remedies which a court of equity gives depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always by its decree declare the rights, interest, or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often

273. 1 POMEROY, *supra* note 7.
274. *Id.* § 157-58, at 213-14.
275. *Id.* § 157, at 213-14.
276. *Id.* § 157, at 214.
277. *Id.*

> happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money.[278]

Pomeroy's statement that the equity court had this power to award monetary relief "when necessary" is arguably echoed in ERISA section 502(a)(3), which contemplates an award of other "appropriate" equitable relief.[279] Indeed, in this same section—section 158—Pomeroy referenced the equity courts' power to decree monetary recovery "when necessary" by payment of either "a single specific sum" or through an accounting.[280]

Finally, in a later section of his treatise expressly dealing with the nature and extent of trustee liability, Pomeroy squarely tells us that:

> In addition to this claim of the beneficiary upon the trust estate as long as it exists, the trustee incurs a personal liability for a breach of trust by way of *compensation or indemnification*, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act.[281]

Thus, Pomeroy's commentary on concurrent law-equity jurisdiction can be reconciled by reference to the different types of claims—"the nature and object of the trust."[282] When the trust is "general" and the relief is "general" (i.e., the "mere recovery of monies"), the law court would have jurisdiction. But, when the claim is of a kind that requires the specialized jurisdiction of

278. *Id.* § 158, at 215 (cited in Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1350-51).

279. The equity courts' remedial power is mirrored in ERISA section 502(a), as Professor Langbein explained. Langbein, *What ERISA Means by "Equitable," supra* note 21, at 1335. Recovery for losses and profits, and other foregone gains, is mirrored in section 502(a)(2), at least for cases in which relief runs to the plan, and section 502(a)(3) "vindicates the core principle of trust remedy law, the make-whole standard." *Id.*

280. 1 POMEROY, *supra* note 7, § 158, at 215. Pomeroy's reference to the single payment of money or an accounting makes it clear that these were two separate procedures but nevertheless involved the same end result—the beneficiary's recovery of money from the breaching trustee. This analysis therefore tracks Bogert's treatise, discussed in Part V.B.3, *supra*.

281. 4 POMEROY, *supra* note 7, § 1080, at 230 (emphasis added). Defense attorneys have seized upon Pomeroy's statement that monetary relief was available where the trust property has been lost or put beyond the beneficiary's reach as illustrative of the argument that make-whole relief was only available where the trust corpus was harmed. *See Amschwand* Respondents' Supp. Brief, *supra* note 151, at *8. The actual text simply does not support this proposition, and the argument can, in any event, be readily dismissed when recognizing that the trust property or corpus consists of the plan proceeds, which have undisputedly been lost or put beyond reach in *Amschwand*-type cases.

282. 1 POMEROY, *supra* note 7, § 158, at 215.

the equity court—because it requires the court to "declare the rights, interest, or estate of the *cestui que trust*"—jurisdiction will lie in equity, even when the final relief is recovery of money.[283] Pomeroy names this "complete indemnification and compensation of the beneficiary"[284] "a simple contract equitable debt."[285] Whatever we label it, this relief is monetary relief, and it was routinely awarded by a court of equity.

C. Understanding and Applying Pre-Fusion Trust Cases to ERISA plans

To recap, in determining whether *Amschwand*-type plaintiffs can recover make-whole relief under ERISA's equitable relief provision, the primary resources, at least according to Justice Scalia, are the "standard current works." As demonstrated in Parts V.A-B above, however, the relevant treatises are hardly unequivocal on this point. The Restatement (Second) of Trusts, the Restatement (Third) of Trusts, and the Uniform Trust Code are relatively clear that a beneficiary can directly recover from the trustee for his losses, but Bogert and Pomeroy are not a model of clarity on this crucial question.[286] In addition, none of these authorities address whether equity attached any particular conditions to such monetary relief— although the fact that none of them mention any such conditions indicates that such conditions were *not* required. This lack of clarity not only vividly illustrates Justice Ginsburg's suspicion that the standard current works would not necessarily supply a ready answer for courts attempting to determine whether a relief qualifies as equitable under *Great-West*, but provides an escape hatch for breaching fiduciaries. After all, if the standard current works fail to disclose what conditions, if any, attached to make-whole relief, then a clever attorney can find some. Hence, the fiduciaries' two-prong attack is that make-whole relief was traditionally limited to situations where: (1) the breach resulted in harm to the corpus—because that would typically be the result in cases

283. *Id.*

284. 4 POMEROY, *supra* note 7, § 1080, at 230.

