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# ERISA: PUNITIVE DAMAGES FOR BREACH OF FIDUCIARY DUTY

*Fiduciary duty principles are central to the protection provided by the Employee Retirement Income Security Act (ERISA or Act). The law is unsettled, however, about whether Congress intended to extend punitive damages, a typical remedy for breach of fiduciary duty under the common law, to the applicable ERISA provision. This Note argues that the plain meaning of the ERISA fiduciary duty provision, the legislative history underlying the purposes and policies of the Act, and the availability of punitive damages under analogous law, taken together, support the recovery of punitive damages for a breach of ERISA's fiduciary duty provision.*

## INTRODUCTION

ON LABOR DAY, 1974, President Gerald Ford signed the Employee Retirement Income Security Act (ERISA or Act),<sup>1</sup> predicting that it would provide significant benefits for labor-management relations.<sup>2</sup> ERISA, a complex Act regulating pension plans,<sup>3</sup> consolidates and refines the patchwork of federal regulation that previously had governed such plans.<sup>4</sup>

There are approximately 450,000<sup>5</sup> private pension plans<sup>6</sup> in the United States. These funds comprise the largest single source of funds for the New York Stock Exchange.<sup>7</sup> Fiduciaries of pension funds acquire nearly sixty-five percent of the corporate stocks and bonds issued in capital markets.<sup>8</sup> The magnitude of pension fund activity and retirement security needs of American workers

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1. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1381 (1982) and scattered sections of 26 U.S.C. (1982)).

2. Statement on the Employee Retirement Income Security Act of 1974, 10 WEEKLY COMP. PRES. DOC. 1084 (Sept. 2, 1974).

3. ERISA supersedes all state laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). See *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir. 1978) (Congress intended ERISA to preempt the entire field of employee benefit plan regulation).

4. See Lieben, *The Coverage of Title I of ERISA: Some Recent Developments*, 61 NEB. L. REV. 428, 428-29 & nn.4-16 (1982).

5. Note, *The Employee Retirement Income Security Act of 1974 and Union Influence in Pension Fund Investment Decisions*, 12 FORDHAM URB. L.J. 151, 152 (1984).

6. ERISA explicitly excludes "governmental plans" from coverage. 29 U.S.C. § 1003(b)(1). A "governmental plan" is a plan established or maintained by the government of the United States, any state government, or any political subdivision or agency thereof for the benefit of public employees. *Id.* § 1002(32).

7. Note, *supra* note 5, at 152.

8. *Id.*

prompted Congress to reform federal pension regulation.<sup>9</sup>

In the eleven years since the passage of ERISA, thousands of lawsuits filed under Title I of the Act have resolved many of its interpretive ambiguities.<sup>10</sup> One issue that remains unsettled, however, is whether ERISA permits a plaintiff to recover punitive damages for a pension fund manager's breach of fiduciary duty.

Courts have reached opposing conclusions in answering this question. In *Russell v. Massachusetts Mutual Life Insurance Co.*,<sup>11</sup> the Ninth Circuit held that punitive damages against fiduciaries are contemplated and justified by the Act, although under very "limited circumstances."<sup>12</sup> The Eighth Circuit, in *Dependahl v. Falstaff Brewing Co.*,<sup>13</sup> gave a sweeping statement of the opposite view, saying that "punitive damages are [not] provided for in ERISA."<sup>14</sup> District courts also have split on this issue: some have permitted punitive damage awards in conformity with *Russell*,<sup>15</sup> while others have relied on *Dependahl*, denying personal liability for punitive damages for breaches of fiduciary duty by plan managers.<sup>16</sup> In re-

9. 29 U.S.C. § 1001(a).

10. More than 3000 Title I lawsuits were filed in the first five years of ERISA's existence. Gallagher, *Recent Developments in Concepts Relating to Fiduciary Liability*, 16 FORUM 753, 753 (1981).

11. 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 53 U.S.L.W. 4938 (U.S. June 25, 1985). *Accord* Winterrowd v. David Freedman & Co., 724 F.2d 823 (9th Cir. 1984). The Tenth Circuit has declined to decide the issue. *Carter v. Central States Pension Plan*, 656 F.2d 575 (10th Cir. 1981).

12. *Russell*, 722 F.2d at 491-92.

13. 653 F.2d 1208 (8th Cir.) (dictum), *cert. denied*, 454 U.S. 968 (1981).

14. *Id.* at 1216. The court made this observation in dictum, as it was not required to decide the general issue of punitive damages under ERISA. The court merely held that punitives were inappropriate for conduct prohibited under 29 U.S.C. § 1140. *Id.* at 1216-17. *Dependahl's* general statement that punitives are not recoverable under ERISA includes within its scope the narrower principle that punitives are not recoverable against individuals for breaches of fiduciary duty.

15. *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677, 680 (C.D. Cal. 1982); *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623, 626 (W.D.N.Y. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Employee Benefits Cas. 1010, 1012 (N.D. Ill. 1982), *aff'd in part on other grounds*, 732 F.2d 1331 (7th Cir. 1984); *Eaton v. D'Amato*, 581 F. Supp. 743, 747-48 (D.D.C. 1980); *accord Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980); *cf. VAW v. Federal Forge, Inc.*, 583 F. Supp. 1350, 1356-57 (W.D. Mich. 1984) (court awarded mental distress damages on the same rationale as *Russell* offers for punitives); *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232, 1235-36 (E.D. Mo. 1983) (violations of "technical requirements" distinguishable from breaches of fiduciary duty).

16. The cases that have denied punitive damages usually cite *Dependahl*, but they do not necessarily endorse *Dependahl's* blanket disapproval of punitive damages. *See* Cowden v. Montgomery County Soc'y for Cancer Control, 591 F. Supp. 740, 753 (S.D. Ohio 1984) (finding no fiduciary breach, but allowing possibility of punitives recovery under proper circumstances); *Hechenberger v. Western Elec. Co.*, 570 F. Supp. 820, 822-23 (E.D. Mo. 1983) (plaintiff did not allege degree of misconduct necessary to constitute a fiduciary breach).

versing *Russell*, the Supreme Court left the issue of recovery of punitive damages by a plan unresolved.<sup>17</sup>

This Note analyzes the split between the circuits. It begins by outlining the fiduciary provisions of ERISA as well as the general principles underlying fiduciary duty.<sup>18</sup> It then analyzes the conflicting judicial rationales that led to the split.<sup>19</sup> In particular, this Note examines the plain meaning of the ERISA fiduciary duty provision,<sup>20</sup> the Act's legislative history, the underlying purposes and policies of the Act,<sup>21</sup> and the availability of punitive damages under analogous law.<sup>22</sup> This Note concludes that punitive damages are recoverable under ERISA in suits against individuals based on breach of fiduciary duty.

