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ERISA Section 104(B)(4): What Documents Do Employees Have A Right To Demand From Their Employers?

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ERISA SECTION 104(b)(4): WHAT DOCUMENTS DO EMPLOYEES HAVE A RIGHT TO DEMAND FROM THEIR EMPLOYERS?

The American worker has an undeniable fear regarding his future pension benefits. As the following sample demonstrates, this fear has manifested itself frequently in all parts of the country: the *Santa Fe New Mexican* reported that state prison guards fear the loss of their pensions under a new system;[1] the *Cincinnati Business Courier* recently wrote about hospital employees who fear a loss of their pension funds under the hospital's privatization plan;[2] the *Spartanburg Herald-Journal* reported that Buffalo mill workers recently received notice that their pensions "are in jeopardy."[3] The fear of pension loss extends beyond just small pockets of individual workers. Some claim that uncertainty about pensions partially explains flagging consumer confidence in 1995.[4]

The University of Wisconsin published a recent study on the length of time spent at one job by the average American worker.[5] The study showed that job mobility greatly decreases in pension-covered jobs.[6] According to the authors, this study confirmed the conclusions of other studies that pension benefits have a greater impact on worker retention than an added dollar of wage, longer tenure, or union membership.[7]

Are workers' fears over the possible loss of benefits unfound-

1. *See* Mark Oswald, *Officials Differ on Private Prison Costs*, SANTA FE NEW MEXICAN, Aug. 30, 1996, at B1, *available in* LEXIS, News Library, Newmex File.

2. *See* Dan Monk, *Hospital Plan Faces Foes*, 15 CIN. BUS. COURIER, Apr. 1, 1996, at 3, *available in* LEXIS, News Library, Busdtl File.

3. Clay Murphy, *Ex-Buffalo Mill Workers Fear Loss of Pensions*, SPARTANBURG HERALD-J., Dec. 1, 1995, at C3, *available in* LEXIS, News Library, Busdtl File.

4. *See* Dick Marlowe, *Crumbling Consumer Confidence May Be Worth Money in the Bank*, ORLANDO SENTINEL, May 31, 1995, at B1, *available in* LEXIS, News Library, Orsent File (noting that "the prospect of early retirement to a life of fun and sun is only a fading memory from the high-rolling 1980s").

5. *See* Steven G. Allen et al., *Pensions, Bonding, and Lifetime Jobs*, 28 J. OF HUM. RESOURCES 463, 463-64 (1993).

6. *See id.* at 464.

7. *See id.*

ed? *Varity Corp. v. Howe*[8] would seem to suggest otherwise. In *Varity*, the employer misrepresented the financial situation of a functionally insolvent subsidiary.[9] The employer's goal was to encourage workers to shift their nonpension benefits from a solvent subsidiary to a newly-incorporated, money-losing subsidiary in order to release the solvent subsidiary from the obligation to pay these benefits.[10] In an unprecedented decision, the Supreme Court allowed workers an individual remedy under section 502 of the Employee Retirement Income Security Act (ERISA) in order to provide equitable relief for these workers.[11]

The fear of losing pension and welfare benefits also has resulted in litigation initiated by workers who demand disclosure by their employer of documents under ERISA section 104(b)(4)[12] which would allow them to monitor their pension plans in order to avoid the *Varity* scenario. This Note examines the implications of ERISA for a worker seeking full document disclosure. The first section presents an overview of ERISA, explaining its basic structure and the plans that can be constructed under the statute. The next section analyzes recent court decisions regarding disclosure requirements under ERISA section 104(b)(4) and discusses the current circuit split involving this section.[13] The third section addresses Department of Labor (DOL) opinion letters written in response to attorneys seeking to advise clients regarding disclosure obligations.

This Note then turns to an analysis of the traditional judicial methods of statutory interpretation in the area: first, a textualist approach, and second, an approach that looks to legislative history and to the purposes of ERISA. This section also critiques both methods in order to demonstrate that although both methods of statutory interpretation are useful, neither is

8. 116 S. Ct. 1065 (1996).
9. *See id.* at 1069.
10. *See id.* at 1068-69.
11. *See id.* at 1079.
12. 29 U.S.C. § 1024(b)(4) (1994).
13. *See* Board of Trustees of the CWA/ITU v. Weinstein, 107 F.3d 139, 140 (2d Cir. 1997); Faircloth v. Lundy Packing Co., 91 F.3d 648, 651-52 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997); Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686, 688 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1676 (1996); Bartling v. Fruehauf Corp. 29 F.3d 1062, 1065 (6th Cir. 1994).

able to address disclosure requirements adequately under the statute. Finally, this Note proposes a third-tier pragmatic judicial inquiry as an alternate method of interpreting the ERISA disclosure requirements. This section specifically includes a five-part inquiry that courts should use to review litigation and addresses the possibility of congressional intervention by way of amending ERISA if this dilemma remains unresolved by the courts.