285. *Id.* § 1080, at 229.

286. Justice Ginsburg predicted this eventuality in her dissent in *Great-West Life & Annuity Insurance Co. v. Knudson*. 534 U.S. 204, 232 (2002) (Ginsburg, J., dissenting) ("I question the Court's confidence in the ability of 'the standard works' to 'make the answer clear.'"). Justice Ginsburg highlighted as illustrative a conflict between Dobbs and the Restatement of Restitution on the issue of the availability of restitutionary relief in an equity court. *Id.* (Ginsburg, J., dissenting) (stating that "the Court does not indicate what rule prevails, for example, when those works conflict, as they do on key points, compare Restatement of Restitution § 160, comment e, p. 645 (1936) (constructive trust over money available only where transfer procured by abuse of fiduciary relation or where legal remedy inadequate), with 1 Dobbs, Law of Remedies § 4.3(2), at 595, 597 (limitation of constructive trust to 'misdealings by fiduciaries' a 'misconception'; adequacy of legal remedy 'seems irrelevant').").

involving traditional trusts; and (2) payment was made back into the trust corpus— because that would be typically be the result under traditional trust law.[287]

At this juncture, because the standard current works do not address what, if any, conditions traditionally attached to make-whole relief, it becomes necessary to resort to pre-fusion equity cases. After all, the standard current works restate the common law of trusts as developed by the equity courts, so hopefully Justice Scalia will pardon the rerouting of the inquiry.

1. The Argument That Make-Whole Relief Was Traditionally Limited to Cases Where the Trust Corpus Was Harmed is Irrelevant to Modern-Day ERISA Plan Arrangements

The plan fiduciaries in *Amschwand* argued to the Supreme Court that make-whole relief was only available where the fiduciary engaged in self-dealing with the trust or the trust corpus was harmed.[288] The standard current works do not directly contradict this proposition, and since most trust law cases would have involved either self-dealing or harm to the corpus, it can be argued that these are "conditions." It is almost impossible to refute this argument by reference to the standard current works, because of the lack of clarity in those sources as described above, and because of the nature of traditional trusts. Unlike the modern ERISA employee welfare benefit plan, a trust relationship required a trustee, a beneficiary, and a trust corpus. ERISA, however, does not exactly track all the incidents of traditional trust law. Most importantly, ERISA does not require the existence of a trust corpus for the trust relationship to arise.[289] Indeed, in the modern context, employee welfare benefit plans are either self-funded or insured arrangements

287. *See Amschwand* Respondents' Supp. Brief, *supra* note 151, at *8. The argument that make-whole relief was only available in cases involving self-dealing is misplaced for the simple reason that self-dealing cases usually involved *restitutionary* relief, not make-whole relief. To the extent that make-whole relief was appropriate, such relief was not dependant on harm to the corpus. In self-dealing cases, the harm was in the egregiousness of the breach, and courts were more likely to impose restitutionary relief through imposition of a constructive trust in order to deter self-dealing and prevent unjust enrichment. *See also* Niles, *supra* note 253. Opponents of make-whole relief do not seem to disagree with the general rule that the trustee can be held personally liable for make-whole damages. *See* BOGERT & BOGERT, *supra* note 146, § 862 n.2 and cases cited therein.

288. *Amschwand* Respondents' Supp. Brief, *supra* note 151, at *8 n.3 ("Without exception, all of the cases and commentaries cited by the Government . . . relate solely to relief in the event of harm to, or self-dealing with, the trust corpus . . . by the trustee . . . charged with its care.").

289. A trust relationship requires a trustee, a beneficiary (cestui), and trust property. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959). Under ERISA, trust property is not required. *See* Muir, *Fiduciary Status*, *supra* note 46, at 395-96.

that are contractual in nature. The contract is to pay premiums in return for a benefit, such as life insurance or health insurance. If there is no identifiable trust *res* in such an arrangement, how can *Amschwand*-type plaintiffs ever show harm to the trust corpus?

