

1 of 1 DOCUMENT

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*2 U. Pa. J. Lab. & Emp. L. 391***LENGTH:** 39061 words**ARTICLE:** Fiduciary Status As an Employer's Shield: The Perversity of ERISA Fiduciary Law**NAME:** Dana M. Muir+

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SUMMARY:

... What should be more surprising to those familiar with the standard of fiduciary obligation articulated by Justice Cardozo is that, in each case, the benefit plan actor owed a fiduciary obligation to the employee or retirees vis-a-vis the benefit plans involved. ... While most pension plan assets are held in trust, in the welfare benefit plan context, which includes health care plans, frequently there is no need to establish a trust in connection with the plan because plan obligations are payable from the general funds of the plan sponsor. ... In a defined benefit plan, the pension plan sponsor must fund the plan at whatever level is necessary to pay promised benefits. ... Unpacking benefit plan operation and analyzing issues of asset administration separately from issues of benefit administration increases the transparency of the incentives for opportunistic behavior. ... It also supports the policy of minimizing a plan sponsor's unanticipated fiscal risks associated with ambiguities in benefit plan documents. ... The anti-inurement provision precludes, with few exceptions, assets of a benefit plan from inuring to a plan sponsor. ... Conceptually and most simply, I am advocating that ERISA's principle of ensuring that benefit plan participants receive the benefits promised by their employers be extended to issues of benefit administration. ... While the jurisprudence recognizes the damages available under the first and third clauses, it has neglected to give content to the enforcement of rights clause. ...

TEXT:

[*391]

Justice Cardozo captured the essence of fiduciary obligation when he penned the elegant, and now famous, n1 formulation: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." n2 A fiduciary standard based upon honor is one that rings with the most noble of law's goals: equity, fairness, adaptability, and support of enduring values. And, the law has drawn upon the principles of fiduciary obligation to govern a wide array of its most challenging problems. n3 This [*392] incorporation and adaptation n4 of fiduciary principles has given rise to questions about the scope of fiduciary obligations in various contexts. n5 Only in the realm of private sector employee benefit plans, though, have fiduciaries been able to turn their status as fiduciaries, a status that once required "the punctilio of an honor the most sensitive," n6 into a shield against liability.

Consider the plight of a woman whose employer-sponsored health care plan rejected, as not medically necessary, her physician's recommendation that she be hospitalized during the final phase of her pregnancy. n7 While at home and without nursing care, she lost her unborn child. n8 Or, evaluate the situation of retiring, long-service employees

who were asked to sign waivers indicating that the retirees had reviewed and accepted the applicable benefits and had waived all legal claims concerning the administration of those benefits. n9 Despite the employer's numerous promises, some of them in writing, that the retirees' "health insurance would be paid by [the employer] for life," n10 the employer later imposed substantial co-pays and deductibles as part of the retirees' health care programs. n11 Or, assess the legal claims of retirees whose former employer [*393] moved them, but not their peers, from that employer's retirement and health care plans to new plans. n12 The new plans were sponsored by a recently established joint venture and some of the retirees' benefits were decreased. n13 What criteria did the employer use to select which retirees went to the new plans and which stayed in the plans of that long time employer? The last four digits of the retirees' social security numbers; those whose "last four" were 4254 or lower were assigned to the new plans while those with higher numbers remained in the long-established plans. n14

Anyone who is familiar with basic legal doctrines probably would be surprised to learn that none of the individuals in the foregoing cases had cognizable legal claims. Yet, that is the outcome of each of the cases. n15 What should be more surprising to those familiar with the standard of fiduciary obligation articulated by Justice Cardozo is that, in each case, the benefit plan actor owed a fiduciary obligation to the employee or retirees vis-a-vis the benefit plans involved. n16 Yet, in none of the cases did the courts find that the plan actors had breached their fiduciary duties. n17

Trust law traditionally has used the concepts embodied in fiduciary obligation to protect trust beneficiaries from opportunistic behavior by trustees. n18 The Employee Retirement Income Security Act of 1974 n19 (ERISA) incorporates, both explicitly n20 and implicitly, n21 a broad range of fiduciary principles to protect people who participate in and benefit from private sector employee benefit plans. n22 These protective mechanisms, however, have been turned on their heads in areas ranging from standards of review, n23 to self-interested decisionmaking, n24 the scope of fiduciary activities, n25 and the availability of remedies. n26 In these areas, instead of [*394] imposing high standards of care and loyalty, ERISA's fiduciary provisions actually operate to protect benefit plan sponsors and representatives from liability.

This Article examines the apparently perverse operation of ERISA's fiduciary regime. It begins, in Part I, by considering the enactment and original purpose of the fiduciary provisions, including their origins in, and relationship to, traditional concepts of trust law. Part II explores the administration of modern health care and pension benefit plans, explaining that, for analytical purposes, benefit plan administration should be unpacked into constituent elements of benefit administration and asset administration. Part III shows that the deficiencies in fiduciary protections tend to be concentrated in benefit administration while the fiduciary protections tend to set appropriate standards for asset administration. This is true across all four of the spheres examined.

Part IV suggests that a proper understanding of ERISA's fiduciary regime would recognize the way in which contract and fiduciary principles intertwine. ERISA's drafters imported the fiduciary regime to impose heightened standards of care and loyalty; there is absolutely no evidence that they intended anything less. Commentators, such as Judge Easterbrook and Professor Fischel have shown that contractarian principles lie at the core of the fiduciary relationship. n27 Part IV concludes by proposing an analytical approach, based on these concepts, that is consistent with ERISA's protective goals and with existing statutory language. This approach would permit enforcement of the broad range of rights that arise under the typical benefit plan. In direct contrast to the way the incentives currently operate, the approach suggested here would discourage opportunistic decisionmaking and increase the quality of benefit plan determinations.

I. The Fiduciary Promise

ERISA incorporates three categories of explicit fiduciary provisions: definitional; standard setting; and remedial. In each context the ERISA provisions are based upon the principles developed and utilized in trust law, but with unique aspects intended to address the complexities of private sector employee benefit plans.

A. The Actors

Traditional trust law defines a trustee as "the person holding property [*395] in trust." n28 ERISA's definition of who is a fiduciary encompasses the traditional trustee, but casts a broad enough net to sweep in many others who act vis-a-vis employee benefit plans. Generally, individuals become ERISA fiduciaries whenever, and to the extent that, they have discretion over the assets, management, or administration of a benefit plan or are paid to provide investment advice to a plan. n29

ERISA's fiduciary provisions extend liability beyond that of traditional trust law doctrine in a second way. While most pension plan assets are held in trust, n30 in the welfare benefit plan context, which includes health care plans, frequently there is no need to establish a trust in connection with the plan because plan obligations are payable from the general funds of the plan sponsor. Even without a trust, ERISA will treat an individual as a fiduciary to the extent that the individual has discretion in the administration, management, or assets of a benefit plan or is paid to provide investment advice to a plan. n31 The Supreme Court has confirmed that the fiduciary administration functions encompass such activities as communicating plan terms and choices to plan participants and beneficiaries. n32

Under ERISA's definition of a fiduciary, the scope of fiduciary duty is significantly narrower than under traditional trust law. Unlike traditional trust law, in which each fiduciary is responsible for all fiduciary obligations owed to the trust, n33 ERISA's functional definition of "fiduciary" results in many fiduciaries, each with limited responsibilities. In benefit plans, each fiduciary has a sphere of fiduciary obligation that is limited to the scope of fiduciary powers held by that individual. This allocation of responsibility recognizes the value of specialization in modern-day employee benefit plans where a pension trust may hold millions and even billions of dollars in assets. n34 For example, an individual responsible for giving investment advice, n35 for controlling asset management or disposition, n36 or for making [*396] administrative decisions, n37 will be deemed a fiduciary only to the extent of that individual's sphere of responsibility.

B. The Promise

A second category of fiduciary provisions is that of substantive standards. Trust law imposes a wide variety of obligations on a trustee. A trustee has a duty of loyalty and must act "solely in the interest of the [trust] beneficiary." n38 Whenever a trustee is dealing with the beneficiary on the trustee's own account, the trustee must act fairly and communicate all known material information as well as that information that the trustee should know. n39 The duty of loyalty is further complicated by the requirement that a trustee must be impartial in the treatment of multiple current beneficiaries n40 as well as multiple successive beneficiaries. n41 In investing trust assets, a trustee must comport with the standard of a prudent investor, n42 and to the extent the trust provides specific instructions regarding the propriety of investments, the trustee generally must obey those instructions. n43 While administering the trust, a trustee must act in accordance with a standard of ordinary prudence. If, however, the trustee represents herself as having skills that meet a higher standard the trustee will be held to that higher standard. n44 A trustee also must maintain accounts for the trust n45 as well as furnish "complete and accurate information as to the nature and amount of the trust property" n46 to the beneficiaries of the trust. n47

The drafters of ERISA explicitly mobilized a number of these trust law standards and adopted them into the federal regime of benefit plan regulation. Specifically, the statute sets the general standard of care as that of a prudent person familiar with the benefit plan matters at issue. n48 The [*397] counterpart to the trust law duty of loyalty is found in those provisions requiring 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." n49 The other substantive standards require benefit plan fiduciaries to minimize the risk of large losses by diversifying plan investments n50 and to act in accordance with plan documents. n51

Furthermore, the "prohibited transactions" provisions flatly prohibit specified transactions that involve plan assets. These provisions are broadly drawn to proscribe any transactions between a party in interest, n52 including a fiduciary, and the plan. n53 The prohibitions are so broad that exceptions are necessary to permit normal activities, such as making reasonable payments to related parties for office space and services. n54 The Department of Labor (DOL) has established numerous class exemptions to those prohibitions. The exemptions permit activities such as limited securities transactions and the extension of mortgage financing for residential purchases. n55

C. The Enforcement

The third category of fiduciary provisions is remedial. Traditionally, trust law's flexibility and adaptability have operated to protect beneficiaries and that flexibility has extended to the scope of available remedies. Pre-eminent commentators have explained that, "Equity is primarily responsible for the protection of rights arising under trusts and will provide [*398] a beneficiary with whatever remedy is necessary to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties." n56 Furthermore, the Supreme Court has recognized that courts of equity have the power to award money damages in claims brought against trustees. n57

In comparison, ERISA's civil enforcement scheme specifically permits a variety of parties, including the DOL, another fiduciary, or a participant or beneficiary, to bring suits to enforce fiduciary obligations. n58 Legislative materials dating to the enactment of ERISA thoroughly illustrate congressional concern with protecting plan assets from malfeasance and misuse. Representatives recognized the threat posed by the then-existing abuses of pension plan assets. n59 Other contemporaneous statements indicate that the fiduciary provisions were intended to set high standards for those who have responsibility for benefit plan assets. n60 Similarly, in the view of the Supreme Court, "one of Congress' central purposes in enacting" n61 ERISA was to prevent the "great personal tragedies" n62 of workers whose pension plans terminated without having sufficient assets to pay promised benefits. Not surprisingly then, the scope of relief that may flow to a benefit plan that has suffered a loss is very broad, and includes both equitable and remedial awards. n63

[*399] While broad equitable and remedial awards are available to benefit plans, the scope of recovery available to an injured plan participant or beneficiary is narrowly circumscribed. n64 There is, however, every indication that Congress intended to mobilize the flexible fiduciary framework, and, thus, provide a basis for all appropriate remedies as well as an efficient incentive structure in this arena too. n65 Part III revisits all three categories of fiduciary provisions: definitional; standard setting; and remedial. But, first, it is useful to establish the dichotomy between asset administration and benefit administration.

II. Opportunistic Behavior in Benefit Plan Operation

Commentators, courts, and legislators all have failed to recognize that, in their operation, private sector employee benefit plans revolve around two axes. One axis consists of plan assets, and the other is made up of the payment of benefits. On the one hand, benefit plans must have a source of funds. On the other hand, benefits must be paid to plan participants and beneficiaries according to the terms of the plan. These two areas of operation, asset administration and benefit administration, generate different types of legal claims and require different analytical structures. Thus, benefit plan operation should be unpacked into two constituent elements: administration of assets and administration of benefits. This bifurcation in administration is a key structural factor that lies at the heart of benefit plans; therefore understanding it is integral to the effective regulation of those plans.

A. Opportunistic Behavior in Asset Administration

The drafters of ERISA focused on patterns of abuse in retirement plan assets. The title of the statute itself reflects the emphasis on retirement plans as opposed to health care plans. ERISA, after all, is the "Employee Retirement Income Security Act." n66 The title also demonstrates congressional concern with the security of employer-sponsored retirement plans.

More specifically, the legislative history and events that preceded ERISA reflected an increasing national concern that retirement plans were failing to pay promised benefits. The underlying problem was not that the retirement plans were not being administered according to their terms. n67 [*400] Instead, the perceived deficiencies were two-fold. First, plans contained what were thought to be unduly harsh terms. Second, even where employees met the requirements for benefit eligibility, plans failed to build and maintain sufficient asset reserves to meet their benefit commitments. n68

ERISA addressed the use of harsh plan terms by setting minimum standards for vesting n69 and accruals, n70 and by prohibiting forfeiture n71 as well as alienation of benefits. n72 ERISA also established a variety of measures to deal with the problems of asset shortfalls. Part three of the statute is dedicated to minimum funding requirements, n73 and the Internal Revenue Code contains minimum funding standards as well. n74 As an additional measure of protection for defined benefit plans, n75 Title IV of ERISA governs matters involving plan termination insurance. n76 ERISA was the genesis of the Pension Benefit Guaranty Corporation (PBGC). n77 The PBGC is a governmental corporation that, as of 1997, insured the obligations of approximately 45,000 pension plans that covered about 42 million workers, providing a final layer of protection should any of those plans terminate with insufficient assets to pay benefit obligations. n78

Therefore, minimum funding requirements now obligate sponsoring employers to appropriately fund plans. As a further measure, the PBGC [*401] acts as an insurer of last resort. But, ERISA's fiduciary provisions constitute another critical segment in the regulatory prevention of asset shortfalls. The fiduciary standards and prohibited transactions rules protect the integrity of plan assets. One House report stated the concerns as follows: "Of particular interest... has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of

persons who should be deemed pension "fiduciaries," and the standards of accountability they shall be governed by in the management and disposition of pension funds." n79

As further evidence of the extensive concern with asset protection and funding issues, many commentators point to Studebaker's closing of its Indiana plant and the related termination of its underfunded retirement plan as one of the events that drew congressional attention to the problem of retirement plan underfunding and ultimately led to ERISA's enactment. n80 The legislative history shows that the problem of plan underfunding was thought to be widespread and severe. One legislator stated that:

One of the principal reasons that many workers have failed to receive their pension benefits is that, because of shut-downs or some other reason, pension plans have terminated without sufficient assets to meet the vested benefits of plan participants....

[A Department of Treasury and Labor study] indicated that during 1972 alone more than 15,000 pension plan participants lost retirement benefits because their pension plans terminated without sufficient assets to meet all plan obligations. n81

Numerous factors contributed to the phenomenon of underfunded retirement plans. The sponsorship of private sector employee retirement plans was, and remains, a voluntary matter to be determined between an employer and its employees. n82

Prior to ERISA, no state or federal law imposed any funding [*402] requirement on those retirement plans. Therefore, employers could simply choose to leave plans unfunded and pay benefit promises from current assets, if enough assets were available, as the promises became due. n83 Alternatively, an employer might fund its plan for current obligations as those obligations were earned by the employees, but fail to provide funding for promised grants of prior or past service credit. n84 And no legal requirement existed to ensure that any funds the employer did choose to set aside to meet future plan obligations were held in trust. n85

Other, even more nefarious, actions also contributed to funding problems in some plans. For example, one Senate subcommittee investigated George Barash, who had founded two unions sited in New Jersey. n86 The subcommittee discovered that, through self-dealing and manipulation of union benefit funds, Mr. Barash expected to become a multi-millionaire. n87 He had charged the plans "huge consulting fees" n88 for administrative services his own firm provided to the plans. n89 Perhaps his most aggressive scheme was the transfer, as part of the plans' liquidation, of four million dollars in plan assets to offshore charitable corporations. n90 The principal shareholder of the charitable corporations was none other than Mr. Barash. n91 Despite these activities, nothing Mr. Barash had done violated any laws. n92

Whether the plan funding deficiencies were due to overly optimistic business forecasts, acceptance of risk by employees, malfeasance, or other factors, it would not necessarily follow that the underfunding would spur a national policy debate and, eventually, the enactment of legislation with ERISA's scope. Commentators assert that the specter of massive pension plan defaults drew the attention of policy makers, at least in part, because the potential defaults implicated the status of the federal Social Security n93 [*403] program. n94 Traditionally, the theory underlying the Social Security system has been that it should provide a minimal level of financial support for superannuated individuals. n95 However, the tripartite theory of retirement income also incorporates two other sources of support: individual savings and private sector pension plans. n96 The fear at the time seems to have been that substantial numbers of private sector employer pension plans might fail to provide promised benefits, thus causing legions of Americans to lose one of the three expected streams of retirement income. In response, disappointed retirees might then seek expansion of the benefits provided by Social Security. n97

In addition to the pressures on the Social Security system, even direct national intervention and governmental assumption of the liabilities of defalcating plans would not have been unprecedented. Instead of increasing Social Security benefits, an alternative method of redressing the lost benefit expectations would have been for the national government to have assumed the obligations of failing private sector pension plans. While such a notion might seem far-fetched in today's regulatory climate, that is exactly what happened during the 1930's when the government took over the pension plans of the railroads. Aging workforces and declining business revenues had threatened the retirement income expectations of hundreds of thousands of railroad workers. n98 The government took control of the railroad plans, assumed

the unfunded obligations, and, on an ongoing basis, consolidated the plans with a substitute Social Security program. n99 To this day, the railroad retirement system remains a separate, and nationalized, program. n100

[*404] Thus, at the time of ERISA's enactment, many of the perceived threats were tied to the possibility that plans might terminate with insufficient assets to pay promised benefits. As a result, legislators focused on ensuring that employers sufficiently fund their plans and preventing the misuse of plan assets. First, the minimum funding and PBGC measures addressed the funding issues. Second, in order to protect against misuse of funds, the drafters incorporated measures requiring that funds held by a benefit plan must be held in trust or in some other protected mechanism, assets must be appropriately invested, and any asset transactions entered into on behalf of a plan must lie within parameters established by the fiduciary and prohibited transactions provisions.

In contrast to the demonstrated concern with the funding and proper use of retirement plan assets, issues of benefit administration in retirement plans received relatively little legislative attention, and health care plan matters received almost no consideration beyond investigation into self-dealing and malfeasance. n101 Given the historical patterns of default on benefit expectations, though, the lack of detailed debate accorded to regulation of benefit administration is understandable. Plan defaults like that of Studebaker drew public attention because thousands of former employees lost some or all of their expected pension benefits in a short period of time. n102 To make matters worse, many older workers lost their jobs. This left them without any current source of income as well as without their expected future retirement benefits. n103

B. Opportunistic Behavior and Benefit Administration

In comparison to these large scale defaults by retirement plans, squabbles between an employer and an employee over the calculation of a promised benefit might have seemed like small matters. And though data are not available, relatively few of these disputes may have occurred. After all, the majority of those covered by plans appear to have been denied benefits because of stringent vesting requirements or lack of adequate plan funding. n104 So long as sufficient assets exist and participants know how their retirement benefits will be calculated, one might expect that few issues of benefit administration should arise under a pension plan.

Under normal circumstances, it is a fairly simple matter to determine the amount of a plan participant's benefit entitlement. In a defined benefit [*405] plan, a participant's benefit is determined by the formula specified in the plan. n105 In a defined contribution plan, the calculation is even simpler: a participant is entitled to what is in that participant's plan account. n106 The difficulties tend to occur only in extraordinary circumstances. n107 As a threshold matter, however, a pension plan must have either the assets or a source of assets to pay its benefit obligations. Prior to ERISA, it was the availability of assets, not the calculation of obligations, that represented the most significant barrier to payment of plan benefits.

In short, there is no indication that problems with benefit administration were thought to represent the same level of threat as problems of asset administration. Although benefit administration was not Congress's main concern, the regulatory framework of ERISA does contemplate and address potential issues involving benefit administration. The definition of who is a fiduciary and the statutory standards for fiduciary behavior encompass matters of plan administration. n108 In addition, ERISA imposes significant disclosure obligations, many of which run in favor of plan participants. n109 These provisions ensure that participants receive enough information regarding their plan benefits to allow them to understand how their benefits should be calculated. Every employee benefit plan must contain a claims and appeals procedure that meets minimum standards. n110 This means that participants have a mechanism through which to gain information about the reasons for benefit denials and to pursue their claims.

Thus, the statute clearly evidences an intent to mobilize the fiduciary framework to address matters of benefits administration. And, while the legislative consideration given to the application of the fiduciary framework in this context was less extensive than that given to issues of asset administration, a careful review of the record shows that the enacting Congress fully intended that those actors involved in benefits administration be governed by the fiduciary concepts of heightened duties [*406] of care and loyalty. n111 ERISA's duty of care and its version of the duty of loyalty apply without distinction to matters of benefit and asset administration. n112 In fact, the scant record of historical problems in benefits administration may actually help explain the congressional decision to rely on a fiduciary regime to provide participants and beneficiaries with a full range of protections against opportunistic benefit administration decisions. Because of its widely applicable, flexible, and adaptable nature, a fiduciary regime could be relied upon to adapt to changing benefit plan typology and practice. As benefit plans changed over time, however, the judiciary has failed to recognize the flexibility Congress built into the regulatory structure through adaptation of fiduciary principles.

