SUPREME COURT OF THE UNITED STATES

No. 91–1671

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARK, AND RUSSELL FRANZ, PETITIONERS *v.* HEWITT ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 1, 1993]

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

The majority candidly acknowledges that it is plausible to interpret the phrase "appropriate equitable relief" as used in §502(a)(3), 88 Stat. 891, 29 U. S. C. §1132(a)(3), at least standing alone, as meaning that relief which was available in the courts of equity for a breach of trust. *Ante*, at 8. The majority also acknowledges that the relief petitioners seek here—a compensatory monetary award—*was* available in the equity courts under the common law of trusts, not only against trustees for breach of duty but also against nonfiduciaries knowingly participating in a breach of trust, *id.*, at 7–8, 13, 14. Finally, there can be no dispute that ERISA was grounded in this common-law experience and that "we are [to be] guided by principles of trust law" in construing the terms of the statute. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 111 (1989). Nevertheless, the majority today holds that in enacting ERISA Congress stripped ERISA trust beneficiaries of a remedy against trustees and third parties that they enjoyed in the equity courts under common law. Although it is assumed that a cause of action against a third party such as respondent is provided by ERISA, the remedies available are limited to the "traditional" equitable remedies, such as injunction and

restitution, and do not include compensatory damages—
“the classic form of *legal* relief.” *Ante*, at 7 (emphasis in original). Because I do not believe that the statutory language requires this result and because we have elsewhere recognized the anomaly of construing ERISA in a way that “would afford *less* protection to employees and their beneficiaries than they enjoyed before ERISA was enacted,” *Firestone, supra,* at 114 (emphasis added), I must dissent.

Concerned that many pension plans were being corruptly or ineptly mismanaged and that American workers were losing their financial security in retirement as a result, Congress in 1974 enacted ERISA, “declar[ing] [it] to be the policy of [the statute] to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect [to the plans], 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.” 29 U. S. C. §1001(b).

As we have noted previously, “ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U. S. C. §§1101–1114, `codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'” *Firestone*, *supra*, at 110 (quoting H. R. Rep. No. 93–533, p. 11 (1973)). ERISA, we have explained, “abounds with the language and terminology of trust law” and must be construed against the background of the common law of trusts. *Firestone, supra,* at 110–111; see also *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570–571 (1985). Indeed, absent

some express statutory departure—such as ERISA's broader definition of a responsible "fiduciary," see *ante*, at 14—Congress intended that the courts would look to the settled experience of the common law in giving shape to a "`federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone*, *supra*, at 110; see also H. R. Rep. No. 93–533, *supra,* at 11; S. Rep. No. 93–127, p. 29m (1973); 120 Cong. Rec. 29928, 29932 (1974) (statement of Sen. Williams).

Accordingly, it is to the common law of trusts that we must look in construing the scope of the "appropriate equitable relief" for breaches of trust contemplated by §502(a)(3), 29 U. S. C. §1132(a)(3).[1]

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[1]As an initial matter, the majority expresses some uncertainty about whether §502(a)(3) affords a cause of action and *any* sort of remedy against nonfiduciaries who participate in a fiduciary's breach of duty under the statute. See *ante*, at 5–6. In my view, however, the statute clearly does not bar such a suit. Section 502(a)(3) gives a cause of action to any participant, beneficiary, or fiduciary of an ERISA-governed plan "to redress . . . violations" of the statute. There can be no dispute that when an ERISA fiduciary breaches his or her duty of care in managing the plan, there has been a violation of the statute. See 29 U. S. C. §1104. The only question then is whether the remedies provided by §502(a)(3) "to redress such [a] violatio[n]" must stop with the breaching fiduciary or may extend to nonfiduciaries who actively assist in the fiduciary's breach. Section 502(a)(3) does not expressly provide for such a limitation and it does not seem appropriate to import one given that trust beneficiaries clearly had such a remedy at common law, see *ante*, at 7–8, 13, 14, and that ERISA is grounded in that common law and was intended, above all, to protect the interests of beneficiaries.