## I. PREEMINENCE OF FIDUCIARY DUTY

### A. Under ERISA

Title I of ERISA spells out the responsibilities of pension fund

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Some cases could be read to allow punitive damages against fiduciaries, even though the court denied punitive damages against a pension plan. *See* *Diano v. Central States, Southeast & Southwest Areas Health, Welfare & Pension Funds*, 551 F. Supp. 861 (N.D. Ohio 1982) (distinguishing between plan and fiduciary, quoting unreported case of *Short v. Junior Steel Co. Employees Pension Plan & Trust*, No. CV80-844 NRP (C.D. Cal. Sept. 18, 1980)); *Maxfield v. Central States, Southeast & Southwest Areas Health, Welfare & Pension Funds*, 559 F. Supp. 158, 160 (N.D. Ill. 1982) (punitive damages claim dismissed because pension plan would ultimately have been liable); *see also* PENS. REP. (BNA) No. 317, at A-13 (Nov. 17, 1980) (abstract of *Short*); *cf.* *Hopkins v. New York Tel. Co.*, No. 82 Civ. 4461 (WCC) (S.D.N.Y. Nov. 27, 1984) (available May 1, 1985 on WESTLAW, DCT database) (reserving judgment on whether punitives reasonable).

One court has expressly denied punitive damages in an ERISA suit against an individual fiduciary, specifically rejecting the statutory interpretation in *Russell*. *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 750-52 (N.D. Ga. 1983). Several other courts have unequivocally denied punitive damages in all ERISA cases. *See* *Heine v. Clark Equip. Co.*, No. 82-C-1286 (N.D. Ill. Dec. 21, 1983) (available Nov. 10, 1984 on LEXIS, Genfed library, Cases file); *Wardle v. Central States, Southeast & Southwest Area Pension Fund*, PENS. REP. (BNA) No. 239, at D-1 (S.D. Ind. Apr. 23, 1979), *aff'd on other grounds*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Bell v. Southern Or. Log Scaling & Grading Bureau*, No. 76-431 (D. Or. Aug. 5, 1976) (available Nov. 10, 1984 on LEXIS, Genfed library, Cases file); *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80, 82 (C.D. Cal. 1976).

17. "In light of this holding, we do not reach any question concerning the extent to which [§ 1109] may authorize recovery of extracontractual compensatory or punitive damages from a fiduciary by a plan." (emphasis in original). *Massachusetts Mutual Life Ins. Co. v. Russell*, 53 U.S.L.W. 4938, 4941 n.12 (June 25, 1985), *rev'g* 722 F.2d 482 (9th Cir. 1983).

18. *See infra* notes 23-69 and accompanying text.

19. *See infra* notes 70-140 and accompanying text.

20. *See infra* notes 70-90 and accompanying text.

21. *See infra* notes 91-110 and accompanying text.

22. *See infra* notes 111-40 and accompanying text.

fiduciaries.<sup>23</sup> It encompasses the labor law provisions and provides for the protection of employee benefit rights.<sup>24</sup> It establishes comprehensive reporting and disclosure requirements,<sup>25</sup> minimum funding,<sup>26</sup> vesting and participation standards,<sup>27</sup> stringent fiduciary standards for those who handle benefit funds,<sup>28</sup> and criminal and civil liability for violations of the Act.<sup>29</sup>

Congress declared that the fiduciary responsibility provisions of ERISA are central to Title I's protection of employee benefit rights.<sup>30</sup>

Any comprehensive program to prevent abuses in our private retirement system must also focus on the area of fiduciary responsibility . . . . Workers' pension funds deserve strong fiduciary protections to insure that their interests are not subordinated to the self-enriching intrigues of "insiders" to the plan. This bill will establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds.<sup>31</sup>

Prior acts<sup>32</sup> failed to adequately address the obligations and duties of pension fund fiduciaries. Internal Revenue Code regulations dealing with pension plans focused on the production of revenue and the prevention of tax evasion.<sup>33</sup> The Labor-Management Relations Act addressed the narrow problem of employee fund diversion by employers and union officials.<sup>34</sup> The 1958 Welfare and Pension

23. 29 U.S.C. §§ 1001-1144 (1982). ERISA has three other titles. Title II, codified at scattered sections of 26 U.S.C. (1982), outlines the tax consequences of ERISA as an amendment to the Internal Revenue Code, including the tax treatment of individual retirement accounts (IRA's) and Keogh plans. Title III clarifies the jurisdiction of federal agencies and establishes procedures for the joint administration of the Act by the Secretaries of Treasury and Labor. 29 U.S.C. §§ 1201-1242. Title IV establishes a retirement plan termination insurance program administered by the Pension Benefit Guaranty Corporation (PBGC). *Id.* §§ 1301-1381.

24. *Id.* §§ 1001-1144.

25. *Id.* §§ 1021-1031.

26. *Id.* §§ 1081-1086.

27. *Id.* §§ 1051-1061.

28. *Id.* §§ 1101-1114.

29. *Id.* §§ 1131-1144.

30. Dobranski, *The Arbitrator as Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U. L. REV. 65, 67 n.7 (1982).

31. 120 CONG. REC. 29,951 (1974) (statement of Sen. Ribicoff), *reprinted in* 3 SUB-COMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4795 (1976) [hereinafter cited as LEGISLATIVE HISTORY].

32. *See supra* note 4.

33. 120 CONG. REC. 29,956 (1974) (statement of Sen. Bentsen), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 31, at 4811.

