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Employee Benefits - Employee Retirement Income Security Act Allows Employers to Pursue Federal Common Law Cause of Action for Equitable Restitution of Mistaken Pension Fund Contributions

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EMPLOYEE BENEFITS—EMPLOYEE RETIREMENT INCOME SECURITY 
ACT ALLOWS EMPLOYERS TO PURSUE FEDERAL COMMON LAW 
CAUSE OF ACTION FOR EQUITABLE RESTITUTION OF MISTAKEN 
PENSION FUND CONTRIBUTIONS


I. INTRODUCTION

The issue of whether an employer has a cause of action to recover mistaken overpayments to a multiemployer-employee benefit plan is currently hotly debated. Circuit courts that have addressed the issue remain split. Most circuits have addressed the issue in terms of whether this cause of action can be implied from section 403(c)(2)(A)(ii) of the Employee Retirement Income Security Act (ERISA). Generally,

1. An employee benefit plan can be either an “employee pension benefit plan” or an “employee welfare benefit plan,” or both. See 29 U.S.C. § 1002(3) (1988). An “employee pension benefit plan” provides retirement income for employees or defers their income until retirement. Id. § 1002(2)(A). An “employee welfare benefit plan” is “maintained for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care 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 . . . .” Id. § 1002(1).

A multiemployer benefit plan is created by a collective bargaining agreement between one or more employee organizations and at least two employees. Note, Implying a Statutory Right for Employers for the Return of Mistaken Overcontributions to a Multiemployer-Employee Benefit Plan, 62 NOTRE DAME L. REV. 396, 396-97 (1987). Employers contribute to the plans on behalf of their employees covered by the collective bargaining agreement. Id. These contributions are often based on the number of hours worked by the employee, the production of the employer, or both. Id. at 397 (citing Dime Coal Co. v. Combs, 796 F.2d 394, 395 (11th Cir. 1986) (contributions based on tons of coal produced and hours worked) and 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) (contribution based on total productive hours worked)). For ERISA's statutory definition of a multiemployer plan, see 29 U.S.C. § 1002(37)(A) (1988).

2. The Eleventh, Ninth, Seventh and Sixth Circuits have addressed the issue of whether an employer has a cause of action for the return of overpayments. See infra notes 4-6. Other circuits, while not addressing the issue directly, have allowed the employer to recover the mistaken overpayments on equitable grounds. See Dumac Forestry Servs., Inc. v. International Bhd. of Elec. Workers, 814 F.2d 79, 82-83 (2d Cir. 1987); Teamsters Local 639-Employers Health Trust v. Cassidy Trucking, Inc., 646 F.2d 865, 868 (4th Cir. 1981) (equitable principles should apply to determine whether restitution of overpayment is proper; factors such as set off for payments made to beneficiaries not actually covered by plan and illegality of payments must be considered); Reuther v. Trustees of Trucking Employees, 575 F.2d 1074, 1078-79 (3d Cir. 1978) (did not address issue of implied right nor federal common law cause of action, but applied equitable principles to allow recovery).

while the Ninth Circuit has allowed such a cause of action,\(^4\) most other circuits have rejected such an implied cause of action.\(^5\) Some courts, after rejecting an implied cause of action, have considered whether fed-

1461 (1988); see id. § 1103(c)(2)(A)(ii) (as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, tit. 4, § 410(a), 94 Stat. 1308). Originally, ERISA provided that in “case of a contribution which is made by an employer by a mistake of fact, [section 403(c)(1)] shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.” See Note, supra note 1, at 399 n.16. Congress amended this section making the time limit for the return more lenient; Congress also believed the requirement that a contribution be made by a mistake of fact was too narrow and amended the statute to allow return for a mistake of law as well. Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980, 126 Cong. Rec. 20,208 (1980).

Incorporating these changes, sections 403(c)(1) and (2)(A) now provide:

1. Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under section 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.


4. Award Serv., Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985) (holding that cause of action for return of mistaken payments properly implied by section 403 under standards of Cort v. Ash); Chase v. Trustees of Western Conference of Teamsters Pension Trust Fund, 753 F.2d 744, 749-50 (9th Cir. 1985) (same). The Ninth Circuit has also implied other causes of action under ERISA. See, e.g., Fenton Indus., Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1304-05 (9th Cir. 1982) (employer injured by interruption of benefits to his employee has implied cause of action under ERISA as long as employer alleges specific and personal injury).

5. Giardono v. Jones, 867 F.2d 409, 413 (7th Cir. 1989) (no implied cause of action exists under section 403 because section 502 of ERISA provides exclusive list of allowable parties and causes of action and does not include employers); Dime Coal Co. v. Combs, 796 F.2d 394, 399-400 (11th Cir. 1986) (no implied cause of action under section 403 because of lack of legislative intent...
eral common law could support a cause of action for equitable restitution; these courts are also divided.\(^6\)

This conflict among the circuits seems to result from four main factors. First, the language of section 403(c)(2)(A)(ii) is ambiguous.\(^7\) Instead of clearly creating a cause of action for the return of overpayments, the section merely provides that the prohibition against plan assets enuring to the benefit of the employer "shall not prohibit the return of such [mistaken] contribution or payment to the employer . . .".\(^8\) A second factor is the disagreement over whether section 502 of ERISA,\(^9\) which expressly grants the right to initiate a private cause of action, is pre-empted by Cort analysis; \(Whitworth Bros.,\) 794 F.2d at 228-29 (no implied cause of action under Cort analysis).

6. After refusing to recognize an implied cause of action under section 403, the Eleventh Circuit also rejected the existence of a federal common law cause of action. \(See Dime Coal,\) 796 F.2d at 399 n.7 ("Although the question is not well presented . . . we hold that no federal common law right to recovery of the disputed contributions at issue in this case exists.").

The Sixth Circuit, while rejecting an implied cause of action, has allowed an employer a federal common law cause of action for equitable restitution of mistaken overpayments. \(See Whitworth Bros.,\) 794 F.2d at 234-36 (pre-emption subsection of ERISA, 29 U.S.C. § 1441(a), and congressional directive authorizing courts to develop federal common law concerning pension rights supports creation of federal common law cause of action for mistaken overpayments); \(see also\) Peckham v. Board of Trustees, 719 F.2d 1063, 1066 (10th Cir. 1983) (allowing federal common law cause of action for unjust enrichment to self-employed union members who over-contributed; trustee must make determination which is conclusive unless arbitrary or capricious, not supported by evidence or erroneous on question of law).

Some district courts have also rejected an implied cause of action and allowed a federal common law cause of action. \(See Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.,\) 679 F. Supp. 743, 747-51 (N.D. Ill. 1988) (finding common law right of action but no implied right of action); \(Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund,\) 618 F. Supp. 943, 950 (D. Del. 1985) (no implied cause of action but federal common law cause of action exists; noting that result is consistent with courts that allow implied cause of action), \(aff'd in relevant part,\) 850 F.2d 1028, 1034 (3d Cir. 1988) (court did not consider whether implied or federal common law right exists because issue not raised on appeal).


The Ninth Circuit construed this language as creating a right in the employer to a return of the mistaken contributions. \(See Award Serv. Inc. v. Northern Cal. Retail Clerks Unions,\) 763 F.2d 1066, 1068 (9th Cir. 1985); \(see also\) Note, \(supra\) note 1, at 408-09. Other circuits, however, stress that the language is merely permissive and no such right exists. \(See, e.g., Whitworth Bros.,\) 794 F.2d at 231.