As the majority notes, at common law the courts of equity were the predominant forum for beneficiaries' claims arising from a breach of trust. These courts were not, however, the exclusive forum. In some instances, there was jurisdiction both in law and in equity and it was generally (although not universally) acknowledged that the beneficiary could elect between her legal and equitable remedies. See *Clews* v. *Jamieson*, 182 U. S. 461, 480–481 (1901); G. Bogert & G. Bogert, Law of Trusts and Trustees §870, pp. 101–107 (2d rev. ed. 1982); 3 A. Scott & W. Fratcher, Law of Trusts §198, pp. 194–203 (4th ed. 1988); J. Hill, Trustees *518–*519; Annot., Remedy at Law Available to Beneficiary of Trust as Exclusive of

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Moreover, the amendment of the statute in 1989, adding §502(*l*), seems clearly to reflect Congress' understanding that ERISA provides such a remedy. As the majority notes, see *ante*, at 11, §502(*l*) empowers the Secretary of Labor to assess a civil penalty against nonfiduciaries who “knowing[ly] participat[e]” in a fiduciary's breach of trust. 29 U. S. C. §1132(*l*)(1)(B) (1988 ed., Supp. III). The subsection further provides that this penalty shall be “equal to 20 percent of the applicable recovery amount” obtained from the nonfiduciary in a proceeding under §502(a)(5), which provides a cause of action to the Secretary that parallels that provided to beneficiaries under §502(a)(3). §§1132(*l*)(1) and (2); see also *ante*, at 11–12. This provision clearly contemplates that some remedy may be had under §502(a)(5)—and, by necessary implication, under §502(a)(3)—against nonfiduciaries for “knowing participation” in a fiduciary's “breach of fiduciary responsibilit[ies].” §1132(*l*)(1). Given that this understanding accords with well-established common-law trust principles undergirding ERISA and that it is also compatible with the language of §502(a)(3), I see no basis for doubting the validity of petitioners' cause of action.

Remedy in Equity, 171 A. L. R. 429 (1947). Indeed, the Restatement of Trusts sets out in separate, successive sections the "legal" and "equitable" remedies available to beneficiaries under the common law of trusts. See Restatement (Second) of Trusts §§198, 199 (1959).

The traditional "equitable remedies" available to a trust beneficiary included compensatory damages. Equity "endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed." J. Hill, *supra*, at *522; see also J. Tiffany & E. Bullard, Law of Trusts and Trustees 585–586 (1862) (defendant is chargeable with any losses caused to trust or with any profits trust might have earned absent the breach). This included, where necessary, the payment of a monetary award to make the victims of the breach whole. *Clews* v. *Jamieson, supra,* at 479–480; J. Hill, *supra*, at *522; G. Bogert & G. Bogert, *supra*, §862; see also *United States* v. *Mitchell*, 463 U. S. 206, 226 (1983); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 154, n. 10 (1985) (Brennan, J., concurring in judgment).

Given this history, it is entirely reasonable in my view to construe §502(a)(3)'s reference to "appropriate equitable relief" to encompass what was equity's routine remedy for such breaches—a compensatory monetary award calculated to make the victims whole, a remedy that was available against both fiduciaries and participating nonfiduciaries. Construing the statute in this manner also avoids the anomaly of interpreting ERISA so as to leave those Congress set out to protect—the participants in ERISA-governed plans and their beneficiaries—with "less protection . . . than they enjoyed before ERISA was enacted." *Firestone*, 489 U. S., at 114.[2] Indeed, this is precisely how four

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[2]Section 514(a) of ERISA pre-empts "any and all State

Justices of this Court read §502(a)(3)'s reference to "appropriate equitable relief" in *Russell*. See 473 U. S., at 154, and n. 10 (Brennan, J., joined by WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment).

