



25 of 26 DOCUMENTS

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Washington & Lee Law Review

Fall, 1997

*54 Wash & Lee L. Rev. 1351***LENGTH:** 38987 words**ARTICLE:** Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains**NAME:** Dana M. Muir ***BIO:**

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LEXISNEXIS SUMMARY:

... This Article looks to theory underlying the development of United States social policy in order to inform the analysis of regulatory and jurisprudential challenges that flow from the current patterns of private benefit plan programs. ... None of these benefit plan characteristics fit within the paradigm of a testamentary transfer. ... Under ERISA employers retained decisional power over benefit plan sponsorship. ... Of Black Holes and Benefit Plan Jurisprudence ... In contrast, ERISA comprehensively displaces state laws that "relate to" a benefit plan. ... In fact, ERISA leaves the decision of plan sponsorship, and largely the determination of plan content, to employer-employee resolution. ... Noffs, Inc., the employer of the patient's spouse, Joseph Echols, verified that its health care benefit plan covered Gloria Echols. ... Even though it reversed the Tenth Circuit and did not permit the imposition of a constructive trust against Guidry's pension plan assets, the Supreme Court did leave the door open to the possibility that an exception might apply to the case of a plan fiduciary who breaches a fiduciary duty owed to an employee benefit plan. ... Furthermore, enforcing representations may permit employees to receive disparate benefit entitlements in contravention of nondiscrimination requirements and may allow relatively low level benefit plan administrators to bind the plan, employer, or benefit program administrator to pay benefits not contemplated by a plan document. ...

TEXT:

[*1351] [*1352]

Cleaning up this Godforsaken mess will become the political and moral struggle of our time. n1

I. Introduction

The foregoing quotation does not refer to environmental issues, n2 civil rights concerns, n3 the strains on our jurisprudential system, n4 or the AIDS epidemic. n5 Instead, the "Godforsaken mess" is this country's system of [*1353] privately-sponsored employee benefit programs. Although others might argue that their favorite social woe is more compelling, there is little question that the economic issues associated with the aging of baby boomers, the largest

demographic group in the United States population, n6 will raise significant issues of domestic social policy. Such issues include intergenerational conflict, the basic structure of federal entitlement programs, and the relative responsibility of individual workers and their employers.

Problems are becoming particularly poignant as the oldest baby boomers begin to reach their fifties. The projected effect of the baby boom cohort on the current retirement income support system is staggering. Estimates indicate that by the time the youngest of the boomers reach age sixty-five, 56.3% of the federal budget will be devoted to Social Security, Medicare, and other retirement programs. n7 According to the Bipartisan Commission on Entitlement and Tax Reform, by 2012 "there will not be one cent left over for education, children's programs, highways, national defense or any other discretionary program." n8 Optimistic demographic estimates indicate that life expectancies are increasing by seventy-two days each year, while at the same time fertility rates are dropping. n9 Both factors contribute to the financial issues confronting older Americans.

The problems of retiring boomers and, concomitantly, younger generations that may be forced to support them, are exacerbated by deficiencies in the private pension system. The average "replacement rate" of a typical defined benefit pension plan is only 22% of final salary after twenty years of service. n10 The lack of inflation protection in most defined benefit pension plans further contributes to the long term insufficiency of retirement income. Additionally, as individuals continue to retire under early retirement programs associated with corporate downsizing and as life expectancies increase, the long term issues are becoming increasingly acute. Assuming a 4% inflation rate, a pension benefit can lose 69% of its value over thirty years. n11 The trend toward defined contribution plans probably will not provide a solution for retiring boomers. n12 As a result, some commentators and pension activists are [*1354] advocating federal mandates requiring private employers to sponsor retirement plans. n13

Even such a dramatic increase in the federal regulation of private employment arrangements would not be unprecedented. Federal regulation has transformed workplace relationships in this country. Much of the early legislation focused on the collective bargaining process, n14 child labor, wage levels, and hours worked. n15 In response to other perceived problems, Congress fashioned a patchwork of regulatory law which shaped various facets of the employer-employee relationship. Concerns about job security culminated in many diverse obligations, such as notice requirements for plant closings n16 and guaranteed leaves of absence for the care of ill family members. n17 Biased workplace practices resulted in federal prohibitions against employer discrimination directed toward varied classifications including race n18 and disability. n19 More obscure legislative efforts addressed employment of seamen on merchant vessels, n20 established support programs for displaced homemakers, n21 and limited the use of lie detector tests in the workplace. n22

Perhaps nowhere has the federalization of a sphere of the employment relationship been as extensive as in the arena of privately-sponsored employee benefit programs. Beginning in 1974, Congress dramatically expanded federal regulation of the terms of employment arrangements when it passed the Employee Retirement Income Security Act of 1974 (ERISA). n23 With provisions [*1355] affecting pension programs, almost all categories of noncash compensation, n24 and some categories of cash compensation, n25 ERISA altered the legal landscape for employer and employee relationships. At the time of its passage, commentators gave mixed reviews to the new legislation. Some hailed ERISA as the solution n26 to inadequate and unenforceable employer-sponsored deferred and noncash compensation programs. n27 Others were skeptical about the capacity of such reticulated federal legislation to provide efficient and equitable solutions to the myriad plans regulated by ERISA. n28 ERISA was unique in the way it attempted to balance increased regulation with a system of voluntary plan sponsorship. n29

Two decades of experience indicate that portions of the statute have achieved the relevant congressional goals. n30 In addition to its successes, however, the federal regulation of employer-sponsored benefit programs has also [*1356] been attacked on several fronts. n31 The recent prominence accorded to the debate over national health care reform n32 highlights one of the more notable challenges still facing federal regulators. On the pension side of the equation, prognosticators of forthcoming problems in retirement security usually focus on the aging baby boom population n33 as the straw that may break this camel's back. n34

This Article looks to theory underlying the development of United States social policy in order to inform the analysis of regulatory and jurisprudential challenges that flow from the current patterns of private benefit plan programs. Part II opens with a discussion of contemporary social welfare reform theory, focusing on the work of Professor Theda Skocpol. n35 It then integrates Professor Skocpol's theoretical work with the unique paradigm of employer-sponsored benefit programs that has developed in the United States. n36 Part III explains how ERISA's broad preemptive force intersects with its narrowly construed substantive provisions to create regulatory voids that undermine the security of

current benefit promises. n37 In order to sharpen the overall discussion, Part IV examines two specific areas where benefits jurisprudence receives particularly heavy criticism. n38 Part IV.A concentrates on health care plans and considers the enforceability of misstatements or misrepresentations of health care benefit entitlements. n39 Part IV.B turns to the pension context and examines the pension entitlements of employees and benefit plan trustees who engage in wrongdoing. n40 [*1357]

One prominent commentator, Professor Norman Stein, asserts that many of the jurisprudential difficulties are attributable to the central ERISA compromise and are unavoidable results of our system of voluntary plan sponsorship. n41 Part V argues that the narrow construction accorded to ERISA's provisions is reminiscent of thirteenth century England's system of writs, which even excluded claims evidencing a clear injury if they did not fit within the narrow paradigm of an established writ. n42 A substantial factor in the inequities and inefficiencies found in benefits jurisprudence has been reliance on narrow and overly formalistic analysis. n43 As an alternative framework, the interest analysis approach, advocated by Professors Daniel Fischel and John Langbein in their seminal article on fiduciary duty jurisprudence, n44 should be extended to the broader array of employer-sponsored welfare and retirement income plan issues. This Article concludes by illustrating how use of the Fischel and Langbein interest analysis accords with and gives substance to the basic compromise of ERISA. n45

II. United States Social Policy and the Development of Privately Sponsored Benefit Programs

A. Early Efforts at Federal Support Programs

In her seminal work, *Protecting Soldiers and Mothers*, n46 Professor Skocpol challenges the widely accepted notion n47 that the study of United States [*1358] social welfare programs should begin with the New Deal era and legislation such as the Social Security Act of 1935. n48 Instead, Professor Skocpol concentrates on the period beginning in the 1860s and continuing through the early 1900s when Congress sponsored and funded increasingly generous pension and disability benefits for Civil War veterans and their dependents. n49 Professor Skocpol considers whether the effect of advocacy groups or the import of high revenues from protective tariffs explains the development and expansion of Civil War pensions. Ultimately, she rejects both theories as insufficient explanations. n50 Instead, Professor Skocpol looks to the structure and organization of the United States political system, including the judiciary, to account for the generous early retirement and disability benefits for veterans and their dependents. n51

In the early stages of the Civil War, benefits were outgrowths of limited existing entitlement programs for veterans and were used as a recruiting measure. n52 Professor Skocpol traces the growth of those benefits, both in amount and in scope of coverage, to Republican political efforts. n53 Over time the program increased substantially in its complexity, both in terms of eligibility determinations and in calculation of awards. n54 The intricacies led to substantial discretion on the part of the United States Pension Bureau, which administered the program, and, at the time, was called the "largest executive bureau in the world." n55 Given the size, scope, and abstruse nature of the Civil War pension program, some fraud and corruption was inevitable. Hard data are impossible to obtain, but some commentators have alleged that politicization of and discretion in the Civil War programs ultimately led to more than 25% of all approved benefit applications being fraudulent in some way. n56

According to Professor Skocpol, the perceived corruption and administrative incompetence associated with the Civil War pension system provided powerful arguments against subsequent social reform efforts. n57 By extension, [*1359] this theory regarding the development of and eventual problems with the Civil War pension system helps explain the failure of subsequent efforts to grant pension coverage benefitting the broader United States working population. Attempts to enact other employment-focused regulation, such as wage and hour statutes and health care coverage, also met with limited success. n58 During the late 1800s and early 1900s, some western European countries instituted governmental programs in these areas and extended coverage, at relatively minimal levels, to broad segments of the population. n59 In contrast, restrictive United States programs followed the structure and theory of the Civil War pension [*1360] system by providing proportionally generous benefits for those whose actions, rather than financial circumstances or general employment records, were deemed worthy of social recognition and support. n60

According to Skocpol's analysis, another factor affecting the divergence between western European and United States social welfare programs was the difference in their respective political institutions. n61 For example, Britain developed a professional civil service and, thus, the capability of administering social programs in a reasonably efficient and unbiased manner. The British civil service attracted and employed individuals whose expertise and advocacy supported the extension of social welfare benefits, both in terms of the types of benefits offered and the scope of coverage. n62 Additionally, the existence of a professional civil service led the political parties to advocate the extension of programs to various voting cohorts. n63

In contrast, organizational and competitive forces of the United States political system led to Republican sponsorship of comparatively generous but narrowly targeted social benefits for those who provided critical political support to Republican electoral victories. n64 At the same time, this focus and use of fiscal resources contributed to the rejection of social support programs based upon need. n65 The United States public viewed this patronage-based administrative system with suspicion, further undercutting public support for social programs. n66 Critics of governmental programs pointed to the fraud and incompetence that developed in the administration of the Civil War pension system. n67 This was offered as an example of the corruption and spending excess that could be found in such extensive social support legislation, especially given the perceived lack of a reliable administrative system. n68 In addition, the courts' use of constitutional principles to void the social welfare legislation that passed public and legislative scrutiny dealt the final blow to the extension of broad based protective legislation for the United States working population. n69

B. Rise of Private Employer Programs as an Alternative

Because, unlike the western European nations, the United States did not develop federally-sponsored social support programs that extended pension insurance to broad classes of workers, the United States pension system developed privately as the nation industrialized. Even prior to the development of formal private pension plans, some employers provided income to superannuated workers by transferring them to less physically demanding work, giving them a monetary "gift" when they terminated employment, or even making small, periodic payments that resembled what today would be recognized as a pension. n70 However, the arrangements were informal and the employers who chose to provide some income to their aged workers retained discretion over the provision of those benefits. n71

The American Express Company n72 generally receives credit for being the first employer to establish a formal private pension plan in the United States; it began its plan in 1875. n73 During the closing years of the 1800s and the early 1900s, a few other companies established pension programs for their [*1361] employees. n74 The concept of company-sponsored pension plans then began to spread more quickly, and by 1929 formal pension plans covered approximately 14.4% of the nonagricultural workforce. n75 Consistent with contemporary social welfare theory, n76 many employers remained generally hostile to the idea of dependable benefit promises, viewing such commitments as contradictory to notions of thrift, self-responsibility, and proper work ethic. n77 Private pension plan growth spurted again between 1940, when 4.1 million workers were covered, and 1960, when 18.7 million workers, almost 41% of the workforce, enjoyed pension coverage. n78

A variety of demographic, sociological, and regulatory factors converged to explain the demand for and the resulting rapid growth of pension and other benefit plan coverage. Employment opportunities decreased for individuals past age sixty-five. n79 A contemporaneous government report attributed the drop in employment, from 68% of all men aged sixty-five and older in 1890 to 42% in 1952, to a decrease in self-employed occupations, especially agriculture. n80 Life-spans increased while family size decreased. n81 As elderly individuals became less likely to reside with their children or to depend on their children for financial support, n82 the need for pension and health care programs increased. Yet, governmental programs remained limited due to public skepticism and court invalidation, n83 so it seems logical that plan growth occurred in the private sector.

Pressure for private sector plan development and sponsorship increased when employers competed for scarce labor during World War II. Although federal regulation limited the availability of salary and wage increases, n84 it [*1362] permitted employers to modify health care and pension plans. In the immediate post-World War II years, the continuing labor shortage and high corporate tax rates encouraged the growth of benefit program sponsorship as employers used tax subsidized noncash compensation programs to compete for employees. n85 Other factors sometimes cited as influencing private sponsorship of deferred and noncash compensation plans include the bargaining policy goals of labor unions and court decisions upholding retirement benefits as a mandatory subject for collective bargaining. n86

The formalized plans adopted by employers during this period were very different on their surface from earlier informal plans. The new plans typically purported to cover most, if not all, of an employer's workers instead of being reserved for a small cadre of favored executives. Also, the plans frequently established formulae for calculating pension benefits or provided for the purchase of indemnity coverage in the case of medical insurance programs. n87 However, much of the perceived progress proved illusory because new plans often contained onerous vesting requirements that few individuals could meet. n88 One study published in 1960 found that more than 25% of all plans surveyed provided for vesting only at actual retirement. n89 As the next section discusses, even as employers formalized benefit plans, the law typically continued to view the plans as gratuitous arrangements, revocable at the will of employers.

C. Regulation of the Early Programs

Given the skepticism during this era about governmental involvement with pension and other similar social welfare programs, it should not be surprising that legislative and common law enforcement of benefit expectations began slowly. The earliest explicit federal regulation affecting privately-sponsored benefit plans came with the enactment of the federal income tax in 1913. n90 The following year, the Treasury Department confirmed the right of employers to deduct, as compensation, the cost of pension payments. n91 [*1363] Then, in 1942, Congress added to the Internal Revenue Code the first provisions limiting a benefit plan's ability to discriminate in the provision of benefits. n92

Even in the private sector, administrative challenges increased as the number and assets of benefit plans grew. As with federal administration of the Civil War pension program, n93 problems arose with corruption and ineptitude in plan administration and investment. n94 Although most pension plan assets were held through bank trust indentures, the limited responsibilities delegated to the bank trustees meant that neither federal nor state banking laws were effective in curbing plan abuses. n95 Similarly, state insurance law was ill-equipped to deal with the rapidly expanding employer-sponsored health and life insurance programs. n96 Thus, it appeared that the legal doctrines most applicable to the new breed of employee benefit plans would be found in the common law of trusts or contracts.

Not surprisingly, the fiduciary concepts of trust law were extended to pension plan assets. n97 Trust law, however, did not easily adapt to challenges posed by the diverse loyalties of employers acting both as plan sponsors and trust administrators. Furthermore, delegation of fiduciary duties, the charitable characterization accorded some benefit trusts causing them to be viewed as gratuitous arrangements, and procedural issues posed new problems for trust law. n98 None of these benefit plan characteristics fit within the paradigm of a testamentary transfer. Traditional fiduciary doctrine, therefore, supplied an incomplete and ill-fitting framework for the analysis of developing benefit plan issues.

Contract doctrine offered an alternative conceptual framework for the legal problems that began to crop up as benefit plan sponsorship expanded. Courts determined that plans developed and funded solely by employers had [*1364] elements of unilateral contracts, while they sometimes viewed certain negotiated and contributory plans as bilateral contracts. n99 When benefit promises did not rise to the level of enforceable contracts, often due to a lack of consideration, courts sometimes applied the doctrine of promissory estoppel to ensure employees' expectations were met. n100 Still, claimants faced hurdles such as standing and the limitations of third-party beneficiary theory, n101 as well as questions regarding which company officers had authority to make binding benefit promises. n102 To the extent that courts continued to view retirement and health care plans as gratuities which conferred few, if any, enforceable rights on workers, most established contract law principles were simply inapplicable. n103

Thus, although state common law doctrines of trust and contract had some limited application to benefit plan issues, by 1958 the lack of any effective statutory or common law regime was clear. Yet, just six states had enacted specific legislation to regulate private benefit programs. n104 As a result, the regulatory focus began to shift to the federal level. In 1958 Congress enacted the Federal Welfare and Pension Plan Disclosure Act (WPPDA), in response to continuing abuses connected with benefit plans and the lack of effective federal or state regulation. n105 Even in this legislation, one can observe a reluctance to involve any federal administrative body in actively combating various improprieties. The legislation did not establish an active governmental role in auditing plans or actively enforcing benefit promises. Instead, the WPPDA attempted to address problems by mandating disclosure of plan terms and investments to participants in deferred and noncash compensation plans and to the Department of Labor (DOL). n106 The goal of the [*1365] WPPDA was to ensure that participants received sufficient information to police benefit programs in which they participated. n107

In spite of these legislative attempts to protect the plan interests of workers, problems remained. Stringent vesting rules continued to prevent even individuals with long service from gaining entitlement to benefits. n108 Furthermore, workers with vested rights could still be forced to forfeit their expected benefits if a plan terminated without providing adequate funding for benefits. In one such situation in the 1960s, often pointed to as the genesis of the congressional hearings that, in turn, led to the enactment of ERISA, n109 Studebaker Corporation declared bankruptcy and closed its automobile plant in South Bend, Indiana. Because the Studebaker pension plan was underfunded, 6,900 employees lost some or all of their promised pension benefits. n110 The United Auto Workers and Studebaker privately negotiated the distribution of the inadequate plan assets and agreed to favor retirees over those who remained employed until the plant closed. n111 As a result, a fifty-nine year-old who had not retired received 15% of his vested pension benefit, while a sixty year-old who had retired received her full vested benefit. n112

Congress responded to the continuing unreliability of benefit plan promises, as evidenced by incidents such as the underfunded termination of the Studebaker plan, by enacting ERISA in 1974. Title I of ERISA addresses many coverage problems perceived to exist with employer plans. n113 ERISA's vesting and accrual requirements have been

lauded as a successful way to combat the illusory nature of many of the early pension promises. n114 Title I of ERISA also contains a melange of other provisions governing the establishment and administration of privately-sponsored employee benefit [*1366] plans. n115 In accordance with the history of federal benefit regulation dating back to the WPPDA, n116 a number of these requirements relate to reporting and disclosure. n117 Among other things, the statute requires that all benefit plans be memorialized in a written document and that amendments to the plan follow the plan's explicit amendment procedure. n118

To meet the problem of unfunded benefit plan promises, the statute set forth specific funding requirements for pension plans. n119 As an additional measure, ERISA provided for the creation of an insurance program to be run by a new federal corporation, the Pension Benefit Guaranty Corporation (PBGC). n120 In theory, the insurance program protects the benefits of participants in certain types of pension plans from the eventuality that their pension plan will contain too few assets to pay their benefits at a time when their employer is unable to make the contributions necessary to fund the plan. n121 As Part IV.B of this Article discusses in detail, ERISA also contains an anti-alienation provision intended to ensure that plan beneficiaries do not pledge or otherwise prespend their retirement income. n122

In contrast to the Labor Management Relations Act (LMRA), n123 which contains little explicit direction regarding preemption, ERISA contains a broad preemption provision. n124 Still, some very specific exemptions from federalization exist. n125 ERISA's "savings clause" n126 establishes an exemption [*1367] from preemption for insurance, banking, and securities. n127 Before ERISA's enactment, states were beginning to apply their general insurance regulation to self-funded employer-sponsored health care plans. For example, Missouri fined Monsanto Company \$ 185 million for its failure to obtain the proper insurance licensing for its medical care plan. n128 Courts have referred to these state actions as the genesis for ERISA's "deemer clause," n129 which limits the savings clause and provides that employee benefit plans and trusts shall not be deemed to be institutions that would be regulated by state insurance, banking, or securities laws. n130

With ERISA implemented, it appeared that employees finally would achieve some degree of security in employer-sponsored benefit plans. There was some expectation that ERISA would change the rules of the game because ERISA no longer permitted the earliest types of plans where employers maintained full discretion over entitlement. It also contrasted with the second generation of plans, which purported to cover large groups of employees but failed to provide actual benefits in most cases because of stringent vesting rules or a lack of funds. Under ERISA employers retained decisional power over benefit plan sponsorship. n131 But, once made, their voluntary promises of benefits would be increasingly enforceable. n132

III. Of Black Holes and Benefit Plan Jurisprudence

Federalization of the law governing employer-sponsored benefit programs is attributable to ERISA's extraordinarily broad preemption clause. The next Subpart will sketch the scope of ERISA preemption. The second Subpart focuses on ERISA's substantive and remedial jurisprudence. Although frequently viewed as disparate sets of normative rules, the intersection of preemption and substantive jurisprudence affects both plan sponsorship decisions and the enforceability of benefit promises. The results generate policy repercussions for the baby boomers and succeeding generations.