A civil action may be brought-
\(\text{(I) by a participant or beneficiary-}\)
\(\text{(A) for the relief provided for in subsection (c) of this section, or}\)
\(\text{(B) to recover benefits due to him under the terms of his\)
action to enforce specified ERISA provisions only to plan participants, beneficiaries, fiduciaries, and the Secretary of Labor, is an exclusive listing of civil causes of action and those who have standing to bring them, thereby prohibiting employers from bringing a cause of action. A third factor which increases the likelihood of conflict among the circuits is the lack of legislative history as to whether such a cause of action does indeed exist. Finally, the concern that allowing a cause of action

- to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
- by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
- 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 equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
- by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
- 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
- the Secretary to collect any civil penalty under subsection (i) of this section.


The jurisdiction of the federal courts is also limited in section 502. Section 502(e)(1) states that federal district courts "shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(e)(1) (1988).


12. For the statutory definition of a fiduciary, see 29 U.S.C. § 1002(21)(A) (1988). In some limited circumstances an employer is regarded as a fiduciary and can thus bring suit under section 502(a)(3). Note, supra note 1, at 400 n.26 (citing Great Lakes Steel v. Deggendorf, 716 F.2d 1101, 1103 (6th Cir. 1983) (employer named administrator of single employer benefit plan and thus its fiduciary) and United States Steel Corp. v. Pennsylvania Human Relations Comm'n, 669 F.2d 124, 126 (3d Cir. 1982) (employer has sole authority to determine and alter terms of employee health benefit plan)).

13. Whitworth Bros. Storage Co. v. Central States, 794 F.2d 221, 225-26 (6th Cir.) (outlining position of the various courts and stating "courts disagree whether the grant of jurisdiction in section 502 is exclusive, thereby prohibiting an action by an employer . . . "); cert. denied, 479 U.S. 1007 (1986); see also Dime Coal Co. v. Combs, 796 F.2d 394, 399 n.7 (11th Cir. 1986) (refusing to allow federal common law cause of action because section 502 creates comprehensive legislative scheme for enforcement, thereby resulting in presumption that such remedy deliberately omitted).

THIRD CIRCUIT REVIEW 803

will damage the integrity of benefit plans has led to differing results.\(^{15}\)

The Third Circuit directly considered the issue of whether an employer has an implied cause of action under either section 403 of ERISA or a federal common law cause of action for equitable restitution to recover mistaken overpayments for the first time in Plucinski v. I.A.M. National Pension Fund.\(^{16}\) In Plucinski, the United States Court of Appeals for the Third Circuit held that there is no implied right of action under ERISA for recovery of payments made to a pension fund under mistake of fact or law, but that there is an action available under federal common law for equitable restitution.\(^{17}\)

II. DISCUSSION

In Plucinski, Perth Amboy Dry Dock Co. (PADD) sought to recover payments made on behalf of its employee, Plucinski,\(^{18}\) to the International Association of Machinists and Aerospace Workers Fund (IAM Fund or the Fund).\(^{19}\) Beginning in 1966, PADD entered into a series of

15. In *Crown Cork & Seal v. Teamsters Pension Fund*, this concern led the court to completely reject any implied cause of action. 549 F. Supp. 307, 312 (E.D. Pa. 1982). In rejecting the implied cause of action, the court stated, "[t]o impose a right of restitution in favor of employers could severely undermine the funds' integrity." *Id.* In *Award Service, Inc. v. Northern California Retail Clerks Unions*, this concern led the court to attach a caveat to the implied cause of action it found under section 403: "Award Service [the employer] will have to establish that the equities favor restitution in order to succeed on the merits." 763 F.2d 1066, 1069 (9th Cir. 1985).

16. 875 F.2d 1052 (3d Cir. 1989). The Third Circuit, while having dealt with related issues, has never addressed the issue of whether an employer has an implied cause of action or a federal common law cause of action to recover mistaken contributions. See *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1030 (3d Cir. 1988) (refusing to review lower court holding that federal common law cause of action exists for employer to recover mistaken overpayments because benefit fund did not cross-appeal finding); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 310-12 (3d Cir. 1982) (holding employees have no cause of action under federal common law unjust enrichment theory to recover surplus funds where contract provides surplus is to go to employee even though section 4044(d)(2) of ERISA reflects Congress's view that equities favor surplus going to beneficiaries where contract provides surplus is to go to employer); *Reuther v. Trustees of Trucking Employees*, 575 F.2d 1074, 1078-79 (3d Cir. 1978) (allowing employer to recover mistaken overpayments citing "equitable character" of pension plans without addressing existence of federal common law or implied right).

17. *Plucinski*, 875 F.2d at 1053. The court emphasized that the employer can recover the mistakenly paid funds only when the court finds it equitable to do so. *Id.* The court then noted that equitable circumstances would require the court to refrain from granting restitution where refunding the payments would lead to the underfunding of the plan. *Id.*

18. *Id.* Plucinski's employment with PADD as a storekeeper began in October 1945. *Id.*

19. The IAM Fund is a "defined benefit" fund which means that the fund does not keep segregated accounts for individual employees; instead, all assets are pooled and pensions are paid from this pool at a predetermined amount to eligible employees upon retirement. *Id.* For a discussion of definitions of multi-
collective bargaining agreements that obligated it to make contributions to this fund on behalf of members of the International Association of Machinists and Aerospace Workers (IAM) and three other local unions.20 Both parties agreed that neither the original nor any subsequent agreements between PADD and its employees covered Plucinski.21 PADD contended that it began making contributions on Plucinski's behalf only after it reached an agreement with a union representative allowing Plucinski to participate in the IAM Fund.22 The IAM Fund, however, disputed this and alleged that PADD began making payments to defraud the Fund into accepting Plucinski although he was not entitled to participate under the collective bargaining agreements.23

In October 1984, shortly before he reached the age of sixty-five, Plucinski filed an application for pension benefits with the IAM Fund.24 The Fund denied the request.25 Then on March 17, 1986, Plucinski brought suit in the United States District Court for the District of New Jersey against PADD, the IAM Fund and other defendants to recover the value of the pension benefits that he was promised.26 PADD cross-claimed against the IAM Fund to recover the contributions on behalf of Plucinski.27 On motion for summary judgment, the district court held that PADD was solely responsible for paying Plucinski's pension and directed the IAM Fund to refund to PADD the value of all contributions paid on behalf of Plucinski, plus interest.28

In so holding, the district court found that it was appropriate to create a federal common law cause of action for the recovery of erroneously paid contributions.29 The IAM Fund appealed the district court’s employer-employee benefit plans and the formalities required to create them, see supra note 1.