The answer is that this group of plaintiffs has to argue by analogy that the insurance benefit, or other employee welfare benefit, is the trust corpus.[290] Once the promised plan benefit is recast as the trust corpus, the argument that make-whole relief requires harm to the corpus is deflated. Even if harm to the trust corpus is required under the traditional make-whole doctrine, the ERISA trust corpus in the form of the promised benefit *is* harmed if the fiduciary's breach results in the lack of the benefit.

This is not to suggest that the requirement of harm to the corpus is even dispositive of the right to relief. The lack of a corpus or harm to a trust corpus is not required under ERISA's other remedial provisions such as section 502(a)(1)(B), and yet participants and beneficiaries are made whole by an award of the improperly denied benefit.[291] Further, harm to the trust corpus was not required at common law.

2. In Any Event, Make-Whole Relief Was Not Limited to Cases Where the Trust Corpus Was Harmed

As a general rule, it is certainly true that the majority of cases applying make-whole relief involved situations where the trustee(s) engaged in self-dealing or caused loss to the trust corpus by poor investment or otherwise.[292] Nevertheless, equity decisions can be found that did not involve harm to the corpus. One need look no further than the cases relied upon in Bogert's discussion of make-whole relief.

A review of the decisions relied upon by Bogert illustrates that courts readily acknowledged the appropriateness of make-whole relief for acts of misconduct that did not involve direct harm to the corpus. In *Bosworth v. Allen*, corporate officers/directors were held liable for improper disposition of corporate assets.[293] The court explained that directors are treated as trustees in courts of equity and held to a strict "account" for misconduct.[294]

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290. *See* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 209-11, 223-28 (1990) (explaining, *inter alia*, why private pension and employee-benefit plans are trusts, why ERISA trusts differ from private trusts, and drawing a comparison between ERISA plans and contracts). Note that Professor Langbein's article was cited in RESTATEMENT (THIRD) OF TRUSTS § 1 Reporter's Notes cmt. a.

291. *See, e.g.*, ERISA § 501(a)(1)(B).

292. *See Amschwand* Respondents' Supp. Brief, *supra* note 151, at *8.

293. Bosworth v. Allen, 61 N.E. 163, 165, 167 (N.Y. 1901).

294. *Id.* at 165.

As we have seen, an accounting was one procedural device for holding a breaching trustee personally liable for payment of monies, such payment being in the form of a surcharge on the trust account. In the *Bosworth* case, the court explored the nature of fiduciary duties and the broad range of attendant remedies for breach when trustees are held to account:

> Equitable jurisdiction extends to all culpable acts and omissions of the directors by which the pecuniary interests of the corporation are or may be injured. If they are treacherous to its interests, and appropriate its property, or intentionally waste its assets, or take money for official action, or "sell out" by resigning, and thus giving control to others, they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, *as well as for the damages naturally resulting from their official misconduct; and even, as we have recently held, for money received by virtue of their office*.[295]

Indeed, the court referred to the accounting action as "flexible and comprehensive,"[296] allowing the equity court to order a wide range of relief, even if such relief could also be had in a court of law: "While the *cestui que trust* may sometimes proceed at law against his trustee, he need not do so but may always call him into a court of equity."[297] The distinguishing feature of equity jurisdiction is the need for the equity court's specialized expertise on issues such as whether a trust relationship existed and the nature of the remedy. Apparently, equity courts saw nothing remarkable about the proposition that make-whole relief was available in many types of cases, involving various forms of misconduct, and without any apparent requirement that the breach must involve self-dealing or harm to the corpus.

Yet other cases relied upon by Bogert expressly awarded make-whole relief even though there was no harm to the corpus. In *West v. Biscoe*, cited in support of Bogert section 862, the settlor left land to her sons on the condition that they paid $500 to each of her two granddaughters.[298] The sons, therefore, were trustees of an implied trust in favor of the granddaughters, the trust fund being the promise to pay $500.[299] The sons did not pay the $500 to one of the granddaughters, and her widower sued.[300] The equity court

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295. *Id.* (emphasis added) (citing McClure v. Law, 55 N.E. 388 (N.Y. 1899)).
296. *Id.*
297. *Id.* at 166.
298. West v. Biscoe, 6 H. & J. 460, 465, 1825 Md. LEXIS 24, *10 (Md. 1825).
299. *Id.*
300. *Id.* at 465, *11.