A. The Preemption Black Hole

Except for the explicit exemptions, n133 ERISA provides for the preemption of "any and all State laws insofar as they may now or hereafter relate to any [*1368] employee benefit plan." n134 On its face, the rather detailed preemption provision appears carefully crafted. However, consistent with Professor Skocpol's theory that governmental institutions affect social policy, the legislative history undergirding this provision reflects the unique political climate that existed during the final stages of ERISA's enactment. President Ford signed the legislation on Labor Day, 1974. n135 Prior to Nixon's resignation, the Watergate controversy had captured the attention of both the nation and Congress. n136 One legitimately can wonder how Congress's preoccupation with Watergate affected its attention to and enactment of ERISA. It appears plausible, at least for some of the heavily debated provisions, that the extensive consideration Congress gave to pension reform over the prior ten years offset any distraction caused by Watergate. n137

Nevertheless, the language of the preemption provision can be traced only to the Conference Committee, which negotiated the final, compromise version of the legislation. n138 Prior drafts of the legislation limited preemption to itemized issues addressed by ERISA or to subject matters covered by ERISA. n139 The Supreme Court repeatedly has pointed to the threat of inconsistent state regulation in the benefits arena as the explanation for the broadly drafted preemption provision. n140 This concern, which the Supreme Court traces to ERISA's legislative history, would have been consistent with the increasing patchwork of benefit program regulation promulgated by the states. n141 There

also was hope that the broad preemption provision would limit preemption litigation. n142 The unprecedented breadth of the preemption provision inspired uncertainty in its creators, and the legislation called for a task force to evaluate the appropriate scope of preemption and to make recommendations [*1369] for any necessary modifications. n143 No task force ever completed such an evaluation. n144

ERISA's preemption provision is unique in the realm of federal employment legislation. The LMRA is almost totally silent on the question of preemption. Yet, the Supreme Court has construed the LMRA as preempting most related state regulation. n145 At the other end of the spectrum, the federal antidiscrimination statutes typically establish minimum protections but explicitly permit most state regulation in the field. n146 This has left the states free to experiment with employment-related regulation, an opportunity they have not wasted. In the nondiscrimination arena, many state and local statutes prohibit a broader array of employer conduct and offer stronger remedies than the federal statutes. n147

Not surprisingly given the broad wording of the statute, ERISA's preemptive effect has been broader even than that of the LMRA. In its second decision to address ERISA preemption, n148 the Supreme Court made two specific statements integral to the development of preemption jurisprudence. The Court stated that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." n149 Standing alone, the "connection with or reference to" language provides little in the way of limitation. For example, this formulation arguably is broad enough to encompass state tort calculations that refer to benefit plans for damage determinations. However, the Court provided some guidance on the contours of the "connection with or reference to" test when it opined that a state law or action may be "too tenuous, remote, or peripheral" to meet the "relates to" test. n150

Subsequent Supreme Court opinions have refined the "connection with or reference to" analysis, essentially establishing a bifurcated test. In its 1997 decision in *California Division of Labor Standards Enforcement v. Dillingham Construction*, n151 [*1370] the Court indicated that a state law will fail the "reference to" prong of the test where the law "acts immediately and exclusively upon ERISA plans . . . or where the existence of such plans is essential to its operation." n152 Application of the "connection with" prong of the test has proven more difficult to explicate. Recent decisions indicate that two considerations are critical in this determination. First, one must evaluate "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." n153 The second determinant is the "nature of the effect of the state law on ERISA plans." n154 Under the "connection with" analysis, the Court indicated that ERISA may preempt statutes even if these statutes are consistent with national benefit plan policy, n155 have only an indirect effect on privately sponsored benefit programs, and have no specific intent to affect benefit plans. n156

Under current preemption jurisprudence, state regulation explicitly referencing an employee benefit plan likely will fall prey to ERISA's preemption provision. Furthermore, the provision's broad language has been construed to void state laws having a connection with an employee benefit plan. n157 In spite of the limitations on preemption imposed by the "tenuous, remote, or peripheral" standard, n158 ERISA's preemption clause federalized a vast array of state law that touched upon privately-sponsored deferred and noncash compensation programs. n159 The range of state statutes nullified in their application to employee benefit plan matters extends from garnishment n160 to unjust discharge. n161 The complexity, n162 breadth, n163 and quantity n164 of ERISA [*1371] preemption jurisprudence has drawn substantial criticism from courts and commentators alike, with commentators comparing ERISA preemption to a "black hole." n165

B. The Substantive and Remedial Black Holes

Once swept into the federal sphere by preemption, some employee benefit plan issues become consigned to a void - the so called "black hole" of ERISA. That void results from a lack of federal standing, an absence of any available relief, or an inability to state a claim within the narrow parameters prescribed by the statute. n166 It is here that the approach to statutory construction reminds one of the limited use of writs in English law. Thus, ERISA's substantive and remedial provisions require evaluation for consistency with the underlying policy goals embedded in the statute. The "black hole" of deferred and noncash compensation programs jurisprudence is not a necessary consequence of comprehensive preemption. Instead, the federal substantive and remedial law, or more accurately, the absence of federal substantive and remedial law, creates the vacuity. n167

A brief examination of federal discrimination law is useful before resuming a discussion of benefits regulation. Title VII has proven adaptive, at least in part, to the complexities created by evolving societal standards. Perhaps one of the best examples is that of sexual harassment. Although Title VII's explicit prohibitions extend only to discrimination

on the basis of sex, by the mid-to-late 1970s courts began to decide that sexual harassment in the workplace constituted illegal sex discrimination. n168

More recently, courts have been willing to consider alternative standards in gauging the effect of alleged harassment on the working environment. n169 [*1372] The argument is not that the anti-discrimination jurisprudence perfectly reflected the underlying policies of Title VII. n170 Rather, the argument is that in some contexts courts have looked beyond the narrow wording of the statute and have recognized claims that arguably are consistent with the goals of non-discrimination undergirding Title VII. n171 These interpretative efforts have been applied to legislation which intends to guarantee minimum protections but which leaves the field open for additional state level proscriptions.

In contrast, ERISA comprehensively displaces state laws that "relate to" a benefit plan. Thus, any failures in legislative efficacy at the federal level theoretically will not be offset at the state level. Once displacement of state law is complete, the preeminent consideration becomes the scope of the applicable federal substantive provisions. In the field of employee benefit programs, an initial survey would not lead one to question the encyclopedic nature of the regulation. As enacted, ERISA comprised 208 pages of text. n172 Since then, Congress has not neglected it. Rather, Congress has amended ERISA almost every single year. n173 [*1373]

The applicable jurisprudence has rendered illusory the apparent breadth of many of the statutory provisions. For example, the remedial section enumerates several causes of action, confers standing on a variety of potential plaintiffs, and permits the recovery of an array of remedies, including legal fees. n174 In spite of expectations that the judicial system would develop a federal common law to supplement ERISA's specific provisions, n175 the remedial provisions have been used effectively as a shield in addition to their intended role as a sword against wrongdoing. Even in the case of a bad faith denial of benefits, insurers are liable only for the amount of benefits improperly denied; courts have foreclosed actions for extracontractual and punitive damages. n176 Nor does this limitation on recoveries operate only to preclude or limit claims by benefit program participants or beneficiaries. The lack of any available remedy may prevent a plan sponsor from exerting rights against an insurer. n177 The DOL has expressed concern with the extent to which remedial limitations impinge upon its enforcement actions. n178

The federalization of benefit-related claims leaves numerous would-be plaintiffs without legal recourse. This result is far from unheard of in the law, and neoclassical economists frequently argue in favor of a laissez-faire approach to employment arrangements. n179 Another federal employment-related statute provides a good example of a purposeful regulatory vacuum. Application of traditional preemption doctrine means that the National Labor Relations Act (NLRA) preempts state regulation of conduct that it arguably protects or prohibits. n180 In addition, traditional doctrine results in the nullification [*1374] of state regulation to the extent that Congress intended to leave certain sectors of the union-management relationship to the governance of the free market. n181

One can imagine a similar interstitial role for the free market in the operation of employer-sponsored deferred and noncash compensation programs. Under modern theory, which recognizes that benefit programs constitute components of employment compensation, n182 it is reasonable to expect that neoclassical economists would argue that the details of such arrangements should be left to the parties. In fact, ERISA leaves the decision of plan sponsorship, and largely the determination of plan content, to employer-employee resolution. n183 I believe this is consistent with the implications of Professor Skocpol's social policy theory, which highlight public skepticism of government's ability effectively to sponsor administratively complex social support programs. n184 However, as illustrated by the next Part, which considers two specific and disparate doctrinal areas that have drawn the ire of commentators due to what appear to be very different problems, the results of the ERISA regulatory voids have been neither efficient nor equitable.

IV. Regulatory Challenges in Health Care Programs and Pension Plans

A. An Instance of Underprotection - A Failure in the Health Care System?

Beginning with the WPPDA, n185 federal regulation requires increased disclosure of the terms of employer-sponsored benefit programs. n186 Participants in all types of programs now receive Summary Plan Descriptions (SPD), which must describe plan benefits in language understandable to the average employee. n187 Other disclosure requirements include provision of a copy of plan documents upon request n188 and notice of plan amendments. n189 Consistent with social policy efforts to minimize federal intervention and [*1375] direct federal enforcement, one goal of disclosure is to increase the power and responsibility of employees and their dependents. n190

Access to information enables employees to understand their entitlements under the terms of employer-sponsored benefit programs. Employees also are better able to conform their conduct to maximize their benefit entitlement. For example, assume that an employee who recently began working at her first job requires elective surgery, but the sche-

duling of the surgery is flexible. If she understands that her employer-provided medical plan does not begin until the first day of the third month following her hire, the employee is less likely to face the prospect of becoming personally responsible for paying for a costly medical procedure than someone who does not understand the terms of his employer's medical plan. With this increased access to information, though, comes some concomitant responsibility. In general, ERISA places the burden of enforcing the federal regulatory provisions and employer benefit promises on individual employees. n191

In spite of the mandated disclosure rules, numerous instances still exist where employees rely on others' interpretations of benefit program terms. Where those interpretations are inaccurate, employees who have relied to their detriment on the advice they received often find state law preempted. At the same time, they may find their potential federal claims consigned to the void created by gaps in the remedial provisions.

Although anyone who recalls the basics of promissory estoppel and similar state common law claims might suppose the outcome of misrepresentation claims to be obvious, the courts have struggled with complications interjected by the dual forces of preemption and limitations on federal benefit claims. n192 Instances of misstatement and misrepresentation do not conform to a neat paradigm. The losers are not always employees nor are the winners always employers. An outside plan administrator, rather than an employer, may make the misstatement or misrepresentation. n193 Additionally, an employer that sponsors a health care program or an insurance carrier or program administration company that provides coverage or service to an employer-sponsored health care program may mislead a health care provider. n194

The harshest economic burdens are not necessarily those borne by employees. Health care provider cases may not evoke the natural sympathies involved in cases where the misstatement or misrepresentation is made [*1376] to an individual. From a systemic view, however, the effect of denying a remedy to providers may be more serious than the effect of denying a remedy to individual employees. After all, providers already are beset by economic pressures including criticisms of waste and mismanagement, n195 daunting administrative requirements, n196 and the specter of medical malpractice claims. n197

1. Interpretation of Ambiguities - A Role for the Common Law

Given the scope of ERISA's writing and disclosure requirements and the complexities of current employer-sponsored health care programs, it is inevitable that interpretive problems will occur. From a traditional contract law perspective, an oral interpretation of an ambiguity in an employer's health care program coverage requires an analysis of the type of oral representation at issue. Where an oral representation constitutes an interpretation of a contract and the parties later dispute the contract's meaning in court, the oral comments may illustrate the meaning of the contract. n198 Although the parol evidence rule excludes evidence of oral promises made prior to the formation of the contract, traditional contract doctrine does not exclude subsequent conversations. n199 In the instance of expected, detrimental, and reasonable reliance by a promisee, equitable estoppel typically would militate in favor of admitting a representation as to the meaning of an ambiguous plan term. n200

As the state courts learned in the early and simpler days of benefit programs, n201 however, the employer-sponsored health care program arena does not lend itself to application of paradigmatic contract law principles. The third-party beneficiary nature of claims by employees and their dependents and the division of responsibility among employers, plans, and plan administrators [*1377] complicate the analysis. Under ERISA, the complicating statutory factor is the statute's requirement that benefit plans and amendments be in writing. n202 Courts have relied heavily on those provisions as limiting the availability of equitable relief. n203

The focus on the terms of the written plan have reduced the analysis to technical, and sometimes seemingly arbitrary, distinctions between interpretations of ambiguous plans and statements that conflict with unambiguous plan provisions. For example, in the seminal decision of *Kane v. Aetna Life Insurance*, n204 the plaintiffs, Kenneth and Kathy Kane, adopted a premature infant with serious medical complications. n205 Prior to the adoption, Kathy telephoned the plan administrator of Kenneth's employer-sponsored health care plan and received verbal confirmation that the health care plan would cover the child beginning on the date formal adoption proceedings commenced. n206 The hospital also obtained a verbal verification that the plan would cover the child beginning on a specific date. n207 Later, when providers billed their expenses, the plan administrator denied payment on the basis that the plan would not cover costs because the hospitalization began before the date of coverage. n208 The Eleventh Circuit reversed a grant of summary judgment in favor of the employer and plan administrator after reaching in its analysis to find ambiguity in the plan language. n209 Once the court determined that the representations constituted interpretations of ambiguous language in the health care plan, it permitted the Kanes to make an estoppel claim. n210

In their formalistic focus on the distinction between interpretations of ambiguities and conflicts with clear plan language, Kane and the subsequent decisions have failed to address some of the most significant issues in allocating liability in misrepresentation cases. The starting point for loss allocation must be identification of the responsible party or parties. However, the task is more difficult than it sounds because of the multiplicity of entities involved in the typical health care plan and the varied roles held by some of the entities. Plan participants as well as plans, insurers, plan administrators, health care service providers, and other interested parties typically have played some function in the context of a plan misstatement or misrepresentation. A single entity may hold multiple roles. For example, an employer may serve as plan sponsor as well as plan administrator. [*1378]

Thus, identification of the parties and their roles is fundamental to understanding the true interests of the parties and properly allocating liability. After all, litigation awards will produce incentive effects for avoidance of misstatements or misrepresentations only to the degree that the source of the incorrect statement is held responsible, directly or indirectly, for the costs associated with the error. For example, courts in cases such as Kane must address the distinction between the plan administrator's duty qua administrator to stand behind its representations and the plan's duty qua plan to pay the benefits as stated by the administrator. Because the plan sponsor has control over both plan documentation and the choice of a plan administrator, imposing liability on the sponsor is one method of ensuring care in both arenas. However, where independent plan administrators exist, it may be more efficient to hold those plan administrators directly liable for the negligent or willful misstatements of their representatives. On the other hand, in a self-funded plan the benefit plan's responsibility for payment of a disputed claim ultimately will inure to the employer as the sponsor of the plan.

Finally, it appears that a recent decision of the Supreme Court endangers even the established but narrow grounds of applying estoppel principles to interpretations of ambiguous plans provisions. In *Mertens v. Hewitt Associates*, n211 the Court held that ERISA's provision for equitable relief in Section 502(a)(3) permits only "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." n212 Combining this conclusion with the Court's general reluctance to infer causes of action under ERISA's remedial provisions n213 threatens the viability of any equitable claim under ERISA, including estoppel claims. When a plaintiff asserting an estoppel claim seeks recovery of compensatory damages or their functional equivalent, *Mertens* would preclude recovery under what otherwise would be the most likely statutory source for such a claim. On the other hand, if a claimant attempts to rely upon a general federal common law right of action, the claimant faces the doctrine disfavoring implied causes of action. n214

2. Conflicts with Plan Terms - The Black Hole Re-Emerges

In contrast to the application of estoppel in cases of plan ambiguities, the doctrine generally does not extend to misrepresentations or misstatements that conflict with the clear terms of a plan. In such instances, ERISA preemption [*1379] negates any state law claim - the black hole reemerges and claimants generally have no right to maintain either a federal statutory or common law action. n215

The United States Court of Appeals for the Eleventh Circuit rendered one of the first and most influential decisions in *Nachwalter v. Christie*. n216 In *Nachwalter*, a former employee's estate asserted that pension plan trustees orally agreed to permit the former employee to use June 30, 1981 as the date when he could remove his assets from the plan. n217 That date automatically became the valuation date for the former employee's benefit entitlement. n218 In contrast, the plan language clearly indicated that the benefits could not be withdrawn until June 30, 1982, which also should have been the date of valuation. n219 The value of the account dropped dramatically between 1981 and 1982, and the employee's estate sought a distribution equal to the amount of the account balance as June 30, 1981. n220

The Eleventh Circuit began its analysis by observing that ERISA preempted any state common law claim, such as one predicated upon estoppel principles, because the claim clearly related to an employee benefit plan. n221 The court determined that federal courts may only create federal common law in ERISA cases where ERISA does not expressly address the issue at hand. n222 In the opinion of the court, ERISA's writing requirement precluded estoppel claims based upon oral representations that conflict with the terms of a written plan. n223 The Eleventh Circuit also worried that enforcing oral representations regarding the terms of a plan might threaten the financial stability of plans by requiring the disbursement of benefits not contemplated at the time of plan funding. n224

Although *Nachwalter* dealt with a pension plan, many courts have applied the *Nachwalter* rationale to welfare benefit plans. n225 Although the [*1380] analyses have varied somewhat, courts generally accept the *Nachwalter* doctrine, and its application usually results in the denial of estoppel claims. n226 The primary rationales for rejecting application of the traditional common law doctrine of estoppel are that enforcement of representations, especially oral representations, which are inconsistent with plan documents would (1) be inconsistent with ERISA's writing require-

ment, (2) be inconsistent with ERISA's mandate that plan amendments be adopted according to a plan's amendment procedure, and (3) potentially compromise the financial integrity of plans. In marked contrast, where an SPD contains a representation that conflicts with the terms of a written plan, courts almost universally enforce the representations found in the SPD. n227

Although the SPD doctrine initially appears inconsistent with the court's strict enforcement of written plan terms in most other cases of misstatement or misrepresentation, the two doctrines are reconcilable. In fact, the explanation represents yet another example of analysis that relies on a formal, yet nonsubstantive, distinction. ERISA mandates SPDs, and their purpose is "to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." n228 SPDs do not serve their purpose if inconsistent plan terms are permitted to trump the representations in an SPD. Thus, courts, to effectuate the intended purpose of the SPDs, employ the legal fiction that SPDs embody plan terms. n229 This process does not become a matter of failure to apply estoppel doctrine, but becomes one of defining what comprises the written terms of a given plan. Distinguishing between representations regarding [*1381] benefit eligibility made via an SPD and those made in some other way does not appear to be consistent with a general policy goal of permitting plan participants to enforce their rights as represented by the plan sponsor.