20. Plucinski, 875 F.2d at 1053.
21. Id. Plucinski was neither a member of the IAM nor the three other local unions covered by the agreement nor was his job classification of “storekeeper” covered by any collective bargaining agreement. Id.
22. Id. at 1053-54. In March 1972, the IAM Fund advised PADD that it would not permit participation by any more employees who were not members of the IAM. Id. at 1053. PADD began making these payments on behalf of Plucinski in late 1972 or early 1973. Id.
23. Id. at 1054.
24. Id.
25. Id. The Fund denied the request because, as a storekeeper, Plucinski was not entitled to benefits under any of the collective bargaining agreements and there was no other written agreement making Plucinski eligible. Id.
26. Id. The other defendants included the PADD Management Pension Fund, PADD's former President, Alfred C. Bruggeman and PADD's Vice President, William T. Harth. Id. These defendants, however, were not involved in the appeal. After the district court decision, Plucinski settled his claims with the four defendants, PADD, the PADD Management Fund, Bruggeman and Harth. Id.
27. Id. The IAM Fund also cross-claimed against PADD. Id.
28. Id.
29. Id. (citation omitted). The Third Circuit noted that, in so holding, the
order that IAM refund to PADD all contributions made on behalf of Plucinski. Thus, the sole issue on appeal was whether PADD, as an employer, had a valid cause of action to recover mistakenly paid contributions.

In analyzing whether an employer has such a cause of action, the Third Circuit first noted that the only section of ERISA which refers to mistaken contributions is section 403. The Third Circuit recognized that section 403 provides no express right of action for employers to recover mistaken contributions. Since no express cause of action existed, the court then addressed whether the district court's judgment could be supported by either an implied right of action or a federal common law cause of action.

In determining whether there was an implied right of action under section 403, the court first discussed the four factor analysis outlined by the United States Supreme Court in Cort v. Ash, noting, however, that "[t]he question . . . is one of statutory construction, and the key inquiry is the intent of the legislature." The court then noted that the circuits are divided on the issue, the Ninth Circuit holding that employers have an implied right of action for the recovery of mistaken contributions under section 403, and the Sixth and Eleventh Circuits holding that no district court adopted the holding and reasoning of Airco Industrial Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943 (D. Del. 1985), rev'd in part on other grounds, 850 F.2d 1028 (3d Cir. 1988). Plucinski, 875 F.2d at 1054.

Id. Originally, PADD also appealed but it thereafter settled with Plucinski and withdrew its appeal. Id.

31. Id.

32. Id. at 1054-55. Section 403 is codified in 29 U.S.C. § 1103(c) (1988). For the text of section 403, see supra note 3.

33. Plucinski, 875 F.2d at 1055. Instead, according to the court, section 403(c)(2)(A)(ii) merely makes it possible for the trustee to refund the mistaken contributions without violating the non-enurement provisions of section 403(c)(1). Id. at 1055. For the complete text of section 403, see supra note 3.

34. Plucinski, 875 F.2d at 1055. The court addressed both issues even though the district court's holding was based upon a federal common law cause of action and PADD appeared to concede that there was no implied right of action because recognizing a cause of action under either theory would allow the court to affirm the district court's judgment. Id. (citing Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1045 (3d Cir. 1973)).

35. 422 U.S. 66, 78 (1975). The Plucinski court summarized these factors: (1) whether the plaintiff is in the class for whose especial benefit the statute was enacted; (2) whether there is any indication that Congress intended to imply a remedy; (3) whether a remedy is consistent with the purposes underlying the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law.

Plucinski, 875 F.2d at 1055 (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

36. Id. (citing Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 91 (1981)).

37. Plucinski, 875 F.2d at 1055 (citing Award Serv. Inc. v. Northern Cal. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985), cert. denied, 474 U.S. 1081 (1986)). The Plucinski court then summarized the Cort analysis in Award
such implied right of action exists.\(^{38}\)

In *Plucinski*, the court rejected the Ninth Circuit’s approach, and adopted that of the Sixth and Eleventh Circuits because the court found that “‘neither the statute nor the legislative history reveals a congressional intent to create a private right of action.’”\(^{39}\) The court supported this finding of lack of intent with two reasons.\(^{40}\) First, the language of section 403(c)(2)(A)(ii) is permissive. Merely giving permission does not imply that Congress also intended employers to be able to judicially compel the refund of contributions.\(^{41}\) Second, the court noted that there is no indication in the statute or in the legislative history that Congress intended to provide employers any causes of action at all under ERISA.\(^{42}\) Section 502\(^{43}\) demonstrates this proposition through its specification that participants, beneficiaries, fiduciaries and the Secret-

In *Award Service*, the Ninth Circuit held that the plaintiffs met the first *Cort v. Ash* factor, because section 403(c)(2)(A)(ii) of ERISA—the section that permits pension funds to return payments made under mistake of fact or law—was “clearly designed for the benefit of employers.” It found that the second and third factors were met, reasoning that Congress must have intended to create a private right of action because otherwise the decision whether to refund the overpayments would be left wholly to the trustee of the fund, who would naturally favor keeping money in the fund. The court stated that “implying a private right of action furthers the congressional scheme of permitting restitution of contributions paid by mistake when equitable factors militate in favor of such restitution.” The court found that the fourth factor was met because “no principle of federal-state comity renders a federal cause of action inappropriate.”

*Id.* at 1055-56 (citations omitted).

38. *Id.* at 1055. To support its contention that the Sixth and Eleventh Circuits had rejected such an implied cause of action, the court cited Whitworth Bros. Storage Co. v. Central States, 794 F.2d 221, 233 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986) and Dime Coal Co. v. Combs, 796 F.2d 394, 398-99 (11th Cir.). The court also cited a district court case as supporting this proposition. *Plucinski*, 875 F.2d at 1056 (quoting *Dime Coal*, 796 F.2d at 1057 and *Whitworth*, 794 F.2d at 232-33).

40. *Id.*

41. *Id.* (citing *Crown Cork*, 549 F. Supp. at 311). In *Crown Cork*, the court analyzed this permissive language as part of the second *Cort v. Ash* factor, whether Congress indicated its intent to create such a remedy. *Crown Cork*, 549 F. Supp. at 311. In *Crown Cork*, the court emphasized that this permissive language did not manifest Congress’ intent to create a right to such contributions. *Id.*

42. *Plucinski*, 875 F.2d at 1056.

tary of Labor have the right to bring specified civil actions under ERISA.\textsuperscript{44}

After rejecting an implied cause of action, the court addressed to the issue of whether an employer has a federal common law cause of action for recovery of mistaken contributions.\textsuperscript{45} Quoting a Third Circuit district court opinion, the court inferred that it is not inconsistent to reject an implied cause of action yet approve a federal common law cause of action because the finding of insufficient congressional intent to imply a cause of action is not the equivalent of congressional intent to deny a federal common law cause of action.\textsuperscript{46} Moreover, unlike an implied cause of action, specific congressional intent to create a cause of action is not required for the court to create a federal common law cause of action since Congress both authorized and expected federal courts to create common law under ERISA.\textsuperscript{47} Therefore, instead of a finding of specific congressional intent, the test to determine whether it is appropriate to create a federal common law cause of action is whether such action is "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted . . . by Congress."\textsuperscript{48}

Next, the court noted that the Third Circuit had previously recognized several common law actions pursuant to ERISA.\textsuperscript{49} The court, however, cautioned that "courts [should] not lightly create additional

\textsuperscript{44} Plucinski, 875 F.2d at 1056.

\textsuperscript{45} Id.

\textsuperscript{46} Id. The court quoted Chief Judge Schwartz who observed: "'[T]he result of the Cort v. Ash analysis . . . [is] not that Congress intended to forbid this cause of action, but only that there is insufficient evidence that Congress intended to provide a remedy.'" Id. (quoting Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 951 (D. Del. 1985), rev'd in part on other grounds, 850 F.2d 1028 (3d Cir. 1988)).