ordered the sons to pay the $500 and said they were personally liable to pay the amount directly to the beneficiary.[301] *West v. Biscoe* thus demonstrates that equity courts would grant remedial relief for breach of fiduciary duty that did not involve self-dealing or direct loss to any trust corpus, and would order a direct monetary payment to a beneficiary as opposed to requiring payment to the trust. In *West*, the money owed was a promise to pay a benefit to a beneficiary, and the money owed was not part of the original trust corpus at all.[302] This situation illustrates payment of money owed under a contractarian view of trusts—a direct analogue to make-whole relief for breach of a promise to pay insurance proceeds under section 502(a)(3). Interestingly, the equity court also implicitly rejected the defendants' arguments that any remedy for personal liability was at law by holding that this was an *equitable* claim and that the trustees were under a personal obligation in *equity* to pay the money owed.[303]

In other cases, the "harm" to the trust corpus was that it ceased to exist, often because it was wrongly given to a third party.[304] In *Silliman v. Gano*, the trustee had sold various parcels of land that arguably belonged to plaintiffs in trust.[305] The court explored the plaintiffs' potential equitable remedies in the event the plaintiffs were able to establish a trust relationship.[306] One such remedy, where a trustee has only sold part of the property, was that the beneficiary was entitled to "such remedy, if practicable, as will fully compensate him for his injury, but will not permit him to elect a remedy which goes beyond a full reparation, merely for the reason that his trustee has betrayed his confidence."[307] In the *Amschwand*-type cases, plaintiffs are similarly deprived of the trust corpus—the insurance proceeds—through fiduciary breach, and the remedy should similarly fully compensate them for their injury. "Full reparation" would consist of the insurance proceeds that have been lost, but should not extend to other compensatory damages for emotional distress.[308]

301. *Id.* at 469, *18.

302. *Id.* at 465, *10.

303. *Id.* at 467, **15-16.

304. *See, e.g.*, Burris v. Brooks, 24 S.E.2d 521 (N.C. 1896); Robertson v. Sublett, 25 Tenn. 313 (Tenn. 1845) (finding that the trustee used funds for purposes other than those set forth in the trust); Silliman v. Gano, 39 S.W. 559, 562 (Tex. 1897) (discussing equitable remedies if the plaintiffs could establish a trust relationship. Trustee had sold land and court explained the applicable general principles: "by the breach of trust [the trustee] becomes, in any event, personally liable to make compensation to the beneficiary for his property.").

305. *Id.* at 560.

306. *Id.* at 562-63.

307. *Id.* at 563.

308. This comports with Professor Medill's view that make-whole relief is available but not

Other illustrative cases can be found. The facts of another surcharge action, *Appeal of Harrisburg National Bank*, are also analogous to the *Amschwand* case.[309] There, the trust corpus consisted of the proceeds of a life insurance policy, and the court considered whether the proceeds belonged to the decedent's orphans or was payable to the administrator of the estate (presumably to pay his fees).[310] The lower court had ordered that the bank holding the proceeds should pay these insurance proceeds to the administrator, but the Pennsylvania Supreme Court reversed because the court had no jurisdiction over the bank or the orphans' guardian.[311] Consequently, the court's surcharge comments were dicta but are nevertheless illustrative of the remedial relief available. The court stated that if the administrator had not collected the life insurance proceeds or had "lost" them, he could be surcharged for that amount.[312]

In such a case, it could be argued that failure to collect proceeds does indeed harm the trust corpus because the trust corpus is deprived of the uncollected amount. But how is that distinguishable from Mr. Amschwand's situation? The answer is that it is not—Mr. Amschwand's trust consisted of the life insurance proceeds due to his beneficiary, and that trust was deprived of the proceeds by a fiduciary breach. There is no discernable difference between what happened to Mr. Amschwand and what happened in *Harrisburg National Bank*. Like the administrator in *Harrisburg National Bank*, the Spherion fiduciary could be held personally liable for a breach of trust that resulted in a failure to collect or realize life insurance proceeds.[313] This is most analogous to the loss of insurance proceeds in *Amschwand*—failure to collect is the same as Spherion's failure to advise the participant of his eligibility (or worse, *misrepresentation* of his eligibility). Thus, the court stated that an equity court could have surcharged the administrator with the life insurance proceeds, begging the question why this case is any different to loss of insurance proceeds by other means, or the loss of profit caused by a delay in paying Mr. Goeres.[314] "In the settlement of the

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compensatory damages for emotional distress. Medill, *supra* note 17, at 935.

