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**SYMPOSIUM:** PUBLIC POLICY FOR RETIREMENT SECURITY IN THE 21ST CENTURY: Reform of Qualified Retirement Plans: ERISA and Investment Issues

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**LEXISNEXIS SUMMARY:**

... In any discussion of reform in the regulation of qualified retirement plans, one critical set of issues relates to the investment of plan assets. ... In discussing participant and beneficiary rights, the Eighth Circuit looked only to *Hughes Aircraft Co. v. Jacobson*, where the Supreme Court determined that particular subsets of participants and beneficiaries could not challenge the plan sponsor's use of surplus plan assets to benefit other subsets of participants and beneficiaries. ... Would plan participants and beneficiaries have standing now to challenge the fiduciaries' actions with respect to the Granite investment? If so, the participants' and beneficiaries' ability to enforce their rights to membership in a plan free of fiduciary breach could depend upon whether the plan became underfunded before the statute of limitations runs. ... Particularly in participant-directed plans, the relief will necessarily be individualized if the fiduciary breach is due to selection of an inappropriate investment vehicle, the provision of fraudulent investment advice, or some similar action with an effect on the participant's account assets. ... As explained earlier, patterns of participant behavior show that their investment decisions on holding employer stock in their DC plan accounts are not rational. ...

**HIGHLIGHT:** *In this Article, Professor Muir identifies problems in the regulation of fiduciary responsibility for both defined benefit and defined contribution pension plans. She explains how one circuit has misapplied constitutional standing doctrine in the context of defined benefit plans. She also discusses the implications of that analysis if it receives widespread acceptance. For defined contribution plans, Professor Muir examines why plan participants confront obstacles in bringing claims for fiduciary breach in situations where they have clearly been harmed by a breach. She ends by suggesting a proposed framework for addressing the unique challenges posed by making employer stock available as an investment alternative in a participant-directed defined contribution plan.*

**TEXT:**

[\*200] I. INTRODUCTION

In any discussion of reform in the regulation of qualified retirement plans, one critical set of issues relates to the investment of plan assets. During the last year, the Pension Benefit Guaranty Corporation's (PBGC) insurance program experienced a net loss of \$ 11.3 billion--a loss greater than five times any previous one-year loss. n1 Underfunding in all employer-sponsored defined benefit plans now exceeds \$ 300 billion. n2 Pension claims to the PBGC in 2002 totaled more than the combined claims for all prior years. n3 Nor have defined contribution plans escaped the negative effects of the economic downturn. Recent reliable statistics indicate that average account balances in defined contribution plans [\*201] decreased during 2001, despite continuing contributions by plan participants. n4 The media is rife with accounts of delayed retirements, and retiree financial stress due to losses in defined contribution plan accounts.

Many factors, including stock market losses, decreasing interest rates, and employer insolvencies, have contributed to the current weaknesses in defined benefit (DB) plan and defined contribution (DC) plan assets. In this Article, I address a subset of those investment issues that intersects with fiduciary and related remedial concepts. More specifically, I will focus here on two questions. First, do the provisions of the Employee Retirement Income Security Act of 1974 n5 (ERISA) fail to provide appropriate incentives for fiduciary compliance, and, if so, what types of reform are necessary to address those issues? Second, does professional investment advice have a role to play in participant-directed DC plans and, if so, how should the regulation of that advice be shaped?

I begin, in Part II, by discussing recent case law that implicates the security of DB plan funding. By limiting the ability of plan participants and beneficiaries to bring suit alleging breach of fiduciary duty in DB plans, the Eighth Circuit's opinion in *Harley v. Minnesota Mining & Manufacturing Co.* n6 may effectively insulate numerous instances of fiduciary breach from challenge. The decision deserves serious consideration because of the constitutional questions it raised regarding the standing of plan participants and beneficiaries to pursue legal actions against plan fiduciaries who breach their statutory obligations. In Part III, I turn to a discussion of a developing issue in the DC plan arena. The issue provides an interesting counterpoint to *Harley* because it implicates the ability of DC plan participants and beneficiaries to enforce the statutory obligations of plan fiduciaries. In Part IV, I consider the role of professional advice for participants whose DC plans delegate investment decision making to them. There appears to be widespread support for the concept of increasing the investment advice available to plan participants. However, the model by which investment advice might be provided and how to shape the regulation of such advice deserves consideration. Finally, in Part V, I close with some general thoughts on reforms to address regulatory issues that interfere with the optimization of plan investments.

## II. DEFINED BENEFIT PLAN ASSET SECURITY

The key attribute of a DB plan is the promise it makes to plan participants. The plan establishes a formula by which a participant's benefit will be calculated. Every DB plan sponsor, in essence, pledges to contribute to the plan at whatever [\*202] levels are necessary to fund the plan. n7 The Internal Revenue Code n8 (IRC) sets out complex mechanisms for calculating minimum and maximum contribution thresholds that are intended to ensure minimum funding while precluding overfunding that could result in unacceptably high tax subsidies. n9

### A. Assuring Asset Integrity--the Practical and Statutory Framework

Participants benefit when DB plans are funded in excess of their projected liabilities. The advantages to participants of an overfunded plan can be classified into two categories. First, a plan that is overfunded at a single point in time is more likely to be able to meet its long term commitments than a plan that is minimally funded or underfunded. In some ways it is even misleading to evaluate the funding of a DB plan on a given date. By their nature, DB plans are established to pay benefits, often in the form of lifetime annuities, n10 to current employees beginning at some point in the future. From an employee's perspective then, it is important, but not sufficient, that the plan be well funded at the point the employee is exchanging work for a blend of current compensation and the promise of a future benefit from the DB plan. The rational employee also would value increased certainty that the plan will be sufficiently funded throughout the period the employee expects to receive benefit payments. A variety of factors implicate the ongoing funding status of a DB plan: plan sponsor contributions, investment returns, actuarial assumptions, and fiduciary integrity. And these are out of the control of the individual employees who will rely on the plans for their benefits.

The second set of advantages that accrue to participants from an overfunded defined benefit plan relates to the potential for future benefit increases. Plan sponsors typically retain the right to amend or terminate their DB plans. n11 Upon plan termination, excess plan assets may revert to the plan sponsor. n12 During the early- and mid-1980s, the number and size of such reversions led to public outcry and, ultimately, congressional action. n13 The resulting legislation, which imposes [\*203] an excise tax of fifty percent in addition to the distribution being taxed at the corpora-

tion's normal income tax rate, n14 substantially discourages plan sponsors from pursuing reversions. Thus, while any excess assets in the plan nominally may belong to the plan sponsor upon reversion, for all practical purposes the assets are only available to pay benefits to participants and beneficiaries.

Because the relevant IRC rules limit overfunding of DB plans in order to minimize the costs of the tax subsidy for qualified plans, a plan sponsor may avoid, and in some cases may even be precluded from, making contributions to a DB plan that is fully funded. In such a circumstance, the effect of overfunding redounds to the benefit of the plan sponsor. But, frequently plan participants and beneficiaries in an overfunded DB plan experience some increase in benefits that are attributable to the overfunded nature of the plan. Three examples of such increases in benefits include cost of living increases for retirees, short-term enhanced window programs, and funding of corollary benefits.

One way plan sponsors have traditionally used plan surpluses to benefit participants has been through the use of cost of living increases for retirees. The typical DB plan calculates a participant's benefit as of the date of the participant's termination from employment. For example, a DB plan might provide for benefits at age sixty-five of 1.5% per year of service multiplied by the employee's salary averaged over the final five years of employment. At retirement, an employee with thirty years of service and a final average salary of \$ 50,000 per year would be entitled to an age sixty-five pension benefit of \$ 22,500 per year. n15 While a benefit calculated in part on final pay may provide a substantial income at the time of retirement, over time the effect of inflation can ravage that benefit. n16 Few DB plans sponsored by private employers include automatic cost of living adjustments. n17 Employers do, however, almost always retain discretion over the terms of DB plans and, as a result, may choose to increase pensions to counter inflationary effects. n18 While data are not available, it is logical to conclude that a plan sponsor would be more willing to grant discretionary benefit increases from an overfunded DB plan than from a plan where increasing the benefit levels would require the sponsor to make higher contributions to the plan.

[\*204] Plan sponsors have also relied upon overfunded DB plans to ease the pain of workforce reductions. By providing incentives, in the nature of higher benefits than otherwise offered by the plan, to employees to retire early, an employer can reduce its workforce while avoiding involuntary layoffs. These enhanced plans are often known as "window plans" n19 because they are available only temporarily--during a "window" of opportunity. Employees who qualify for window plans may receive credit for more years of service than they actually worked, a more favorable than normal actuarial age reduction, or other improvements to their expected benefits. In *Hughes Aircraft Co. v. Jacobson*, the Supreme Court confirmed the right of plan sponsors to use plan surpluses to establish these short-term enhanced retirement incentives. n20 Because downsizing typically coincides with times of financial pressures at employers, common sense dictates that the incentivized benefits associated with window programs would most likely be made available at companies with overfunded DB plans. Employees, as a group, benefit in a second way from window plans. Those plans enable employers to reduce their workforces through voluntary retirements instead of through layoffs. Thus, employees who do not retire through the window program, but who would have lost their jobs in lieu of the window program's existence, benefit from the plan.

Finally, plan sponsors have some opportunities to use assets from overfunded DB plans to provide collateral benefits to plan participants. In March 2003, the Department of Labor (DOL) issued an advisory opinion to counsel for The Prudential Insurance Company of America (Prudential), opining that Prudential could terminate life insurance benefits for its retirees that it had been funding through use of its general assets and then amend its DB plan to provide similar life insurance benefits. n21 This may not result in a net addition of life insurance benefits for retirees. But, by relieving Prudential of the need to fund the life insurance benefits through its general assets and to account for the liabilities on its financial statements, permitting the DB plan to provide the benefits may have retained benefits for retirees that otherwise would have been terminated. Another example of the use of excess DB plan assets to provide collateral benefits occurs with retiree health accounts. The IRC currently explicitly permits excess assets to be used to provide retiree health benefits. n22

[\*205] Funding levels of DB plans, then, affect both benefit security and the potential to receive enhanced benefits. On the input side, two primary factors determine funding levels: plan sponsor contributions and investment returns. The drafters of ERISA recognized that the large amounts of money held by DB plans could tempt those charged with the investment of plan assets into various types of fraud and malfeasance. n23 As a result, ERISA sets forth fiduciary standards that apply to anyone who "exercises any authority or control respecting management or disposition of [a pension plan's] assets" n24 or who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . ." n25 Most DB plans have a formal committee of fiduciaries, who are employees of the plan sponsors, who oversee investment policy and practices. ERISA permits those fiduciaries to delegate investment selection to professional investment man-

agers, n26 who also become plan fiduciaries. The delegation, however, must conform to fiduciary standards of prudence and care, and the fiduciaries retain fiduciary responsibility to monitor the investment managers.

The statute establishes a broad range of remedies for fiduciary breach and permits suits by a participant, beneficiary, fiduciary, or the Secretary of Labor. n27 A court can order a breaching fiduciary to reimburse the plan for any losses attributable to the fiduciary's breach and to repay gains the fiduciary wrongfully received. n28 The statute makes fiduciaries personally liable for these awards. n29 A plaintiff may seek removal of a fiduciary, or any other "equitable or remedial relief as the court may deem appropriate . . . ." n30 Awards under these provisions, however, must run in favor of the plan. n31 Where relief of that sort is not practical, such as in a situation where a plan has been terminated or the individual who has been harmed is no longer a plan participant, a second remedial section permits "other appropriate equitable relief . . . ." n32 This provision, however, is narrower than it may appear at first glance. In 2002, the Supreme Court held that only relief [\*206] that would typically have been available in equity, including equitable restitution but not legal restitution, constitutes equitable relief for this purpose. n33

### B. Standing to Challenge Fiduciary Breach--the Problem

Because of its implications for the security of DB plan assets, it is worth considering the case of *Harley v. Minnesota Mining & Manufacturing Co.* n34 in some detail. A committee of employees of Minnesota Mining & Manufacturing Co. (3M) oversaw the investment of the company's DB plan assets. n35 There is no question that this responsibility made the relevant employees plan fiduciaries. During 1990, the committee decided to invest \$ 20 million in collateralized mortgage obligations (CMOs) offered by Granite Corporation, a hedge fund. n36 The parties offered conflicting evidence about the scope of the analysis and diligence performed by the fiduciaries both prior to making the investment and in monitoring the investment. n37 It appears, for example, that the committee discussed the CMO investment for only ten to twenty minutes before approving it. n38 However, Deborah Weiss, who was Manager of Pension Investments, seems to have read the Private Placement Memorandum for the CMOs and obtained information from other investment managers about at least some of the potential problems in investing in CMOs. n39

It is without controversy, though, that by early 1994 the entire \$ 20 million investment became worthless. n40 A class consisting of all plan participants and beneficiaries filed suit against 3M alleging breach of fiduciary duty in the selection and monitoring of the Granite investment. n41 The plaintiffs alleged that losses to the plan totaled \$ 80 million. n42 The district court determined, however, that if the DB plan was overfunded, as 3M claimed, 3M would be entitled to summary judgment on the basis that the plan had not suffered any loss. n43

[\*207] The court's logic in characterizing an estimated \$ 80 million in principal and foregone investment returns as not constituting a loss to the plan is a good example of the misunderstandings that can occur due to the complexity of DB plan funding and obligations. The district court relied heavily on a misreading of the Supreme Court's 1999 decision in *Hughes Aircraft Co. v. Jacobson*. n44 In *Hughes*, the Court rejected arguments by plaintiff participants and beneficiaries that Hughes had violated its fiduciary duty by using DB plan assets to fund early retirement window benefits during a downsizing. n45 The Supreme Court stated that "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." n46 Instead, individual DB plan members are only entitled to receive the benefits actually promised to them by the plan. n47 In *Harley*, the district court reasoned that, so long as the plan had surplus assets, the fiduciary's investment in the Granite CMOs could not cause loss to the plan. n48 The court called any existing surplus in the plan a "purely gratuitous [act] on 3M's part." n49 After all, 3M had the right to cease contributions to the plan so long as a surplus existed, n50 but instead, 3M had elected to contribute over \$ 400 million between the time of the loss of the Granite investment and 1996. n51

The Eighth Circuit, however, properly decided that the district court's holding that the total write-off of the Granite investment did not cause loss to the plan was "contrary to the plain meaning of [ERISA]." n52 After all, the section of ERISA titled "Liability for breach of fiduciary duty" describes a fiduciary as being "personally liable to make good to [the] plan any losses to the plan resulting from [a] breach" n53 of fiduciary duty. The Eighth Circuit, regrettably though, then proceeded to dismiss the plaintiffs' claims by narrowly interpreting ERISA's remedial provisions to avoid what it viewed as "serious Article III case or controversy concerns." n54

The Constitution permits federal courts to address only "Cases" or "Controversies." n55 Professor Tribe summarizes the basic principle of standing doctrine as follows:

[\*208] To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered

"injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. n56

In a divided decision, the Eighth Circuit reasoned that the *Harley* plaintiffs had not suffered any injury in fact and thus would not meet the constitutional minimum for standing. n57 This analysis flowed from the court's limited consideration of the scope of the rights that accrue to participant and beneficiaries in DB plans.