\textsuperscript{47} Id. The court noted that in certain areas, such as ERISA, Congress has authorized federal courts to create common law. Id. (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) ("It is not uncommon for the federal courts to fashion federal law where federal rights are concerned.") and Van Orman v. American Ins. Co., 680 F.2d 301, 311 (3d Cir. 1982) ("Congress intended federal courts to fashion federal common law concerning pension plans under ERISA.").

\textsuperscript{48} Id. (quoting Van Orman, 680 F.2d at 312). The court later interpreted this test as also requiring that the federal common law cause of action furthers the purposes of ERISA. See infra notes 54-64 and accompanying text.

\textsuperscript{49} Plucinski, 875 F.2d at 1056. The Third Circuit has recognized a federal common law claim by an employer alleging that a fund had fraudulently induced the employer to withdraw from the fund, resulting in the imposition of a large withdrawal penalty against the employer. Id. (citing Carl Colteryahm Dairy, Inc. v. West Pa. Teamsters & Employers Pension Fund, 847 F.2d 113, 122 (3d Cir. 1988), cert. denied, 109 S. Ct. 865 (1989)). A federal common law cause of action for employees to recover from their employer the difference between pension payments guaranteed by the Pension Benefit Guaranty Corporation and those promised in the pension agreement has also been recognized. Id. (citing Murphy v. Heppenstall Co., 635 F.2d 233, 237-39 (3d Cir. 1980)). An action for one fund to sue another for a declaratory judgment as to which fund is liable for medical expenses of a beneficiary of both plans has also been recognized. Id.
[ERISA] rights under the rubric of federal common law' " because, through ERISA, Congress established an extensive regulatory network. The court next noted that the Sixth and Eleventh Circuits were divided on the issue, indicating that the Eleventh Circuit rejected this cause of action for just such a reason. Specifically, the court noted the Eleventh Circuit's reasoning that the comprehensive nature of remedies within ERISA made it appropriate to presume that Congress deliberately omitted the remedy and, therefore, denied the federal common law cause of action. The court then addressed the Sixth Circuit's holding. While the court agreed with the Sixth Circuit's creation of a federal common law right, it rejected the Sixth Circuit's rationale because that court failed to address what the Third Circuit determined to be the primary consideration in the creation of a federal common law cause of action—whether the creation of the cause of action would further the purposes of ERISA.

The court then considered whether the creation of a federal common law cause of action would be consonant with the purposes of ERISA. First, the court discussed whether such a cause of action could be consistent with the primary purpose of ERISA—"to 'protect the integrity of the pension funds for the benefit of employees and their beneficiaries.' " While admitting that an automatic right of restitution

(citing Northeast Dep't of ILGWU v. Teamsters Local Union No. 229, 764 F.2d 147, 157-59 (3d Cir. 1985)).

The court also cited Van Orman, as one situation where the court had refused to create a federal common law cause of action. Id. at 1057 (citing Van Orman, 680 F.2d at 312). In Van Orman, however, the court appeared to refuse the creation of such a cause of action for employees to recover surpluses in an on-going pension fund, not because such a cause of action was inconsistent with policies underlying ERISA, but because the contracts involved specifically provided that the surplus was not to go to the employees. See Van Orman, 680 F.2d at 312.

50. Plucinski, 875 F.2d at 1056 (quoting Van Orman, 680 F.2d at 312).

51. Id. at 1057. The Eleventh Circuit rejected a federal common law cause of action for employers to recover mistaken overpayments. Dime Coal Co. v. Combs, 796 F.2d 399, 399 n.7 (11th Cir. 1986). That court emphasized, however, that the issue of a federal common law cause of action was not well presented. Id. In contrast, the Sixth Circuit found such a cause of action. Whitworth Bros. Storage Co. v. Central States, 794 F.2d 221, 235-36 (6th Cir.), cert. denied, 479 U.S. 1007 (1986).

52. Plucinski, 875 F.2d at 1057 (citing Dime Coal, 796 F.2d at 399 n.7). This facile reasoning, however, although not addressed by the court, may lead to the conclusion that no federal common law cause of action is ever to be created under ERISA. For a discussion of this concept, see infra notes 106-10 and accompanying text.

53. Plucinski, 875 F.2d at 1057 (discussing Whitworth, 794 F.2d at 233-36).

54. Id. (citing Whitworth, 794 F.2d at 233-36).

whenever error was established would conflict with this primary purpose,\textsuperscript{56} the court argued that an approach which applies equitable considerations to the allowance of restitution would be entirely consonant with this primary purpose.\textsuperscript{57} In fact, the principal equitable consideration in such an approach is whether restitution would undermine the financial stability of the plan.\textsuperscript{58} The court further supported this assertion by noting that most courts that have allowed such a cause of action have followed this approach.\textsuperscript{59}

Next, the court addressed a subsidiary purpose of ERISA—encouraging the growth and maintenance of multiemployer plans.\textsuperscript{60} The court found that the creation of such a federal common law cause of action would further this purpose.\textsuperscript{61} Since it is optional for an employer to establish an ERISA plan, putting the burden of mistaken payments wholly on employers may discourage some employers from operating ERISA plans.\textsuperscript{62} The creation of a federal common law cause of action allowing the employer to recover these mistaken payments would therefore further the purpose of encouraging the growth and maintenance of ERISA plans.\textsuperscript{63}

The primary reason, therefore, for the court’s adoption of the fed-

\textsuperscript{56} Plucinski, 875 F.2d at 1057. Such an automatic right of action could conflict with this purpose because "'[m]istaken contributions, once invested, may be just as essential to the funds' integrity and stability as non-mistaken contributions . . .'" \textit{Id.} (quoting \textit{Crown Cork}, 549 F. Supp. at 312).

\textsuperscript{57} \textit{Id.} at 1057-58.

\textsuperscript{58} \textit{Id.} at 1057 (citing \textit{Award Serv. Inc. v. Northern Cal. Retail Clerks Unions}, 763 F.2d 1066, 1069 (9th Cir. 1985), \textit{cert. denied}, 474 U.S. 1081 (1986) and \textit{Peckham v. Board of Trustees of the Int'l Bhd. of Painters}, 719 F.2d 1063, 1066 (individuals who contribute to pension fund have causes of action for return of mistaken contributions unless fund will be underfunded), \textit{modified on rehearing}, 724 F.2d 100 (10th Cir. 1983)).

\textsuperscript{59} Plucinski, 875 F.2d at 1057. Many courts have only allowed restitution where equities, including the integrity of the plan, are considered. \textit{See Award Serv.}, 763 F.2d at 1069; \textit{Teamsters Local 639 v. Cassidy Trucking, Inc.}, 646 F.2d 865, 868 (4th Cir. 1981). The Third Circuit has also recognized that equitable principles must be applied when it creates other similar federal common law causes of action. \textit{See} \textit{Carl Colteryahn Dairy, Inc. v. West Pa. Teamsters & Employers Pension Fund}, 847 F.2d 113, 121-22 (3d Cir. 1988) (recognizing equitable action by employer to avoid allegedly fraudulent assessment of liability for withdrawal from multiemployer plan), \textit{cert. denied}, 109 S. Ct. 865 (1989); \textit{Reuther v. Trustees of the Trucking Employees}, 575 F.2d 1074, 1078 (3d Cir. 1978) ("Because Congress has emphasized 'the equitable character' of [ERISA-qualifying] pension plans, . . . we believe that equitable principles should be applied in this case.").

