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An Employer's Implied Cause of Action for Restitution Under Section 403 of ERISA

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NOTES

AN EMPLOYER'S IMPLIED CAUSE OF ACTION FOR RESTITUTION UNDER SECTION 403 OF ERISA

INTRODUCTION

Employee benefit plans[1] have grown dramatically.[2] Each year, employers contribute vast sums of money[3] and other assets[4] to these plans. The Employee Retirement Income Security Act (ERISA)[5] governs the economically and socially powerful system[6] of private employee benefit

1. An "employee benefit plan" includes both welfare and pension plans. *See* 29 U.S.C. § 1002(3) (1982). An "employee welfare plan" is a program providing medical, surgical or hospital 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. *See id.* § 1002(1). An "employee pension plan" is a fund which provides retirement income or results in a deferral of income. *See id.* § 1002(2)(A).

2. A startling expansion of coverage has occurred: In 1940, an estimated 4 million employees were covered by private pension plans; by 1950, the figure had increased to almost 10 million; in 1960, over 21 million; and in 1979, approximately 30 million employees were covered. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 2 Legislative History of The Employee Retirement Income Security Act of 1974, at 2348, 2350, (1976) [hereinafter cited as Legislative History]; United States Dep't of Labor, Patterns of Worker Coverage by Private Pension Plans iii (1980).

An astounding accumulation of assets has occurred to finance these benefit programs. In 1940, private pension assets totaled $2.4 billion. *See* Williams, *Development of the New Pension Reform Laws*, 26 Lab. L.J. 135, 135 (1975). In 1973, more than $150 billion was held in reserve to pay benefits. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 2 Legislative History, *supra*, at 2348, 2350. Today, estimates of a thousand billion dollars have been given. *See* Transcript of NBC White Paper: The Biggest Lump of Money in the World 2 (1985) (available in files of Fordham Law Review). "We're talking about the largest lump of money ever put together under one governing law in the history of the world." *Id.* (statement of Robert A.C. Monks, former U.S. pension administrator).

3. In 1978, employers contributed $48.5 billion to these plans. *See* United States Dep't of Labor, Estimates of Participant and Financial Characteristics of Private Pension Plans 19 (1983).

4. Employers have contributed real estate instead of cash to plans. *See* Suhrbier, *Contributing Real Estate in Lieu of Cash to a Pension Plan*, 10 Journal of Pension Planning and Compliance 217, 217 (1984). If the employee pension plan is an employee stock ownership plan (ESOP), the employer contribution may be company stock. *See* B. Coleman, Primer on Employee Retirement Income Security Act 15 (1985).

5. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered titles of 5, 18, 26, 29, 31 & 42 of the U.S.C.). ERISA is a voluminous document. The Act consists of four parts: Title I of ERISA is concerned with protecting employee benefits, 29 U.S.C. §§ 1001-1145 (1982); Title II provides amendments to the Internal Revenue Code relating to pension plans and is scattered in titles 5, 26, 31 and 42 of the U.S. Code, Pub. L. No. 93-406, 88 Stat. 829, 898-994 (1974); Title III covers the responsibilities of the Department of Treasury and the Department of Labor, the two federal agencies which administer and enforce the Act, 29 U.S.C. §§ 1201-1242 (1982); Title IV establishes the Pension Benefit Guaranty Corporation to administer an insurance program for single and multiemployer plans, 29 U.S.C. §§ 1301-1461 (1982). *See generally* B. Coleman, *supra* note 4, at 3-8 (discussion of the four titles).

6. The NBC documentary entitled "The Biggest Lump of Money in the World"

plans.[7] In response to the broken promise of private plans,[8] Congress passed ERISA,[9] which seeks primarily to protect the individual's benefit rights.[10] When enacting ERISA, however, Congress also recognized that the Act's requirements should not overburden employers and thus discourage creation of employee benefit plans.[11]

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revealed the tremendous impact pension funds have not only on the lives of those depending on these plans for their subsistence after retirement, but also on the whole U.S. economy. Pension funds have become the permanent owners of corporate America. Robert Monks, former U.S. pension administrator, said that he did not think that "anybody can make a commercial decision in America today without considering the implications of pension money. When Mr. Pickens makes an offer for Company A, ERISA plans own a lot of. . . Company A." Transcript of NBC White Paper: The Biggest Lump of Money in the World, *supra* note 2, at 6; *see* 2 Legislative History, *supra* note 2, at 1600 (statement of Sen. Williams).

7. ERISA does not govern public pension plans. *See* 29 U.S.C. § 1003(b) (1982) (provisions of Title I do not apply to any governmental plan); *see also id.* § 1002(32) (defining "governmental plan").

8. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2352; 120 Cong. Rec. 4279 (1974), *reprinted in* 2 Legislative History, *supra* note 2, at 3372 (statement of Rep. Brademas); 119 Cong. Rec. 30,003 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 1599 (statement of Sen. Williams); Rosenstein, *Private Enforcement of Employees Retirement Income Security Act*, 47 U. Cin. L. Rev. 272, 272-76 (1978); Williams, *supra* note 2, at 136-37.

9. ERISA was signed into law on Labor Day, September 2, 1974, by President Gerald Ford. *See* ERISA: Text of the Law as Amended through 1982 vii (K. Gill ed. 1983).

In 1980, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendment Act [MPPAA]. The basic purposes of the MPPAA are to protect participants and beneficiaries in multiemployer plans and to eliminate problems that impeded the maintenance and growth of such plans. *See* 126 Cong. Rec. 20,178 (1980) (statement of Sen. Javits). The MPPAA primarily address the problems created when employers withdraw from multiemployer plans. *See* 126 Cong. Rec. 20,177 (1980) (statement of Sen. Javits); Note, *The Multiemployer Pension Plan Amendment Act of 1980: The Defeat of Employer Reliance Interests in* Peick v. Pension Benefit Guaranty Corporation, 32 Buffalo L. Rev. 283, 283-87 (1983). *See also* B. Coleman, *supra* note 4, at 8-11 (discussion of ERISA updates).

10. *See* Morse v. Stanley, 566 F. Supp. 1455, 1458 (S.D.N.Y. 1983), *aff'd in part and rev'd in part*, 732 F.2d 1139 (2d Cir. 1984); 29 U.S.C. § 1001(b), (c) (1982); H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2348.

11. The voluntary nature of private pension plans required that Congress not overburden employers. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2348 ("committee has been constrained to recognize the voluntary nature of private retirement plans"); S. Rep. No. 383, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1 Legislative History, *supra* note 2, at 1069, 1069 ("committee recognized that private retirement plans are voluntary on the part of the employer, and, therefore, it has carefully weighed the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits"); Grubbs, *The Employee Retirement Income Security Act: The First Decade*, 11 Journal of Pension Planning and Compliance 7, 8 (1985) (pension funds are voluntary). In fact, Congress designed ERISA to promote expansion of private retirement plans. *See* 126 Cong. Rec. 20,177 (1980) (statement of Sen. Javits) (one of the purposes of MPPAA is to eliminate problems that impeded maintenance and growth of multiemployer plans); 120 Cong. Rec. 29,209 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4702 (statement of Rep. Tiernan) ("Both the Senate and House have put in long hours working to reform the pension system, to strengthen the position of the retiree without discouraging the growth of private pension plans."); 120 Cong. Rec. 3978 (1974), *reprinted in* 2 Legis-

ERISA provides comprehensive rules for pension and welfare plans.[12] To protect participants'[13] and beneficiaries'[14] rights,[15] the Act creates minimum vesting,[16] participation[17] and funding standards,[18] and imposes reporting, disclosure[19] and fiduciary requirements[20] on plan administrators[21] and trustees.[22] One fiduciary section requires that the assets of a plan be held in trust for the exclusive purpose of providing benefits to the participants and beneficiaries.[23] This section states that the assets of a plan can never inure to an employer.[24] Employers, however, often mis-

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lative History, *supra* note 2, at 3294 (statement of Rep. Perkins) (statement which incorporated subcommittee report stating that ERISA was designed in part to promote expansion of private retirement plans). When amending ERISA by enacting the MPPAA, Congress continued to realize the need to maintain a balance between the need of employers and the plan. *See* 126 Cong. Rec. 23,038 (1980) (statement of Rep. Thompson); 126 Cong. Rec. 20,185 (1980) (statement of Sen. Long); 126 Cong. Rec. 20,177 (1980) (statement of Sen. Williams).

12. *See* Shaw v. Delta Air Lines, 463 U.S. 85, 90 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980).