34. *Id.*

Plans Disclosure Act purported to protect the pension participant, but it only required the filing of limited information with the Secretary of Labor and the furnishing of such information to employees upon request.<sup>35</sup> It lacked any substantive fiduciary standards and relied on the "initiative of the individual employee to police the management of his plan."<sup>36</sup>

These regulatory gaps permitted widespread abuse within the pension system.<sup>37</sup> The escapades of pension fund fiduciary George Barasch epitomized the abuses that prompted pension fund regulation reform.<sup>38</sup> Barasch dominated two unions and their employee benefit plans and effectively controlled approximately \$15,500,000 of the members' money.<sup>39</sup> He used this money to capitalize several corporations and create a management firm to administer the pension funds.<sup>40</sup> He also channeled various funds into several foreign corporations, including "research foundations," which he had created.<sup>41</sup>

Barasch diverted almost five million dollars of the employees' money.<sup>42</sup> For his efforts, he received an annual salary of \$35,000 from the management firm, \$407,000 in life insurance coverage, and \$54,098 per year for life in total retirement benefits.<sup>43</sup> His pension benefit alone was worth \$796,925.<sup>44</sup>

Only after pressure from a Senate subcommittee as well as federal and state agencies did Barasch return \$4.2 million to the employee benefit funds.<sup>45</sup> However, he was never prosecuted because he had broken no law.<sup>46</sup> The Barasch episode and others like it provided the primary impetus for the passage of ERISA. According to Senator Bentsen, one of the chief sponsors of the legislation, ERISA "will protect workers from these kinds of fiduciary abuses."<sup>47</sup>

The broad fiduciary provisions of ERISA begin with an expansive definition. A fiduciary is defined as one who "exercises any

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35. *Id.*

36. *Id.* at 29,957, reprinted in 3 LEGISLATIVE HISTORY, *supra* note 31, at 4811.

37. *Id.*, reprinted in 3 LEGISLATIVE HISTORY, *supra* note 31, at 4795.

38. *Id.* at 29,951, reprinted in 3 LEGISLATIVE HISTORY, *supra* note 31, at 4795.

39. *Id.*, reprinted in 3 LEGISLATIVE HISTORY, *supra* note 31, at 4796.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

discretionary authority or discretionary control" over a plan or its assets, gives investment advice for a fee, or has any discretionary authority in a pension plan's administration.<sup>48</sup>

The definition of fiduciary has a broad sweep. It does not enumerate certain pension plan officers but instead defines a fiduciary in a functional manner. Fiduciaries are, on one level, individuals who exercise direct control over the plan's management and assets or who give advice for a fee about investment. They are fiduciaries based on the nature of their positions.<sup>49</sup> Moreover, officers in a corporation whose employees are covered by a plan may be fiduciaries, if they have authority over the plan, even though they may not ever have used that authority. Thus, individual officers who have only a tangential relationship with the pension plan also find themselves within ERISA's broad embrace:

In the context of plans with few participants, the term "fiduciary . . ." may include not only the employer, the plan administrator named in the plan and the trustee of a trustee plan, but also the officers and directors of the employer, any employee responsible for administering the plan, the actuary, the accountant, the investment adviser, the lawyer, any other plan consultant, including even an insurance agent instrumental in establishing the plan. Indeed, the list of potential fiduciaries may be limited only by the creativity of a claimant's lawyer and the facts and circumstances of a particular claim.<sup>50</sup>

ERISA compels fiduciaries to perform several duties.<sup>51</sup> They must act for the exclusive purpose of "providing benefits to participants and their beneficiaries."<sup>52</sup> Their standard of behavior is that of the "prudent man acting in like capacity and familiar with such matters."<sup>53</sup> Fiduciaries must prudently diversify a plan's investments and comply with the plan documents,<sup>54</sup> but are prohibited from engaging in certain transactions "if they know or should know" the transaction involves a "party in interest."<sup>55</sup>

If fiduciaries breach any of their duties, they are *personally* liable for any resulting losses.<sup>56</sup> They must restore to the plan any profits

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48. 29 U.S.C. § 1002(21)(A) (1982).

49. Gallagher, *supra* note 10, at 754.

50. Pillsbury, *Employee Benefit Plan Claims Under ERISA*, 55 CONN. B.J. 357, 375 (1981).

51. See 29 U.S.C. § 1104(a)(1) (1982).

52. *Id.* § 1104(a)(1)(A)(i).

53. *Id.* § 1104(a)(1)(B).

54. *Id.* § 1104(a)(1)(C).

55. *Id.* § 1106(a).

56. *Id.* § 1109(a).

made through use of the plan assets and are "subject to such other equitable or remedial relief as the court may deem appropriate," including their removal as fiduciaries.<sup>57</sup> Fiduciaries may also be liable for the acts or omissions of co-fiduciaries.<sup>58</sup> In addition, they are subject to a bonding requirement<sup>59</sup> and civil penalties if found to be a party in interest to a prohibited transaction.<sup>60</sup>

### B. *General Principles of Fiduciary Duty*

Traditionally, fiduciaries have occupied a special place under the law:

One is said to act in a "fiduciary capacity" or to receive money or contract a debt in a "fiduciary capacity," when the business which he transacts, or the money or property which he handles, is not his own for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating *great confidence and trust* on the one part and a *high degree of good faith* on the other part.<sup>61</sup>

Such a special relationship imposes a stringent standard of behavior on the fiduciaries. Chief Judge (later Justice) Cardozo articulated the quintessential definition of this standard in *Meinhard v. Salmon*:<sup>62</sup>

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.<sup>63</sup>

This rigorous standard of behavior is enforced by liberal remedies which are available for breach of a fiduciary duty. Awards are not limited by the amount of damage inflicted by such breach.<sup>64</sup> Indeed, significant penalties have been imposed upon a variety of

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57. *Id.*

58. *Id.* § 1105.

59. *Id.* § 1112(a).

60. *Id.* § 1132(i).

61. BLACK'S LAW DICTIONARY 564 (rev. 5th ed. 1979) (emphasis added); see also *In re Estate of Heilman*, 37 Ill. App. 3d 390, 396, 345 N.E.2d 536, 540 (1976) ("A fiduciary relation arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal."); *Williams v. Griffin*, 35 Mich. App. 179, 183, 192 N.W.2d 283, 285 (1971) (fiduciary relation exists "when there is a reposing of faith, confidence, and trust, and the placing of reliance by one upon the judgment and advice of another").

62. 249 N.Y. 458, 164 N.E. 545 (1928).

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

64. See, e.g., *infra* text accompanying notes 109-10.



breaching fiduciaries:<sup>65</sup> an agent under contract,<sup>66</sup> a pre-ERISA pension plan manager,<sup>67</sup> a public employee,<sup>68</sup> and a corporate employee.<sup>69</sup>

## II. THE CASE FOR ALLOWANCE OF PUNITIVE DAMAGE AWARDS

The debate over the grant of punitive damages under ERISA centers on differing interpretations of the same three sources: ERISA's actual language, its legislative history, and analogous case law. Though *Dependahl v. Falstaff Brewing Corp.*,<sup>70</sup> in denying punitive damages, merely cited other conclusory cases rather than analyzing the relevant sources,<sup>71</sup> some district court cases that have

65. Historically, the first exceptions to the rule prohibiting punitive damages in contract actions were in breaches of fiduciary duties by a "public utility" or by an employer. This was due to the overpowering economic leverage possessed by these defendants. The plaintiffs could do very little to protect themselves from the defendant's bad faith. Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 678 (1975). ERISA governs a disparate power relationship between fiduciaries and beneficiaries that is analogous to the power disparity in the employer/employee relationship.