309. Appeal of Harrisburg Nat'l Bank, 84 Pa. 380 (1877) (cited in DOL *Amschwand* Brief, *supra* note 3, at **13-14).

310. *Id.*

311. *Id.* at 383.

312. *Id.* at 384.

313. *See also* BOGERT & BOGERT, *supra* note 146, § 971, at 414-16 (noting that trustee can be charged in an accounting with the items of trust income that the trustee did not receive but would have received if he had performed his duties).

314. *See* Goeres v. Charles Schwab & Co., Inc., No. C 04-01917 CRB, 2004 WL 2203474, at *1 (N.D. Cal. Sept. 28, 2004), *aff'd*, 220 F. App'x 663 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2994 (2008) (mem.).

administrator's account, they certainly could decide that this was an asset of the estate which the administrator ought to have collected, and if he had negligently lost it, could surcharge him with the amount."[315] It is disingenuous to argue that this situation is distinguishable from present-day loss of benefits because it involved harm to the trust corpus. Moreover, it is absurd to think that Congress intended to extend trust-law duties to ERISA fiduciaries and yet limit the remedies available for breach of those duties in such a fashion.

English cases support the same point. In *Marriott v. Kinnersley*, the trust corpus included an insurance policy but the trustees discontinued premium payments.[316] The trustee was held liable for the proceeds, plus costs.[317] The trustee was "charged with a general breach of trust, with the loss sustained by the discontinuance of the policy, and must pay costs."[318] Again, in some broad sense there was harm to the corpus in that the life insurance proceeds were now lost, but such a harm has no meaningful distinction from loss of insurance proceeds in *Amschwand*. Similarly, the failure to pay income to a beneficiary from a trust fund does not involve "harm to the corpus."[319] That was the breach at issue in *Gates v. Plainfield Trust Co.* and yet the beneficiary was entitled to income from the trust fund, and it was payable directly to her, not payable back into the fund.[320]

The only Supreme Court decision that is arguably on point is *United States v. Mitchell*.[321] Proponents of make-whole relief rely on *Mitchell*, and Bogert also cited to the decision in support of the generalized proposition that make-whole relief is appropriate in a breach of trust case.[322] *Mitchell* involved the federal government's liability as trustee over Indian land.[323] Specifically, the Indian beneficiaries alleged that the government:

> (1) failed to obtain a fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis; (3) failed to obtain any payment at all for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for

315. *Appeal of Harrisburg Nat'l Bank*, 84 Pa. 380.
316. 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830)
317. *Id.*
318. *Id.*
319. *Amschwand* Respondents' Supp. Brief, *supra* note 151, at *8.
320. 194 A. 65 (N.J. 1937). The relevant facts are set forth in the lower court's opinion at *Gates v. Plainfield Trust Co.*, 191 A. 304 (N.J. Ch. 1937).
321. 463 U.S. 206 (1983).
322. BOGERT & BOGERT, *supra* note 146, § 862.
323. *Mitchell*, 463 U.S. at 206.

> maintenance of roads; (5) failed to pay any interest on certain funds from timber sales held by the Government and paid insufficient interest on other funds; and (6) exacted excessive administrative fees from allottees.[324]

Make-whole opponents characterize the *Mitchell* breach as involving harm or self-dealing with the trust corpus, but the breaches of trust actually alleged are not so easily characterized as such. The "corpus" was land and timber on the land, and the breach of trust was mismanagement of that property.[325] Such claims, like the *Amschwand*-type claims, do not neatly fit into the basic trust model. While the corpus (land or timber) was "harmed" in some broad sense, the mismanagement was more far-reaching and resulted in harm that cannot be squarely characterized as "harm" to the land or timber, but is more fairly characterized as consequential loss to the beneficiaries' interests in the trust corpus.