In discussing participant and beneficiary rights, the Eighth Circuit looked only to *Hughes Aircraft Co. v. Jacobson*, n58 where the Supreme Court determined that particular subsets of participants and beneficiaries could not challenge the plan sponsor's use of surplus plan assets to benefit other subsets of participants and beneficiaries. n59 Reasoning that an overfunded DB plan would be able to pay all of the benefits promised to the plaintiffs under the current terms of the DB plan, the Eighth Circuit determined that only 3M, as plan sponsor, would suffer loss from any fiduciary breach that had occurred in the making or monitoring of the Granite investment. n60 In order to avoid conflict with what it viewed as a constitutional limitation, the Eighth Circuit construed ERISA's relevant remedial provision as precluding the plaintiffs' action. n61 The court supported this determination by opining that the alleged breach of fiduciary duty did not interfere with ERISA's primary purpose of protecting the pension rights of [\*209] individual participants and beneficiaries. n62 Again, in considering the rights of those individuals, the court appears only to have considered their rights to receive the benefits promised under the current plan terms. n63

The Eighth Circuit's decision in *Harley* dramatically undercuts ERISA's protection of DB plan assets from fiduciary breach. Under the *Harley* court's logic, the only plaintiffs that could seek redress for breach of fiduciary duty owed to an overfunded DB plan are the Secretary of Labor and plan fiduciaries. n64 The DOL successfully pursues numerous cases of fiduciary malfeasance each year, n65 but like all government agencies, it operates with severely constrained resources. DOL cannot possibly police the more than three million plan sponsors and other members of the benefits plan community that provide benefits to more than 200 million plan participants and beneficiaries across a broad range of pension, health care, life insurance, and other types of employee benefit plans n66 without the possibility of suits by private parties to enforce ERISA's standards. n67

Nor will the theoretical possibility of suits by plan fiduciaries sufficiently deter fiduciary wrongdoing. Consider the facts of the *Harley* case. Two categories of fiduciaries exist. One category consists of the plan sponsor, 3M, and its employees who act as fiduciaries. As the alleged wrongdoers vis-a-vis the DB plan, there is essentially zero likelihood that these fiduciaries will bring suit against themselves for fiduciary breach. The second category of fiduciaries for the 3M DB plan consists of outside service providers to the plan. Again, the likelihood that any of these entities would bring suit against the very fiduciaries who award them business and monitor their performance is nil. So, the import of the *Harley* decision is that most fiduciaries who breach their statutory obligations to overfunded DB plans would be effectively immunized from liability. The next Section considers the intersection of the Supreme Court's standing doctrine, which "has for some time been one of the most criticized aspects of constitutional [\*210] law," n68 with ERISA, which regulates DB plans and has been called "one of the most complex laws ever enacted by Congress." n69

### C. Standing to Challenge Fiduciary Breach--Constitutional Analysis

The question of whether participants and beneficiaries in overfunded DB plans have constitutional standing to sue fiduciaries who breach their obligation to the plans can be best considered in the larger context of standing doctrine. I begin this subsection, then, with a discussion of the way in which the Supreme Court's standing jurisprudence has developed into a mechanism to protect the separation of powers. Once that approach is properly understood, it becomes clear that cases between private parties--such as cases brought by pension plan participants and beneficiaries against plan fiduciaries--do not raise the same concerns as do the body of cases that makes up the core of the Court's recent standing jurisprudence and involves claims by a private party alleging that government action is unconstitutional. Bearing that foundational principle in mind, I turn next to an evaluation of whether participants and beneficiaries in cases such as *Harley* do suffer injury in fact when a breaching fiduciary's actions cause loss to an underfunded DB plan. Finally, I consider, in the alternative, whether participants and beneficiaries may bring such suits under the theory of representational standing.

#### 1. Standing Doctrine

Until the mid-1960's, standing jurisprudence barely made the Supreme Court's radar screen. The Court decided only eight Article III standing cases prior to 1966. n70 During the past twenty-five years, however, the Court has more than made up for its early lack of doctrinal elaboration in this area. n71

Numerous commentators have offered discourses on the historical development of standing doctrine. n72 In 1992, Professor Cass Sunstein wrote one particularly thoughtful and oft-cited account that describes five phases in the [\*211] Supreme Court's approach to standing jurisprudence. n73 The first phase was the longest and lasted from the signing of the Constitution to approximately 1920. n74 During this period Congress enacted both qui tam actions and informers' actions. n75 Though the Framers provided almost no elucidation of their view of the "case or controversy" clause, both congressional action n76 and British legal precedent n77 indicate an intent to enable citizens to enforce legally recognized rights. In Professor Sunstein's words, "The relevant practices suggest not that everyone has standing, nor that Article III allows standing for all injuries, but instead something far simpler and less exotic: people have standing if the law has granted them a right to bring suit." n78

The second step, and the Court's first real consideration of Article III standing, occurred during the progressive and New Deal periods. n79 In the relevant cases, where citizens challenged regulatory legislation as unconstitutional, the Court decided that the citizens had no personal stake in the lawsuits and, thus, no standing. n80 But, this was hardly inconsistent with the long and well-established history of individuals' abilities to enforce their own legal rights. In fact, "the Supreme Court [wrote] as late as 1939 that, to have standing, a plaintiff must have a 'legal right--one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.'" n81 The distinguishing basis was that none of these legal rights existed in the cases of citizens asking the courts to declare acts of Congress unconstitutional.

The 1949 enactment of the Administrative Procedures Act (APA) led to the development of the third phase in standing jurisprudence. The APA contains its own provisions permitting individuals to seek administrative review. n82 Professor Sunstein argues that Congress intended to capture the existing case law definition of standing and permit private plaintiffs to bring three categories of cases. n83 For present purposes, it is only important to understand that the APA provided standing for people who had legal interests that arose either under the APA or under other statutes. n84

[\*212] Fourth, Professor Sunstein writes that the Supreme Court's decision in *Association of Data Processing Organizations v. Camp* n85 marked a shift in the concept of standing because the "Court essentially jettisoned the entire framework of the APA, even as it purported to interpret that very statute." n86 The requirement of an "injury in fact," which proved the downfall of the *Harley* plaintiffs, n87 first appeared in the *Data Processing* decision. n88 Given the factual context of the decision, the language of the APA, and the tenuous relationship between an "injury in fact" requirement and Article III's language and earlier jurisprudence, n89 standing doctrine could have broken into two clear strands at this point.

Instead, in its fifth phase the Court has continued its use of the "injury in fact" language while shifting its underlying focus to a judicial concern with maintaining separation of powers. Professor Sunstein traces this focus, in part, to a 1983 law review essay authored by Justice Scalia prior to his being confirmed as a Supreme Court Justice. n90 Justice Scalia's concern was two-fold. First, he worried that unlimited standing would damage the separation of powers by permitting increased opportunity for the federal judiciary to review executive actions. n91 Second, prompt access to the court system would provide challengers of executive actions quicker review than would use of the democratic electoral system, thus undermining the democratic process. n92 At least up through the 1992 publication date of Professor Sunstein's article, this reliance on separation of powers concerns to inform standing doctrine culminated in *Lujan v. Defenders of Wildlife*, n93 where Justice Scalia authored the majority opinion.

In *Lujan*, the Defenders of Wildlife, an environmental organization, contended that the Secretary of the Interior's 1986 elimination of the consultation requirement for United States agencies operating overseas violated the Endangered Species Act. n94 The plaintiffs argued that they had observed habitats of certain endangered animals in the past and intended in the future to observe and study the species. n95 The Court determined that the plaintiffs lacked standing because their future intentions to visit the habitats were too ill-defined to meet the [\*213] "injury in fact" requirement. n96 Plaintiffs were no different from any other citizen who might wish to observe these animals in their native habitats and their "'some day' intentions" did not show "actual or imminent" injury. n97 A concurrence by Justice Kennedy, which Justice Souter joined, noted that if the plaintiffs had made more definitive plans--such as purchasing transportation, selecting a particular date of travel, or accessing the habitats on a regular basis--a nexus theory might have supported standing. n98

Two cases decided subsequent to Professor Sunstein's seminal article deserve mention. The first both reinforces the Court's current approach to standing as one that is bottomed on a concern to preserve separation of powers by preventing the Judiciary from intruding on the Executive's power and duty to enforce the laws and Congress' power to author legislation, and puts that approach in context. In 1997, Chief Justice Rehnquist authored the Court's decision in *Raines*

*v. Byrd*, n99 which denied standing to members of Congress who wanted to challenge the line-item veto statute. After strongly emphasizing standing's role in ensuring the separation of powers, n100 the Court acknowledged that the doctrine has particular force in only a limited set of cases: "Our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." n101

In contrast, in its 2000 decision in *Vermont Agency of Natural Resources v. United States*, n102 the Court held that the private plaintiff had standing to bring a claim against his former employer, the Vermont Agency of Natural Resources, under the federal False Claims Act. The Court reaffirmed that its jurisprudence requires that an individual experience a concrete and particularized injury in order to have standing. n103 Here, although the plaintiff was acting as an agent of the United States in making the False Claims Act claim, the Court relied on the historic acceptance of *qui tam* actions in this country and in England. n104 At the same time, though, the Court noted that the plaintiff's right to a portion of the proceeds resulting from an award in the suit provides a "bounty," and, thus, an [\*214] interest in the outcome of the case. n105 In dicta, the Court stated that "it would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, *in whose name* (as the statute provides . . .) the suit is brought . . . ." n106 So, the Court appears, even in its more skeptical modern review of standing, to preserve the long and well-established view that "people have standing if the law has granted them a right to bring suit" n107 even where their role is simply that of designated agent.

## 2. Application of Standing Doctrine to DB Plan Suits

The Eighth Circuit's approach to construing ERISA's remedial provisions misapprehends both the statute and constitutional standing doctrine. First, I address the Supreme Court's standing doctrine as applied to DB plans. Properly understood, standing considerations do not require a narrow construction of participants' and beneficiaries' rights to a forum in the federal courts in cases of fiduciary breach. Once the mists generated by standing are banished, it becomes clear that the statute fully provides participants and beneficiaries with the right to protect their pension plan assets from the malfeasance of fiduciaries who do not honor their obligations to the plan trust.

A suit brought by private parties--here plan participants and beneficiaries--against private parties--a plan sponsor and plan fiduciaries--simply does not implicate the separation of powers concerns that have given rise to the Supreme Court's enhanced scrutiny of standing in recent decades. In this regard, disputes where all the litigants are private parties are the polar opposite of cases where a plaintiff seeks a finding that congressional or executive actions are unconstitutional. And, the Supreme Court reserves its rigorous scrutiny of standing for those allegations of unconstitutionality. n108

In contrast, civil actions brought by private parties to enforce their legal rights have lain at the heart of the Court system's jurisdiction since the earliest days of this nation. n109 Furthermore, Congress's exercise of its powers to grant legally protected rights dates to the 1800s. n110 Federal court jurisdiction over civil lawsuits brought to enforce congressionally-granted rights is not only consistent with the Constitution's standing provision, but such jurisdiction also fully recognizes the courts' role in providing a forum for the protection of legal rights and, thus, reinforces separation of powers.

[\*215] Participants and beneficiaries who bring suit against fiduciaries who breach their obligation to overfunded DB plans have standing because they suffer injury in fact. n111 Such participants and beneficiaries suffer negative financial effects that are more than sufficient to meet the Court's injury in fact test. Furthermore, ERISA grants participants and beneficiaries the right to membership in a plan that is operated in compliance with the statute's fiduciary standards. When fiduciaries fail to act in accordance with those standards, they impinge on the participants' and beneficiaries' legally established rights, giving rise to injury in fact. Either of those results alone would be sufficient for federal court jurisdiction. It is worth recognizing, however, that through ERISA's explicit remedial provisions, Congress explicitly granted participants and beneficiaries the right to bring suit in a representational capacity to enforce ERISA's fiduciary standards, and the Supreme Court has specifically recognized that right. The next subsections elucidate these constitutional principles in the complex area of DB pension plans.

### a. Conceptualizing Participant and Beneficiary Rights

The rights of participants and beneficiaries in a DB pension plan can best be understood by conceptualizing them in the classic formulation of property law, which views ownership as a bundle of rights. n112 Employees exchange their labor for current salary and a variety of benefits including the bundle of DB plan rights. n113 The provisions of ERISA and the terms of the DB plan jointly [\*216] determine the composition of the bundle of rights possessed by any

given participant or beneficiary. ERISA establishes the minimum size of the bundle, but that minimum is quite large. The statute assures employees that in exchange for their labor they will receive a non-forfeitable benefit after a specific number of years of service, n114 and provides for rights to a variety of information including a summary of the plan's terms, n115 notification of the plan's funding status, n116 benefit data, n117 notices of changes in plan terms, n118 and access in some circumstances to the complete plan document. n119 Plans must provide internal mechanisms, including appeal processes, for resolution of disputed benefit entitlements. n120 ERISA's provisions extend beyond the employee to also provide independent protections to beneficiaries. For example, plans must provide pre-retirement survivor annuities for spouses of workers who have vested benefits but die prior to retirement. n121 DB plans typically also must offer retiring workers the right to receive their pension benefits as a joint and survivor annuity n122 in case the retiree predeceases the spouse, and prohibits the retiring worker from waiving that annuity except with spousal consent. n123 ERISA established the PBGC, and Title IV of the statute is devoted to the PBGC's program of protections for DB plans. n124

[\*217] Furthermore, ERISA sets forth a significant framework of fiduciary obligations, framing them in terms of traditional trust law standards. Specifically, provisions require fiduciaries to act "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: providing benefits to participants and their beneficiaries . . ." n125 Fiduciaries must act in accordance with a general standard of care--that of a prudent person familiar with the benefit plan matters at issue--in all of their actions including when selecting and monitoring plan investments. n126 ERISA also specifically requires benefit plan fiduciaries to minimize the risk of large losses by diversifying plan investments n127 and to act in accordance with plan documents. n128 In addition to the many rights granted by ERISA, only some of which are surveyed in this paragraph, plans may provide more benefits to plan participants and beneficiaries.