3. The Health Care Provider Controversy

Before leaving the health care arena, another context for misrepresentations and misstatements regarding health care plans deserves attention. This third category of claims involves verifications of coverage made to health care providers. The doctrines which have developed in this context provide an interesting contrast to doctrines governing the claims of individuals. The general issues are the same - preemption and, to the extent ERISA displaces state law, the right of the claimant to assert a federal cause of action. In contrast to individual claims, though, state law actions sometimes survive in the provider context. In part, the reasoning involved requires an understanding of derivative and non-derivative claims in the health care context.

a. Derivative Claims

A medical care provider's derivative claim usually results when a patient executes an "assignment of benefits" in favor of the provider. An assignment of benefits is a contractual agreement permitting the health care provider to assert the patient's own claims for health care benefits and to receive payment for services directly from the patient's health care plan or insurer. In contrast, a patient may grant a provider only the right to bill and recover from the health insurer. n230 Where the patient grants only a right of direct billing and recovery, she retains her individual rights against the health care plan. n231

Theoretically, in a derivative claim but not in a grant of the right to direct billing, the provider steps into the patient's shoes and acquires the patient's legal rights vis-a-vis the benefit plan and related entities. n232 One would expect the legal doctrines to view a provider holding an assignment of benefits as the equivalent of the patient. In fact, the preemption analysis follows this theoretical construct with the result that ERISA typically preempts derivative claims based in state law. n233 A provider's right to assert a federal derivative claim, however, is more complex and often involves a challenge to the provider's standing. [*1382]

The conceptual issue regarding standing arises from the intersection of (1) the statutory source of the patient's right of action; (2) the contractual relationship among the patient, the provider, and the insurer; and (3) generally accepted principles applying to assignees. Courts have adopted three different ways of resolving the standing issue. Relying on yet another narrow and formal approach to interpreting the statutory language, the United States Court of Appeals for the Third Circuit denies ERISA standing to assignees because the relevant statutory remedial provision does not explicitly refer to assignees. n234 In theory, the Third Circuit's analysis disallows a variety of claims in situations where such a denial would appear inequitable. For example, consider the situation of a life insurance claim inherited from someone who was an ERISA beneficiary. Absent derivative standing, the beneficiary forfeits the inherited claim. n235

At the other end of the spectrum, the United States Court of Appeals for the Seventh Circuit grants standing to many assignees. n236 This analysis focuses on ERISA's definition of a plan "beneficiary." n237 ERISA explicitly grants participants and beneficiaries standing to bring benefit actions and defines the term "beneficiary" to include "a person designated by a participant . . . who is or may become entitled to a benefit" under an employee benefit plan. n238 Under this analysis, a provider meets this definition when a plan participant designates, by executing an assignment of benefits, the provider to receive plan benefits in compensation for services rendered. n239 As long as an as-

signee has a colorable claim, the theory permits the question of whether the attempted assignment meets the health care plan's requirements to be resolved on the merits and not as a question of jurisdiction. n240

A somewhat different approach focuses first on the validity of the provider's assignment under the health care plan. n241 Where an assignment [*1383] conflicts with plan language, this analysis gives insurers and plan sponsors the opportunity to achieve earlier dismissal of a suit than typically occurs under the Seventh Circuit's formulation. However, because both approaches ultimately reach the contractual issue, the end result should be the same.

b. Health Care Providers - The Black Hole Re-Emerges

As illustrated above, standing imposes a potential hurdle not faced by plan participants upon providers who hold assignments of benefits and wish to bring an ERISA claim. Even if a provider obtains standing, the typical provider still faces the obstacle of ERISA's failure to provide explicitly for misrepresentation claims. n242 In what appears to be an anomaly, providers who seek payment directly on their behalf, rather than derivatively through patients who as direct plan participants or beneficiaries would seem to have the better claim, are somewhat more likely to find success in the misstatement and misrepresentation context. None of ERISA's detailed listings of the parties who may bring various claims n243 confer a direct right upon health care providers. Providers qua providers have no such direct right. n244 In the preemption analysis, however, this remedial vacuity actually operates in favor of the providers.

The leading case on this issue is *Memorial Hospital System v. Northbrook Life Insurance Co.* n245 *Noffs, Inc.*, the employer of the patient's spouse, Joseph Echols, verified that its health care benefit plan covered Gloria Echols. n246 The plan actually provided that coverage would begin two weeks later because Joseph had not been employed long enough to meet the plan's waiting period. n247 The insurance company, Northbrook Life Insurance Company (Northbrook), who also administered the plan, discovered the error by the time the health care provider, Memorial Hospital System (Memorial), submitted its bill for payment. n248 Northbrook denied payment of the \$ 110,829.40 bill. n249 [*1384]

Even assuming the direct nature of the claim founded on Texas insurance law, the United States Court of Appeals for the Fifth Circuit felt compelled "to enter the preemption thicket." n250 In the absence of direction from the Supreme Court, the Fifth Circuit, like other circuits, decided to strike a balance between laws that are preempted because they have a "connection with" an employee benefit plan and laws that survive preemption because they touch upon a benefit plan in "too tenuous, remote, or peripheral" a manner to warrant preemption. n251 The Fifth Circuit approach evaluates two factors. First, it inquires whether the state law regulates "areas of exclusive federal concern." n252 Second, it determines whether the state law claim would "directly affect the relationship among the traditional ERISA entities - the employer, the plan and its fiduciaries, and the participants and beneficiaries." n253

The economic considerations associated with modern day health care affect this type of analysis. Although many health care providers offer services to those who cannot pay, budgetary and profit constraints frequently limit a provider's ability to give free care. n254 As a result, even if a medical facility has the expertise and ability to provide needed care, it may transfer an uninsured patient to another hospital, a practice known as "patient dumping." n255 Common law rules, n256 ethical standards within the medical profession, n257 state statutes, n258 and federal statutes n259 limit, but do not eliminate, patient dumping. Thus, if an individual does not have health care coverage, a provider may decline to treat that individual unless the provider receives advance payment, or at least a guarantee of payment, for the provider's services. Where a patient claims to have health insurance, a provider typically will seek some verification of health care coverage from the insurer. Therefore, the health care industry has increasingly relied upon coverage verifications prior to providing medical care. n260 [*1385]

Given this background, the salient question is similar to that in misrepresentation cases brought by participants and patients. When a provider receives an inaccurate verification of coverage, who should bear the risk of the uninsured patient's nonpayment - the provider who relied upon the information, the source of the misinformation, or, if different, the plan or some other entity related to the plan? The Memorial Hospital court peripherally approached this question as part of its preemption inquiry. n261 The court noted that allocation of risk among commercial entities transacting business within a state has traditionally been a state interest. n262 Thus, incorrect coverage verifications are not matters of exclusive federal concern. n263

With regard to the second factor in the Fifth Circuit test, health care providers do not constitute one of the traditional ERISA entities. n264 ERISA's detailed provisions represent a congressional compromise intended to grant extensive protection to employee benefit expectations yet maintain incentives for employer flexibility and the development and maintenance of benefit plans. n265 Third parties such as health care providers, however, neither received

protection under ERISA nor were subjected to ERISA regulation. Thus, Congress did not make health care providers a party to ERISA's bargain. n266 Instead, Memorial Hospital's claim may be analogized to a permissible tort action brought against an ERISA entity by a third party. n267 Moreover, the Supreme Court has indicated that ERISA does not preempt "run-of-the-mill" third party tort actions. n268

One commentator n269 and some of the other circuits n270 agree that ERISA generally does not preempt a provider's nonderivative claim. Not all courts [*1386] have adhered to this limited application of preemption doctrine. In this context, the United States Court of Appeals for the Sixth Circuit determined that state law claims for promissory estoppel, negligence, and breach of good faith strike to "the very heart of issues within the scope of ERISA's exclusive regulation and, if allowed, would affect the relationship between plan principals by extending coverage beyond the terms of the plan. Clearly, [the state law] claims are preempted by ERISA." n271 One primary difference between the Sixth Circuit's analysis and courts which have declined to find preemption of provider claims is the Sixth Circuit's focus on the patient to plan relationship.

This focus is reasonable because individual plan participants are not indifferent about whether ERISA permits their health care providers to enforce inaccurate coverage verifications. Patients typically remain personally responsible for the costs of their medical care, even when they execute an assignment of benefits in favor of the provider. n272 When providers can assert claims arising out of a misrepresentation or misstatement, the patient benefits because the patient avoids personal liability for medical care costs that the technical provisions of the patient's health care plan did not cover. Even where the patient lacks sufficient assets to pay for the cost of past care, a benefit redounds to the patient. In such an instance, the patient avoids costs associated with, among other things, collection actions and reputational effects.

The patient/plan-centered analysis of the Sixth Circuit approach also reflects the economic reality that such awards may affect the availability or terms of voluntarily-sponsored employer health care programs. The sophistication and costs associated with modern medical practice mean that the amounts at stake in cases of inaccurate coverage verification can be significant. n273 To the extent that benefit plans bear the costs of misrepresentation and misstatement awards, directly or indirectly, in self-funded plans those costs will accrue to plan sponsors. In the short term, unanticipated costs will affect specific plan sponsors confronted with those costs. Over the longer term, one would expect the potential cost of such awards to become part of the analysis undertaken by any employer considering whether to sponsor a self-funded health care program for its employees. [*1387]

In contrast, the Memorial Hospital rationale rejects the need to undertake a patient/plan-centered analysis. n274 Instead, this approach separately considers the provider/plan relationship and the patient/provider relationship. n275 In each instance, the formal analysis determines that one of the parties to the relationship is not a primary ERISA party. Therefore, the preemptive effect, which the second factor of the circuit's preemption analysis otherwise implicates, is avoided.

The focus on the relationship between the provider and the entity responsible for the inaccurate verification permits a determination that recovery by the health care provider does not affect the patient's individual rights under her health care plan. n276 This is only technically correct to a limited degree. True, the legal theory supporting the provider's award will be based upon state insurance law, contract law, or tort law principles and not upon enforcement of the benefit plan. Moreover, payment for services is made directly to the provider so the patient does not receive a direct benefit. However, the argument ignores the fact that the patients in question benefit from payment of what otherwise would be noncovered health care expenses.

The second relationship considered under the Memorial Hospital approach is that of patient and provider. The Memorial Hospital court argued that, from a systemic standpoint, efficiencies accrue to patients as a group when the law permits providers to assert claims based upon inaccurate insurance verifications. n277 The court worried that the failure to enforce verifications would result in providers refusing to give treatment unless they receive advance payment for their services or are able to "impose other inconveniences" upon patients. n278 The next question, though, is how the issue of inaccurate verifications might affect the relationship between patients and their health care plans. Because it implicates the relationship between two primary ERISA parties, this question poses a much greater threat of ERISA preemption under the second prong of the Fifth Circuit's preemption analysis.

Obviously, the relationship among providers, patients, and health care plans is becoming increasingly complex. During recent years, more than 80% of all health care plans have adopted advance verification requirements as part of cost control efforts. n279 These requirements typically surface as pre-authorization or pre-certification rules. n280 In a nonemergency situation, the physician [*1388] primarily responsible for the patient's care must contact an entity

in charge of what is known as "utilization review" and obtain authorization before undertaking any medical treatment. n281 If the physician does not comply with pre-certification procedure, neither the patient nor the provider may claim benefits from the health care plan. n282 The pre-certification requirement reduces health care costs through advance denial of disfavored treatment procedures, such as inpatient surgery, when outpatient options exist. n283

Utilization review modifies the incentives for those engaged in the sponsorship and administration of employer-sponsored health care programs. Previously, unless they were held accountable for their verifications of coverage, health care plan administrators had little incentive to provide accurate verifications. Even in the case of bad faith denials of benefits, plaintiffs generally have been limited in their recovery to the benefits owed under the plan. n284 However, as utilization reviewers engage in dialogue with providers, the cost-reduction strategy means that the reviewers have an incentive to understand the nature of the patient's health problem and the type of treatment being provided. It would seem that the utilization reviewers also have an independent incentive to determine in advance whether an individual has coverage at all under a plan because a negative answer relieves reviewers of engaging in the review process.

B. An Instance of Overprotection - A Failure in the Pension System?

Given the more than four trillion dollars in assets currently held by employee benefit pension plans, n285 it should come as little surprise that numerous claimants in recent years have attempted to look to benefit plan accounts to satisfy judgments or to obtain compensation for wrongdoing. In one frequently observed fact pattern, a plan participant's wrongdoing causes a substantial loss to the individual or entity seeking reimbursement. n286 Pension benefits held in a qualified plan n287 constitute the wrongdoer's only significant [*1389] asset. What at first glance may seem to be a simple state law claim for garnishment or imposition of a constructive trust now requires evaluation in light of ERISA's preemptive, substantive, and remedial provisions.

ERISA section 206(d)(1) specifically governs anti-alienation. n288 Section 206(d)(1) generally prohibits assignment or alienation of plan benefits. n289 However, the interpretative questions regarding the provision have proven far more difficult than the relatively simple sounding description indicates.

Guidry v. Sheet Metal Workers National Pension Fund (Guidry I) n290 is probably the best known, and perhaps the longest running, case in the field of ERISA anti-alienation. Although the Supreme Court's decision in Guidry I began to define the contours of the anti-alienation provision, a number of related questions remained unresolved. n291 As noted in Part IV, the multiplicity of answers given to these questions and the perceived inequities which flow from some of the decisions have drawn the attention of commentators. n292 A narrow statutory solution, however, can resolve the perceived problems with anti-alienation. n293 As with the health care cases, this Article evaluates anti-alienation doctrine in order to study the broader implications for the regulation and sponsorship of privately-sponsored deferred and noncash compensation programs.

1. Guidry I

The facts of Guidry I revolve around Curtis Guidry, chief executive of Local Nine of the Sheet Metal Workers International Association (Union) from 1964 to 1981. n294 From 1977 to 1981, he also was a trustee of the Union's [*1390] pension fund. n295 In 1981, the Union discovered that Guidry embezzled \$ 998,000 from the Union, and Guidry eventually pleaded guilty to embezzling a portion of this sum. n296 The Union attempted to recover some of the lost assets by requesting that the pension plan impose a constructive trust in favor of the Union on Guidry's pension plan benefits. n297

In its first and only decision to construe the scope of the anti-alienation provision outside the context of ERISA's interaction with the Bankruptcy Code n298 or ERISA's preemption provision, n299 the United States Supreme Court disagreed with both the district and circuit courts n300 and determined in [*1391] Guidry I that ERISA prevented the pension plan from placing a constructive trust on Guidry's pension plan benefits. n301 The Court began its nearly unanimous opinion n302 by stating its inability to discern any meaningful distinction between a garnishment, generally agreed to be prohibited by ERISA's anti-alienation provision, and a constructive trust. n303 As a result, the constructive trust arrangement would also violate the anti-alienation provision absent an applicable exception. n304 The United States Court of Appeals for the Tenth Circuit built an exception around ERISA's provisions for relief against fiduciaries who violate their ERISA duties. n305 The Supreme Court found this reasoning inapposite because Guidry acted wrongfully against the Union, but did not breach a fiduciary duty to either of the benefit plans from which he was due to receive benefits. n306

The Supreme Court also rejected the district court's use of federal labor law policy to justify an exception to ERISA's anti-alienation provision. n307 Instead, the Court pointed to the "elementary tenet of statutory construction

[*1392] that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." n308 The applicable labor statutes make only a broad provision for the types of judgments available to plaintiffs. n309 In contrast, ERISA's anti-alienation provision specifically prohibits certain types of collection actions. n310 According to the Court, the labor law provisions cannot support an exception to anti-alienation. n311

Even though it reversed the Tenth Circuit and did not permit the imposition of a constructive trust against Guidry's pension plan assets, the Supreme Court did leave the door open to the possibility that an exception might apply to the case of a plan fiduciary who breaches a fiduciary duty owed to an employee benefit plan. n312 The Court specifically stated that it need not decide this latter question. n313 Consequently, the Court did not impugn the Tenth Circuit's decision to utilize traditional state trust law concepts in construing ERISA's fiduciary provisions. Instead, the Court simply held that those fiduciary provisions were inapplicable to Guidry because the Union did not claim that Guidry breached his fiduciary duties as a trustee of the Union's pension plan. n314

In dictum, however, the Court stated:

[The anti-alienation provision] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of lawful debt. n315

To a large extent, it is the sweep of this general language that has been the subject of continuing controversy.

2. The Progeny

a. The Fiduciary Analysis

The question explicitly unanswered by the Supreme Court in *Guidry I* was whether a qualified plan may offset the pension benefits of a plan fiduciary [*1393] who breaches a duty to the plan. n316 A comparison of the decided cases reveals a consistent fact pattern. First, a participant in a qualified pension plan, who is also a fiduciary of the plan, has breached a fiduciary duty to the plan. Second, the plan has obtained, or is in the process of obtaining, a judgment against the plan fiduciary. Third, the plan attempts to offset the participant's plan benefits against the amount owed to the plan under the judgment. n317

The consistencies in the fact patterns have not resulted in the development of equivalently consistent doctrine to deal with the issue. Instead, the circuits have split over the proper analysis in such cases, and have developed three different approaches. One method of analysis results in full protection for plan assets even of wrongdoing fiduciaries, while the other two typically permit plans to reach the assets of fiduciaries in order to offset losses from wrongdoing.

The Fifth Circuit developed an approach purporting to reconcile ERISA's fiduciary remedial provision with the anti-alienation provision. n318 However, it read the remedial provision narrowly. The court could have given content to ERISA's fiduciary requirements by looking to traditional trust law, which served as the basis for the statutory provisions. n319 The Fifth Circuit's analysis, though, compared the remedial language of the fiduciary section with the language of the anti-alienation provision and summarily determined that the fiduciary section's remedial language was insufficient to preclude fiduciaries from receiving the full protection of the anti-alienation provision. n320 The court buttressed its determination by pointing to the Supreme Court's dicta in *Guidry I*, n321 which discourages the development of equitable exceptions to statutory provisions such as ERISA's anti-alienation clause. n322 To the extent that the statute's remedial provisions for fiduciary breach are inconsistent with the anti-alienation clause, a limitation on application of the anti-alienation protections to fiduciaries becomes far more than an equitable exception. [*1394] Furthermore, as Part V will show, the court's decision to elevate the anti-alienation provision over the preemption provision fails to account for the true interests of the parties. n323

A second approach, based on formal and artificial distinctions, was developed by the Third Circuit in *Coar v. Kazimir*. n324 In *Coar*, a pension fund offset the benefits of a plan fiduciary against more than \$ 121 million in judgments obtained against that fiduciary. n325 The Third Circuit majority distinguished *Guidry I* on the basis that an internal plan offset differs from a garnishment by a third party. n326 As discussed above, in *Guidry I* the Supreme

Court decided that no substantial difference existed between the constructive trust sought by the Union and a garnishment, which was generally agreed to be prohibited by ERISA's anti-alienation provision. n327 Both involve a triangular relationship where a debt owed by one person to another is collected from funds held by a third person. The Third Circuit ruled that offsets differ substantially from this kind of triangular relationship because offsets are two-party transactions, involving only the debtor and creditor. n328 As a result, the Coar majority concluded that the kind of offset made by the pension plan was "simply not an alienation within section 206(d)(1)." n329 [*1395]

Although attractive in its outcome, the Coar analysis is not doctrinally sound. Its overly technical focus is likely to engender future interpretative problems and inconsistent application. Under Coar's reasoning, it should not matter whether ERISA's fiduciary recovery section, a violation of some other ERISA provision, or even a violation of another state or federal law provides the basis for the judgment being offset. The only determinant, under this analysis, should be whether the harm ran against the plan, thereby retaining the character of the recovery as an offset, as opposed to resulting in a triangular relationship such as a garnishment. In fact, at least to the extent that nonfiduciaries can cause harm to a plan, the reasoning should permit the offset of benefits of any plan participant and not be limited to the benefits of plan fiduciaries.

In addition, the distinction between two-party and three-party recoveries elevates form over substance and fails to recognize the realities of funding defined benefit pension plans. Because the plan sponsor must make contributions to a defined benefit plan sufficient to fund the promised benefits, it is likely to be the plan sponsor that eventually bears the cost, in the form of increased plan contributions, of any unreimbursed harm done to such a plan. n330 The oddity of the Coar rationale is that if a wrongdoing fiduciary causes harm to a defined benefit plan, the ability to offset the fiduciary's benefits ultimately protects the sponsoring employer from having to make good the loss. However, if a fiduciary causes harm directly to his employer, *Guidry I* precludes the employer from recovering against the fiduciary's plan benefits. n331 Thus, an employer who has been harmed directly has fewer rights than an employer who has been harmed indirectly. In this way, the result appears somewhat inapposite to the Third Circuit's focus on, and desire to draw a distinction between, direct and indirect recoveries.