While pension plans raise asset concerns, prompting Congress to heavily regulate their terms and funding, health care plans are exempt from much of ERISA. n113 Health care plans are, however, subject to the reporting and disclosure, fiduciary, administration, and enforcement provisions. n114 The issues that currently plague health care plans, though, have proven to be very different from the problems of asset administration that so concerned ERISA's drafters. In a health care plan typically no trust exists to hold assets; instead claims are paid through an insurance program or, in the case of a self-funded plan, on a current basis from the general assets of the employer. n115 Therefore, diversification of plan investments and theft of plan funds do not tend to be frequent problems. Plan actors have little chance to engage in opportunistic behavior vis-a-vis plan assets when funds are not identified to the plan, much less invested for the future payment of benefit claims.

This does not mean, however, that health care plans do not give rise to opportunistic behavior by plan actors. Instead, the problematic behavior that has developed under health care plans and that has gained widespread attention in recent years is different in character than what occurred in pension plan operation prior to ERISA. Rather than issues of asset administration, health care plans spawn issues of benefit administration. Unlike pension plan benefits, health care eligibility determinations are individualized and do not reduce to neat formulae. Treatment needs are based on the unique health factors of individual participants and the recommendations of their physicians. Nor are disease and treatment patterns stable and reasonably predictable over time as are the factors, such as compensation, that underlie pension benefit obligations. Indeed, the [*407] pace of medical advancement and the continuing development of experimental treatments cause great difficulty for health plans, which need to determine whether to cover new and expensive medical interventions. n116

Traditionally, health care plans have provided that they would cover medically necessary treatment that is not experimental or investigational. n117 As clear as this statement might seem, it is not necessarily a simple question for a plan representative to determine whether it is medically necessary for a beneficiary to receive thirty days inpatient treatment for alcoholism. n118 Consider the difficulty of the decision maker faced with the question of whether a patient's chest pains meant it was medically necessary for him to see a cardiologist even though he was only forty years old. n119 Or step into the shoes of the managed care representative who had to determine whether it really was medically necessary for a plan participant to receive the specialized heart surgery that was available only outside of the plan's normal service area. n120 Finally, should the reviewer have decided it was medically necessary for Florence Corcoran to be hospitalized during the final portion of her pregnancy, or was it enough to provide significant amounts of in-home nursing care? n121 In hindsight, each of these determinations eventually resulted in a death that may have been prevented or delayed had a different ex ante decision on medical coverage been reached.

Under the current regulatory scheme, substantial economic incentives may motivate opportunistic decisionmaking in determinations of eligibility for disputed plan benefits. The plan sponsor of a pure self-funded health care plan saves every cent of a denied claim because authorized claims are paid from the sponsor's general funds; the economic incentives are similar in many pension plans. In a defined benefit plan, the pension plan sponsor must fund the plan at whatever level is necessary to pay promised benefits. Therefore, the plan sponsor realizes an indirect savings from plan denials. And, whether the context is a health care or a pension plan, even an [*408] unrelated and seemingly independent professional benefits administrator is likely to face implied or explicit pressure from the plan sponsor to minimize claims experience. The only real difference between pension and health care plans is that the benefit formulae in pension plans tend to be less subject to ambiguity and, in that way, offer less leeway for opportunistic benefit determinations.

It is unclear to what extent reputational effects may constrain opportunistic behavior in disputed matters of benefit administration. Professor Langbein has argued that these types of benefits determinations occur over long time periods and involve repeat players. n122 Therefore, he argues plan sponsors and the administrators they hire typically "have strong incentives not to acquire a reputation for sharp practice in handling benefit claims...." n123

Professor Langbein's argument may have validity in the pension arena where benefit criteria are generally applicable across the participant population. However, countervailing factors, particularly in the health care plan context, decrease the reputational cost that Professor Langbein relies upon to limit opportunistic behavior. As noted above, medical benefit claims tend to involve individualized determinations. Because of the vast array of medical problems faced by plan participants, the range of treatment options, and the pace of scientific progress, denial of any specific claim may not cause concern in the general participant populations. This is especially true where the denials involve claims for rare maladies, those with social stigmas attached, those likely to occur only in a limited population group, or those that, for some other reason, fail to register with the general participant population as a type of claim they might experience in the future. Similarly, the general tendency of individuals to discount the possibility that they will contract a terminal dis-

ease, such as cancer, may reduce the implied threat represented by denials of access to expensive treatments such as autologous bone marrow transplant. n124

[*409] Furthermore, even Professor Langbein recognizes that there are situations in which the long term, repeat player constraints fail to operate effectively. In an article co-authored with Professor Fischel, he admits that issues of benefit administration "often arise when the incentives of the long term relationship are attenuated." n125 He gives as an example the heavily litigated issue of an employer's obligation to pay severance plan benefits when a business unit is sold and employees begin working for the new employer. n126 But the point is really more general: whenever an employer or other plan-related entity or individual can benefit at the expense of plan participants and beneficiaries, there will be an incentive for opportunistic behavior. The repeat player constraints that would otherwise militate against such opportunistic behavior are diminished by short-term financial or competitive pressures, individualized treatment needs, and lack of employee cohesion.

To summarize the issues in terms of the two categories of plan operation, the types of opportunistic behavior that occur in asset administration differ significantly from the types of opportunistic behavior that occur in benefit administration. Prior to ERISA, pension plan actors tended to act wrongfully at the aggregate level and with respect to the corpus of the trust. The specific behaviors involved inadequate funding, making inappropriate investments, or self-dealing. As a result, the congressional debates focused on the fundamental problem of asset inadequacy. In contrast, the opportunistic behavior in benefit administration tends to occur at the level of the individual participant. n127

Whether the issues involve individualistic benefit determinations, misrepresentations of eligibility, or wholesale changes in plan terms, the issues of benefit administration always are grounded in the benefit plan documentation. Unpacking benefit plan operation and analyzing issues of asset administration separately from issues of benefit administration increases the transparency of the incentives for opportunistic behavior. It [*410] also provides a basis for identifying and explaining the reasons underlying the judiciary's flawed approach to ERISA's fiduciary scheme.

III. The Distinctions in Fiduciary Analysis

This Part shows that ERISA's fiduciary provisions currently operate to protect employers and other actors who control plan decisionmaking. This is counter-intuitive to the usual principle that fiduciary standards operate in favor of trust beneficiaries. This Part specifically examines the operation of ERISA's fiduciary provisions in four different spheres: deferential review; self-interested fiduciaries; the definition of a fiduciary; and remedial restrictions. The unifying thread tying together the unusual application of fiduciary concepts in these areas is that the problematic situations tend to arise in issues of benefit administration, not asset administration.

A. Deferential Review

As explained above, one of the determinative factors of ERISA fiduciary status is the presence of discretion in decisionmaking. n128 Ironically, although the presence of discretion may mean that a plan actor is a fiduciary, that same discretion often protects a fiduciary's decisions from serious scrutiny. The relevant jurisprudence has established that, when a plan document reserves discretion to a fiduciary decision maker, the fiduciary's decisions will be reversed only if they are found to be arbitrary and capricious. n129 Even the decisions of a self-interested fiduciary frequently receive some level of deference. n130

The deference routinely accorded to those who make benefit decisions is an outgrowth of the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*. n131 Oddly enough, in that case the Court actually required that a *de novo* standard be used to review an employer's determination of benefit eligibility. n132 After selling its plastics division to Occidental Petroleum, Firestone refused to pay termination benefits to its former employees whom Occidental hired. n133 Firestone's termination plan provided for payment of benefits in the case of "a reduction in work force," but Firestone construed that plan provision as not encompassing the [*411] personnel changes that occurred as a result of the sale of the division. n134 Former Firestone employees brought suit under ERISA section 502(a)(1)(B), which permits plan participants or beneficiaries to sue to enforce rights due under a plan, to seek a declaratory judgment of prospective benefit entitlement under the plan, or to obtain benefits promised by a plan. n135

The Supreme Court granted certiorari in order to resolve a conflict among the circuit courts of appeals on the proper standard of review to be applied to a benefit determination made by a plan decision maker. n136 After rejecting the rationale of those circuits that had analogized ERISA benefit actions to suits brought under the Labor Management Relations Act, n137 the Supreme Court immediately looked to trust law principles as a source of guidance. n138 Firestone's termination benefit plan did not explicitly grant Firestone the right to construe ambiguous plan terms. n139

The Supreme Court distinguished between situations where the terms of a trust grant interpretative discretion to the plan trustee, in which case a deferential standard of review is appropriate, n140 and the instant case, in which plan determinations should be reviewed under a de novo standard. n141 In an article published shortly after the Firestone decision, Professor Langbein argued that the Court misunderstood basic trust law principles. n142 According to Professor Langbein, the demarcation line in trust law is between trusts with explicit provisions denying discretion to the plan trustee, and all other trusts. Where the trustee is denied discretion, the trustee's decisions are not accorded deference. In all other trust cases, however, trustees are treated as having discretion to interpret the terms of the trust. n143 Firestone's trust existed in the middle ground where the documents neither explicitly grant nor deny discretion to the trustees. In Professor Langbein's view, under traditional trust law, a trustee, such as Firestone, typically would have had discretion to interpret ambiguous plan [*412] terms. n144

For present purposes though, the critical factor is that the Supreme Court grounded its rationale on the terms of the benefit plan. Thus, the Firestone decision appears to permit plan sponsors to attain a deferential standard of review for benefit decisions by including plan language that reserves deference to the plan administrator. n145 Not surprisingly, in the years following Firestone, the practice has been for plans explicitly to reserve discretion to their plan decision makers. n146 When a plan contains such a grant of discretion, the applicable standard of review for benefit determinations is the arbitrary and capricious standard. n147

More precisely, the effect of drafting plan documents explicitly to grant interpretative discretion to decision makers has come to be a complex amalgam of shield and sword. Discretion is the touchstone of ERISA's fiduciary definition. Therefore, an explicit grant of interpretative discretion will ensure that the grantee is a fiduciary to the extent of the scope of the grant. Under traditional conceptions of fiduciary obligation, individuals who undertake actions connected with a benefit plan might prefer to avoid direct grants of discretion, and thus, to avoid fiduciary status. n148 After all, trust law principles imply that the actor's fiduciary status would cause the actor to owe a very high level of obligation to plan participants and beneficiaries. Any rational decision maker could be expected to be concerned about a standard requiring "the punctilio of an honor the most sensitive." n149

However, in fiduciary decisions involving matters of benefit administration, the Firestone standard severely circumscribes the true nature of the protections accorded to participants and beneficiaries. As I drew the parameters of the distinction between benefit administration and [*413] asset administration, n150 decisions of benefit administration determine basic eligibility for benefits as well as the quantity of benefits owed to participants and beneficiaries. Unlike the usual trust situation, the benefits are not the result of a gratuitous transfer. Instead, the participants have exchanged their labor in return for benefits of a certain type and at established levels. n151 But, in benefit administration the typical question is one of plan interpretation. And in those situations, it is the plan fiduciary who is called upon to construe the plan instrument. Where the plan explicitly grants interpretative discretion to the fiduciary, the Firestone standard frequently results in acquiescence to any reasonable construction made by the fiduciary. n152

The result of explicitly granting discretion, then, is to accord great power to the fiduciary as well as to protect the fiduciary's benefit decisions from searching review. In unanticipated or genuinely ambiguous circumstances, as well as in any situation not addressed specifically and unequivocally in the plan, the fiduciary has the right to determine the existence and scope of the plan's obligations to participants and beneficiaries. Once made, the fiduciary's determination will be reviewed by the courts only for abuse of discretion. The incentives are such that this combination of power to interpret and protection from serious scrutiny might be expected to encourage the drafting of ambiguous plan documents and the avoidance of specificity in benefit obligations.

If discretion and deference are, in fact, the norm in trust law, n153 one might ask why it is not appropriate for plan sponsors to achieve discretion and deference through the incorporation of explicit plan terms. After all, Firestone's requirement that discretion be incorporated into the plan [*414] ensures that participants and beneficiaries are on notice as to the scope of authority to be exercised by plan fiduciaries. To the extent traditional trust law uses discretion and deference as the default standards, it fails to take even this step of ensuring notice to legally unsophisticated trust beneficiaries. Thus, the existing employee benefit jurisprudence actually provides more protection to plan participants and beneficiaries than trust law does to beneficiaries.

In traditional trust law, however, other controls operate to protect against opportunistic fiduciary behavior, particularly in the case of self-interested fiduciaries. The next sub-part examines the comparative lack of effective controls for dealing with self-interested fiduciary behavior in the context of benefit plan fiduciaries. Again, the problematic determinations are those that occur in the course of benefit administration.

B. Self-Interested Fiduciaries

While traditional trust law discourages self-interested trustees, n154 ERISA explicitly allows agents of plan sponsors and of other fiduciaries to act as ERISA fiduciaries. n155 A justification offered for ERISA's approach is that unless employers are permitted to exercise the control that flows from designating their own agents as plan fiduciaries, employers will be very reluctant to sponsor benefit plans. n156 The increased cost that might result from impartial decisionmaking is a risk that would discourage sponsorship. n157

Embedded in this explanation, though, is the recognition that conflicted fiduciaries may be expected to act counter to the best interests of participants and beneficiaries. This expectation is in obvious tension with ERISA's exclusive benefit rule that requires 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...." n158 The Firestone Court appeared to recognize the potential for perverse incentives and the harm that might flow from [*415] evaluating the interpretative decisions of such self-interested fiduciaries under an abuse of discretion standard. In one sentence at the very end of its analysis of the appropriate standard of review, the Court anticipated the problem of opportunistic behavior by self-interested fiduciaries. n159 But, the only guidance the Court provided is contained in its statement that a "conflict [of interest] must be weighed as a "factor in determining whether there is an abuse of discretion." n160

The post-Firestone jurisprudence has struggled with the question of how to evaluate self-interested fiduciary decisionmaking. The question for present purposes though is whether, in the context of benefit administration, the current legal regime sufficiently constrains opportunistic behavior associated with self-interested fiduciary decisionmaking. An alternative way of stating the problem is to ask whether the jurisprudence appropriately balances the explicit acceptance of self-interested fiduciaries with the protection ERISA's drafters provided to benefit plan participants and beneficiaries through the substantive standard of the exclusive benefit rule.

The answer to this question depends, in large part, upon two constituent issues. First, it is necessary to identify what constitutes a conflict of interest and the extent to which any given conflict threatens to bias benefit administration. Second, it is critical to determine how a given conflict, once identified, should affect the standard of review against which the interested fiduciary's decision will be measured.

Focusing in detail on the standard of review, the predominant approach that has developed is known as the sliding scale approach. This sliding scale approach is the approach that follows most literally from the Supreme Court's language in Firestone that a "conflict must be weighed as a "factor in determining whether there is an abuse of discretion." n161 Under sliding scale review, the arbitrary and capricious standard is used to evaluate the decisions of even self-interested fiduciaries. The court, however, considers the self-interest of the fiduciary as a factor in determining whether the fiduciary's plan construction constitutes an abuse of discretion. n162 In essence, this method adopts the approach advocated by [*416] Judge Posner even before the Firestone decision. Judge Posner had argued that the arbitrary and capricious standard is flexible enough to accommodate situations of conflicted decision makers. n163 In his view:

Flexibility in the scope of judicial review need not require a proliferation of different standards of review; the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees' decisions - more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is. n164

Yet, while perhaps formally avoiding a "proliferation of different [*417] standards of review," n165 the sliding scale utilized in the Posner approach means that the available standards for measuring fiduciary conduct in benefit administration are limited only by the number of differing degrees of conflicts of interest. Perhaps the range of standards is not infinite, but neither is the range narrow. The flexibility of this approach leads to unpredictability in standard setting. To determine in advance the standard against which their conduct will be measured, self-interested fiduciaries would need to be able to predict both the weight a reviewer would attach to a conflict as well as the way in which that reviewer would modify the arbitrary and capricious standard to account for the conflict. Given the flexibility of the standard and the imprecision inherent in determining the scope of a conflict, the potential for unpredictability is writ large.

One possible response to such unpredictability is that a self-interested fiduciary will become overly cautious, thus overestimating the scope of the conflict, the level of increased scrutiny to which the fiduciary's decision will be sub-

jected, or both. In the short-term, this type of error might seem harmless, and perhaps even desirable, because it could be expected to raise the level of protection accorded to participants and beneficiaries. After all, to the extent self-interested fiduciaries overestimate the stringency of the standard of review against which their decisions will be measured, those fiduciaries would be less likely to engage in opportunistic behavior and more likely to construe plan ambiguities in favor of participants and beneficiaries. At the same time though, unpredictability that causes a fiduciary to err on the side of caution undercuts the primary justification offered for the very existence of ERISA's explicit acceptance of self-interested fiduciaries. n166 Those who support the concept of self-interested fiduciaries would be expected to argue that, over the long term, the decrease in a plan sponsor's control over plan decisionmaking would negatively affect rates of benefit plan sponsorship.

On the other hand, to the extent self-interested fiduciaries underestimate the stringency of the review by which their determinations will be judged, they could be expected to construe plan ambiguities in favor of the plan sponsor. In this latter set of circumstances, the risk to plan participants and beneficiaries is the risk of opportunistic behavior. This risk is consistent with the decision to permit self-interested fiduciaries. It also supports the policy of minimizing a plan sponsor's unanticipated fiscal risks associated with ambiguities in benefit plan documents. But, opportunistic decision-making fails to honor the concept of benefit plans as deferred compensation systems. From the perspective of participants and beneficiaries whose benefit expectations are not fulfilled, opportunistic [*418] benefit denials are inequitable and an abuse of the power differential between employees and plan sponsors. And, opportunistic behavior by plan decision makers is inconsistent with the substantive standard of the exclusive benefit rule.

Similarly, reviewers may err by establishing a standard of review that either overestimates or underestimates the scope of a fiduciary's self interest. First, reviewing authorities might either underestimate the nature of conflicts of interest, or fail to sufficiently increase the stringency of the arbitrary and capricious standard of review to account for such conflicts. Then, self-interested fiduciary decision makers will be inadequately constrained from engaging in opportunistic plan construction that inappropriately narrows the scope of the plan's benefit obligations. Second, where reviewers err on the opposite side and utilize an unduly harsh standard of review, some would argue that the plan sponsor's choice of a fiduciary would be negated and that, in the long term, incentives for plan sponsorship will decline.

An alternative to the sliding scale approach for reviewing plan interpretations by self-interested fiduciaries has come to be known as the "presumptively void" approach. n167 This multi-part formulation was developed by the Eleventh Circuit and requires a plan participant or beneficiary to demonstrate that the fiduciary who made the determination of benefit eligibility acted under a "substantial conflict of interest." n168 Once the participant or beneficiary makes that showing, the burden "shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest." n169 At the second level then, this approach could be expected to have an effect that is strongly protective of participants and beneficiaries. The result of the burden shifting is to presume the fiduciary's interpretation to be void unless the fiduciary can demonstrate that the conflict of interest did not affect the decision regarding benefit entitlement.

However, the presumption arises only after the participant or beneficiary has made the initial showing of fiduciary self-interest. n170 To obtain a standard of review more stringent than the most deferential version of the arbitrary and capricious standard requires a higher burden of proof by the participant or beneficiary claimant. This burden is in addition to the [*419] already significant requirement that evidence of an apparent conflict be presented: a claimant who has been denied benefits must show, as a threshold matter, both the existence of a conflict of interest and that the conflict caused a breach of fiduciary duty. n171 The causation requirement is particularly odd since the participant or beneficiary is simply making a claim for benefits due under a plan. The success of this claim should be independent of a showing of fiduciary breach. n172 Furthermore, even after a claimant meets these severe threshold prerequisites, only in the Eleventh Circuit will the fiduciary's decision be presumed invalid. n173 While other circuits using a multi-part approach sometimes purport to base their analysis on the Eleventh Circuit's formulation, n174 they actually utilize a standard of review that is more deferential to the fiduciary's interpretation than the presumptively void approach. n175

In my view, the approach that most completely ignores the inherent incentives for opportunistic behavior when self-interested fiduciaries interpret plan provisions while performing their duties of benefit administration, is the approach that combines a harsh gateway analysis with the ambiguity of the sliding scale "standard." Under this formulation, a participant who simply alleges a lack of impartiality will not avoid [*420] application of the arbitrary and capricious standard of review. n176 Instead, as is usual in the multi-step approach, the claimant must present evidence both of a conflict and that the conflict caused the fiduciary to seriously breach a fiduciary obligation. n177 But, under

the most fiduciary-friendly approach, by meeting this high hurdle n178 all the claimant has achieved is to have the fiduciary's decision reviewed according to a sliding scale adjustment to the arbitrary and capricious standard. n179

From a more conceptual viewpoint though, whether a reviewer utilizes a sliding scale approach or any type of multi-step approach, every analysis granting a more stringent review than the most deferential arbitrary and capricious standard is dependent upon an initial determination that a conflict of interest exists. After all, even under the sliding scale analysis, a reviewer must assess the existence as well as the extent of the alleged conflict in order to determine how far up or down the arbitrary and capricious scale to slide. The existence and importance of conflicts of interest in determining standards of review highlights the reason for distinguishing among broad categories of conflicts.

While the classifications are not air tight, the distinction between benefit administration and asset administration has significant currency in this context. The fiduciary provisions have proven to be particularly effective when self-interested fiduciaries become involved in asset administration. As I demonstrated above, n180 Congress' specific attention to the problems of inadequate plan funding and misuse of plan assets can be seen throughout the relevant fiduciary provisions. Significant protections, like the requirement that fiduciaries diversify investments, n181 deter opportunistic behavior. The exclusive benefit rule, n182 the prudence requirement, n183 and the mandate that fiduciaries act in accordance with plan documents to the extent not inconsistent with the statutory requirements, n184 restrain fiduciaries from engaging in conduct, vis-a-vis plan assets, that was problematic prior to ERISA.