The result of the statutory framework and plan provisions, then, clearly is not a situation as the Eighth Circuit seemed to believe, where participants and beneficiaries have only one entitlement--the ability to receive a specific dollar payment at some point in the future. Instead, ERISA addresses disparities in bargaining power and information between employees and employers by ensuring that when employees exchange their labor for DB pension rights that they receive a large bundle of property rights in the plan, not just the one paltry stick recognized by the Eighth Circuit. And, when a plan actor interferes with the participants' and beneficiaries' property right to any stick in the bundle, that interference constitutes injury in fact.

#### b. *Participant and Beneficiary Injury in Fact*

When participants' and beneficiaries' rights are properly conceptualized as a bundle of rights it becomes simple to identify injury in fact in cases where fiduciaries breach their obligations to overfunded pension plans. Each and every one of the sticks that together represent plan assets are protected by ERISA's fiduciary provisions. As the Supreme Court recognized in *Hughes Aircraft Co. v. Jacobson*, n129 no individual participant or beneficiary may state a claim to any specific stick in the asset bundle, regardless of whether those sticks might be [\*218] designated somehow as surplus or not surplus. Instead, all of the participants and beneficiaries together have property rights in all of the sticks that constitute plan assets. n130 And, when plan fiduciaries, in breach of their statutory duties, cause harm to any of the sticks in that asset bundle, the fiduciaries have caused injury in fact to the participants' and beneficiaries' legal rights.

This conceptual analysis is consistent with the reality of DB plan operation. First, as discussed above, n131 well-funded DB plans are more likely than weak plans to grant increased benefits to retirees, to offer enhanced window plans, or to provide important supplemental benefits such as life insurance or health care. This potential for future benefits is one of the sticks in participants' and beneficiaries' bundle of rights. The potential is no less a property right simply because it is a right that is contingent on future amendment of a plan.

Second, measurement of a DB plan's assets and liabilities is much more art than science. On the asset side of the equation, the size of the asset bundle must be estimated to reflect the market value of assets that may be subject to dramatic fluctuation (as in the case of some risky financial instruments) or inherently difficult to value (as in the case of real property and other unique and infrequently traded assets). On the liability side of the equation, a DB plan's obligations depend upon a multitude of variables that must be estimated. For example, workforce turnover, participant longevity, future compensation levels, and age at retirement all affect a DB plan's liabilities but are incapable of exact prediction. And, once the plan predicts its future liabilities, it must discount those liabilities to a present value, once again using an estimate--this time an estimated interest rate. Because of the complexity in estimating assets and liabilities, ERISA and the IRC provide plan sponsors with a number of options in determining the sponsor's minimum and maximum contributions. n132



Contribution obligations and plan funding can change dramatically and suddenly depending upon economic factors and investment performance. The statistics on PBGC obligations, set out at the beginning of this Article, n133 are one example of this. 3M's DB plan provides another example. Although it was overfunded during the 1990s, n134 by the end of 2002 it was underfunded by approximately \$ 600 million even though 3M had contributed more than \$ 800 million to the plan during the year. n135 Given the volatility of plans and the inability to predict the future financial health of any plan sponsor, a fiduciary [\*219] breach that causes loss to the plan increases the risk that participants and beneficiaries will not receive their full benefit entitlements.

That increased risk to participants and beneficiaries is sufficient for injury in fact under current Supreme Court standing jurisprudence. In *Regents of the University of California v. Bakke*, n136 the Court considered whether Allan Bakke lacked standing to bring his challenge to the admissions policies of the Medical School of the University of California. The allegation was that he lacked standing because he could not show that he would have been admitted to the Medical School even if the School had not used race as a criteria in its admissions decisions. n137 The Court rejected this argument because the School's practice of setting aside of some seats in the entering class for minority applicants increased Bakke's risk of not being admitted. n138 Similarly, in DB pension plans, the harm a breaching fiduciary causes to the plan increases the risk that participants and beneficiaries will not receive their expected benefits. That is all that is required to meet the constitutional standing requirement.

Third, during the entire life of the plan trust, ERISA requires that fiduciaries make prudent investments and act solely for the purpose of benefiting participants and beneficiaries. n139 The extent of any plan overfunding does not affect these basic fiduciary obligations. n140 No provision of ERISA permits plan sponsors or fiduciaries to self-deal in assets of overfunded plans, steal assets from those plans, or gamble away the assets. Only by terminating a DB plan, and fully buying out all of the participants' and beneficiaries' property rights, which also requires more than a simple cash pay-out, n141 may a plan sponsor ever gain entitlement to a plan surplus.

Given all of this uncertainty in asset and liability valuation and in sponsor contributions, it becomes apparent why Congress required in ERISA that plan trusts hold all of a pension plan's assets in trust n142 for the exclusive benefit of participants and beneficiaries. From the perspective of any given participant or beneficiary it would be terribly dangerous to exchange one's labor for the right to a future payment from a plan that is funded "just right" at the moment of the exchange. In a sense, the employee's situation is worse than that of Goldilocks, [\*220] who was faced with three bowls of porridge. Who decides if the plan is funded "just right," and how do they decide? Unlike Goldilocks' ability to taste the porridge, the employee cannot independently measure the plan's financial status to ensure it is "just right." What is more, unlike Goldilocks, who, since she wanted to eat the porridge at the time she tasted it, did not need to seek porridge that was too hot or too cold currently in order to assure it would be right when it came time to eat, the employee will not consume plan benefits until many years in the future. In light of the many risks that inhere in long-term DB plan funding--risks associated with investment of plan assets, of unexpected demographics or interest rates affecting plan liabilities, and of the fiscal health of a plan sponsor affecting its ability to make contributions to the plan--a larger bundle of sticks in the plan's asset bundle increases the likelihood that the plan will have the ability to pay benefits to our hypothetical Goldilocks-like employee. And, if the plan fiduciaries, in breach of their statutory duty cause some of those asset sticks to be lost, the fiduciaries have impinged on the participants' and beneficiaries' property rights in a secure pension, causing injury in fact.

Fourth, ERISA grants participants and beneficiaries the legal right to participate in a DB plan that is free from fiduciary malfeasance. Congressional hearings prior to ERISA are rife with concerns about the misuse of plan assets. Senator Ribicoff stated that: "frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them." n143 Representative Perkins promised that: "Since trustees and managers of plans have not always been above manipulating or investing funds for their own gain rather than in the interest of the beneficiary, fiduciary standards are established which will provide additional safeguards against mismanagement." n144 Senator Williams, one of the architects of ERISA, said ERISA was intended: "to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets . . ." n145 Senator Clark opined that ERISA "sets fiduciary standards to insure that pension funds are not mismanaged." n146 In spite of the extensive legislative history reflecting worries about fiduciary overreaching, not a single statement limits the concerns to situations where DB plans were overfunded. Instead, as these comments indicate, legislators focused on providing participants and beneficiaries [\*221] with safeguards against all manner of fiduciary wrongdoing. The Supreme Court has acknowledged the presence of this particular stick in the bundle of plan rights held by participants and beneficiaries. In *Massachusetts Mutual Life Insurance Co. v. Russell*, n147 the Court cited many of the

foregoing and others in support of its statement that: "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future."

Congress's focus on fiduciary obligation clearly was informed by the history of malfeasance in pension plans that had occurred prior to ERISA's enactment. It is hardly surprising, then, that Congress granted to plan participants and beneficiaries the right that many commentators view as the most important of all property rights--the right of exclusion. n148 Among the other remedies available against breaching fiduciaries, ERISA section 409 explicitly permits plaintiffs to seek, and courts to grant, "removal of [a breaching] fiduciary." n149 The resulting statutory framework grants participants and beneficiaries the legal right to membership in a DB plan that is free from fiduciary breach and to seek the removal of fiduciaries who have not fulfilled their obligations to the plan. Thus, under this regime, where plan fiduciaries violate their statutorily-imposed obligation of trust, they have, per se, impinged on the participants' and beneficiaries' legal rights, causing injury in fact.

In sum, a proper understanding of participant and beneficiary rights in a DB plan accepts that those rights are constituted of far more than just a simple right to receive a stream of payments at some time in the future. Instead, as participants and beneficiaries in an ERISA-regulated trust, participants and beneficiaries enjoy a rich array of legal rights that can best be conceptualized by using the traditional property law concept of a bundle of rights. The bundle includes, along with many other rights, a contingent right to increased future benefits should the plan sponsor choose to grant those benefits or should the employees have sufficient bargaining strength to negotiate for them, a right held by the entire cohort of participants and beneficiaries to have all of the plan assets used exclusively for their benefit and invested prudently, and a right to membership in a plan free of the types of fiduciary fraud and self-dealing that pre-dated ERISA. Fiduciaries who, through breach of their statutorily-imposed duty, impinge on any one of these property rights do cause harm--and, thus, injury in fact, as required by standing doctrine, [\*222] to the legal rights of participants and beneficiaries. In a situation, such as occurred in *Harley*, where the fiduciary impinged on all of these property rights, the harms are exponential.

### c. Participant and Beneficiary Representational Standing

Though unnecessary given the foregoing analysis, participants and beneficiaries in cases where fiduciaries breach their duties to overfunded DB plans would, alternatively, have standing under the concept of representational standing. Since the earliest days of this country's history, Congress's power to grant parties the right to bring civil suits in a representational capacity has gone unquestioned by the federal courts. In fact, the quintessential suits of this type were suits by private citizens against private citizens. n150 Further, the Eighth Circuit's notion that a bounty is necessary for a representational action to meet the constitutional requirements of standing ignores history and misinterprets the Supreme Court's current jurisprudence. As Professor Sunstein explains, "history suggests that the bounty is designed to offer an incentive, not to create an injury where none existed before." n151 Recognition of congressional power to create representational actions accords with this history and with the respect due to Congress under separation of powers principles. The Supreme Court acknowledged the constitutionality of representative actions in its decision in *Vermont Agency of Natural Resources v. United States* n152 when, although unnecessary given the terms of the statute in question, the Court stated that it might have been enough for the plaintiff to be "the statutorily designated agent of the United States, *in whose name . . . the suit is brought . . .*"

Congress clearly empowered participants and beneficiaries to bring representational actions for breaches of fiduciary duty. ERISA section 502(a)(2) grants four categories of plaintiffs the right to bring civil actions for the relief provided under ERISA section 409: the Secretary of Labor, plan fiduciaries, and participants and beneficiaries. n153 Section 409 describes the monetary relief available to redress breaches of fiduciary duty as relief that runs "to the plan." n154 In the context of a DB plan, the only reasonable construction of these provisions is the one recognized by the Supreme Court in *Russell*. There the Court stated that the statutory language "is indicative of Congress's intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." n155 The Supreme Court could hardly have been more clear in recognizing [\*223] that actions seeking relief under the combination of ERISA sections 502(a)(2) and 409, whether brought by the Secretary, a plan fiduciary, or by participants and beneficiaries, have a representational component. And, recognition of standing for representational actions provided for by Congress is consistent both with the history of standing for representational actions, which dates nearly to the signing of the Constitution, and with the Supreme Court's recent standing jurisprudence.

In sum, constitutional standing considerations do not mandate a cramped interpretation of ERISA's remedial provisions. In combination, ERISA and DB plan documents provide plan participants and beneficiaries with a bundle of legal rights. Fiduciaries that breach their obligations to DB plans will typically impair some number of the legal rights in the

participants' and beneficiaries' bundle. Those impairments easily meet the low threshold of injury in fact required for constitutional standing. This is particularly true given that these suits present themselves as actions by private parties against private parties, and, thus, do not seek the types of relief against either congressional or executive actions that require more careful scrutiny of standing to preserve appropriate separation of powers. Alternatively, participants and beneficiaries have standing to pursue relief on behalf of their DB pension plan under the concept of representational standing. Congress clearly used its longstanding power to include representational concepts in ERISA sections 502(a)(2) and 409.

#### *D. Standing to Challenge Fiduciary Breach--ERISA Analysis*

Now that any concerns with constitutional standing have been negated, this subsection will consider the proper construction of ERISA's remedial provisions in the context of breaches of duty by fiduciaries of overfunded DB plans. I begin by recapping the relevant statutory language, which I addressed in large part in the last subsection. Next, I consider the relevant Supreme Court jurisprudence, which counsels strict adherence to the statutory language. Finally, I consider the policy ramifications of various constructions of ERISA's remedial provisions.