A third alternative avoids both the narrow reading of the Fifth Circuit and the doctrinally questionable logic of Coar's offset rationale. Given the fiduciary [*1396] nature of the breaches in these instances, ERISA's specialized fiduciary recovery provision becomes relevant to any determination. n332 Legislative history strongly supports the use of established trust law fiduciary principles in construing those provisions. n333 In turn, traditional trust law concepts permit impounding the share of a trustee who also is a trust beneficiary to offset any fiduciary breach by the trustee. n334

The anti-alienation provision does not necessarily abrogate the equitable power of the courts to protect the plan trust and to prevent wrongdoers from benefitting at the expense of the trust and the other beneficiaries. n335 Other anti-alienation exceptions derived from state law have developed. For example, the majority of courts addressing the issue during ERISA's early years permitted ex-spouses to garnish pension plan benefits to satisfy spousal and family support judgments. n336 These courts reasoned that, although a technical reading of the statute might indicate otherwise, Congress did not intend ERISA to preclude enforcement of state court orders for spousal maintenance or child support. n337

From the perspectives of both doctrine and policy, this rationale, based upon ERISA's fiduciary provisions, is more sound than the other two approaches. Doctrinally, because it is grounded in statutory language, such a rationale avoids *Guidry I*'s distrust of judicially created, purely equitable exceptions to statutory provisions. The resulting limitation on anti-alienation protection is both narrow and, with the constraint of having to define who is an ERISA fiduciary, reasonably easy to apply. Permitting plans to offset the benefits of a breaching fiduciary also accords with ERISA's policy of providing plans with broad protections against and remedies for fiduciary violations. [*1397]

Furthermore, by avoiding the artificial distinctions made by the offset rationale of the Third Circuit, an analytical approach founded on ERISA's fiduciary provisions rules out offsets against the benefits of nonfiduciaries or against any wrongdoer whose harm to the plan did not conform to the relatively narrow paradigm of a fiduciary breach. At the same time, the fiduciary analysis avoids the overly narrow approach of the Fourth Circuit. The Fourth Circuit's reasoning results in the protection of the pension plan benefits of breaching fiduciaries despite ERISA's explicit provision that breaching fiduciaries may be held personally liable for losses caused by their wrongdoing. Such extensive protections discourage plan sponsorship and fail to incentivize against fiduciary breach.

b. Nonfiduciary Wrongdoing

Until recently, it appeared that developing doctrine would uniformly permit a judgment creditor to reach the benefits of a nonfiduciary once the funds had been paid out of a qualified plan. n338 As with the fiduciary cases, these nonfiduciary wrongdoing cases conform to a common factual outline. First, a plan beneficiary causes some kind of monetary harm - to a union of which he was a fiduciary, to the plan itself, or to innocent investors. n339 Second, the party who experiences a loss attempts to capture the wrongdoer's pension benefits after the plan pays the benefits to the wrongdoer. n340 The method of attempted recovery may vary slightly - using, as alternatives, garnishment, writ of execution, or court-ordered restitution.

After losing in its effort to obtain a constructive trust over Curtis Guidry's pension benefits held by qualified plans, the Union sought to garnish Guidry's bank account into which the plan benefits were paid on a periodic basis. n341 The Tenth Circuit, in *Guidry v. Sheet Metal Workers International Ass'n Local No. 9* (*Guidry II*), n342 held that ERISA's anti-alienation provision did not preclude this type of garnishment. n343 In an en banc decision, the Tenth [*1398] Circuit upheld this portion of the *Guidry II* decision in *Guidry v. Sheet Metal Workers National Pension Fund* (*Guidry III*). n344 The Third Circuit also permits garnishment of benefits once the benefits have been paid. n345

In a third nonfiduciary case, the United States Court of Appeals for the Fourth Circuit reached a different outcome. In *United States v. Smith* n346 Dr. Charles Smith was indicted on six counts of mail and wire fraud stemming from solicitation of investments in fraudulent real estate schemes. n347 To settle the charges, Smith entered into a plea agreement that required him to serve a prison sentence and contained a recommendation that the district court order restitution. n348 Consistent with the plea agreement and the recommendation of a presentence report, the district court ordered Smith to make restitution as he received pension benefits for a period of five years after his release from prison. n349 Over a strenuous dissent, n350 the Fourth Circuit vacated the district court's restitution order, stating that the order violated ERISA's anti-alienation clause. n351 The Fourth Circuit remanded the case for a revised restitution order that would "leav[e] Smith's ERISA-protected benefits in his possession." n352

The key to understanding the doctrinal disagreement between the Tenth and Third Circuits and the Fourth Circuit lies in their differing approaches to the relevant statutes and, in one method of analysis, the imposition of artificial distinctions. The Tenth and Third Circuits interpreted the sparse legislative [*1399] history of the anti-alienation provision to indicate that "a plan is obligated to protect benefits from alienation at least up to the point of payment so that benefits will be available for retirement purposes." n353 Lacking clear legislative history concerning the application of the anti-alienation provision once a plan has distributed benefits, the cases turned to a Treasury Department regulation interpreting the provision. n354

The applicable Treasury regulation defines "assignment" and "alienation" in terms of rights or interests enforceable against a qualified pension plan. n355 According to the Treasury regulation, the anti-alienation provision no longer protects the money from claims of a creditor once the plan pays out the benefits. n356 Of course, the creditor must collect from the plan beneficiary perhaps, as in *Guidry II* and *Guidry III*, by garnishing the applicable bank account. n357 *Guidry I*, under this approach, deals only with attempts to obtain rights against assets still held by a plan. n358

A comparison of ERISA's anti-alienation provision with the quite different anti-alienation provisions found in other federal statutes supports the right of creditors to garnish ERISA plan benefits once those benefits are paid. The Social Security Act provides protection to benefits "paid or payable" n359 and the Veterans' Benefits Act provides protection to benefits "either before or after receipt by the beneficiary." n360 Clearly, Congress understands how to write statutory language that effectively extends protection to a stream of benefits even after the benefits have been paid and it has incorporated such protections where it has deemed them appropriate. n361 Congress's failure to draft a similarly explicit anti-alienation provision in ERISA arguably reflects its intent to limit the reach of the provision. n362

The Fourth Circuit did not consider the Treasury regulation and limited its discussion of the opinions from the Tenth and Third Circuits to a brief [*1400] footnote. n363 The court relied primarily n364 upon that portion of the *Guidry I* dicta which states that the anti-alienation provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless)." n365 In *Smith*, obligations imposed by the Victim and Witness Protection Act of 1982 n366 militated in favor of payment to the defrauded individuals and provided policy considerations that countered those of ERISA's anti-alienation clause. n367 Even those countervailing considerations did "not alter the Supreme Court's findings that ERISA funds are inviolate with exceptions only as announced by Congress." n368

In order to invalidate the restitution order in *Smith*, though, the Fourth Circuit distinguished a prior decision in the circuit that permitted a creditor to garnish proceeds paid out of a qualified benefit plan in a lump sum and before retirement age. n369 In distinguishing funds paid as a post-retirement stream of income from funds paid in a lump sum

before retirement age, the Fourth Circuit relied upon a Supreme Court decision stating that pension annuities paid under the Railroad Retirement Act (RRA) cannot be alienated, even after being disbursed to the beneficiary. n370 According to the Fourth Circuit, the Railroad Retirement Act's anti-alienation provision was "substantially similar" to ERISA's, and the two should be construed in the same manner. n371 [*1401]

From an analytical standpoint, the Fourth Circuit's approach to the construction of ERISA's anti-alienation provision significantly differed from the approach taken by the Third and Tenth Circuits. The latter circuits noted technical but significant distinctions in wording between the relevant portions of the Social Security Act and the Veterans' Benefits Act and ERISA's anti-alienation provision. n372 In spite of potentially compelling differences in statutory language, intent, and policy effects, the Fourth Circuit simply announced that the RRA's anti-alienation provision was "substantially similar" to the provision in ERISA. n373 As a result, the Fourth Circuit felt bound by the RRA precedent. n374 Therefore, the Fourth Circuit accorded a broad reading to the Supreme Court's dicta in *Guidry I*. n375

The Third and Tenth Circuits read *Guidry I* far more narrowly. n376 These circuits highlighted both the fact that the Supreme Court had not "specifically addressed distributed funds" n377 and their belief that "if the Court had intended to explicitly decide that income could not be garnished after payment, it would have stated the conditions under which such income retained its protected status." n378 The latter courts recognized that, to the extent that the anti-alienation provision does not apply to distributions once made to beneficiaries, no exception to the anti-alienation provision is necessary.

The position taken by the Third and Tenth Circuits has the advantage of avoiding the arbitrary distinction made by the Fourth Circuit between annuities paid at retirement, and preretirement, lump sum distributions. n379 This distinction, supposedly grounded in ERISA's policy of protecting a stream of retirement income, fails to take into consideration a variety of economic factors associated with many retirement plans. n380 First, consider a situation where an individual takes a preretirement lump sum distribution but decides to invest the proceeds in a privately purchased annuity payable at age sixty-five. The logic of the Smith court's analysis may accord the annuity the [*1402] protection of the anti-alienation provision in order to "safeguard a stream of income for [retirement]." n381 Yet, the end effect is the same as a scenario in which the individual deposits the proceeds in an interest bearing savings account, intending only to make periodic withdrawals in retirement. Presumably, the Fourth Circuit would not enter into an inquiry of "intent" in the latter situation and would permit a judgment creditor to reach the funds in the savings account, consistent with its decision regarding preretirement distributions. n382 On the surface, the key difference between the two situations is the availability of the funds before retirement age. However, an individual who purchases an annuity but later sells it at a discount may negate that difference.

An even more difficult question for the Fourth Circuit arises when an individual retires and elects to receive his qualified plan benefits in a lump sum. This distribution appears to fall in a no man's land given the distinction drawn by the court between qualified plan funds that are paid out prior to retirement and annuities payable at retirement. Will the reach of the anti-alienation provision to this frequently encountered situation n383 depend upon the way the retiree invests the proceeds of the lump sum payment? Upon the retiree's intent in spreading consumption of the proceeds over time? Upon some other yet to be determined factor?

Although it might seem that it makes little difference whether courts enforce a judgment against assets held by a retirement plan or against amounts distributed from the plan, in application, significant implications do flow from the line the courts draw. First, allowing enforcement of judgments only against distributed amounts permits plans to avoid the expense of validating and complying with orders running against the plans. n384 Second, plans avoid the risk of nonqualification associated with making an incorrect judgment concerning the payment of plan assets to anyone other than a plan participant or beneficiary. n385 Third, plans may avoid some questions about when a judgment creditor is entitled to receive a distribution of plan assets. The creditor naturally would like to receive full payment as soon as the claim is substantiated, whether through a court judgment or through some alternative procedure. However, permitting such early distributions could wreak havoc with defined benefit plans, which often do not permit large lump sum distributions [*1403] and which employees fund in anticipation of not having to make any distributions until the participant reaches a retirement age recognized by the plan. Alternative times for distribution could include the plan participant's earliest elective retirement date n386 or the time at which the plan participant actually elects to retire.

Some commentators have argued that the express goal of the anti-alienation provision is to provide protection to plan participants, not to plans. n387 Under this view, it is inappropriate to take the plans' interests into account in determining the scope of the anti-alienation provision. n388 However, this fails to consider the tension which permeates

ERISA as a result of the twin goals of protecting plan participants and minimizing the costs associated with sponsoring benefit plans. Achieving a result that is consistent with the statutory language but that permits plan costs to be minimized without decreasing the protections accorded to innocent plan participants is consistent with the underlying goals of ERISA.

Considering the interest of employee benefit plans when determining the parameters of the anti-alienation provision does present one problem. Depending on the posture of a given case, the actual interests of plans may vary. For example, when the wrongdoing runs against the plan, the plan will face increased risk and greater administrative burdens if forced to pay out benefits and then to seek their return to the plan trust rather than to simply offset the benefits. In a twist on timing problems discussed above, permitting claimants to recover only from funds that have been distributed from the plan instead of directly from plan assets also may result in significant delays in recovery for a plan that has experienced a loss. If the creditor recovers the entire amount of the distributions and a plan participant or beneficiary has control over the timing or method of plan distribution, the participant or beneficiary may have little incentive to request early or lump sum distributions as opposed to annuitized distributions. When the plan is the creditor, the burden of delaying recovery redounds to the plan.

Adoption of the analysis suggested above in instances of fiduciary breaches against ERISA plans can prevent these potential problems. n389 Nonfiduciaries have limited opportunity to cause harm to benefit plans. In cases of fiduciary wrongdoing, the proposed analysis would permit direct and immediate offsets by plans when the plans suffer damage through a fiduciary breach. The immediate offset would avoid the question of delaying a plan's recovery. It also would avert a situation where the plan would be required to [*1404] pay out benefits only to seek the return of the benefits through a garnishment or another similar mechanism.

V. An Enhanced Analytical Approach: The Argument for Interest Analysis

Significant criticism has been directed toward the jurisprudence analyzed in Part IV. Though always in the confines of one of the two doctrinal areas discussed above, some commentators have advocated specific and carefully crafted statutory solutions to resolve controversies and perceived inequities. n390 Others have advanced creative ways to interpret discrete statutory sections to avoid the harshest results. n391 Taking an alternative approach, some commentators have recommended expanding the use of equitable doctrines in misrepresentation cases. n392 More generally, Professor Norman Stein has argued that traditional equitable principles offer an incomplete framework for the complicated fiduciary issues inherent in benefit plans. n393 In fact, Professor Stein has questioned whether federal statutory law is even capable of balancing the competing interests underlying this country's current approach to benefit regulation. n394

This Article offers an alternative analysis which would be applicable to the misrepresentation and anti-alienation problems and to the broader array of remedial issues under ERISA. On the surface, even the doctrines presented in Part IV and the disputes they have engendered appear to have little in common. Part IV.A discussed specific problems that occur under health care plans while Part IV.B dealt with pension plan litigation. n395 Part IV.A considered the under enforcement of health care benefit representations while Part IV.B considered the over enforcement of retirement plan obligations. n396 Different statutory provisions are involved - the writing and general remedial sections on the one hand and the anti-alienation and fiduciary remedial section on the other. However, this Part argues that many of the jurisprudential problems derive from common root causes. Once those causes are identified and understood, I set forth a framework for incorporating interest analysis [*1405] into remedial decision making under ERISA. I conclude by showing how interest analysis can contribute to improved decision making from a national policy perspective by balancing the tensions inherent in ERISA.

A. The Approach to Remedies: Federalism, Feudalism, and Getting Caught on the Statutory Hook

In the remedial contexts of both the misrepresentation cases and the anti-alienation cases, this author believes that the jurisprudence reflects a very narrow approach to statutory construction. Frequently, the purported analytical distinctions being drawn actually are based on formal and arbitrary differences that do not appropriately further the incentive effects of liability allocation nor reflect the realities of plan sponsorship. n397 As a result, what are often pointed to as ERISA's "comprehensive and reticulated" provisions have proven deceptive in application, at least in the remedial context. n398

Not surprisingly, the analysis of remedial issues under ERISA, such as the availability of a promissory estoppel claim, typically begins with consideration of that "comprehensive and reticulated" statutory language. n399 The initial problem in an estoppel case occurs because none of ERISA's hundreds of pages of text references estoppel. After

continuing their hunt for a statutory hook on which to base a decision, courts fall back upon the writing and amendment requirements. n400

However, neither requirement directly addresses nor is necessarily dispositive of the estoppel question. And, in other contexts, courts have interpreted both requirements in ways that accord more limited parameters to their scope than appears to occur in the remedial context. n401 The exact language of the writing requirement states: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." n402 Yet, it hardly makes sense to permit a benefit plan sponsor to avoid all of ERISA's requirements by refusing to reduce a plan to writing. Accordingly, the law recognizes that the lack of a written plan will result in a violation of ERISA, not in a finding that no ERISA plan exists. n403 Thus, the writing requirement is not always absolute. [*1406]

The second statutory provision that has influenced the availability of estoppel in the health care cases is the amendment procedure requirement. n404 By definition, the oral and written representations that plaintiffs seek to enforce through an estoppel-type of action do not conform to the terms of the benefit plan. If enforced, the representations that are inconsistent with a plan's terms could be viewed as constituting plan amendments. But, amendments must be made in accordance with a plan's amendment procedure and ERISA requires that each plan have such a procedure. n405 Technically, misstatements and misrepresentations of plan benefits do not conform to the usual amendment procedures which require writings, approvals, and so forth. As with the writing requirement though, outside of the remedial context the mandate of amendment procedure compliance has not been held to be absolute. n406

Consider the situation of a benefit plan that, due to a drafting error, fails to contain an amendment procedure. An extremely literal approach would conclude that no ERISA plan exists because the plan at issue fails to contain a necessary element of an ERISA plan - an amendment procedure. Alternatively, one could require the plan to be continued on an infinite basis in accordance with its initial terms. After all, it is impossible for the plan sponsor to meet ERISA's requirement that any amendment be adopted in compliance with the plan's amendment procedure when no such procedure exists. It even would be impossible to amend the plan to add an amendment procedure. In a similar situation though, the Supreme Court recently recognized the impracticality of such a slavish approach to the statutory language and accepted a reservation of rights clause as sufficient to state an amendment procedure. n407 This decision stands in stark contrast to ERISA's remedial jurisprudence, which tends to treat the statutory amendment requirement as an absolute that effectively prohibits application of estoppel doctrine in many ERISA cases.

In the wrongdoing context, courts also treat the anti-alienation provision as an absolute, barring remedies for those harmed by the wrongdoing. Even when the wrongdoer is a plan fiduciary, the Fifth Circuit's approach places the anti-alienation limitations ahead of ERISA's wide grant of remedial discretion to courts confronted with fiduciary violations. n408 Similarly, in the nonfiduciary context, the Smith approach extends the parameters of anti-alienation protection not just to a wrongdoer, and not just in contradiction of policies [*1407] ingrained in a criminal restitution statute, but even to funds that have been distributed from an ERISA plan. n409

Yet, in other contexts courts have not construed the anti-alienation provision as an absolute. A truly categorical interpretation would prevent the settlement of contested benefit claims. After all, any time a plan participant compromises a request for benefits there is a sense that the participant has alienated her anticipated benefit. The unanimous opinion of the courts is that in such situations the general systemic policy favoring settlements outweighs the technical application of ERISA's anti-alienation provision. n410

Again, these simply are cases in point, chosen for the disparate types of situations they exemplify. Together they illustrate judicial approaches common not only to these fact settings, but to other ERISA issues as well. The remedial provisions have been particularly susceptible to narrow and absolute construction. The reluctance to permit most estoppel actions because the statute lacks any reference to estoppel specifically or to common law causes of action generally constitutes one such situation. In addition, ERISA has been held to exclude compensatory damages for plan or statutory violations n411 and extra- contractual damages for improper or bad faith processing of a benefits claim. n412 Where the purportedly wrongful termination of an employee's health insurance allegedly precipitated a fatal heart attack, ERISA preempted the widow's state law claims, but apparently did not offer any alternative remedy. n413

In reviewing ERISA's remedial jurisprudence, one almost begins to think that federalization has intertwined with feudalism and we have returned to the "rigid, technical, and overly formal" system of writs used in thirteenth century England. n414 The existence of a clear injury is insufficient to support a cognizable legal or equitable claim. Instead, the claim must fit within the narrowly interpreted paradigm established by ERISA's remedial requirements. Present day claimants, however, lack the alternative of seeking redress in a court of chancery. Thus, given the unlikelihood of legislative attention n415 [*1408] to each of the problems raised here, let alone to the broader array of ERISA re-

medial matters, a revised jurisprudential approach to these issues is necessary. It is useful, before turning to suggested changes, to consider the implications of benefit plan development and social policy theory.

B. Remedies, History, and Social Policy Theory

Prior to the enactment of ERISA, benefit plan regulation rested primarily at the state level, but a cohesive jurisprudence never developed. Benefit plans contained elements of contracts and trusts, but the unique complexities of benefit plans presented challenges for each of these doctrinal frameworks. n416 Enactment of the WPPDA slowed the development of state law, and ERISA's sweeping preemption provision ultimately halted any further maturation of common law benefits-specific doctrine at the state level.

This historical background may account, at least in part, for the courts' tendencies to construe ERISA's provisions in formal and absolute terms. After all, the development of a comprehensive federal common law jurisprudence requires the existence of basic, underlying principles to ensure consistency and a lack of judicial arbitrariness. Because no such benefit program principles ever developed at the state level, the federal courts did not have an analytical foundation specific to benefit plans to turn to when they began construing ERISA's remedial provisions.

One partial exception is the fiduciary arena where the courts do, in accordance with ERISA's legislative history, sometimes draw upon general fiduciary principles. n417 In many instances, though, those fiduciary principles are insufficient to deal with the complexity of modern benefit plans. n418 And, as I have shown in the context of anti-alienation, the courts' narrow remedial approaches sometimes lose sight of broader fiduciary concepts. n419 Even in one of the most developed general doctrinal areas relevant to ERISA plans, the common law doctrines frequently do not adequately resolve the unique tensions inherent in benefit programs. n420

Professor Skocpol's social policy analysis contributes to an understanding of this limited jurisprudential approach that developed both historically and under ERISA. n421 From the viewpoint of contemporary social policy [*1409] theory, skepticism of the federal government's ability to maintain and administer broad based social programs manifests itself in a variety of ways. n422 Certainly, such skepticism affects the decision to accord substantial responsibility for retirement income to a regime of private plan sponsorship as opposed to expansive social programs. Professor Skocpol's theory suggests that the same skepticism affects the approach taken by the court system to the interpretation of benefit plan regulation. n423 Similar to the approach courts took in the early days of labor legislation, the courts act to minimize government intrusion into benefit plan sponsorship by construing statutory provisions to circumscribe their effect. n424

One result of this jurisprudence in the ERISA context is the type of regulatory black holes highlighted in the discussion of misrepresentation and misstatement cases. n425 Even anti-alienation doctrines that are most protective of participant assets and income streams may be reconciled with this theory. n426 Misrepresentation and misstatement decisions also take an extremely formal and literal approach to the statutory language, while disregarding equitable principles. n427

The next subpart argues for the increased use of interest analysis in ERISA jurisprudence. n428 Such an analytical approach is consistent with ERISA's statutory provisions and is general enough to provide insights in approaching a variety of benefit plan issues. Part V.C argues that incorporating consideration of the multiple roles played by plan actors and their diverging economic incentives into the analysis of legal issues would help avoid arbitrary distinctions and inefficient burdens on benefit program sponsorship. n429 In addition, a full understanding of these considerations and the courts' difficulties dealing with the considerations would aid policy makers as they grapple with restructuring the federal regulation of benefit programs to accommodate the needs of the baby boom generation. Finally, Part V.D discusses the application of interest analysis in terms of the tension between ERISA regulation and the domestic regime of voluntary benefit plan sponsorship. n430 It argues that the courts' purported focus on this so called "ERISA [*1410] compromise" sometimes misses the mark and that one key to sound analysis lies with understanding the tension inherent in the statute. Again, interest analysis could be a beneficial tool in this endeavor.