AN OVERVIEW OF ERISA

Before President Gerald Ford signed ERISA into law in 1974,[14] the gift theory predominated in the area of pension benefits: employers could choose to provide benefits but could set any limits they thought appropriate.[15] This laissez-faire approach, however, allowed 6,900 Studebaker Corporation employees to lose their pensions in 1963 because of an underfunded plan.[16] The outcry over the Studebaker debacle inspired Congress to draft federal pension legislation.[17]

ERISA's passage in 1974 marked a new era for pension benefits, but was certainly not the end of pension woes: Congress created what many criticized as one of the most complex statutes in existence.[18] ERISA's complexity is due partly to the fact that it displaced all state law with a broad preemption clause

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14. *See* Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 204 (1995).

15. *See* Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 183 (1995).

16. *See* Muir, *supra* note 14, at 203.

17. *See id.* at 203-04.

18. *See* H.R. DOC. NO. 95-375, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9814, 9815 (detailing a 1978 message of President Carter to Congress, in which the President stated that "ERISA has been a symbol of unnecessarily complex government regulation"); *see also* Paul J. Fasser, Jr., *The New Pension Law*, *in* PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-EIGHTH ANNUAL CONFERENCE ON LABOR 59, 59 (Richard Adelman ed., 1975) (referring to ERISA as "one of the most complex laws ever enacted by Congress").

necessary to foster a uniform system.[19] The five primary goals of ERISA are to protect workers, to improve the design and regulation of pensions, to enforce worker pension rights, to provide insurance for workers who lose their pensions,[20] and to encourage the formation of new plans.[21]

ERISA is divided into four titles. Title I explains the reporting and disclosure requirements.[22] In addition, Title I defines and establishes requirements for: participation and vesting;[23] funding;[24] fiduciary responsibility;[25] and administration and enforcement.[26] Title II amends the Internal Revenue Code to provide qualified plans with tax advantages.[27] Title III describes the authority given to various federal departments for ERISA.[28] Title IV provides for the termination of plans and creates the Pension Benefit Guarantee Corporation (PBGC) to administer federally guaranteed pensions.[29]

ERISA plans involve four major parties: the employer, who makes contributions; the plan administrator, who, as the name denotes, administers the plan; the trustee, who invests the plan's assets or chooses another to invest assets; and the worker, who is the beneficiary of the plan.[30] There are two basic types of pension plans. The first, originally popular, and hence the plan type originally targeted by Congress,[31] is the defined bene-

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19. *See* Fisk, *supra* note 15, at 162.

20. *See* John R. Keville, Note, *Retire At Your Own Risk: ERISA's Return on Investment*, 68 ST. JOHN'S L. REV. 527, 533 (1994).

21. *See* Muir, *supra* note 14, at 204 (citing 29 U.S.C. § 1001 (1988)); *see also* H.R. REP. NO. 93-533, pt. 1, at 2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640 (listing as one of Congress's goals the promotion of "a renewed expansion of private retirement plans").

22. *See* 29 U.S.C. §§ 1021-1031.

23. *See id.* §§ 1051-1061.

24. *See id.* §§ 1081-1086.

25. *See id.* §§ 1101-1114.

26. *See id.* §§ 1131-1145.

27. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 898-994 (1974) (codified as amended in various sections of I.R.C. (1994)).

28. *See* 29 U.S.C. §§ 1201-1242 (1994).

29. *See* 29 U.S.C. §§ 1301-1461 (1994).

30. *See generally* Robert R. Frei & James G. Archer, *Taxation and Regulation of Pension Plans Under the Internal Revenue Code*, 1967 U. ILL. L.F. 691, 692-93 (discussing the tax consequences of pension plans for both employers and employees).

31. *See* Keville, *supra* note 20, at 535-36.

fit plan. This plan promises the worker a certain amount, based on a plan formula,[32] which is calculated by an actuary based on factors such as age, years of service with the employer, and the final average salary during a specified period.[33] Under a defined benefit plan, the employer bears the risk of loss because the employer must pay set benefits even if the investments are unsuccessful.[34]

The current trend among employers is to utilize the second type, the defined contribution plan,[35] which takes much the opposite approach. In a defined contribution plan, the employer contributes to an individual account established for each worker.[36] The worker's benefits depend on the value of the account, which varies with the success of investments made on the plan's behalf.[37] Employee stock ownership plans (ESOP) are a primary example of the defined contribution plan: the employer contributes to the worker's account and then invests the funds in the employer's own stock.[38] Under the defined contribution plan, the worker bears the risk of loss because the calculation of benefits is equal to contributions plus or minus the investment returns.[39] The current trend toward defined contribution plans and the resulting shift in the risk of loss have created a focus on the disclosure requirement of Title I.

The goal behind the disclosure requirement is clear. In the statute, Congress stated its policy "that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans" and "to protect . . . the interests of participants in employee benefit plans and their

32. *See* Muir, *supra* note 14, at 205.

33. *See id.*

34. *See id.* at 206.

35. *See* Keville, *supra* note 20, at 535, 541-42 (citing three reasons for the shift to defined contribution plans: (1) a lower amount of government regulation, (2) the shift toward a greater number of small employers, and (3) the increased mobility of the American worker since World War II).

36. *See* Muir, *supra* note 14, at 205.

37. *See id.* (citing 29 U.S.C. § 1002(34) (1994)).

38. *See* Keville, *supra* note 20, at 529 n.15.