##### *1. Statutory Provisions*

As discussed above, n156 the relevant statutory provisions in a participant and beneficiary suit alleging breach of fiduciary duty to a DB pension plan typically are ERISA sections 502(a)(2) and 409. It is worthwhile, at this point, however, to step back and consider these provisions in the larger context of ERISA's extensive regulatory framework. Section 502(a)(2) is one of five provisions in section 502 that provide participants and beneficiaries with a basis to bring civil [\*224] suits under ERISA. n157 Although the Supreme Court has referred to the civil remedies provisions as being "carefully integrated civil enforcement provisions" that exist as part of an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute,'" n158 significant gaps do exist in the protections extended to plan participants and beneficiaries, particularly in the health care arena. n159 Section 502's language is simple and direct--allowing for civil actions "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [ERISA § 409]." n160 Section 409 is contained in Title I of ERISA's Part IV, which is devoted to provisions dealing with "Fiduciary Responsibility." n161 Structurally, that Part first sets forth the coverage of the Part and the requirements for written plan documents and establishment of a formal trust. n162 Then the Part establishes general fiduciary standards and makes specific provisions regarding issues such as co-fiduciary liability and prohibited transactions. n163

The third and final set of provisions deals with various aspects of fiduciary liability, including section 409, which is titled "Liability for breach of fiduciary duty." n164 Not surprisingly, given the congressional concern with providing protection against fiduciary misdeeds, n165 section 409's language is cast in very broad terms. Its language applies to all plans of any type subject to ERISA's regulation, referring as it does to "a plan," "such plan," and "the plan." n166 It refers to "any person who is a fiduciary," to breaches of "any of the responsibilities, obligations or duties" imposed by ERISA, to an obligation to make the plan whole for "any losses," and for restoration to the plan of "any profits." n167 In [\*225] somewhat inelegant drafting, n168 section 409 also permits courts to award any "other equitable or remedial relief" n169 and explicitly includes removal of fiduciaries among the relief that may be granted. n170

Consider together the implications of sections 502(a)(2) and 409. Congress explicitly empowered nearly every party with a significant interest in benefit plans to bring a civil action for breach of fiduciary duty. And, the scope of the available remedies explicitly applies to any breaching fiduciaries. The remedies themselves are limited only by whatever limits exist on the federal courts' abilities to award equitable or remedial relief. There is no basis whatsoever in this statutory framework to preclude suits by participants and beneficiaries against fiduciaries who breach their statutory duties--regardless of whether the plan is a pension or health care plan, regardless of whether the plan is underfunded, overfunded, or not funded at all, regardless of the size or contingent nature of the participants' or beneficiaries' benefits, and regardless of the fiduciary's position as a plan sponsor, an employee of a plan sponsor, or an outside service provider. In short, the statutory language makes clear that the many factual intricacies that determine the nature of an employee benefit plan simply are not relevant to the ability of plan participants and beneficiaries to seek relief against breaching fiduciaries.

##### *2. Supreme Court Jurisprudence*

In one of its earliest ERISA decisions, the Supreme Court opened its opinion by referring to the statute as "comprehensive and reticulated." n171 Since then the Court has used that phrase eleven times in ERISA cases, n172 typi-

cally to support a decision that hews closely to the statute's language. The Court's approach has been particularly consistent in cases interpreting ERISA's remedial provisions.

The Court has repeatedly referred to "ERISA's interlocking, interrelated, and interdependent remedial scheme." n173 On the one hand, this approach has resulted [\*226] in the Court refusing to permit any relief not explicitly provided for in the statute. For example, the Court has stated that ERISA "should not be supplemented by extratextual remedies . . ." n174 And, "ERISA's 'comprehensive and reticulated' scheme warrants a cautious approach to inferring remedies not expressly authorized by the text." n175 In the same vein: "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." n176

On the other hand, the Court has been careful not to disrupt the balance Congress struck in protecting participant and beneficiary interests n177 by disallowing remedies contained in the statute. In *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, n178 the Court refused to immunize nonfiduciaries from liability for violations of the prohibited transactions provisions. The Court closely examined the relevant statutory language and found that it "*admits of no limit* . . . on the universe of possible defendants. Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants--the focus, instead, is on redressing the 'act or practice which violates any provision of [ERISA Title I].'" n179

Similarly, in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, n180 the Supreme Court rejected an argument that ERISA's nondiscrimination provision, section 510, n181 only protects benefits that are capable of vesting under the statute. The Court looked at section 510's unrestricted use of the term "plan" and "any right." n182 The statutory language contained no limitation on the types of benefit plans to which section 510 applied, and the Court refused to add a limitation. n183

In the context of participant and beneficiary claims alleging fiduciary breach, section 409's language also "admits of no limit." n184 As explained above, n185 the [\*227] statute's plain wording refers to: "a plan," "such plan," and "the plan." n186 Well-established Supreme Court jurisprudence requires that this language be given its natural breadth, which does not preclude actions against fiduciaries who breach their obligations to overfunded DB plans.

### 3. Policy Considerations

In addition to being inconsistent with the statutory language and Supreme Court jurisprudence, precluding participants and beneficiaries from bringing suit against fiduciaries who breach their duties to overfunded pension plans raises serious problems in application. Given the lack of grounding in the statutory language for such an interpretation, it is unclear what date should be used to measure the plan's funded status. Nor is it clear what methodology should be used to determine that status. Furthermore, from a technical perspective the rationale of such an interpretation would seem to preclude even participants and beneficiaries in at least some underfunded plans from bringing suit against breaching fiduciaries that caused or contributed to the underfunding.

The Eighth Circuit did not indicate the appropriate date for measurement of a plan's funding status for purposes of determining whether participants and beneficiaries have the right to challenge breaches of fiduciary duty. The court referred to the overfunded nature of the plan during the period of the Granite investment and 3M's later voluntary contributions. n187 But, consider a case where fiduciaries breach their obligations when making an investment and, at the time of that decision, the plan is overfunded. Should that overfunded status be sufficient to protect the fiduciaries from suit even if the loss resulting from the breach causes the plan to be underfunded? Or, if the plan is underfunded when the breach occurs but is overfunded at a later date when the loss caused by the breach is realized, are the fiduciaries immunized from liability? Would it matter whether the plan became overfunded due to investment gains or plan sponsor contributions? None of these situations present appropriate grounds for protecting the breaching fiduciaries, but, under the Eighth Circuit's logic in *Harley*, participants and beneficiaries may not have standing in any of these cases.

A third scenario is what occurred in *Harley*. The plan appears to have been overfunded at the time of the investment and throughout the pendency of the lawsuit. n188 However, the 3M plan has since become underfunded. n189 Would plan participants and beneficiaries have standing now to challenge the fiduciaries' actions with respect to the Granite investment? If so, the participants' and beneficiaries' ability to enforce their rights to membership in a plan free of [\*228] fiduciary breach could depend upon whether the plan became underfunded before the statute of limitations runs. Such an approach would effectively permit a plan sponsor to immunize favored fiduciaries by making contributions at levels sufficient to prevent the plan from becoming underfunded until after the statute of limitations expires.

One could argue that incenting the plan sponsor in this way would be good policy because it would help prevent underfunding of DB plans. This argument, however, misses the key point that pensions represent deferred compensation. Economic limits constrain employees' entire compensation package. An employer that contributes to the DB plan to offset fiduciaries' malfeasance will have fewer compensation and benefit dollars available for salaries and other benefits.

Nor is it entirely clear from the Eighth Circuit's opinion whether any level of overfunding is sufficient to negate plan participants' and beneficiaries' right to bring suit against breaching fiduciaries or whether some minimum amount of overfunding is required. The court states in summary that: "For these reasons, we conclude that plaintiffs' failure to investigate and monitor claims were properly dismissed if the Plan's *surplus was sufficiently large* that the Granite investment loss did not cause actual injury to plaintiffs' interests in the Plan." n190 Thus, it is possible the Eighth Circuit would find that participants and beneficiaries in a less overfunded plan than the 3M plan would have standing to sue. But, the Eighth Circuit provides no guidance as to how much overfunding is enough to immunize breaching fiduciaries.

How to measure plan overfunding is another question that flows from the *Harley* decision. ERISA permits plan sponsors to choose among six methods of funding for accrued benefits or to propose a customized method to the IRS for approval. n191 Plan sponsors also have substantial discretion in adopting assumptions, including employee turnover rates, future compensation rates, and most importantly interest rates, for their plans. n192 The interest rate assumptions are so important that they currently are subject to considerable debate. n193 A plan's funding status also depends upon whether the calculation is being made assuming the plan will continue indefinitely or whether it will be terminated immediately. n194 If a plan's funded status at a particular point in time determines whether participants and beneficiaries have the right to challenge fiduciary [\*229] breaches, considerable resources will be expended on the expert testimony of actuaries and other pension funding experts to address these questions.

Consider, as well, the application of the Eighth Circuit's logic to underfunded DB plans. The court's conclusion indicates that overfunding alone may not be sufficient to deny participants and beneficiaries standing--instead perhaps the overfunding must be "sufficiently large" so that a breach of fiduciary duty does not "cause actual injury to the plaintiffs' interests in the Plan." n195 But looking to the court's rationale, it is possible that it could be extended even to underfunded plans. The Eighth Circuit provided two reasons for its decision. First, permitting the suit to go forward would raise Article III standing issues because the court failed to recognize injury in fact where the participants and beneficiaries had not failed to receive any benefits payable by the plan. n196 Second, the court believed ERISA's protective goals were met because "the ongoing Plan had a substantial surplus before and after the alleged breach and a financially sound settlor responsible for making up any future underfunding." n197

These statements may indicate that the Eighth Circuit believes that participants and beneficiaries actually have to suffer some loss of benefit payments in order to obtain standing. If so, that would dramatically limit the types of cases where participants and beneficiaries could bring suits challenging breaches of fiduciary duty to DB plans. Pushed to its logical extreme, the court's rationale would preclude standing where the DB plan is drastically underfunded, but the breaching fiduciaries convince a fact finder that the plan sponsor has the financial strength to make up the underfunding. And, even if a plan sponsor does not have that financial wherewithal, a breaching fiduciary could argue that the PBGC's guarantees sufficiently protect participants and beneficiaries from losing benefits except to the extent that the benefits of some individuals may exceed the PBGC guarantees. But, surely, Congress did not intend, and ERISA's language does not require, a plan sponsor to default on its plan obligations, the PBGC to assume responsibility for the plan, and participants and beneficiaries to lose expected benefits before those participants and beneficiaries gain standing to bring suit for breach of fiduciary duty.

In sum, the *Harley* court was wrong. Participants and beneficiaries in DB plans governed by ERISA enjoy a large bundle of rights. When fiduciaries breach their statutory obligations to DB plans those breaches will almost always impinge on some number of the sticks in the participants' and beneficiaries' bundle of rights. That is sufficient to constitute injury in fact under the Supreme Court's Article III doctrine. n198 Furthermore, permitting participants and beneficiaries to [\*230] bring suit in all cases involving breach of fiduciary duty to a DB plan, regardless of the plan's funding status or any other factual variable, is consistent with the statutory language, the Supreme Court's jurisprudence on ERISA remedies, and the goals that under gird pension policy.

### III. FIDUCIARY BREACH IN DC PLANS

Plaintiffs who bring claims alleging fiduciary breach in DC plans face a challenge that is the opposite of the issue for DB plan plaintiffs. The nub of the issue for plaintiffs who allege fiduciary breach in a DB plan is whether they have

a sufficient individual stake to gain standing under the injury in fact doctrine. n199 In contrast, DC plan plaintiffs face potential challenges that their stake is too individualized.

When DC plan plaintiffs seek relief under the combination of ERISA sections 502(a)(2) and 409, their claims must be consistent with the Supreme Court's decision in *Massachusetts Mut. Life Ins. Co. v. Russell*. n200 That decision was the Court's first major decision on ERISA remedies and it established an approach to construction of those remedies that focused closely on the statutory language. The plaintiff, Doris Russell, was a participant in disability plans sponsored by her employer, Massachusetts Mutual. n201 Russell suffered from back problems and received benefits for approximately five months. n202 The disability committee then terminated her benefits for 132 days, during which period multiple physicians evaluated Russell's condition. n203 During the approximately four-and-a-half month period when the company withheld her benefits, Russell's disabled husband was forced to cash in his retirement savings and the stress further aggravated her back problems. n204 Russell sought compensatory and punitive damages from Massachusetts Mutual, asserting that the plan fiduciaries ignored the medical reports, used incorrect eligibility standards, and purposefully delayed evaluation of her claim. n205 Russell brought her claim under ERISA sections 502(a)(2) and 409. n206

At the Supreme Court, the case presented on the question of whether section 409 authorizes a participant to personally recover "extracontractual compensatory [\*231] or punitive damages." n207 This issue, though, subsumed two different questions. First, Russell wanted to personally and directly recover the compensatory and punitive damages; she did not want the recovery to go to the plan. Second, the issue raised the question of what types of damages are available under sections 502(a)(2) and 409. The Court ultimately determined that neither punitive nor compensatory damages are available under these sections. n208 For purposes of this Article, the first question is the more important.

Massachusetts Mutual argued that recovery under sections 502(a)(2) and 409 must "inure[] to the benefit of the plan as a whole." n209 The Supreme Court engaged in an integrated reading of the entire statutory provision and agreed with Massachusetts Mutual that remedies awarded under section 409 must go to a benefit plan and not directly to an individual participant or beneficiary. n210 It is critical, however, to understand both the setting of this case and the Supreme Court's reasoning. Looking to the language of section 409, the majority began by noting that it characterized the fiduciary relationship as one between the fiduciary and "the plan." n211 The opinion then focused on the statutory requirement to "make good to such plan" the "losses to the plan" and that any profits realized by the fiduciary be "restored to such plan." n212 Finally, to support its decision the majority turned to legislative history from the time of ERISA's enactment. It emphasized that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators . . ." n213 The Court's decision, then, meant that Russell could not recover directly and individually as a result of any fiduciary breach that had occurred.

Fiduciaries rely on some of the language in *Russell* to argue that plaintiffs cannot recover under sections 502(a)(2) and 409 to individual DC plan accounts. n214 Their logic is that the *Russell* decision requires relief to "inure[] to the benefit of the plan as a whole." n215 Since recoveries for fiduciary breach in a DC plan flow to the individual accounts of participants, the relief does not benefit the plan "as a whole." n216

[\*232] To the extent courts accept this argument, the individualized nature of DC plans would largely immunize fiduciaries from suits for fiduciary breach. The only other section that is available to plaintiffs seeking relief for fiduciary breach is section 502(a)(3). But, depending on the application of current jurisprudence to cases of fiduciary breach, it is possible that this may only rarely provide a viable avenue of recovery. The Supreme Court has made clear that, in cases not involving breach of fiduciary duty, plaintiffs may recover only relief typically available in equity, including equitable restitution but not legal restitution, n217 under section 502(a)(3)'s provision for "appropriate equitable relief." n218 Thus, plaintiffs may have to meet difficult standards, including showing that the fiduciaries have been unjustly enriched, to recover for fiduciary breach under section 502(a)(3). n219

Courts have, in a variety of situations, relied upon *Russell* to deny plaintiffs the right to recover under sections 502(a)(2) and 409. For example, in *Farr v. US West, Inc.*, n220 Farr alleged that the plan fiduciaries had provided fraudulent information on the tax consequences of taking a lump sum benefit from a DB plan that was offering a window benefit. The Ninth Circuit read *Russell* as meaning that: "a plan may get relief under § [409], but individual beneficiaries generally may not." n221 Farr and the other plaintiffs were seeking direct recompense for the additional tax burden from the lump sums, or front or back pay between the dates of their actual retirements and the date they would have retired but for the window benefit. n222 Thus, the court decided they were seeking individualized relief and not relief that would benefit the plan as a whole and dismissed their claim. n223 Similarly, in *Cinelli v. Security Pac. Corp.*, n224 a retiree sued after his former employer terminated his company-paid supplemental life insurance. With-

out deciding whether the plan fiduciaries had breached their obligations, the Ninth Circuit dismissed the claim as one that requested relief that [\*233] was not available. In the words of the court: "Individual beneficiaries may bring fiduciary actions against the plan fiduciaries, but they must do so for the benefit of the plan and not their individual benefit." n225

It becomes easy, then, to understand the arguments made by fiduciaries of DC plans when plaintiffs seek relief to their plan accounts due to fiduciary breach. Particularly in participant-directed plans, the relief will necessarily be individualized if the fiduciary breach is due to selection of an inappropriate investment vehicle, the provision of fraudulent investment advice, or some similar action with an effect on the participant's account assets. In such instances, individualized calculations are necessary to determine the extent of the participant's harm. And, relief would appropriately inure to the individual accounts of harmed participants.