Given these standards, conflicts of interest in asset administration that [*421] result in a plan actor utilizing plan assets for the benefit of the actor rather than for the benefit of participants and beneficiaries, tend to be readily identifiable and are proscribed. For example, a fiduciary may not use plan assets to purchase employer stock in order to defeat a tender offer. n185 In addition, the DOL investigates these types of fiduciary wrongdoing in asset administration, as evidenced by the 1998 indictment of a 72-year-old business owner who allegedly embezzled all of the assets from his firm's pension plans. n186

The prohibited transactions provisions serve as another constraint on self-interested fiduciary behavior in asset administration. n187 It is generally agreed that the prohibited transactions provisions, imperfect as they may be, n188 exist to counter the perceived risk in self-dealing with plan assets. n189 The absolute prohibitions avoid the uncertainties and litigation that might result from permitting asset transactions but subjecting them to a fairness standard or similar review. n190

However, the fiduciary principles that have been so successful in constraining self-interest in the asset administration context have proven ineffective in setting predictable and protective standards in benefit administration. In the context of asset administration, the general fiduciary obligations and the specific prohibited transactions provisions ensure that fiduciaries, including self-interested fiduciaries, are held to a very high standard of obligation. But, in benefit administration the deferential arbitrary and capricious standard of review tends to trump the substantive exclusive benefit standard. If a fiduciary arranges for a kick-back of plan assets, for example, the fiduciary's judgment in entering into the transaction will not be reviewed according to the arbitrary and capricious standard. Instead, such an action is explicitly prohibited by the prohibited transactions provisions. In contrast, conflicts of interest in benefit administration are more complicated. In the context of benefit administration, a plan sponsor need only reserve discretion to its plan decision maker in order to meet the basic requirement for arbitrary and [*422] capricious review. Then, questions of plan interpretation will go to the fiduciary and any review is likely to be quite deferential. The only real question is how a conflict of interest affects the analysis and the effect of the exclusive benefit requirement.

The Firestone Court appeared to indicate that when benefit administration is undertaken by self-interested decision makers, those decisions should be examined under a stricter than normal standard of review. However, the subsequent jurisprudence has not successfully developed a satisfactory approach to deal with these issues. Determining the scope of a conflict of interest, and how to account for that conflict, is critical to setting an appropriate standard of review. In the realm of benefit administration though, the necessary determinations of the existence and scope of a conflict of interest can be extraordinarily complex.

There is a sense that every employee benefit plan can be expected to benefit the entity that sponsors the plan. n191 Depending upon its structure, a benefit plan may enable an employer to increase employee retention rates n192 or to encourage voluntary workforce reductions. n193 It may also enable the employer to capture economies of scale and efficiencies associated with administrative specialization to decrease the cost of benefits to employees, n194 or to reduce compensation costs by splitting the tax subsidy accorded to qualified benefit plans between the employer and the participating employees. n195 Employers will be unlikely to voluntarily sponsor benefit plans unless they can realize some advantage from the sponsorship. n196 In addition to this desirable employer self-interest, which serves as the

basis for voluntary plan sponsorship, post-Firestone courts have struggled to balance plan sponsors' legitimate interest in retaining interpretative power over ambiguous plan provisions with protections for plan participants.

ERISA's anti-inurement provision imposes a specific constraint on the ability of a plan sponsor to act in a self-interested manner vis-a-vis plan assets. The anti-inurement provision precludes, with few exceptions, assets [*423] of a benefit plan from inuring to a plan sponsor. n197 But, even here, the realities of benefit plan operation mean that employers accrue advantages from the plans they sponsor. In its 1996 decision in *Lockheed Corp. v. Spink*, n198 the Supreme Court recognized and accepted, as consistent with ERISA, incidental gains to plan sponsors. The Court stated:

Among the "incidental" and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily. n199

As a matter of clarification, a distinction must be made between conflicts of interest between the plan sponsor and the plan participants or beneficiaries, and the types of conflicts that arise among plan participants and beneficiaries. Plan fiduciaries do have an obligation to balance the diverse interests of individuals or subgroups of participants and beneficiaries. n200 But, facing difficult decisions regarding the proper balance to strike among the conflicting interests of those to whom one owes fiduciary obligations is quite different from being in a position to benefit oneself or those to whom one is beholden through other relationships, at the expense of plan participants and beneficiaries. To distinguish them from the former class of conflicts of interest, one commentator has designated this latter category of concerns as "conflicts of obligation." n201

The focus of this Article is on conflicts of interest. Though a variety of doctrinal approaches have been developed to limit the opportunistic behavior expected to result from conflicts of interest by fiduciaries involved in benefit administration, none of the methods of analysis provides systematic or predictable protections to plan participants and beneficiaries. A sliding scale approach is flexible enough to accommodate any level of conflict, but it is this very flexibility that results in unpredictability. The unpredictability is as likely to discourage plan sponsorship by overprotecting participant and beneficiary interests as it is to underprotect those interests by failing to discourage opportunistic behavior. In contrast, the gateway approach is somewhat more defined in its parameters. However, as applied by most circuits, it relies upon the sliding scale approach at the second step. Thus, it does not enhance [*424] predictability of outcomes.

In addition to unpredictability, deference to decisionmaking by conflicted fiduciaries risks negating the substantive standard of the exclusive benefit rule. As benefit plans and the jurisprudence have evolved, this concern is particularly relevant in benefits administration. Particularly in the health care context, it is not possible for benefit plans to anticipate and address each potential question of entitlement. Thus, decisions regarding benefit eligibility frequently turn upon the construction of a general plan term, such as whether services are "medically necessary" or "experimental." The short-term economic incentives militate in favor of opportunistic determinations. Fiduciaries, even self-interested fiduciaries, are currently able to use the shield of the arbitrary and capricious standard, in some modified form, to protect their determinations from searching scrutiny.

C. The Fiduciary Definition

On its face, ERISA utilizes an expansive approach to determine who is a benefit plan fiduciary. As already shown, the definition of a fiduciary includes each plan actor with discretion over plan management or administration, every person who has responsibility for the management or disposition of plan assets, and anyone providing or responsible for providing ongoing investment advice for a fee. n202 This definition has cast a broad net and, in its application, the net has encompassed a variety of actors with relationships to benefit plans that may or may not fit the traditional trust law definition of a fiduciary. The primary occupations of individuals who, based upon their actions, have been held to be ERISA fiduciaries include accountants, attorneys, arbitrators, and even those taking part in liquidating a business entity. n203 Even relatively minimal levels of activity of the types referenced by the definition may give rise to fiduciary status. For example, in one instance an employer whose act of discretion consisted of failing to provide a plan administrator with timely notification of the termination of a participant's employment was held to be a fiduciary. n204

At its most basic, even the definition of a fiduciary reflects the split between benefit and asset administration. According to statutory requirements, plan trust instruments must designate a trustee or trustees for [*425] each benefit plan that utilizes a trust. n205 With only limited and specified exceptions, the trustee has "exclusive authority" over the management and control of plan assets, n206 which makes the trustee an ERISA fiduciary. n207 A dual fiduciary structure exists, though, because ERISA separately requires each plan document to designate a fiduciary with "authority to control and manage the operation and administration of the plan." n208 While one individual or entity could fulfill both roles, the implicit statutory recognition of the different functions reinforces the distinction drawn in this article between asset administration and benefit administration.

In spite of its apparent breadth, the definition of an ERISA fiduciary contains two significant limitations that, taken together, permit employers who sponsor plans to avoid fiduciary liability for many of their decisions. This applies even where those decisions directly affect or closely relate to benefit plans. Over time, as the jurisprudence has supported the limitations, plan sponsors have engaged in decisionmaking that has negatively affected the benefit entitlement of large cohorts of plan participants and beneficiaries. Oddly enough, the first limitation is an outgrowth of the functional definition that extends fiduciary status so broadly. The limiting factor occurs because an actor is only a fiduciary to the extent that the actor is engaging in fiduciary actions. n209 The second limitation is that actions deemed to parallel settlor functions in traditional trust law are deemed not to constitute fiduciary actions. n210 Thus, even an individual or an entity that is clearly a plan fiduciary will not be treated as such, and will not be held to fiduciary standards, to the extent he (or it) is engaging in actions that parallel a settlor function.

The exclusion for settlor status avoids what otherwise might be difficult fiduciary issues whenever an employer amends or terminates a benefit plan. Consider the situation of an employer that sponsors a generous pension or health care plan and subsequently experiences financial difficulty. If it is precluded from amending or terminating a generous benefit plan, the employer may be forced out of business. [*426] Without the settlor exclusion, an amendment or termination will appear to violate ERISA's substantive fiduciary standard that all benefit plan actions must be undertaken "solely in the interest of the participants and beneficiaries" n211 as well as "for the exclusive purpose of providing benefits to participants and beneficiaries." n212 After all, under the facts given, the reduction or termination would seem to be undertaken for the financial benefit of the plan sponsor. Prohibiting these types of plan reductions and terminations, though, would be problematic given the permissive nature of benefit plan sponsorship. Since employers are under no obligation to sponsor any benefit plan whatsoever, n213 it is sensible to determine, as the Supreme Court has, that employers retain the right to amend or terminate their voluntarily-sponsored benefit plans unless they contractually commit themselves to continuing sponsorship. n214 Any other regime would discourage plan sponsorship ab initio.

Furthermore, the most basic business decisions may have some effect on an employer-sponsored benefit plan. Almost without exception, employers are fiduciaries of the benefit plans they sponsor because they are trustees, n215 named fiduciaries, n216 plan administrators, n217 exercise some discretion over plan management or administration, or in some way control plan assets. n218 In theory, one could take the position that an employer's fiduciary status vis-a-vis its benefit plan means that every action the employer takes should be scrutinized to ensure that decisions are made for the exclusive benefit of plan participants and beneficiaries and are prudent in terms of the benefit plan.

For example, a successful product may lead to increased profits, which in turn, may result in higher contributions to a profit sharing plan or an increase in available cash flow to devote to funding a defined benefit plan. An unsuccessful product may have the reverse effect on employee benefit plans. Scrutinizing these types of business decisions for compliance with ERISA's exclusive benefit rule, however, would be inconsistent with some of the most basic principles of corporate law. It would be inefficient and, most likely, would result in a reduction in benefit plan sponsorship. Mandating that business decisions "be made with an eye [*427] single to the interests of [benefit plan] participants and beneficiaries" n219 obviously conflicts with the fundamental corporate law axiom that a corporation should be run for the benefit of its shareholders. n220 Moreover, such a requirement would not mesh well with the business judgment rule, which recognizes that a corporation's directors are in a better position than the courts to make efficient business decisions. n221 Finally, any such limitation on freedom of corporate decisionmaking would be a significant disincentive for plan sponsorship.

The current jurisprudence avoids these kinds of issues by deeming an employer's fiduciary obligation to be limited to those actions that give rise to fiduciary status. Thus, an employer's right to make basic business decisions is protected against a claim that such decisions breach fiduciary obligations to its benefit plan participants. The treatment of business decisions as either outside the realm of benefit plan management, or as exempted from fiduciary obligation by application of the settlor function doctrine, reinforces the limitations on an employer's fiduciary status.

As it has developed, the settlor exception exempts an employer's actions, vis-a-vis its benefit plan, from the standards of fiduciary obligation. The exemption applies so long as the employer takes those actions through the route of a formal plan amendment. Returning to the examples offered in the introduction, n222 the settlor function exception provided the rationale for the decision that a plan sponsor, B.F. Goodrich, could transfer retirees from its long-time plans to the plans of a newly established entity. n223

Furthermore, B.F. Goodrich could, consistent with ERISA, select the retirees to be transferred by using a seemingly arbitrary method - in this case selecting those whose social security numbers ended with the last four digits of 4254 or lower. n224 Neither the selections nor the transfers were reviewable even under an arbitrary and capricious standard. Because B.F. [*428] Goodrich used a plan amendment to determine who would be transferred and to effect the transfers, the actions fell wholly outside the scope of B.F. Goodrich's fiduciary obligations to plan participants and beneficiaries.

In its 1999 decision in *Hughes Aircraft Co. v. Jacobson*, the Supreme Court made clear that if there are any exceptions to this formalistic analysis, those exceptions are extremely narrow. n225 In *Hughes Aircraft*, a class of retirees challenged two amendments that Hughes Aircraft had made to its defined benefit pension plan. n226 The retirees brought claims for breach of fiduciary duty as well as for alleged violations of other ERISA provisions. n227 The case is an interesting example of the settlor exception because the effect of the plan amendments was to utilize some funds and investment returns on those funds, disproportionately for one subgroup of participants where the funds had been contributed by the entire group of participants. n228 Some of the contributions were used to benefit individuals who had never even contributed to the plan. n229 Hughes Aircraft benefited from these plan amendments because the excess funds at issue were used (1) to encourage older workers to voluntarily terminate employment, and (2) to pay for benefits for new employees who never contributed to the plan, thereby decreasing its compensation costs. n230

The standard of a "punctilio of an honor the most sensitive" n231 and the trust law principle of loyalty reflected in ERISA's exclusive benefit rule might lead a reasonable reader to think that Hughes Aircraft owed contributing participants an obligation to use their contributions and the investment returns in the best interest of the contributors. The Supreme Court, however, never evaluated the level of fiduciary obligation owed in such an instance. Instead, the Court recognized that Hughes Aircraft took all of its actions through the process of plan amendments. n232 Once the Court accepted that characterization, the fiduciary case was over. In the words of the Court: "Each of respondents' fiduciary duty claims must fail because ERISA's fiduciary provisions are inapplicable to the amendments." n233 The Court rejected arguments that the scope of the settlor function should be narrowed due to the contributory nature of the plan, n234 [*429] the participants' alleged status as co-settlors, n235 or the existence of a sham transaction. n236

The scope of the settlor exception and the tensions that arise when it is applied in difficult cases can be best analyzed by contrasting the settlor doctrine with the fiduciary status that flows from discretionary administration of a benefit plan. In *Curtiss-Wright Corp. v. Schoonejongen*, the Supreme Court established that employers are acting in the role of settlors, and thus outside their roles as plan fiduciaries, when they "adopt, modify, or terminate [benefit] plans...." n237 In *Hughes Aircraft*, the Supreme Court reiterated its holding in *Curtiss-Wright Corp.* and confirmed that it would not be distracted by notions of equity or common law. n238 For analytical purposes, the question becomes whether the actions of a plan sponsor parallel the actions taken by settlors of trusts when those settlors establish a trust, change its design, or terminate it. n239 When that test is met, plan sponsors may act free of the heightened obligations imposed by fiduciary principles.

There is one limit to this expansive doctrine exempting settlor functions. While an employer's actions in adopting, amending, or terminating a benefit plan are not fiduciary actions and are not subject to fiduciary standards, actions taken to implement the adoption, amendment, or termination may be fiduciary actions and, thus, must meet fiduciary standards. In *Varity Corp. v. Howe* the Supreme Court drew an analytical distinction between what can be labeled as "implementation actions" and "settlor actions." n240 A brief review of the *Varity* facts is useful to explicate the analytical lines drawn and to compare them with B. F. Goodrich's actions in shifting its employees among plans and to Hughes Aircraft's utilization of its plan's surplus assets.

Varity Corporation ("Varity") attempted to address the financial problems faced by its Massey-Ferguson, Inc. unit ("Massey") by consolidating Massey's unprofitable divisions into a separate subsidiary, Massey Combines ("M-C"). n241 As part of the consolidation, Varity planned to transfer employees, retirees, and associated benefit plan obligations to M-C. n242 In attempting to convince the employees to transfer voluntarily, [*430] Varity held employee meetings and prepared and disseminated written and video materials. n243 The meetings and materials indicated that Varity expected M-C to have a rosy future and that the employee benefits offered by M-C would be substantially equivalent

to those offered by Varity. n244 Within two years, however, M-C went into receivership. n245 The individuals who had transferred to M-C were able to show that Varity knew from M-C's inception that M-C had a negative net worth in the tens of millions of dollars and that Varity had intentionally misrepresented M-C's financial prospects. n246

One could categorize Varity's activities as settlor actions that did not constitute fiduciary actions and, thus, would not be subjected to fiduciary standards. n247 Varity's decision to establish M-C as a separate subsidiary constituted a business decision. As such, it was a reasonable decision, undertaken in response to general financial concerns with the transferred lines of business. Furthermore, Varity's establishment n248 of the M-C benefit plans fit squarely within the settlor exception for the establishment, amendment, and termination of benefit plans. Arguably, all of Varity's actions in communicating with its employees and transferring them to the new plans were undertaken in Varity's general role as an employer/settlor.

The Supreme Court, however, rejected the characterization of Varity's communications activity as part of Varity's settlor function. n249 Under traditional trust law, trust administration is a fiduciary function. n250 The scope of administration includes those duties and powers that can be explicitly traced to the trust instrument as well as those implicit powers and duties that are necessary to achieve the purposes of the trust. n251 Varity was the administrator of the plans. In that role, the company had both the power and the duty to convey information necessary for participants and beneficiaries to make informed decisions about their participation, benefits, and options under the plan. n252 It is a very short leap to determine, as the Supreme Court did, that Varity was acting as a plan fiduciary when it communicated with the employees about the prospects of M-C and the benefits they could expect as employees of M-C. n253

[*431] The critical distinction for purposes of fiduciary obligation, and ultimately for liability, lies in the line drawn between implementation actions, such as the misrepresentations made by Varity, and settlor actions, such as the participant transfers made by B.F. Goodrich or the benefit amendments made by Hughes Aircraft. Perhaps, in the same way that Judge Posner believes the flexibility of the sliding scale facilitates its use in a wide variety of contexts, n254 the settlor/implementation standard will be applicable across a range of situations involving welfare and pension plan implementation, amendment, and termination.

However, to the extent that the settlor/implementation standard effectively exempts all employer decisions from fiduciary scrutiny so long as the decisions are implemented through a plan amendment, one might expect to see the number of plan amendments increase dramatically. As that happens, certain types of amendments are likely to raise policy concerns. The B.F. Goodrich amendment provides one example of an amendment where the distinction drawn among plan participants appears arbitrary. n255 By relying on the settlor function exception, B.F. Goodrich was able to circumvent its fiduciary obligation to treat plan members impartially. n256 The Hughes Aircraft decision provides another example where the employer relied on the settlor exemption to protect it from claims that it used plan assets in ways that conflicted with the best interests of the benefit plan's original participants and beneficiaries. n257 The Supreme Court accepted the arguments that the employer was acting as a settlor even though the plan assets at issue were largely the product of contributions made by those original participants and beneficiaries. n258

The last brick in the wall of protection provided by ERISA's fiduciary definition is the near complete exemption from liability enjoyed by nonfiduciaries. n259 Under traditional trust law concepts, nonfiduciaries are liable for knowing participation in a fiduciary's breach of duty. n260 Yet, the circuit courts originally split over the applicability of that principle to benefit cases. n261 The disagreement arose because ERISA does not [*432] explicitly provide for nonfiduciary liability. n262 In discussing this issue in dicta, a slender majority of the Supreme Court emphasized the Court's repeated refusal to extend liability beyond ERISA's explicit provisions. The Supreme Court strongly indicated that it did not believe nonfiduciaries to be subject to liability under ERISA even for knowing participation in a fiduciary breach. n263

In sum, although ERISA's fiduciary definition appears to be extremely broad on its face, the jurisprudence has developed an exemption for settlor-like actions. As currently configured, that exemption protects any action a plan sponsor takes through the formal route of a plan amendment from evaluation against fiduciary standards. If an action is classified as a nonfiduciary action, it appears that the actor does not even risk any of the potential liability that would have existed under traditional trust law for knowing participation in a fiduciary breach.

D. Remedial Restrictions

The civil enforcement scheme is the fourth sphere in which the construction given to ERISA's fiduciary regime deserves scrutiny. As in the foregoing spheres, the result of the judiciary's concentration on asset administration is the es-

establishment of a fiduciary regime that favors plan sponsors when the issues that arise are ones of benefit administration. Statutory provisions ensure that appropriate remedies are available to address fiduciary breaches in the investment and administration of plan assets. In application, those provisions have established a basis for damage [*433] awards that flow to plans, n264 removal of fiduciaries who violate their duties, n265 and even injunctions barring wanton fiduciaries from providing any further fiduciary services to benefit plans. n266 But, the statutory emphasis on ensuring the adequacy of remedies for fiduciary breach in asset administration situations has resulted in an unduly narrow availability of remedies in benefit administration disputes.

The genesis of the remedial jurisprudence in the context of benefit administration disputes can be traced to Massachusetts Mutual Life Ins. v. Russell. n267 In that case, the Supreme Court first addressed the scope of ERISA remedies. The plaintiff, Doris Russell, was a participant in a disability plan sponsored by her employer, Massachusetts Mutual. n268 After the company suspended her disability benefits for 132 days, Russell sought compensatory and punitive damages from Massachusetts Mutual. n269 She grounded her claim in ERISA sections 502(a)(2) and 409(a), which, read together, explicitly permit a participant or beneficiary to sue for fiduciary violations. n270 The Court granted certiorari on the interpretative question of whether section 409 authorizes a participant to personally recover "extracontractual compensatory or punitive damages." n271 Although the Court did not carefully distinguish between them, for analytical purposes this question subsumes two separate issues.