39. *See* Muir, *supra* note 14, at 205.

beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries."[40] The basic purpose of disclosure, therefore, was to allow both participants and beneficiaries to review the method by which their plan was administered in order to arm them with the knowledge necessary to ensure compliance with ERISA.[41] The crucial role that disclosure plays is demonstrated through the onslaught of litigation occurring over the issue.

AN EXPLANATION OF THE CURRENT CIRCUIT SPLIT

A split currently exists among four circuits regarding the disclosure requirements under ERISA section 104(b)(4). In *Bartling v. Fruehauf Corp.*,[42] the Sixth Circuit initially interpreted ERISA section 104(b)(4) to allow broad disclosure to participants.[43] In *Hughes Salaried Retirees v. Administrator of Hughes*,[44] the Ninth Circuit originally followed suit and held in favor of broad disclosure in its initial hearing of the matter.[45] The court revisited the issue en banc, however, and vacated the earlier decision of the court's initial three-judge panel.[46] In *Faircloth v. Lundy Packing Co.*,[47] the Fourth Circuit followed the Ninth Circuit's analysis and narrowly interpreted the statutory disclosure requirement, denying workers access to several documents.[48] Most recently, the Second Circuit similarly decided in favor of narrow ERISA section 104(b)(4) disclosure requirements in *Board of Trustees of the CWA/ITU v. Weinstein*.[49]

40. 29 U.S.C. § 1001(a)-(b) (1994).

41. For a discussion of the policy arguments in favor of broader disclosure, see Brief of Appellants at 17, Faircloth v. Lundy Packing Co., 91 F.3d 648 (4th Cir. 1996) (No. 95-1275), *cert. denied*, 117 S. Ct. 738 (1997).

42. 29 F.3d 1062 (6th Cir. 1994).

43. *See id.* at 1070 (stating "all other things being equal, courts should favor disclosure where it would help participants understand their rights").

44. 39 F.3d 1002 (9th Cir. 1994), *vacated en banc*, 72 F.3d 686 (9th Cir. 1996).

45. *See id.* at 1006-07.

46. 72 F.3d 686, 695 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1676 (1996).

47. 91 F.3d 648 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 738 (1997).

48. *See id.* at 654 (rejecting the broad interpretation given the statute in *Bartling*).

49. 107 F.3d 139, 140 (2d Cir. 1997).

Bartling v. Fruehauf Corp.

In *Bartling*, a subsidiary of the Fruehauf Corporation ("Fruehauf") announced the termination of its pension plan and the formation of another in the following year.[50] Fruehauf presented a videotape and booklet explaining the termination for its workers.[51] The workers also received benefit commitment letters, which described monthly benefits along with the method of their calculation.[52] In the midst of these changes, Fruehauf also began discussing the sale of a division of its subsidiary to another company.[53] In the current climate of fear about pensions, workers in the division apparently became nervous and requested several documents regarding the pension plan.[54]

Fruehauf furnished the plan participants with the following documents: the plan itself; amendments to the plan; the Internal Revenue Service (IRS) tax determination letter;[55] filings with the IRS and the PBGC relating to the Plan; the Form 5500 for the past three years;[56] and the most recent summary plan description (SPD).[57] Fruehauf also offered to provide benefit cal-

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50. *See* Bartling v. Fruehauf Corp., 29 F.3d 1062, 1065 (6th Cir. 1994).

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See* [1997] 15 Stand. Fed. Tax Rep. (CCH) ¶¶ 44, 360.01-.02. If a plan is tax qualified, it has satisfied the Internal Revenue Code requirements necessary to receive the tax advantages of Title II of ERISA. Those preferences are the following: (1) the earnings and invested funds are not taxable; (2) the employer's contributions are deductible from its gross federal income tax; and (3) the employer's contributions are not taxable to the workers. *See* I.R.C. §§ 401(a), 404 (1994); [1997] 6 Stand. Fed. Tax Rep. (CCH) ¶¶ 17, 507.01-.04.

56. Plans with 100 or more participants use the Form 5500 for annual reporting purposes. *See* LINDA PANSZCZYK & JAN GERSTEIN, 1996 U.S. MASTER EMPLOYEE BENEFITS GUIDE 40 (1995). The Form 5500 is a type of notice statement. It does not contain financial information. *See* Disclosure of Plan Information to Participants and Beneficiaries, 58 Fed. Reg. 68,339, 68,341 (1993) (proposed Dec. 27, 1993).

57. *See Bartling*, 29 F.3d at 1065-66. As is evidenced by the title, the SPD is meant to provide a summary of the plan in language that can be understood by the average participant. *See* PANSZCZYK & GERSTEIN, *supra* note 56, at 36. It includes a statement of the participant's rights under ERISA, including: (1) the duties of fiduciaries; (2) the right to benefit status information; (3) the right to obtain more plan

culations upon receipt of individual authorizations from participants in the plan.[58] Fruehauf, however, refused to provide an actual copy of the benefit calculations, which the workers needed to verify their monthly letters.[59] Fruehauf also refused to provide actuarial reports, the specification sheet used to solicit insurance company bids, and provisions in the purchase agreement relating to pension and welfare benefits.[60]

ERISA section 104(b)(4) provides for the following disclosure:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other *instruments under which the plan is established or operated.*[61]

Certain documents are specified, but the final, ambiguous clause is at the center of the dispute. In *Bartling*, for example, the issue was whether the three contested documents were "instruments under which the plan is established or operated."[62]

The Sixth Circuit held that the actuarial valuation report was a document under which the plan was operated.[63] The court first used a plain meaning approach—it decided that because the actu-

information; (4) the right to be free of retaliation for exercising rights; and (5) specifically the right to bring lawsuits. *See id.* at 37. The SPD should also contain the procedure for presenting claims and the remedies available under ERISA. *See id.*

58. *See Bartling*, 29 F.3d at 1066.