The *Mertens* Court gave *Mitchell* short shrift, acknowledging that *Mitchell* supported the proposition that an equity court could award money damages, but dismissing *Mitchell* on the basis that such money damages were in fact legal, not equitable:

> At common law, however, there were many situations—not limited to those involving enforcement of a trust—in which an equity court could "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority."[326]

As Professor Langbein notes, the situation that the *Mertens* Court referred to was the clean-up doctrine, whereby an equity court could resolve legal claims and award legal relief if the legal claims were incidental to the equitable claims.[327] Neither *Mitchell* nor the trust law cases discussed above, however, were decided under the clean-up doctrine.[328] The *Mitchell* case and the equity cases addressing make-whole relief were equitable cases brought against a breaching trustee, not legal claims seeking money damages as an incident to an otherwise equitable claim. The *Mitchell* Court explained that if a federal statute establishes a trust relationship and its attendant fiduciary obligations:

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324. *Id.* at 210.

325. *Id.* at 225.

326. Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) (citing 1 POMEROY, *supra* note 7, § 181, at 257).

327. Langbein, *What ERISA Means by "Equitable*,*" supra* note 21, at 1350.

328. *Id.*

> [I]t naturally follows that the [fiduciary] should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. . . . This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.[329]

The *Mitchell* case was not a case where legal claims were incidental to the equitable claims. On the contrary, it was an equity case applying a recognized equitable remedy. Hence, the clean-up doctrine was not even in the picture. Of course, once the clean-up doctrine is taken out of the picture, *Mitchell* mandates make-whole relief for ERISA participants and beneficiaries. But, that analysis escaped the Court in *Mertens* and the error persists.[330]

3. Make-Whole Relief Was Not Limited to Cases Where the Monetary Relief Was Payable Back to the Trust

The argument that, to the extent monetary relief was available in equity, recovery flowed back into the trust is also not supported by the cases. Again, in many instances of breach of trust the natural remedy would be to pay money back into the trust. Similarly, the surcharge award in an action for an

329. *Mitchell*, 463 U.S. at 226 (citing, *inter alia,* RESTATEMENT (SECOND) OF TRUSTS §§ 205-12 (1959); BOGERT & BOGERT, *supra* note 146, § 862; 3 SCOTT & FRATCHER, *supra* note 84, § 205). The Court buttressed its decision by reference to the applicable statute and regulations:

> recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians. It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed. "Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust."

Mitchell, 463 U.S. at 226-27 (quoting United States v. Mitchell, 445 U.S. 535, 550 (1980) (White J., dissenting)). Justice Scalia, of course, rejects any attempts to adopt a purposive approach toward ERISA section 502(a)(3). *See Mertens*, 506 U.S. at 256.

330. *Mertens*, 506 U.S. at 248; *see also* Langbein, *What ERISA Means by "Equitable,"* *supra* note 21, at 1364; Medill, *supra* note 17. Professor Langbein has urged the Court to "confess its error," and Professor Medill has laid out the path for the Court to follow in reconciling its precedents with traditional trust law principles, but the Court's denial of certiorari in *Amschwand* likely indicates that the Court is not in a confessional mood.

accounting would flow back to the trust in the sense that the trustee's commission payment from the trust corpus would simply be reduced. While it is certainly a truism that the recovery was payable to the trust in most cases, the cases relied upon by Bogert and others simply do not refer to any *rule* or *condition* that monetary relief *must* be paid to the trust.

That such a rule was unknown is supported by the existence of cases where the monetary payment was directly paid to the beneficiary, not to the trust. In addition to *West v. Biscoe*,[331] *Appeal of Harrisburg National Bank*,[332] and *Silliman v. Gano*, discussed, *supra*, other cases support this reality. Again, one need look no further than Bogert. For example, in *Graham v. Graham*, the beneficiary claimed that the trustee engaged in self-dealing by investing the trust funds into his own business.[333] The court held that beneficiaries can elect to either follow the fund and claim that in which it has been invested (tracing the funds) or could elect to hold the trustee personally liable.[334] The money need not be paid into the trust fund—the beneficiary in this case, if he prevailed on remand, would simply be entitled to receive the amount of the fund.[335]