\textsuperscript{60} Plucinski, 875 F.2d at 1058. The court noted that Congress had included provisions, such as tax benefits to employers who maintain ERISA-qualifying plans, to further the purpose of encouraging broad participation. \textit{Id.} Various legal commentaries also identify this as an underlying purpose of ERISA. \textit{See}, \textit{e.g.}, Note, \textit{supra} note 1, at 408.

\textsuperscript{61} Plucinski, 875 F.2d at 1058.

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.}
eral common law cause of action for equitable restitution is that "creating such a cause of action will fill in the interstices of ERISA and further the purposes of ERISA." 64 Although this appears to be the primary reason, 65 the court also noted two subsidiary reasons. 66 First, the existence of section 403 does not demonstrate that Congress intended to deny employers a cause of action for equitable restitution; instead it simply shows that Congress agreed that employee benefit funds should be allowed to return such contributions. 67 Second, the court stated that the failure to recognize such a cause of action would lead to severely inequitable results not intended by Congress. 68

Because the court held that an employer has a federal common law cause of action for the return of mistakenly paid contributions as long as equitable considerations support such restitution, the court vacated the judgment of the district court and remanded for a consideration of the equities of ordering restitution. 69 The court directed the lower court to consider on remand the amount of money in the fund and the magnitude of the burden should the fund return the mistaken contribution. 70 Also relevant to the equities of ordering restitution is the question of whether the contributions on behalf of Plucinski were truly made by mistake or whether such contributions constituted an attempt to defraud the Fund into accepting Plucinski as a participant. 71

III. ANALYSIS

In Plucinski, the Third Circuit correctly rejected an implied cause of action under ERISA section 403(c)(2)(A)(ii) for the employer to recover mistaken contributions. 72 Although the court's rationale underlying its

64. *Id.*
65. *See supra* note 46 and accompanying text.
66. *Plucinski,* 875 F.2d at 1058.
67. *Id.*
68. *Id.* The court stated:
A simple keypunch error could cost an employer tens of thousands of dollars or more. Perhaps more strikingly, a trustee could extort extra money from an employer by force or fraud, and the employer would have no definite means of recouping the "contributions" from the fund. Even in the more run of the mill case it would be inequitable to allow the fund to keep money which came its way by honest mistake, for example if the employer miscalculated the amount it owed or if it erroneously believed that it was legally obligated to pay certain monies to the fund.

69. *Id.*
70. *Id.*
71. *Id.* For a discussion of the parties' respective positions on this issue, see *supra* notes 22-23 and accompanying text.
72. *See Plucinski,* 875 F.2d 1056. In Plucinski, the court rejected the implied cause of action based on two determinations. *Id.* First, the court found that the language of ERISA section 403(c)(2)(A)(ii) is merely permissive. *Id.* For the full text of section 403, see *supra* note 3. Second, the court noted that neither legis-
rejection of such an implied cause of action is brief, it is in accord with
the recent application of the Cort v. Ash test by the Supreme Court and
lower courts. These Supreme Court decisions, as well as the lower
court decisions, have emphasized the importance of the first two fac-
tors. The first factor—whether the plaintiff is “one of the class for
whose especial benefit the statute was enacted”—has been interpreted as
not simply asking who would benefit from the act, but whether Congress
intended to confer federal rights on the plaintiff. This determination
can be based on the language of the statutes. Thus, the determination
in Plucinski that the language of section 403(c)(2)(A)(ii) is merely permis-
sive implies that this factor is not satisfied.

73. 422 U.S. 66, 78 (1975).
(1985) ("[b]ecause neither the statute nor the legislative history reveals a con-
gressional intent to create a private right of action . . . we need not carry the Cort
v. Ash inquiry further."); (quoting Northwest Airlines, Inc. v. Transport Work-
ners Union of America, 451 U.S. 77, 94 n.31 (1981)); California v. Sierra Club,
451 U.S. 287, 293, 298 (1981) ("Cases subsequent to Cort have explained that
the ultimate issue is whether Congress intended to create a private right of ac-
... but the four factors specified in Cort remain the criteria through which
this intent could be discerned."); Northwest Airlines, 451 U.S. at 91 (ultimate
question is congressional intent and four Cort factors relevant to intent). For a
summary of the four factor test as originally set forth in Cort, see supra note 35.
75. See supra note 74; Sierra Club, 451 U.S. at 302 (Rehnquist, J., Burger,
C.J., Stewart, J., & Powell, J., concurring) (four factors for determining existence
of implied cause of action not all of equal weight).
76. Cort, 422 U.S. at 78-80 (statute making political contributions by corpo-
ations criminal suggests no intent on part of Congress to confer a federal right
upon shareholders against corporations where intent to protect shareholders
was at best a subsidiary purpose); see also Sierra Club, 451 U.S. at 294 (question
not who would benefit from eventual application of statute, rather whether Con-
gress intended to confer federal rights; discerned from language of statute).
Such a right appears to be created if either the statute was enacted specifi-
cally to benefit the plaintiff or if the language is right-creating. Cannon v. Uni-
versity of Chicago, 441 U.S. 677, 690-92 (1979) (to determine first factor in Cort
analysis, court emphasized importance of whether right or duty creating lan-
guage was explicit and whether statute explicitly identified class to benefit); see
also Cort, 422 U.S. at 78-79 (suggesting right would be created if statute created
specifically to benefit plaintiff); Sierra Club, 451 U.S. at 294 (congressional intent
to create right may be discerned from language of statute).
77. See Sierra Club, 451 U.S. at 297-98; Cannon, 441 U.S. at 690.
78. Plucinski, 875 F.2d 1052, 1056.
79. Similarly, in Crown Cork & Seal v. Teamsters Pension Fund, 549 F.
Supp. 307, 311 (E.D. Pa. 1982), the court found that the first factor was not met
because the language was merely permissive. Id. at 311 (section 403(c)(2)(A)(ii)
not intended to create right to contributions, based on permissive language).