The first constituent question is whether recovery under section 409 for breach of fiduciary obligation may flow only to a benefit plan or whether recovery may flow directly to others, such as participants and beneficiaries. On this issue, the Supreme Court determined that, based upon an integrated reading of the entire statutory provision, only a benefit plan may recover. n272 The majority emphasized that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." n273 The Court's approach to the language and purpose [*434] of section 409 is one that elevates the aggregate concept of security for plan assets over atomistic protection of individual participants and beneficiaries. n274

Because Russell's claim was for direct, individual relief, the Russell Court could have ended its analysis with its determination that any recovery under section 409 must inure to a benefit plan, not to an individual participant or beneficiary. Instead, the Court also discussed the second constituent issue embedded in its grant of certiorari - the scope of damages provided for by section 409. Massachusetts Mutual had made a full retroactive payment of Russell's disability benefits before she even filed her legal claim. She had no claim for additional benefits under the terms of the plans. n275 Instead, she requested compensatory and punitive damages flowing from what she alleged to be an unreasonable delay by Massachusetts Mutual in the payment of her benefits. n276 The compensatory damages claim alleged that the termination of her benefits caused her husband to cash out his retirement benefit and aggravated the psychiatric condition that caused her original disability. n277 The Supreme Court characterized her damages claim as one seeking "extracontractual damages" n278 and determined that section 409 does not provide for such damages to individuals. n279 In its opinion, the Court explicitly reserved two related questions. First, does section 409 permit a plan to recover extracontractual damages for breach of fiduciary duty? n280 Second, do any of ERISA's other remedial provisions permit awards of extracontractual damages to aggrieved participants or beneficiaries? n281

Russell is an opinion that purports to resolve what superficially appears to be a simple and relatively narrow interpretative question that explicitly leaves open some important matters. The majority opinion, however, addresses two major issues in ERISA's remedial scheme and makes a number of sweeping statements regarding the legislation's focus and structure. As the first Supreme Court precedent in the area, the opinion set the tone for ERISA remedial jurisprudence, particularly with regard to the scope of available remedies. n282 On the first sub-issue, a number of [*435] lower courts extended the Russell opinion's holding that section 409 provides no basis for individual plan participants to recover personally for breach of fiduciary duties to bar individual recovery for fiduciary breach under the more general remedial provisions of section 502, which sets forth ERISA's civil enforcement scheme. n283 In my view, such an extension of Russell was unwarranted because section 502 contains none of the restrictive language found in section 409. n284 In 1996, the Supreme Court finally reversed that particular extension of Russell and confirmed the right of plan participants and beneficiaries to bring individual actions on their own behalf in cases of fiduciary breach, at least in situations where no other available relief exists. n285 That is the only area, though, in which it is certain that the Court has drawn back from the narrow approach to ERISA remedies that it began in Russell. n286

The parallel question of whether ERISA permits individual recovery for past due plan benefits did not generate significant controversy. In cases of benefit administration, the recovery must flow to the plan participant, beneficiary, or someone making a claim on behalf of a plan participant or beneficiary. After all, the crux of a claim for opportunistic benefit administration is that the participant or beneficiary has received less than he or she is entitled to under the terms

of the plan. Recovery to the plan would never compensate the claimant. Instead, the recovery must flow to the claimant in the form of payment of benefits owed. ERISA section 502(a)(1)(B) ensures this result by permitting a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." n287

Thus, the benefit enforcement provision of ERISA Section 502(a)(1)(B) offers an alternative basis of recovery for participants or beneficiaries who seek to challenge benefit denials. The provision was not at issue in Russell because the plaintiff had explicitly disclaimed reliance on it. In its entirety, the language quoted above is fully consistent with the traditionally-based and efficient interpretation offered in Part V. n288 The [*436] Russell majority opinion, however, provided three distinct grounds for the jurisprudence that has dramatically limited the scope of recovery available under the benefit enforcement provision.

First, the Russell majority stated that "502(a)(1)(B)... says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim." n289 This statement is curious because Russell had disclaimed reliance on the section. The Court seemed to reference section 502(a)(1)(B) as an analogy that served to reinforce its decision to limit relief under section 409. There is no indication, though, that the Court examined the goals of section 502(a)(1)(B), its legislative history, or even the natural implications of its language. The cursory nature of the Court's statement is understandable given that the benefit enforcement section was not at issue. Yet, not surprisingly, the circuit courts of appeals have tended to take the Supreme Court at its word. Without exception, the benefits enforcement section has been construed to permit only the recovery of benefits due under a plan. n290

The second limiting effect of the Russell opinion results from its characterization of the plaintiff's damage claim as one seeking extracontractual damages. The Court first used the term "extracontractual damages" in the Russell opinion. Not only had the Court never used the term before in the ERISA context, it had never used it in any other context either. Moreover, although the Russell rationale purports to be grounded in the language of ERISA, n291 the term "extracontractual" never appears in the [*437] statute, nor was the term one extensively used in the case law of the time. n292 In fact, no reported court decision had ever used the term in the ERISA context prior to the Ninth Circuit's opinion in Russell. n293

In spite of the lack of any statutory hook and the sparseness of prior case law usage, the Russell Court did not define what it meant by its references to extracontractual damages. Also, it did not explain what might constitute contractual damages under a benefit plan as opposed to extracontractual damages. One possibility is that the Court was using the term in its most general sense. The term extracontractual damages is used in a variety of contractual contexts to describe damage requests that exceed the traditional measure of contract damages. For example, Professor Dobbs refers to emotional distress damages and punitive damages as extracontractual damages. n294

The most common use of the term extracontractual to refer to a limitation on damages, however, probably occurs in the insurance context. n295 In the past, because insurance policies were viewed as contingent contracts to pay the amount specified under the policy, remedies frequently were limited to the terms of the policy - generally its face value. n296 More recently, traditional contract law principles have been [*438] applied in the insurance context. n297 The line drawn in contract-based causes of action is between those "ordinary remedies for breach [of contract]," n298 which would include foreseeable damages under the rule of Hadley v. Baxendale, n299 and those additional consequential and punitive damages traditionally recoverable in tort but not contract. n300

Over time, though, the judiciary in some states have eased the constraints against recovery of this later type of extracontractual damages by first-party insureds. n301 Commentators tend to trace the change to Gruenberg v. Aetna Insurance Co., n302 decided in 1973 by the California Supreme Court. n303 In that case, the court permitted a tort claim based on a bad faith n304 breach of an implied contractual covenant of good faith and fair dealing. n305 From a remedial perspective, once a jurisdiction accepts a tort cause of action in this context, a plaintiff's claim may encompass the full range of tort remedies. n306 Appropriate remedies include economic harm, noneconomic harm such as pain and suffering, and, in appropriate cases, punitive damages. n307

Commentators have divided over the prudence of permitting first-party insureds to bring tort claims. One side recognizes the potential for insurers to exploit delays in litigation and the incentives for opportunistic behavior if remedies are constrained. n308 Others argue that the potential for unreasonably large awards, the inability of courts to distinguish opportunistic from reasonable behavior, and the existence of alternative mechanisms to increase efficient behavior militate in favor of barring tort [*439] claims. n309

Employee benefit claims may or may not be similar to traditional insurance actions. The Supreme Court, though, gave no reason for its characterization of Russell's claim as one seeking extracontractual damages and drew no parallels with traditional insurance law. Nor did it cite any statutory provisions or legislative history analogizing employee benefit plan remedies to those available in insurance law or otherwise justifying its choice to speak in terms of extracontractual damages.

We are left to guess the reason for the adoption of this concept into ERISA's jurisprudence. Neither the briefs, nor the transcripts of the oral arguments, provide any insight. One reasonable explanation for the Court's use of the term is that it was simply contextual. The defendant employer, Massachusetts Mutual, was an insurance company. Its attorneys would have been accustomed to litigating claims as state law-based insurance claims. It is also reasonable to think that those attorneys would have been well aware of the traditional remedial limitations inherent in the characterization of claims as extracontractual.

There is a third way in which the Russell Court provided the foundation for a narrow remedial approach. During its discussion of available remedies, the Court made what has proven to be one of its most quoted statements on the scope of damages available under ERISA: n310 "The six carefully integrated civil enforcement provisions found in 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." n311 The effect of those words has been to establish what, for all intents and purposes, constitutes a presumption against the availability of relief. If a plaintiff cannot point to a statutory provision explicitly authorizing the relief sought, that relief will be deemed unavailable. In a previous article, I likened this remedial restriction to the system of writs that existed in thirteenth century England. n312 Unless the plaintiff's case falls within a formal and narrowly-defined set of facts, no recovery will be available even in cases of egregious behavior and significant loss. n313

The aftermath of Russell has been a remedial jurisprudence that, when [*440] benefits administration is challenged, denies any recovery other than the payment of plan benefits. Thus, when Florence Corcoran lost her unborn child after her health-care-utilization reviewer found late-term hospitalization to be medically unnecessary, she had no available remedy. n314 The only coverage her plan owed her was the physician-recommended hospitalization, and it was too late to provide that benefit. Similarly, the General Motors retirees received all the benefits promised by their plan. n315 The plan reserved the right to amend or terminate benefits n316 and once General Motors amended the plan, the retirees had no claim for anything not provided by the new terms of the plan. n317

E. Failure of the Fiduciary Regime

The preceding discussion demonstrates how, at four levels, benefit plan sponsors and other plan actors have successfully looked to ERISA's fiduciary provisions to protect their actions in administering benefit plans. In addition, these four layers of protection work together to provide a shield that is larger than the sum of its parts. It is useful to address the scope of that shield prior to considering an alternative analytical approach.

As a threshold matter, an individual or entity who takes action vis-a-vis an employee benefit plan can claim not to have taken the action within the individual's or entity's role as an ERISA fiduciary. Under the current jurisprudence, the actor's argument will be successful so long as the action was taken through the formal route of a plan's adoption, amendment, or termination. The exception for actions in amending a plan is extraordinarily broad. There appear to be few, if any, limits on what a plan sponsor may accomplish through the plan amendment mechanism, so long as the minimum terms of the plan meet ERISA's standards and other applicable federal law. Amendments with the effect of excluding people who historically participated in the plan, n318 reducing plan benefits, n319 and using plan assets contributed by some participants for the benefit of new and noncontributing participants n320 have all survived legal challenges.

If a plan's decision maker is unsuccessful in arguing that the action at issue constituted a plan adoption, amendment, or termination, the existence of decisionmaking authority is likely to cause the actor to be deemed an ERISA fiduciary. At that point, the second layer of fiduciary protections [*441] becomes relevant. So long as the plan documents recite an appropriate incantation granting discretion to the decision maker, the interpretation of the decision maker is entitled to great deference. The basic standard of review is the unintrusive "arbitrary and capricious" standard. Third, although ERISA explicitly requires fiduciaries to act "solely in the interest of the participants and beneficiaries," n321 it also permits self-interested individuals and entities to act as ERISA fiduciaries. The result has been to provide some level of deference, even to a determination made by a self-interested fiduciary.

Finally, even if a plan's actor is deemed a fiduciary and its determination is so clearly incorrect or tainted by self-interest as not to survive judicial scrutiny, jurisprudence interpreting the remedial provisions favors the fiduciary. The Supreme Court's decision in *Russell* set the tone for a jurisprudence that offers little or no redress to injured plan participants and beneficiaries. At most, they can obtain equitable relief, as narrowly defined by the Supreme Court, n322 and an order that the plan must pay the benefits due to the injured party.

In sum, current fiduciary doctrine tends to favor fiduciaries, not beneficiaries, when the issues are ones of benefit administration. Efficiency is sacrificed. Injuries are not redressed. In addition, the doctrine does not recognize that Congress mobilized the fiduciary framework so that the flexible and adaptable fiduciary principles would provide effective protections to those who participate in, and benefit from, privately sponsored employee benefit plans.

IV. An Alternative Approach

There is an alternative framework of analysis for benefit administration issues. It is a framework that is fully consistent with the statutory language. From a policy perspective, this alternative would be better than current doctrine at supporting ERISA's goal of having plan sponsors keep the benefit promises they make. Also, by holding decision makers responsible for the foreseeable consequences of their actions, this proposal would reduce the incentives for opportunistic decisionmaking.

A. A Framework for Promise Enforcement

ERISA's drafters authored the fiduciary provisions with a primary focus on the problems of asset administration that threatened pension plan [*442] security during the late 1960s and early 1970s. n323 Counter to one's normal expectations, in the context of benefit administration, plan sponsors and other plan actors who have fiduciary status have been able to employ ERISA's definition of who constitutes a fiduciary and the substantive fiduciary provisions as an indirect shield to protect their decisionmaking. While ERISA represents a compromise between protecting participant and beneficiary interests and encouraging voluntary plan sponsorship, n324 when the questions are ones of benefit administration, the participants and beneficiaries appear to be doing all the compromising.

This is surprising not only because it conflicts with the usual understanding that fiduciary principles are protective of beneficiaries, but also because the drafters of ERISA did not completely ignore questions of benefit administration. The legislative history shows that the fiduciary provisions were intended to encompass actions undertaken as benefit administration. n325 The statute also bifurcates the plan document and the plan trust and the requirements applicable to each. n326 The terms of each employee benefit plan must be described in a plan document, fiduciaries must act in accordance with those terms, n327 and the plan document must be available to participants and beneficiaries. n328

The attention to written plan terms, their enforcement, and their disclosure, supports one of the basic premises of benefit plan regulation. ERISA was enacted to ensure that employers fulfill their benefit promises. n329 Conceptually, that goal is easy to understand. The goal currently breaks down in application, however, because ERISA largely achieves the goal of promise fulfillment through the trust requirement, fiduciary regulation, and remedies. Each of these concepts has worked well in asset administration matters, but not in matters of benefit administration.

Matters of benefit administration do not sound clearly in fiduciary [*443] law, at least not when compared to the funding and investment of trust assets. Instead, matters of benefit administration are either issues of benefit entitlement, which often involve plan construction, or they are issues of the extent to which a plan sponsor may amend a plan. Both are issues that turn on the scope and terms of the parties' agreement. The harm caused by an opportunistic decision may be limited to a loss of plan benefits, as is the case when a pension plan pays benefits at a rate that is lower than anticipated, yet no consequential damages arise. But, particularly in health care plan decisions, the foreseeable damages that may flow from an opportunistic decision may include physical injury and even death. For example, when a utilization reviewer denies a physician's recommendation that a pregnant woman be hospitalized during the final weeks of her pregnancy, the death of the unborn child is a foreseeable result. n330

When considered from the general perspective of benefit plan administration, these benefits decisions intertwine fiduciary duty and contractarian principles. By definition, the decision maker with final discretionary authority is a fiduciary. When viewed through the lens of benefit administration, the importance of a plan's terms and the need to redress injury mean that contractarian principles are also important.

It may seem to be a considerable departure from the jurisprudence and ERISA's fiduciary framework to incorporate contractarian principles. However, even traditional trust relationships incorporate notions of contract. n331 Also, the

employment relationship itself tends to be one founded in contract. At a superficial level, one may think of the employment relationship in terms of collective bargaining agreements, independent contractors, and contractual exceptions to the doctrine of employment-at-will--all areas governed by contract law. More conceptually, however, one can approach many employment-related questions of obligation and duty from the perspective that employers and employees are parties with largely divergent economic interests. n332

Furthermore, viewing modern day benefit plans solely through the lens of traditional equitable concepts and without adherence to contractarian principles will result in a distorted image even in the context of what has been identified here as asset administration concerns. Pension plan trusts are not donative in the manner of the usual private trust created for the benefit of a grantor's heirs. n333 Instead, pension plan trusts are funding mechanisms established to meet the requirements of the Internal [*444] Revenue Code and to effect a tax-advantaged transfer of compensation.

Health care plans, which typically do not operate via a trust mechanism, bear even less relationship to the traditional donative trust. Yet, they resemble pension plans in that they too are "given" in exchange for labor. In the early 1900's, benefit plans were frequently viewed as gratuitous transfers that conferred few, if any, enforceable rights upon employees. n334 Modern theory typically views pension plan sponsorship as a method for providing deferred wages. n335 Similarly, health care plans tend to be viewed as a component of compensation n336 that represents a substantial portion of compensation expense. n337

Given the compensatory nature of benefit plans in general, the statutory provisions, the distinct differences between issues of benefit administration and asset administration, and the lack of a trust corpus in health care and other welfare benefit plans, treating the fiduciary framework as one that operates only on equitable principles, as narrowly defined, and without consideration of contractarian principles or access to money damages, not only is unnecessary it is unwise. When dealing with opportunistic behavior in benefit administration, the application of contractarian concepts to evaluate behavior and to permit recovery of foreseeable consequential damages supports a core value of ERISA--ensuring that employers keep the benefit promises they voluntarily make. Conceptually and most simply, I am advocating that ERISA's principle of ensuring that benefit plan participants receive the benefits promised by their employers be extended to issues of benefit administration.

The distinction drawn above between issues of benefit administration and asset administration provides a conceptual basis to permit claims for foreseeable consequential damages in instances of opportunistic benefit administration. Such an approach is consistent with the language of ERISA. The statute requires the existence of a plan document that is [*445] available to plan participants and beneficiaries, and the plan must be administered according to the document's terms. It would be surprising indeed, if the plan participants and beneficiaries did not have a means to enforce those terms and to seek redress for their injuries.

Of course, ERISA explicitly permits claims to be brought under its benefit enforcement provision, section 502(a)(1)(B). n338 It is universally accepted that the provision allows participants and beneficiaries to bring an action for benefits owed under the terms of a plan. n339 The actual language of the statute, however, does not stop at benefits owed. It states: "A civil action may be brought... by a participant or beneficiary... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." n340

The only ambiguous portion of section 502(a)(1)(B) is the middle clause, which I will refer to as the enforcement of rights clause. The Supreme Court in *Russell* stated that "502(a)(1)(B)... says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim." n341 Unfortunately, without exception, the lower courts have relied upon that general statement to reject claims for money damages other than plan benefits. n342 But, the Court's statement on this point constitutes dicta as the language of the section was not at issue. Careful attention to the legislative history, to the wording of the entire subsection, and to the role of the enforcement of rights clause in the remedial scheme, shows that the jurisprudence has inappropriately constrained the scope of available remedies.

No legislative history directly addresses the meaning of the enforcement of rights clause. n343 In 1973, House and Senate committee reports described the remedial provisions in their respective bills as providing participants and beneficiaries with "broad remedies for redressing or preventing violations." n344 Both reports also stated an explicit [*446] intent to make available the "full range of legal and equitable remedies." n345 At the time, none of the bills contained any language equivalent to the enforcement of rights clause. However, the House bill did contain wording similar to what eventually became clauses one and three of section 502(a)(1)(B). n346 Both the House and Senate versions also contained broad provisions for recoveries in the case of breach of fiduciary duty. n347 The Senate ver-

sion authorized "appropriate relief, legal or equitable" n348 for fiduciary breach, while the House version referred to "appropriate relief." n349 Given (1) the Senate Committee's reference to the "full range of legal and equitable remedies available" n350 and its stated intent that claimants have an opportunity to redress violations; (2) the explicit inclusion of legal relief in the Senate bill; and (3) the House's identical description of its remedial approach, it is reasonable to conclude that the House expected "appropriate relief" to include an opportunity to recover traditional money damages. In both the House and the Senate, the 1974 versions that eventually went to the Conference Committee were substantially equivalent to the 1973 versions. n351

The summary of differences between the House and Senate bills prepared for the Conference Committee concluded that there were no relevant differences between the remedial provisions and recommended adoption of the House version. n352 Because of the explicit reference in the [*447] Senate bill to legal relief, in order to conclude that the provisions for remedies in the case of fiduciary breach were similar, the Conference Committee must have believed the term "appropriate relief" in the House bill to have encompassed a right to traditional money damages. In its final report, the Conference Committee itself conflated the remedial provisions and summarized the House and Senate versions as though they were equivalents. n353 When the Conference Committee summarized its own proposed language, it repeated, word-for-word, the language it used to describe the House and Senate provisions. n354 Thus, the Conference Committee must have believed that its proposed statutory language provided for traditional money damages.

However, although it indicated that it intended its final language to provide the same breadth of remedial opportunities as would have been available under the House and Senate bills, the Conference Committee did not adopt the exact language of either the House or the Senate bill. The Committee reorganized, reworded, and subdivided the remedial scheme. A careful comparison of the bills that went to the Conference Committee with the final civil enforcement scheme reveals that the Committee added the enforcement of rights clause to the language that eventually became section 502(a)(1)(B). n355 Also, section 502(a)(2), which provides a right to pursue actions for fiduciary breach and section 503(a)(3)(B), which provides an equitable cause of action for enforcement of plan terms and Title I of ERISA, were provisions drafted at the Conference Committee stage. n356

The result of the Conference Committee's redrafting can be summarized as follows. All of the contractarian forms of relief are consolidated in section 502(a)(1)(B). Section 502(a)(2) provides the basis [*448] for fiduciary violations involving asset administration--especially the types of violation which concerned ERISA's drafters. Section 502(a)(2) refers to and operates jointly with section 409 to provide extensive remedies to plans. Finally, section 502(a)(3) provides a basis for general equitable claims.

In *Russell*, the Supreme Court determined that section 502(a)(2) does not provide individual plan participants with a basis on which to state a claim for money damages. n357 Similarly, in *Mertens* the Court held that section 502(a)(3)(B)'s reference to equitable relief forecloses plan participants from seeking money damages under that subsection. n358 The question, then, is what happened in the Conference Committee to the right of participants and beneficiaries to bring actions for the full range of legal relief? Both the Senate and the House versions that went to conference contemplated such relief. Instead of objecting to the availability of traditional money damages, the Committee recommended adoption of the House version. The logical answer to the question is that the enforcement of rights clause provides the statutory basis for awards of traditional money damages. After all, that is the phrase that the Conference Committee added when it reorganized ERISA's civil enforcement scheme. Consideration of the language of section 502(a)(1)(B) and the overall structure of the remedial scheme supports this interpretation of the legislative history.

One approach to construing the words of the enforcement of rights clause is to read it in *pari materia* with the rest of section 502(a)(1)(B). n359 It is reasonable to view the first clause, which permits actions for benefits currently due under the plan terms, as an action with roots in a contract regime. n360 Similarly, the final clause permits actions to clarify future rights [*449] in the same way that contract law permits declaratory judgments. n361 Specifically, if one parses the language of the subsection, the parallel between the first and third clauses is obvious. Both provide actions for "benefits." The primary objective of section 502(a)(1)(B), then, appears to be to recognize and to provide a basis for causes of action grounded in contractarian principles. Together, the first and third clauses provide the basis for all actions to recover benefits. Actions for past due benefits are available under the first clause, while actions for future benefits are available under the third clause.