C. Interest Analysis: Recognizing the Actors and Their Roles

In their seminal article on ERISA's exclusive benefit rule, n431 Professors Fischel and Langbein explain how trustee functions in ERISA plans, where employers and employees act as settlors and beneficiaries, diverge from traditional testamentary trustee functions. n432 Professors Fischel and Langbein discuss the multiple roles individuals and entities play in ERISA plans. n433 They also point out the different interests held by subsets of what initially appear to be cohesive benefit plan cohorts. n434 For example, although the courts often treat plan participants as a single

unit, the actual interests of young employees as compared to old employees, or retirees as compared to active workers, sometimes differ significantly. n435

Ultimately, Professors Fischel and Langbein advocate an analytical approach that considers the interests of the various parties and the bargain that the relevant parties would have reached had they considered the issue *ex ante*. n436 For example, judicial reviews of benefit determinations made by plan administrators have resulted in inconsistent application of the arbitrary and capricious standard of review and, thus, in discordant decisions. n437 An *ex ante* approach to evaluating the existence of conflicts of interest better reflects the bargain the parties would have made had they addressed the specific issue at stake and maximizes efficiency. n438 The authors argue that considering the interests of employers and employees from an *ex ante* perspective will tend to converge seemingly divergent interests. n439 Similarly, when the differing interests of subgroups of plan participants are at issue, Professors Fischel and Langbein call for recognition of the various interests and application of trust law's rule of impartiality to resolve disputes. n440 [*1411]

This focus on the actual interest of the parties offers much to the broader array of ERISA jurisprudence. As already shown, unlike other employment cases which frequently involve only the employer and employees, benefit cases also may involve "outsiders" such as plan administrators, investment managers, trustees, health care providers, and utilization reviewers. To further confuse the issue, an actor in a misstatement case or an anti-alienation case may play several diverse roles. For example, an employer may act as employer, plan sponsor, plan administrator, and plan fiduciary. Also, the actors differ in their economic interests, and multiple roles may cause the interests of a single entity, such as an employer, to vary depending upon the role being analyzed. Existing legal analysis often does not undertake a thorough evaluation of the relevant actors and their interests. Part IV demonstrated the results of the existing legal analysis - doctrines based upon artificial distinctions and a failure to accord liability in an efficient manner. n441

For example, in the context of misstatements and misrepresentations, the doctrinal distinction that has developed between health care providers and plan participants appears anomalous. Providers, who might be characterized as third party beneficiaries of an employer-sponsored health care plan, typically receive more favorable claims treatment than an employee and his or her dependents who are the intended beneficiaries of the plan. This is not to say that a provider should always be left without a remedy any more than it is to say that plan participants and their beneficiaries never should bear any responsibility for understanding the terms of their plan as that plan is written.

Certainly, the notion that health care providers are not one of the traditional ERISA entities n442 militates in favor of permitting providers to raise state law estoppel-type claims. The economic realities necessitating health insurance verifications also support enforcement of those verifications. n443 However, current doctrine permitting recoveries by many health care providers while denying equivalent recoveries for misrepresentations made to a plan participant or beneficiary cannot be reconciled with the logic of the latter cases. Recall that the three reasons typically given for the denial of participant representation claims are (1) failure to comply with ERISA's writing requirement, (2) inconsistency with ERISA's mandate that plan amendments be adopted according to a plan's amendment procedure, and (3) compromise of the financial integrity of plans. n444

Enforcing representations made to health care providers gives rise to payments that are inconsistent with plan terms and theoretically could be [*1412] viewed as plan amendments implemented outside any written amendment procedure. Where liability is allocated to benefit plans, the financial effect on the plan is the same whether recovery is made by a provider or by a participant. Additionally, provider recoveries benefit the patient, at least indirectly, thus generating concern about disparate treatment of similarly situated employees. The possibility remains that the errors of low-level administrative employees may prove costly. Thus, each of the substantive reasons raised for denying participant claims also applies to provider claims.

From an economic perspective, given the artificial distinction between provider and participant claims, one would expect the development of a mechanism to reallocate costs. As between patients and providers, providers can be expected to assume the burden of seeking coverage verifications if, unlike patient verifications, provider verifications are enforceable. Patients would benefit by gaining indirect enforcement of verifications, while providers would avoid the potential losses associated with unenforceable verifications made by patients and any resulting uncollectibility from the patients. The increasing practice of utilization review makes it unlikely that those acting on behalf of plans would refuse to make verifications to providers. Reviewers require cooperation from health care providers in the evaluation of a patient's condition and course of treatment. In fact, by increasing the *ex ante* analysis, the utilization review process may decrease the instances of inaccurate verifications.

The result of permitting state claims by providers, then, is that state law effectively may provide protection both for providers, who are outside the scope of ERISA, and employees and their dependents, who find their direct federal "protections" to be of little value. In the view of this author, this backdoor use of state law is likely to increase transaction costs and undercut the force of the general federal regulation. Furthermore, it will not always be appropriate to allocate total liability for inaccurate verifications to plans and related actors. What about an employee or dependent who misleads a provider about the status of the individual's insurance coverage? In the tradition of the WPPDA, ERISA incorporates substantial reporting and information requirements. n445 Given the availability of the information, patients should have some obligation to understand and convey to their health care providers the basic coverage terms of their medical plan benefits.

In the case of *Cromwell v. Equicor-Equitable HCA Corp.*, n446 the patient's husband, who claimed to have employer-provided health insurance, left his job more than a year before the patient became ill. n447 Surely this couple [*1413] realized that the employer-sponsored health care plan no longer provided coverage. On the narrow facts, perhaps it is not surprising that the court in *Cromwell* determined that ERISA preempted the provider's claim against the insurer and employer. n448 One cannot object to liability on the part of the patient in such a case. Yet, the plan administrator also provided an inaccurate verification. n449 To the extent that a judgment against the patient is uncollectible, the burden of the remaining loss still must be allocated among the plan administrator, the plan, the plan sponsor, and the provider. n450 Where the provider may recover from a plan-related entity, courts must consider appropriate allocation between that entity and a patient who fraudulently misrepresented her health care coverage status.

Looking at the interests from an ex ante perspective informs the misrepresentation and misstatement cases. Employees and employers may consider plan coverage, according to the terms of the plan, as part of an employee's compensation. The interests of employers and employees align against plan coverage for employees or former employees who knowingly misrepresent their benefit status. Such coverage would increase the costs of the plan, would decrease an employer's willingness to sponsor a plan because coverage would not grant a corresponding benefit to the employer, and would represent a windfall vis-a-vis the eligible employees.

Considering the status and interests of the parties also informs anti-alienation analysis. The parties affected by such an anti-alienation action extend beyond the employee who committed the wrongdoing and the employer as plan sponsor. Other interested parties may include the plan, fellow employees, and outsiders injured by the wrongdoing. Issues associated with the multiple roles of plan actors occur in this scenario as well. An employee/wrongdoer also may be a plan fiduciary, for example, or an employer/plan sponsor may be injured by the wrongdoing.

In fiduciary wrongdoing cases, proper recognition of the importance ERISA places upon fiduciary status highlights the inappropriateness of the Fifth Circuit's approach. ERISA explicitly addresses the liability of fiduciaries vis-à-vis the benefit plans that bear the burden of the fiduciary breach, and grants wide deference to courts in the determination of appropriate relief. n451 Consider the interests of the parties from an ex ante perspective. Surely, the interests of the plan sponsor and the nonbreaching plan participant [*1414] population align against paying benefits to a breaching fiduciary. And, it seems inappropriate in a case of wrongdoing to consider the fiduciary's ex ante interest in breaching duties without penalty.

However, the language of *Guidry I* does call for consideration of the interest of the breaching fiduciary, and his beneficiaries, in a stream of retirement income. n452 Here I would utilize the balancing approach advocated by Professors Fischel and Langbein. n453 By comparing the interests of breaching fiduciaries to the interests of the class of innocent plan participants, one could reasonably deny benefits to the wrongdoer in order to ensure benefit entitlement to the innocent participants. Although the case for denying benefits to the beneficiaries of a wrongdoer is weaker, balancing the wrongdoer's interests against the interests of beneficiaries of innocent plan participants leads to a similar conclusion.

Interest analysis also speaks to the nonfiduciary context. The *Smith* court drew artificial distinctions between benefits paid at retirement and pre-retirement distributions. n454 The alternative analysis permits recovery once the wrongdoing plan participant actually receives plan benefits. n455 By focusing on a participant's economic interest vis-à-vis the plan, interest analysis avoids treating older wrongdoers more favorably than younger wrongdoers. Furthermore, interest analysis avoids the possibility, which may occur under the *Smith* analysis, of making the wholly arbitrary distinction between lump sum and annuitized benefit entitlements.

In sum, a version of the interest analysis advocated by Professors Fischel and Langbein has application in resolving ERISA disputes far beyond the realm of the exclusive benefit rule. Consideration of the roles and interests of the parties from an ex ante perspective would improve decision making in health care plan disputes - as evidenced by the miss-

tatement and misrepresentation cases. And, as shown by the anti-alienation cases, the analysis also has relevance in the broader arena of pension plan litigation. Finally, the next Part discusses the application of interest analysis in resolving some of the tension inherent in the basic ERISA compromise.

D. Enforcing the Underlying Bargain

Although ERISA's genesis is traceable to the concern for participant protection that arose after the Studebaker plant closing, n456 ERISA is not simply a remedial statute. At the time of ERISA's passage, employers accepted [*1415] the extensive federal regulation in order to maintain the voluntary nature of privately sponsored welfare and pension benefit programs. n457 Even under the extensive regulation, employers kept the right to choose whether to sponsor any benefit plan for their employees. And, largely, employers may select the benefit levels of any plan they do choose to offer. n458

The result is a statute permeated by the tension of somewhat inconsistent goals - (1) providing protection to benefit plan participants; and (2) encouraging, or at least not excessively discouraging, benefit plan sponsorship. n459 This overarching policy has not gone unrecognized in the ERISA jurisprudence. The Supreme Court has spoken about the "tension between the primary goal of benefitting employees and the subsidiary goal of containing pension costs" n460 and the "careful balancing" in the remedial provisions "of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." n461

In the context of misrepresentations and misstatements that conflict with plan terms, employees and their dependents typically have been precluded from stating individual claims. n462 However, as discussed above, in other settings the statutory provisions cited as governing those disputes are less than absolute. Where a plan participant has received explicit but incorrect advice regarding benefit eligibility, ERISA's general goal of protecting participant expectations seems to militate in favor of enforcement of the representation. The tension becomes apparent when one considers the potential costs to benefit plans and their sponsors.

Courts have reasoned that estoppel claims represent less of a threat to health care plans than to pension plans because health care plans are not funded in advance on an actuarial basis. n463 Although typically there is not a specific trust fund to deplete in a self-funded health care plan, the costs associated with a single, lengthy hospitalization can easily exceed the liability associated with a pension plan miscalculation, even when one considers the total present value of the incremental increase in the lifetime pension benefit. Ultimately, the cost of an award against a self-insured health care plan inures on the plan sponsor, just as plan sponsors bear the cost of increased retirement plan payments. Furthermore, enforcing representations may permit employees [*1416] to receive disparate benefit entitlements in contravention of nondiscrimination requirements n464 and may allow relatively low level benefit plan administrators to bind the plan, employer, or benefit program administrator to pay benefits not contemplated by a plan document. n465 These considerations illustrate the manner in which vigorous enforcement of benefit expectations can drive up plan costs and discourage employer sponsorship of benefit programs.

Consider the dichotomy between federal law and state law that now exists in the treatment of estoppel actions. Permitting medical providers to bring estoppel-type claims appears to raise the same issues discussed in the participant context. n466 Typically, however, the nonderivative state law claims of providers are subjected only to preemption analysis. n467 As shown in Part IV.C, failure carefully to consider the parties involved in these claims, their various interests, and the overarching policy objectives of federal benefit plan regulation, increases transaction costs and undermines the integrity of federal regulation. n468

Consider the anti-alienation cases in light of ERISA's dual objectives. Although even breaching fiduciaries who are also plan participants would have some level of expectation regarding their pension benefits, it seems reasonable to determine that they could forfeit those expectations through their own wrongdoing. Permitting an offset against the benefits of a breaching fiduciary not only accords with traditional trust law doctrine, but it also serves as a deterrent to fiduciary wrongdoing. This may be most effective in small plans where a company principal serves as a plan fiduciary. Such instances present an increased likelihood of a breach of fiduciary obligations. n469

In addition, when the actions of a wrongdoing plan participant result in harm to a broader class of participants, it is unclear why statutory protections should accrue to the wrongdoer as opposed to the innocent plan participants. On the other side of the equation, to the extent that a wrongdoer causes harm, directly or indirectly, by increasing funding costs to a benefit plan sponsor, economic costs accrue and operate to discourage plan sponsorship. Here, interest analysis illustrates that permitting a plan to offset the benefit of a breaching fiduciary best serves the ERISA compromise. [*1417]

Commentators have recognized some of the shortcomings that result from the intersection of ERISA's preemption and remedial schemes. n470 However, commentators have focused on ERISA's failure, in the absence of federal common law remedies, to provide appropriate relief to benefit plan participants who are injured by a breach of ERISA's statutory requirements n471 or who are misled regarding their plan benefits. n472 The foregoing discussion indicates that decision making could be made more principled even under the existing statute by considering ERISA's overarching policy goals in light of interest analysis. A remedial jurisprudence that rejects policy considerations and ignores the actual interests of the parties with the result that it fails to enforce voluntary employer promises impinges upon the bargain entered into by employees. Such an outcome rewards sharp employer practices and sloppy plan administration - outcomes that few would argue are consistent with the long term interests of employees, employers, or domestic benefit policy.

VI. Conclusion

Although regulation of privately sponsored noncash and deferred compensation programs has moved from the state to the federal arena, the ability of those programs to provide security to the aging baby boom population remains in question. With trillions of dollars in assets n473 and substantial foregone tax revenues at stake, n474 it is not surprising that benefit reform measures are on the agenda in each congressional session. n475 Yet, the almost annual statutory amendments fail to achieve quiet on the benefits front.

Courts are unhappy with the increasing volume of benefits litigation. n476 Commentators, employees, employers, the DOL, and other interested actors all raise questions regarding the jurisprudence. By examining in detail two specific doctrinal areas where courts have generally held that ERISA preempted traditional state law, this Article shows that the jurisprudence has [*1418] drawn unprincipled and arbitrary distinctions in construing ERISA's substantive, remedial, and preemptive provisions. While others have criticized the scope of ERISA preemption and questioned the voluntary nature of employer-sponsored benefit plans, at least some of the jurisprudential problems can be resolved consistently with the existing federal statute.

Many of the problems are attributable to a judicial tendency to construe the relevant statutory provisions in narrow and absolute terms. At the same time, the jurisprudence has failed to recognize the realities of funding and administering increasingly complex benefit programs. More important than the specific instances of inequities, though, are the systemic implications of these decisions. The statutory language is rarely absolute. And, the very complexities that permit employers to select the types, levels, and administrative schemes most appropriate for their own business circumstances and employees mean that cases seldom can be resolved by applying a simple statutory section with a single, plain meaning. Some basic principles must be used to guide the analysis.

One method of improving decision making in benefits cases is to consider carefully the full range of benefit plan actors, their roles, and their interests, as proposed in the context of ERISA's exclusive benefit rule by Professors Fischel and Langbein. Determinations made after fully evaluating the interests of the relevant actors from an ex ante perspective should reflect the economic choices the parties would have made. Such an approach increases the likelihood that the decisions will be appropriate from a policy standpoint because it balances the employee's benefit expectations with the employer's willingness to sponsor benefit programs.

Furthermore, use of interest analysis properly accounts for the ERISA compromise. The overriding bargain of ERISA balances participant protection with recognition of the voluntary nature of benefit plan sponsorship. Yet, it is disingenuous to argue that the technical statutory language represents the considered compromise of the primary ERISA parties on every issue that reaches the courts. Instead, interest analysis provides a principled method for achieving that balance in the wide range of disputes that occur under ERISA. Furthermore, increasing the transparency of the existing statutory tension as well as of the economic positions of the relevant actors will play an important role in avoiding past misconceptions as legislators, policy makers, plan sponsors, and participants confront the further development of federal regulation in this area. Surely, the aging of the baby boom population will result in increased national attention to this "Godforsaken mess."

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance Law Industry Regulation Federal Regulations Employee Retirement Income Security Act (ERISA) ERISA Preemption Bad Faith & Misrepresentation Pensions & Benefits Law Employee Benefit Plans Defined Contribution

PlansPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Civil Claims & RemediesEquitable ReliefConstructive Trusts

FOOTNOTES:

n1 James H. Smalhout, *The Not-So-Golden Years*, *Wall St. J.*, June 29, 1995, at A14. Mr. Smalhout has since authored his own book addressing shortcomings in the U.S. pension insurance system. James H. Smalhout, *The Uncertain Retirement: Securing Pension Promises in a World of Risk* (1996); see also Karen Ferguson & Kate Blackwell, *Pensions in Crisis* 216 (1995) ("Pension policy is at a crossroads. The old system has failed; the new directions are as yet uncharted. It is now up to us to choose which road to take."); Craig S. Karpel, *The Retirement Myth* 4 (1995) ("We're living in a time of global political and technological change so swift and sweeping that yesterday's rational retirement plan has become a parachute that won't open.").

n2 See Bruce Babbitt, *The Future Environmental Agenda for the United States*, 64 *U. Colo. L. Rev.* 513, 514 (1993) ("The next generation of environmental challenges will be more intractable, more difficult problems that fundamentally relate to how we live on the land and on the planet.").

n3 See Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 *S. Cal. L. Rev.* 1453, 1460 (1993) ("The problem of police abuse in urban America must be treated as a civil rights emergency, requiring effective national, state and local action.").

n4 See Steven A. Schultz, Note, *In Re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged - A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 *Brook. L. Rev.* 553, 554 (1992) ("It has become increasingly apparent in the last few years that the asbestos crisis facing the judicial system in the United States has reached epidemic proportions.").

n5 See Julie C. Relihan, Note, *Expediting FDA Approval of AIDS Drugs: An International Approach*, 13 *B.U. Int'l L.J.* 229, 229 (1995) ("Acquired Immune Deficiency Syndrome (AIDS) has evolved into a devastating global emergency that demands immediate attention from all corners of the world.").

n6 See Louise B. Russell, *The Baby Boom Generation and the Economy* 2 (1982). But see William Strauss & Neil Howe, *Generations: The History of America's Future* 36, 395-96 (1991) (adopting generational counting method and arguing that 1961-81 population is larger than 1943-60 population).

n7 Karpel, *supra* note 1, at 7.

n8 *Id.* at 7-8.

n9 *Id.* at 9.

n10 *Id.* at 34.

n11 *Id.*

n12 See *id.* at 34-37. The average lump sum distribution from a 401(k) plan is only \$ 11,154. *Id.* at 44.

n13 See, e.g., Ferguson & Blackwell, *supra* note 1, at 205-16; Norman Stein, *ERISA and the Limits of Equity*, 56 *Law & Contemp. Probs.* 71, 110 (Winter 1993).

n14 National Labor Relations (Wagner) Act (NLRA), ch. 372, *49 Stat. 449 (1935)* (codified as amended at *29 U.S.C. 151-169 (1994)*). Two major acts have amended the Wagner Act. See Labor Management Relations (Taft-Hartley) Act (LMRA), ch. 120, *61 Stat. 136 (1947)* (codified as amended at *29 U.S.C. 141-187 (1994)*); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, *73 Stat. 519* (codified as amended in scattered sections of *29 U.S.C.*). For a summary of the origins and history of the NLRA, see James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, *74 N.C. L. Rev.* 939, 948-65 (1996).