ERISA applies to employee benefit plans established or maintained by both employers and employee organizations. *See* 29 U.S.C. § 1003(a) (1982); *see also id.* § 1002(4), (5) (defining "employee organization" and "employer"). These plans must meet the applicable requirements of ERISA or lose their qualified status under § 401 of the Internal Revenue Code. *See* Rosenstein, *supra* note 8, at 275. Even if an employer does not elect to have an employee pension plan qualified, it still must satisfy the requirements of ERISA if the Act applies to the plan. *See id.*

13. The term "participant" means any past or present employee or past or present member of an employee organization who is or may become eligible to receive a benefit from an employee benefit plan or whose beneficiaries may be eligible to receive such a benefit. *See* 29 U.S.C. § 1002(7) (1982).

14. The term "beneficiary" means any person or entity designated by a participant, or by the terms of the employee benefit plan, who is or may become entitled to a benefit from such plan. *See id.* § 1002(8), (9).

15. *See* B. Coleman, *supra* note 4, at 3; Rosenstein, *supra* note 8, at 274-76.

16. *See* 29 U.S.C. § 1053 (1982). *See generally* B. Coleman, *supra* note 4, at 4-5 (reviewing vesting rights).

17. *See* 29 U.S.C. § 1052 (1982). *See generally* B. Coleman, *supra* note 4, at 4 (reviewing participation requirements).

18. *See* 29 U.S.C. §§ 1082-1085 (1982). *See generally* B. Coleman, *supra* note 4, at 35-37 (reviewing funding requirements). Employers may be severely penalized for failing to satisfy these funding standards. *See id.* at 5.

19. *See* 29 U.S.C. §§ 1021-1031 (1982). *See generally* B. Coleman, *supra* note 4, at 4 (reviewing reporting and disclosure requirements).

20. *See* 29 U.S.C. §§ 1101-1114 (1982). *See generally* B. Coleman, *supra* note 4, at 5-6 (reviewing fiduciary requirements).

21. The "administrator" is specifically designated by the plan or plan sponsor. If there is neither a designated administrator nor a plan sponsor, the administrator is the person prescribed by the Secretary's regulation. *See* 29 U.S.C. § 1002(16) (1982).

22. Plan administrators and trustees are fiduciaries as defined by 29 U.S.C. § 1002(21)(A) (1982). *See also* Fine v. Semet, 514 F. Supp. 34, 41-42 (S.D. Fla. 1981) (trustees' fiduciary duty), *aff'd*, 699 F.2d 1091 (11th Cir. 1983); Nass v. Staff Retirement Plan of Local 810, 515 F. Supp. 950, 957-58 (S.D.N.Y.) (administrators are fiduciaries), *aff'd mem.*, 671 F.2d 492 (2d Cir. 1981); 29 U.S.C. § 1002(14) (1985) (fiduciary includes any administrator, officer, trustee or custodian).

23. *See* 29 U.S.C. § 1103(c)(1) (1982).

24. *See id.*

takenly overcontribute to these plans.[25] Thus, this section also contains an exception to its exclusive purpose rule by stating that an employer's mistaken contributions may be returned.[26]

Although this section allows for the return of mistaken contributions, its operation is unclear. Courts disagree on whether ERISA confers on employers an implied right of restitution for mistaken contributions when the plan trustees do not voluntarily return them.[27]

This Note argues that an implied cause of action for restitution exists for employers under section 403 of ERISA. In discerning the intent of Congress, this Note focuses on the impact of ERISA's unique preemption provision on state restitution law and the federal courts' power to create common law in the private pension plan area.

IMPLIED RIGHT OF RESTITUTION UNDER SECTION 403

In 1973, thirty-six million workers were covered by private pension plans.[28] However, many of these covered employees never received promised benefits.[29] Congressional subcommittees investigated the origin of this problem and found that lack of vesting provisions, inadequate funding standards and premature plan terminations caused the nonpayment of promised benefits.[30] Congress passed ERISA to restore credibility to the private pension system.[31]

A. *Civil Enforcement*

ERISA creates rights[32] that ensure the actual receipt of promised ben-

25. See *infra* notes 84-85 and accompanying text.

26. *See* 29 U.S.C. § 1103(c)(2)(A) (1982).

27. *Compare* Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985) (§ 403(c)(2)(A) of ERISA confers on employers an implied right for restitution of mistakenly paid contributions), *cert. denied*, 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986) *with* Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311-12 (E.D. Pa. 1982) (§ 403(c)(2)(A) does not confer on employers an implied right for restitution of mistakenly paid contributions), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983). See *infra* notes 47-58 and accompanying text.

28. *See* 119 Cong. Rec. 30,003 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 1600 (statement of Sen. Williams).

29. *See* 119 *id.*, *reprinted in* 2 Legislative History, *supra* note 2, at 1599-1600 (discussing the incident where 4500 Studebaker workers lost 85% of benefits because of insufficient plan assets and also the Departments of Labor and Treasury study reports that 19,000 workers lost vested benefits); Rosenstein, *supra* note 8, at 272 (estimated that only ten percent received benefits); Williams, *supra* note 2, at 136 (fewer than one-quarter received benefits).

30. *See* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374-75 (1980); 29 U.S.C. § 1001(a) (1982); H.R. Rep. No. 779, 93d Cong., 2d Sess. 11-14 (1974), *reprinted in* 2 Legislative History, *supra* note 2, at 2590, 2600-03.

31. *See* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374-75 (1980); H.R. Rep. No. 533, 93d Cong., 1st Sess. 8-9 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2355-56; 119 Cong. Rec. 30,005 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 1605 (statement of Sen. Williams).

32. ERISA's reporting and disclosure, participation, vesting, funding and fiduciary requirements and the rights given to participants and beneficiaries are coterminous. For

efits to plan participants and beneficiaries.[33] The administration of the Act is entrusted to the Department of Labor and the Department of the Treasury.[34] In addition, section 502 of ERISA[35] specifically empowers pension participants, beneficiaries and fiduciaries to enforce the provisions of ERISA.[36] This section is powerful because it explicitly grants pension participants and beneficiaries a right to sue plan administrators, employers, trustees and the plan itself[37] to recover benefits and enforce rights.[38]

Employers, however, are not explicitly empowered[39] to assert these ex-

example, ERISA requires that the plan administrator furnish certain information to the participants, see *supra* note 19, which simultaneously gives participants the right to receive such information. *See* Rosenstein, *supra* note 8, at 274-75.

33. The legislative history of ERISA reveals that the Act's requirements were aimed at securing employee's pension rights. *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 2 Legislative History, *supra* note 2, at 2590, 2597; H.R. Rep. No. 533, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2352.

34. *See* 29 U.S.C. §§ 1135-1137, 1202 (1982).

35. *Id.* § 1132.

36. *See id.* § 1132(a). Section 1132(a) states:

> A civil action may be brought—
> (1) by a participant or beneficiary—
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
> (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;
> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
> (6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Id.

37. *See id.* § 1132(d) (an employee benefit plan may sue or be sued under Title I of ERISA).

38. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3093 (1985); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 326-27 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4277, 4593-94; H.R. Rep. No. 533, 93d Cong., 1st Sess. 2, 17 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2349, 2364; S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1 Legislative History, *supra* note 2, at 587, 621; 119 Cong. Rec. 30,005 (1974), *reprinted in* 2 Legislative History, *supra* note 2, at 1604 (statement of Sen. Williams). *See generally* Rosenstein, *supra* note 8, at 278-83 (discussion of the various individual enforcement methods).

39. An employer can be a fiduciary under ERISA and therefore fall within one of section 502's enumerated parties. *See* Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985) (ERISA permits employers to wear "two hats" and thus

press causes of action[40] provided by section 502.[41] Although given no

assume fiduciary status only when and to the extent that they function as plan administrators); United States Steel Corp. v. Pennsylvania Human Relations Comm'n, 669 F.2d 124, 128 (3d Cir. 1982) (employer as fiduciary can sue under § 502). In these cases, employers were not seeking to recover mistaken contributions.

40. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 24-25 (1983). Participants and beneficiaries have a cause of action pursuant to § 502(a)(1)(B) to recover accrued benefits, to seek declaratory relief concerning their future benefits, to enjoin a plan administrator from improperly refusing to pay benefits in the future, and to remove a fiduciary if he violates his duties. ERISA also authorizes the award of attorney's fees. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3093 (1985).

41. *See* 29 U.S.C. § 1132(a) (1982); Tuvia Convalescent Center, Inc. v. National Union of Hosp. & Health Care Employees, 717 F.2d 726, 729-30 (2d Cir. 1983); Fentron Indus., Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1305 (9th Cir. 1982).