Given that the first and third clauses of section 502(a)(1)(B) reflect contractarian principles, it would be internally consistent to read the enforcement of rights clause as authorizing similar types of actions. The enforcement of rights clause, however, uses the term "rights," which is much broader than the term "benefits." This phrase must, then, provide a basis for participants and beneficiaries to bring contractarian-based actions for enforcement of rights other than bene-

fits. The language sweeps broadly enough to permit a participant or beneficiary to bring any plan-related action against any relevant party for injuries caused by nonpayment of benefits. For example, if a plan actor made an opportunistic decision and unreasonably denied a claim for benefits, then the actor has not followed the terms of the plan. n362 Under current doctrine, the participant should be able to claim the benefits owed from the plan under the first clause of section 502(a)(1)(B). In addition, the enforcement of rights clause provides a basis for an action to recover from the plan actor any foreseeable damages that result from the plan actor's unreasonable denial of benefits.

Typical contract-based recoveries would permit the recovery of foreseeable damages as part of the enforcement of a contract. Similarly, permitting an action against a plan actor who has unreasonably denied a benefit claim because the action seeks to enforce a "right" that arises under the terms of a plan is a logical application of the statutory language. In the example given, no damages would have occurred, and no claim would exist, if the actor had made a decision that was consistent with the terms of the plan. Thus, the claim against the actor is brought to enforce a "right," (the right to foreseeable consequential damages), that arose because of a fiduciary's actions that were inconsistent with the plan's terms.

[*450] The language of section 502(a)(1)(B) recognizes that a benefits plan has two duties vis-a-vis its participants and beneficiaries. The first duty is to actually pay the benefit, the second duty is to behave reasonably in processing the claim and making the payment. The duties are separable, as implied by the reference to "benefits" in the first and third clauses and the reference to "rights" in the enforcement of rights clause. The measure of damages for the failure to behave reasonably is not the amount owed under the first or third clauses. Those clauses promise specific benefits and the measure of damages is the amount of the promised benefits. In contrast, the measure of damages under the enforcement of rights clause is the harm that results from a plan administrator's failure to behave reasonably in processing a benefits claim and making payment. While the jurisprudence recognizes the damages available under the first and third clauses, it has neglected to give content to the enforcement of rights clause. This violates the general legal principle that there is no right without a remedy. That is a particularly ironic outcome in this situation, because the right is explicitly established in ERISA's remedial scheme.

Furthermore, if the enforcement of rights clause is not read to permit actions of this type, it is hard to imagine what actions the phrase does authorize. In order to have substantive content, that clause must provide the basis for actions other than those provided for elsewhere in ERISA's civil enforcement scheme. Looking at the remaining available causes of action, as discussed extensively above, n363 separate sections provide for a broad range of relief to the plan and equitable relief to injured participants and beneficiaries when a fiduciary breach has occurred. The statute separately provides for the enforcement of the disclosure provisions n364 and for equitable actions to enforce ERISA and plan terms. n365 Other sections permit enforcement actions and collection of penalties by the Department of Labor. n366 One commentator speculated that the enforcement of rights clause authorizes actions for specific performance. n367 But, the civil enforcement scheme already permits actions for the payment of past and future benefits as well as for traditional equitable relief for violations of ERISA and benefit plans. It is hard to imagine a participant or beneficiary being interested in seeking specific performance of anything else.

In sum, interpreting the enforcement of rights clause as authorizing claims against plan actors for foreseeable consequential damages is consistent with the language of the phrase, with the structure of section 502(a)(1)(B), and with the framework of ERISA's civil enforcement [*451] scheme. Furthermore, it is coherent with the legislative history, which evidences an intent both to provide the "full range of legal and equitable remedies" n368 and to ensure that participants and beneficiaries have an avenue for redressing their injuries. n369 This interpretation also is harmonious with the congressional decision to mobilize the flexible and adaptable fiduciary regime. The enforcement of rights clause simply makes available actions equivalent to those traditionally available in trust law. Even the Supreme Court has recognized that, under traditional common law principles, "money damages were available... against the trustee." n370

Finally, reading the enforcement of rights clause to permit actions for foreseeable consequential damages helps to reconcile some apparently inconsistent Supreme Court statements regarding the availability of remedies under ERISA. The Russell Court made a sweeping generalization about the unavailability of extracontractual damages. However, in a later decision, the Court considered whether ERISA preempted a terminated employee's state law claims for money damages. n371 The Court determined the claims were preempted and, in a unanimous portion of the opinion, stated:

It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits. n372

Courts and commentators have generally dismissed that statement as dicta. However, it is more consistent with the language of the statute, the legislative history, and ERISA's general fiduciary scheme than is the language of Russell.

An alternative interpretation of the enforcement of rights clause may be made by analogizing it to insurance law. The first clause of section 502(a)(1)(B) bears some resemblance to a first-party insured's right to recover the face value of the policy. Further, the third clause is similar to a first-party insured's right to seek a declaratory judgement. Under this construction, the enforcement of rights clause operates as a general provision permitting a plaintiff to seek other appropriate relief that arises [*452] because of rights under the insurance policy. As insurance law has developed, most states imply a duty of good faith and fair dealing under insurance contracts. Breach of that duty gives rise to a tort claim. Injured parties are permitted to seek the full range of tort remedies including punitive damages when appropriate. n373

It is widely recognized that Congress intended the development of a common law of ERISA. n374 A duty of good faith and fair dealing in the administration of employee benefit plans can be interpreted as the development of such a common law and is consistent with widespread common law practice. It is difficult to imagine many persuasive policy arguments that could be made against implying such a duty. Once implied, the language of the enforcement of rights clause supports a tort claim for breach of the duty of good faith and fair dealing. The duty would be a "right" and would be implied under the terms of the plan. The tort claim arguably would be brought to enforce that right. n375

Both the first interpretation offered, which is based on the contractarian nature of section 502(a)(1)(B), and the second interpretation, which is based on a combination of contractarian and tort principles, are consistent with the language of the enforcement of rights clause. Considering the language of the statute, the legislative history, and the development of the law, the first interpretation is the more persuasive of the two. The overall language of section 502(a)(1)(B) reflects contractarian notions. Reading the enforcement of rights clause to permit claims for money damages is most consistent with that overall language. The legislative history does indicate an intent to provide a "full range of legal and equitable remedies available" n376 as well as to ensure that participants have the right to redress for their injuries. That intent might militate in favor of reading the enforcement of rights clause to encompass tort remedies, which are broader than contract remedies. However, in insurance law, the cause of action permitting tort claims for breach of the duty of good faith and fair dealing did not become widely available until well after the enactment of ERISA. It is difficult, then, to argue that the drafters intended the enforcement of rights clause to incorporate those particular actions.

It appears that the contractarian approach of interpreting the [*453] enforcement of rights clause is the better choice. However, it is useful to consider the effects of the various remedies that would be available under the two interpretations offered. The next subsection analyzes the levels of compensation appropriate to redress injuries suffered by participants and beneficiaries, the costs of expanding remedies, and incentives for efficient benefit administration.

B. Efficiency and Incentive Structures

Fundamental economic theory on efficient levels of damages for breach of contract indicates that the starting point for analysis is to set damages equal to the loss of expectation by the nonbreaching party. n377 Recoveries based upon loss of expectation, however, are not unlimited. Efficiency considerations militate in favor of applying the Hadley v. Baxendale n378 rule that recoveries are limited to foreseeable damages. n379 The same principles apply to the issues of claims administration that arise under ERISA.

Consider, for example, a situation where a five dollar blood test is at issue. Assume that one of 250,000 similarly situated patients is expected to have cancer and the test will accurately identify the cancer. Also, assume that a utilization reviewer improperly denies access to the test, which is covered by the terms of the plan. Finally, assume the test, which would have detected the cancer, was not administered due to the plan decision maker's ex ante denial of benefits, and the patient subsequently dies. Under the current jurisprudence, no cause of action will be available under ERISA. Even an action for the value of the blood test cannot be brought because any award granted would not be in the nature of plan benefits - a blood test can no longer be administered on the deceased. n380

In contrast, a contractarian approach will set damages equal to foreseeable consequential damages. The cancer in the example was foreseeable. Therefore, the damages recoverable by the heirs will reflect the loss of life, consortium, and so forth. A contractarian approach, then, will provide compensation that more accurately matches the injury than

does the current jurisprudence. Similarly, allowing the recovery of [*454] foreseeable consequential damages will provide some financial incentives to plan decision makers to not engage in opportunistic or negligent behavior.

Yet several questions remain. First, how will awards of foreseeable consequential damages affect the financial status of employee benefit plans? Here, the answer requires identification of the party that acted opportunistically and that the assessment of damages run against that party. The potential for dissipation of plan assets is easily avoided because the benefit plan itself will not be an appropriate defendant in claims other than those for plan benefits. Instead, claims for injuries caused by opportunistic benefit administration decisions will be available only against those actors who are responsible for the decisionmaking. n381 The benefit of this approach is two-fold. First, benefit plans will be protected from the direct financial effects of damage awards. Second, the costs associated with inappropriate decisions will be borne by the actor responsible for the decision. Thus, the rational decision maker will factor in the potential for liability when establishing the level of care with which to approach benefit determinations.

That leads to the second, and more complex, question. Assuming the goal is to induce an optimum level of care by plan actors, what types of injuries should the law recognize and should enhanced damages be available? Assume temporarily that the only cognizable legal injuries are financial or physical injuries, and recovery is not permitted for mental distress, mental pain and suffering, or similar claims. Obviously, the individual who has cancer and dies because of the failure to obtain an early diagnosis through use of the five-dollar test will have a legally cognizable injury. Concomitantly, an individual who is denied the test but does not have cancer and, therefore, experiences no physical or financial injury, is less likely to experience a cognizable injury. When making a decision on whether it is efficient to deny or approve the test, the plan decision maker needs to take into account only damages for the one in 250,000 individuals who is expected to have cancer. Given the five-dollar cost of the test, a risk neutral plan administrator n382 will pay for the test if damages for the single [*455] participant who is expected to develop cancer exceed \$ 1.25 million. n383

Limiting remedies in this way will fail to recognize other damages associated with the denial of the test and will under-deter opportunistic behavior by the plan decision maker. Such a situation, where there is a significant chance that an injurer may escape liability for the harm she caused, is one where efficiency concerns support imposition of enhanced damages. Though generally skeptical of enhanced damages, n384 Professors Polinsky and Shavell show that when an injurer avoids liability for harm she has caused, the standard measure of damages is insufficient to achieve optimal standards of care and to discourage excessive activity. n385 They argue that damage awards must be enhanced by multiplying the magnitude of damages caused by a factor representing the probability of the injurer [*456] escaping liability. n386 That additional amount must be added to the proven damages to ensure that, when the injurer makes determinations on whether to engage in risky activity and the appropriate level of precautions, he will take into account the full cost of the harm caused. n387

Similarly, in the context of benefit plan claims determinations, decision makers may expect to avoid liability because of the small size of the claim, the difficulty in proving causation, or a failure of a benefit denial to result in a legally cognizable injury. n388 In the hypothetical situation of the five-dollar test, an individual who is inappropriately denied access to the test might experience injury even though he would have tested negative for cancer. Having the test and knowing the result might increase the patient's comfort level with his health status. Also, approval of the test might give the patient greater confidence that the health care plan will live up to its obligations if his health status ever deteriorated. Moreover, the patient's physician might derive some useful information from the negative test result. In addition, the denial of access to even an inexpensive test for cancer might cause a patient to experience mental pain and suffering, particularly because of the general stress associated with such a potential diagnosis.

Therefore, it seems reasonable to assume that some subgroup of patients is likely to experience some injury if inappropriately denied access to a test for cancer, even if the test would simply have confirmed the absence of cancer. Nevertheless, to the extent that small and speculative damages tend to discourage litigation, a significant number of valid claims probably will not be pursued. When making a decision on whether payment for the five-dollar test is efficient, risk-neutral plan decision makers will exclude from consideration the costs associated with those injuries. And that exclusion will result in under-deterrence of opportunistic behavior by the decision maker. In economic terms, the decision maker will not fulfill his or her contractual obligations even though it would be efficient for society for the decision maker to do so.

Theoretically, enhanced damages, calculated by some type of modified Polinsky and Shavell approach, could offset this under-deterrence and the inadequate incentives for appropriate decisionmaking in benefits administration. The calculation of the appropriate level of enhanced damages, though, is more complex in this situation than in the basic torts example used by Professors Polinsky and Shavell. They assume all injuries to be equal in the amount of damages

caused. In contrast, in a diagnostic health procedure such as the hypothetical five-dollar test for cancer, the scope of the harm may vary drastically.

[*457] In benefits administration cases, the likelihood of holding the decision maker liable can be expected to correlate positively with the scope of the injury incurred. A plan participant or beneficiary, or an estate, is most likely to pursue legal remedies when an inappropriate claims denial causes significant injury, such as the death of the person whose cancer went undiagnosed. A modified Polinsky and Shavell approach might provide for enhanced damages in the amount of the damages for the smaller, less certain injuries caused to those who were denied access to the test but for whom the test would not have detected cancer multiplied by a factor based upon the likelihood those denials would go unchallenged. With the complexity of the calculations involved, particularly given modern health care practice, the likelihood of actually achieving an efficient level of enhanced damages through this method seems extraordinarily low.

This simple example of the five-dollar-diagnostic test indicates the difficulties in structuring an efficient remedial regime in the context of benefit plan decisionmaking. Enhanced damages raise the specter of under or over estimating the efficient level. If uncapped punitive damages, which have historically been available in the tort system, become available in benefit administration claims, the risk of under or over shooting the amount required to achieve efficiency grows enormously. n389 The usual concern is that uncapped punitive damages will result in awards that err by being too generous to sympathetic plaintiffs. One might argue that such errors should not be of significant concern because benefit plan decisionmaking is not an appropriate arena for the application of economic concepts of efficient breach. The principle underlying efficient breach assumes that the injury resulting from breach is economic and that there is a net gain to society when the contract is breached. This results because, even after the breaching party compensates the other party, the breaching party realizes a savings over having performed. However, in benefits administration, particularly in breaches involving health care plans, the injuries that result may involve serious negative health consequences. Given the social cost of these injuries, some may argue that it is acceptable to award punitive damages in amounts that cause plan decision makers to err on the side of caution.

On the other hand, overly generous punitive awards pose a number of threats to the efficient operation and maximum availability of employee benefit plans. In the context of tort injuries, Professors Polinsky and [*458] Shavell argue that enhanced damages often lead to excessive precautionary activity n390 or lower than optimal levels of activity. n391 These concerns have currency in the benefits system because excessive care might lead decision makers to authorize unnecessary tests or to pay benefits beyond levels contemplated by plan sponsors. If one accepts that a firm has only limited resources to devote to compensation and benefit costs, it becomes clear that excessive and unanticipated payments will be made by reducing other compensation and benefit costs through wage cuts, benefit plan reductions, or lowering the employment level. Similarly, the potential for unlimited damages, even if the damages are directly borne by plan actors and not plans, may discourage the sponsorship of benefit plans. After all, plan sponsors tend to be active in the administration of their benefit plans. Little is gained by expanding remedial provisions to the point where employers terminate existing plans or decide not to sponsor additional plans. n392

In addition, unlimited punitive damage awards can be expected to increase the litigation of disputed benefit claims. One result will be increased pressure on the federal courts. A greater concern is the risk that the lottery ticket aspect of a punitive damages claim - the possibility of receiving a very large award - will impinge on the ERISA-mandated system of dispute resolution. The current system of plan administration requires plans to provide an appeals process. Given enough incentive, even claimants who successfully recover their benefits through that system might decide to pursue a claim for suffering they endured and punitive damages. It is difficult to see how burdening plan actors with potentially unlimited verdicts and the costs of defending against these claims will result in a more efficient system of plan administration or in a regime that expands access to voluntarily-sponsored health care and pension plans.

As discussed above, in instances of inappropriate denials of inexpensive procedures, participants and beneficiaries who are denied access to such procedures may not have sufficient incentive to challenge those denials unless enhanced or punitive damages are permitted. But, from a practical standpoint, when an inexpensive treatment is denied, a participant often will be able to personally pay for the care and challenge the denial of coverage ex post, should the participant wish to do so. Participants and beneficiaries may find it far more difficult to personally pay in advance for expensive and continuing care. To the extent that more expensive procedures or continuing care may result in significant injury, [*459] the incentive effects discussed above will operate to encourage efficient decisionmaking.

The prior subsection showed that the enforcement of rights clause should be construed to provide remedies beyond those currently allowed by the jurisprudence. In redefining the level of damages available under ERISA from the current scheme, which severely circumscribes damages, to one that expands the ability of participants and beneficiaries to

recover damages, it represents a reasonable starting point to adopt the conservative interpretation of the enforcement of rights clause. That construction would permit recovery of foreseeable consequential damages and, as a result, provide some measure of deterrence against opportunistic breach.

In evaluating these and other modifications to ERISA's remedial structure, two issues arise. First, there is the *ex ante* problem of providing appropriate incentives to minimize opportunistic behavior in benefits administration. In the health care context this primarily applies to pre-authorization determinations, and, as a result, appropriate access to health care services. Second, there is the *ex post* problem of remedies when opportunistic behavior occurs in spite of the incentives or due to error. These latter situations may span a variety of contexts. In a pension plan, the question may be one of how to calculate a defined benefit or defined contribution plan entitlement. In a health care plan, an issue may arise where a plan inappropriately denied access to care, refused to pay legitimate claims, or made an inaccurate verification of coverage and then denied the resulting claims. In a severance plan, a participant's right to benefits may be unclear because the participant is employed by a follow-on entity.

When thinking about remedies, one goal should be to provide incentives for correct decisionmaking in the first instance. Currently, a participant's only remedies in cases of inaccurate benefit entitlement decisions are claims for the plan benefits themselvesⁿ³⁹³ and traditional equitable remedies such as injunctions.ⁿ³⁹⁴ From the plan's perspective, in the worst case it must pay or provide the benefits it has denied, and, in the discretion of the court, attorney's fees.ⁿ³⁹⁵ Thus, the direct economic incentives for a plan to avoid opportunistic behavior when deciding whether to pay disputed benefits are almost nil.

Second, where damages include negative health consequences, basic notions of appropriate relief support the availability of compensation for foreseeable consequences of the plan decision maker's failure to comply with the terms of the health care promise. In cases where an inaccurate [*460] benefit determination results in physical damages, the costs should be internalized to the plan actor that made the determination, not externalized to an innocent participant or beneficiary. This would avoid the perceived unfairness of the current system's denial of damages in cases such as *Corcoran*. Permitting awards of foreseeable consequential damages would also provide an incentive for plan decision makers to consider the potential cost of the injuries caused by claim denials that are inconsistent with the terms of a benefit plan.

The difficult question is whether efficiency and national benefit plan policy would be furthered by permitting individual participants and beneficiaries to recover punitive damages in instances of inappropriate claims administration. The statute can be read to permit those damages, but such an interpretation is not as strong as one that permits typical contract damages. From an efficiency standpoint, if damages are limited to foreseeable consequential damages, decision makers will be encouraged to ignore the costs associated with injuries for which they expect to ultimately avoid responsibility. Yet, permitting punitive damages is likely to result in awards that exceed the level necessary to achieve optimum levels of care in benefit plan administration. Furthermore, the negative effects that can be expected to flow from overly generous punitive awards, such as use of benefit plan assets for unnecessary medical procedures, decrease in plan sponsorship, and dramatic increases in litigation over issues of benefits administration represent a significant threat to the benefit plan system. In my estimation, the risks posed by punitive damages exceed the rewards likely to follow from permitting those damages. Others may view the trade-offs differently.

Finally, this subpart concentrates on the problems that arise through disputed benefit entitlements. Elsewhere in this Article, I have addressed the problems that occur through the process of benefit plan amendments. Those problems will also benefit from applying a contractarian framework to their resolution. Too often courts ignore basic contract principles when deciding cases that involve benefit plan amendments.

For example, the *Sprague* Court looked only at the terms of the benefit plans and applied a mechanistic reading of their terms instead of looking to the reasonable expectations of the parties as determined by all of the relevant documentation.ⁿ³⁹⁶ A decision that considered the representations made to the employees at the time of their decision to retire, including the waivers drafted by the company, may have produced a different result. Just as in the context of claims denials, in cases where plan sponsors breach their contractual commitments through the route of plan amendments, opportunistic behavior can be discouraged by permitting recovery of [*461] foreseeable consequential damages. Punitive damages represent the same risk of overly generous awards in this context as they do in claims denial situations.

V. Conclusion

ERISA's fiduciary framework is generally effective in addressing many of the problems at which it was targeted. When the actual operation of present day benefit plans is unpacked into components that reflect administrative reality, the opportunity arises for more finely tuned analysis. I advocate recognizing the many differences that exist between administration of plan assets and administration of plan benefits. The distinctions between these two areas of benefit plan operation provide the conceptual basis for a new understanding of the fiduciary regime. The first step is to recognize that the focus of ERISA's drafters, and of its fiduciary regime, was on problems of asset administration. The unintended and unanticipated result of that focus has been ineffective and inefficient regulation of benefits administration. In that sphere, plan sponsors have turned the principles underlying fiduciary obligation on their heads. Rather than treating benefit plan administration as requiring "the punctilio of an honor the most sensitive,"ⁿ³⁹⁷ plan sponsors have called upon ERISA's fiduciary provisions to provide them with a shield against liability. This result, however, was not intended by Congress and is not mandated by the statute.