Other courts have stressed that section 403 creates no such right in an em-

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The second factor—whether Congress has indicated, either explicitly or implicitly, an intent to create such a remedy—\[^{80}\]—is implied by the court’s second finding that there is no indication in either the statute or the legislative history that Congress intended to give employers any causes of action at all under ERISA.\[^{81}\] The Plucinski court supported this assertion by noting that section 502 of ERISA, which specifies all parties that may bring civil actions under ERISA, does not mention employers.\[^{82}\] This rationale in Plucinski is clearly supported by a recent Supreme Court case, Massachusetts Mutual Life Insurance Co. v. Russell.\[^{83}\]

In Russell, a beneficiary brought an action against the plan for improper refusal to pay benefits, seeking extra-contractual damages pursuant to section 409(a) of ERISA.\[^{84}\] Although the Court found that the first and fourth Cort factors were clearly met,\[^{85}\] the Court found that the “six carefully integrated civil enforcement provisions found in § 502(a) of the statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.”\[^{86}\] As in Plucinski, the Supreme Court in Russell also found that

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\[^{81}\] Plucinski, 875 F.2d at 1056. Other courts have noted the lack of legislative history concerning whether employers have such a cause of action. See, e.g., Whitworth, 794 F.2d at 227.

\[^{82}\] Plucinski, 875 F.2d at 1056.


\[^{84}\] Section 409(a) provides in pertinent part:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.


\[^{85}\] Russell, 473 U.S. at 145 (the beneficiary “is a member of the class for whose benefit the statute was enacted and, in view of the pre-emptive effect of ERISA, there is no state-law impediment to implying a remedy”). For a listing of the Cort factors, see supra note 35.

\[^{86}\] Russell, 473 U.S. at 146 (emphasis in original). The Supreme Court continued: “The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA’s interlocking, interrelated, and interdependent remedial scheme, which is in part of a ‘comprehensive and reticulated statute.’ ” Id. (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 358, 361 (1980)). Interpreting this case, the Sixth Circuit stated: “The Court found . . . that Congress did not intend to authorize remedies other than those specifically listed in section 502.” Whitworth Bros. Storage Co. v. Central States, 794 F.2d 221, 232 (6th Cir.), cert. denied, 479 U.S. 1007 (1986).
there was a “stark absence” in the legislative history of any reference to an intention to authorize the remedy in question and concluded that the second factor was not satisfied. 87

The Third Circuit’s conclusion that the application of the Cort factors did not warrant implication of an employer civil cause of action is amply supported by the decisions of lower courts that have addressed the issue of whether an employer had an implied cause of action under section 403. Similar to the Plucinski court, these decisions, in denying an implied cause of action, have emphasized both the lack of right-creating language in the statute and the lack of legislative intent as evidenced both by the legislative history and section 502. 88 Therefore, in Plucinski, the court’s findings of a lack of legislative history and the section 502 exclusion of employers as those entitled to sue, clearly support a determination that the second Cort factor is not satisfied. For example, in Crown Cork & Seal v. Teamsters Pension Fund, 89 the employer, Crown Cork, brought an action against the pension fund for the return of mistaken contributions amounting to approximately $80,000. 90 After concluding that ERISA clearly provided no express cause of action, the court turned to the determination of whether an implied cause of action existed under section 403. 91 The court noted that the central inquiry is whether Congress intended to create such a cause of action and that the Cort

87. Russell, 473 U.S. at 148. The Supreme Court also found that the structure of section 502 implies that the creation of any new remedy would violate the third factor, consistency with the legislative scheme, because of section 502’s comprehensive “interlocking, interrelated and interdependent remedial scheme.” Id. at 145-46. The Court held that because these second and third factors were not met, although the first and fourth were, no cause of action could be implied under ERISA. Id. at 145-48.

Because of the Court’s admission that the first and fourth factors were clearly not met, this case has far-reaching impact. In effect, no civil causes of action may be implied under ERISA because of section 502’s comprehensive and interlocking nature, and because the second and third factors are never met unless there is some clear intent on the part of Congress evident in the legislative history or on the face of the statute to create such a cause of action. See Russell, 473 U.S. at 145-48. This analysis, applied to Plucinski, suggests that there is no implied cause of action under section 403.

Other courts, in rejecting an implied cause of action, have retained a more rigid factor approach. See, e.g., Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 949-50 (D. Del. 1985) (neither language nor legislative history suggests section 403 created for “especial” benefit of employers; omission of employers from section 502 is strong indication that Congress did not intend to grant employers cause of action; statutory scheme primarily concerned with fiscal health of pension funds and ERISA preempts state law), rev’d in part on other grounds, 850 F.2d 1028 (3d Cir. 1988).


90. Id. at 308.

91. Id. at 310.
factors are a means of discerning that intent. In refusing to find such an implied cause of action, the court emphasized that the language of section 403 was merely permissive and that employers were not in the group for whose especial benefit the statutory scheme was enacted. The court also noted the lack of legislative history indicating intent and the omission of employers from the list of those entitled to sue under section 502.

Similarly, the Sixth Circuit in Dime Coal Co. v. Combs, rejected a strict factor analysis and supported its conclusion that there was no implied cause of action for employers to recover mistaken payments by noting that the language of the statute, the legislative history and the "six carefully integrated civil enforcement provisions found in § 502(a)" provide strong evidence that Congress did not intend to create such a cause of action for employers. Thus, it appears that Plucinski correctly rejected an implied cause of action.

The next question that must be addressed is whether it is inherently inconsistent to deny an implied cause of action after concluding that Congress did not intend to create such a cause of action, yet create the same cause of action under the rubric of federal common law. In rejecting such a federal common law cause of action, the court in Dime Coal suggests there exists such an inconsistency. It is submitted, however, that it is entirely proper to create such a cause of action under federal common law where Congress clearly indicates its intent that the courts develop a federal common law to fill in the interstices of the statute it creates.

92. Id. at 311. (citing Touche Ross & Co. v. Reddington, 442 U.S. 560, 568 (1979)). The court thereafter followed an analysis similar to that in Plucinski without emphasizing a factor by factor approach. Id. For a discussion of the recent rejection of a strict conception of the Cort test which emphasizes each factor, see supra note 74.

93. Crown Cork, 549 F. Supp. at 311. The court noted that ERISA and the MPPAA amendments were designed specifically to benefit employees and their beneficiaries. Id. Although the court in Crown Cork did not follow a strict factor approach, this finding roughly comports with the first Cort factor, namely, whether the statute creates a right in the employer.

94. Although the court in Crown Cork did not follow a strict factor approach, the lack of legislative history and the omission of employers from section 502 roughly comport with the second Cort factor—intent. In Crown Cork, the court did not address the issue of whether there was a federal common law cause of action and denied relief to the employee. Crown Cork, 549 F. Supp. at 311-12.

95. 796 F.2d 394 (11th Cir. 1986).

96. Id. at 398 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)). In Dime Coal, the court also considered whether a federal common law cause of action was appropriate and rejected such a cause of action. Id. at 399 n.7. For a discussion of the Dime Coal court's rejection of a federal common law cause of action, see infra notes 98-99 and accompanying text.

97. This inherent inconsistency seems to be magnified when one considers whether an implied cause of action is found, or whether the cause of action is created under federal common law, the result will generally be the same. For a discussion of this result, see infra note 129 and accompanying text.
In *Dime Coal*, the Eleventh Circuit declined to find a federal common law action for equitable restitution, reasoning that the comprehensive nature of the remedies within section 502 made it appropriate to presume that the remedy was deliberately omitted. In so doing, the Eleventh Circuit adopted the reasoning of *Northwest Airlines, Inc. v. Transport Workers Union*. It is submitted that this is a misapplication of *Northwest Airlines*.

In *Northwest Airlines*, an airline carrier had been held liable to female cabin attendants for back pay because the collectively bargained lower wages of women attendants were found to violate both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. The airline carrier then brought an action for contribution against the unions who participated in the bargaining agreements. After determining that the employer had no implied right of contribution under either statute, the Court turned to the question of whether the employer had a federal common law right to contribution. First, the Court noted that generally, federal law-making power is vested within the legislative, not the judicial, branch except for certain defined areas of the law such as admiralty, where federal courts are granted general jurisdiction, and labor management, where Congress has specifically authorized the judiciary to develop a federal common law under section 301(a) of the Labor Management Relations Act (LMRA). The Court then noted that the liability for such discrimination against female cabin attendants did not fit within these limited categories, instead it was “entirely a creature of federal statute.” In rejecting a federal common law cause of action, the Court reasoned that where Congress has enacted a comprehensive

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98. *Dime Coal*, 796 F.2d at 399 n.7 (“the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement”) (quoting *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981)).