In *Moore v. Robertson*, trustees were similarly personally charged to refund money wrongfully diverted from a trust directly to the beneficiaries.[336] In *Burris v. Brooks*, the North Carolina Supreme Court applied equitable principles to affirm a ruling that the beneficiary was entitled to "damages" from a trustee who delivered the trust corpus—a note—to a third party.[337] The corpus no longer existed, so naturally the monetary make-whole relief ran directly to the individual, not back into the trust.[338] These cases

331. West v. Biscoe, 6 H. & J. 460, 1825 Md. LEXIS 24 (Md. 1825).

332. Appeal of Harrisburg Nat'l Bank, 84 Pa. 380 (1877).

333. 85 Ill. App. 460, 461-62 (Ill App. 1899) (cited in BOGERT & BOGERT, *supra* note 146, § 862 n.2).

334. *Id.* at 462-63 (citing Stephenson v. McClintock, 141 Ill. 604, 613 (Ill. 1892); Ward v. Armstrong, 84 Ill. 151, 154 (Ill. 1876); Tyler v. Daniel, 65 Ill. 316 (Ill. 1872); Seaman v. Cook, 14 Ill. 501, 504 (Ill. 1853)).

335. *Graham*, 85 Ill. App. at 464 (reversing and remanding dismissal of beneficiary's claim against trustee).

336. Moore v. Robertson, 17 N.Y.S. 554 (N.Y. Gen. Term 1891).

337. 24 S.E.2d 521 (N.C. 1896).

338. *Id.* Interestingly, many of the cases relied upon by ERISA fiduciary-defendants are restitution cases, not make-whole cases. In such cases, the *restitutionary* relief consists of *restitution* of trust funds into the trust. As we have seen, however, make-whole relief is distinguishable from restitution. *See, e.g.*, Mosser v. Darrow, 341 U.S. 267 (1951) (beneficiaries argued the government trustee should *restore* to fund monies paid for state taxes); Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 464 (1939) (involving request for relief in the form of *restoration* of lost profits by bad investments)); *Amschwand* Respondents' Supp. Brief, *supra* note 151, at *8 n.3 (citing, *inter alia*, Harris Trust & Sav. Bank v. Salomon

demonstrate that courts of equity apparently saw no problem with allowing monetary relief to run to the individual beneficiary. Equitable make-whole relief under ERISA section 502(a)(3) should not, therefore, be foreclosed on this basis.

Conclusion

This Article is entitled "a square peg in a round hole" because any attempt to fit traditional trust law make-whole relief into ERISA section 502(a)(3) as equitable relief is fraught with difficulties. The trust world in which make-whole relief existed is not an exact match for today's world of employee welfare benefit plans. Although Congress anticipated ERISA interpretative issues would be resolved by resort to traditional trust law principles, it is unrealistic to expect all the incidents of traditional trust law to apply to a commercial trust model that does not have the same attributes as the traditional trust model. But that is where the Supreme Court has led litigants, forcing them to squeeze the square peg of make-whole relief into the round hole of ERISA section 502(a)(3). Putting aside the Court's wisdom in requiring litigants to become experts in the law-equity distinctions of a bygone era, this Article has attempted to burrow down into the litigation posture of the Department of Labor in *Amschwand*-type cases to clarify whether this form of monetary relief was available and whether any special conditions attached in equity.

Reference to the standard current works clarifies that make-whole relief was indeed available as an equitable trust law remedy. But that is merely a generalized proposition that begs further inquiry. The *Amschwand* fiduciary defendants took the Supreme Court at its word in *Mertens* and *Great-West* and conducted that inquiry, finding two potential conditions that they believe equity attached to make-whole relief, limiting its availability.[339] The special conditions that the plan fiduciaries believe foreclose make-whole relief as an option under section 502(a)(3) are that make-whole relief was only recognized where the fiduciary breach harmed the trust corpus, and that any recovery correspondingly went to the trust corpus.[340]

The first argument, requiring harm to the trust corpus, is attractive from a defending fiduciary's perspective because *Amschwand*-type claims involve welfare benefit plans which often do not have an identifiable trust corpus. If there is no trust corpus, it cannot be harmed. If there is no harm to the

Smith Barney, Inc., 530 U.S. 238, 250-51 (2000)) (beneficiaries sought *restitution* of plan assets against a transferee of tainted plan assets (under section 502(a)(3)).