59. *See id.* Fruehauf claimed that the calculations were computer generated and that no actual copies of the worksheets existed.

60. *See id.* at 1065-66.

61. 29 U.S.C. § 1024(b)(4) (1994) (emphasis added).

62. *Bartling*, 29 F.3d at 1069. The court also addressed at some length the separate issue of the amount of damages to be assessed against Fruehauf for failure to disclose required documents. *See id.* at 1069. ERISA section 502(c)(1)(B) provides that defendants can be assessed up to $100 per day per document from the date of refusal. *See* 29 U.S.C. § 1132(c)(1)(B) (1994). This issue will not be addressed in the above discussion because there is no split among the circuits: in the absence of a clear abuse of discretion, a court of appeals will not review the decision of a lower court. *See Bartling*, 29 F.3d at 1068-69.

63. *See Bartling*, 29 F.3d at 1070.

arial valuation report is required for every third plan year,[64] these reports are indispensable to the operation of the plan, and therefore were included under a literal interpretation of the phrase "instruments under which the plan is . . . operated."[65]

The court also discussed the legislative history regarding the purpose of the ERISA disclosure requirements.[66] In support of its decision to allow disclosure of the actuarial valuation report, the court cited the following language from the congressional report: "[T]he purpose of ERISA's disclosure requirements is to ensure that 'the individual participant knows exactly where he stands with respect to the plan.'"[67] The court interpreted this statement to favor broad disclosure if it will help participants understand their rights.[68]

The Sixth Circuit addressed why the participants were not entitled to a copy of the purchase agreement for the division of the subsidiary at which they worked.[69] Again employing a literal interpretation of the relevant provision, the court determined that the plan was neither established nor operated under the purchase agreement.[70] The court implicitly recognized that the participants did not need the purchase agreement in order to monitor their plan.[71]

The court did allow the participants to access the benefit calculation procedure.[72] The court found that the company "knew or should have known" that they were obligated to provide the calculation procedure used to determine participant benefits.[73] The

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64. *See* 29 U.S.C. § 1023(d) (1994).

65. *Bartling*, 29 F.3d at 1070.

66. *See id.*

67. *Id.* (quoting H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649).

68. *See id.*

69. *See id.*

70. *See id.*

71. The reason for this determination was a purely factual matter: the plan addressed in the purchase agreement was not the same plan that was the source of the litigation, so its disclosure would not serve a monitoring purpose. *See id.*

72. *See id.* at 1070-71.

73. *See id.* at 1071.

court did so in a conclusory fashion, however, without specifically referring to the previously addressed statutory interpretation.[74]

Hughes Salaried Retirees v. Administrator of Hughes

The Ninth Circuit faced a very different set of facts than those reviewed by the Sixth Circuit. The plaintiffs in *Hughes* were retired workers receiving benefits under a defined benefit pension plan.[75] The workers were part of a self-appointed committee which requested that the plan administrator furnish them with the names and addresses of the other 10,000 retired participants in order to communicate with them regarding the plan administrator's allegedly unlawful use of plan assets to meet the company's funding obligations; to gain support for negotiating with, or, if necessary, litigating against the plan in order to obtain increased benefits; and to monitor the plan.[76]

The procedural posture of *Hughes* highlights the more prominent circuit split over the disclosure requirements under ERISA section 104(b)(4). The district court dismissed the case for failure to state a claim,[77] but a three-judge panel of the Ninth Circuit reversed the district court.[78] The Ninth Circuit then voted to rehear the case sitting en banc[79] and, in a five-to-four decision, reversed its own three-judge panel.[80]

The primary issue before the Ninth Circuit en banc was whether ERISA section 104(b)(4) required the disclosure of the names and addresses of the other retired workers as documents "under which the plan is established or operated."[81] The court

74. The only argument raised by Fruehauf as to why it refused to provide the calculation procedure was that the participants failed to ask for the procedure by name. *See id.* at 1070-71. The court stated that to deny the participants access to the document on these grounds would be contrary to the "spirit" of the disclosure provision. *See id.* at 1071.

75. *See* Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686, 688 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1676 (1996).

76. *See id.* at 688.

77. *See id.* at 688-89.

78. *See* Hughes Salaried Retirees v. Administrator of Hughes, 39 F.3d 1002, 1006-07 (9th Cir. 1994), *vacated en banc*, 72 F.3d 686 (9th Cir. 1995).

79. *See* Hughes Salaried Retirees v. Administrator of Hughes, 53 F.3d 1090 (9th Cir. 1995).

80. *See Hughes*, 72 F.3d at 688-89.