66. *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958) (then Circuit Judge Warren Burger allowed punitive damages for breach of an agent's fiduciary duty).

67. *Werkschull v. United California Bank*, 85 Cal. App. 3d 981, 149 Cal. Rptr. 829 (1978).

68. *County of Cook v. Barrett*, 36 Ill. App. 3d 623, 344 N.E.2d 540 (1975) (county entitled to recover \$180,000 in bribes received by a county clerk who was held to be a fiduciary; the absence of any resulting damage deemed irrelevant).

69. *American Timber & Trading Co. v. Niedermeyer*, 276 Or. 1135, 558 P.2d 1211 (1976) (corporate fiduciary liable to repay income diverted to himself as well as salary and bonuses received while diverting income).

70. 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981).

71. The *Dependahl* court merely stated,

We do not think punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts.

*Id.* at 1216. As support for this broad statement, the court relied on *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979) and *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D. Cal. 1976). *Calhoun* concerned a summary judgment motion by the same parties who were defendants in *Dependahl*. The court said only that "[p]unitive damages are not recoverable under ERISA." *Calhoun*, 478 F. Supp. at 359. The *Calhoun* court also relied on *Hurn*. While *Hurn* held that ERISA "permits no recovery of punitive damages," 424 F. Supp. at 82, the *Hurn* court, like the *Dependahl* and *Calhoun* courts, neglected to provide any analysis in support of its conclusion. Thus, *Dependahl* is an analytical orphan, though some other cases may provide foster parenting.

Perhaps the *Dependahl* court's statements about punitive damages under ERISA were conclusory because they were dicta. The specific issue in *Dependahl* was whether punitive damages were appropriate in a case of "interference with employee benefit plans." *Dependahl*, 653 F.2d at 1216. This particular violation, which is analogous to a common law tortious interference with contract claim, see *id.* at 1217, is covered by 29 U.S.C. § 1140. Section 1140, like § 1109, relies on the remedial provisions of § 1132, which courts have used

denied punitive damages have attempted to base their conclusions on somewhat more substantial legal underpinnings. The court in *Russell v. Massachusetts Mutual Life Insurance Co.*,<sup>72</sup> however, analyzed the three sources in detail in upholding a punitive damage award. Examination of these sources reveals the strength of the *Russell* court's analysis.

### A. *Statutory Interpretation*

Civil enforcement of ERISA is provided in section 1132(a) of the Act:

A civil action may be brought— . . .

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .<sup>73</sup>

Section 1132(a)(3), which is restricted to equitable relief, is the remedy for violations of ERISA that are not caused by breaches of fiduciary duty. Section 1132(a)(2), on the other hand, is far more expansive, covering violations of the Act arising from fiduciary breaches. Section 1109, which section 1132(a)(2) specifically incorporates, provides a cause of action for breach of fiduciary duty, empowering members of a pension plan to sue fiduciaries.<sup>74</sup> If the fiduciaries are found liable for breaching their duty, they must compensate the fund for any loss resulting from the breach and return any profits they earned through the improper use of plan assets.<sup>75</sup> Significant to the argument favoring an award of punitive damages is the availability of "such *other equitable or remedial relief* as the court may deem appropriate"<sup>76</sup>. This language gives courts broad

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to allow punitive damages in appropriate circumstances. See cases cited *supra* note 15. But see cases cited *supra* note 16. However, the *Dependahl* court found punitive damages inappropriate, inasmuch as it characterized the *Dependahl* defendants' wrongdoing as essentially a breach of contract. The court said, "[t]he common law of contract refuses to allow an award of punitive damages." *Dependahl*, 653 F.2d at 1217. Thus, the *Dependahl* court held only that an award of punitive damages is inappropriate in a claim based on § 1140.

72. 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 53 U.S.L.W. 4938 (U.S. June 25, 1985).

73. 29 U.S.C. § 1132(a)(2)-(3) (1982).

74. *Id.* § 1109(a).

75. *Id.*

76. *Id.* (emphasis added).

discretion to tailor appropriate relief.<sup>77</sup>

Despite the existence of a remedy for breaches of fiduciary duty in section 1132(a)(2), however, some courts seem to rely solely upon the remedy for breaches not involving a fiduciary duty in section 1132(a)(3) to find that only equitable relief is available under ERISA.<sup>78</sup> In doing so, these courts misinterpret the statute. Congress specifically created two separate provisions describing appropriate relief in different terms. This distinction cannot be ignored. Canons of statutory construction require statutes to be read and construed as a whole.<sup>79</sup> Only equitable relief may be awarded under section 1132(a)(3); both equitable and legal relief are allowed under section 1132(a)(2). If the remedies available under section 1132(a)(2) were intended to be identical to those available under section 1132(a)(3), then the reference in section 1132(a)(2) to section 1109 would be mere surplusage, since the language of section 1132(a)(3) would otherwise necessarily encompass an action for breach of fiduciary duties.

An inference that Congress included a completely unnecessary provision is usually not assumed.<sup>80</sup> The interpretation that the extent of relief available under section 1132(a)(2) is different from that available under 1132(a)(3) avoids this unsettling inference. A court should prefer a construction that gives each element of the statute a

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77. See generally Gallagher, *supra* note 10, at 763-64 (discussing breadth of fiduciary provisions, fiduciary standard, and scope of both liability and relief); Pillsbury, *supra* note 50, at 381 (“[T]he remedies available to ERISA claimants, although still undefined, are potentially very broad because they may even include awards of punitive damages or damages for emotional distress.”).

78. See, e.g., Heine v. Clark Equip. Co., No. 82-C-1286 (N.D. Ill. Dec. 21, 1983) (available Nov. 10, 1984 on LEXIS, Genfed library, Cases file); Wardle v. Central States, Southeast and Southwest Areas Pension Fund, PENS. REP. (BNA) No. 239, at D-1 (S.D. Ind. Apr. 23, 1979), *aff’d on other grounds*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); Bell v. Southern Or. Log Scaling & Grading Bureau, No. 76-431 (D. Or. Aug. 5, 1976) (available Nov. 10, 1984 on LEXIS, Genfed library, Cases file).