Several circuits and lower courts have addressed the issue of whether an employer has standing to sue under § 502 of ERISA. *Compare Tuvia*, 717 F.2d at 730 (an employer has no standing to bring an action under § 502) *with Fentron*, 674 F.2d at 1304-05 (employer has standing under § 502); *see also* Great Lakes Steel v. Deggendorf, 716 F.2d 1101, 1103 (6th Cir. 1983) (employer *qua* employer has no standing under § 502 to seek declaratory judgment that ERISA superseded a state law); Blue Cross & Blue Shield v. Bell, 596 F. Supp. 1053, 1058 (D. Kan. 1984) (employer has no standing under § 502 to seek declaratory judgment action on whether a state statute is preempted by ERISA); R.M. Bowler Contract Hauling Co., v. Central States, S.E. & S.W. Areas Pension Fund, 547 F. Supp. 783, 784 (S.D. Ill. 1982) (employer lacks standing under § 502 to seek declaratory judgment of rights and liabilities); Modern Woodcrafts, Inc. v. Hawley, 534 F. Supp. 1000, 1013-14 (D. Conn. 1982) (employer lacks standing under § 502 to sue trustees for breach of fiduciary duty based on allegation that trustees forced employer to contribute too much); Central Tool Co. v. International Ass'n of Machinists Nat'l Pension Fund, 523 F. Supp. 812, 814 n.4 (D.D.C. 1981) (employer's challenge to cancellation of its employees' benefit rights dismissed for lack of standing). This Note suggests that these decisons can be reconciled by placing them into two categories—Category 1: denial of employer standing under § 502 as a denial of an implied cause of action under this section; Category 2: either permitting or not permitting employer third party standing.

The cases falling into Category 1 are those in which the employer sues on his own behalf for a remedy which will not directly benefit plan participants. *See Great Lakes*, 716 F.2d at 1102-03 (employer seeking clarification of whether a state law is preempted by ERISA); *Blue Cross*, 596 F. Supp. at 1055-56 (same); Tuvia Convalescent Center, Inc. v. National Union of Hosp. & Health Care Employee, 553 F. Supp. 303, 308 (S.D.N.Y. 1982) (employer seeking money damages from plan for breach of fiduciary duty for failure to provide requested information), *aff'd*, 717 F.2d 726 (2d Cir. 1983); *R. M. Bowler*, 547 F. Supp. at 783 (employer seeking clarification of his rights and liabilities under the plan); *Modern Woodcrafts*, 534 F. Supp. at 1006-07 (employer sought remedy for financial injury caused by breach of fiduciary duty).

The essence of the standing inquiry is whether the party seeking to invoke a court's jurisdiction has alleged a sufficient personal stake in the controversy as to assure the "concrete adverseness which sharpens the presentation of issues . . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). This personal stake requires an injury in fact caused by the challenged conduct. *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531 (1984).

The courts deciding the Category 1 cases denied standing to employers under § 502 because employers were not listed as one of the specified parties in § 502. *See Tuvia*, 717 F.2d at 730; *Great Lakes*, 716 F.2d at 1102-03; *Blue Cross*, 596 F. Supp. at 1058; *R.M. Bowler*, 547 F. Supp. at 783-84; *Modern Woodcrafts*, 534 F. Supp. at 1012-14. The courts in Category 1 never focused on the employer's personal stake in the outcome or the causal connection between the claimed injury and challenged conduct. By denying employers standing because of their exclusion from the list in § 502, these courts simultaneexpress cause of action, does an employer have an implied cause of action

ously prevent any implied causes of action under this section for employers because they will never have standing to assert such an action. Courts should not use standing as a shield from the task of determining whether a party has an implied cause of action. *See* Associaton of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 158 (1970) (whether statutes gave petitioners a "legal interest" were separate questions on the merits from whether they had standing to sue).

These courts that denied employers standing under § 502 did not determine whether the employers had alleged a personal interest in the outcome of the litigation, but instead examined the section's language and Congress' intent. *See, e.g.*, *Tuvia*, 717 F.2d at 729-30; *Great Lakes*, 716 F.2d at 1103-04. This approach confuses the law of standing with whether an implied cause of action exists. A better approach would be to allow an employer who has been injured to present his claim to the court and then for the court to determine separately whether a private cause of action exists for the employer under § 502. *Cf.* California Cartage Co. v. United States, 721 F.2d 1199, 1203 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 110 (1984) (court discussed separately the issues of standing and existence of private cause of action under the Shipping Act); Munoz-Mendoza v. Pierce, 711 F.2d 421, 425 (1st Cir. 1983) (when question of standing and existence of valid claim collapse into one, only standing question is whether plaintiffs have suffered an injury).

The Eighth Circuit has properly analyzed personal claims brought by employers against trustees as an implied cause of action issue rather than as a question of whether an employer has standing to sue under § 502. In Central States, S.E. & S.W. Areas Pension Fund v. Admiral Merchants Motor Freight, Inc., 511 F. Supp. 38 (D. Minn. 1980), *aff'd sub. nom.* Central States, S.E. & S.W. Areas Pension Fund v. Jack Cole-Dixie Highway Co., 642 F.2d 1122 (8th Cir. 1981), the district court noted that neither § 502 nor ERISA's legislative history indicated an intent to permit employers to seek damages for a trustee's failure to prudently manage a trust. The court decided that employers had no implied cause of action under § 502 for damages caused by an alleged breach of fiduciary duty. The court carefully explained the detrimental impact such a cause of action would have on ERISA's enforcement scheme. *See Central States*, 511 F. Supp. at 47-48.

The Category 2 cases are those which either permit or do not permit employers to sue on behalf of their employees under § 502. The employers in these cases were asserting their employees' rights under ERISA. *See Fentron*, 674 F.2d at 1303 (employer seeking employee redress for alleged wrongful termination of employee rights); *Central Tool*, 523 F. Supp. at 814 n.4 (same). The Ninth Circuit in *Fentron* permitted an employer to sue under § 502 as a third party provided he had suffered an injury in fact. *See* 674 F.2d at 1304; *see also* 13 C. Wright, A. Miller & E. Cooper, *supra*, § 3531.9, at 579 n.67. Although the District of Columbia district court denied an employer third-party standing, these two decisions might be reconcilable because it is within a court's discretion to permit third-party standing. *See* 13 C. Wright, A. Miller & E. Cooper, *supra*, § 3531.9.

Courts have permitted an employer who has suffered an injury in fact to assert his employees' rights in circumstances suggesting a congruence rather than a conflict of interests with his employees. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 573-74 & n.3 (3d Cir. 1980); Gajon Bar & Grill, Inc. v. Kelly, 508 F.2d 1317, 1322 n.9 (2d Cir. 1974). The congruence requirement is essential for an ERISA action when an employer is asserting his employees' statutory rights because an employer's interest could be at odds with the employees' rights. *See* Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., 105 S. Ct. 2833, 2838 (1985) (employer has incentive to underreport the correct number of employees because such underreporting would reduce his payments to the Plan). Therefore, before permitting an employer to have third-party standing in an ERISA claim, the court should ascertain the congruence of interest between the employer and his employees.

The failure to distinquish between Categories 1 and 2 has led at least one court to interpret the Ninth Circuit's *Fentron* decision as an indication that employers can sue for a breach of fiduciary duty unrelated to participants' rights. *See* Building Serv. Employees Pension Trust v. Horsemen's Quarter Horse Racing Ass'n, 98 F.R.D. 458, 459 (N.D. Cal. 1983) (trustees allegedly forced employers to overpay). This is a harmful result be-under another section of ERISA for a remedy unrelated to the enforcement of participants' and beneficiaries' rights?

Section 403 of ERISA requires the assets of a plan to be held in a trust by one or more trustees.[42] Section 403 further states that the "assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."[43] However, this exclusive purpose section permits trustees to refund mistaken contributions made by an employer.[44] The exclusive purpose rule "shall not prohibit the return of such [mistaken] contribution."[45] This section does not give an employer an express cause of action for the return of mistaken contributions.[46]

The courts disagree on whether section 403 creates for employers an implied cause of action for restitution.[47] The Third Circuit affirmed a

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cause a cause of action might by inferred without the proper inquiry into Congress' intent to create such a cause of action for employers under ERISA.

42. *See* 29 U.S.C. § 1103(a) (1982). For exceptions to this general requirement, see *id.* § 1103(b).

43. *Id.* § 1103(c)(1). Section 403(c)(1) and (2)(A) further states:

> (1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.
>
> (2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—
>
> (i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and
>
> (ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

Id. § 403(c)(1), (c)(2)(A).

44. *See, e.g.,* Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985), *cert. denied,* 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986); Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311 (E.D. Pa. 1982), *aff'd mem.,* 720 F.2d 661 (3d Cir. 1983).

45. 29 U.S.C. § 1103(c)(2)(A) (1982).

46. *See, e.g.,* Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985), *cert. denied,* 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986); Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 310-11 (E.D. Pa. 1982), *aff'd mem.,* 720 F.2d 661 (3d Cir. 1983).