81. *Id.* at 689. The court also spent a significant amount of time addressing

held that disclosure of the names and addresses was not required because the plain language of the statute limited documents to those similar to the documents specifically identified in the statute.[82] The court thus reversed the three-judge panel even though under a literal interpretation of the statute, the names and addresses of the retired beneficiaries are necessary to operate the plan. Without that information, the plan administrator would not know where and to whom benefit checks were to be sent.[83] The court concluded its plain meaning analysis by stating that ERISA does not provide for the disclosure of the list of names because "[it] provides participants with absolutely no information whatsoever about the plan."[84] The court made clear that it would not define precisely what information would fall under ERISA section 104(b)(4), leaving that issue open for a document-by-document analysis.[85]

The Ninth Circuit's analysis mirrors that of the Sixth Circuit more than by simply beginning with a plain meaning approach. The court in *Hughes* went on to cite the identical language from the legislative history previously cited by the Sixth Circuit in denying the plaintiffs access to the names.[86] The court conclud-

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whether the plan administrator had a fiduciary duty to disclose the documents under ERISA section 404. *See id.* at 691-95. After a lengthy discussion, the court rejected the argument, stating that the common law of trusts imposes no obligation on a trustee to disclose names and addresses of beneficiaries "in the absence of special circumstances such as voting rights or the need to obtain other beneficiaries' consent to initiate litigation." *Id.* at 694 n.6. The *Hughes* dissenters disagreed and dissented in part on the ground that ERISA section 404 does impose a general fiduciary duty to disclose because a special circumstance exists when ERISA participants seek to communicate with other participants and to monitor their benefits. *See id.* at 696 (Pregerson, J., dissenting).

Addressing ERISA section 404 issues is outside the scope of this Note, however, because there is not a circuit split over the issue. The Sixth Circuit, in finding a broad disclosure requirement, did so solely on the basis of ERISA section 104(b)(4). *See* Bartling v. Fruehauf Corp., 29 F.3d 1062, 1070 (6th Cir. 1994).

82. *See Hughes*, 72 F.3d at 691.

83. The dissent pointed to this as an argument in favor of disclosure. *See id.* at 697 (Pregerson, J., dissenting).

84. *Id.* at 689 (quoting Order of Dismissal, No. CV-91-00335-RAG (C.D. Cal. July 9, 1991) (unpublished opinion)).

85. *See id.*

86. *See id.* at 690 ("As the legislative history bears out, the documents contem-

ed its discussion of the statute by addressing the test used by the three-judge panel to allow disclosure. The panel required disclosure of all documents "critical to the operation of a plan."[87] The en banc opinion explained that such a broad standard would allow for general disclosure of documents subject only to specified limits.[88] The court held instead that the statute and legislative history indicate that ERISA section 104(b)(4) conversely requires general nondisclosure subject only to the enumerated exceptions, and hence that the catch-all end provision applies only to other similar documents.[89]

Faircloth v. Lundy Packing Co.

The Fourth Circuit also has weighed in on the ongoing argument over how much information employers must disclose to participants under ERISA section 104(b)(4). In *Faircloth*, the three employees were participants in an ESOP.[90] The employer, Lundy Packing Co. (Lundy), a closely-held corporation, established the ESOP in 1976 and allowed employees to participate after one year with the company.[91] The ESOP, a defined contribution plan, maintained individual accounts for each employee on an annual basis.[92] The majority of the ESOP assets were invested in Lundy stock, which was valued through

plated by § 104(b)(4) are those that allow 'the individual participant [to] know[] exactly where he stands with respect to the plan . . . .'") (quoting S. REP. NO. 127, at 27 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863); *see also supra* text accompanying note 67 (relating Sixth Circuit's citation of same language).

87. Hughes Salaried Retirees v. Administrator of Hughes, 39 F.3d 1002, 1007 (9th Cir. 1994), *vacated en banc*, 72 F.3d 686 (9th Cir. 1995).

88. *See Hughes*, 72 F.3d at 691.

89. *See id.* The four dissenting justices in *Hughes* made the same arguments under ERISA section 104(b)(4) as were made by the three-judge panel; two of the four dissenting judges, Judges Pregerson and Fletcher, were part of the initial panel. *Compare id.* at 697-98 (Pregerson, C.J., dissenting) *with Hughes*, 39 F.3d at 1007-08 (arguing that a mailing list of plan participants is critical to the operation of the plan).

90. *See* Faircloth v. Lundy Packing Co., 91 F.3d 648, 651 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997).

91. *See id.*

92. *See id.*; *see also supra* text accompanying notes 35-39 (discussing defined contribution plans).

an independent appraisal.[93]

In 1992, the workers were informed that the value of the Lundy stock had dropped by forty-two percent, and, as a result, their account values had dropped.[94] During this same time period, the United Food and Commercial Workers Union (UFCW) was conducting a campaign to organize the workers.[95] The workers requested assistance from the UFCW representative to help them understand the precipitous drop in their account values.[96] The union representative helped the participants prepare letters to send to the company requesting several plan and company documents.[97] Lundy provided the participants with the plan document, the trust agreement,[98] the latest SPD, and the last three summary annual reports (SAR).[99] After the participants filed suit, Lundy also provided them with the last three Form 5500s.[100]

Lundy refused to provide the following documents: the IRS determination letter; the bonding policy covering the ESOP and its fiduciaries; the appraisal reports and supporting documentation; the minutes of meetings regarding the ESOP during the last three years; and the investment, funding, cost-sharing, and trustee expense policies.[101]

The Fourth Circuit used its own version of the plain meaning

93. *See Faircloth*, 91 F.3d at 651.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* at 651-52.