The similarities with cases that have found claims to be unavailable under sections 502(a)(b) and 409, however, are only superficial. In *Russell* and in each of the cases discussed above, the plaintiffs sought relief that would be paid by the fiduciaries to the individual plaintiffs outside the plan. And, at most, that is all *Russell* held--that under sections 502(a)(2) and 409 plaintiffs could not get relief that bypasses the plan and is paid directly from the fiduciary to them as individuals. Instead, any payment a court orders a fiduciary to make must flow to the plan.

An understanding of *Russell* that permits DC plan participants to recover for fiduciary breach so long as the relief flows to their plan accounts comports with the *Russell* majority's focus on the relationship between the fiduciary and the plan, as opposed to the fiduciary and the plaintiff. n226 It also is consistent with the statutory language, which refers only to "a plan," "such plan," and "the plan" without any indication that the relief can only be awarded to the undivided assets held in a DB plan or to an unallocated account in a DC plan. Finally, permitting DC plan participants to recover to their plan accounts is necessary in order to achieve the congressional goals that the *Russell* Court recognized. Unless appropriate relief is available to allow participants and beneficiaries to receive redress for fiduciary breaches they will not be able to protect themselves from the "misuse and mismanagement of plan assets" n227 that so concerned Congress.

It is true that in its *Russell* opinion, the Court twice referred to recovery under sections 502(a)(2) and 409 as flowing to "the plan as a whole." n228 However, in the first reference the Court was simply restating the petitioner's argument. n229 In the second, the Court was focused on *Russell*'s request that compensatory and [\*234] punitive damages be paid directly to her. n230 The Court's rationale seemed to be that relief flowing to the plan as a whole would typically be the best way to protect participants and beneficiaries against "possible misuse of plan assets." n231 The Court went on to make an important statement about the scope of fiduciary duties imposed by ERISA: "The principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." n232

In DB plans, where plan assets are not allocated to individual participants' accounts, monetary relief for fiduciary breach typically would flow to the plan as a whole. In that way, losses to the plan would be redressed, assets would be protected against misuse, and fiduciaries would be held accountable for appropriate management, asset investment, and so forth. But, in a DC plan, typically all or most n233 of the funds held by the plan will be held in individual participant accounts. The only way losses to the plan can be redressed, assets can be protected against misuse, and fiduciaries can be held accountable for appropriate management, asset investment, and so forth is by allowing for recoveries to individual participant accounts. Finally, this interpretation is consistent with the statutory language, which throughout section 409 refers to "a plan," "such plan," and "the plan," but never to "the plan as a whole." As discussed above, n234 the Supreme Court has been consistent in interpreting ERISA's remedial provisions as they are written--without adding remedies that are not there and without taking away remedies that are provided for under the statute.

The Fourth Circuit's analysis in *Smith v. Sydnor* n235 took a reasonably broad view of the relief available to participants under sections 502(a)(2) and 409. In *Smith*, the plaintiffs alleged that the defendants violated their fiduciary duties by causing the employee stock ownership plan to sell employer securities back to the company for an insufficient price. n236 Plaintiffs sought to require the company and an individual fiduciary to disgorge all the profits from that transaction, rescind the purchase, and restore a put option that the plan had held to sell the employer [\*235] securities at a substantially higher price. n237 In considering whether the plaintiffs could bring an action under sections 502(a)(2) and 409, the Fourth Circuit stated: "This remedy is precisely what ERISA § 409 provides. Although this remedy will undoubtedly benefit *Smith* and other participants in the Plan, it does not solely benefit the individual participants." n238 This case is not entirely on point with the hypothetical cases of most concern in this section--cases where

fiduciary breaches cause harm to individual DC plan accounts but do not harm a suspense account or other account containing unallocated assets n239--because in *Smith* the repurchase of employer stock at an inadequate price also damaged the suspense account. But, the Fourth Circuit at least acknowledged that plaintiffs may recover to individual plan accounts under sections 502(a)(2) and 409.

In sum, under the worst case scenario for plaintiffs in fiduciary breach cases, ERISA jurisprudence could develop in such a way that DB plan plaintiffs are prevented from bringing fiduciary breach cases because their interests are not individualized enough to meet the standing requirement of injury in fact. At the same time, DC plan plaintiffs could be prevented from bringing fiduciary breach cases because their interests are too individualized to meet the requirements of sections 502(a)(2) and 409. But, both of those approaches misapprehends the nature of benefit plans and the provisions of ERISA. The statute and plans grant a rich bundle of rights to participants in DB and DC plans. When a fiduciary breach causes loss to a DB plan, that loss affects the DB plan participants' and beneficiaries' bundle of rights. In fact, the mere fact of fiduciary breach impinges on the right Congress granted to plan participants and beneficiaries to be members in a plan that is free of fiduciary malfeasance. In DC plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts. The statute, the legislative history, and Supreme Court precedent all are consistent with an interpretation of ERISA sections 502(a)(2) and 409 that would permit DC plan participants to recover to their plan accounts in such cases of fiduciary wrongdoing.

#### IV. AN INCREASED ROLE FOR INVESTMENT ADVICE

This Part turns to a different type of issue associated with the investment of plan assets--the need participants who are responsible for making their own [\*236] investment decisions in DC plans have for integrated investment management services. To better ground the discussion of regulation, this Part begins with a brief description of the various forms of investment advice and how investment advice differs from investment education. Second, I consider a legislative proposal intended to expand participant access to such advice. Finally, I conclude with discussion of important factors that should inform regulatory efforts in the investment advice arena.

##### A. *The Case for Integrated Investment Management*

Current regulation draws a sharp distinction between investment education and investment advice. To delegate responsibility for investment selection in a DC plan, and concurrently to avoid liability for investment selection, a plan sponsor must provide participants with some investment education. At minimum, participants must receive "a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designated investment alternative." n240 Once the plan sponsor has delegated investment responsibility to participants, the plan is known as a "participant-directed plan."

Many plan sponsors offer more than the minimum required investment education to their employees. Seminars on investment principles and on-line and other analytic tools have become popular ways for plan sponsors to assist employees in optimizing their DC plan investments. These programs and techniques come at little cost to the plan and the programs can accommodate significant numbers of employees in a group setting. Providing investment education does not cause the plan to become a fiduciary for investment selection--a fact that provides significant liability protection to the plan sponsor.

Compare investment advice. Investment advice differs from investment education in that education teaches general investment principles and techniques. Investment advice provides an individual with personalized recommendations on which mutual funds to purchase, the amount of a specific stock to hold, and so forth. Thus, investment advice must take into account an employee's financial status and goals, the person's specific risk tolerance, and numerous other individualized factors. Investment advice, then, cannot be provided in a mass forum or through the use of generic materials. This makes investment advice much more expensive than investment education for plans that may choose to offer advice. And, investment advice is a fiduciary function. As such, it is subject to ERISA's fiduciary standards, including prudence and loyalty. Furthermore, if a plan sponsor chooses to hire an outside investment advisor rather than the sponsor providing the advice directly, the selection and monitoring of the outside advisor [\*237] to provide advice is a fiduciary function. Those who have discretionary decision-making authority over the selection will be subject to ERISA's fiduciary standards.

Whether it is because of the cost of the programs, their complexity, the potential legal liability, or for some combination of these factors, far fewer plans offer employees investment advice than offer investment education. On the other hand, studies consistently show that not only do employees want investment advice, they want full service advice. They



do not want to be taught how to choose their investments. They do not even particularly want to be told what investments to make. Instead, they want someone to make the investment decisions and complete all of the necessary administrative steps to complete the transactions. In industry parlance, employees want "do it for me" service. In this Article, I will refer to the combination of services that includes both decision making on asset allocation and administrative implementation as integrated investment management services.

One legitimate question is whether responding to employees' stated desire for access to integrated investment management would serve any function other than increasing employee satisfaction. The question is not meant to minimize the importance of employee satisfaction with their benefit plans. Rather, it is intended as a way to surface a variety of issues associated with investments in participant-directed accounts. Approaching the question from this perspective brings to light two other possible rationales for integrated investment management. First, increased access to professional advice should reduce the incoherent decision-making that appears to occur not infrequently when plan participants make their own investment decisions. Second, integrated investment management should effectively address those situations, which research finds to be quite prevalent, where participants make an investment decision but do not follow through by taking the necessary administrative steps to implement the decision.

On the first point, I have written elsewhere at some length, n241 about behavioral economics research and empirical data that show participant decision making does not seem to optimize investment returns even given various levels of risk tolerance. To briefly summarize, participants spend little time considering their initial investment allocations and consider only a limited amount of material. n242 And, once they have made their initial allocation decision, participants tend not to modify that decision or rebalance their plan portfolios even in response to changing personal or market factors. n243 Participants also [\*238] appear to be unreasonably loss averse. n244 On the other hand, they have a tendency to allocate assets evenly across the available investment vehicles regardless of the relationship between the available choices and their risk tolerance. n245 Other research indicates that when the range of choices becomes too large to reasonably approach in this way, participants actually tend not to be able to make any choice at all. n246 As the number of funds offered increases, plan participation rates decrease so that plans with two funds have average participation rates of seventy-five percent whereas plans with sixty funds have participation rates of approximately sixty percent. n247 Participants also, contrary to common sense, are more likely to purchase employer stock with their discretionary contributions in a plan where the employer's match is in employer stock than in a plan where the employer's match is not automatically invested in employer stock. n248

Second, research indicates that participants who take part in investment education programs or who receive investment advice may decide to make portfolio changes as a result of that education or advice. However, substantial numbers of participants never follow through and actually take the administrative steps necessary to implement the change. n249 Assuming that participants' reported intent to make changes reflects informed decisions made utilizing educational principles or advice, this tendency to inertia appears suboptimal. The inertia also indicates that expenditures on education and advice are not resulting in maximum value to participants. After all, a participant who becomes more financially sophisticated and who can make better investment decisions as a result of education, will not retire with any additional assets as a result of that education if the knowledge and decisions never translate into actual investment allocations.

In sum, substantial evidence exists that integrated investment management could enhance investment returns in participant-directed DC plan accounts and that numerous participants want such a service. By offering integrated investment management, a plan sponsor may enhance participant satisfaction with the plan. [\*239] And, professional management could overcome both the inertia and the incoherent nature of investment allocations made by participants.

### *B. Proposed Regulatory Measures to Encourage Investment Advice*

In May 2003, the House of Representatives passed H.R. 1000, known as the Pension Security Act of 2003 (Pension Security Act). n250 Among other things, that Act intends to "promote the provision of retirement investment advice to workers managing their retirement income assets." n251 As this Article is being written, the bill is awaiting attention by the Senate where it faces significant opposition. n252 The 106th and 107th Congresses both considered similar bills, with an earlier version, H.R. 2269, passing the House of Representatives but not the Senate. n253

The focus of the Pension Security Act's provisions on investment advice is apparent from the title of the applicable section of the bill: "Prohibited Transaction Exemption for the Provision of Investment Advice." n254 Currently, the prohibited transaction provisions of ERISA and the IRC preclude entities that provide services to benefit plans or to plan sponsors from also providing investment advice for a fee. n255 So, for example, the outside service provider that

is the primary contact for plan participants, the record-keeper, or the provider of the plan's mutual funds cannot provide investment advice for a fee unless the provider obtains an exemption from the DOL or shapes its provision of investment advice to fit an approach the DOL has approved. The Pension Security Act, in contrast, would permit service providers, who have an existing business relationship with a plan, to provide investment advice so long as the provider complies with detailed disclosure obligations intended to make plan participants aware of the provider's conflicts of interest. n256 As a result, the Pension Security Act would remove one of the largest barriers to the provision of investment advice.

The key decision maker, however, in whether a plan offers investment advice tends to be the plan sponsor. Jurisprudence makes clear that plan sponsors do not have any fiduciary obligations under ERISA when establishing or amending the terms of a benefit plan. n257 As a result, if a plan sponsor chooses not to offer [\*240] investment advice through its DC plan, the plan sponsor will not have breached any obligation to the plan participants even though investment advice might benefit those participants. As noted above, n258 however, a plan sponsor that does offer investment advice currently assumes fiduciary responsibility for the selection and monitoring of the investment advisor. In addition, the plan sponsor may be liable as a co-fiduciary for any fiduciary breach committed by the investment advisor, and may even risk the protections typically associated with a participant-directed plan if the investment advisor fails to comply with the regulatory standards. n259 The potential liability associated with investment advice likely is one reason plan sponsors hesitate to offer investment advice through their DC plans.

The Pension Security Act would address, in a limited way, these barriers to plan sponsors' adoptions of investment advice programs. The Act would protect plan sponsors from co-fiduciary liability if the adviser breaches its fiduciary obligations so long as the advice was provided in accordance with a formal arrangement, the terms of the arrangement required fiduciary compliance by the adviser, and the adviser acknowledged its role as an ERISA fiduciary. n260 On the other hand, the Act would maintain the plan sponsor's obligations to select and monitor investment advisers in accordance with ERISA's fiduciary standards. n261 The Act elucidates on these obligations to only a limited extent by stating that: "The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice." n262 This provides only limited comfort to plan sponsors and individual fiduciaries who are employees of plan sponsors because it leaves unresolved the difficult question of what a fiduciary must do to adequately monitor the provision of investment advice. The substantive and procedural standards for selecting service providers such as record keepers and investment vehicles should provide useful guides for the fiduciary selection of an investment adviser. However, it is unclear how fiduciaries should monitor investment advice given the individualized nature of advice. The Retirement Security Act does not provide any guidance on this, nor does it address whether improper advice could void the protections of participant-directed account plans. As a result, even if the Retirement Security Act is enacted, plan sponsors may remain reluctant to accept the potential for liability that results from offering investment advice through their DC plans.