The Tenth Circuit has determined that § 403 gives self-employed individuals who are plan participants a right to restitution for amounts paid into the fund for their own account. *See* Peckham v. Board of Trustees, 719 F.2d 1063, *aff'd as modified,* 724 F.2d 100 (10th Cir. 1983). The question whether employers *qua* employers have a similar right was left unresolved. *See id.* at 100.

47. *Compare* Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985) (§ 403(c)(2)(A) confers on employers a right to the restitution

district court's decision holding that no implied cause of action for restitution for employers arises under section 403.[48] The district court believed that employers were not the particular group ERISA was intended to protect.[49] The district court believed that the phrase "shall not prohibit" expressed a congressional intent only to allow, not require, trustees to return mistaken contributions[50]—a mere exception to trustees' strict fiduciary duties to maintain funds solely for the benefit of participants.[51] The court also believed an implied right for restitution would threaten the fund's stability.[52]

Conversely, the Ninth Circuit has held that section 403 implies a right of action for employers.[53] The court thought that section 403 was enacted to benefit employers.[54] Without an implied right of restitution, the decision to return contributions mistakenly paid would be left to the discretion of the "interested trustee."[55] Further, this implied right of action advances Congress' intent to permit restitution of contributions paid by mistake when equitable factors favor restitution.[56] Finally, because ERISA preempted all state law on employee benefit plans, the court found no principle of federal-state comity making a federal cause of action inappropriate.[57]

The Ninth Circuit's holding is consistent with the Fourth Circuit's in-

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of mistakenly paid contributions), *cert. denied*, 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986) *and* E.M. Trucks, Inc. v. Central States, S.E. & S.W. Areas Pension Plan, 517 F. Supp. 1122, 1124-25 (D. Minn. 1981) (§ 403(c)(2)(A) gives employer right to refund if equity requires it) *with* Airco Indus. Gases v. Teamster Health & Welfare Pension Fund, 618 F. Supp. 943, 949-50 (D. Del. 1985) (§ 403(c)(2)(A) does not confer on employers an implied right of restitution), Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311-12 (E.D. Pa. 1982) (same), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983) *and* Kann v. Keystone Resources, Inc., 575 F. Supp. 1084, 1091 (W.D. Pa. 1983) (same). *See also* Teamster's Local 348 Health & Welfare Fund v. Kohn Beverage Co., 749 F.2d 315, 321 n.6 (6th Cir. 1984) (dictum) (an employer has no cause of action under § 403), *cert. denied*, 105 S. Ct. 2024 (1985); Martin v. Keldorn, Inc., 546 F. Supp. 889, 894 (N.D. Ill. 1982) (§ 403 permits, but does not require, offset of overpayments against underpayments); Ethridge v. Masonry Contractors, Inc., 536 F. Supp. 365, 368 (N.D. Ga. 1982) (§ 403(c)(2)(A) gives employer legal recourse for offset).

48. *See* Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983).

49. *See id.*; *see also* Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 949 (D. Del. 1985).

50. *See* Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983); *see also* Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 950 (D. Del. 1985) (language of § 403 does not create a cause of action for employers).

51. *See* Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311-312 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983).

52. *See id.* at 312.

53. *See* Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986).

54. *See id.*

55. *Id.*

56. *See id.*

57. *See id.*

terpretation of section 403. The Fourth Circuit has held that employers have no right to an automatic refund under section 403. Rather, they can obtain a refund only under principles of restitution.[58]

B. *Implied Federal Rights of Action—The Role of Congressional Intent*

The Supreme Court has been reluctant in recent years to imply private rights of action under federal statutes.[59] These decisions reflect the Court's unwillingness to extend its jurisdiction[60] or to infringe on legislative powers by implying causes of action Congress never intended to cre-

58. *See* Teamsters Local 639 v. Cassidy Trucking, Inc., 646 F.2d 865, 868 (4th Cir. 1981). The Fourth Circuit did not explicitly discuss the issue of whether an implied cause of action for restitution existed. *See id.*; *see also* Central States, S.E. & S.W. Areas Pension Plan v. Wholesale Produce Supply Co., 478 F. Supp. 884, 887-88 (D. Minn.) (employer entitled to offset for overpaid contributions under § 403(c)(2)(A) without consideration of the section's permissive phraseology), *aff'd*, 611 F.2d 694 (8th Cir. 1979); Service Employees Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Serv., Inc., 504 F. Supp. 197, 198 (D.D.C. 1980) (same).

59. In recent terms, the Supreme Court decided twelve cases in which plaintiffs sought an implied cause of action under a federal statute. In nine cases, the Court refused to find an implied right of action. *Compare* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 593-95 (1983) (recognizing implied right of action under Title VI of Civil Rights Act of 1964), Herman & MacLean v. Huddleston, 459 U.S. 375, 380-87 (1983) (affirming existence of implied right of action under § 10(b) of Securities Exchange Act of 1934), and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-88 (1982) (recognizing implied right of action for damages under Commodities Exchange Act) *with* Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3092-94 (1985) (no implied right under ERISA for extra-contractual damages to a beneficiary caused by improper processing of benefit claims), Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 534-41 (1984) (no implied right of action for investment companies under § 36(b) of Investment Company Act of 1940), Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 23-29 (1982) (no implied cause of action under Urban Mass Transportation Act for violations of labor agreements), Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11-21 (1981) (no implied private right of action for damages against state and federal officials for failure to enforce provisions of Water Pollution Control Act or Marine Protection Research and Sanctuaries Act of 1972), Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 639-40 (1981) (no implied right of action for contribution from coconspirators under federal antitrust laws), California v. Sierra Club, 451 U.S. 287, 292-98 (1981) (no implied cause of action under § 10 of Rivers and Harbors Appropriation Act of 1899), Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 91-95 (1981) (no implied right of action for contribution in Title VII suits), Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 15-27 (1981) (no implied right of action under section 6010 of Developmentally Disabled Assistance and Bill of Rights Act of 1975), and Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-84 (1981) (no implied right of action for back wages under Davis-Bacon Act under contract which was not covered by the Act).

At an earlier time federal courts, relying primarily on common law tort principles, generously conferred rights of action on private litigants. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916).

60. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3094 (1985) ("Congress did not provide, and did not intend the judiciary to imply"); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981) ("[i]t is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes").

ate.[61] Thus, the Court has strictly adhered to a congressional intent analysis when determining the existence of an implied cause of action under a federal statute.[62]

Whether Congress intended to create a cause of action is a matter of statutory construction.[63] The Court has considered the following factors when interpreting a statute to determine legislative intent: the language,[64] legislative history and purpose of the statute;[65] the identity of the class for whose particular benefit the statute was enacted;[66] the existence of express statutory remedies adequate to accomplish the legislative purpose;[67] and the states' traditional role in providing the relief sought.[68] The Court also has considered the state of the law when the statute was

61. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 18 (1981) ("[w]here . . . Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment"); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981) (courts' lawmaking powers are limited); Cannon v. University of Chicago, 441 U.S. 677, 730-31, 743 (1979) (Powell, J., dissenting) (implied cause of action violates separation of powers doctrine); Note, *State Incorporation Of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 Yale L.J. 1144, 1146 (1985) [hereinafter cited as *State Incorporation*]. *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375-76 (1982) (no violation of separation of powers doctrine by judical recognition of implied causes of action).

62. In Cort v. Ash, 422 U.S. 66 (1975), the Court developed a four-factor test to determine whether a private right of action should be implied under a federal statute: (1) the identity of the class for whose special benefit the statute was passed, (2) consideration of implicit or explicit legislative intent to create or deny a private remedy, (3) the consistency of a private remedy with the underlying purpose of the legislative scheme, and (4) the traditional role of the states in providing the relief sought. *See id.* at 78.

In subsequent decisions, the Court essentially compressed the *Cort* test into one factor—legislative intent. *See* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 535-36 (1984); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981); California v. Sierra Club, 451 U.S. 287, 293 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

Denial of an implied right of action by a federal court does not preclude the creation of state remedies, unless federal preemption exists. See *State Incorporation*, *supra* note 61, for a discussion that state incorporation of federal standards into a state law right of action is an appropriate response to the Supreme Court's current hostility toward implication of federal rights of action.

63. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Cannon v. University of Chicago, 441 U.S. 677, 688 (1979).

64. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16-19 (1979) (Court determined that Congress intended to create a private right of action under § 215 of the Investment Advisor Act of 1940 based solely on the statute's language); *see also* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (initial focus in determining legislative intent is statutory language); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (same).

65. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 91 (1981).

66. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984); California v. Sierra Club, 451 U.S. 287, 293 (1981); Cort v. Ash, 422 U.S. 66, 78 (1975).

67. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984); Transamerica

enacted.[69] For example, if an implied federal cause of action existed prior to a legislative revision of the particular statute, the question then becomes whether Congress intended to preserve, rather than create, the pre-existing remedy under the statute.[70]

C. *Congressional Intent and Section 403*

The impact of ERISA's preemption provision on state restitution law[71] together with section 403's language and purpose indicates that Congress must have intended to permit a cause of action for restitution for employers under section 403.[72] In addition, Congress' authorization of the development of a body of federal common law in the area of pension plans shows that Congress must have intended the courts to imply appropriate causes of action.[73] Thus, section 502's list of parties empowered to sue for civil enforcement remedies should not foreclose implying this restitutive cause of action for employers.

The legislative history of ERISA also indicates that Congress must have intended a restitutive remedy for employers. Although ERISA was enacted primarily to protect participants' and beneficiaries' rights to receive benefits,[74] Congress knew that overburdening employers could thwart the growth of pension plans.[75] When enacting ERISA, Congress wanted to strike an appropriate balance between the employers' interests in maintaining flexibility in the design and operation of their pension programs and the employees' need for protection of their rights and expectations.[76]

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-74 (1979).

68. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984); California v. Sierra Club, 451 U.S. 287, 293 (1981) (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)); Cort v. Ash, 422 U.S. 66, 78 (1975).

69. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536-41 (1984); Herman & MacLean v. Huddleston, 459 U.S. 375, 383-87 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982).

70. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-79 (1982); *see also* Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983) ("Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action").

Although congressional intent is the touchstone in an implied cause of action analysis, *Daily Income Fund* makes clear all these factors may be considered in discerning legislative intent.

71. See *infra* notes 88-110 and accompanying text.

72. See *infra* notes 119-35 and accompanying text.

73. See *infra* notes 111-18 and accompanying text.

74. See *supra* notes 10, 15, 33 and accompanying text.

75. See *supra* note 11 and accompanying text.

76. *See* 120 Cong. Rec. 4278 (1974), *reprinted in* 2 Legislative History, *supra* note 2, at 3369 (statement of Rep. Perkins); H.R. Rep. No. 533, 93d Cong., 1st Sess. 9 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2356; S. Rep. No. 383, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1 Legislative History, *supra* note 2, at 1063, 1069; S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973), *reprinted in* 1 Legislative History, *supra* note 2, at 587, 599; 126 Cong. Rec. 23,038 (1980) (statement of Rep. Thompson); *see also*

1. Pre-ERISA State Remedy for Mistaken Contributions to a Pension Plan

The law of restitution[77] provides a remedy for a party who has paid money because he believed that he was obligated to do so,[78] when in fact he either had no obligation or was not bound to the full extent of the performance rendered.[79] An action for the recovery of the mistakenly paid sum[80] exists in restitution because the other party has been "unjustly enriched"[81] by this mistake. Restitution of the overpayment will be given unless returning the money is unjust.[82] If, for example, the "unjustly enriched" party has changed position in reliance on the mistake, restitution may be denied.[83]

Employers often mistakenly contribute significant amounts of money[84] to employee benefit plans because they believe they are required to do so when actually no such obligation exists.[85] In such cases, the employee

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Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323, 326 (2d Cir. 1982) (Congress was concerned with employers' interests when enacting ERISA), *aff'd mem. sub. nom.* Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983).

77. The threshold maxim of the modern law of restitution is that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937). *See generally* 1 G. Palmer, Law of Restitution §§ 1.1-.8 (1978).

78. It is an established general rule that money mistakenly paid to another because the payor did not have full knowledge of all the facts may be recovered. *See* D. Dobbs, Handbook on the Law of Remedies § 11.1, at 716 (1973); Restatement of Restitution §§ 6, 7, 15, 16, 18 (1937). In general, relief was not available, though, if the mistake was one of law occurring when the payor had full knowledge of the facts but came to an erroneous conclusion as to their legal effect. *See* 3 Corbin, Corbin on Contracts §§ 616-620 (1960); 13 Williston, A Treatise on the Law of Contracts §§ 1581-1592 (3d ed. 1957). However, this rule denying relief because the mistake was one of law "has been eroded by so many qualifications and exceptions, varying from jurisdiction, that it has little, if any, vitality." J. Calamari & J. Perillo, The Law of Contracts § 9-28, at 309 (2d ed. 1977) (footnote omitted).

79. *See* J. Calamari & J. Perillo, *supra* note 78, § 9-29; G. Palmer, Mistake and Unjust Enrichment 21-32 (1962) [hereinafter cited as G. Palmer II]; Restatement of Restitution § 18 (1937).

80. Recovery usually is given in quasi-contract under the title "money paid by mistake" in an action for money had and received. *See* 2 G. Palmer, *supra* note 77, § 11.2, at 491; 3 G. Palmer, *supra* note 77, § 14.1, at 143-44.

81. *See* G. Palmer II, *supra* note 79, at 23; Restatement of Restitution, § 1 comment a (1937).

82. *See* 3 G. Palmer, *supra* note 77, § 14.1, at 147-48.

83. *See* J. Calamari & J. Perillo, *supra* note 78, § 9-30, at 310-11.

84. *See, e.g.,* Teamsters Local 639 v. Cassidy Trucking, Inc., 646 F.2d 865 (4th Cir. 1981) (court determined excess of $4,483.44); Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 945 (D. Del. 1985) (amount of $25,831.41); Teamsters Pension Trust Fund v. Philadelphia Fruit Exch., 603 F. Supp. 877, 879 (E.D. Pa. 1985) (excess of $2,647.78); Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 308 (E.D. Pa. 1982) (employer alleged $80,000 excess contribution), *aff'd mem.,* 720 F.2d 661 (3d Cir. 1983); Ethridge v. Masonry Contractors, Inc., 536 F. Supp. 365, 367 (N.D. Ga. 1982) (excess of $64,268.68); E.M. Trucks, Inc. v. Central States, S.E. & S.W. Areas Pension Plan, 517 F. Supp. 1122, 1124 (D. Minn. 1981) (amount of $15,136.00).

85. *See* Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066 (9th

benefit plans are unjustly enriched. Accordingly, prior to ERISA, a state's law of restitution was available to provide a remedy[86] for employers who had mistakenly overcontributed to employee benefit plans.[87]

2. ERISA's Preemption of State Restitution Law

Under ERISA, Congress established a comprehensive regulatory scheme.[88] In the interest of uniformity,[89] Congress provided for the pre-

Cir. 1985) (employer not a party to collective bargaining agreement), *cert. denied*, 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986); Teamsters Local 639 v. Cassidy Trucking, Inc., 646 F.2d 865, 866 (4th Cir. 1981) (employer mistakenly believed he had contractual obligation to pay); Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 945 (D. Del. 1985) (employer mistakenly paid for two misclassified employees); Teamsters Pension Trust Fund v. Philadelphia Fruit Exch., 603 F. Supp. 877, 878-79 (E.D. Pa. 1985) (field audit revealed overpayments); Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 308 (E.D. Pa. 1982) (collective bargaining agreement did not require amount employer contributed), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983); Ethridge v. Masonry Contractors, Inc., 536 F. Supp. 365, 366-67 (N.D. Ga. 1982) (field audit revealed overpayment); E.M. Trucks, Inc. v. Central States, S.E. & S.W. Areas Pension Plan, 517 F. Supp. 1122, 1123 (D. Minn. 1981) (employer continued to contribute after expiration of agreement); Service Employees Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Serv., Inc., 504 F. Supp. 197, 198 (D.D.C. 1980) (miscalculation); Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co., 478 F. Supp. 884, 886 (D. Minn.) (employer mistakenly made payments on behalf of a particular employee), *aff'd per curiam*, 611 F.2d 694 (8th Cir. 1979).

86. *See, e.g.*, Sherrill v. Frank Morris Pontiac-Buick-GMC, Inc., 366 So. 2d 251, 257 (Ala. 1978) (principle of unjust enrichment permits recovery of money paid by mistake); Winslow Cohu & Stetson, Inc. v. Skowronek, 136 N.J. Super. 97, 104, 344 A.2d 350, 354 (1975) (considered unjust enrichment to permit recipient to retain mistakenly paid money unless its return would be inequitable); Matter of Guardianship of Kordecki, 95 Wis. 2d 275, 282, 290 N.W.2d 693, 696 (1980) (person who confers benefit on another because of a mistake is entitled to restitution).

87. *See, e.g.*, Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 308 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983); Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co., 478 F. Supp. 884, 887 (D. Minn.), *aff'd per curiam*, 611 F.2d 694 (8th Cir. 1979); *cf.* Martin v. Hamil, 608 F.2d 725, 729-30 (7th Cir. 1979) (ERISA preempts any state claim for restitution of contributions).