79. Northwest Paper Co. v. Federal Power Comm’n, 344 F.2d 47, 50 (8th Cir. 1965); see Cowden v. Montgomery County Soc’y for Cancer Control, 591 F. Supp. 740, 753 (S.D. Ohio 1984). But see Whitaker v. Texaco, Inc., 566 F. Supp. 745, 751 (N.D. Ga. 1983) (“[T]he language of section 1109 (‘equitable or remedial relief as the court [sic] may deem appropriate’) is sufficiently parallel to the language of section 1132(a)(3) (‘appropriate equitable relief’) to prompt the conclusion that punitive damages are not available for breach of fiduciary duty either.”).

80. See, e.g., Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976) (“[A] statute should not be construed in such a way as to render certain provisions superfluous or insignificant.”); Wilderness Soc’y v. Morton, 479 F.2d 842, 856 (D.C. Cir.) (“[A]ll words and provisions of statutes are intended to have meaning and are to be given effect, and words of a statute are not to be construed as surplusage.”), *cert. denied*, 411 U.S. 917 (1973); accord Equal Employment Opportunity Comm’n v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977); Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977).

different function.<sup>81</sup> This is particularly relevant when Congress includes precise language in one section of a statute but omits it in another section of the same act. “[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>82</sup>

The significant language in ERISA is the inclusion of “equitable or remedial” relief for breaches of fiduciary duty while limiting relief for general violations to “equitable.” Remedial relief allows the recovery of damages, a form of legal relief. The addition of “remedial relief” under section 1132(a)(2) supports the conclusion that *both* equitable and legal relief are available for breaches of fiduciary duty. Since the fiduciary responsibility provisions are central to the Act’s purpose,<sup>83</sup> broader relief is available for breaches of fiduciary duty than for other violations of the Act. This interpretation is consistent with ERISA’s general tone.<sup>84</sup>

Within section 1109 the phrase “equitable or remedial” relief is significant in itself, apart from the distinction discussed above. The phrase would be meaningless if a discretionary award of punitive damages was not contemplated by the Act. A court’s equitable power to order a fiduciary to personally restore a plan’s status quo can remedy any damage inflicted by a fiduciary’s breach. Thus, the court’s discretionary power to award *additional* remedial relief would never be exercised unless section 1109 envisions some action against a fiduciary beyond returning the plan to its condition prior to the breach. A limited interpretation of section 1132(a)(2) does not give full effect to the Act.<sup>85</sup>

Finally, ERISA provides for court removal of the fiduciary,<sup>86</sup> criminal sanctions, including imprisonment,<sup>87</sup> and the award of reasonable attorney’s fees and costs.<sup>88</sup> These provisions and the Act’s

81. *United States v. Dinerstein*, 362 F.2d 852, 855-56 (2d Cir. 1966).

82. *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

83. *See supra* notes 30-47 and accompanying text.

84. The proper course in construing statutes is to “search out and follow the true intent of the legislature and adopt that sense of words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.” *Hattaway v. United States*, 304 F.2d 5, 9-10 (5th Cir. 1962) (quoting *United States v. Winn*, 28 F. Cas. 733, 734 (C.C.D. Mass. 1838) (No. 16,740)).

85. For discussion of this principle of statutory construction, see *supra* note 80.

86. 29 U.S.C. § 1109(a).

87. *Id.* § 1131.

88. *Id.* § 1132(g). It may be argued that punitive damages should not be available under ERISA because a large award of attorney’s fees provides the same deterrent effect. However, this argument is susceptible to the same criticism as the argument discussed *infra* at notes 97-100 and accompanying text. That is, the mere availability of one method of punishment and

broad definition of a fiduciary<sup>89</sup> evince ERISA's wide remedial scope for breaches of fiduciary duties.<sup>90</sup>

### B. *Legislative Purpose, History, and Policy*

ERISA is a remedial statute<sup>91</sup> explicitly enacted to safeguard "the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate *remedies, sanctions* and ready access to the Federal courts."<sup>92</sup> The legislative history underlying the Act exposes the breadth of these remedies and sanctions: "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with *broad remedies* for redressing or *preventing violations* of the Act. [Our intent] is to provide the *full range of legal and equitable remedies available* in both state and Federal courts . . . ."<sup>93</sup>

The use of the word "sanctions" in the Act and the apparent Congressional intent to prevent violations of the Act indicate goals of both punishment and deterrence. Courts rationalize punitive damages on three bases: punishment, deterrence, and "as a private aid to courts in enforcing established norms of conduct by compen-

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deterrence does not necessarily mean that Congress intended to preclude other effective methods. An award of punitive damages is completely discretionary under § 1109. Therefore, in those cases where exorbitant attorney's fees and costs would sufficiently fulfill the function of punitive damages, the court need not award them. In those cases of egregious misconduct, however, the court's power to award punitive damages allows it the discretion to impose damages beyond the fixed amount of attorney's fees and costs. These fees and costs might be low compared to recent punitive damage awards for breach of fiduciary duty. *See, e.g., infra* text accompanying notes 109-10 (discussing large punitive damage awards).

89. *See supra* notes 48-50 and accompanying text; *see generally* Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1, 4-5 (1977) (discussing fiduciaries, parties in interest, and disqualified persons).

90. It is a well-settled principle that remedial statutes are to be liberally construed to effectuate their purposes. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

91. "Unlike prior federal regulation, ERISA is directed specifically at the protection of employees and the guaranteeing of their benefits. It is a 'pro-employee' act designed to provide a wide variety of safeguards and minimum standards with respect to the establishment, operation, and administration of benefit plans." Lieben, *supra* note 4, at 429-30. The House Report on an earlier version of ERISA stated that "the primary purpose of [ERISA] is the protection of individual pension rights." H.R. REP. NO. 533, 93d Cong., 1st Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639.

92. 29 U.S.C. § 1001(b) (1982) (emphasis added).

93. H.R. REP. NO. 533, *supra* note 91, at 17, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4655; S. REP. NO. 127, 93d Cong., 1st Sess. 35, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4871 (emphasis added).

sating for otherwise non-compensable injuries."<sup>94</sup> Punitive damages, then, serve to effectuate the explicit goals Congress intended for ERISA.