101. Id. at 82.

102. Id. at 91-95.

103. Id. at 95-99.

104. Id. at 95-96 & n.35; see also Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(a), 301(a) (1988). In discussing the exception where Congress has authorized creation of common law the court stated, “An analogous situation is presented under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). In *Textile Workers v. Lincoln Mills*, we concluded that § 301(a) supplied a basis for federal jurisdiction over certain cases and an authorization for judicial development of substantive federal law to govern those cases.” Id. at 96 n.35. (citation omitted).

105. Id. at 97. The Court then emphasized that “the authority to construe a statute is fundamentally different from the authority to fashion a new rule . . . .” Id. In this area, where courts generally have little power to create common law, the Court applied a rule of construction. Id.
legislative scheme including an integrated system of procedures for enforcement, as it has done in both statutes in question, a presumption applies that a remedy was deliberately omitted and the judiciary must not fashion new remedies. The Court, in concluding, was careful to stress that this rationale did not apply in other situations where the courts have more flexibility in creating common law.

While it is true that ERISA is just such a "comprehensive legislative scheme including an integrated system of procedures for enforcement," the presumption applied in Northwest Airlines cannot be applied to the creation of federal common law under ERISA because ERISA, in fact, falls within the exception to the general prohibition against the judicial creation of such law. Indeed, the power of the courts to create federal common law under ERISA has been analogized to that under section 301 of the LMRA which the Court in Northwest Airlines specifically excepted from its holding. The application of such a test to a comprehensive and integrated statute such as ERISA would always result in a finding of inability to create federal common law, a result directly contrary to the congressional mandate.

Thus, while it may be inconsistent to deny an implied cause of action yet allow a federal common law cause of action where there is no

106. Id.
107. Id. at 98. The court stated, "Whatever may be a federal court's power to fashion remedies in other areas of the law, we are satisfied that it would be improper for us to add a right to contribution to the statutory rights that Congress created in the Equal Pay Act and Title VII." Id. (footnote omitted) (emphasis added).
108. Id. at 97.
109. ERISA's broad preemption provision, section 1449(a), and relevant legislative history combine to indicate federal common law should be created under ERISA. See Whitworth Bros. v. Central States, 794 F.2d 221, 234-35 (6th Cir.), cert. denied, 479 U.S. 1007 (1986); Note, supra note 1, at 406.
110. Many courts have noted the power of the federal judiciary to create a federal common law under ERISA. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (Brennan, J., concurring) (legislative history demonstrates Congress's intent that courts develop "appropriate equitable relief" under ERISA); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983) ("a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans . . ."); Whitworth, 794 F.2d at 234-35 (Congress intended courts to develop federal common law under ERISA); Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3d Cir. 1980) ("In enacting ERISA, Congress authorized the evolution of a federal common law of pension plans."); cert. denied, 454 U.S. 1142 (1982). For a discussion of the legislative history underlying the conclusion that federal common law should be created under ERISA, see Note, supra note 1, at 406-07.
111. Russell, 473 U.S. at 156 (citing remarks of senators showing treatment under ERISA should be similar to that under section 301 of Labor Management Relations Act).
112. Id. at 157 ("Thus ERISA was not so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that the courts shall undertake it.").
congressional mandate to create federal common law, the creation of federal common law is of necessity required where Congress has so mandated it. Such a creation of federal common law is consistent with congressional intent because the test for determining whether a federal common law cause of action is appropriate is broader than that required to establish whether an implied cause of action exists. While specific congressional intent to create such a remedy is required to imply a cause of action, the test for the creation of a federal common law cause of action is whether such a cause of action would further the purposes of the underlying statute.

The creation of a federal common law cause of action for equitable restitution as limited by the Third Circuit in Plucinski clearly furthers the purposes of ERISA. In Plucinski, the court was careful to allow a federal common law cause of action only when equitable considerations, such as the financial stability of an employee benefit plan, support the creation of a remedy. Such a cause of action is consistent with the policy of ERISA, stated in the preamble to the statute, which seeks to insure the equitable character and financial soundness of employee benefit plans. Moreover, such a cause of action furthers the policy of encouraging growth and maintenance of multi-employer plans. If employers alone bare the burden of mistaken payments, they would be discouraged from operating ERISA qualifying plans. Moreover, ERISA's broad preemption provision and the requirement of uniformity mandate the creation of a federal common law of equitable

112. Plucinski, 875 F.2d 1052, 1055 (3d Cir. 1989). For a further discussion of this intent requirement, see supra note 72-74 and accompanying text.

113. See Plucinski, 875 F.2d at 1058; see also Russell, 473 U.S. at 158 (the test is "whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA . . ."); In re C.D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1151 (E.D. Pa. 1977) ("The source of this law must be the policies underlying ERISA."); aff'd, 582 F.2d 1273 (3d Cir. 1978); Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 457 (1957) (under Labor Management Relations Act, test is whether remedy will effectuate policy of legislation).

114. Plucinski, 875 F.2d at 1057-58. For a discussion of other applicable equitable considerations suggested by the court, see supra notes 57-59 and accompanying text.


116. Plucinski, 875 F.2d at 1058.


restitution rather than the random application of state equity law.

Although the court in Plucinski failed to address the issue of employer standing under ERISA, this issue must be addressed in light of the court's acceptance of a federal common law cause of action because the majority of circuit courts have summarily dismissed, for lack of standing, civil causes of action arising under ERISA brought by employers.119 Underlying this rejection of employer standing is the rationale that section 502(a) exclusively lists those parties entitled to sue under ERISA, thus excluding employers.120 It is submitted, however, that this

While state law may be used as a model, uniformity is required when courts are called upon to create federal common law. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 157 n.18 (1985) ("Where the courts are required themselves to fashion a federal rule of decision, the source of the law must be federal and uniform. Yet, state law, where compatible with national policy, may be resorted to and adopted as a federal rule of decision. . . .") (quoting Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 516, 525 (N.D. Ind.), modified on other grounds, 567 F.2d 692 (7th Cir. 1977)).


The lead case supporting the position that employers have standing to bring a civil action under ERISA is Fentron Industries v. National Shopmen Pension Fund. 674 F.2d 1300 (9th Cir. 1982). In Fentron, an employer sued the pension fund and its trustees for violation of their fiduciary duties in withholding benefits. Id. at 1303. The employer alleged injury from interference with its collective bargaining agreement and disruption of employer-employee relations caused by the trustee's actions. Id. at 1304. The court then developed a three part test derived from Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-56 (1970): "in order to have standing [the] plaintiff must (1) suffer injury in fact; (2) fall arguably within the zone of interests protected by the statute allegedly violated; and (3) show that the statute itself does not preclude the suit." Fentron, 674 F.2d at 1304. Applying the test, the court held that employers have standing under ERISA. Id. at 1305. Specifically, the court found that (1) the injuries were sufficiently personal; (2) the injuries fell within the zone of interests of ERISA—stability of employment and development of industrial relations; and (3) the listing in section 502(a) cannot be considered exclusive because there is nothing in the legislative history to suggest either that the list is exclusive or that Congress intentionally omitted employers. Id. at 1304-05.