The Labor Management Relations Act (LMRA) did not preempt employers' restitution claims under state law for mistaken contributions to employee benefit plans established under § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (1982). *See* Chase v. Trustees of W. Conference of Teamsters Pension Trust Fund, 753 F.2d 744, 746-47 & n.1 (9th Cir. 1985) (state law, if not preempted by ERISA, governs reimbursement of contributions made from 1969 through 1974 to § 302(c)(5) plans); Wong v. Bacon, 445 F. Supp. 1177, 1180-82 (N.D. Cal. 1977) (parties agree state law, if not preempted by ERISA, gives plaintiffs right to restitution for mistaken contributions to § 302(c)(5) plans); *see also* Connell v. United States Steel Corp., 516 F.2d 401, 405 (5th Cir. 1975) ("Congress affirmatively provided that state law [and not LMRA] govern pension and welfare trust matters."); Beam v. International Org. of Masters, 511 F.2d 975, 979 (2d Cir. 1975) (court applies traditional trust law to § 302 claim). *But see* Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552, 558 (6th Cir. 1962) (federal law applies to § 302 breach of fiduciary duty suits).

88. *See* Shaw v. Delta Air Lines, 463 U.S. 85, 90-91 (1983); Alessi v. Raybestos-Manhattan, Inc. 451 U.S. 504, 510 (1981); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361-62 & n.1 (1980).

89. *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir. 1985) (preemption provision protects employers from conflicting and inconsistent state and local regula-

emption of state laws relating to employee benefit plans. Section 514 states that "the provisions of [Title I] and [Title IV] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."[90] Section 514 has been described as a "virtually unique pre-emption provision"[91] and also as "the most sweeping federal preemption statute ever enacted by Congress."[92]

ERISA has not, however, completely eliminated the states' regulatory domain in the area of employee benefit plans.[93] Section 514 provides that state law is not preempted in certain situations. If a state law regulates either a governmental,[94] church, foreign[95] or excess benefit plan[96] or one that is maintained for the sole purpose of complying with workers' compensation, unemployment or disability laws, it is not preempted by section 514.[97] Also excluded from section 514's preemptions[98] are state

tions); 120 Cong. Rec. 29,197 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4670 (statement of Rep. Dent) (preemption provision protects participants from conflicting and inconsistent state regulations); 120 Cong. Rec. 29,942 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4770-71 (statement of Sen. Javits) (state action in field of private employee benefit plans must be displaced to provide uniformity). *See generally* Kilberg & Heron, *The Preemption of State Law under ERISA*, 1979 Duke L.J. 383 (discussion of § 514); Comment, *ERISA and the Preemption of State Law*, 6 Fordham Urb. L.J. 599 (1978) (same).

90. 29 U.S.C. § 1144(a) (1982). This section does not apply to any cause of action which arose, or any act or omission which occurred, before Januray 1, 1975. *See id.* § 1144(b)(1).

91. Franchise Tax Bd. v. Construction Laborers Vacation Trust Fund, 463 U.S. 1, 24 n.26 (1983); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) (Congress explicitly stated ERISA's broad preemptive effect).

92. California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983); *see* Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1215 (8th Cir.) (Congress intended to occupy the field of employee benefit plans), *cert. denied*, 454 U.S. 968 (1981); Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977) (Congress intended preemption in its "broadest sense"), *cert. denied*, 435 U.S. 980 (1978); Lucash v. Strick Corp., 602 F. Supp. 430, 435 (E.D. Pa. 1984) ("Congress intended to completely occupy the field of employee benefit plans"), *aff'd*, 760 F.2d 259 (3d Cir. 1985); Lederman v. Pacific Mut. Life Ins. Co., 494 F. Supp. 1020, 1022 (C.D. Cal. 1980) (Congress intended ERISA to preempt entire field of employee benefit plans); 120 Cong. Rec. 29,197 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4670 (statement of Rep. Dent) ("I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans.").

93. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 25 (1983); Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1315 (1984).

94. See *supra* note 7.

95. A foreign benefit plan is one maintained outside the United States primarily for the benefit of nonresident aliens. *See* 29 U.S.C. § 1003(b)(4) (1982).

96. The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the allowable limits established for tax-qualified plans. *See id.* § 1002(36).

97. These plans are referred to as § 4(b) plans in § 514(a). *See id.* § 1144(a). Sections 4(b) plans, defined in 29 U.S.C. § 1003(b), are not governed by ERISA. *See id.* § 1003(b).

98. Another express exception provision states that section 514 shall not apply to the Hawaii Prepaid Health Care Act. *See id.* § 1144(b)(5).

criminal laws[99] and state laws regulating insurance, banking, securities[100] or multiple-employer welfare arrangements.[101]

Section 514's structure requires a two-step analysis to determine whether ERISA preempts a particular state law.[102] The first step is to determine whether the state law "relate[s] to" employee benefit plans.[103] Once a court determines that a state law "relate[s] to" the plan,[104] the next preemption inquiry is whether the law is saved by one of section 514's exceptions.[105]

Supreme Court decisions give the phrase "relate to" a broad meaning. A state law "relate[s] to" a benefit plan if the law has a connection with or reference to such a plan.[106] The Court has stated that "[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."[107]

ERISA should preempt a state's law of restitution when it permits recovery of mistaken contributions to employee benefit plans because it "relate[s] to" these plans under the Supreme Court's broad definition of this phrase[108] and does not fall within any of the express preemption

99. *See id.* § 1144(b)(4).

100. *See id.* § 1144(b)(2)(A).

101. *See id.* § 1144(b)(6). A multiple-employer welfare arrangement is an employee welfare benefit plan which provides welfare benefits to employees of two or more employers if such plan is not established or maintained pursuant to a collective bargaining agreement or by a rural electric cooperative. *See id.* § 1002(40)(A).

102. *See* Kilberg & Inman, *supra* note 93, at 1317-18.

103. *See id.*

104. *See generally* Kilberg & Inman, *supra* note 93, at 1320-27 (discussion of courts' analysis of the "relate to" requirement).

105. *See* Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2389 (1985); Kilberg & Inman, *supra* note 93, at 1318. An inherent tension exists between § 514's general preemption provision and its exceptions. While the general preemption provison broadly preempts state law, the section's saving clause appears to broadly preserve states' lawmaking powers over much of the same regulation. *See Metropolitan Life*, 105 S. Ct. at 2389 & n.16 (1985). In particular, the insurance saving clause has caused a significant overlap between ERISA and state law. *See* Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311, 1317 (5th Cir. 1985) (state laws regulating insurance which prescribes same conduct as ERISA "may provide a cause of action in place of, in addition to, or coequal with any cause of action available under ERISA"); Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978) (insurance clause saved a state-mandated benefit statute).

106. *See* Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983). But "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n.21. In addition, state laws which affect fundamental state interests have not been found preempted by ERISA. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 25-26 (1983) (state tax levy); Kilberg & Inman, *supra* note 93, at 1320-21.

107. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2389 (1985). "[E]ven indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981).

108. See *supra* notes 106-07 and accompanying text. An action for the restitution of mistaken contributions relates to the corpus of an ERISA trust fund and is therefore

exceptions.[109] All courts considering the issue have concluded that ERISA preempts a state's law of restitution and thus this state remedy is unavailable to employers.[110]

3. The Power of Federal Courts to Create Common Law in the Private Pension Plan Area

Although section 502 provides express causes of action for only participants, beneficiaries, fiduciaries and the Secretary of Labor,[111] the omission of employers from section 502 should not foreclose the inference of a cause of action for restitution for employers under section 403.[112] Congress authorized the federal courts to develop substantive law to resolve issues involving rights and obligations under private em-

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preempted. *See* Justice v. Bankers Trust Co., 607 F. Supp. 527, 532 (N.D. Ala. 1985); *see also* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502, 1504 (9th Cir. 1985) (ERISA preemption extends to state common law causes of action); Hollenbeck v. Falstaff Brewing Corp., 605 F. Supp. 421, 429 (E.D. Mo. 1984) (state's common law will be preempted if in its application the common law "relate[s] to" employee benefit plans); Central States, S.E. & S.W. Areas Pension Fund v. Admiral Merchants Motor Freight, Inc., 511 F. Supp. 38, 48 (D. Minn. 1980) (state common law preempted), *aff'd sub. nom.* Central States, S.E. & S.W. Areas Pension Fund v. Jack Cole-Dixie Highway Co., 642 F.2d 1122 (8th Cir. 1981).

109. A state's restitution law is neither a criminal, insurance, banking or security law. See *supra* notes 99-100 and accompanying text. Nor does the preemption of state restitution law infringe on what courts have considered to be a state's fundamental interest. See *supra* note 106.

A state's law of restitution is not preempted when it applies to a governmental, church, foreign, excess benefit or multiple-employer welfare plans or one that is maintained for the sole purpose of complying with workers' compensation, unemployment or disability laws. See *supra* notes 94-97, 101 and accompanying text.