I propose an analytical approach which recognizes that benefit plans intertwine notions of fiduciary duty with voluntary assumptions of contractual obligation. Conceptually, my approach is consistent with Judge Easterbrook and Professor Fischel's view that fiduciary obligations incorporate contractarian principles. I argue that an appropriate understanding of ERISA's legal framework is one that recognizes the full scope of the fiduciary relationship.

Both the substantive and remedial provisions of the statute support the proposed analysis. Because of slavish adherence to ill-considered dicta in *Russell*, ERISA jurisprudence has narrowly constrained the availability of remedies in the sphere of benefits administration. Neither the statute nor the legislative history compel this result. ERISA's language provides the basis for recovery of foreseeable consequential damages. It is a close question as to whether the statute also authorizes punitive damages.ⁿ³⁹⁸ However, permitting claims for foreseeable consequential damages against [*462] plan actors who engage in opportunistic or careless behavior will ensure that benefit plan participants and beneficiaries are compensated for injuries caused by inappropriate benefit administration. The prospect of liability for foreseeable consequential damages also will decrease the incentives that currently exist for plan actors to behave opportunistically and to minimize the resources they devote to careful decisionmaking.

My proposal will change the landscape of ERISA jurisprudence. All it requires, though, is recognition that Congress mobilized fiduciary principles to serve as the heart of ERISA regulation because of the flexibility, the adaptability, and the enduring value of those principles in governing relationships of heightened obligation. There is no evidence that Congress ever intended anything less.

Legal Topics:

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

Pensions & Benefits Law Employee Benefit Plans Defined Contribution Plans Pensions & Benefits Law Employee Retirement Income Security Act (ERISA) Fiduciaries Delegation Pensions & Benefits Law Employee Benefit Plans Defined Benefit Plans

FOOTNOTES:

n1. Justice Cardozo's formulation is one of the most famous statements ever made about the scope of fiduciary obligation. See Kelvin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 *Am. U. L. Rev.* 559, 587 *n.156* (1984) (noting Justice Cardozo's formulation in "the most frequently quoted case on fiduciary duties"); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *Yale L.J.* 625, 658 (1995) (referring to "Cardozo's incessantly cited opinion in *Meinhard v. Salmon*"); Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance*, 61 *Geo. Wash. L. Rev.* 954, 966 (1993) ("Indeed, a tradition of quoting Cardozo's description has developed among judges because it is difficult to find better language with which to express the concept of fiduciary duty.").

n2. *Meinhard v. Salmon*, 164 *N.E.* 545, 546 (N.Y. 1928).

n3. See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 *J.L. & Econ.* 425, 432-34 (1993) (discussing some of the many topics to which the label "fiduciary" is applied); see also Tamar

Frankel, *Fiduciary Law*, 71 *Cal. L. Rev.* 795, 797 (1983) ("Courts, legislatures, and administrative agencies increasingly draw on fiduciary law to answer problems caused by... social changes."); Jerry W. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 *Notre Dame L. Rev.* 199, 214-18 (1992) (exploring the expansion of fiduciary duties to new categories of persons); L.S. Sealy, *Fiduciary Relationships*, 1962 *Cambridge L.J.* 69, 71-72 (1962) (discussing the evolution of fiduciary relationships in modern law).

n4. Judge Easterbrook and Professor Fischel insist that the spreading use of fiduciary concepts is an adaptation and not merely an extension of those concepts. See Easterbrook & Fischel, *supra* note 3, at 425.

n5. See, e.g., Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back - Something May be Gaining on You"*, 68 *Am. Bankr. L.J.* 155, 159 (1994) (arguing that the fiduciary standards applied to directors of a debtor in possession ("DIP") are stricter than the usual standard of corporate governance); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 *U. Pa. L. Rev.* 1675, 1678-79 (1990) (citation omitted) ("The self-interest of officers and directors in the corporation and its assets and the wide discretion granted them in the performance of their jobs, have led courts to abandon any attempt to hold corporate fiduciaries to the same high standard of conduct required of other fiduciaries."); Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 *B.U. L. Rev.* 523 (1993) (discussing the Revised Uniform Partnership Act's limitation on the fiduciary duties among partners).

n6. *Meinhard*, 164 *N.E.* at 546.

n7. See *Corcoran v. United Healthcare, Inc.*, 965 *F.2d* 1321, 1322-24 (5th Cir. 1992).

n8. See *id.* at 1324. The health care plan had agreed to provide in-home nursing care for 10 hours a day. However, no nurse was on duty when the fetus went into distress. See *id.*

n9. See *Sprague v. General Motors Corp.*, 133 *F.3d* 388, 394-95 (6th Cir. 1998).

n10. *Id.* at 395.

n11. See *id.*

n12. See *Sengpiel v. B.F. Goodrich Co.*, 156 *F.3d* 660, 663-64 (6th Cir. 1998).

n13. See *id.* The joint venture later merged into yet another corporate entity. See *id.*

n14. See *id.*

n15. See *id.* at 668; *Sprague*, 133 *F.3d* at 406; *Corcoran*, 965 *F.2d* at 1338.

n16. See *Sengpiel*, 156 *F.3d* at 668; *Sprague*, 133 *F.3d* at 406; *Corcoran*, 965 *F.2d* at 1338.

n17. See *Sengpiel*, 156 *F.3d* at 668; *Sprague*, 133 *F.3d* at 406; *Corcoran*, 965 *F.2d* at 1338; cf. *Hughes Aircraft Co. v. Jacobson*, 525 *U.S.* 432, 119 *S. Ct.* 755, 763 (1999) (same result).

n18. See Lawrence W. Waggoner et al., *Family Property Law* 674 (2d ed. 1997).

n19. Employee Retirement Income Security Act (ERISA) 1-4402, 29 U.S.C. 1001-1461 (1994).

n20. See *infra* Part I.C.

n21. See H.R. Conf. Rep. No. 93-1280, at 302 (1974) (noting the expectation "that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans").

n22. See ERISA 2(b), 29 U.S.C. 1001.

n23. See *infra* Part III.A.

n24. See *infra* Part III.B.

n25. See *infra* Part III.C.

n26. See *infra* Part III.D.

n27. See Easterbrook & Fischel, *supra* note 3, at 427; see also Langbein, *supra* note 1, at 625-27.

n28. *Restatement (Second) of Trusts* 3(3) (1959).

n29. See ERISA 3(21)(A), 29 U.S.C. 1002.

n30. Assets of employee benefit plans must be held in trust unless one of the statutory exemptions is met. See *id.* 403(a), 29 U.S.C. 1103. The key exemptions are those that permit assets funded by insurance contracts or policies. See *id.* 403(b), 29 U.S.C. 1103.

n31. See *id.* 3(21)(A); 29 U.S.C. 1002(21)(A).

n32. See *Varity Corp. v. Howe*, 516 U.S. 489, 502-03 (1996).

n33. See 2A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* 184, at 560 (4th ed. 1987) ("Where there are several trustees it is the duty of each of them, unless it is otherwise provided by the terms of the trust, to participate in the administration of the trust.").

n34. The value of defined benefit plans insured by the Pension Benefit Guaranty Corporation ("PBGC") exceeded \$ 1.1 billion in 1996. See Pension Benefit Guaranty Corp., 1997 Pension Insurance Data Book tbl. A-21 (1998).

n35. See *Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc.*, 877 F. Supp. 948, 953 (E.D. Pa. 1995); *Anoka Orthopedic Assoc. v. Mutschler*, 709 F. Supp. 1475, 1484 (D. Minn. 1989); *Brandt v. Grounds*, 687 F.2d 895, 897-98 (7th Cir. 1982), *aff'g* 502 F. Supp. 598 (N.D. Ill. 1980).

n36. See Associates in *Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 569 (7th Cir. 1991).

n37. See *Varity Corp.*, 516 U.S. at 502-03.

n38. *Restatement (Second) of Trusts* 170 (1959).

n39. See *id.*

n40. See *id.* 183.

n41. See *id.* 232.

n42. See *id.* 227.

n43. See *id.*

n44. See *id.* 174.

n45. See *id.* 172.

n46. *Id.* 173.

n47. See *id.*

n48. See ERISA 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B); see also 29 C.F.R. 2550.404a-1 (1997) (explaining the application of the prudence standard to investment duties).

n49. ERISA 404(a)(1)(A)(i), 29 U.S.C. 1104(a)(1)(A)(i); cf. 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."). This provision permits the payment of plan expenses. See ERISA 404(a)(1), 29 U.S.C. 1104.

n50. See ERISA 404(a)(1)(C), 29 U.S.C. 1104(a)(1)(C).

n51. See *id.* 404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D).

n52. See *id.* 3(14), 29 U.S.C. 1002(14) (defining party in interest to include plan service providers, an employer with employees who are plan participants, certain individuals and entities with an ownership interest in a plan sponsor, and plan fiduciaries).

n53. See *id.* 406, 29 U.S.C. 1106. There are numerous class and individual exemptions to the prohibited transactions provisions. For a detailed discussion of those exemptions, see Donald J. Myers & Michael B. Richman, Class Exemptions from Prohibited Transactions, in *ERISA Fiduciary Law* 365 (Susan P. Serota ed.,

1995); William P. Wade & Richard I. Loebl, Individual Prohibited Transaction Exemptions, in ERISA Fiduciary Law 365 (Susan P. Serota ed., 1995).

n54. See ERISA 408(b)(2), 29 U.S.C. 1108(b)(2).

n55. See John H. Widman, Prohibited Transaction Provisions, in ERISA: A Comprehensive Guide 191, 209-14 (Martin Wald & David E. Kenty eds., 1991).

n56. George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees 1, 3-4 (2d ed. 1978) (emphasis added).

n57. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

n58. See ERISA 502(a)(2)-(3); 29 U.S.C. 1132(a)(2)-(3).

n59. See 120 Cong. Rec. 29,957 (1974), reprinted in 3 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974, 4733, 4811 (Comm. Print 1976) [hereinafter History] (stating 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") (statement of Sen. Ribicoff); 120 Cong. Rec. 29,954, (1974) reprinted in 3 History, supra, at 4733, 4803 (referring to situations "in which pension funds have been used improperly by plan managers and fiduciaries") (statement of Sen. Nelson); 120 Cong. Rec. 4278 (1974), reprinted in 3 History, supra, at 3351, 3370 (Comm. Print 1976) ("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.") (statement of Rep. Perkins).

n60. See 120 Cong. Rec. 29,932 (1974), reprinted in 3 History, supra note 59, at 4633, 4743 (stating that ERISA was intended "to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets") (statement of Sen. Williams); 120 Cong. Rec. 29,961 (1974), reprinted in 3 History, supra note 59, at 4277, 4323 (stating that ERISA "sets fiduciary standards to insure that pension funds are not mismanaged") (statement of Sen. Clark).

n61. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980).

n62. *Id.* (quoting 120 Cong. Rec. 29,950 (1974), reprinted in 3 History, supra note 59, at 4733, 4793 (statement of Sen. Bentsen)).

n63. See *infra* text accompanying notes 265-68.

n64. See *infra* text accompanying notes 316-19.

n65. See *infra* Part II.B.

n66. ERISA 1 (emphasis added).

n67. See 119 Cong. Rec. 30,003 (1973), reprinted in 2 History, supra note 59, at 1579, 1599 (noting the problem that "two-thirds of all pension plan participants...have no vested right in their plan"); see also Michael S. Gordon, Overview: Why was ERISA Enacted?, in U.S. Senate, Special Comm. on Aging, 98th Cong., The

Employee Retirement Income Security Act of 1974: The First Decade 15-16, reprinted in John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 73 (2d ed. 1995) (discussing a controversial Labor Subcommittee study, which found that, while plans purported to cover millions of employees since 1950, only five percent of those employees actually received benefits).

n68. See *infra* text accompanying note 80 (discussing the Studebaker pension plan termination and its effect on the public policy debate).

n69. See ERISA 203, 29 U.S.C. 1053.

n70. See *id.* 204, 29 U.S.C. 1053.

n71. See *id.* 206(c), 29 U.S.C. 1056(c).

n72. See *id.* 206(d), 29 U.S.C. 1056(d).

n73. See *id.* 301-308, 29 U.S.C. 1081-1086. In an article published shortly after ERISA's enactment, one of the Senators who sat on the Labor Subcommittee during the reform efforts called the minimum funding requirements one of the six provisions at "the heart of the legislative effort." Harrison A. Williams Jr., *Development of the New Pension Reform Laws*, 26 *Lab. L.J.* 135, 137 (1975).

n74. See *I.R.C.* 412 (1999).

n75. For a discussion of what constitutes a defined benefit plan and the difference between defined benefit and defined contribution plans, see *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755 (1999).

n76. See ERISA 4001-4402, 29 U.S.C. 1301-1461.

n77. See Williams, *supra* note 73, at 137 (listing the insurance program as another of the six key ERISA reforms).

n78. See PBGC, Annual Report i (1997). Some commentators have criticized the nature of the security provided by the PBGC and the moral hazard involved in the current system. See, e.g., James H. Smalhout, *The Uncertain Retirement* (1996).

N79. H.R. Rep. No. 93-533, at 7 (1973).

n80. See, e.g., Smalhout, *supra* note 78, at 8-9; Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in *Pension and Employee Benefit Law*, *supra* note 67, at 62-66; Alvin D. Lurie, *ETIs: A Scheme for the Rescue of City and Country with Pension Funds*, 5 *Cornell J.L. & Pub. Pol'y* 315, 329 (1996); Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 *B.C. L. Rev.* 201, 203-04 (1995); Ezra S. Field, *Note, Money for Nothing and Leverage for Free: The Politics and History of the Leveraged ESOP Tax Subsidy*, 97 *Colum. L. Rev.* 740, 744 (1997); Christina A. Smith, *Note, The Road to Retirement-Paved with Good Intentions but Dotted with Potholes of Untold Liability: ERISA Section 510, Mixed Motives and Title VII*, 81 *Minn. L. Rev.* 735, 741-42 (1997).

n81. 120 Cong. Rec. 4279 (1974) (statement of Rep. Brademas).

n82. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefit plans.").

n83. See Note, Pension Plans and the Rights of the Retired Worker, 70 *Colum. L. Rev.* 909, 910 (1970).

N84. Unfunded past service grants appear to have been at least part of the reason for the underfunding of the Studebaker plan. See Allen, *supra* note 80, at 63.

n85. See Note, *supra* note 83, at 910.

n86. See Gordon, *supra* note 67, at 71.

n87. See *id.*

n88. *Id.*

n89. See *id.*

n90. See *id.*

n91. See *id.*

n92. See *id.* Earlier misfeasance and malfeasance, especially in the realm of health care and other welfare benefit plans, led to the enactment in 1958 of the Welfare and Pension Plan Disclosure Act (WPPDA). See Note, *supra* note 83, at 932 n.119; William J. Isaacson, Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights, 59 *Colum. L. Rev.* 96, 101-05 (1959). For the original version of the WPPDA, see Act of Aug. 28, 1958, Pub. L. No. 85-836, 72 Stat. 997 (repealed by ERISA 111(a)(1)).

n93. See Federal Old Age, Survivors, Disability and Hospital Insurance Program (OASDHI), 42 *U.S.C.* 401-32 (1994). Following popular usage, this article uses the term "Social Security" to refer to the post-retirement income portion of the OASDHI program.

n94. See E. Haavi Morreim, Benefits Decisions in ERISA Plans: Diminishing Deference to Fiduciaries and an Emerging Problem for Provider-Sponsored Organizations, 65 *Tenn. L. Rev.* 511, 511-12 (1998)

n95. See Eugene Steuerle & Jon M. Bakija, Retooling Social Security for the 21st Century 15-16 (1994).

n96. See President's Comm. on Pension Pol'y, Coming of Age: Toward a National Retirement Income Policy 12 (1981). Together these three sources of income have become known as the "three-legged stool" of retirement income support. *Id.*; see also Robert J. Lynn, The Pension Crisis 41 (1983); Phyllis C. Borzi, A National Retirement Income Policy: Problems and Policy Options, 19 *U. Mich. J.L. Reform* 5, 8 (1985); Frances Leonard, The Three Legged Stool: Women and Retirement (In)Security, 32 *Hastings L.J.* 1195 (1981); Camilla E. Watson, The Pension Game: Age-and Gender-Based Inequities in the Retirement System, 25 *Ga. L. Rev.* 1, 5-6 (1990); John R. Keville, Note, Retire at Your Own Risk: ERISA's Return on Investment?, 68 *St. John's L. Rev.* 527, 532 (1994).

n97. See Morreim, *supra* note 94, at 511-12.

n98. See William C. Greenough & Francis P. King, *Pension Plans and Public Policy*, 27-47 (1976), reprinted in *Pension and Employee Benefit Law*, *supra* note 67, at 9-10.

n99. See *id.* at 10.

n100. See Railroad Retirement Act of 1974, 45 U.S.C. 231-231v (1994). For a discussion of the Railroad Retirement Act, see *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573-76 (1979) (deciding the scope of alienability of plan benefits).

n101. See *supra* text accompanying notes 86-92.

n102. See *Pension and Employee Benefit Law*, *supra* note 67, at 63.

n103. See *id.*

n104. See *supra* text accompanying note 68.

n105. See Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* 3.111(F) (1997).

n106. See *id.*

n107. See, e.g., *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993) (disputing enforcement of miscalculation in benefit entitlement based upon aggregation of prior service credit).

n108. See *supra* text accompanying notes 31-32.

n109. See ERISA 101-111, 29 U.S.C. 1021-1031 (1994)(setting forth ERISA's reporting and disclosure requirements).

n110. See *id.* 502, 29 U.S.C. 1132. Detailed regulations have been in place since 1977 describing the minimum requirements for benefit plan claims procedures. See 29 C.F.R. 2560.503-1 (1977). On September 9, 1998, the Department of Labor ("DOL") issued a proposed regulation intended to address many of the inequities in the existing requirements. 63 Fed. Reg. 48,389 (1998) (to be codified at 29 C.F.R. pt. 2560) (proposed Sept. 9, 1998).

n111. See *infra* note 325.

n112. See ERISA 404(a)(1), 29 U.S.C. 1104(a)(1).

n113. See *id.* 201(1), 301(a)(1), 29 U.S.C. 1051(1), 1081(a)(1).

n114. See *id.* 4, 29 U.S.C. 1003.

n115. See Employee Benefits Research Inst., *Databook on Employee Benefits* 235-39 (4th ed. 1997).

n116. See, e.g., *infra* note 124 (citing commentary on the litigation over the availability of bone marrow transplants).

n117. See *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1255 (3d Cir. 1993) (referring both to a "medical necessity" requirement and an exclusion for "experimental procedures"); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1204 (10th Cir. 1992) (discussing findings of the lower court on whether treatment was "medically necessary" as well as not "experimental or unproven"); *Elsroth v. Consolidated Edison Co.*, 10 F. Supp.2d 427, 439-40 (S.D.N.Y. 1998) (citing plan exclusions for interventions that are not "medically necessary" or "generally recognized"); *Alcorn v. Sterling Chems. Inc. Med. Benefits Plan*, 991 F. Supp. 609, 614 (S.D. Tex. 1998) (considering plan exceptions from coverage for "service that is experimental" as well as "any service not medically necessary").

n118. See *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49 (D. Mass. 1997).

n119. See *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997).

n120. See *Kuhl v. Lincoln Nat'l Health Plan*, 999 F.2d 298 (8th Cir. 1993).

n121. See *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

n122. See John H. Langbein, *The Supreme Court Flunks Trusts*, 6 *Sup. Ct. Rev.* 207, 216 (1990).

n123. *Id.*

n124. The obligation of health care insurance to cover bone marrow transplants has been heavily litigated. See, e.g., *Martin v. Blue Cross & Blue Shield*, 115 F.3d 1201, 1204 (4th Cir. 1997) (concluding that ABMT for treatment of epithelial ovarian cancer is an experimental or investigative procedure under the terms of the plan); *Bechtold v. Physicians Health Plan*, 19 F.3d 322, 328-29 (7th Cir. 1994) (concluding that ABMT is not a reasonable or necessary treatment for solid tumors such as breast cancer); *Grethe v. Trustmark Ins. Co.*, 881 F. Supp. 1160, 1168 (N.D. Ill. 1995) (deciding that ABMT for inoperable breast cancer was not medically necessary under the terms of the plan); *Dozsa v. Crum & Forster Ins. Co.*, 716 F. Supp. 131, 139 (D.N.J. 1989) (holding that ABMT for multiple myeloma is not educational or experimental in nature); *Thomas v. Gulf Health Plan, Inc.*, 688 F. Supp. 590, 596 (S.D. Ala. 1988) (deeming ABMT treatment for breast cancer to be experimental). For commentary on the issue see Laurie Dechery, Note, *Preferential Treatment or Discriminatory Standards: Do Employer-provided Insurance Plans Violate Title VII When They Exclude Treatment for Breast Cancer?*, 80 *Minn. L. Rev.* 945 (1996); Denise S. Wolf, Note, *Who Should Pay for "Experimental" Treatments? Breast Cancer Patients v. Their Insurers*, 44 *Am. U. L. Rev.* 2029 (1995); Michael J. Brandi, Commentary, *The Paradox of Technological Progress in Health Insurance Contracts: "Experimental Treatment Clauses" and Breast Cancer*, 2 *Conn. Ins. L.J.* 243 (1996); Paul Earl Pongrace, III, Commentary, *HDC/ABMT Experimental Treatment or Cure All? (Ask the Insurance Companies)*, 2 *J. Pharmacy & Law* 329 (1993).

n125. Fischel & Langbein, *supra* note 49, at 1132.

n126. See *id.* at 1132-33.

n127. Now that plan sponsors have begun to understand the scope of the protection provided to them by ERISA's fiduciary provisions, opportunistic behavior does not always occur at the level of the individual partic-

ipant. For examples of plan sponsors who avoided fiduciary liability yet affected the benefit eligibility of large groups of employees, see cases cited supra notes 9-17.