339. *See Amschwand* Opp. Cert., *supra* note 26, at *10.

340. *Id.*

corpus, make-whole relief is unavailable, ergo relief under section 502(a)(3) is unavailable and the *Amschwand*-type plaintiffs fall through the hole entirely. Because we have seen that make-whole relief was available in cases where there was no harm to the trust corpus, or where the trust corpus had ceased to exist, this argument fails even if we accept the proposition that ERISA welfare benefit plans do not have an identifiable trust corpus. But, we need not accept that proposition because the corpus in an ERISA plan is the promised plan benefit.

The second argument that any make-whole monetary relief must run back into the trust corpus is belied by ERISA's remedial scheme. Certainly, relief for loss *to the plan* is payable *to the plan* under ERISA sections 409 and 502(a)(2).[341] Relief for these types of cases would, therefore, be payable to the trust corpus. But the availability of relief payable back into the trust corpus does *not* foreclose the availability of relief to the individual beneficiary, as pre-fusion trust law cases evidence, and which is reflected in ERISA section 502(a)(3).

As explained in Part II.D *supra*, ERISA section 409(a) specifies the remedies available against fiduciaries for losses to the plan and is enforceable in an action brought under section 502(a)(2). Again, it is important to remember that section 502(a)(2) only authorizes plan-wide relief. Thus, plaintiffs seeking individualized relief for fiduciary breaches are forced to seek relief under section 502(a)(3). Plan fiduciaries typically argue that allowing monetary remedies unavailable under section 409(a) to individuals as equitable relief under section 502(a)(3) effectively renders section 409(a) "superfluous"[342] and in conflict with the Supreme Court's repeated characterization of such relief as "money damages."[343]

The first argument is based on *Massachusetts Mutual Life Insurance Co. v. Russell*, where the Supreme Court held that section 409(a) authorizes relief only for the benefit of the entire plan.[344] The appropriate enforcement provision is section 502(a)(2). When read together, the liability and enforcement provisions encapsulate that category of common law cases that awarded make-whole relief to the trust corpus. But that still leaves the category of cases analogous to the modern *Amschwand*-type category of

341. The breaching fiduciary "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." ERISA § 409(a) (emphasis added).

342. Fiduciaries' *Enron* Brief, *supra* note 26.

343. *Id.* (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 252 (1993); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002)).

344. 413 U.S. 134, 139-44 (1985).

cases, where there was no trust and where the equity court awarded make-whole relief to the individual beneficiary. The second category of claims at common law involved fiduciary breaches that did not result in loss to the trust corpus, either because the loss was to the beneficiary directly or because the trust corpus no longer existed. This is the type of claim that is most analogous to the *Amschwand* category of claims. In such cases, recovery could not be to the trust, and so the equity courts awarded make-whole relief *to the individual*. Viewing the common law trust and trustee cases through this prism, therefore, clarifies the distinction between make-whole relief to the trust—mirrored in sections 409(a) and 502(a)(2)—and make-whole relief to the individual—mirrored in section 502(a)(3).

This Article illustrates that the Supreme Court has erred in more ways than one. As Professor Langbein has argued, the Court's initial error was to impose an arcane law-equity distinction on ERISA section 502(a)(3) in the first place.[345] Justice Scalia compounded that error in *Great-West* not only by failing to consider make-whole relief at all, but also by declaring that courts could determine whether a remedy fell within the narrowly-construed pre-fusion time warp by ready reference to "standard current works."[346] Despite Justice Scalia's assurances, these works simply do not make the answer clear. Because of the lack of clarity, a canny lawyer can read between the lines and find support for the requirement of special conditions even when none existed, simply by trolling the cases and finding an absence of an exact match to the ERISA case being litigated. But, as illustrated above, one can also troll the cases and find support for the opposite conclusion. At the end of the inquiry, the conclusion is not a stunning one. The proponents of make-whole relief appear to have the better of the argument, and should be able to fit their relief into ERISA section 502(a)(3), but although not a contortion, it is a tight squeeze.

345. Langbein, *What ERISA Means by "Equitable," supra* note 21, *passim*.
346. *Great-West*, 534 U.S. at 217.