110. *See* Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1419 (2d Cir. 1985); Chase v. Trustees of the W. Conference of Teamsters Pension Trust Fund, 753 F.2d 744, 746 (9th Cir. 1985); Peckham v. Board of Trustees, 719 F.2d 1063, 1065, *aff'd as modified*, 724 F.2d 100 (10th Cir. 1983); Martin v. Hamil, 608 F.2d 725, 729-30 (7th Cir. 1979); Folz v. Marriott Corp., 594 F. Supp. 1007, 1020 (W.D. Mo. 1984); District 65, UAW v. Harper & Row Publishers, Inc., 576 F. Supp. 1468, 1487 (S.D.N.Y. 1983); UAW v. Dyneer Corp., 4 Employee Benefit Cases 1486, 1488 (N.D. Ohio 1983), *aff'd per curiam*, 747 F.2d 335 (6th Cir. 1984); Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co., 478 F. Supp. 884, 887 (D. Minn.), *aff'd per curiam*, 611 F.2d 694 (8th Cir. 1979).

111. See *supra* notes 35-38, 40 and accompanying text.

112. Section 502 is concerned only with causes of action which lead to the civil enforcement of participants' and beneficiaries' rights. *See* 29 U.S.C. § 1132 (1982) (heading of section 502 is "Civil enforcement"); *cf.* Stone & Webster Eng'g. Corp. v. Ilsley, 690 F.2d 323, 326-28 (2d Cir. 1982) (employer brought declaratory judgment action regarding ERISA's preemption of a state statute and court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (1982)), *aff'd mem. sub nom.* Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983).

A broad reading of the cases which have denied employer standing under section 502, see *supra* note 41, may lead to the conclusion that an employer can never have an implied cause of action under any section of ERISA. *See* Petition for Writ of Certiorari at 12, Northern Cal. Retail Clerks Union v. Award Serv., Inc., 763 F.2d 1066 (9th Cir. 1985). This Note argues that these cases should be read as only denying employers implied causes of action under civil enforcement § 502. See *supra* note 41.

ployee benefit plans.[113] Accordingly, courts should have greater freedom implying causes of action under ERISA than under other federal statutes because of the courts' power to create common law in the private pension plan area.[114]

Moreover, implying an employer's cause of action for restitution under section 403 would not alter the carefully crafted enforcement scheme created by section 502[115] because a new liability is not being created[116] to enforce participants' and beneficiaries' rights created by ERISA.[117] Rather, the implied cause of action under section 403 preserves the employers' claim for restitution of mistaken contributions.[118]

4. Preserving Restitution by Implying It under ERISA

The Supreme Court stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*[119] that in determining whether a private cause of action is implicit in a federal statutory scheme, the initial focus must be on the state of the law when the legislation was enacted and whether Congress intended to preserve pre-existing remedies.[120] Prior to ERISA's enact-

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113. *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985) (Congress intended courts to fashion a body of federal common law to govern ERISA suits); Van Orman v. American Ins. Co., 680 F.2d 301, 311 (3d Cir. 1982) (same); Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3d Cir. 1980) (citing Senator Javits' remarks as support for congressional authorization of the evolution of federal common law of pension plans), *cert. denied*, 454 U.S. 1142 (1982); Teamsters Pension Trust Fund v. Philadelphia Fruit Exch., 603 F. Supp. 877, 880 (E.D. Pa. 1985) (employees' claims based on federal common law of pension funds); Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816, 818-19 (E.D.N.C. 1978) (courts are to create federal common law); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4277, 4594 (all civil actions by participants and beneficiaries "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of Labor-Management Relations Act of 1974"); 120 Cong. Rec. 29,942 (1974), *reprinted in* 3 Legislative History, *supra* note 2, at 4771 (statement of Sen. Javits) (body of federal substantive law will be developed).

114. There is neither a separation of powers problem nor an impermissible extension of federal courts' jurisdiction because of this grant by Congress to create federal common law in the pension area. These concerns have made the Court reluctant to infer causes of action under federal statutes. See *supra* notes 60-61 and accompanying text.

115. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3093 (1985).

116. In Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085 (1985), the Court held that ERISA did not provide a beneficiary with a cause of action for extra-contractual damages against fiduciaries. The Court found that Congress did not intend to authorize remedies to enforce beneficiaries' rights in addition to those provided by § 502. *See id.* at 3093; *see also* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 93-94 (1981) (express remedies indicate an intent not to authorize additional remedies).

117. See *supra* notes 13-20, 32 and accompanying text.

118. See *infra* notes 119-22 and accompanying text.

119. 456 U.S. 353 (1982).

120. *See id.* at 378-79. In *Merrill Lynch*, the Court focused on whether Congress intended to preserve a pre-existing federal implied cause of action for damages under the Commodities Exchange Act after a legislative revision of the statute. Section 403(c)(2)(A) was revised in 1980 by the MPPAA. *See* Crown Cork & Seal v. Teamsters Pension Fund, 549 F. Supp. 307, 308-09 (E.D. Pa.), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983). Prior to the revision the section read: " 'In the case of a contribution which is

ment, a state restitution remedy was available for such mistakes in performance.[121] To preserve a restitutive remedy after ERISA was passed, a federal remedy would have to exist because of the Act's preemption of state restitution law.[122]

The impact of ERISA's unique preemption provision[123] reveals that Congress must have intended section 403 to preserve an employer's cause of action for restitution.[124] If an employer is denied a restitutive remedy under section 403, he cannot resort to state law to obtain the relief he seeks.[125] The harsh result which would occur if an employer is denied an implied cause of action[126] flouts Congress' intent to provide an appropriate balance between employers and participants.[127] Unless an employer who has mistakenly contributed too much to a plan has a federal cause of action for restitution,[128] he is without a legal recourse.[129] The employer

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made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.'" *See* 29 U.S.C.S. § 1103 (1982) (History). Before the 1980 revision, two courts permitted offsets for employers for overpaid contributions without consideration of the permissive phraseology of § 403(c)(2)(A). *See* Central States, S.E. & S.W. Areas Pension Fund v. Wholesale Produce Supply Co., 478 F. Supp. 884 (D. Minn.), *aff'd*, 611 F.2d 694 (8th Cir. 1979); Service Employee Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Jantorial Serv., Inc., 504 F. Supp. 197 (D.C. 1980). Therefore, whether a federal implied cause of action for restitution existed under Section 403 prior to the 1980 revision is unclear because of the lack of recognition. *Cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 380-86 (1983) (private right of action under Securities Act of 1934 had been consistently recognized for more than 35 years prior to revision); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379 (1982) (federal courts routinely and consistently recognized implied private cause of action under Commodity Exchange Act prior to its revision).

121. See *supra* notes 77-87 and accompanying text.

122. See *supra* notes 108-10 and accompanying text.

123. See *supra* notes 88-110 and accompanying text.

124. *Cf.* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (Congress must have assumed that § 215, which declares certain contracts void, would provide a cause of action for rescission, injunctions and restitution).

125. See *supra* notes 108-10 and accompanying text.

126. Significant amounts of money are often mistakenly contributed by employers. See *supra* notes 84-85 and accompanying text.

127. See *supra* notes 11, 76 and accompanying text.

128. An employer may also have a cause of action for restitution only under federal common law. *See* Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 950-51 (D. Del. 1985). The district court held that although employers had no implied cause of action under § 403, they did have a federal common law action for unjust enrichment. The court, after considering only the *Cort v. Ash* factors, found that there was insufficient evidence that Congress intended to provide a remedy under § 403. *See id.* at 949-50. The court stated, however, that this result did not mean that Congress intended to forbid such a cause of action and concluded that employers have a federal common law action which was inferred from Congress' authorization to federal courts to create common law in this area. *See id.* at 950. The court noted that its result was "essentially consistent" with those cases implying a cause of action under § 403. *See id.* at 950; *see also* Comment, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. Colo. L. Rev. 355 (1980) (suggesting that an implied cause of action analysis is consistent with a federal common law analysis).