120. See, e.g., Tuvia Convalescent Center v. National Union, 717 F.2d 726, 730 (2d Cir. 1983) (employers have no standing to sue under ERISA for violation of fiduciary duties because section 502(a) is exclusive).

Most courts reject the rationale of Fentron on two grounds: (1) the listing in section 502(a) is exclusive in light of the comprehensive nature of ERISA and the lack of legislative history and (2) Fentron applied an inappropriate standard in asking whether Congress intended to deny the suit, instead of the relevant inquiry into whether Congress intended to grant the remedy. See Tuvia, 717 F.2d at 730 (applying rationale of Pressroom Unions v. Continental Assurance Co. 700 F.2d 889, 892 (2d Cir. 1983) in which that court held that section 502(e) was an exclusive jurisdictional grant of standing); see also Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 71 (D.C. Cir. 1987)
rationale does not apply to a federal common law cause of action although such a cause of action "arises under" ERISA, to the extent that the judiciary is fulfilling its congressional mandate to fill in the interstices of ERISA.121

In Whitworth Bros. Storage Co. v. Central States,122 the Sixth Circuit suggested that this rationale is not applicable to the return of employer's overpayments to employee benefit plans because the standing test is clearly satisfied under a contractual analysis.123 The test for determining standing is whether the plaintiff has suffered "injury in fact."124 The court continued, "[I]t appears clear that an employer who mistakenly pays contributions . . . which he is not contractually obligated to pay is injured in fact by the trust fund's refusal to return the contributions, and, therefore satisfies the requirements of the standing doctrine."125

Moreover, the rationale underlying the rejection of employer standing, specifically the exclusive nature of section 502(a), cannot apply when a federal common law cause of action is at issue.126 This rationale cannot apply because a federal common law cause of action is created to

(employer has no standing to bring suit for declaration as to its obligation to pay withdrawal liability); Hermann Hosp. v. Meba Medical & Benefits Plan, 845 F.2d 1286, 1289 (5th Cir. 1988) (hospital had no standing to bring action against plan as nonenumerated party in section 502(a) but would have derivative standing as assignee of beneficiary); Menard & Co., 619 F. Supp. at 1460-62 (as nonenumerated party, plan has no standing to sue employer and related corporation when seeking contributions); Blue Cross & Blue Shield v. Bell, 596 F. Supp. 1053, 1058 (D. Kan. 1984) (employer has no standing under ERISA to determine whether Kansas's laws are preempted by ERISA); cf. Gruber, 608 F. Supp. at 393-94 (employers who brought suit against fund had no standing under ERISA but court allowed suit under pendent jurisdiction).

For a discussion of Fentron, see supra note 118. For the text of section 502(a), see supra note 9.

121. For a discussion of this congressional mandate, see supra notes 106-10 and accompanying text.

122. 794 F.2d 221 (6th Cir.), cert. denied, 479 U.S. 1007 (1986). In Whitworth, the court denied an implied cause of action for the return of mistaken contributions but allowed a federal common law cause of action. Id. at 233-36.

123. Id. at 226 n.7.

124. Id.

125. Id. (emphasis added). This rationale is further supported when one considers that in most other suits where the employer was denied standing, the employer was suing the trustees of the plan for a breach of fiduciary duty. See, e.g., Tuvia Convalescent Center v. National Union, 717 F.2d 726, 728 (2d Cir. 1983). This injury is much less personal, especially when one considers that, under ERISA section 404, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." 29 U.S.C. § 1104(a) (1988).

126. This rationale of the exclusive nature of section 502(a) has been applied in situations where the plaintiff-employer argues that an implied cause of action exists under ERISA when no express cause of action exists. See, e.g., Giardino v. Jones, 867 F.2d 409, 413 (7th Cir. 1989). This is further evidenced by courts naming this standing argument on the part of the employer the "implied statutory standing concept." Hermann Hosp. v. Meba Medical & Benefits Plan, 845 F.2d 1286, 1289 (5th Cir. 1988).
fill the gaps of ERISA, so that by necessary implication, it is outside the scope of section 502(a). In creating a federal common law cause of action, the courts create a right in the employer, supplemental to ERISA, to recover mistaken contributions. Therefore, when such contributions are not returned, the employer’s judicially-created right is violated and the employer meets the standing requirement of injury in fact. Thus, not only is the court’s creation of a federal common law cause of action valid, but there should be no impediments to an employer invoking such a cause of action.

IV. Conclusion

In creating the federal common law cause of action for equitable restitution, the court in Plucinski achieved a result that is both fair to all parties concerned and supported by well reasoned precedent and the legislative history of ERISA. The employer can now get back what is truly his as long as the equities favor such a return. If, for example, the return of mistaken contributions would undermine the integrity of the fund, the employer would not be entitled to a refund. This result is consistent with the tension between the fairness of returning something that is rightfully the employer’s, and the overriding policy underlying ERISA of protecting the interests of plan participants and beneficiaries, coupled with the fact that the employer who makes these contributions is truly in the best position to avoid such a mistake.

Although the end result of creating an equitable cause of action is essentially the same as that arrived at by most circuits that allow an implied cause of action by applying equitable considerations to the determination of whether the payment should be returned, such an

127. See Whitworth, 794 F.2d at 226 n.7 (standing requirement is satisfied when plaintiff demonstrates “injury in fact”); see also, Blue Cross & Blue Shield v. Bell, 596 F. Supp. 1053, 1057 (D. Kan. 1984) (under general principles of standing to sue, “actual injury resulting from the putatively illegal conduct of the defendants” is necessary; plaintiff must have personal stake in the outcome of the litigation) (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)).

128. Plucinski, 875 F.2d 1052, 1057-58 (court should deny recovery if restitution would underfund plan). In Plucinski, the court also noted that other equitable considerations would include fraud on the part of the fund to extort extra payments not actually due, as well as fraud on the part of the employer to lead the fund to accept a participant not actually covered by the collective bargaining agreements. Id. at 1058.

This approach resolves the concern of many courts that such a cause of action would undermine the integrity of the fund, leading those courts to deny such a cause of action. For a discussion of this concern and those courts that have rejected the cause of action on such a basis, see supra note 15 and accompanying text.

129. For a discussion of the underlying policies of ERISA, see supra notes 113-15 and accompanying text.

130. Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 950 (D. Del. 1985) (creation of federal common law cause of action for equitable restitution essentially consistent with courts that have found
implied cause of action is not supported by the necessary underlying legislative intent required to imply a cause of action under ERISA.\textsuperscript{131} In contrast, all that is required to create a federal common law cause of action is the congressional authorization that the courts fill in the gaps of the relevant statute and that the cause of action further the policies underlying the statute.\textsuperscript{132} As outlined in \textit{Plucinski}, these requirements are clearly satisfied.

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\textsuperscript{131} For a discussion of the congressional intent necessary to imply a cause of action, see \textit{supra} notes 73-81 and accompanying text.

\textsuperscript{132} For a discussion of the test required to create a federal common law cause of action, see \textit{supra} note 113 and accompanying text.