98. The trust agreement existed because ERISA specifies that all plan assets must be held in trust. *See* 29 U.S.C. § 1103(a) (1994).

99. *See Faircloth*, 91 F.3d at 652. The SAR contains the following information: the type of funding arrangement; the amount of plan and administrative expenses; the total number of participants and beneficiaries; the value of the plan assets at the beginning and end of the year; the amount of increases and decreases in net assets; and total income, with a breakdown for the percentage of employer contributions, employee contributions, gains or losses from the sale of assets, and investment earnings. *See* Disclosure of Plan Information to Participants & Beneficiaries, 58 Fed. Reg. 68,339, 68,341 (1993) (proposed Dec. 27, 1993).

100. *See Faircloth*, 91 F.3d at 652.

101. *See id.*

approach to determine that Lundy was not obligated to disclose the majority of the documents. Using a formalistic approach, the court defined each term of the phrase "other instruments under which the plan is established or operated."[102] The court saw no reason to examine legislative history or to employ other rules of statutory construction, because the language at issue was "unambiguous."[103]

The majority agreed specifically with the *Hughes* decision that ERISA section 104(b)(4) should be construed as a nondisclosure provision unless the document at issue is similar to those enumerated in the provision.[104] The court went so far as to say that because the Sixth Circuit found in favor of a presumption of disclosure, "we do not find *Bartling* persuasive."[105]

Although the court refused to engage in a review of legislative history or other methods of statutory construction, it noted that, "if Congress intended for section 104(b)(4) to encompass all documents that provide information about the plan and benefits, Congress could have used language to that effect."[106] After interpreting the statutory language, the court made several decisions regarding the plaintiffs' requests for specific documents. First, because the IRS determination letter showed only that the ESOP is tax-qualified, the court held that the letter did not "set up or manage" the ESOP, and hence that no disclosure was required.[107] Second, the bonding policy[108] was denied on the same ground.[109]

The court specifically addressed the appraisal or valuation reports of Lundy stock and the supporting financial documents. Again, the ESOP was not set up or managed under these reports because the documents "simply derive[d] the value of Lundy

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102. *Id.* at 653.
103. *Id.*
104. *See id.* at 654 ("[Section] 104(b)(4) requires the disclosure of only the documents described with particularity and 'other instruments' similar in nature.") (quoting Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686, 691 (4th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1676 (1996)).
105. *Id.*
106. *Id.*
107. *Id.*
108. The bonding policy insures the ESOP against fiduciary misconduct. *See id.*
109. *See id.*

stock."[110] The court did not discuss disclosure of the trustee meeting minutes of the previous three years under section 104(b)(4) because it found the request too broad without further clarification of what the participants wanted.[111] The court made an exception for the funding and investment policies, to which it held the participants were entitled.[112] The court's theory was that because these policies set forth "Lundy's obligations to fund the ESOP and explain the responsibilities regarding investing the assets of the ESOP," both were formal documents under which the ESOP is governed.[113]

Although Judge Michael agreed with the majority in some respects,[114] he concurred only in part and dissented from the majority's interpretation of section 104(b)(4).[115] Judge Michael's opinion represented the first time a judge made no attempt to construe the plain meaning of the statute.[116] To Judge Michael, the words of the key phrase "instruments under which the plan is established or operated" clearly were ambiguous.[117] In explaining his approach, Judge Michael made a classic argument in favor of the use of legislative history in lieu of "the mechani-

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110. *Id.* at 655.

111. *See id.*

112. *See id.* at 656.

113. *Id.* The court concluded, however, that the participants were not entitled to the cost-sharing and trustee expense policies. The court based its decision, in part, on the fact that the participants had refused to clarify to the plan administrator what was meant by the term "cost-sharing policy" and because there was no indication that a trustee expense policy existed. *See id.* at 655-56.

114. Judge Michael agreed with the majority that ERISA section 404 did not create any disclosure requirements under the fiduciary duty provision because the more general section 404 cannot control the more specific ERISA section 104(b)(4). *See id.* at 661 (Michael, J., concurring in part and dissenting in part). Furthermore, Judge Michael agreed with the majority that the plan was not obligated to disclose cost-sharing policies, trustee expense policies, and trustees' meeting minutes for the reasons stated by the majority. *See id.* at 659 (Michael, J., concurring in part and dissenting in part).

115. *See id.* at 659 (Michael, J., concurring in part and dissenting in part).

116. *See* Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1076 (1996); Bartling v. Fruehauf Corp., 29 F.3d 1062 (6th Cir. 1994).