n128. See supra text accompanying note 31.

n129. See infra text accompanying notes 136-48.

n130. See infra text accompanying Part IV.B.

n131. *489 U.S. 101 (1989)*.

n132. See *id. at 115*.

n133. See *id. at 105-06*.

n134. See *id.*

n135. See *id. at 106*.

n136. See *id. at 108*. The Supreme Court also addressed the question of whether the former Firestone employees retained their status as plan "participants," and, thus, their statutory entitlement to plan information. See *id. at 105*.

n137. Labor Management Relations Act (LMRA), Pub. L. No. 100, 61 Stat. 136 (1947) (codified as amended at *29 U.S.C. 141-187* (1994)). The Supreme Court recognized that the arbitrary and capricious standard for LMRA actions developed in order to provide a basis for federal court jurisdiction. See *Firestone, 489 U.S. at 109-10*. Because ERISA explicitly provides for benefit actions, the LMRA analogy was inapt. See *id. at 110*.

n138. See *Firestone, 489 U.S. at 110*.

n139. See *id. at 111*.

n140. See *id.*

n141. See *id. at 112*.

n142. See Langbein, supra note 122, at 218.

n143. See *id. at 217-19*.

n144. See *id. at 217-19*. One need not accept Professor Langbein's view in order to argue that Firestone was wrongly decided. Because fiduciary law is flexible, the Court might have distinguished employee benefit plans from traditional trusts on a variety of grounds. In fact, Professor Langbein himself has recognized that such differences exist. See Langbein, supra note 1, at 663; cf. *Restatement (Second) of Trusts 187 cmt. a* (1959) (explaining that the exercise of a fiduciary power is discretionary unless required by the terms of the trust or by "principles of law applicable to the duties of trustees").

n145. See Langbein, *supra* note 122, at 220.

n146. See Peter J. Wiedenbeck & Russell K. Osgood, *Employee Benefits* 1270-71, 1311 (1996) (reprinting CCH Pension Plan Guide model plans that contain provisions granting discretion to plan administrators).

n147. See *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 827 (1st Cir. 1997) (applying the arbitrary and capricious standard where an administrator has discretion).

n148. In regulatory material, the DOL has taken the position that individuals who perform purely ministerial duties do not act as ERISA fiduciaries. See 29 C.F.R. 2509.75-8 (1998) (Question and Answer D-2).

n149. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

n150. See *supra* Part II.

n151. The Supreme Court has implicitly accepted the deferred compensation theory of pension plans, which views pension benefits as being earned by employees during their productive work life with receipt deferred until after retirement. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 895 (1996). For more detail on the deferred compensation theory and competing theories of pension plans, see *Pension and Employee Benefit Law*, *supra* note 67, at 15-16.

n152. In some cases, however, sympathetic courts have determined that a fiduciary's denial of benefits violated the arbitrary and capricious standard. See, e.g., Morreim, *supra* note 94, at 516. It is interesting to compare Firestone's permissive application of the arbitrary and capricious standard to the more stringent application of what is nominally the same standard under the Administrative Procedure Act. There, the "hard look" doctrine, first articulated by Judge Harold Leventhal, imposes a significant burden on an agency in defending a rule. See, e.g., Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. Cal. L. Rev. 621, 625-26 (1994) (explaining how judges including Judge Leventhal forced an agency defending a rule to show that it had taken a "hard look" at "all relevant aspects of the problem, answered comments raised in the rulemaking record, and advanced an adequate explanation of why it chose this particular solution over other alternatives").

n153. See Langbein, *supra* note 122, at 219.

n154. See *Restatement (Second) of Trusts* 170 (1) cmts. a-h (1959) (listing the broad range of actions prohibited to trustees because of the self-interest involved); Charles Bryan Baron, Esq., *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 *St. John's L. Rev.* 43, 45-53 (1998) (discussing prohibitions against certain self-dealing transactions). If a trustee does engage in a self-interested transaction the application of the "no further inquiry" rule essentially establishes an irrebuttable presumption that the trustee's action was wrongful and the transaction will be voided. See *id.* at 53-54.

n155. See Employee Retirement Income Security Act (ERISA) 408(c)(3), 29 U.S.C. 1108(c)(3) (1994).

n156. See Fischel & Langbein, *supra* note 49, at 1126-27.

n157. See *id.*

n158. ERISA 404(a)(1), 29 U.S.C. 1104(a)(1).

n159. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (quoting *Restatement (Second) of Trusts* 187 cmt. d (1959)).

n160. *Id.*

n161. *Firestone*, 489 U.S. at 115 (quoting *Restatement (Second) of Trusts* 187 cmt. d (1959)).

n162. See *Vega v. National Life Ins. Servs., Inc.*, 145 F.3d 673, 677-78 (5th Cir. 1998) ("We repeatedly have stated that a conflict of interest does not alter the standard of review, but is a factor to be considered in deciding whether the plan administrator abused its discretion."); *Ladd v. ITT Corp.*, 148 F.3d 753, 753-54 (7th Cir. 1998) ("Our role is the limited one of determining whether MetLife abused its discretion... If, however, the administrator has a conflict of interest, then, though the standard of review is nominally the same, the judicial inquiry is more searching."); *Edmonds v. Hughes Aircraft Co.*, No. 97-1431, 1998 U.S. App. LEXIS 9419, at *20 (4th Cir. May 8, 1998) ("Though we review all discretionary decisions for abuse of that discretion, we subject decisions made by fiduciaries with conflicts of interest to a 'sliding scale' of additional scrutiny."); *Peruzzi v. Summa Med. Plan*, 137 F.3d 431, 433 (6th Cir. 1998) ("The conflict of interest inherent in self-funded plans does not alter the standard of review, but 'should be taken into account as a factor in determining whether the... decision was arbitrary and capricious.'") (quoting *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989)); *Torre v. Federated Mut. Ins. Co.*, Nos. 95-3411, 96-3010, 1997 U.S. App. LEXIS 22680, at *12 (10th Cir. Aug. 27, 1997) ("Courts reviewing decisions of conflicted plan administrators should still apply an arbitrary and capricious standard, but should 'decrease the level of deference given to the... administrator's decision in proportion to the seriousness of the conflict.'") (quoting *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996)); *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1261 n.12 (3d Cir. 1993) ("Courts scrutinize more closely decisions by plan administrators acting under a conflict of interest."). The courts struggled with the question of whether any significant difference exists between the arbitrary and capricious standard and the abuse of discretion standard. See Jon C. Bruning, Note, ERISA Plan Fiduciaries Beware: the Abuse of Discretion Standard of Review Is No Longer a Guarantee of Judicial Deference - *Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011 (5th Cir. 1992), 73 Neb. L. Rev. 932, 943 (1994). Most courts of appeals have concluded that there is no significant difference. See, e.g., *Terry v. Bayer Corp.*, 145 F.3d 28, 37 n.6 (1st Cir. 1998); *Honda v. Sunshine Biscuit Long Term Disability Plan*, No. 95-56857, 1997 U.S. App. LEXIS 35920, at *13 n.1 (9th Cir. Oct. 7, 1997); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 n.1 (10th Cir. 1996); *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992); *Cox v. Mid-America Dairymen, Inc.*, 965 F.2d 569, 572 n.3 (8th Cir. 1992). But see *Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001, 1008 (7th Cir. 1998) (noting that some decisions of the Seventh Circuit have indicated that the arbitrary and capricious standard is more deferential than the abuse of discretion standard).

The other courts of appeals that have addressed the matter utilize some version of the approach developed by the Eleventh Circuit in *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556 (11th Cir. 1990). See *infra* text accompanying notes 167-73 for an extended discussion of the Brown approach. Neither the First nor the Tenth Circuit has determined the appropriate standard of review to measure the decisions of self-interested benefit plan fiduciaries.

n163. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987).

n164. *Id.* at 1052-53.

n165. *Id.* at 1052.

n166. See *supra* text accompanying notes 156-58.

n167. See *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998) (referring to *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1566-67 (11th Cir. 1990) as "adopting the 'presumptively void' approach"); *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997) (stating that "the Ninth and Eleventh Circuits adopted a 'presumptively void' test"); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 826 (10th Cir. 1996) (noting that "other circuits apply a 'presumptively void' test").

n168. *Brown*, 898 F.2d at 1566-67.

n169. *Id.*

n170. See *id.*

n171. See *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1322 (9th Cir. 1995); see also *Farley v. Arkansas Blue Cross & Blue Shield*, 147 F.3d 774, 776 (8th Cir. 1998) ("A plan beneficiary is not entitled to less deferential review absent material, probative evidence demonstrating that a palpable conflict of interest existed, which caused a serious breach of the administrator's fiduciary duty."); *Semmler v. Metropolitan Life Ins. Co.*, No. 97-7528, 1998 U.S. App. LEXIS 149, at *2 (2d Cir. Jan. 7, 1998) (requiring evidence showing "that the administrator was in fact influenced by such conflict" (quoting *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996))).

n172. Perhaps the clearest support for this point exists in ERISA's remedial provisions. Participants and beneficiaries have standing to bring claims to recover benefits owed under the terms of their benefit plans. See ERISA 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). That provision operates independently from the provisions that grant participants and beneficiaries standing to bring claims for fiduciary breach. See ERISA 502(a)(2)-(3), 29 U.S.C. 1132 (a)(2)-(3). And, until the Supreme Court resolved the issue in 1996, it was unclear whether participants and beneficiaries even had the right to bring actions for personal recoveries in situations of fiduciary breach. See *Varity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996).

n173. See *Brown*, 898 F.2d at 1566.

n174. See, e.g., *Atwood*, 45 F.3d at 1322 ("A review of our cases shows that we have employed a methodology similar to that of the Eleventh Circuit.").

n175. See *Semmler*, 1998 U.S. App. LEXIS 149, at *3 ("If a plaintiff succeeds in showing that the administrator was actually influenced by the conflict of interest, 'the deference otherwise accorded the administrator's decision drops away and the court interprets the plan de novo.'" (quoting *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1256 (2d Cir. 1996))); *Atwood*, 45 F.3d at 1323 ("If the beneficiary has made the required showing [of fiduciary self-interest], the principles of trust law require us to act very skeptically in deferring to the discretion of an administrator who appears to have committed a breach of fiduciary duty.").

n176. See *Farley*, 147 F.3d at 776.

n177. See *id.*

n178. See *supra* text accompanying notes 176-77.

n179. See *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998).

n180. See, e.g., Jane K. Stanley, *The Definition of a Fiduciary Under ERISA: Particular Persons and Entities*, 27 *Real Prop. Prob. & Tr. J.* 711 (1993) (discussing fiduciary status of plan sponsors, plan administrators, and many others).

n181. See Employee Retirement Income Security Act (ERISA) 404(a)(1)(C), 29 *U.S.C.* 1104(a)(1)(C) (1994).

n182. See *id.* 404(a)(1)(A), 29 *U.S.C.* 1104(a)(1)(A). Daniel Fischel and John Langbein's seminal article on this provision popularized the phrase "exclusive benefit rule." Fischel & Langbein, *supra* note 49, at 1107.

n183. See ERISA 404(a)(1)(B), 29 *U.S.C.* 1104(a)(1)(B).

n184. See *id.* 404(a)(1)(D), 29 *U.S.C.* 1104(a)(1)(D).

n185. See *Donovan v. Bierwirth*, 680 *F.2d* 263 (2d Cir. 1982).

n186. See Tom Gilroy, California Businessman Indicted on Charges of Embezzling from Employee Pension Plan, *Pens. & Ben. Daily* (BNA) at D-15 (Jan. 21, 1999).

n187. See *supra* text accompanying notes 52-55 for a discussion of the prohibited transactions requirements.

n188. For an example of the types of issues that have arisen under ERISA's prohibited transaction requirements, see *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 *U.S.* 152 (1993) (determining that the plan sponsor's transfer of encumbered property to its pension plan in partial satisfaction of funding obligations constituted a prohibited transaction).

n189. See Susan P. Serota, Overview of ERISA Fiduciary Law, in *ERISA Fiduciary Law* 9, 23 (Susan P. Serota ed., 1995); Fischel & Langbein, *supra* note 49, at 1109.

n190. See Frank M. Cappuccio, Note, The Duties of Employee Benefit Plan Trustees Under ERISA in Hostile Tender Offers, 82 *Colum. L. Rev.* 1692, 1698 (1982).

n191. See Fischel & Langbein, *supra* note 49, at 1118.

n192. See *id.*

n193. See *Lockheed Corp. v. Spink*, 517 *U.S.* 882, 891 (1996) (permitting the utilization of excess pension plan assets to fund early retirement benefits which were offered in an attempt to reduce Lockheed's workforce).

n194. See Fischel & Langbein, *supra* note 49, at 1118.

n195. See Bruce Wolk, Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality, 70 *Va. L. Rev.* 419, 426-33 (1984), reprinted in *Pension & Employee Benefit Law*, *supra* note 67, at 200-03.

n196. In fact, a corporation that sponsored employee benefit plans purely as gratuities to employees might violate its obligation to its shareholders. See *Dodge v. Ford Motor Co.*, 170 *N.W.* 668 (1919) (holding that a

corporation may not sacrifice the interests of the shareholders for others or operate a corporation for the primary benefit of others with only an incidental benefit for shareholders).

n197. See ERISA 403(c)(1), 29 U.S.C. 1103(c)(1) (1994).

n198. 517 U.S. 882 (1996).

n199. *Id.* at 893-94 (citation omitted).

n200. See Fischel & Langbein, *supra* note 49.

n201. Morreim, *supra* note 94, at 516.

n202. See ERISA 3(21)(A), 29 U.S.C. 1002.

n203. See Stanley, *supra* note 180.

n204. See *Blatt v. Marshall & Lassman*, 812 F.2d 810, 813 (2d Cir. 1987) (holding that an accounting firm was a fiduciary and violated its duty by failing to deliver the notice of change form to committee until one and a half years after plan participant left firm).

N205. See ERISA 403(a), 29 U.S.C. 1103(a) (1994).

n206. See *id.*

n207. ERISA's definition of a fiduciary includes those with discretionary management authority over plan assets and those who have control over plan assets. See *supra* text accompanying note 31. For discussion of the regulatory and case law authority treating employee benefit plan trustees as ERISA fiduciaries, see Stanley, *supra* note 180, at 718.

n208. ERISA 402(a)(1), 29 U.S.C. 1102(a)(1) (1994); see also George L. Flint, Jr., ERISA: Extracontractual Damages Mandated for Benefit Claims Actions, 36 *Ariz. L. Rev.* 611 (1994) (noting the differing requirements of trust and plan documents and implying the dual fiduciary structure).

n209. See ERISA 3(21)(A), 29 U.S.C. 1002.

n210. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755, 763 (1999) (stating that plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries).

n211. ERISA 404(a)(1), 29 U.S.C. 1104(a)(1) (1994).

n212. *Id.* 404(a)(1)(A)(i), 29 U.S.C. 1104(a)(1)(A)(i).

n213. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (holding that ERISA does not require employers to maintain personal benefit plans).

n214. See *id.* at 890; see also *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 77 (1995) (holding that employers are free, under ERISA, to terminate welfare plans).

n215. See *supra* text accompanying note 29.

n216. See ERISA 402(a)(2), 29 U.S.C. 1102(a)(2).

n217. See *id.* 3(16)(A), 29 U.S.C. 1002(16)(A).

n218. See *supra* text accompanying note 29.

n219. *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

n220. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1985) (holding that, in the context of a takeover threat, concern for constituencies other than shareholders is appropriate only when there is some rationally related benefit accruing to shareholders). But see Principles of Corporate Governance 2.01(b)(1992) (stating that a corporation may devote a reasonable amount of resources to public welfare and humanitarian and philanthropic concerns even if shareholder gain is not enhanced). For further discussion regarding corporate concern for constituencies other than shareholders see Joel Seligman, Corporations 120-25 (1995).

n221. See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (stating that "The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.").

n222. See *supra* text accompanying notes 12-14.

n223. See *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665 (6th Cir. 1998).

n224. See *id.* at 663-64 (holding that B.F. Goodrich could transfer only those retirees with certain social security numbers).

n225. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755 (1999).

n226. See *id.* at 759.

n227. See *id.* at 760.

n228. The Supreme Court chose not to include in its opinion the fact, as stated by the Ninth Circuit, that approximately half of the plan's surplus funding was attributable to employee contributions. See *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288 (9th Cir. 1997).

n229. See *Hughes Aircraft*, 119 S. Ct. at 759.

n230. See *id.* at 763-64.

n231. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

n232. See *Hughes Aircraft*, 119 S. Ct. at 762.

n233. *Id.* at 763.

n234. See *id.*

n235. See *id.* at 763 n.5 (dismissing the participants' argument that, due to their contributions, they were co-settlors of the trust).

n236. See *id.* at 763-64.

n237. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (discussing settlor functions in the context of a welfare benefit plan); see also *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (extending the Curtiss-Wright rationale to pension plans).

n238. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755 (1999).

n239. See *Lockheed Corp.* 517 U.S. at 890.

n240. *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

n241. See *id.* at 492-93.

n242. See *id.* at 493.

n243. See *id.* at 493-94.

n244. See *id.* at 499-501.

n245. See *id.* at 494.

n246. See *id.* at 494, 504-05.

n247. See *id.* at 504-05.

n248. The lower courts had determined Varity and Massey-Ferguson to be alter egos. The Supreme Court did not distinguish between them and I follow that practice here. See *id.* at 492.

n249. See *id.* at 504-05.

n250. See *id.* at 502.

n251. See *id.* at 502.

n252. See *id.* at 502-03.

n253. See *id.* at 502-03.

n254. See *supra* text accompanying notes 161-64.

n255. See *supra* text accompanying notes 12-14 for a brief discussion of the Sengpiel case.

n256. See *supra* text accompanying notes 12-16.

n257. See *supra* text accompanying notes 225-36 for a brief discussion of the Hughes Aircraft case.

n258. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S.Ct. 755, 764 (1999).

n259. Nonfiduciaries who are parties in interest are subject to ERISA's prohibited transactions requirements. See ERISA 406, 29 U.S.C. 1106 (1996). Actuaries must meet specific requirements regarding certification of annual reports and the actuarial assumptions they utilize for minimum funding standards. See ERISA 103, 302, 29 U.S.C. 1023, 1082 (1996).

n260. See Bogert & Bogert, *supra* note 56, 868.

n261. Compare *Pappas v. Buck Consultants*, 923 F.2d 531, 541 (7th Cir. 1991) (holding that nonfiduciaries might be subject to liability under ERISA); and *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988)(same), with *Useden v. Acker*, 947 F.2d 1563, 1579-80 (11th Cir. 1991) (determining that nonfiduciaries are not subject to liability under ERISA); and *Nieto v. Ecker*, 845 F.2d 868, 872-73 (9th Cir. 1988)(same).

n262. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253-54 (1993).

n263. See *id.* at 266 n.1. Justice White's dissent, which was joined by Chief Justice Rhenquist, and Justices O'Connor and Stevens, accepts the argument that ERISA's foundation in traditional trust law and recent statutory amendments provide a basis for holding nonfiduciaries liable for knowing participation in fiduciary breach. See *id.* (White, J., dissenting). Not surprisingly, the case law following *Mertens* has tended to accept the dicta of the majority. See *Reich v. Compton*, 57 F.3d 270, 284 (3d Cir. 1995) (holding that ERISA does not permit the Secretary of Labor to bring suits against nonfiduciaries even for knowing participation in a fiduciary breach); *Witt v. Allstate Ins. Co.*, 50 F.3d 536, 538 (8th Cir. 1995) (supporting that, while ERISA does allow suits for equitable relief against nonfiduciaries, suits for monetary damages against nonfiduciaries are not allowed); *Reich v. Rowe*, 20 F.3d 25, 30-31 (1st Cir. 1994) (holding that ERISA does not permit suits against nonfiduciaries charged with knowing or unknowing participation in a fiduciary breach); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 666 (2d Cir. 1994) (holding that ERISA does not authorize suits for money damages against nonfiduciaries). But see *Concha v. London*, 62 F.3d 1493, 1504 (9th Cir. 1995) (holding that ERISA section 1132(a)(3) does permit equitable relief against nonfiduciaries).

n264. See *Donovan v. Robbins*, 752 F.2d 1170, 1185 (7th Cir. 1985)(upholding congressional intention for damage awards considered in 29 U.S.C. 1105); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984)(same).

n265. See *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978).

n266. See *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991)(holding that fiduciaries breached the duty of trust and were therefore enjoined from serving as ERISA fiduciaries).

n267. 473 U.S. 134 (1985).

n268. See *id.* at 136.

n269. See *id.* at 136-37. The regulations in effect at the time required resolution of disputed claims within 120 days from a request for review. See 29 C.F.R. 2560.503-1(h)(1)(i)(1994). In 1998, the DOL proposed revised regulations which would reduce the time for review of health benefit decisions. See 63 Fed. Reg. 48,389 (1998).

n270. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139 n.5 (1985).

n271. See *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).

n272. See *Russell*, 473 U.S. at 140.

n273. *Id.* at 134 n.8.

n274. See *id.* at 142 n.9.

n275. See *id.* at 136.

n276. See *supra* note 269.

n277. See *Response to Petition for Writ of Certiorari, Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (No. 84-9).

n278. See *Russell*, 473 U.S. at 136.

n279. See *id.* at 144.

n280. See *id.* at 144 n.12.

n281. See *id.* at 139 n.5.

n282. The four person concurrence recognized the breadth of the language in the majority opinion and indicated concern over implied limitations on fiduciary liability. See *id.* at 150-56.

n283. See *McLeod v. Oregon Lithoprint, Inc.*, 46 F.3d 956 (9th Cir. 1995); *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614 (11th Cir. 1991).

n284. Compare ERISA 409, 29 U.S.C. 1109 (1994) (making repeated reference to obligations to plans), with ERISA 502(a), 29 U.S.C. 1132 (1994) (lacking equivalent language).