n15 Fair Labor Standards Act of 1938, ch. 676, *52 Stat. 1060* (codified as amended at *29 U.S.C. 201-219 (1994)*).

n16 Worker Adjustment and Retraining Notification Act, *29 U.S.C. 2101-2109 (1994)*.

n17 Family and Medical Leave Act of 1993, *29 U.S.C. 2601-2654 (1994)*.

n18 Civil Rights Act of 1964, *42 U.S.C. 2000(e)-(q) (1994)*.

n19 Americans with Disabilities Act of 1990, *42 U.S.C. 12,101-12,213 (1994)*.

n20 Shipping, *46 U.S.C. 10,101-11,112 (1994)*.

n21 Displaced Homemakers Self-Sufficiency Assistance Act, *29 U.S.C. 2301-2314 (1994)*.

n22 Employee Polygraph Protection Act of 1988, *29 U.S.C. 2001-2009 (1994)*.

n23 Employee Retirement Income Security Act of 1974 (ERISA) 1-4402, *29 U.S.C. 1001-1461 (1994)*.

n24 See *id.* 3(1), *29 U.S.C. 1002(1)*.

n25 See, e.g., *I.R.C. 162(m) (1994)* (limiting deductible cash compensation to one million dollars).

n26 See Robert L. Fischer & Marc H. Berger, *A New Tax Benefit - Individual Retirement Plans Under the '74 Act*, *6 Tax Adviser* 215, 215 (1975) (noting that tax accountants are hailing increased tax advantages available under ERISA); G. Waldron Snyder, *Employee Retirement Income Security Act of 1974*, *11 Wake Forest L. Rev.* 219, 226 (1975) (calling ERISA "sophisticated effort to improve the [private benefit] system without depriving it of its vitality and health"); Harrison A. Williams, Jr., *Development of the New Pension Reform Laws*, *26 Lab. L.J.* 135, 135 (1975) (calling ERISA "milestone in the development of labor-management relations"); Kay G. Finley & Merritt A. Gardner, Note, *The Pension Reform Act of 1974: Brave New World of Retirement Security*, *27 U. Fla. L. Rev.* 1044, 1083 (1975) (calling ERISA "a noble piece of legislation"); see also *120 Cong. Rec.* 29,935 (1974) (statement of Sen. Williams) ("[A] pension reform law is now a reality because of the hardship, deprivation and inequity suffered by American working people. . . . The discipline of law will enable this and succeeding generations of workers to face their retirement period with greater confidence and greater security . . .").

n27 See *infra* text accompanying notes 109-12 for a discussion of the termination of Studebaker Corp.'s pension program, which many agree was a primary factor in initiating the congressional hearings that ultimately led to the enactment of ERISA.

n28 See, e.g., R. Michael Sanchez et al., *The Pension Reform Act of 1974: Fiduciary Responsibility and Prohibited Transactions (Part I)*, 6 *Tax Adviser* 86, 98 (1975) ("[T]he complexity of the statute and the myriad of detailed rules demonstrate once again that this part of the Act is an example of classic bureaucratic overkill [T]he Act threatens to strangle the very structure it is intended to safeguard - namely private employee benefit plans."); Winthrop D. Thies, *How Most Nearly to Enjoy "Pension Reform,"* 113 *Tr. & Est.* 564, 609 (1974) ("The new proposed legislation, in addition . . . to increasing pension costs and liabilities, which may serve to give many American workers ultimately less rather than more, largely crams each employer into a Procrustean bed as to pensions.").

n29 See *infra* text accompanying notes 459-61.

n30 See, e.g., Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 *U. Chi. L. Rev.* 1105, 1105 (1988) (noting success of reporting and disclosure obligations and vesting provisions).

n31 See, e.g., *id.* at 1105-07 (citing as problems ERISA's preemption, multi-employer, insurance, and fiduciary provisions).

n32 The Clinton administration's proposed reform measure was introduced to Congress as the Health Security Act, H.R. 3600, 103d Cong. (1993); S. 1757, 103d Cong. (1993). Competing proposals included: Health Equity and Access Reform Today Act of 1993, H.R. 3704, 103d Cong. (1993); S. 1770, 103d Cong. (1993); Managed Competition Act of 1993, H.R. 3222, 103d Cong. (1993); S. 1579, 103d Cong. (1993); American Health Security Act of 1993, H.R. 1200, 103d Cong. (1993); S. 491, 103d Cong. (1993).

n33 The usual definition of the baby boom generation includes those born between 1946 and 1964. See, e.g., *Russell*, *supra* note 6, at 1.

n34 See, e.g., Karpel, *supra* note 1, at 1-5.

n35 See generally, e.g., Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (1992) [hereinafter Skocpol, *Social Policy*]; see also Theda Skocpol, *Boomerang: Clinton's Health Security Effort and the Turn Against Government in U.S. Politics* (1996); Theda Skocpol, *Social Policy in the United States: Future Possibilities in Historical Perspective* (1995); Theda Skocpol, *Social Revolutions in the Modern World* (1994); *infra* Part II.

n36 See *infra* Part II.

n37 See *infra* Part III.

n38 See *infra* Part IV.

n39 See *infra* Part IV.A.

n40 See *infra* Part IV.B.

n41 Stein, *supra* note 13, at 73-81.

n42 See *infra* Part V.

n43 See *infra* notes 421-30 and accompanying text (discussing problems with benefits jurisprudence).

n44 Fischel & Langbein, *supra* note 30, at 1105.

n45 See *infra* Part V.

n46 Skocpol, *Social Policy*, *supra* note 35, at 100-03.

n47 See Michael B. Rappaport, *The Private Provision of Unemployment Insurance*, 1992 *Wis. L. Rev.* 61, 127 ("Historically, it is generally believed, as to both UI [unemployment insurance] and social insurance generally, that before the New Deal the government more or less followed a laissez faire policy as to social insurance, that private insurance failed to adequately develop, and therefore that government insurance was necessary."); Richard B. Stewart, *Madison's Nightmare*, 57 *U. Chi. L. Rev.* 335, 337 (1990) ("The New Deal also produced the first wave of large-scale national social insurance and welfare programs, including the social security and unemployment systems."); Susan L. Waysdorf, *Fighting for Their Lives: Women, Poverty, and the Historical Role of United States Law in Shaping Access to Women's Health Care*, 84 *Ky. L.J.* 745, 805 (1996) ("From an historical perspective, the Social Security Act of 1935 was a massive, omnibus, New Deal legislative vehicle which was the first manifestation of the expanding federal role in social welfare. As a result, the . . . Act . . . would become the basis for what some critics call the 'welfare state' . . ."); Neal Devins, *Government Lawyers and the New Deal*, 96 *Colum. L. Rev.* 237, 242 (1996) (book review) ("FDR's New Deal promised nothing less than a social revolution.").

n48 Social Security Act, ch. 531, 49 *Stat.* 620 (1935) (codified as amended at 42 *U.S.C.* 301-1397(e) (1994)).

n49 Skocpol, *Social Policy*, *supra* note 35, at 100-03.

n50 *Id.* at 102-10.

n51 *Id.* at 102-30.

n52 *Id.* at 106-24.

n53 *Id.*

n54 *Id.*

n55 *Id.* at 120 (quoting Green B. Raum, *Pensions and Patriotism*, 153 *N. Am. Rev.* 211, 215 (1891)). Professor Skocpol points out the inaccuracy of this statement. *Id.* at 590 n.64 (noting larger size of Department of Public Works in New South Wales).

n56 *Id.* at 143-45.

n57 *Id.* at 532-33.

n58 See id. at 253-61, 525.

n59 See id. at 131.

n60 Id. at 130-51.

n61 Id.

n62 Id. at 135-51.

n63 Id. at 249-53.

n64 Id at 120-29.

n65 Id. at 120-30.

n66 Id.

n67 Id. at 260-63.

n68 Id. at 261-63.

n69 Id. at 254-61.

n70 National Indus. Conference Bd., Inc., *Industrial Pensions in the United States* 41-47 (1925).

n71 Id. at 42-43.

n72 See National Planning Ass'n, 82d Cong., 2d Sess., *Pensions in the United States* 11 (Comm. Print 1952). The committee print wrongly implies that the American Express Company, which was first in providing pension plans, is unrelated to the current American Express Company. The two companies are one and the same. See Peter Z. Grossman, *American Express: The Unofficial History of the People Who Built the Great Financial Empire* 145 (1987); Alden Hatch, *American Express: A Century of Service* 89 (1950).

n73 National Planning Ass'n, *Pensions in the United States* 11; see also Robert L. Clark & Ann A. McDermed, *The Choice of Pension Plans in a Changing Regulatory Environment* 64 (1990); William C. Greenough & Francis P. King, *Pension Plans and Public Policy* 27 (1976); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 *Iowa L. Rev.* 431, 440 (1991).

n74 National Planning Ass'n, *Pensions in the United States* 11 (citing Consolidated Gas Co. of New York in 1892, Carnegie Steel in 1901, and Standard Oil Co. (New Jersey) in 1903); Clark & McDermed, *supra* note 73, at 64 (citing Baltimore & Ohio Railroad Company in 1880).

n75 Clark & McDermed, *supra* note 73, at 64.

n76 See *supra* Part II.A.

n77 National Indus. Conference Bd., *supra* note 70, at 43-44.

n78 *Id.* at 66.

n79 National Planning Ass'n, 82d Cong., 2d Sess., *Pensions in the United States* 4-5 (Comm. Print 1952).

n80 National Planning Ass'n, 82d Cong., 2d Sess., *Pensions in the United States* 4-5 (Comm. Print 1952); see also Dan M. McGill, *Fundamentals of Private Pensions* 2-3 2d ed. 1964).

n81 National Planning Ass'n, *Pensions in the United States* 6; McGill, *supra* note 80, at 2.

n82 National Planning Ass'n, *Pensions in the United States* 6; McGill, *supra* note 80, at 5.

n83 See *supra* Part II.A.

n84 National Planning Ass'n, *Pensions in the United States* 11; Joseph Schwartz, *In Pensions We Trust* 5 (1949); see also Clark & McDermed, *supra* note 73, at 70; Sar A. Levitan, *Welfare and Pension Plans Disclosure Act*, 9 *Lab. L.J.* 827, 827-28 (1958).

n85 William J. Isaacson, *Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights*, 59 *Colum. L. Rev.* 96, 98 (1959).

n86 Watson, *supra* note 73, at 442.

n87 See Isaacson, *supra* note 85, at 98-101.

n88 See Clark & McDermed, *supra* note 73, at 66; National Indus. Conference Bd., Inc., *supra* note 70, at 68-84; Edwin W. Patterson, *Legal Protection of Private Pension Expectations* 60-64 (1960).

n89 *Patterson*, *supra* note 88, at 61.

n90 Clark & McDermed, *supra* note 73, at 67.

n91 *Id.*

n92 *Id.* at 68-69; *Patterson*, *supra* note 88, at 85-88. In 1947, the Taft-Hartley Act added labor law provisions that, in part, prohibit unions from diverting contributions made to union pension plans or to pension plans jointly sponsored by unions and employers. Labor Management Relations (Taft-Hartley) Act, 302, 61 *Stat.* 136, 157 (1947) (codified as amended at 29 *U.S.C.* 186 (1994)).

n93 See *supra* text accompanying notes 55-56.

n94 Benjamin Aaron, *Legal Status of Employee Benefit Rights Under Private Pension Plans* 100 (1961); John H. Langbein & Bruce A. Wolk, *Pension And Employee Benefit Law* 67-68 (1995); Isaacson, *supra* note 85, at 101-05.

n95 Isaacson, *supra* note 85, at 107.

n96 *Id.* at 107-08.

n97 Note, Pension Plans and the Rights of the Retired Worker, 70 *Colum. L. Rev.* 909, 922-23 (1970).

n98 Isaacson, *supra* note 85, at 108-09; Stein, *supra* note 13, at 73-81; Note, Legal Problems of Private Pension Plans, 70 *Harv. L. Rev.* 490, 498 (1957).

n99 *West v. Hunt Foods, Inc.*, 225 P.2d 978, 983 (*Cal. Ct. App.* 1951); Note, *supra* note 97, at 917-18.

n100 *West*, 225 P.2d at 983; *Hunter v. Sparling*, 197 P.2d 807, 815-16 (*Cal. Ct. App.* 1948); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163, 167-69 (*Mo. Ct. App.* 1959) (*per curiam*); Restatement (First) of Contracts 90 illus. 2 (1932); Note, *supra* note 97, at 920-21.

n101 See *Hughes v. Encyclopedia Britannica Inc.*, 117 N.E.2d 880, 881 (*Ill. App. Ct.* 1954); Note, *supra* note 97, at 921.

n102 See *Lee v. Jenkins Bros.*, 268 F.2d 357, 370 (2d Cir. 1959); *Langer v. Superior Steel Corp.*, 178 A.490, 491 (*Pa.* 1935).

n103 See *Hughes*, 117 N.E.2d at 882; *Kravitz v. Twentieth Century-Fox Film Corp.*, 160 N.Y.S.2d 716, 720 (*N.Y. Sup. Ct.* 1957). But see *Hunter v. Sparling*, 197 P.2d 807, 814 (*Cal. Ct. App.* 1948) (determining that pensions are compensation for services rendered and not mere gratuities).

n104 See Isaacson, *supra* note 85, at 110 (noting that only Washington, Wisconsin, California, Massachusetts, Connecticut, and New York had enacted regulatory legislative programs for private benefit systems); Levitan, *supra* note 84, at 830.

n105 Act of Aug. 28, 1958, Pub. L. No. 85-836, 72 *Stat.* 997, repealed by ERISA, Pub. L. No. 93-406, 111(a)(1), 88 *Stat.* 829, 851.

n106 Aaron, *supra* note 94, at 103-08; Clark & McDermed, *supra* note 73, at 69; Langbein & Wolk, *supra* note 94, at 68-69.

n107 See Aaron, *supra* note 94, at 103; Isaacson, *supra* note 85, at 121.

n108 119 Cong. Rec. 30,003 (1973), reprinted in Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 1599 (Comm. Print 1976) [hereinafter History] ("[T]wo-thirds of all pension plan participants . . . have no vested right in their plan."). For example, because the pension plan of Raybestos Corp. provided for vesting only at retirement, the closing of its New Jersey plant caused 900 employees to forfeit their expected pension benefits. *Id.*

n109 See, e.g., Langbein & Wolk, *supra* note 94, at 62-67.

n110 Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm., 89th Cong. 103-28 (1966) (statement of Clifford M. MacMillan, Vice President, Studebaker Corp.).

n111 Smalhout, *supra* note 1, at 8-9.

n112 See 120 Cong. Rec. 4279 (1974), reprinted in History, *supra* note 108, at 3373.

n113 See ERISA 201-11, 29 U.S.C. 1051-61 (1994) (establishing requirements for nonforfeitability and form of payment).

n114 See, e.g., Fischel & Langbein, *supra* note 30, at 1105.

n115 For a brief overview of the contents of ERISA's four titles, see Dana M. Muir, Plant Closings and ERISA's Noninterference Provision, 36 B.C. L. Rev. 201, 203-05 (1995).

n116 See *supra* text accompanying notes 105-07.

n117 ERISA 101-111, 29 U.S.C. 1021- 1031 (1994).

n118 *Id.* 402, 29 U.S.C. 1102.

n119 *Id.* 301-306, 29 U.S.C. 1081- 1086; I.R.C. 412, 4971 (1996).

n120 ERISA 4002(a), 29 U.S.C. 1302(a).

n121 For one explanation of the potential problems facing the pension insurance system, as well as a suggested alternative system, see generally Smalhout, *supra* note 1.

n122 See ERISA 206(d)(1), 29 U.S.C. 1056(d)(1). I.R.C. 401(a)(13)(A) requires qualified pension benefit plans to provide parallel protections. I.R.C. 401(a)(13)(A). This Article generally follows the courts' terminology by referring to both provisions collectively as "ERISA's anti-alienation provision" or "the anti-alienation provision."

n123 Labor Management Relations (Taft Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. 141-187 (1994)).

n124 ERISA 514, 29 U.S.C. 1144 (1994).

n125 One specific exemption permits Hawaii to provide for universal health care within the state. *Id.* 514 (b)(5), 29 U.S.C. 1144(b)(5). For more information on the "Hawaii exception," including a discussion of the case law and legislative history of the exception, see David Gregory, The Scope of ERISA Preemption of State Law: A Study in Effective Federalism, 48 U. Pitt. L. Rev. 427, 474-75 (1987).

n126 See, e.g., *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987), superseded by statute as stated in *Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991).

n127 ERISA 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A).

n128 Jay Conison, ERISA and the Language of Preemption, 72 *Wash. U. L.Q.* 619, 648 (1994).

n129 See, e.g., *Pilot Life Ins. Co.*, 481 U.S. at 45.

n130 ERISA 514(b)(2)(B), 29 U.S.C. 1144(b)(2)(B) (1994).

n131 See, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

n132 See ERISA 2, 29 U.S.C. 1001.

n133 See supra note 125.

n134 ERISA 514(a), 29 U.S.C. 1144(a). Another subsection broadly defines "State laws" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA 514(c)(1), 29 U.S.C. 1144(c)(1).

n135 ERISA: The Law and the Code v (1997).

n136 See Gregory, supra note 125, at 456.

n137 Id.

n138 See Conison, supra note 128, at 619.

n139 Id.

n140 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995); *FMC Corp. v. Holliday*, 498 U.S. 52, 64-65 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), superceded by statute as stated in *Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 746 n.24 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983).

n141 See supra text accompanying note 128 (regarding application of state insurance regulation).

n142 120 Cong. Rec. 29,942 (1974).

n143 Conison, supra note 128, at 650-51; Leon E. Irish & Harrison J. Cohen, ERISA Preemption: Judicial Flexibility and Statutory Rigidity, 19 *U. Mich. J.L. Reform.* 109, 114 (1985).

n144 Dana M. Muir & Cindy A. Schipani, The Intersection of State Corporation Law and Employee Compensation Programs: Is It Curtains for Veil Piercing?, 1996 *U. Ill. L. Rev.* 1059, 1073.

n145 See Henry H. Drummonds, The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace, 62 *Fordham L. Rev.* 469, 560-94 (1993).

n146 See 42 U.S.C. 2000e-7 (1994).

n147 See Drummonds, *supra* note 145, at 496-502.

n148 The first discussion occurred in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521-26 (1981).

n149 *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

n150 *Id.* at 100 n.21.

n151 117 S. Ct. 832 (1997).

n152 *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 117 S. Ct. 832, 834 (1997).

n153 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995).

n154 *California Div. of Labor Standards Enforcement*, 117 S. Ct. at 838.

n155 See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

n156 *Id.*

n157 See, e.g., *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), superceded by statute as stated in *Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991).

n158 See, e.g., *New York State Conference of Blue Cross & Blue Shield Plans*, 115 S. Ct. at 1683 (upholding New York state statute that imposed surcharges on certain insurance plans, thereby affecting rates paid by employer-sponsored health insurance plans). For a more detailed analysis of current ERISA preemption jurisprudence, see Muir & Schipani, *supra* note 144, at 1114-19.

n159 See, e.g., *New York State Conference of Blue Cross & Blue Shield Plans*, 115 S.Ct. at 1671 (listing cases where Supreme Court has found state law to be preempted).

n160 See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 828-29 (1988).

n161 See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-43 (1990).

n162 See *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 827 (N.D. Ala. 1988) (referring to ERISA preemption as "morass serv[ing] as the stage for a theater of the absurd"); Conison, *supra* note 128, at 623 (stating that "current law is based on flawed assumptions").

n163 See *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 392 (Tex. 1991) (Doggett, J., concurring) (worrying that ERISA's continuing expansion will "preempt everything in its meandering path" (quoting *Jordan*, 694 F. Supp. at 835)).

n164 See *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 135 n.3 (1992) (Stevens, J. dissenting) (noting that LEXIS contained more than 2800 cases addressing ERISA preemption).

n165 See *Cathey*, 805 S.W.2d at 392 (Doggett, J., concurring) (calling ERISA preemption "black hole"); Jayne Elizabeth Zanglein, Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA, 72 Wash. U. L.Q. 671, 674 (1994).

n166 See, e.g., *Andrews-Clarke v. Travelers Ins. Co.*, Civ. No. 97-10191-WGY, 1997 U.S. Dist. LEXIS 17390, at *15 (D. Mass. Oct. 30, 1997).

n167 See *id.* at *21-26.

n168 See *Barnes v. Costle*, 561 F.2d 983, 994-95 (D.C. Cir. 1977); *Garber v. Saxon Bus. Prod., Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (per curiam); *Williams v. Saxbe*, 413 F. Supp. 654, 657-61 (D.D.C. 1976), vacated on other grounds sub nom. *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

n169 See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting "reasonable woman" standard). But see *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The controversy over the reasonable woman standard has engendered a voluminous debate in academic literature. See, e.g., Martha Chamallas, Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences, 92 Mich. L. Rev. 2370 (1994); Jane L. Dolkart, Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards, 43 Emory L.J. 151, 161-67 (1994); Gillian K. Hadfield, Rational Women: A Test for Sex-Based Harassment, 83 Calif. L. Rev. 1151 (1995).