Beyond doubt, deterrence is the predominant justification for punitive damages under ERISA. Deterrence becomes particularly crucial in commercial settings where fiduciaries may abuse the pension funds and the responsibilities entrusted to them.

The need for punitive damages and the effect of deterrence is most acute in the situation where the defendant tacitly determines that he will engage in wrongful conduct with the expectation of greater profits and run the risk of later paying compensation for the conduct. In this situation, the defendant finds it cheaper to pay damages, if necessary, than to proceed lawfully. If the wrongdoer is assessed compensatory damages, the maximum penalty will merely restore him to the status quo and he is likely to resort to wrongful conduct again. On the other hand, if punitive damages exist, the risk of a substantial penalty may *deter* his wrongful conduct.

. . . .

The deterrent value of punitive damages is greatest in affecting commercial behavior.<sup>95</sup>

Thus, without the threat of personal liability for punitive damages, the fiduciary will be more likely to breach his duty because the only civil remedy will be restoration to the status quo ante.

The Senate Report accompanying the ERISA legislation indicates that Congress intended to deter ERISA violations. "Under the bill, the Secretary of Labor and participants and beneficiaries of a plan may bring civil actions for *any appropriate legal or equitable relief* to redress or *restrain* a violation of fiduciary duties."<sup>96</sup> Inasmuch as Congress understood the importance of restraining ERISA violations, it provided for a wide variety of remedies. Punitive damages clearly fall within the full range of legal and equitable remedies that Congress intended to provide for breaches of fiduciary duties.

Some district courts have used the availability of criminal penalties<sup>97</sup> in ERISA to justify denying punitive damages to remedy breaches of fiduciary duties: "It is the opinion of this Court that criminal penalties are a sufficient deterrence . . . such that punitive damages are not necessary to protect the rights of plan participants

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94. Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 652 (1982).

95. *Id.* 653-63.

96. S. REP. NO. 383, 93d Cong., 1st Sess. 104, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4890, 4988 (emphasis added).

97. 29 U.S.C. § 1131 (1982).

and beneficiaries created thereby.”<sup>98</sup> The mere availability of criminal sanctions, however, should not preclude an effective alternative for deterrence.

One commentator discussing the availability of punitive damages under statutes providing both criminal and civil sanctions noted that “[t]o dispose of their availability merely because a criminal law exists is to remove an effective method for deterring outrageous conduct.”<sup>99</sup> Other commentators have observed that much criminal conduct is rarely prosecuted and that crimes involving unlawful commercial behavior “depend on the threat of civil punishment for effective enforcement.”<sup>100</sup>

The availability of criminal sanctions should not be interpreted to exclude other deterrents. Congress intended to provide a greater remedy than compensatory damages. It enacted the criminal provisions to punish the wrongdoer. Foreclosure of punitive damage awards by the availability of criminal sanctions would nullify Congressional intent in cases of malicious noncompliance with fiduciary duties where the court is reluctant to invoke the criminal penalties.

Opponents of the recovery of punitive damages for breach of fiduciary duty use yet another rationale to justify their view. They argue that the protection of individual pension rights must be balanced against the burden of the increased cost of assuring the continuation of voluntary pension and benefit plans. The court in *Whitaker v. Texaco*<sup>101</sup> adopted such a view. Reasoning that punitive damages would so burden employers that they would lose incentive to maintain private pension plans,<sup>102</sup> the court cited Senator Nelson’s comments during the floor debate on ERISA: “[I]n the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping the costs within reasonable limits for employers.”<sup>103</sup>

The legislative history of ERISA reveals, however, that the projected increases in costs that concerned Congress were those associated with the recurring regulation requirements imposed by the Act, such as the new minimum funding and vesting require-

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98. *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232, 1236 (E.D. Mo. 1983); see *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 (N.D. Ga. 1983).

99. Comment, *supra* note 94, at 665.

100. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 656-57 (1980).

101. *Whitaker*, 566 F. Supp. 745 (N.D. Ga. 1983).

102. *Id.* at 751.

103. *Id.* at 751 n.8.

ments.<sup>104</sup> Unfixed and unexpected punitive damages are not a foreseeable cost that would dissuade an employer from adopting an ERISA-regulated pension plan. Furthermore, punitive damage awards do not "add to the cost of financing pension plans" because they are exacted from the personal assets of the breaching fiduciary and not from the plan assets.<sup>105</sup>

Moreover, the legislative history shows Congress' intent to engraft principles of the law of trusts onto the fiduciary duty provisions of ERISA.<sup>106</sup> One reason articulated by Congress for this incorporation is that a plan participant "is not equipped to safeguard either his own rights or the plan assets."<sup>107</sup> The law of trusts contemplates use of punitive damages to protect beneficiaries.<sup>108</sup> Congress intended that punitive damages be available in ERISA to protect defenseless plan participants from breaches by pension plan fiduciaries.

Not only have punitive damages traditionally been awarded in the trust context, but such awards have increasingly become a major aspect of recovery. In *Estate of Anderson*,<sup>109</sup> the court awarded appreciation damages of \$885,160, more than half of the total award, for an improper sale of real property from the decedent's estate. A jury awarded \$3,000,000 in punitive damages against a trustee in *Estate of Pitzer*<sup>110</sup> for intentional infliction of emotional distress. In relying on trust principles, then, Congress plainly intended that punitive damages be available against ERISA fiduciaries.

104. See H.R. REP. NO. 533, *supra* note 91, at 13-14, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4651-52.

105. 29 U.S.C. § 1109(a) (1982).

106. H.R. REP. NO. 533, *supra* note 91, at 11, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4649-51 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); S. REP. NO. 127, *supra* note 93, at 28, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4864-65.

107. H.R. REP. NO. 533, *supra* note 91, at 11, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4649-51; S. REP. NO. 127, *supra* note 93, at 28, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4864-65.

108. See generally BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 862, at 39-41 (2d ed. rev. 1982) (consequential and exemplary damages may be recovered in suits for breach of trust); 3 SCOTT, THE LAW OF TRUSTS § 205, at 1665 n.1 (3d ed. 1967 & Supp. 1984) (punitive damages recoverable upon showing of willful, malicious, or wanton conduct).

109. 149 Cal. App. 3d 336, 196 Cal. Rptr. 782 (1983).

110. 155 Cal. App. 3d 979, 202 Cal. Rptr. 855 (1984).