The majority, however, struggles to find on the face of the statute evidence that §502(a)(3) is to be more narrowly construed. First, it observes that ERISA elsewhere uses the terms "remedial relief" and "legal relief" and reasons that Congress must therefore have intended to differentiate between these concepts and "equitable relief." Second, it is noted that the crucial language of §502(a)(3) describes the available relief as *equitable* relief. It is then asserted that "[s]ince *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under §502(a)(3) to `equitable relief' in the sense of `whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*," rendering Congress' imposition of the modifier "equitable" a nullity. *Ante*, at 9–10 (emphasis in original). Searching for some way in which to give "appropriate equitable relief" a limiting effect, the majority feels compelled to read the phrase as encompassing only "those categories of relief that were *typically*

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laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. 29 U. S. C. §1144(a). Although the majority stops short of deciding the pre-emption implications of its holding, see *ante*, at 13, it is difficult to imagine how any common-law remedy for the harm alleged here—participation in a breach of fiduciary duty concerning an ERISA-governed plan—could have survived enactment of ERISA's "`deliberately expansive'" pre-emption provision. *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 138 (1990) (citation omitted).

available" in the broad run of equity cases, without regard to the particular equitable remedies available in trust cases. See *id.*, at 8 (emphasis in original). This would include injunction and restitution, for example, but not money damages. See *ibid.* As I see it, however, the words "appropriate equitable relief" are no more than descriptive and simply refer to all remedies available in equity under the common law of trusts, whether or not they were or are the exclusive remedies for breach of trust.

I disagree with the majority's inference that by using the term "legal . . . relief" elsewhere in ERISA, Congress demonstrated a considered judgment to constrict the relief available under §502(a)(3). To be sure, §502(g)(2)(E) of the statute empowers courts to award appropriate "legal or equitable relief" where a fiduciary successfully sues an employer for failing to make required contributions to a "multiemployer plan." §1132(g)(2)(E). Likewise, §104(a)(5)(C) authorizes the Secretary of Labor to bring "a civil action for such legal or equitable relief as may be appropriate" to force the adminstrator of an employee benefit plan to file certain plan documents with the Secretary. 29 U. S. C. §1024(a)(5)(C). And, finally, §§4003(e)(1) and 4301(a)(1) of the statute, also cited by the majority, empower courts to dispense "appropriate relief, legal or equitable or both," in actions brought by the Pension Benefit Guaranty Corporation (PBGC) or by plan fiduciaries, participants, or beneficiaries with respect to the peculiar statutory duties relating to the PBGC. 29 U. S. C. §1303(e)(1); see also §1451(a)(1) (authorizing "an action for appropriate legal or equitable relief, or both"). Significantly, however, none of the causes of action described in these sections—relating to the financing of "multiemployer plans," administrative filing requirements, and the PBGC—had any discernible analogue in the common law of trusts. Accordingly, there being no common-law tradition

either in law or in equity to which Congress might direct the courts, it is not at all surprising that Congress would refer to both legal and equitable relief in making clear that the courts are free to craft whatever relief is most appropriate.[3] It seems to me a treacherous leap to draw from these sections a congressional intention to foreclose compensatory monetary awards under §502(a)(3) notwithstanding that such awards had always been considered "appropriate equitable relief" for breach of trust at common law. See *supra*, at 4–5.[4]

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[3]The majority claims to find a common-law analogue for an action under §104(a)(5)(C), likening an action by the Secretary of Labor to enforce ERISA's administrative filing requirements to a common-law action against a trustee for failure to keep and render accounts. *Ante*, at 11, n. 9. The analogy seems to me a long reach. The common-law duty of trustees to account to beneficiaries for all transactions made on behalf of the trust bears, at best, only slight resemblance to the ERISA-created duty of plan administrators to file with the Secretary of Labor specified annual reports, plan descriptions, and summary plan descriptions. See 29 U. S. C. §1024(a)(1). So, too, the fact that some States — by *statute* — have required trustees to render an accounting to state courts, see 2A A. Scott & W. Fratcher, Law of Trusts §172, p. 456 (4th ed. 1988), cited *ante*, at 10–11, n. 9, fails to establish a *common-law* analogue for actions by the Secretary under §104(a)(5)(C).