### [\*241] C. Considerations for the Regulation of Investment Advice

In this Section I will briefly outline a proposal to increase the predictability of a plan sponsor's obligations in the selection and monitoring of investment advisers. I also will offer two suggestions targeted at specific areas in which integrated investment management may be particularly valuable. The first is the question of whether ERISA should limit the amount of employer stock that plan participants may hold in their DC plan accounts. The second suggestion is targeted at the question of what government agency can most efficiently and effectively regulate investment advisers.

Elsewhere I proposed a nonexclusive safe harbor to protect plan sponsors in their monitoring of advice providers. n263 The Advisers Act requires investment advisers with \$ 25 million or more under management to register with the SEC and, concomitantly requires advisers with less than \$ 25 million under management to register with the states. n264 I suggest that a plan fiduciary be protected from selection and monitoring liability so long as the plan offers at least two choices of investment advisory firms and the plan fiduciary believes in good faith at the time it selects firms that the firms are registered with the SEC. Finally, the plan fiduciary must, on an annual basis, engage in a review sufficient to maintain a good faith belief that the investment advisory firms remain federally registered. n265

#### 1. Investments in Employer Stock

I propose here that integrated investment management services be used to address the controversy over employer stock in DC plans. Commentators have suggested that ERISA should cap the amount of employer stock that individual employees can hold in their DC plan accounts. For example, Professor Stabile proposed that the maximum amount be

set at ten percent. n266 Similarly, multiple bills have been introduced in congress to set limits on employer stock ownership in participant-directed DC plans. n267

The issue that these proposals address is an important one. As explained earlier, n268 patterns of participant behavior show that their investment decisions on holding employer stock in their DC plan accounts are not rational. Furthermore, at [\*242] one time the theory that people dramatically under diversify when they invest their human capital and financial capital in the same enterprise seemed primarily that--a logical-sounding financial theory. However, the corporate scandals and dot com failures of the past few years turned this theory into reality for far too many loyal employees. The press has been filled with accounts of people not only losing their jobs, but also losing nearly all of their retirement savings where they had invested heavily in stock of their employer. Nor have losses of this sort been limited to corporations embroiled in scandal and dot coms. During the recent years of a declining stock market and corporate downsizing, employees of a wide array of companies have faced job loss or declines in the value of the company stock they hold in their retirement accounts. And, there too, the most negatively affected may be those who lost both jobs and significant portions of their DC plan assets.

The commentators and legislators who would prevent reoccurrences of these losses by capping employer stock ownership often cite parallel regulation of DB plans as support for their approach. n269 ERISA does cap a DB plan's ownership of plan sponsor stock at ten percent of the DB plan's assets. n270 However, the rationale for limiting a plan sponsor's purchase of its own stock in a DB plan is quite different from the reasons underlying the suggested DB plan caps, particularly, as those caps would affect participants' discretionary investment decisions. When making investment decisions in a DB plan, whether those investments are in employer stock or any other investment vehicle, plan sponsors and the responsible investment committee act as fiduciaries. n271 In addition to its general fiduciary provisions, ERISA sets out prohibited transactions, which literally prohibit transactions in certain categories, regardless of fairness to the plan. n272

Transactions of these types were thought to pose such a risk to plans that they should be explicitly banned. The harm that the provisions target is the plan sponsor's self-interest in choosing its own stock as a DB plan investment. This self-interest encompasses not only an ability to support the stock's price through increased demand, but also the placement of a potentially large block of stock in friendly hands. A DB plan's ownership of employer stock can be useful in fending off a hostile attempt to purchase the company or adverse shareholder proposals. n273

[\*243] In contrast, this rationale of constraining self-interest has little place in participant-directed DC plans. So long as there is no explicit or implicit pressure from the employer regarding investments in employer securities, individual participants simply do not face a conflict of interest when deciding whether to invest in those securities. Instead, at least in theory, their investment allocation decisions would be made with the intent of maximizing their ultimate retirement assets.

Although participants do not have a conflict of interest in deciding whether to invest in employer stock, it is important to ask whether any other reasons exist that might cause participants to make suboptimal investment decisions regarding employer stock. Two such reasons can be identified. First, the prior paragraph noted the possibility of explicit or implicit employer pressure. Given power and information differences between employees and employers it would not be unexpected that some employers might use subtle, or not so subtle, measures to encourage employees to purchase employer stock. It is even possible that employees would perceive implicit pressure in communications that the company intends as nothing more than morale building. This type of investment problem is unique to employer stock and unlikely to be replicated in the selection of other investment vehicles. Second, employees may simply make the kinds of investment mistakes identified by behavioral economics research. Their discretionary purchases of employer stock where the employer match is made in employer stock may reflect confirmation bias. n274 Or, their pro rata allocation of assets to employer stock in a plan with a small number of investment alternatives may result from use of the 1/n heuristic. n275 These types of errors may or may not be unique to employer stock.

So, participants may over invest in employer stock as a result of suboptimal decision making. At least some of the influences that contribute to such over investment are attributable to employer actions--implicit or explicit pressure to purchase employer stock or making matching contributions in employer stock. As a result, it may make policy sense to consider legislative or regulatory action to address these problems that lead to inefficient participant decision-making. However, the commentators and legislators who would arbitrarily cap employee investment in employer stock at a set level regardless of the company's economic prospects, the employees' individual financial situations, and other relevant factors do not seem to have chosen the best approach.

Arbitrary caps would preclude employees who would rationally, given their risk tolerances and individual circumstances, choose to invest heavily in securities of their employer from doing so. At least in that way, the caps would be [\*244] economically inefficient and may actually lower investment returns for employees. The caps also would further increase the differential between upper management employees, who often have access to stock option plans and other favorable ways of investing in their firms, and lower level employees who would be limited in their ability to use tax-incented programs to invest in their employers.

Instead of arbitrary caps, I propose that integrated investment management services could effectively address many of the factors that lead to inefficient over-investment in employer stock. Plan sponsors that wish to offer employer stock as a discretionary investment in DC plans should be required to provide integrated investment management services through the plan. In addition, any plan sponsor that wants to make matching contributions in employer stock should be required to provide participants with an opportunity to diversify out of employer stock after a reasonable period n276 and provide integrated investment management services through the plan. This would ensure that employees at least have the opportunity to receive professional advice regarding their investments in employer securities. It also would address the more general issues of participant inertia and incoherent decision making, which seems to occur across the broad range of investment vehicles.

Two criticisms might be made against this proposal. First, and most seriously, opponents may question whether integrated investment management services arranged for by a plan sponsor and offered through a plan could possibly be free of conflicts of interest in favor of the employer who selects the investment management firm. This is a fair point. There are, however, multiple ways by which my proposal and existing legislation work to negate this type of conflict. First, under my proposal, each benefit plan offers at least two investment advisers. The competitive position of the advisers should work to ensure their loyalty to their participant clients. Second, the advisers would be subjected to ERISA's fiduciary standards. Their recommendations and actions, including with respect to company stock, would have to be made in the best interest of the individual participant clients and meet the prudence requirement. n277 Thus, constraints would exist to prevent advisers from recommending investments in employer stock in an attempt to curry favor with plan sponsors at the expense of participants.

Another potential criticism is that the proposal only requires a plan to offer integrated investment management services if the plan includes employer stock as [\*245] an investment vehicle. This means that the approximately 55% of plans that do not include employer stock as an investment vehicle n278 would not be required to provide integrated investment management services. Participants in those plans would not necessarily have access to services that could enhance their investment returns. Again, the point is a fair one. However, research and financial theory shows that employer stock poses risks in excess of those posed by other classes of investment vehicles. n279 Thus, the advice and administrative follow through of professional investment advisers is especially important for participants who have to decide whether or not to invest in employer stock. The proposal does not, however, discourage other plans from providing some type of investment advice. On the contrary, by providing increased protection from liability for plan sponsors that meet the terms of the nonexclusive safe harbor, my proposal aims to increase the likelihood that plan sponsors will elect to offer investment advice.

## *2. Regulating Integrated Investment Advice Services*

As integrated investment advice services become more prevalent, it will become important to consider whether the regulatory framework should be adjusted. Currently, the DOL and the IRS share regulatory authority over employee benefit plans sponsored by private employers. n280 The PBGC also has some responsibility, particularly over DB insurance premiums, plan terminations, and multiemployer plans. n281 The Pension Security Act would continue this pattern of regulation by delegating authority to the DOL to promulgate rules for and oversee the provisions of disclosures on conflicts of interest by investment advisers who provide advice to plan participants and beneficiaries. n282

The DOL, however, is not necessarily the best choice to regulate issues primarily associated with investment advice. The agency certainly has considerable expertise with an array of employee benefit plan regulation. And, the DOL has been active and largely effective in enforcing ERISA's fiduciary standards as applied to plan sponsors and plan service providers. n283

The regulation of investment advisers, though, raises some unique issues. All advisers must comply with the Investment Advisers Act of 1940. n284 The SEC has primary regulatory authority for that Act. And, as noted above, n285 investment advisers with \$ 25 million or more in assets under management must register with [\*246] the SEC. n286 As a result, the SEC has developed considerable expertise in investment advice issues. It also is able to integrate its regulation of advisers with its regulation of other securities industry participants.

In recent years the SEC has been actively updating its regulation of investment advisers. In 2001, it began a program of mandatory electronic reporting for the advisers who must register with the SEC. n287 At that time, the agency also proposed comprehensive revisions to Part II of the registration form. n288 That section sets forth the disclosures that must be made to the SEC and on an individual basis to clients regarding conflicts of interest. n289 The proposed revisions engendered so much controversy that the SEC shelved the proposal and has not yet returned to it. n290

Because of its existing expertise and recent efforts on disclosure, the SEC is the logical agency to regulate investment advisers and set their disclosure requirements whether the advisers are providing advice on assets held inside or outside a qualified plan. Delegating the authority to the SEC would be most efficient from the perspectives of deployment of agency assets, the level of compliance costs imposed on the advisory industry, and the education of investors in understanding conflicts of interest and other disclosures.

From an agency perspective, if DOL were to receive regulatory authority, as proposed by the Pension Security Act, over advisory disclosures when advice is given on the investment of DC plan assets, DOL would at the very least want to coordinate its regulation with the SEC. But, having each agency develop internal expertise over the provision of investment advice would be an inefficient use of federal resources. Inefficiencies would multiply with the need to coordinate regulation and enforcement.

From the perspective of investment advisers, it would be inefficient to have to comply with different regulations promulgated by different federal agencies depending on whether the adviser is providing advice on assets held inside or outside a DC plan account. An adviser must take into account a client's full financial status when determining portfolio allocations. This means that typically an adviser would have to provide two sets of disclosures to the same client--one set for the client's plan assets and one set for assets held outside the plan. Presumably advisers would be subject to audits and enforcement actions by both [\*247] the SEC and the DOL. A bifurcated regulatory system of this type could only add to the compliance costs of advisers, costs that would ultimately be borne by plan sponsors, plan participants, or individual investors outside benefit plans.

The inefficiencies that a bifurcated system would impose on the agencies and advisers might be justified if the costs are offset by advantages to plan participants and non-plan investors. However, not only is it hard to envision that happening, it seems likely that participants and non-plan investors also would be burdened by such a system of regulation. As just discussed, it is likely that investment advisers would pass along the increased costs of such a regulatory regime to their clients. That would burden all individual investors, whether or not they participate in a DC plan that provides investment advice. Similarly, the increased costs that result from replicating expertise in regulation and enforcement at the DOL and the SEC would be borne by taxpayers.

Plan participants who receive advice on both plan assets and non-plan assets would receive two different sets of disclosures--one for each category of assets. It is difficult to imagine why two sets of disclosures would be other than confusing to participants. Some might argue that advisers that have business relationships with plans or plan sponsors have different conflicts of interest because of those relationships. The argument is that this would require disclosures about those conflicts when the adviser is giving advice to the participants about investment of plan assets. But, this logic is flawed. Here, too, the participants would benefit from one set of disclosures. The participants need to be aware that the adviser's relationship with the plan or plan sponsor poses a risk of tainted advice on both plan and non-plan assets. After all, under the logic of bifurcated disclosure and regulation, an adviser could disclose a plan-related conflict with respect only to plan assets and avoid giving tainted advice regarding those assets. But, if the adviser provides advice on non-plan assets in a way that benefits its business relationships with the plan or plan sponsor, the participant still gets tainted advice.

## V. CONCLUSION

If Americans are to enjoy retirements free of severe financial worries in the 21st century, then the pension plans sponsored by private employers must contain sufficient assets to provide expected and needed benefits. ERISA's fiduciary and remedial provisions are critical in ensuring that the assets in DB plans are not squandered by careless or criminal fiduciaries. Those same provisions also protect the assets in DC plans. No significant amendments to either ERISA's fiduciary provisions or its remedial provisions have been enacted since the passage of the statute in 1974. Depending upon the way jurisprudence develops, however, reforms in these provisions may become vital to ensure appropriate protection of plan assets. In the context of the investment of plan assets, fiduciaries of overfunded DB plans should not be given a free pass for fiduciary violations. Nor [\*248] should participants in DC plans be left without adequate remedies to address violations by plan sponsors or any kind of plan service provider.

In addition, it appears that participants and beneficiaries in DC plans want and need help in making investment decisions so that over the course of their lifespan they do not move from being YUPPIES to Grossly Under Prepared Persons (GUPPIES).<sup>n291</sup> But, the regulation of the provision of advice needs to consider the complex web of interests--some of which contain significant conflicts of interest--of plan sponsors, advice providers and participants. It also should recognize the SEC's expertise in this arena and avoid duplicate regulation that would be costly and confusing to both the industry and investors. Finally, it must deal with the unique issues presented by investments in employer stock.

### Legal Topics:

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

GovernmentsFiduciary ResponsibilitiesPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)FiduciariesDelegationPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)FiduciariesPersonal Liability

### FOOTNOTES:

<sup>n1</sup> *Challenges Facing Pension Plan Funding: Hearings Before the Subcomm. on Select Revenue Measures of the House Committee on Ways and Means*, 108th Cong. 5 (2003) (testimony of The Honorable Steven A. Kandarian, Executive Director, Pension Benefit Guaranty Corporation), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=322>.