### C. Availability of Punitive Damages Under Analogous Law

The Eighth Circuit's intimation in *Dependahl*<sup>111</sup> that punitive damages are available in statutory causes of action only if the words "punitive damages" themselves are explicitly used<sup>112</sup> is erroneously simplistic. Courts have allowed punitive damages even where Congress has not explicitly authorized them. Consider, for example, the Landrum-Griffin Act, known as the bill of rights for union members.<sup>113</sup> The Landrum-Griffin Act unilaterally protects the rights of union members as ERISA protects the rights of plan participants. As in ERISA, Congress did not expressly provide for the recovery of punitive damages under Landrum-Griffin. Yet, enforcement of the latter Act through "such relief . . . as may be appropriate,"<sup>114</sup> consistently has been held to include such awards.<sup>115</sup> Several ERISA cases, including *Russell*, have relied on this analogous Landrum-Griffin Act language in allowing punitive damages against pension plan fiduciaries.<sup>116</sup>

Cases interpreting the Landrum-Griffin Act have looked to its underlying purposes to determine whether to allow punitive damages. Even though these purposes were not fully clear, one court found a legislative intent to "protect the individual rights of union members and to deter abuse and denial thereof by union officers."<sup>117</sup> In proper cases, punitive damage awards will serve this purpose.<sup>118</sup>

The purpose of ERISA also is unilaterally protective: "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts."<sup>119</sup> Yet the legislative history of ERISA is

111. See *Dependahl*, 653 F.2d at 1216.

112. See *supra* note 71.

113. Labor-Management Reporting and Disclosure Act of 1959, § 101, 29 U.S.C. § 411 (1982).

114. 29 U.S.C. § 412 (1982).

115. See, e.g., *Bise v. International Bhd. of Elec. Workers*, 618 F.2d 1299, 1305 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980); *Morrissey v. National Maritime Union of Am.*, 544 F.2d 19, 24-25 (2d Cir. 1976); *Cooke v. Orange Belt Dist. Council of Painters No. 48*, 529 F.2d 815, 820 (9th Cir. 1976); *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 199-201 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968).

116. See *Russell*, 722 F.2d at 491-92; *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677, 680-81 (C.D. Cal. 1982); *Eaton v. D'Amato*, 581 F. Supp. 743, 748 (D.D.C. 1980).

117. *Bise*, 618 F.2d at 1305 n.6.

118. *Id.*

119. 29 U.S.C. § 1001(b) (1982).

more explicit in the scope of its remedies than is the Landrum-Griffin Act. Congress intended that the enforcement provisions of ERISA "provide the full range of legal and equitable remedies available in both state and Federal courts."<sup>120</sup>

Judicial consistency demands that these similarly protective statutes be given harmonious interpretations.<sup>121</sup> The recoverability of punitive damages under the Landrum-Griffin Act without explicit statutory authorization compels the same treatment under the unilaterally protective fiduciary provisions of ERISA.

Some courts have denied punitive damages under ERISA by relying on other statutes that also fail to specify whether such damages are recoverable and which have been interpreted to deny them. One of these is Title VII of the Civil Rights Act of 1964,<sup>122</sup> which has been uniformly interpreted to prohibit such awards.<sup>123</sup> The significant language of Title VII enables the court to order "other equitable relief as the court deems appropriate."<sup>124</sup> This language is comparable to that in section 1132(a)(3) of ERISA: "other appropriate equitable relief."<sup>125</sup> Thus, the analogy to Title VII is tenable with respect to violations under section 1132(a)(3), which prohibits punitive damages in causes of action other than breach of fiduciary duty. Both Title VII and section 1132(a)(3) use only the words "equitable relief." However, the inclusion of a discretionary award of "equitable or remedial"<sup>126</sup> relief for breach of fiduciary duty in ERISA section 1109, which section 1132(a)(2) incorporates by reference, shows Congress' desire for relief broader than Title VII's. The prohibition against punitive damage awards under Title VII is therefore irrelevant to a suit brought under section 1132(a)(2) for breach of fiduciary duty.<sup>127</sup>

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120. H.R. REP. NO. 533, *supra* note 91, at 17, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 4655; S. REP. NO. 127, *supra* note 93, at 35, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 4871.

121. Statutes containing similar language and sharing a common *raison d'être* should be interpreted in a like manner. *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973).

122. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

123. *See, e.g.*, *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-65 (11th Cir. 1982) (collecting cases). *But cf.* *Williams v. Trans World Airlines*, 660 F.2d 1267, 1272 (8th Cir. 1981) (Title VII may allow compensatory damages). Cases relying on the denial of punitive damages in Title VII cases to justify denying such damages in ERISA cases include *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 752 (N.D. Ga. 1983); *Bell v. Southern Or. Log Scaling & Grading Bureau*, No. 76-431 (D. Or. Aug. 5, 1976) (available Nov. 10, 1984 on LEXIS, Genfed library, Cases file).

124. 42 U.S.C. § 2000e-5(g) (1982).

125. 29 U.S.C. § 1132(a)(3) (1982).

126. *Id.* § 1109.

127. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634

Courts also have analogized ERISA to the Labor Management Relations (Taft-Hartley) Act (LMRA)<sup>128</sup> and the National Labor Relations Act (NLRA),<sup>129</sup> both of which usually are held to disallow punitive damages.<sup>130</sup> These courts reason that punitive damages are prohibited under ERISA because these other labor laws do not allow such remedies.<sup>131</sup> A critical distinction, however, between ERISA and these labor laws makes a comparative analysis regarding punitive damages inappropriate.

Most labor laws have "bilateral purposes" as compared with the "unilateral protective function" apparent in both ERISA and the Landrum-Griffin Act.<sup>132</sup> That is, the LMRA and the NLRA attempt to balance the interests of either the employer and employee or the union officer and union member, rather than focusing on the rights of the beneficiary (in ERISA) or the union member (in Landrum-Griffin).<sup>133</sup> When a statute thus seeks to balance competing interests, punitive damages are inappropriate for several reasons.<sup>134</sup>

First, the damages defeat these labor laws' fundamental purpose of encouraging private resolution through mediation, conciliation and compromise.<sup>135</sup> The availability of punitive damages would encourage litigation to the detriment of settlement. ERISA, by contrast, does not encourage a beneficiary to compromise for less than what is fully owed him. Rather, ERISA is unilaterally protective.