n170 See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.) (modifying line of Supreme Court decisions).

n171 Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 357-60 (1992) (arguing that prohibiting sexual harassment exceeds mandate of Title VII).

n172 See History, *supra* note 108, at 4836-5043 (providing text of final bill).

n173 Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755; Retirement Protection Act of 1994, Pub. L. No. 103-465, 108 Stat. 5012; Pension Annuitants Protection Act of 1994, Pub. L. No. 103-401, 108 Stat. 4172; ; Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 416; Unemployment Compensation Amendments of 1992, Pub. L. No. 102-318, 106 Stat. 290; Tax Extension Act of 1991, Pub. L. No. 102-227, 105 Stat. 1686; Rural Telephone Cooperative Associations ERISA Amendments Act of 1991, Pub. L. No. 102-89, 105 Stat. 446; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; Debt Limit Extension Act, Pub. L. No. 101-140, 103 Stat. 830 (1989); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342; Pension Protection Act, Pub. L. No. 100-203, 101 Stat. 1330-33 (1987); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82; Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426; Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

n174 ERISA 502, 29 U.S.C. 1132 (1994).

n175 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("[W]e have held that courts are to develop a 'federal common law of rights and obligations under ERISA- regulated plans.'" (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), superceded by statute as stated in *Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991)); 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits) ("[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."); Zanglein, supra note 165, at 677-79.

n176 See *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 257- 59 (1993); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); Paul O'Neil, Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform, 55 *Ohio St. L.J.* 723, 727-34 (1994). For a detailed discussion of the remedial problems that may flow from the Mertens decision, see Dana M. Muir, ERISA Remedies: Chimera or Congressional Compromise?, 81 *Iowa L. Rev.* 1, 30-46 (1995).

n177 See, e.g., *Buckley Dement, Inc. v. Travelers Plan Adm'rs Inc.*, 39 F.3d 784, 785 (7th Cir. 1994).

n178 DOL Urges Overturn of Mertens; Says Ruling will Hamper Enforcement, 20 *Pens. & Ben. Rep.* (BNA) 1638 (Aug. 2, 1993).

n179 Epstein, supra note 171, at 357-60.

n180 *San Diego Bldg. Trades Council v. Gorman*, 359 U.S. 236, 244-45 (1959).

n181 *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976).

n182 See, e.g., *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 133 (1992) (Stevens, J., dissenting) ("In today's world the typical employee's compensation is not just her take-home pay; it often includes fringe benefits such as vacation pay and health insurance.").

n183 See, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

n184 See supra Part II.A.

n185 See supra text accompanying notes 105-07.

n186 See supra text accompanying notes 117-19.

n187 See 29 C.F.R. 2520.102-2(a) (1996).

n188 See ERISA 104(b)(4), 29 U.S.C. 1024(b)(4) (1994).

n189 ERISA 104(a)(1)(D), 29 U.S.C. 1024(a)(1)(D).

n190 See Peter J. Wiedenbeck, Implementing ERISA: Of Policies and Plans, 72 *WASH. U. L.Q.* 559, 567-68 (1994).

n191 The DOL has the right to bring certain enforcement actions, but its meager staffing imposes practical limitations. See ERISA 502(a)(2), 29 U.S.C. 1132(a)(2).

n192 See *infra* Parts IV.A.1

n193 See *infra* text accompanying notes 210-11.

n194 See *infra* Part IV.A.3.

n195 See, e.g., Karen Tumulty, Democrats Still Seek Acceptable Health Formula, L.A. Times, July 25, 1994, at A12.

n196 Glenn Kramon, Insurers Move into the Front Lines Against Rising Health-Care Costs, N.Y. Times, Aug. 25, 1991, at A1 (estimating administrative costs constitute approximately 24% of all health care spending).

n197 Jonathon J. Frankel, Note, Medical Malpractice Law and Health Care Cost Containment: Lessons for Reformers from the Clash of Cultures, 103 *Yale L.J.* 1297, 1298 (1994) (noting annual medical malpractice insurance expenditures exceed \$ 4.5 billion). The commentary on medical malpractice jurisprudence is voluminous. For one proposal to modify medical malpractice litigation by reducing hindsight bias, see Hal R. Arkes & Cindy A. Schipani, Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias, 73 *Or. L. Rev.* 587, 630-36 (1994).

n198 See *Banque Paribus v. Hamilton Indus. Int'l.*, 767 F.2d 380, 383 (7th Cir. 1985).

n199 John D. Calamari & Joseph M. Perillo, *The Law of Contracts* 3-2(a), at 136 (3d ed. 1987); 4 Samuel Williston & Walter H.E. Jaeger, *A Treatise on the Law of Contracts* 632, at 978 (3d ed. 1961).

n200 *Restatement (Second) of Contracts* 90(1) (1981).

n201 See *supra* text accompanying notes 99-103.

n202 ERISA 402, 29 U.S.C. 1102 (1994).

n203 See, e.g., *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

n204 893 F.2d 1283 (11th Cir. 1990).

n205 *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1284 (11th Cir. 1990).

n206 *Id.*

n207 *Id.* at 1285-86.

n208 *Id.* at 1285.

n209 *Id. at 1285-86.*

n210 *Id.*

n211 *508 U.S. 248 (1993).*

n212 *Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).* For a detailed discussion of *Mertens*, see Muir, *supra* note 176, at 26-29.

n213 *Id. at 254.*

n214 See, e.g., *DeVoll v. Burdick Painting, Inc., 35 F.3d 408, 412 (9th Cir. 1994)*, cert. denied, *115 S. Ct. 1381 (1995).*

n215 See *infra* text accompanying notes 216-29.

n216 *805 F.2d 956 (11th Cir. 1986).*

n217 *Nachwalter v. Christie, 805 F.2d 956, 957 (11th Cir. 1986).*

n218 *Id. at 958.*

n219 *Id.*

n220 *Id.*

n221 *Id. at 959.*

n222 *Id.*

n223 *Id. at 960.*

n224 *Id.*

n225 See, e.g., *Jensen v. Sipco, Inc., 38 F.3d 945, 953 (8th Cir. 1994)* (deciding equitable estoppel may not be used to enforce extra-contractual promise by employer to class of retirees concerning medical benefits); *Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 820-23 (9th Cir. 1992)* (denying recovery under estoppel and state common law claims for insurance company's incorrect interpretation of health plan); *Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 58-60 (4th Cir. 1992)* (deciding court cannot depart from written plan terms based upon estoppel, breach of fiduciary duty, or lack of affirmative act by insurer to cancel insurance policy for employer's nonpayment of premiums); *Peckham v. Gem State Mut., 964 F.2d 1043, 1050-51 (10th Cir. 1992)* (deciding ERISA preempts state law estoppel doctrines although plan employees made oral representations of coverage); *Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 128 (7th Cir. 1992)* (determining that ERISA preempts common-law claims for plan administrator's negligent misrepresentation in spite of ERISA's failure to provide remedy); *Rodrigue v. Western & S. Life Ins. Co., 948 F.2d 969, 971 (5th Cir. 1991)* (denying equitable estoppel claims where plan administrator mistakenly approved treatment in conflict with written plan provisions); *Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1163-64 (3d Cir. 1990)* (declaring invalid

oral amendments to ERISA severance pay plan); *Musto v. American Gen. Corp.*, 861 F.2d 897, 908-10 (6th Cir. 1988) (holding that clear terms of retirement and health plan cannot be superseded by employer's oral promises); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (deciding that, absent fraud, ERISA welfare plan is not subject to amendment by informal communication).

n226 See, e.g., *Miller v. Taylor Insulation Co.*, 39 F.3d 755, 759 (7th Cir. 1994); *Greany Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992); *Williams v. Bridgestone/Firestone, Inc.*, 954 F.2d 1070, 1073 (5th Cir. 1992); *Degan v. Ford Motor Co.*, 869 F.2d 889, 893-95 (5th Cir. 1989); *Musto v. American Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988).

n227 Zanglein, supra note 165, at 681.

n228 29 C.F.R. 2520.102-2(a) (1996).

n229 See Zanglein, supra note 165, at 679-85.

N230 See *Robert S. Pinzur, Ltd. v. Hartford*, 511 N.E.2d 1281, 1285-87 (Ill. App. Ct. 1987).

n231 *Id.* at 1285-87 (distinguishing authorization of direct payment from assignment of claims).

n232 *Cypress Fairbanks Med. Ctr. v. Pan-American Life Ins. Co.*, 110 F.3d 280, 282-83 (5th Cir.), cert. denied, 118 S. Ct. 167 (1997).

n233 See, e.g., *Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1008 (9th Cir. 1995).

n234 *Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 153-54 & n.6 (3d Cir. 1985).

n235 See *Yarde v. Pan Am. Life Ins. Co.*, No. 94-1167, No. 94-1312, 1995 U.S. App. LEXIS 25883, at *9-19 (4th Cir. Sept. 12, 1995) (granting standing to heir of beneficiary).

n236 *Kennedy v. Connecticut Gen. Life Ins. Co.*, 924 F.2d 698, 700 (7th Cir. 1991).

n237 *Id.*

n238 ERISA 3(8), 29 U.S.C. 1002(8) (1994).

n239 *Kennedy*, 924 F.2d at 700. An alternative line of reasoning relied upon the Supreme Court's determination that ERISA treats anyone with a colorable claim as a "participant" for jurisdictional purposes. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989). In *Kennedy*, the Seventh Circuit believed the provider had a colorable claim to plan benefits, and thus granted him standing, because the insurance policy permitted assignments under certain circumstances. *Kennedy*, 924 F.2d at 700.

n240 *Kennedy*, 924 F.2d at 700.

n241 See *Lutheran Med. Ctr. v. Contractors, Laborers, Teamsters & Eng's Health & Welfare Plan*, 25 F.3d 616, 619 (8th Cir. 1994); *Hermann Hosp. v. MEBA Med. & Benefits Plan*, 845 F.2d 1286, 1289-90 (5th

Cir. 1988) (determining that insurer was estopped from challenging validity of assignment); *Misc v. Building Serv. Employees Health & Welfare Trust*, 789 F.2d 1374, 1376-77 (9th Cir. 1986).

n242 See *Coonce v. Aetna Life Ins.*, 777 F. Supp. 759, 770-71 (W.D. Mo. 1991) (permitting estoppel where plan terms were ambiguous).

n243 ERISA 502, 29 U.S.C. 1132.

n244 See, e.g., *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1278 (6th Cir. 1991), cert. dismissed, 505 U.S. 1233 (1992).

n245 904 F.2d 236 (5th Cir. 1990).

n246 *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 238 (5th Cir. 1990).

n247 *Id.*

n248 *Id.*

n249 *Id.*

n250 *Id. at 244.*

n251 *Id.*

n252 *Id. at 245.*

n253 *Id.*

n254 See Jennifer Preston, As Revenues Drop, Hospitals Talk of Forsaking Charity Care, *N.Y. Times*, Apr. 14, 1996, at A1.

n255 Karen I. Treiger, Note, Preventing Patient Dumping: Sharpening the COBRA's Fangs, 61 *N.Y.U. L. Rev.* 1186, 1187 (1986).

n256 See Andrew Jay McClurg, Your Money or Your Life: Interpreting the Federal Act Against Patient Dumping, 24 *Wake Forest L. Rev.* 173, 182-89 (1989).

n257 See Jeffrey E. Fine, Opening the Closed Doors: The Duty of Hospitals to Treat Emergency Patients, 24 *Wash. U. J. Urb. & Contemp. L.* 123, 124 (1983).

n258 Treiger, *supra* note 255, at 1201-04.

n259 See, e.g., Comprehensive Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. 1395dd (1994).

n260 See David A. Hyman, The Conundrum of Charity, *16 Am. J.L. & Med.* 327, 371 (1990) (referring to this practice as "wallet biopsy").

n261 *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 246 (5th Cir. 1990).

n262 Id.

n263 Id. The defendants in Memorial Hospital argued that the measure of any damage award would be determined in part by looking to the amounts which would have been payable if Gloria had been eligible for health insurance at the time Memorial Hospital rendered services. Id. Arguably, looking to the plan in this way would cause the claim to "relate to" an ERISA plan and be preempted. Id. The Fifth Circuit disagreed and indicated that the extent of coverage under the plan simply prevented damages from being speculative. *Id. at 247*. It reasoned that a one-time award would not affect the plan in an ongoing manner, but recognized this as a close question. Id.

n264 *Id. at 249*.

n265 Id.

n266 Id.

n267 *Id. at 248-50*.

n268 See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833 (1988).

n269 See Jeffrey A. Brauch, Health Care Providers Meet ERISA: Are Provider Claims for Misrepresentation of Coverage Preempted?, *20 Pepp. L. Rev.* 497, 525-30 (1993).

n270 *Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1009-11 (9th Cir. 1995); *Lordmann Enter. v. Equicor, Inc.*, 32 F.3d 1529, 1532 (11th Cir. 1994); *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 754-56 (10th Cir. 1991).

n271 *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991). In *Cromwell*, a home health care provider verified coverage through a plan sponsored by the former employer of the patient's husband. *Id. at 1274-75*. The plan administrator paid claims for a period of time before discovering that the husband was not eligible for coverage because he had not been employed by the sponsoring employer for over a year. Id. At that point, the plan administrator began denying claims without explanation. Id.

n272 See *Puritt v. Allstate Ins. Co.*, 672 N.E.2d. 353, 356 (Ill. App. Ct. 1996).

n273 See *Barnes Hosp. v. Sanus Passport/Preferred Servs., Inc.*, 809 F. Supp. 725, 727 (E.D. Mo. 1992) (preempting provider claim for \$ 800,000).

n274 See *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 246 (5th Cir. 1990).

n275 Id.

n276 Id.

n277 *Id. at 247.*

n278 Id.

n279 Celia Silverman et al., EBRI Databook on Employee Benefits 190 (1995).

n280 Id.

n281 Dean M. Hashimoto, The Future Role of Managed Care and Capitation in Workers' Compensation, 22 *Am. J.L. & Med.* 233, 235 (1996).

n282 See Julia A. Martin & Lisa K. Bjerknes, The Legal and Ethical Implications of Gag Clauses in Physician Contracts, 22 *Am. J.L. & Med.* 433, 437 (1996).

n283 See David Dranove, The Five W's of Utilization Review, in *American Health Policy: Critical Issues for Reform* 239, 239-41 (Robert B. Helms ed., 1993). For a powerful recounting of the application of utilization review in the context of emergency care, see Margaret Gilhooley, Broken Back: A Patient's Reflections on the Process of Medical Necessity Determinations, 40 *Vill. L. Rev.* 153, 156-59 (1995).

n284 See *supra* text accompanying note 176.

n285 See Silverman et al., *supra* note 279, at 190.

n286 See, e.g., *Coar v. Kazimir*, 990 F.2d 1413, 1414 (3d Cir. 1993).

n287 The phrase "qualified plan" has come to refer to a plan that qualifies for favorable tax treatment under the Internal Revenue Code (IRC). See, e.g., Langbein & Wolk, *supra* note 94, at 149.

n288 ERISA 206(d)(1), 29 U.S.C. 1056(d)(1) (1994).

n289 Id.

n290 493 U.S. 365 (1989).

n291 See *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 365 (1990) [hereinafter *Guidry I*], appeal after remand, 10 F.3d 700 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995); *infra* Part IV.B.1 (discussing *Guidry I*).

n292 See generally Charles T. Caliendo, Jr., Note, Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-Alienation Rule, 68 *St. John's L. Rev.* 667 (1994); Michael Alan Frazee, Comment, Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment, 10 *W. New Eng. L. Rev.* 317 (1988); Michael T. Murray, Note, The Fraud Exception to ERISA's Anti-Alienation Provision: A Permissible Exercise of the Chancellor's Powers?, 57 *Fordham L. Rev.* 835 (1989); Rodger L. Puz, Case Comment, Alienability of Pension Benefits - Employee Retirement Income Security Act - The United States Supreme Court Held that a Court May Not Imply an Excep-

tion to ERISA's Anti-Alienability Provision in Cases Where an Employee Has Committed Criminal Acts Against His Employer, 29 *Duq. L. Rev.* 139 (1990).

n293 See Caliendo, *supra* note 292, at 703-11; Frazee, *supra* note 292, at 353-57.

n294 *Guidry I*, 493 U.S. at 367.

n295 *Id.*

n296 *Id.*

n297 *Id.* at 368.

n298 See *Patterson v. Shumate*, 504 U.S. 753, 764 (1992). In *Patterson*, the Supreme Court decided that money held in a qualified plan is excludable from estate property in a bankruptcy proceeding. *Id.* at 764. For a pre-*Patterson* article discussing these issues, see Edward W. Brankey & Frank P. Darr, Debtor Interests in Pension Plans as Property of the Debtor's Estate, 28 *Am. Bus. L.J.* 275 (1990). Post-*Patterson* articles include Walter A. Effross, Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence, 23 *Seton Hall L. Rev.* 1636, 1710-18 (1993); Jack E. Karns, ERISA Qualified Pension Plan Benefits as Property of the Bankruptcy Estate: The Unanswered Questions After *Patterson v. Shumate*, 16 *Campbell L. Rev.* 303 (1994); Jeanne Cullinan Ray, Protecting Pension Assets in Personal Bankruptcy, 68 *St. John's L. Rev.* 409, 412-418 (1994).

n299 *Mackey v. Lanier Collection Agency & Servs., Inc.*, 486 U.S. 825, 836-37 (1988). For discussions of the Mackey decision in some depth, see generally Conison, *supra* note 128, at 664-65; Adam D. Elfenbein, *Patterson v. Shumate*: Interpretive Error, 66 *Am. Bankr. L.J.* 439 (1992); Larry J. Pittman, ERISA's Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority, 46 *Fla. L. Rev.* 355, 398-400 (1994). See also James E. Holloway, ERISA Preemption and Comprehensive Federal Health Care: A Call for "Cooperative Federalism" to Preserve the States' Role in Formulating Health Care Policy, 16 *Campbell L. Rev.* 405, 421 (1994).

n300 The district court and the Tenth Circuit both concluded that ERISA's anti-alienation provision did not protect *Guidry's* benefits. *Guidry v. National Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457, 1463 (10th Cir. 1988); *Guidry v. National Sheet Metal Workers Nat'l Pension Fund*, 641 F. Supp. 360, 362-63 (D. Colo. 1986). The lower court argued that *Guidry's* embezzlement threatened the financial security of the Union, and, in turn, of the benefit plans it sponsored. *Guidry*, 641 F. Supp. at 362-68. A survey of the existing decisions revealed a disagreement in the circuits over whether a wrongdoer's pension plan interest could be offset or garnished in order to provide a recovery to the wrongdoer's victim. *Id.* at 362. Relying heavily upon *Guidry's* fraud against the Union, the district court decided that the federal labor statutes, which protect union members from wrongdoing by union officials, militated for a limited exception to ERISA's anti-alienation protection. *Id.* at 362-63. The Tenth Circuit focused more closely on *Guidry's* fiduciary relationship with the Union's pension funds. *Guidry*, 856 F.2d at 1463. As a trustee of that pension fund, *Guidry* fulfilled the statutory criteria to be a fiduciary. *Id.*; see ERISA 3(21), 29 U.S.C. 1002(21) (1994). ERISA section 409 grants courts the power to impose personal liability on a fiduciary who breaches her duties to an ERISA plan and the authority to subject the fiduciary "to such other equitable or remedial relief as the court may deem appropriate." ERISA 409(a), 29 U.S.C. 1109(a) (1994). The Tenth Circuit reasoned that this language and the corresponding legislative history, which called for application of principles of traditional trust law in ERISA fiduciary cases, supported imposition of a constructive trust. *Guidry*, 856 F.2d at 1460-61. The legislative history cited by the court included both committee reports, indicating a general intent to permit a wide variety of "remedies available in both state and federal courts" as well as a specific statement referring to state trust law. S. Rep. No. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871; 120 Cong. Rec. 29,932 (1974) (statement of Sen. Williams), reprinted

in 1974 U.S.C.A.N. 5177, 5186. Looking to the traditional principles of trust law, the Tenth Circuit's analysis incorporated into the interpretation of the federal fiduciary provisions the fiduciary standards developed in the state systems. Importing these concepts into ERISA comported with the legislative history and brought predictability to the federal law. In addition, utilization of the developed trust law concepts brought an analytical consistency to the statute, supporting both the integrity and the administration of the statute's fiduciary provisions.

n301 This logic has been extended to prevent disgorgement of benefits in the context of federal securities law violations. *SEC v. Johnston*, 922 F. Supp. 1220, 1225-27 (E.D. Mich. 1996). But see *United States v. Sawaf*, 74 F.3d 119, 123-25 (6th Cir. 1996) (permitting IRS to garnish taxpayers' benefit plan account).