[4]Moreover, if the text of the statute reflects Congress' careful differentiation between "legal" and "equitable" relief, as the majority posits, it presumably must also reflect a careful differentiation between "equitable" and "remedial" relief and, for that matter, between "legal" and "remedial" relief. See 29 U. S. C. §1109(a) (breaching fiduciary "shall be subject to such other equitable or remedial relief as

Even accepting, however, that “equitable” relief is to be distinguished from “legal” relief under the statute, the majority is wrong in supposing that the former concept swallows the latter if §502(a)(3)'s reference to “appropriate equitable relief” is understood to encompass those remedies that were traditionally available in the equity courts for breach of trust. The fact of the matter is that not all forms of relief were available in the common-law courts of equity for a breach of trust. Although the equity courts could award monetary relief to make the victim of a breach of trust whole, extracompensatory forms of relief, such as punitive damages, were not available. As this Court has long recognized, courts of equity would not— absent some express statutory authorization—enforce penalties or award punitive damages. See *Tull* v. *United States*, 481 U. S. 412, 422, and n. 7 (1987); *Stevens* v. *Gladding*, 17 How. 447, 454–455 (1855); *Livingston* v. *Woodworth*, 15 How. 546, 559–560 (1854); see also 2 J. Sutherland, Law of Damages §392, p. 1089 (3d ed. 1903); W. Hale, Law of Damages 319 (2d ed. 1912); 1 T. Sedgwick, Measure of Damages §371, p. 531 (8th ed. 1891). As JUSTICE KENNEDY has observed, this limitation on equitable relief applied in the trust context as well, where plaintiffs could recover compensatory monetary relief for a breach of trust,

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the court may deem appropriate”). What limiting principle Congress could have intended to convey by this latter term I cannot readily imagine. “Remedial,” after all, simply means “intended as a remedy,” Webster's Ninth New Collegiate Dictionary 996 (1983), and “relief” is commonly understood to be a synonym for “remedy,” *id.*, at 995. At the very least, Congress' apparent imprecision in this regard undermines my confidence in the strong inferences drawn by the majority from Congress' varying phraseology concerning relief under ERISA.

but not punitive or exemplary damages. See *Teamsters* v. *Terry*, 494 U. S. 558, 587 (1990) (dissenting opinion).[5]

By contrast, punitive damages were among the "legal remedies" available in common-law trust cases. In those trust cases that historically could have been brought as actions at law—such as where a trustee is under an immediate and unconditional

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[5]JUSTICE KENNEDY's observation is well grounded in legal history. In crafting a remedy for a breach of trust the exclusive aim of the common-law equity courts was to make the victim whole, "endeavor[ing] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed." J. Hill, Trustees *522; see also Restatement (Second) of Trusts §205 (1959). Historically, punitive damages were unavailable in any equitable action on the theory that "the Court of Chancery as the Equity Court is a court of conscience and will permit only what is just and right with no element of vengeance." *Beals* v. *Washington International, Inc.*, 386 A. 2d 1156, 1159 (Del. Ch. 1978); accord, *Williamson* v. *Chicago Mill & Lumber Corp.*, 59 F. 2d 918, 922 (CA8 1932); *Stolz* v. *Franklin*, 258 Ark. 999, 1008, 531 S. W. 2d 1, 7 (1975); *Superior Constr. Co.* v. *Elmo*, 204 Md. 1, 16, 104 A. 2d 581, 583 (1954); *Given* v. *United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S. E. 476, 478 (1919); *Orkin Exterminating Co. of South Florida* v. *Truly Nolen, Inc.*, 117 So. 2d 419, 422–423 (Fla. App. 1960); D. Dobbs, Remedies §3.9, pp. 211–212 (1973). Thus, even "where, in equitable actions, it becomes necessary to award damages, only compensatory damages should be allowed." *Karns* v. *Allen*, 135 Wis. 48, 58, 115 N. W. 357, 361 (1908); see also *Coca-Cola Co.* v. *Dixi-Cola Laboratories*, 155 F. 2d 59, 63 (CA4), cert. denied, 329 U. S. 773 (1946); *United States* v. *Bernard*, 202 F. 728, 732 (CA9 1913); 1 T. Sedgwick,