<sup>n2</sup> *Id.*

<sup>n3</sup> *Id.*

<sup>n4</sup> Sarah Holden & Jack VanDerhei, *401k Plan Asset Allocation, Account Balances, and Loan Activity in 2003*, EBRI ISSUE BRIEF NUMBER 255, Mar. 2003, at 4 (finding an average decrease of almost four percent in participant accounts).

<sup>n5</sup> Employee Retirement Income Security Act of 1974 (ERISA) § 1-4082, 29 U.S.C. §§ 1001-461 (2000).

<sup>n6</sup> *284 F.3d 901 (8th Cir. 2002)*, cert. denied, 537 U.S. 1106 (2003).

<sup>n7</sup> See JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 355-73 (3d ed. 2000) (discussing applicable minimum funding rules).

<sup>n8</sup> 26 U.S.C. § 61 (2000).

<sup>n9</sup> See Dana M. Muir, Note, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits*, 87 MICH. L. REV. 1034, 1034 n.4 (1989).

<sup>n10</sup> MICHAEL J. CANAN, *QUALIFIED RETIREMENT PLANS* § 3.52 (2000 ed.). Spouses also have rights in determining the form of payment of DB plan benefits. *Id.* at § 7.16.

<sup>n11</sup> PETER J. WIEDENBECK & RUSSELL K. OSGOOD, *EMPLOYEE BENEFITS* app. A at 1274, app. B at 1313 (1996) (setting forth sample amendment and termination provisions).

<sup>n12</sup> *Id.* at 1277.

n13 Muir, *supra* note 9, at 1036-37.

n14 Regina T. Jefferson, *Striking a Balance in the Cash Balance Plan Debate*, 49 *BUFF. L. REV.* 513, 555 (2001).

n15 The calculation is as follows: (1.5% x 30 years of service) x \$ 50,000 final average salary = \$ 22,500.

n16 According to General Accounting Office (GAO) calculations, an average annual inflation rate of five percent would halve the value of a fixed pension in approximately fourteen years. *Pension COLAs*, GAO REPORT GAO/HEHS-95-219R1 (Health, Educ. & Human Servs. Div.) (Aug. 11, 1995), available at <http://161.203.16.4/paprpdf1/155043.pdf>.

n17 *Id.* at 7 (stating that "less than 10 percent [of privately-sponsored DB plans] explicitly provide for automatic COLAs").

n18 *Id.*

n19 Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 *N.Y.U. L. REV.* 780, 815 n.177 (1997); Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 *VA. L. REV.* 1271, 1285 (1993); Susan J. Stabile, *Another Look at 401(k) Plan Investments in Employer Securities*, 35 *J. MARSHALL L. REV.* 539, 563 n.114 (2002).

n20 525 *U.S.* 432, 442 (1999).

n21 4A Op. Employee Benefits Security Admin., Dept. of Labor 1 (2003), available at <http://www.dol.gov/ebsa/regs/aos/ao2003-04a.html>.

n22 *I.R.C.* § 420 (2000).

n23 MICHAEL S. GORDON, SENATE SPECIAL COMM. ON AGING, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 6-25 (1984), reprinted in JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW*, 73-83 (2000).

n24 ERISA § 3(21)(A)(i), 29 *U.S.C.* § 1002(21)(A)(i) (2000).

n25 ERISA § 3(21)(A)(ii), 29 *U.S.C.* § 1002(21)(A)(ii) (2000).

n26 ERISA § 402(c)(3), 29 *U.S.C.* § 1102(c)(3) (2000).

n27 ERISA § 502(a)(2), 29 *U.S.C.* § 1132(a)(2) (2000).

n28 ERISA § 409(a), 29 *U.S.C.* § 1109 (2000)(a).

n29 *Id.*

n30 *Id.*

n31 *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). For a discussion of Russell's application to DC plans, see *infra* Part III.

n32 ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (2000).

n33 *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002).

n34 284 F.3d 901 (8th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003).

n35 *Harley v. Minn. Mining & Mfg. Co.*, 42 F. Supp. 2d 898, 901 (D. Minn. 1999), *aff'd on other grounds*, 284 F.3d 901 (8th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003).

n36 *Harley*, 42 F. Supp. 2d at 901.

n37 *Id.* at 901-04.

n38 *Id.* at 901.

n39 *Id.* at 901-02.

n40 *See id.* at 903.

n41 *Harley*, 42 F. Supp. 2d at 900, 906. Plaintiffs also claimed that 3M violated its fiduciary duty by "making and maintaining the investment under circumstances which presented a clear prohibited transaction." *Id.* at 909-10. This claim, which was dismissed by the district court, is not relevant to the analysis in this Article. *Id.* at 910.

n42 *Id.* at 911.

n43 *Id.* at 914-15.

n44 525 U.S. 432 (1999).

n45 For a discussion of those kinds of short-term benefit programs, see *supra* text accompanying note 20.

n46 525 U.S. at 440.

n47 *Id.* at 440-41.

n48 *Harley*, 284 F.3d at 914.

n49 *Id.*



n50 *Id.*

n51 *Id. at 904 n.10.*

n52 *Id. at 905.*

n53 ERISA § 409, 29 U.S.C. § 1109 (2000) (emphasis added).

n54 *Harley, 284 F.3d at 906.*

n55 U.S. CONST. art. III, § 2.

N56 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 386 (3d ed. 2000) (citations omitted).

n57 *Harley, 284 F.3d at 906.*

n58 525 U.S. 432 (1999).

n59 *Id. at 441-42.*

n60 *Harley, 284 F.3d at 905.* The Eighth Circuit also affirmed the dismissal of the plaintiffs' claims alleging violation of ERISA's prohibited transactions provisions. *Id. at 909.* Furthermore, the circuit court affirmed dismissal of the plaintiffs' claims against the individual members of the plan's investment committee on the basis that those claims were collaterally estopped by the decision on the claims against 3M. *Id.*

n61 That provision provides, in relevant part: "[a] civil action may be brought-- . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 409." ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2000). Section 409 sets out the broad scope of liability faced by a fiduciary who breaches ERISA's standards. *See supra* text accompanying notes 27-31. ERISA's remedial provisions have generated a substantial scholarly literature. *See* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391 (2000) (arguing for a broad reading of ERISA's remedial provision); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1 (1995) (evaluating the import of Supreme Court doctrine for availability of ERISA remedies).

n62 *Harley, 284 F.3d at 907.*

n63 *Id.*

n64 *See* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2000) (permitting suit by the Secretary of Labor and fiduciaries as well as by participants and beneficiaries).

n65 In fiscal year 2002, the Department of Labor closed 1985 investigations into fiduciary breaches and prohibited transactions that resulted in some actions to protect plan benefits. Department of Labor, *DOL Annual Report, Fiscal Year 2002, Report on Performance and Accountability*, available at [http://www.dol.gov/ebsa/publications/apar\\_fy2002.html](http://www.dol.gov/ebsa/publications/apar_fy2002.html).

n66 See About the Employee Benefits Protection Administration, an agency of the Department of Labor, available at <http://www.dol.gov/ebsa/aboutebsa/main.html> (setting forth statistical data on plans and participants).

n67 See Brief of the Secretary of Labor as Amicus Curiae in *Support of Appellants' Petition for Rehearing and Rehearing En Banc at 1, Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002) ("If allowed to stand, the panel's holding that a participant in an over-funded defined benefit pension plan does not have standing to bring suit for breach of fiduciary duty will create an enormous burden for the Secretary as the only person with standing to bring such suits.").

n68 TRIBE, *supra* note 56, at 390.

n69 Paul J. Fassar, Jr., *The New Pension Law*, 28 PROC. N.Y.U. CONF. ON LAB. 59 (1975); see also *Mertens v. Hewitt Ass'n*, 508 U.S. 248, 262 (1993) (calling ERISA "an enormously complex and detailed statute").

n70 See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992).

n71 See *id.*

n72 See Tracey E. George & Robert J. Pushaw, Jr., *Constitutional Law: How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1280-84 (2002); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Richard S. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1763-75 (1999); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995).

n73 Sunstein, *supra* note 70, at 168-69.

n74 *Id.* at 170.

n75 *Id.* at 175-76.

n76 *Id.*

n77 *Id.* at 171-73.

n78 *Id.* at 177.

n79 Sunstein, *supra* note 70, at 179.

n80 *Id.* at 180.

n81 *Id.* at 181 (quoting *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)).

n82 5 U.S.C. § 702 (2000).

n83 Sunstein, *supra* note 70, at 181.

n84 *Id.* at 181-82.

n85 397 U.S. 150 (1970).

n86 Sunstein, *supra* note 70, at 185.

n87 *See supra* text accompanying notes 55-58.

n88 397 U.S. at 152.

n89 *See* Sunstein, *supra* note 70, at 186.

n90 *Id.* at 215. Justice Scalia's article can be found at: Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

n91 Sunstein, *supra* note 70, at 215.

n92 *Id.*

n93 504 U.S. 555 (1992).

n94 *Id.* at 558.

n95 *Id.* at 563-64.

n96 *Id.* at 560.

n97 *Id.* at 564. Nor did the plaintiffs meet the ability to redress the requirements of the standing doctrine. *Id.* at 568.

n98 *Lujan*, 504 U.S. at 579.

n99 521 U.S. 811 (1997).

n100 "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* at 818 (citation omitted).

n101 *Id.* at 819-20.

n102 529 U.S. 765 (2000).

n103 *Id.* at 772-73.

n104 *Id. at 774.*

n105 *Id. at 773.*

n106 *Id. at 772.*

n107 *Supra* text accompanying note 78 (*quoting* Sunstein, *supra* note 70, at 177).

n108 *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

n109 *See* Sunstein, *supra* note 70, at 168, 173.

n110 *Id. at 168, 174-75.*

n111 Causation and ability to redress must be present, in addition to injury in fact. *See supra* text accompanying note 57. Rarely will these elements of the standing requirement present a hurdle to plaintiffs in cases of fiduciary breaches against overfunded DB plans.

n112 *See, e.g., Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937) (Cardozo, J.) ("The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2190-91 (2002) (citing Justice Cardozo's formulation in *Henneford* as the source of the metaphor); Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1229 (1999) (calling the power to exclude "'one of the most treasured strands in an owner's bundle of property rights.'") (citation omitted); Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625, 628 (2002) ("The right to exclude others is frequently described as the most important stick in the bundle of private property rights."); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1446 (2001) (discussing the applicability of the bundle concept to information control); Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1326 (1994) (applying the bundle concept to the right to health care); Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1228 (referring to the bundle concept in the context of copyright ownership).

n113 Congress accepted the deferred wage theory of pension plans when it passed ERISA. The Senate report recognized that "losses of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received." S. REP. NO. 93-383, at 45 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930. The remarks of Senator Harrison Williams, "one of the principal architects of ERISA," lend further support. *Ashenbaugh v. Crucible, Inc.*, 854 F.2d 1516, 1537 (3d Cir. 1988) (Mansmann, J. concurring and dissenting). He stated that "pensions are not gratuities. . . . They represent savings which the worker has earned in the form of deferred payment for his labors." 119 CONG. REC. 29,995, 30,005 (1973).

n114 Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 206-07 (1995) (discussing ERISA's accrual and vesting requirements).

n115 ERISA § 102, 29 U.S.C. § 1022 (2000).

n116 ERISA § 103(b)(2), 29 U.S.C. § 1023(b)(2) (2000).

n117 ERISA § 105, 29 U.S.C. § 1025 (2000).

n118 ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (2000).

n119 ERISA § 104(a)(6), 29 U.S.C. § 1024(a)(6) (2000).

n120 ERISA § 503, 29 U.S.C. § 1133 (2000).

n121 ERISA § 205, 29 U.S.C. § 1055 (2000); *I.R.C. § 401(a)(11)* (2000). Plans may charge participants for the cost of the pre-retirement survivor benefit. If a charge is imposed, participants have the right, with the consent of their spouses, to waive the benefit. *26 C.F.R. § 1.401(a)-20 Q&A-21* (1989).

n122 In an unsubsidized joint and survivor annuity, the benefit otherwise payable to the retiree is reduced by an actuarially appropriate amount. If the retiree predeceases the spouse, the spouse continues to receive a reduced benefit for the remainder of the spouse's lifetime. For more information on joint and survivor annuities and the detailed statutory requirements, see STEPHEN R. BRUCE, *PENSION CLAIMS: RIGHTS AND OBLIGATIONS* 260-64 (2d ed. 1993).

n123 ERISA § 205(c)(1), 29 U.S.C. § 1055(c)(1) (2000); *I.R.C. § 401(a)(11)* (2000).

n124 ERISA §§ 4001-402, 29 U.S.C. §§ 1301-461 (2000). The existence of the PBGC and its guarantee of DB pension benefits does not negate other sticks in the bundle of rights held by plan participants and beneficiaries. Instead, the PBGC program adds rights to the bundle, thereby backstopping the employer-based system.

n125 ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i) (2000); see Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 *U. CHI. L. REV.* 1105, 1108 (1988) ("ERISA's exclusive benefit rule . . . imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty.").

n126 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2000).

n127 See ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C) (2000).

n128 See ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (2000).

n129 525 *U.S.* 432, 440 (1999).

n130 *Id.*

n131 See *supra* text accompanying notes 15-22.

n132 More stringent rules apply to a terminating plan to ensure sufficient assets exist to pay participants and beneficiaries their promised benefits.

n133 See *supra* text accompanying notes 1-3.

n134 *Harley*, 284 F.3d at 904.

n135 *See News Briefs: 3M Contributes \$ 809 Million to U.S. Pension Plans in 2002*, PENS. & INV., Mar. 17, 2003, at 20.

n136 438 U.S. 265, 280 n.14 (1978).

n137 *See id.*

n138 *See id.*

n139 *Supra* text accompanying notes 125-28.

n140 ERISA and the IRC contain overlapping funding provisions. The ERISA provisions are set forth in a self-contained part--Part 3--of Title I. ERISA §§ 301-08, 29 U.S.C. §§ 1081-86 (2000).

n141 To terminate a plan a sponsor must meet disclosure obligations, select an annuity provider in accordance with fiduciary obligations, and so forth.