117. *Faircloth*, 91 F.3d at 660 n.1 (Michael, J., concurring in part and dissenting in part).

cal application of dictionary definitions."[118]

After construing the legislative history, Judge Michael determined that "instruments" must be defined more broadly because participants are entitled to understand where they stand with respect to the plan.[119] According to Judge Michael, participants need enough information to enforce their rights and those of the plan.[120]

His dissent concentrated on the implications of participating in a defined contribution plan such as an ESOP.[121] Judge Michael stressed that ESOP participants are subject to a double risk of loss, which is even more pronounced than the normal defined contribution plan: first, contrary to the normal portfolio theory that diversification is necessary to spread risks, ESOP assets are not diversified,[122] and second, the workers may also lose their current employment as a result of the company failure.[123] He argued that the possibility of double loss was keenly demonstrated by a forty percent drop in account value in a sin-

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118. *Id.* (Michael, J., concurring in part and dissenting in part). In his dissent, Judge Michael elaborated on his method of statutory interpretation:

> It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definition. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the parties who executed the contract or of the body which enacted or framed the statute or constitution.

Id. (Michael, J., concurring in part and dissenting in part) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.05, at 103 (5th ed. 1992) (citation omitted)).

119. Judge Michael looked to the same legislative history as was reviewed in both *Hughes* and *Bartling*—that a participant has a right to know "exactly where he stands with respect to the plan." *Id.* (Michael, J., concurring in part and dissenting in part) (quoting S. REP. NO. 127, at 27 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863; *see also supra* text accompanying notes 67, 86 (quoting this language).

120. *See id.* (Michael, J., concurring in part and dissenting in part).

121. *See id.* at 661-63 (Michael, J., concurring in part and dissenting in part); *see also supra* text accompanying notes 35-39 (discussing defined contribution plans).

122. *See id.* at 662 (Michael, J., concurring in part and dissenting in part).

123. *See id.* at 662-63 (Michael, J., concurring in part and dissenting in part).

gle year.[124] Judge Michael explained that a request for broad disclosure by participants in a plan that had dropped by forty percent made even more sense in light of the fact that the employer had net earnings of nearly two million dollars in the same year.[125]

Stressing the above factors, Judge Michael argued for greater disclosure. First, similar to the Sixth Circuit, he stated that the participants had a right to the IRS determination letter because the ESOP had to be tax-qualified in order to operate.[126] Because plan fiduciaries must be bonded, the bonding policy was also an instrument under which the ESOP is operated, according to the dissent.[127] Judge Michael also asserted that the appraisal reports and supporting documentation were instruments under which the plan was operated because the valuation determines the price at which the plan purchases company stock, and it is on the basis of these valuations that the administrator values the employees' accounts.[128]

Judge Michael ended his discussion of ERISA section 104(b)(4) by discussing the limitations of the provision.[129] He argued specifically that participants' right to inspect corporate documents should be the same as that afforded to shareholders.[130] Judge Michael would have allowed nondisclosure if the company demonstrated a valid reason of the need for confidentiality.[131] As Lundy had already offered the requested information to other participants, the dissent felt that the company had not demon-

124. *See id.* at 663 (Michael, J., concurring in part and dissenting in part).
125. *See id.* at 663 n.2 (Michael, J., concurring in part and dissenting in part).
126. *See id.* at 664 (Michael, J., concurring in part and dissenting in part).
127. *See id.* (Michael, J., concurring in part and dissenting in part).
128. *See id.* (Michael, J., concurring in part and dissenting in part).
129. *See id.* at 665 (Michael, J., concurring in part and dissenting in part).
130. *See id.* (Michael, J., concurring in part and dissenting in part); *see also* DEL. CODE ANN. tit. 8, § 220(b) (Michie 1991) (stating that shareholders are entitled to business records upon demonstration of a proper purpose related to the shareholder's business interests).
131. *See Faircloth*, 91 F.3d at 665 (Michael, J., concurring in part and dissenting in part).

strated a need for confidentiality.[132]

Board of Trustees of the CWA/ITU v. Weinstein

The Second Circuit has most recently addressed the issue of document disclosure under section 104(b)(4). The *Weinstein* facts were limited and straightforward. Weinstein was a retiree who had participated in a pension plan since 1969.[133] In 1995, he wrote to the plan administrator, Foss, to request copies of the plan's annual reports and actuarial valuation reports for the years 1992 through 1994 because he feared that his pension benefits were being reduced as a result of improper actuarial allocations of pension-plan contributions.[134]

Foss forwarded copies of the annual reports to Weinstein but refused to send him copies of the actuarial valuation reports.[135] Foss's reasoning was that the actuarial valuation reports were "'largely duplicative' of the information in the actuarial statements" of the annual reports that Weinstein had already received.[136] According to Foss, the actuarial valuation reports were also unnecessary because the information included was "statistical, highly technical, quite voluminous and . . . unlikely to provide further clarification of the Plan's funding status."[137] Foss sent Weinstein a copy of the most recent actuarial valuation report's table of contents and asked Weinstein to identify the specific information in which he was interested.[138] Weinstein persisted in his requests until June 1995, when the board of trustees of the plan and Foss (the "administrators") filed suit to request a declaratory judgment that ERISA does not require disclosure of actuarial valuation reports.[139]