n285. See *Varity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996).

n286. In its 1990 decision in *Ingersoll-Rand Co. v. McClendon*, the Court arguably opened the way for plaintiffs to seek compensatory and punitive damages. 498 U.S. 133 (1990). For a discussion of that decision, see *infra* text accompanying notes 371-72.

n287. ERISA 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (1994) (emphasis added).

n288. See *infra* Part IV for a discussion of how a different interpretation would affect ERISA's remedial jurisprudence.

n289. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985).

n290. See *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1009 (9th Cir. 1998) (citation omitted) (citing Russell for the proposition that "extracontractual, compensatory and punitive damages are not available under ERISA."); *Godfrey v. BellSouth Telecomms., Inc.*, 89 F.3d 755, 761 (11th Cir. 1996) (holding that the right to sue to enforce rights under a plan does not permit claim for compensatory or punitive damages); *Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 827 (10th Cir. 1995) (stating that dicta in Russell strongly suggests that extracontractual damages are not available); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 30-31 (5th Cir. 1993) (denying the availability of extracontractual relief); *Harsch v. Eisenberg*, 956 F.2d 651, 655 (7th Cir. 1992) (relying on the language of Russell to reject the availability of extracontractual compensatory and punitive damages); *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210, 1219 (4th Cir. 1990) (relying on the broader implications of Russell to reject the plaintiff's claim for extracontractual damages). Another commentator has stated that the federal courts are in disagreement on this issue. See Flint, *supra* note 208, at 622. However, the decision in the case cited as permitting recovery of extracontractual damages under the benefit enforcement provision was actually decided under another section and is inconsistent with a later Supreme Court opinion on the issue. Compare *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-57 (1993) (holding that ERISA section 502(a)(3)(B) authorizes only traditional equitable relief), with *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 194 (6th Cir. 1992) (deciding that ERISA section 502(a)(3)(B) permits awards for direct injuries).

n291. See *Russell*, 473 U.S. at 139-46.

n292. A search of LEXIS in the GENFED library, MEGA file, revealed only 12 reported decisions using the term extracontractual to describe damages, relief, or remedies prior to the Court's opinion in *Russell*. One of those decisions was the Ninth Circuit's opinion in *Russell* and the only other ERISA decisions were two that referred to *Russell* in some way. See *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985) (citing the Ninth Circuit opinion in *Russell* as authority for the availability of extracontractual damages in breach of fiduciary duty cases); *Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 485, 489 (9th Cir. 1983); *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 709 n.19 (N.D. Ala. 1985) (referring to the grant of certiorari in *Russell*); *Gorman v. Southeastern Fidelity Ins. Co.*, 621 F. Supp. 33, 38 (S.D. Miss. 1985) (using term in general insurance context); *Smith v. Metropolitan Life Ins. Co.*, 550 F. Supp. 896, 899 (E.D. Ill. 1982) (same); *Paragon Energy Corp. v. U.S.*, 225 Ct. Cl. 730, 731, 734 (Ct. Cl. 1980) (using term in public contracting setting); *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657, 669 (Ala. 1985) (Maddox, J., concurring) (advocating extracontractual awards in insurance context); *Frazier v. Metropolitan Life Ins. Co.*, 169 Cal. App. 3d 90, 106 (Cal. Ct. App. 1985) (using term in insurance context); *Spychalski v. MFA Life Ins. Co.*, 620 S.W.2d 388, 396 (Mo. Ct. App. 1981) (same); *D'Ambrosio v. Pa. Nat. Mut. Cas. Ins. Co.*, 431 A. 2d 966, 972 (Pa. 1981) (Larsen, J., dissenting) (citing a student comment using the term in the title with both the case and the note addressing insurance issues); *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 259 (Wis. 1981) (discussing the availability of extracontractual damages in the insurance context); *Ott v. All-Star Ins. Corp.*, 299 N.W. 2d 839, 844 (Wis. 1981) (using the term in the insurance context).

n293. See *supra* note 292.

n294. See Dan B. Dobbs, *Law of Remedies* 12.5 (1993).

n295. See commentary cited *infra* notes 298-300.

n296. See Alan O. Sykes, "Bad Faith" Breach of Contract by First-Party Insurers, 25 *J. Legal Stud.* 405, 408 (1996).

n297. See *id.* at 409-10.

n298. Roger C. Henderson, The Tort of Bad Faith in First-Party Insurance Transactions After Two Decades, 37 *Ariz. L. Rev.* 1153, 1153 (1995); Sykes, *supra* note 296, at 408.

n299. 156 *Eng. Rep.* 145 (1854). The following sources support the proposition that damages in insurance cases included those consistent with the rule of *Hadley v. Baxendale*: Rowland Long, *Law of Liability Insurance* 5A.26 (1998); Johnny C. Parker, The Development of First-Party Extracontractual Insurance Litigation in Oklahoma: An Analytical Examination, 31 *Tulsa L.J.* 57, 63 (1995).

n300. See *Henderson*, *supra* note 298, at 1153; Sykes, *supra* note 296, at 408.

n301. For a discussion of the difference between first-party actions and third-party actions, see *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 799-800 (Utah 1985); Robert E. Keeton & Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices* 7.9 (1988).

n302. 510 P.2d 1032 (Cal. 1973).

n303. See *Henderson*, *supra* note 298, at 1153; Sykes, *supra* note 296, at 411.

n304. One of the issues dividing the states that have permitted tort actions against insurers for bad faith breach of an implied covenant of good faith and fair dealing is how to define bad faith. See Sykes, *supra* note 296, at 411 (comparing the California standard with the more widely adopted Wisconsin standard).

n305. See *id.* at 411.

n306. See *id.* at 412.

n307. *Id.*; see also Douglas R. Richmond, The Two-Way Street of Insurance Good Faith: Under Construction, But Not Yet Open, 28 *Loy. U. Chi. L.J.* 95, 111 (1996).

n308. See Sykes, *supra* note 296, at 407.

n309. See *id.* at 407.

n310. The Supreme Court itself has quoted this language three times. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252 (1993); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990); *Pilot Life Ins. Co. v. De-deaux*, 481 U.S. 41, 54 (1987). A LEXIS search in the MEGA file of the GENFED library found a total of 145 citations through the end of 1998.

n311. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

n312. See Dana M. Muir, Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains, 54 *Wash. & Lee L. Rev.* 1351, 1407 (1997).

n313. See, e.g., *Corcoran v. United Healthcare, Inc.*, 956 F.2d 1321, 1322 (5th Cir. 1992); see also Muir, *supra* note 312, at 1371-74.

n314. See *Corcoran*, 956 F.2d at 1338.

n315. See *Sprague v. General Motors Corp.*, 133 F.3d 388, 402 (6th Cir. 1998).

n316. See *id.* at 401.

n317. See *id.*

n318. See *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998).

n319. See *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155 (3d Cir. 1990).

n320. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755 (1999).

N321. ERISA 404(a)(1), 29 U.S.C. 1104(a)(1) (1994).

n322. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993).

n323. See *supra* Part II.

n324. See Muir, *supra* note 312, at 1414-17.

n325. See 120 Cong. Rec. 29,993 (1974) reprinted in 3 History, *supra* note 59, at 4733, 4743 (remarks of Sen. Williams) (noting that ERISA "imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets"); 120 Cong. Rec. 29,929 (1974) reprinted in 3 History, *supra* note 59, at 4733, 4739 (remarks of Sen. Williams) (stating that ERISA's fiduciary standards apply to those with "control over the assets or administration of an employee pension or welfare benefit plan") (emphasis added).

n326. Compare ERISA 402(a)(1), 29 U.S.C. 1102(a)(1) (1994) (requiring "every employee benefit plan [to] be established and maintained pursuant to a written instrument"), with ERISA 403(a), 29 U.S.C. 1103(a) (requiring most "assets of an employee benefit plan [to] be held in trust by one or more trustees").

n327. See ERISA 404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D).

n328. See *id.* 102(b)(2), (4), 29 U.S.C. 1024(b)(2), (4).

n329. See *id.* 2, 29 U.S.C. 1001.

n330. See *Corcoran v. United Healthcare, Inc.*, 956 F.2d 1321, 1322 (5th Cir. 1992).

n331. See Langbein, *supra* note 1, at 625-27.

n332. See, e.g., *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 51 n.11 (D. Mass. 1997) (referring to the situation as one where Travelers broke "its contract with the Clarkes").

n333. See Langbein, *supra* note 122, at 211.

n334. See, e.g., Gordon, *supra* note 67, at 15-16 (discussing the human depreciation theory of plans); Muir, *supra* note 312, at 1360-64.

n335. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755, 763-64 (1999) (citing *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) for the proposition that payment of deferred compensation is one of the many benefits a plan sponsor receives from the operation of a pension plan); see also Gordon, *supra* note 67, at 16. But see Dennis E. Logue, Legislative Influence on Corporate Pension Plans 19-22 (1979) (arguing that defined benefit plans do not fit this theory nearly as well as defined contribution plans, as employers could easily eliminate defined benefit plans in favor of defined contribution plans, a point implicitly refuted by Langbein & Wolk).

n336. See, e.g., U.S. Chamber of Commerce, Employee Benefits 5 (1997). But see Gregory S. Alexander, Pensions and Passivity 56 Law & Contemp. Probs. 111, 120 n.43 (1993) (distinguishing benefits such as health care from cash and deferred compensation on the basis that health care and similar plans constitute a purchase of employee services).

n337. See U.S. Chamber of Commerce, Employee Benefits 13 (1997) (finding the costs of medical and medically related benefits were 9.6% of payroll in 1996).

n338. See statutory text quoted *infra* text accompanying note 340.

n339. See *supra* text accompanying note 287.

n340. ERISA 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (1994) (emphasis added).

n341. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (holding that ERISA section 409(a) does not provide a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims).

n342. See *id.* at 139-46.

n343. See, e.g., *Russell*, 473 U.S. at 146 (demonstrating that the legislative history on ERISA's remedial scheme generally is quite sparse, tending to undercut the Supreme Court's depiction of section 502(a) as being comprised of "carefully integrated civil enforcement provisions"). I have challenged that particular depiction based on other evidence as have other commentators. See Muir, *supra* note 80, at 247; see also Flint, *supra* note 208, at 639.

n344. H.R. Rep. No. 93-533, at 17 (emphasis added), reprinted in 2 History, *supra* note 59, at 2348, 2364; Sen. Rep. No. 93-127, at 35 (emphasis added), reprinted in 1 History, *supra* note 59, at 587, 621.

n345. H.R. Rep. No. 93-533, at 17, reprinted in 2 History, *supra* note 59, at 2348, 2364; Sen. Rep. No. 93-127, at 35, reprinted in 1 History, *supra* note 59, at 587, 621.

n346. See H.R. 2, 93d Cong. 503(e)(1)(B) (1973), reprinted in 2 History, *supra* note 59, at 2181, 2334. The Senate bill contained language that was worded quite differently but would have had a similar effect. See S. 4, 93d Cong. 603 (1973) (stating that "Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary... may be brought by any participant or fiduciary."), reprinted in 1 History, *supra* note 59, at 389, 579.

n347. See H.R. 2, 93d Cong. 503(e)(2) (1973) (providing for appropriate relief for fiduciary breach), reprinted in 2 History, *supra* note 59, at 2181, 2334; S. 4, 93d Cong. 603 (1973) (providing for appropriate relief for fiduciary breach), reprinted in 1 History, *supra* note 59, at 389, 579.

n348. S. 4, 93d Cong. 603 (1973), reprinted in 1 History, *supra* note 59, at 389, 579.

n349. H.R. 2, 93d Cong. 503(e)(2) (1973), reprinted in 2 History, *supra* note 59, at 2181, 2334.

n350. Sen. Rep. No. 93-127, at 35, reprinted in 1 History, *supra* note 59, at 587, 621.

n351. See H.R. 2, 93d Cong. 503(e) (1974), reprinted in 3 History, *supra* note 59, at 4656, 4047; H.R. 2, 93d Cong. 693 (1974), reprinted in 3 History, *supra* note 59, at 3599, 3816 (demonstrating that the only change in the relevant language was that the House version that went to Conference Committee replaced the word "Act" with the word "title" in the introductory language to subsection (e)).

n352. See Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform 23 (Comm. Print 1974), reprinted in 3 History, *supra* note 59, at 5249, 5273.

n353. See H.R. Conf. Rep. No. 93-1280, at 326 (1974) ("Under the bill as passed by both the House and Senate, civil action may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility."), reprinted in 3 History, *supra* note 59, at 4277, 4593.

n354. See H.R. Conf. Rep. No. 93-1280, at 326 (1974) (stating that civil actions "may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility."), reprinted in 3 History, *supra* note 59, at 4277, 4594.

n355. See H.R. Conf. Rep. No. 93-1280, at 75 (1974) (stating that "[A] civil action may be brought... (1) by a participant or beneficiary... (B) to recover benefits due to him under the terms of his plan, to enforce his rights

under the terms of the plan or to clarify his rights to future benefits under the terms of the plan."), reprinted in 3 History supra note 59, at 4277, 4350.

n356. See H.R. Conf. Rep. No. 93-1280, at 75 (1974) (stating that "[A] civil action may be brought... (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409; (3) by a participant, beneficiary, or fiduciary... (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."), reprinted in 3 History supra note 59, at 4277, 4350.

n357. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (holding that ERISA section 409(a) does not provide a cause of action for extracontractual damages caused by improper or untimely processing of benefits claims).

n358. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-63 (1993) (holding that ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in breach of fiduciary duty).

n359. This is the approach the Supreme Court took in *Russell* when it analyzed section 409 in its entirety. See *Russell*, 473 U.S. at 140. Similarly, the Court concluded that "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.* at 142.

n360. See *Flint*, supra note 208, at 641-42. Under current doctrine, jury trials are not available in section 502(a)(1)(B) actions. Under my proposed interpretation of the enforcement of rights clause, the damages would be legal in nature. However, the claim would still be rooted in trust and fiduciary law, so the doctrine on juriability is unlikely to change. See *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998) (denying the right to jury trial in section 502(a)(1)(B) action); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980) (denying juriability in a widely followed decision, in part because of the analogy to trust law); see also *DeFelice v. American Int'l Life Assurance Co.*, 112 F.3d 61 (2d Cir. 1997) (denying the right to jury trial in section 502(a)(1)(B) action); *Daniel v. Eaton Corp.*, 839 F.2d 263 (6th Cir. 1988) (same); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (same); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985) (same); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982) (same); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980) (same).

n361. See *Flint*, supra note 208, at 620.

n362. The plaintiffs, who were former employees, unsuccessfully made a similar argument in *Harsch v. Eisenberg*, 956 F.2d 651, 655 (7th Cir. 1992). See also Richard Rouco, Available Remedies Under ERISA Section 502(a), 45 Ala. L. Rev. 631, 651-52 (1994) (discussing the arguments in *Harsch v. Eisenberg*).

n363. See supra Part IV.D.

n364. See ERISA 502(c), 29 U.S.C. 1132(c) (1994).

n365. See *id.* 502(a)(3), 29 U.S.C. 1132(a)(3).

n366. See *id.* 502(a)(5), (6), (8), 29 U.S.C. 1132(a)(5), (6), (8).

n367. See *Flint*, supra note 208, at 620.

n368. H.R. Rep. No. 93-533, at 17 (1973), reprinted in 2 History, supra note 59, at 2348, 2364; S. Rep. No. 93-127, at 35 (1973), reprinted in 1 History, supra note 59, at 587, 621.

n369. Id.

n370. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

n371. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 136 (1990).

n372. *Id.* at 145. The Court's language would seem to authorize both compensatory and punitive damages because that is what the plaintiff had requested. The Court may or may not have meant to state that ERISA provides a basis for the recovery of punitive damages. However, it is possible to interpret section 502(a)(1)(B) to provide a basis for punitive damage claims. See *infra* text accompanying notes 374-76.

n373. For a slightly more extensive discussion of the remedies available to an injured first-party insured, see *supra* text accompanying notes 295-307.

n374. See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985) (Brennan, J., concurring).

n375. This claim is similar to the claim made by the plaintiffs in *Harsch v. Eisenberg*, 956 F.2d 651, 655 (7th Cir. 1992) (quoting plaintiffs' argument that they were "attempting to enforce their right "under the terms of the plan" to "proper treatment by the plan fiduciary").

n376. H.R. Rep. No. 93-533, at 17 (1973), reprinted in 2 History, supra note 59, at 2348, 2364; S. Rep. No. 93-127, at 35 (1973), reprinted in 1 History, supra note 59, at 587, 621.

n377. See Richard A. Posner, *Economic Analysis of Law* 88-93 (2d ed. 1977).

n378. *156 Eng. Rep. 145* (1854).

n379. See Posner, *supra* note 377, at 94-95.

n380. See *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1011 (9th Cir. 1998) (noting the tragedy inherent in the scope of remedies available, but nonetheless concluding that ERISA provides for no recovery where the beneficiary dies as a result of defendant's denial of benefits due); *Cannon v. Group Health Serv., Inc.*, 77 F.3d 1270 (10th Cir. 1996) (holding that plaintiff's state law causes of action were preempted by ERISA, despite the fact that no cause of action existed under section 502(a)(1)(B) for benefits due following the death of the beneficiary, apart from medical expenses actually incurred).

n381. This is not to say that ultimate liability will always, or even usually, fall on an individual decision-maker. Contribution, insurance, and concepts of respondeat superior, will determine who bears the burden of liability. All of these risk spreading mechanisms have caused problems under ERISA and are beyond the scope of this article.

n382. One may question whether plan administrators are risk neutral, risk averse, or risk preferring. The literature often assumes that businesses are risk averse and that it may be sensible to treat plan decision-makers similarly. See, e.g., John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between*

Scylla and Charybdis, 52 *Geo. Wash. L. Rev.* 789, 801 (1984) (arguing that the tendency of managers to over-invest in their own firms increases their aversion to risk). But see Richard A. Brealey & Stewart C. Myers, *Principles of Corporate Finance* 148-49 (4th ed. 1991) (arguing that diversified shareholders will prefer firms that act in a risk neutral manner); Richard Herring & Friedrich K^um u>bler, *The Allocation of Risk in Cross-Border Deposit Transactions*, 89 *Nw. U. L. Rev.* 942, 1016 n.249 (1995) (stating that "firms are usually assumed to be risk neutral...."). See also Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 *UCLA L. Rev.* 277, 329 (1990) (explaining that, in accordance with prospect theory expectations, managers may tend to be risk-preferring when dealing with possible losses).

When the employer makes the coverage decision in a self-funded health care plan, the employer enjoys a dollar-for-dollar savings for each dollar denied under the plan. This is a significant contrast to a defined benefit pension plan where, because of the existence of a plan trust, there is a funded plan. Given the greater sense that it is spending its own money in the self-funded health care plan, it seems logical to assume that the employer would have a greater appetite for risk. See Hu, *supra*. Similarly, when an outsider, such as a third party administrator or utilization reviewer makes the determination, it often has an incentive to minimize the costs of the plan for the plan sponsor. After all, it typically is the plan sponsor that makes the decisions on retention of plan service providers. See Clark C. Havighurst, *Prospective Self-Denial: Can Consumers Contract Today to Accept Health Care Rationing Tomorrow?*, 140 *U. Pa. L. Rev.* 1755, 1771 n.38 (1992) (noting the cost containment pressures felt by plan administrators).

However, countervailing forces, such as the reputational effect on the employer and the typical methods for calculating the fees of third-party administrators, dilute this incentive to cut costs at the expense of plan participants and beneficiaries. See Mark A. Hall & Gerard F. Anderson, *Health Insurers' Assessment of Medical Necessity*, 140 *U. Pa. L. Rev.* 1637, 1668 (1992). Finally, to the extent one accepts the common assumptions that individuals are risk averse, then ERISA's provisions for personal liability would be likely to cause such fiduciaries to act in a risk averse manner. See Daniel A. Farber, *Toxic Causation*, 71 *Minn. L. Rev.* 1219 (1987). Even to the degree this may be true in theory though, it may be minimized by the use of fiduciary insurance. See Steven Shavell, *On Liability and Insurance*, 13 *Bell J. Econ.* 120, 124-26 (1982).

n383. This is the aggregate cost of the test when administered 250,000 times, and assumes no loss to the 249,999 patients who were denied the test, but for whom the test would not have revealed an early diagnosis of cancer. I next question whether those individuals do suffer a loss.

n384. See *infra* text accompanying notes 390-91.

n385. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869, 887-96 (1998).

n386. See *id.* at 887.

n387. See *id.* at 888-89.

n388. See *id.* at 888 (identifying similar criteria in the context of tort claims).

n389. Claims challenging health care determinations, in particular, can be expected to result in some very large punitive awards. For example, in a case not governed by ERISA because the plan sponsor was a governmental entity, a jury recently awarded a record \$ 116 million to the widow of a participant denied experimental cancer treatment. See *California Jury Awards Record Damages Against Aetna for Treatment Decisions*, *Pens. & Ben. Rep.* (BNA), Jan. 25, 1999, at 247.

n390. See Polinsky & Shavell, *supra* note 385, at 879-80.

n391. See *id.*

n392. See 120 Cong. Rec. 4, 4308 (1974) (worrying that additional regulation would cause constituents to ask: "How come you helped us so much that now we have no [benefits] plan at all because our employer has decided he cannot afford it any longer under the new rules?").

n393. See ERISA 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (1994).

n394. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256, (1993) (describing equitable relief as "those categories of relief that were typically available in equity").

n395. See ERISA 502(g)(1), 29 U.S.C. 1132(g)(1).

n396. See *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998).

n397. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

n398. An even closer question is whether at least some level of punitive damages would increase the efficiency of benefit plan administration. See *supra* text accompanying notes 389-92.