n142 ERISA does permit a few exceptions to the trust requirement, such as an exception for plan assets held by an insurance company. *See* ERISA § 403(b)(2); 29 U.S.C. § 1103(b)(2) (2000).

n143 120 CONG. REC. 29,957 (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, UNITED STATES SENATE, 94TH CONG., LEGIS. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 4733, 4811 (Comm. Print 1976) [hereinafter HISTORY].

n144 120 CONG. REC. 4278 (1974), *reprinted in* 2 HISTORY, *supra* note 143, at 3351, 3370 (Comm. Print 1976).

n145 120 CONG. REC. 29,932 (1974), *reprinted in* 3 HISTORY, *supra* note 143, at 4733, 4743.

n146 120 CONG. REC. 29,961 (1974), *reprinted in* 3 HISTORY, *supra* note 143, at 4733, 4823.

n147 473 U.S. 134, 140 n.8 (1985); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241 (2000) ("Responding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries . . .").

n148 *See, e.g., Lipsky, Jr. & Sidak, supra* note 112, at 1229 (calling the power to exclude "one of the most treasured strands in an owner's bundle of property rights.") (citation omitted); Long, *supra* note 112, at 628 ("The right to exclude others is frequently described as the most important stick in the bundle of private property rights.").

n149 *See* ERISA § 409(a), 29 U.S.C. § 1109(a) (2000).

n150 Sunstein, *supra* note 70, at 176.

n151 *Id.*

n152 529 U.S. 765, 772 (2000).

n153 ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2000).

n154 ERISA § 409(a), 29 U.S.C. § 1109(a) (2000).

n155 *Russell*, 473 U.S. at 142 n.9.

n156 *Supra* text accompanying notes 27-33.

n157 The other provisions are: ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (2000) (permitting suits for plan benefits and to enforce plan rights); ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2000) (permitting suits to enjoin violations of ERISA or the plan and to seek other appropriate equitable relief); ERISA § 502(a)(4), 29 U.S.C. § 1132(a)(4) (2000) (permitting suits to enforce informational requirements); ERISA § 502(a)(9), 29 U.S.C. § 1132(a)(9) (2000) (permitting suits relating to the purchase of annuities to pay plan benefits).

n158 *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

n159 *See Muir*, *supra* note 61, at 391-92 (criticizing ERISA's lack of remedial protection for plan participants and beneficiaries who suffer harm from health care coverage denials).

n160 ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2000).

n161 ERISA Title I, Part IV, 29 U.S.C. Title I, Part IV (2000).

n162 ERISA §§ 401-03, 29 U.S.C. §§ 1101-03 (2000).

n163 ERISA §§ 404-08, 29 U.S.C. §§ 1104-08 (2000).

n164 ERISA § 409, 29 U.S.C. § 1109 (2000).

n165 *Supra* text accompanying notes 143-47.

n166 ERISA § 409(a), 29 U.S.C. § 1109(a) (2000).

n167 *Id.* (emphasis added).

n168 *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 n.8 (1993) (terming the language "artless").

n169 ERISA § 409(a), 29 U.S.C. § 1109(a) (2000).

n170 *Id.*

n171 *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

n172 *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 247 (2000); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999); *Varity Corp. v. Howe*, 516 U.S. 489, 516 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993); *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 214 (1986); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

n173 *Varity*, 516 U.S. at 521; *Russell*, 473 U.S. at 146; see also *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (stating "those provisions amounted to an 'interlocking, interrelated, and interdependent remedial scheme'" (citation omitted)).

n174 *Hughes Aircraft*, 525 U.S. at 447.

n175 *Harris Trust & Sav. Bank*, 530 U.S. at 247 (citations omitted).

n176 *Russell*, 473 U.S. at 146.

n177 *Mertens*, 508 U.S. at 263 ("We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.").

n178 *Harris Trust & Sav. Bank*, 530 U.S. at 251.

n179 *Id.* at 246 (emphasis added; citation omitted).

n180 520 U.S. 510, 512 (1997).

n181 ERISA § 510, 29 U.S.C. § 1140 (2000).

n182 520 U.S. at 514-15.

n183 *Id.* at 516.

n184 *Harris Trust & Sav. Bank*, 530 U.S. at 246.

n185 *Supra* text accompanying note 166.

n186 ERISA § 409, 29 U.S.C. § 1109 (2000).

n187 *Harley*, 284 F.3d at 904.



n188 *See id.*

n189 *Supra* text accompanying note 135.

n190 *Harley*, 284 F.3d at 907 (emphasis added).

n191 LANGBEIN & WOLK, *supra* note 7, at 361-63.

n192 *Id.* at 356-57.

n193 *Challenges Facing Pension Plan Funding: Hearing Before the House Subcomm. on Select Revenue Measures of the House Ways and Means Comm.*, 108th Cong. 10 (2003) (testimony of Steven A. Kandarian, Executive Director, Pension Benefit Guaranty Corporation).

n194 LANGBEIN & WOLK, *supra* note 7, at 365.

n195 *Harley*, 284 F.3d at 907. For a discussion of the import of this language, see *supra* text accompanying note 190.

n196 *Id.* at 906-07.

n197 *Id.* at 907.

n198 And if, for the sake of argument, the breach is not sufficient to constitute injury in fact, then participants and beneficiaries would still have the right to bring suit under a theory of representational standing.

n199 *See supra* Part II.

n200 473 U.S. 134 (1985).

n201 *Id.* at 136.

n202 *Id.*

n203 *Id.*

n204 *Id.* at 137.

n205 *Id.* at 136-37.

n206 *Russell*, 473 U.S. at 139 n.5.

n207 *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983), cert. granted, 53 U.S.L.W. 3203 (U.S. Oct. 2, 1984) (No. 84-9).

n208 *Russell*, 473 U.S. at 148.

n209 *Id.* at 140.

n210 *Id.*

n211 *Id.* (quoting ERISA § 409, 29 U.S.C. § 1109 (2000)).

n212 *Id.* at 140 (quoting ERISA § 409; 29 U.S.C. § 1109 (2000)).

n213 *Id.* at 140 n.8.

n214 Norman Stein, *Enron and its Aftermath: Three and Possibly Four Lessons About ERISA that We Should, but Probably Will Not, Learn From Enron*, 76 ST. JOHN'S L. REV. 855, 873-74 (2002).

n215 473 U.S. at 140.

n216 *Id.*

n217 See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214-15 (2002) (holding equitable restitution but not legal restitution to be available); *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 256 (1993) (deciding that only "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)" are available).

n218 ERISA § 502(a)(3), 29 U.S.C. § 1132 (2000).

n219 Dana M. Muir, *Appropriate Equitable Relief after Great-West v. Knudson*, EMPLOYEE BENEFITS COMMITTEE NEWSLETTER 2 (Am. Bar Ass'n Section of Labor and Employment Law, Chicago, Ill., Fall 2002) (discussing the standards for recovery after *Great-West* and noting that cases of fiduciary breach may be distinguishable).

n220 58 F.3d 1361, 1363 (9th Cir. 1995), later opinion, 1998 U.S. App. LEXIS 38509 (9th Cir. 1998).

n221 *Farr*, 58 F.3d at 1364.

n222 *Id.* at 1363.

n223 *Id.* at 1364.

n224 61 F.3d 1437, 1440 (9th Cir. 1995).

n225 *Id.* at 1445.

n226 See *supra* text accompanying note 211.

n227 *Russell*, 473 U.S. at 140 n.8.

n228 *Id.* at 140, 142 n.9.

n229 *Id.* at 140.

n230 *See id.* at 142 n.9.

n231 *Id.* at 142.

n232 *Id.*

n233 DC plans may hold some assets that have not been allocated to individual accounts. For example, if an unvested participant leaves the plan, that participant's account balance will be forfeited to the plan and held in an unallocated account until it is used to pay plan expenses or reallocated to the accounts of other participants. *See CANAN*, *supra* note 10, at § 7.10.

n234 *See supra* Part II.D.2.

n235 184 F.3d 356 (4th Cir. 1999), *later opinion*, 2000 U.S. Dist. LEXIS 20074 (E.D. Va. Aug. 25, 2000) (deciding fiduciaries had not breached ERISA's standards).

N236 *Smith*, 184 F.3d at 359-60.

n237 *Id.* at 363.

n238 *Id.*

n239 In employee stock ownership plans, suspense accounts hold employer stock between the time the plan sponsor contributes the stock to the plan and it is allocated to participant accounts. For discussions of the use of suspense accounts and the issues they raise in hostile acquisition attempts, see Steven J. Arsenault, *Fiduciary Duties of ESOP Trustees Under ERISA in Tender Offers: The Impact of Herman v. NationsBank Trust Company and a Proposal for Reform*, 3 U. PA. J. LAB. & EMP. L. 87, 93 (2000); Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363, 366-67 (1990).

n240 29 C.F.R. § 2550.404(c)-1(b)(2)(B)(1)(ii) (1992).

n241 *See* Dana M. Muir, *The Dichotomy Between Investment Advice and Investment Education: Is No Advice Really the Best Advice?*, 23 BERKELEY J. EMP. & LAB. L. 1, 11-18 (2002).

n242 *Id.* at 14.

n243 *See* Susan J. Stabile, *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL'Y 361, 376 (2002).

n244 Muir, *supra* note 241, at 13.

n245 *Id.* at 13-14.

n246 Sheena S. Iyengar et al., *How Much Choice is Too Much?: Determinants of Individual Contributions In 401(k) Retirement Plans*, The Pension Research Council 2003 Conference Notebook 37, 40-42 (2003).

n247 *Id.* at 40.

n248 Muir, *supra* note 241, at 15-16.

n249 See Shlomo Benartzi & Richard H. Thaler, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving*, The Pension Research Council 2003 Conference Notebook 76, 77 (2003) (citing research on intended, but unrealized, increases in plan savings rates); Jason Scott & Greg Stein, *Retirement Security in a DC World: Effectively Bridging the Expertise Gap* 16-20 (2003) (unpublished manuscript, on file with this author) (discussing tables showing the effect that immediate and simplified implementation has on adoption of advice).

n250 David Leonhardt, *House Passes Bill to Loosen 401(k) Rules*, N.Y. TIMES, May 15, 2003, at C1.

n251 H.R. 1000, 108th Cong. Pmbl. (2003).

n252 Leonhardt, *supra* note 250, at C1.

n253 See *id.*; Muir, *supra* note 241, at 44-45.

n254 H.R. 1000, 108th Cong. § 105 (2003).

n255 Muir, *supra* note 241, at 35-36.

n256 H.R. 1000, 108th Cong. § 105(a) (2003).

n257 See Dana M. Muir, *The Plan Amendment Trilogy: Settling the Scope of the Settlor Doctrine*, 15 LAB. LAW. 205, 205-07 (1999) (discussing the settlor doctrine for plan amendments).

n258 See *supra* text accompanying note 240.

n259 Muir, *supra* note 241, at 23.

n260 H.R. 1000, 108th Cong. § 105 (2003).

n261 *Id.*

n262 *Id.*

n263 Muir, *supra* note 241, at 51-54.

n264 James H. Walsh, *Federal Regulation of Financial Planners After the Investment Advisers Supervision Coordination Act*, 10 DePAUL BUS. L.J. 259, 282-83 (1998).

n265 Muir, *supra* note 241, at 51.

n266 Susan J. Stabile, *Pension Plan Investments in Employer Securities: More is not Always Better*, 15 YALE J. ON REG. 61, 88 (1998).

n267 H.R. 3692, 107th Cong. (2002); S. 1838, 107th Cong. (2001).

n268 *Supra* text accompanying notes 241-48.

n269 *See, e.g.*, Stabile, *supra* note 266, at 88.

n270 ERISA § 407, 29 U.S.C. § 1107 (2000). The statute also imposes limitations, in some narrow circumstances, on the amount of employer stock that may be held in DC plans. ERISA § 407(b)(2), 29 U.S.C. § 1107(b)(2) (2000).

n271 *See supra* text accompanying notes 24-26.

n272 ERISA § 406, 29 U.S.C. § 1106 (2000).

n273 ERISA's fiduciary provisions do limit the extent to which a plan sponsor can utilize the employer stock held by a DB plan for the benefit of the employee. *See, e.g., Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (deciding in a hostile takeover attempt that the plan fiduciaries must make decisions about the plan's investment in employer securities "with an eye single to the interests of participants and beneficiaries.").

n274 Muir, *supra* note 241, at 15-16.

n275 *Id.* at 13-14.

n276 *See, e.g.*, H.R. 1000, 108th Cong. (2003) (requiring plans to permit diversification out of employer stock after 3 years).

n277 *See supra* text accompanying notes 124-25. For the fiduciary standards to be effective, ERISA must impose sufficient liability for fiduciary breach to discourage breaches and to redress them when they do occur. Whether ERISA's remedial provisions are sufficient for those tasks was, in large part, the focus of Parts II and III of this Article. *See also*, Muir, *supra* note 241, at 38-40 (discussing the potential lack of appropriate remedies to redress incompetent or fraudulent investment advice).

n278 Holden & VanDerhei, *supra* note 4, at 3.

n279 *See supra* text accompanying notes 241-48.

n280 Muir, *supra* note 9, at 1038.

n281 *See id.*

n282 H.R. 1000, 108th Cong. § 105 (2003).

n283 *See supra* text accompanying note 65.

n284 15 U.S.C. §§ 80b-1-80b-18a (2000).

n285 *See supra* text accompanying note 264.

n286 *See* Walsh, *supra* note 264, at 281-83.

n287 Electronic Filing by Investment Advisers; *Amendments to Form ADV, Advisers Act Release No. IA-1897, 73 S.E.C. Docket 595* (Sept. 12, 2000).

n288 Electronic Filing by Investment Advisers; *Proposed Amendments to Form ADV, Advisers Act Release No. IA-1862, 72 S.E.C. Docket 200* (Apr. 5, 2000).

n289 Form ADV is available on the SEC's web site at: <http://www.sec.gov/pdf/fadvpaper.pdf>.

n290 *See* Electronic Filing by Investment Advisers; *Amendments to Form ADV, Advisers Act Release No. IA-1897, 73 S.E.C. Docket 595* (Sept. 12, 2000).

n291 Dana M. Muir, *From YUPPIES to GUPPIES: Unfunded Mandates and Benefit Plan Regulation*, 34 *GA. L. REV.* 195, 195 n.2 (1999) (defining GUPPIES).