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(1982), has also been analogized to ERISA. *Whitaker*, 566 F. Supp. 745, at 752. The comparison to the ADEA was not the sole ground for decision in *Whitaker*, and no other court has drawn such an analogy. *Whitaker* implies that the ADEA, which uses language similar to ERISA's, has been uniformly interpreted to prohibit punitive damages. However, the proposition that punitive damages are disallowed under ADEA has yet to be universally accepted by the courts or commentators. See, e.g., *Wise v. Olan Mills Inc.*, 485 F. Supp. 542, 545 (D. Colo. 1980) (punitive damage award allowed under ADEA). *Accord* *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008, 1011 (D. Colo. 1978). See also Comment, *Punitive Damages Under the Age Discrimination in Employment Act*, 33 HASTINGS L.J. 457, 483-84 (1981) (punitive damages are necessary and appropriate to effectuate purposes of ADEA).

128. 29 U.S.C. §§ 141-188 (1982).

129. *Id.* §§ 151-166.

130. See *International Union, UAW v. Russell*, 356 U.S. 634, 646 (1958) (no punitive damages allowed under NLRA); *Tippett v. Liggett & Meyers Tobacco Co.*, 316 F. Supp. 292, 298 (M.D.N.C. 1970) (no punitive damages under LMRA).

131. See, e.g., *Hechenberger v. Western Elec. Co.*, 570 F. Supp. 820, 822 (E.D. Mo. 1983); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 752 (N.D. Ga. 1983).

132. See *supra* notes 113-19 and accompanying text.

133. See *Eaton v. D'Amato*, 581 F. Supp. 743, 747-48 (D.D.C. 1980).

134. See *Shaller, The Availability of Punitive Damages in Breach of Contract Actions Under Section 301 of the Labor Management Relations Act*, 50 GEO. WASH. L. REV. 219, 231-34 (1982).

135. See *id.* at 234-35.

Second, Congress enacted the LMRA after judicial decisions addressing this situation had disallowed punitive damages.<sup>136</sup> Congress did not explicitly reject the courts' holdings, thus implicitly affirming them.<sup>137</sup> Consequently, Congress' failure explicitly to authorize punitive damages in the LMRA means something quite different from its failure explicitly to authorize punitive damages in ERISA. When ERISA was adopted, the common law of trusts provided for awards of punitive damages for breach of fiduciary duty.<sup>138</sup> Furthermore, "[p]unitive damages long have been imposed in contract cases that have a decidedly tortious flavor, such as those involving . . . breach of fiduciary duty."<sup>139</sup> Thus, Congress' silence in this regard should be viewed as approval of the established practice of allowing punitive damages in ERISA-type cases.

Finally, judgments under most labor laws are enforceable against union assets. Punitive damages are, therefore, less desirable because they punish all union members. Under ERISA, however, the breaching fiduciary, not the pension fund beneficiaries, would be personally liable for any punitive damages awarded.<sup>140</sup> Moreover, the discretionary language of section 1109 provides additional remedial relief only in appropriate circumstances, such as when the funds of the pension plan will not be used to satisfy the award. In sum, whether punitive damages are permitted under a labor statute depends on whether that statute has a unilateral or bilateral purpose. Statutes that have bilateral purposes, like the LMRA or the NLRA, generally do not contemplate punitive damage awards, while statutes with unilateral purposes, like the Landrum-Griffin Act, typically employ such awards as part of their protective scheme. Inasmuch as ERISA resembles the Landrum-Griffin Act in its protective approach to beneficiaries' rights, punitive damages are an appropriate ERISA remedy.

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136. See, e.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (NLRB cannot assess punitive damages against a party who commits an unfair labor practice). See generally Shaller, *supra* note 133 at 221-23 (discussing *Republic Steel* case).

137. See Shaller, *supra* note 133, at 223. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-382 (1982) (when Congress legislates in a context where a remedy has already been supplied by courts, it intends by its silence to authorize the judicial remedy).

138. See *supra* notes 106-10 and accompanying text.

139. Mallor & Roberts, *supra* note 100, at 659. See also Sullivan, *Punitive Damages in the Law of Contracts: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 226-29 (discussing punitive damages for breach of fiduciary duty).

140. See 29 U.S.C. § 1109(a) (1982).

### III. CONCLUSION

The fiduciary responsibility provisions of ERISA are pivotal in Title I's protection of employee benefit rights, the heart of ERISA's protective purpose. In fact, the need for stringent fiduciary standards spurred the passage of the Act. Therefore, it is not surprising that Congress provided a greater breadth of relief for breach of fiduciary duty than for other violations of the Act. The limited language of section 1132(a)(3) only proscribes punitive damages for general violations. The breach of fiduciary standards, however, is a more serious violation, and an award of punitive damages is within the discretion of the court under section 1132(a)(2), which incorporates section 1109. Damages are to be extracted from the breaching fiduciary, not from the plan assets.

This conclusion follows from the plain meaning of ERISA and its legislative history. Congress intended to provide courts with broad remedial power to prevent violations of the Act. It gave them the "full range of legal and equitable remedies available."<sup>141</sup> Furthermore, principles of the law of trusts, incorporated into the Act, allow recovery of punitive damages for breach of fiduciary duty.

Punitive damages also are justified through reference to analogous statutes. For example, ERISA is like the Landrum-Griffin Act in that both have unilaterally protective purposes. Courts have held that punitive damages are recoverable under Landrum-Griffin. Similarly, such damages should be permitted under ERISA. Statutes under which courts have denied punitive damages are distinguishable from ERISA. Such statutes, like the LMRA and NLRA, seek to balance competing interests in labor-management relations. They do not embody the unilaterally protective feature of ERISA and, therefore, are irrelevant to any discussion of punitive damages under ERISA.

Finally, allowing recovery of punitive damages under ERISA bolsters its criminal provisions and furthers the important public policy of deterring abuses in the commercial setting. One court has noted, "While the availability of such relief may be preferable as a matter of public policy, it is not the role of this Court to make such policy judgments."<sup>142</sup> Full analysis of ERISA reveals, however, that ERISA embodies a congressional policy in favor of punitive damages.

ERISA is a landmark piece of labor legislation whose parame-

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141. See *supra* note 93 and accompanying text.

142. *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232, 1236 (E.D. Mo. 1983).

ters are still being defined eleven years after its adoption. As the diversity in judicial opinion reveals, the resolution of the statute's ambiguity is not self-evident. However, when one considers the combined authority of the legislative history accompanying ERISA, analogous statutes, and policy considerations, it becomes apparent that discretionary awards of punitive damages should be allowed in appropriate cases for breaches of fiduciary duties.

DEBORAH A. GEIER