duty to pay over funds to a beneficiary, see *ante*, at 8, n. 6—it has been acknowledged that the beneficiary may recover punitive as well as compensatory damages. See *Fleishman* v. *Krause, Lindsay & Nahstoll*, 261 Ore. 505, 495 P. 2d 268 (1972) (reversing and remanding for jury trial beneficiary's claim for punitive and compensatory damages); *Dixon* v. *Northwestern Nat. Bank of Minneapolis*, 297 F. Supp. 485 (Minn. 1969) (same). Moreover, while the majority of courts adhere to the view that equity courts, even in trust cases, cannot award punitive damages, see Note, Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After *Massachusetts Mutual Life Insurance Co. v. Russell*, 71 Cornell L. Rev. 1014, 1029–1030 (1986); see also D. Dobbs, Remedies §3.9, pp. 211–212 (1973), a number of courts in more recent decades have drawn upon their “legal” powers to award punitive damages even in cases that historically could have been brought only in equity. While acknowledging the traditional bar against such

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Measure of Damages §371, p. 531 (8th ed. 1891).

The majority denigrates this traditional rule by citing to Professor Dobbs' 1973 treatise on remedies. That treatise noted a “modern” trend among some courts (on the eve of ERISA's enactment) to allow punitive damages in equity cases, but it also noted that the majority rule remained otherwise. Moreover, the trend Professor Dobbs identified was driven in large part by the “modern” merger of law and equity and by the consequent belief that there is no longer any reason to disallow “legal” remedies in what traditionally were “equitable” actions. See *ante*, at 10. Accordingly, the majority's observation in no way undermines the validity of the traditional rule—well ensconsed at the time of ERISA's enactment—that punitive damages were not an appropriate *equitable* remedy, even in trust cases.

relief in equity, these courts have concluded that the merger of law and equity authorizes modern courts to draw upon both legal and equitable powers in crafting an appropriate remedy for a breach of trust. See *I. H. P. Corp.* v. *210 Central Park South Corp.*, 16 App. Div. 2d 461, 464–466, 228 N. Y. S. 2d 883, 887–888 (1962), aff'd, 12 N. Y. 2d 329, 189 N. E. 2d 812 (1963); *Gould* v. *Starr*, 558 S. W. 2d 755, 771 (Mo. App. 1977), cert. denied, 436 U. S. 905 (1978); *Citizens & Southern Nat. Bank* v. *Haskins*, 254 Ga. 131, 136–137, 327 S. E. 2d 192, 199 (1985); see also *New Jersey Division, Horsemen's Benevolent Protective Assn.* v. *New Jersey Racing Comm'n*, 251 N. J. Super. 589, 605, 598 A. 2d 1243, 1251 (1991) (present-day Chancery Division can "afford the full range of equitable and legal remedies for breach of trust," including punitive damages); cf. *Charles* v. *Epperson & Co.*, 137 N. W. 2d 605, 618 (Iowa 1965).