129. See *supra* notes 108-10 and accompanying text.

would be at the mercy of the trustee to return the funds.[130] These refunds may not be readily granted by the trustee because if he errs he may be personally liable to the fund.[131]

The language of section 403,[132] by explicitly stating an exception to the exclusive purpose rule for mistaken payments, shows that Congress must have intended this section to benefit employers by preserving their right to restitution when they mistakenly overcontributed.[133] In addition, the purpose of section 403 suggests that Congress must have intended to preserve a restitutive remedy for employers. Section 403's prohibition against the plan's assets inuring to the employer's benefit was intended to prevent misconduct, insider abuse and corruption.[134] This section was

130. *See, e.g.*, Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 311 (E.D. Pa. 1982) (trustees can return contributions if they choose to do so), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983); Ethridge v. Masonry Contractors, Inc., 536 F. Supp. 365, 368 (N.D. Ga. 1982) (if trustees' determinations were always accepted, there would be no restitution under § 403(c)(2)(A)); E.M. Trucks, Inc. v. Central States, S.E. & S.W. Areas Pension Plan, 517 F. Supp. 1122, 1124-25 (D. Minn. 1981) (trustees have no incentive to voluntarily return funds). *But see* Electricians Health, Welfare and Pension Plans, Local No. 995 v. Gulino, 594 F. Supp. 1265, 1272, n.15 (M.D. La. 1984) (judicial review of administrator's decisions that no contribution was mistakenly made is available to employer). This right to review has been used by courts only when the trustees owe a duty to the complaining party. *See, e.g.*, Peckham v. Board of Trustees, 653 F.2d 424 (10th Cir. 1981) (review of action to enforce benefit rights); Horn v. Mullins, 650 F.2d 35 (4th Cir. 1981) (review of denial of employee's disability); Bayles v. Central States, S.E. & S.W. Areas Pension Fund, 602 F.2d 97 (5th Cir. 1979) (review of denial of early retirement benefits). Thus, it is not clear whether employers would have this right to review if they did not have a right to restitution under § 403.

131. *See* 29 U.S.C. § 1109(a) (1982). Trustees could be sued for breach of their duty to hold the assets of the plan for the exclusive purposes of providing benefits to participants and defraying reasonable expenses of administering the plan if they mistakenly refunded an amount to an employer. *See id.* § 1103(c)(1).

132. See *supra* note 43 and accompanying text.

133. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (based on language of § 215, Congress must have intended that suits for rescission, injunction and restitution be available). The phrases used in § 403 are "mistake of fact" or "mistake of fact or law." *See* 29 U.S.C. § 1103(c)(2)(A) (1982). Such phrases are used in restitution actions. See *supra* note 78. Their presence indicates that § 403 is concerned with providing a restitutive remedy. *Cf.* Central States, S.E. and S.W. Areas Pension Fund v. Central Transport, Inc., 105 S. Ct. 2833, 2840 & n.10 (1985) (use of word "trust" in ERISA invokes common law of trusts).

134. *See* Deiches v. Carpenters' Health & Welfare Fund, 572 F. Supp. 766, 773 (D.N.J. 1983). Prior to ERISA, trustess were not subject to the rigorous requirements of the exclusive benefit and purpose rules. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2359. Trustees often entered into transactions that would not benefit the covered employees. *See* S. Rep. No. 383, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 1 Legislative History, *supra* note 2, at 1063, 1085; 120 Cong. Rec. 4278 (1974), *reprinted in* 2 Legislative History, *supra* note 2, at 3370 (statement of Rep. Perkins). Therefore, one of ERISA's requirements is that the assets of the plan be held for the exclusive purpose of providing benefits to participants. See *supra* note 43 and accompanying text. Employers are prohibited from even temporary use of assets. *See* Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc., 105 S. Ct. 2833, 2841 & n.16 (1985). The list of prohibited transactions in 29 U.S.C. § 1106 (1982) exemplifies the abusive activities Congress enacted § 403 to prevent.

not enacted to prevent the legitimate return of money mistakenly contributed.

Thus, section 403 read in conjunction with the Act's preemption section indicates that Congress must have intended employers to have a cause of action for restitution under section 403. In addition, if employers are denied an implied cause of action for restitution, they might provide lower benefits when they realize this risk exists.[135] The participants, whom ERISA seeks to protect, could ultimately suffer because their level of benefits would be lower. Under ERISA, a federal cause of action for restitution is not only appropriate, it is necessary.

D. *Guidelines for Awarding Restitution under Section 403*

Section 403 sets specific guidelines for awarding restitution: an employer's mistaken contribution to a non-multiemployer plan[136] must be one of fact and the mistaken contribution must be returned within one year after payment.[137] An employer's mistaken contribution to a multiemployer plan can be either one of law or fact[138] and the mistaken sum must be returned within six months after the determination of the erroneous contribution.[139]

Courts may look to state law for guidance when fashioning a uniform federal law of restitution for these mistaken performance cases.[140] For example, under state restitution law if a payee raises a change of position defense, the payor may be estopped from claiming restitution.[141] Accordingly, if a plan can show that it detrimentally relied upon the excess funds,[142] an employer will be estopped from receiving a refund.[143] This

See H.R. Rep. No. 533, 93d Cong., 1st Sess. 21 (1973), *reprinted in* 2 Legislative History, *supra* note 2, at 2348, 2368.

135. ERISA does not specify the level of benefits that an employee benefit plan must provide. *See* Shaw v. Delta Air Lines, 463 U.S. 85, 91 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511-12 (1981); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 371 (1980).

136. The term "multiemployer plan" means a plan to which more than one employer is required to contribute and is maintained pursuant to one or more collective bargaining agreements. *See* 29 U.S.C. § 1002(37)(A) (1982).

137. *See id.* § 1103(c)(2)(A)(i).

138. The 1980 amendment permits mistaken contributions to a multiemployer plan to be returned to employers if made due to a mistake of either law or fact. See *supra* notes 43 & 120. The reason for this change was that a mistake of fact was too narrow an exception for multiemployer plans. *See* 126 Cong. Rec. 20,208 (1980) (Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980).

139. *See* 29 U.S.C. § 1103(c)(2)(A)(ii) (1982).

140. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957) (state law, if compatible with the purposes of § 301 of LMRA, may be resorted to in order to find the rule that will best effectuate the federal policy); *see also* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501-02 (9th Cir. 1985) (Congress intended courts to borrow from state law when fashioning a body of federal common law for ERISA).

141. See *supra* note 83 and accompanying text.

142. *See, e.g.*, Crown Cork & Seal Co. v. Teamsters Pension Fund, 549 F. Supp. 307, 312 (E.D. Pa. 1982) (mistaken contributions once invested may be essential to plan's stability), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983); Martin v. Keldorn, Inc., 546 F. Supp.

allocation of burdens insures the financial stability of the plan without placing an onerous burden of proof on employers.[144] The Ninth Circuit, however, has indicated that the employer has the burden of showing that a refund would not undermine the financial stability of the plan.[145] In addition, consideration of state law principles of restitution may aid the courts in determining what constitutes a section 403(c)(2)(A)(i) "mistake of fact" under federal law.[146]

CONCLUSION

Congress intended employers contributing to employee benefit plans governed by ERISA to have a restitutive remedy for mistaken contributions. By providing employers with an implied cause of action, courts are incorporating into ERISA a remedy preventing unjust enrichment which is unrelated to the rights given to plan participants and beneficiaries under the Act. A restitutive remedy will not deplete the plan of its needed assets. Instead it will provide for the return of funds the plan was never entitled to receive. Without this cause of action, employers may be reluctant to provide favorable benefits in their plans or even to establish plans at all. These results might hinder the continued growth of private employee benefit plans. Thus, the remedy both provides justice to the employer and furthers the aims of ERISA.

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889, 893 (N.D. Ill. 1982) (welfare fund would be required to pay twice, once to workers and again to the employer, if mistaken contributions are returned).

143. Courts might also have to deny restitution of mistaken contributions if the refund would violate collective bargaining duties imposed on employers by the National Labor Relations Act since ERISA states that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . ." 29 U.S.C. § 1144(d) (1982). *See* Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund, 654 F.2d 625, 627-28 (9th Cir. 1981) (refund of contributions made during negotiations to reach new collective bargaining agreement could undermine negotiations).

144. For example, if employers were required to prove that the plan's financial stability would not be undermined if the mistaken contributions were returned, employers would have a great burden because they are unable to readily obtain the necessary financial information. *Cf.* Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc., 105 S. Ct. 2833, 2836 (1985) (trustees, who have duty to maintain financial records, have difficulty keeping track of the thousands of employers in multiemployer plans); Tuvia Convalescent Center, Inc. v. National Union of Hosp. & Health Care Employees, 717 F.2d 726, 727 (2d Cir. 1983) (fund refused to give employer requested financial data).

145. *See* Award Serv., Inc. v. Northern Cal. Retail Clerks Union, 763 F.2d 1066, 1069 (9th Cir. 1985) (employer must establish that the equities favor restitution), *cert. denied*, 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986).

146. *See, e.g.*, Teamsters Local 639 v. Cassidy Trucking, Inc., 646 F.2d 865, 867 (4th Cir. 1981); Central States, S.E. & S.W. Areas Pension Fund, v. Wholesale Produce Supply Co., 478 F. Supp. 884, 887 (D. Minn.), *aff'd per curiam*, 611 F.2d 694 (8th Cir. 1979).