n302 Justice Marshall did not join Part II-C of the Court's opinion. *Guidry I*, 493 U.S. 365, 367 n. (1990), appeal after remand, 10 F.3d 700 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

n303 *Id.* at 372.

n304 *Id.*

n305 *Guidry v. National Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457, 1461 (10th Cir. 1988).

n306 *Guidry I*, 493 U.S. at 373-74. As the district court noted, *Guidry* was entitled to pensions from plans sponsored by the National office of the Sheet Metal Workers as well as from a plan sponsored by Local 9. *Guidry v. National Sheet Metal Workers Nat'l Pension Fund*, 641 F. Supp. 360, 361 (D. Colo. 1986).

n307 *Guidry I*, 493 U.S. at 374-76.

n308 *Id.* at 375 (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

n309 See *id.* at 376.

n310 See *id.*

n311 *Id.* at 375-76.

n312 *Id.* at 373.

n313 *Id.*

n314 *Id.* at 375-76.

n315 *Id.* at 376.

n316 *Id.* at 373. Recent legislation gave pension plans the right to offset certain benefits in limited circumstances. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 1502, 111 Stat. 788, 1058-86 (1997).

n317 See *infra* Part IV.B.2.a. (discussing *Coar v. Kazimir*, 990 F.2d 1413 (3rd Cir. 1993), *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir. 1990) and *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir. 1987)).

n318 *Herberger v. Shanbaum*, 897 F.2d 801, 803-04 (5th Cir. 1990). On three different occasions Theodore Shanbaum was accused of improprieties against a pension plan of which he had once been a trustee. *Id.* at 801-02. Although the plan obtained judgments or consent decrees totaling more than \$ 3 million against Shanbaum, the Fifth Circuit forbade any recovery by the plan against his benefits. *Id.* at 804.

n319 See *infra* text accompanying note 334.

n320 *Herberger*, 897 F.2d at 804.

n321 See *supra* text accompanying note 315.

n322 *Herberger*, 897 F.2d at 803-04.

n323 See *infra* Part V.

n324 990 F.2d 1413 (3d Cir. 1993).

n325 *Coar v. Kazimir*, 990 F.2d 1413, 1414 (3d Cir. 1993). Robert Coar had been a trustee of the Pension Fund of Mid-Jersey Trucking Local 701 (Pension Fund). *Id.* at 1414. The Pension Fund obtained two judgments against Coar: one judgment of more than \$ 25 million for violations of his ERISA fiduciary duties and a second of more than \$ 96 million for non-ERISA malfeasance. *Id.* at 1413-15. Coar sued, unsuccessfully, to prevent the Pension Fund from offsetting his plan benefits against his liabilities to the Pension Fund. *Id.* at 1414-15.

n326 See *id.* at 1420-22.

n327 See *supra* text accompanying note 303.

n328 *Coar*, 990 F.2d at 1420-22. The court asserted that language in Treasury Department regulations supports this distinction and appears to view offsets as consistent with the anti-alienation provision. *Id.* at 1421-22. The Ninth Circuit adopted this portion of the Third Circuit's reasoning. *Parker v. Bain*, 68 F.3d 1131, 1140 (9th Cir. 1995) (withholding benefits of fiduciary who embezzled \$ 1.4 million is equivalent of set-off).

n329 *Coar*, 909 F.2d at 1422. As additional support for its decision, the Coar majority reconciled the anti-alienation provision with section 409, which provides remedies for fiduciary breach. *Id.* The Coar majority decided that Congress intended the anti-alienation provision "to protect plan beneficiaries by ensuring that plan assets are used only for payment of benefits." *Id.* at 1420. Consistent with this goal, any recovery, even one from plan benefits, in favor of the plan and against a breaching fiduciary who caused a loss to the plan contributes to the plan's ability to pay benefits to the other plan beneficiaries. *Id.* at 1420-25. The Coar majority also reasoned that section 409's provisions on fiduciary liability are more specific than either ERISA's anti-alienation provision or the federal labor statutes at issue in *Guidry I*. *Id.* As a result, section 409 serves as a better indicator of congressional intent than does the general language of the anti-alienation provision. *Id.* Finally, all members of the panel agreed that it would be absurd to construe ERISA as requiring a plan to make pension payments to a plan fiduciary who had been found guilty of causing millions of dollars in plan losses. *Id.* at 1420-25. In order to address the *Guidry I* Court's concern about proliferating exceptions to the anti-alienation provision, the Coar majority pointed out that ERISA fiduciaries constitute a somewhat narrow, well-defined class. *Id.* Thus, only a li-

mitted number of plan participants would be subject to this "exception" to the anti-alienation provision. *Id.* at 1422. However, ERISA's functional analysis makes it relatively easy for a plan actor to become a fiduciary, and unlike the traditional trust, a single benefit plan typically will have a number of fiduciaries. See Muir, *supra* note 176, at 14-15.

n330 An exception would occur if, in lieu of the wrongdoing, the plan sponsor would have increased plan benefits. In this situation, the plan participants bear the burden of the wrongdoing because, in the absence of the wrongdoing, the plan participants would have received higher benefits. For a more detailed explanation of the differences in risk allocation between defined benefit and defined contribution plans see Muir, *supra* note 115, at 205.

n331 See *supra* notes 299-306 and accompanying text (discussing Guidry I).

n332 See *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117, 119-20 (D.C. Cir. 1987); see also *Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125, 129 (E.D.N.Y. 1990) (adopting logic of Coar in case of breaching fiduciary).

n333 *Crawford*, 815 F.2d at 119-20.

n334 See, e.g., *Restatement (Second) of Trusts* 257 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* 191 (Rev. 2d ed. 1977); Austin W. Scott & William F. Fratcher, *The Law of Trusts* 257 (4th ed. 1987).

n335 See *Crawford*, 815 F.2d at 121-22.

n336 See *Operating Eng'rs' Local No. 428 Pension Trust Fund v. Zambrosky*, 650 F.2d 196, 200 (9th Cir. 1981).

n337 See *id.* at 200-02. The courts also justified enforcement of such state court orders by pointing to ERISA's purpose of ensuring that plan assets be used for the benefit of participants and their beneficiaries. See *id.* However, a few courts took a plain meaning approach to interpreting the statute and denied such garnishments on the basis that they violated ERISA's anti-alienation provision. See, e.g., *General Motors Corp. v. Townsend*, 468 F. Supp. 466, 469 (E.D. Mich. 1976). Ultimately, Congress resolved the issue by granting divorcing individuals an explicit statutory basis upon which to seek pension plan assets held on behalf of a spouse. ERISA 206(d)(3), 29 U.S.C. 1056(d)(3) (1994).

n338 See *infra* text accompanying notes 343-45.

n339 *United States v. Smith*, 47 F.3d 681, 681-82 (4th Cir. 1995) (finding fraudulent real estate schemes harmed innocent investors); *Trucking Employees of N. Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 53 (3d Cir. 1994) (noting excess disability benefits paid); *Guidry I*, 493 U.S. 365, 367 (1990), appeal after remand, 10 F.3d 700 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995) (noting union fiduciary embezzled).

n340 As discussed above, the remedy of constructive trust directly against plan assets is unavailable after Guidry I. See *supra* Part III.B.1.

n341 *Guidry v. Sheet Metal Workers Int'l Ass'n Local No. 9*, 10 F.3d 700, 704 (10th Cir. 1993) [hereinafter *Guidry II*], modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

n342 *10 F.3d 700 (10th Cir. 1993)*.

n343 *Guidry II, 10 F.3d 700, 716-17 (10th Cir. 1993)*, cert. denied, *514 U.S. 1063 (1995)*.

n344 *Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1083 (10th Cir. 1994)* [hereinafter *Guidry III*] (en banc). However, a Colorado garnishment statute ultimately limited the Union's recovery. *Id. at 1087*.

n345 *Trucking Employees of N. Jersey Welfare Fund, Inc. v. Colville, 16 F.3d 52, 53 (3d Cir. 1994)*. Robert Colville received excess disability benefits from the Trucking Employees of North Jersey Welfare Fund, Inc. (Fund). *Id.* Colville had begun receiving disability benefits from the Fund in 1980. *Id.* The Fund utilized the receipt of federal Social Security disability benefits as the standard for entitlement under the Fund and required beneficiaries to notify the Fund if their Social Security benefits terminated. *Id.* Though Colville had been a union shop steward and thus should have had a working knowledge of the plan terms, he did not notify the Fund when his Social Security benefits terminated in October 1981. *Id. at 53-54*. When the Fund discovered in early 1989 that Colville had lost Social Security eligibility, the Fund already had overpaid \$ 44,000 in benefits to Colville. *Id. at 54*. After unsuccessfully attempting to place a constructive trust on Colville's retirement benefits, the Fund sought a writ of execution on the bank account into which Colville deposited his released retirement funds. *Id.*

n346 *47 F.3d 681 (4th Cir. 1995)*.

n347 *United States v. Smith, 47 F.3d 681, 681-82 (4th Cir. 1995)*.

n348 *Id. at 682*.

n349 *Id.*

n350 *Id. at 684-87*.

n351 *Id. at 682-84*.

n352 *Id. at 684*.

n353 *Guidry III, 39 F.3d 1078, 1082 (10th Cir. 1994)* (en banc), cert. denied, *514 U.S. 1063 (1995)*; see also *Trucking Employees of N. Jersey Welfare Fund, Inc. v. Colville, 16 F.3d 52, 56 (3d Cir. 1994)*; *Guidry II, 10 F.3d 700, 711 (10th Cir. 1993)*, modified on reh'g, *39 F.3d 1078 (10th Cir. 1994)* (en banc), cert. denied, *514 U.S. 1063 (1995)*.

n354 *Guidry III, 39 F.3d at 1082-83*; see *Colville, 16 F.3d at 55-56*; *Guidry II, 10 F.3d at 711-13*.

n355 *Treas. Reg. 1.401(a)-13(c)(1)(ii) (1988)*.

n356 See *Guidry III, 39 F.3d at 1082-83*; *Colville, 16 F.3d at 56*; *Guidry II, 10 F.3d at 710*.

n357 See *Guidry III, 39 F.3d at 1082-83*; *Colville, 16 F.3d at 55*; *Guidry II, 10 F.3d at 710*.

n358 See *Colville*, 16 F.3d at 54-55; *Guidry II*, 10 F.3d at 706.

n359 Social Security Act, 42 U.S.C. 407(a) (1994) (emphasis added).

n360 Veterans' Benefits Act, 38 U.S.C. 5301(a) (1994) (emphasis added).

n361 *Guidry III*, 39 F.3d 1087, 1083 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995); *Guidry II*, 10 F.3d 700, 712 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994), cert. denied, 514 U.S. 1063 (1995).

n362 *Guidry III*, 39 F.3d at 1083; *Guidry II*, 10 F.3d at 712.

n363 *United States v. Smith*, 47 F.3d 681, 683 n.* (4th Cir. 1995).

n364 *Id.* at 683.

n365 *Guidry I*, 493 U.S. 365, 376 (1990), appeal after remand, 10 F.3d 700 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

n366 18 U.S.C. 1501, 1512-1515, 3146(a), 3663-64 (1994).

n367 *Smith*, 47 F.3d at 684.

n368 *Id.* at 684 (citing *Guidry I*, 493 U.S. at 377).

n369 *Id.* at 683. In its discussion, the court distinguished *Tenneco Inc. v. First Va. Bank*, 698 F.2d 688 (4th Cir. 1983). In *Tenneco*, when his employment terminated before he reached retirement age, the plan participant, Donald Sweeney, made an elective, lump sum withdrawal of more than \$ 37,000 from his qualified plan accounts, leaving a balance of approximately \$ 5,000. *Id.* at 689. A judgment creditor garnished the funds that Sweeney withdrew from the plan and deposited with his investment broker. *Id.* The creditor unsuccessfully attempted to garnish the benefits which were still held by the plan. *Id.* at 689-90. The Fourth Circuit rejected Sweeney's argument that, because the funds came from qualified retirement plans, the anti-alienation provision permanently protected the funds from garnishment. *Id.* at 690-91. One state court developed similar reasoning and permitted recovery against early plan withdrawals. See *Community Bank Henderson v. Noble*, 552 N.W.2d 37, 40 (Minn. Ct. App. 1996).

n370 *United States v. Smith*, 47 F.3d 681, 683-84 (4th Cir. 1995); see *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590-91 (1979), superseded by statute as stated in *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989).

n371 *Smith*, 47 F.3d at 683. But see Jay A. Kenyon, Comment, *United States v. Smith: Making ERISA Pension Benefits Judgment Proof*, 81 *Iowa L. Rev.* 461, 470-71 (1995) (pointing out differences in statutory language).

n372 *Guidry III*, 39 F.3d 1078, 1083 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995); *Guidry II*, 10 F.3d 700, 712 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

n373 *Smith*, 47 F.3d at 683.

n374 *Id.* at 683-84.

n375 See *id.*

n376 *Trucking Employees of N. Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 55 (3d Cir. 1994); *Guidry II*, 10 F.3d at 707.

n377 *Colville*, 16 F.3d at 55.

n378 *Guidry II*, 10 F.3d 700, 707 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

n379 *United States v. Smith*, 47 F.3d 681, 683 (4th Cir. 1995).

n380 *Id.*

n381 *Id.*

n382 See *supra* text accompanying note 379.

n383 Qualified pension plans distributed more than \$ 125 billion in lump sum benefits during 1990. Silverman et al., *supra* note 279, at 119.

n384 See QDROs: Administrators Find it Burdensome to Deal with QDROs, IFEBP Survey Says, *Pens. & Ben. Daily (BNA)* (Sept. 9, 1994) (finding implementation of domestic relations exceptions to have been expensive for plans).

n385 Non-qualification may cause the loss of the tax advantages associated with a benefit plan. See Langbein & Wolk, *supra* note 94, at 149-50.

n386 This is the earliest date that a domestic relations order can require a plan to make distributions. ERISA 1898(c)(7)(B)(iv), 29 U.S.C. 1056(d)(3)(E)(ii) (1994).

n387 See Langbein & Wolk, *supra* note 94, at 599.

n388 *Id.*

n389 See *supra* Part IV.

n390 See, e.g., Zanglein, *supra* note 165, at 722-23.

n391 See, e.g., Conison, *supra* note 128, at 658-68 (advocating treating ERISA's preemption provision as presumption of preemption).

n392 See Steven L. Brown, Note, ERISA's Preemption of Estoppel Claims Relating to Employee Benefit Plans, *30 B.C. L. Rev.* 1391, 1416-22 (1989) (addressing importance of equitable doctrines in misrepresentation analysis); Kimberly A. Kralowec, Comment, Estoppel Claims Against ERISA Employee Benefit Plans, *25 U.C. Davis L. Rev.* 487, 546-62 (1992) (advocating extensive use of federal common law estoppel actions in benefit cases).

n393 See Stein, *supra* note 13, at 94, 100.

n394 See *id.* at 110.

n395 See *supra* Part IV.

n396 See *supra* Part IV.

n397 See *supra* text accompanying notes 379-86.

n398 *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

n399 *Id.*

n400 See *supra* text accompanying note 223.

n401 See *infra* text accompanying notes 402-03.

n402 ERISA 402(a)(1), 29 U.S.C. 1102(a)(1) (1994).

n403 See, e.g., *Memorial Hospital Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 (5th Cir. 1990).

n404 See ERISA 402(b)(3), 29 U.S.C. 1102(b)(3) (stating that employee benefit plan shall provide procedure for amending plan).

n405 *Id.*

n406 See *infra* text accompanying note 407.

n407 *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228-31 (1995).

n408 See *supra* text accompanying note 320.

n409 See *United States v. Smith*, 47 F.3d 681, 684 (4th Cir. 1995).

n410 See *Lynn v. CSX Transp. Inc.*, 84 F.3d 970, 975 (7th Cir. 1996). Also, before clarifying statutory amendments were made, numerous courts permitted domestic relations orders to affect plan benefits. See, e.g., *Stone v. Stone*, 450 F. Supp. 919, 925-28 (N.D. Cal. 1978), affirmed, 632 F.2d 740 (9th Cir. 1980); *Cartledge v. Miller*, 457 F. Supp. 1146, 1153-56 (S.D.N.Y. 1978).

n411 See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

n412 See *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 41 (1987), superseded by statute as stated in *Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991).

n413 *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 509 (10th Cir. 1991).

n414 David W. Raack, A History of Injunctions in England Before 1700, 61 *Ind. L.J.* 539, 551 (1986).

n415 See *Guidry I*, 493 U.S. 365, 376 (1990) ("If exceptions to this policy are to be made, it is for Congress to undertake that task."), appeal after remand, 10 F.3d 700 (10th Cir. 1993), modified on reh'g, 39 F.3d 1078 (10th Cir. 1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

n416 See supra text accompanying notes 97-103.

n417 See supra Part IV.B.

n418 See Fischel & Langbein, supra note 30, at 1118- 19.

n419 See supra Part IV.B.

n420 See Stein, supra note 13, at 94, 100.

n421 See supra text accompanying notes 46-57 (discussing application of Skocpol's social policy analysis to ERISA jurisprudence).

n422 See supra text accompanying notes 46-57 (discussing application of Skocpol's social policy analysis to ERISA jurisdiction).

n423 See *Skocpol, Social Policy*, supra note 35, at 226-29.

n424 See *id.* at 226-31.

n425 See supra Part III.B.

n426 See supra Part III.B.

n427 See supra Part III.B.

n428 See infra Part V.C-D.

n429 See infra Part V.C.

n430 See infra Part V.D.

n431 See ERISA 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A) (1994) (requiring ERISA benefit plans to be run solely in interests of plan participants and beneficiaries).

n432 See Fischel & Langbein, *supra* note 30, at 1117- 18.

n433 See *id.*

n434 See *id.* at 1118-19.

n435 See *id.* at 1119-20.

n436 See *id.* at 1127-28.

n437 See *id.* at 1133.

n438 See *id.* at 1133-38.

n439 See *id.* at 1158-59.

n440 See *id.* at 1159-60.

n441 See *supra* Part IV.

n442 See *supra* text accompanying note 264.

n443 See Preston, *supra* note 254, at A1.

n444 See *supra* text accompanying notes 226-27.

n445 See, e.g., ERISA 102-105, 29 U.S.C. 1022-1025 (1994).

n446 944 F.2d 1272 (6th Cir. 1991).

n447 *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1274-75 (6th Cir. 1991).

n448 *Id.* at 1278-79.

n449 *Id.* at 1275.

n450 See generally *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 18 (2d Cir. 1996) (permitting plan trustee to raise state law fraud claim against employer who misrepresented individual's entitlement to coverage).

n451 See ERISA 409, 29 U.S.C. 1109 (1994) (discussing personal liability of fiduciary who breaches duties).

n452 See supra text accompanying notes 339-52.

n453 See Fischel & Langbein, supra note 30, at 1118-20.

n454 See supra text accompanying notes 379-82.

n455 See supra text accompanying notes 436-40.

n456 See supra text accompanying notes 108-12.

n457 See Smalhout, supra note 1, at 9-10.

n458 See supra text accompanying note 131.

n459 See Stein, supra note 13, at 109.

n460 *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981).

n461 *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), superseded by statute as stated in *Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991).

n462 See supra Part III.B.

n463 See *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1300 (6th Cir. 1991).

n464 See *Miller v. Taylor Insulation Co.*, 39 F.3d 755, 759 (7th Cir. 1994).

n465 *Aquilio v. Police Benevolent Ass'n of the N.Y. State Troopers, Inc.*, 857 F. Supp. 190, 210 (N.D.N.Y. 1994).

n466 See supra text accompanying notes 464-65.

n467 See supra text accompanying notes 242-68.

n468 See supra Part V.C.

n469 See Stein, supra note 13, at 102-04.

n470 See, e.g., Zanglein, supra note 165, at 672-73; see also Muir, supra note 176, at 30-52 (noting problems resulting from narrow construction of "equitable remedies" permitted in certain types of ERISA cases).

n471 See, e.g., Muir, supra note 176, at 30-46.

n472 See Zanglein, supra note 165, at 685-705.

n473 Langbein & Wolk, *supra* note 94, at 20 (noting that, as of end of 1993, pension funds held assets of \$ 4.6 trillion).

n474 *Id.* at 159-60 (stating that tax expenditure associated with pension plans is largest single federal tax expenditure).

n475 For an indication of the volume of legislative activity, see *supra* note 173 (listing amendments to ERISA).

n476 See Justices Question Whether Non-Fiduciary Is Liable for Money Damages Under ERISA, 20 *Pens. & Ben. Rep.* 524 (BNA) (Mar. 1, 1993) (commenting that members of Supreme Court have "ERISA cases coming out of [their] ears").