Because some forms of "legal" relief in trust cases were thus not available at equity, limiting the scope of relief under §502(a)(3) to the sort of relief historically provided by the equity courts for a breach of trust provides a meaningful limitation and, if one is needed, a basis for distinguishing "equitable" from "legal" relief.[6] Accordingly, the statutory text does

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[6]Not surprisingly, in light of this history, "the Courts of Appeals which have passed on [the question] have concluded that the statutory language and legislative history of section 502(a)(3) of ERISA prohibit recovery of punitive damages." *Varhola* v. *Doe*, 820 F. 2d 809, 817 (CA6 1987); see also *Harsch* v. *Eisenberg*, 956 F. 2d 651, 661 (CA7), cert. denied *sub nom. Bihler* v. *Eisenberg*, 506 U. S. ___ (1992); *Drinkwater* v. *Metropolitan Life Ins. Co.*, 846 F. 2d 821, 825 (CA1), cert. denied, 488 U. S. 909 (1988); *Amos* v. *Blue Cross-Blue Shield of Alabama,* 868 F. 2d 430, 431, n. 2 (CA11), cert. denied, 493 U. S. 855 (1989); *Sommers Drug Stores Co. Employees Profit Sharing Trust* v.

not compel the majority's rejection of the reading of "appropriate equitable re-
lief" advanced by petitioners and the Solicitor General—a reading that the majority acknowledges is otherwise plausible, see *ante*, at 8.[7]

Although the trust beneficiary historically had an equitable suit for damages against a fiduciary for

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Corrigan Enterprises, Inc., 793 F. 2d 1456, 1464–1465 (CA5 1986), cert. denied, 479 U. S. 1034 (1987); *Powell* v. *Chesapeake & Potomac Telephone Co. of Virginia,* 780 F. 2d 419, 424 (CA4 1985), cert. denied, 476 U. S. 1170 (1986). With respect to §502(a)(2), however, under which a beneficiary may claim both "equitable" and "remedial" relief, see 29 U. S. C. §1132(a)(2) (allowing "for appropriate relief under section 1109 of this title"), the courts are split over whether punitive damages may be recovered. Compare *Kuntz* v. *Reese*, 760 F. 2d 926, 938 (CA9 1985) (allowing such a recovery), vacated on other grounds, 785 F. 2d 1410 (1986), cert. denied, 479 U. S. 916 (1986), with *Sommers Drug Stores*, *supra*, at 1463 (disallowing such a recovery); see also *Cox* v. *Eichler*, 765 F. Supp. 601, 610–611 (ND Cal. 1990) (punitive damages available under §502(a)(2) but not under §502(a)(3)). This Court in *Russell* expressly reserved judgment on whether punitive damages might be recovered on behalf of an ERISA-governed plan under §502(a)(2). *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 144, n. 12 (1985).

[7]The majority faults "[t]he notion that concern about punitive damages motivated Congress" in drafting ERISA on the grounds that the availability of punitive damages was not "a major issue" in 1974. *Ante*, at 9, n. 7. Neither, of course, is there anything to suggest that the availability of *compensatory* damages was a "major issue" in 1974, although the majority does not hesitate to attribute this concern to the 93d

breach of trust, as well as against a participating nonfiduciary, the majority today construes §502(a)(3) as not affording such a remedy against any fiduciciary or participating third party on the ground that damages are not "appropriate equitable relief." The majority's conclusion, as I see it, rests on transparently insufficient grounds. The text of the statute supports a reading of §502(a)(3) that would permit a court to award compensatory monetary relief where necessary to make an ERISA beneficiary whole for a breach of trust. Such a reading would accord with the established equitable remedies available under the common law of trusts, to which Congress has directed us in construing ERISA, and with Congress' primary goal in enacting the statute, the protection of beneficiaries' financial security against corrupt or inept plan mismanagement. Finally, such a reading would avoid the perverse and, in this case, entirely needless result of construing ERISA so as to *deprive* beneficiaries of remedies they enjoyed prior to the statute's enactment. For these reasons, I respectfully dissent.

Congress. In any event, it seems to me considerably less fanciful to suppose that Congress was motivated by a desire to limit the availability of punitive damages than that it was moved by a desire to take from the statute's intended beneficiaries their traditional and possibly their only means of make-whole relief.