The Second Circuit quickly dismissed Weinstein's procedural

132. *See id.* at 665 (Michael, J., concurring in part and dissenting in part).
133. *See* Board of Trustees of CWA/ITU v. Weinstein, 107 F.3d 139, 140 (2d Cir. 1997).
134. *See id.*
135. *See id.*
136. *Id.* (quoting response of Foss).
137. *Id.* (quoting response of Foss).
138. *See id.*
139. *See id.*

challenges,[140] and addressed the issue presented by section 104(b)(4) at length.[141] Citing the Fourth Circuit's *Faircloth* decision, the court began its analysis of section 104(b)(4) with a review of the dictionary definitions of the term "instrument."[142] The Second Circuit found that the term connotes a formal legal document, and that only documents similar to the category of documents enumerated in section 104(b)(4)—specifically, plan descriptions, summary plan descriptions, the latest annual report, terminal reports, the bargaining agreement, trust agreements and contracts—must be disclosed to participants.[143]

The Second Circuit also contrasted the language in section 104(b)(4) with that found in other sections of the statute.[144] In sections requiring disclosure to regulatory agencies, the wording of the disclosure provisions is far broader, including for example "reports, books, and records."[145] The court found that by comparison the mere term "instruments" was far more narrow.[146]

The Second Circuit continued its analysis by examining the legislative history of section 104(b)(4).[147] According to the court, the legislative history revealed that participants must receive information from the plan regarding their rights and remedies rather than the technical data contained in actuarial valuation reports.[148]

The court found that the reports in question contained pertinent information about a plan, but that the administrators were not bound by this information.[149] As the actuarial valuation reports did not bind the administrators, they were more akin to a status report or an advisory opinion than to a formal legal

140. *See id.* at 142.
141. *See id.* at 142-47.
142. *See id.* at 142-44.
143. *See id.* at 143 (listing documents enumerated in section 104(b)(4)).
144. *See id.*
145. *Id.* (citing 29 U.S.C. § 1134(a)(1) (1994) (regarding disclosure to be made to the Secretary of Labor)).
146. *See id.*
147. *See id.* at 143.
148. *See id.* at 143-44.
149. *See id.* at 144.

document.[150] As a result, section 104(b)(4) did not require disclosure of the reports.[151] The court concluded its analysis by noting that its holding did not conflict with the Internal Revenue Code requirements and by dismissing the broader language used in Department of Labor opinion letters because none of the letters specifically addressed actuarial valuation reports.[152]

In the final portion of the opinion, the court addressed *Bartling v. Fruehauf Corp.*, noting that the Sixth Circuit previously reached a contrary result regarding the disclosure of actuarial valuation reports.[153] The Second Circuit explicitly disagreed with the Sixth Circuit, stating that under the test applied in *Bartling*, "virtually any report or record generated in the administration of a pension plan might be subject to disclosure."[154] The court concluded its analysis by dismissing the use of section 404, which sets out general fiduciary duties of loyalty and prudence, as a means for requiring disclosure.[155]

THE DEPARTMENT OF LABOR'S STANCE ON THE ISSUE

The advisory opinion letters written by DOL in response to private attorneys' requests for clarification in specific instances also form part of the framework within which ERISA section 104(b)(4) should be analyzed. According to the approach established by the U.S. Supreme Court in *Chevron v. Natural Resources Defense Council, Inc.*,[156] federal courts must follow an agency's interpretation of a statute if the interpretation is consistent with clearly expressed congressional intent.[157] If, however, congressional intent is ambiguous, then the courts must defer to the agency's permissive construction of the statute.[158]

150. *See id.* at 145.
151. *See id.*
152. *See id.* at 145-46.
153. *See id.* at 146 (citing Bartling v. Fruehauf Co., 29 F.3d 1062, 1070 (6th Cir. 1994)).
154. *Id.* at 146.
155. *See id.* The court regarded the use of section 404 to be an inappropriate means for finding disclosure requirements because the section states nothing specifically about disclosure. *See id.* at 147.
156. 467 U.S. 837 (1984).
157. *See id.* at 842-43.
158. *See id.* at 844-45. The court in *Bartling* referenced the DOL opinion letters re-

As noted above, the four circuits have not agreed about congressional intent, or lack thereof; therefore, for the same reason, the use of DOL opinion letters is also a subject of debate.

Even assuming that DOL's interpretation should be taken into account, the dilemma presented by section 104(b)(4) is not resolved. DOL's opinion letters have only added to the confusion that surrounds the issue of disclosure. In 1982, DOL responded to a request for information regarding the required disclosure of trustee meeting minutes.[159] The response was accurate yet unhelpful. If the trustees discussed a matter relating to the establishment or the operation of the plan, such as the establishment of a claims procedure, this portion of the minutes must be disclosed under the provision.[160] If no such information was addressed, then the trustees were not obligated to disclose the minutes.[161] In 1987, DOL reaffirmed the same opinion given five years previously.[162]

The opinion letters do not shed light on the section 104(b)(4) debate for two reasons. First, they do not address whether the trustee minutes as a whole must be disclosed upon request. Second, the disagreement between the circuits focuses on the meaning of the terms "relating to the establishment or the operation of the plan."[163] The claims procedure is only one of poten-

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garding the required disclosure to participants but held that the letters were inapposite. *See Bartling*, 29 F.3d at 1070.

159. *See* Pension and Welfare Benefits Administration Opinion Letter 82-33A (1982), *available in* LEXIS, Labor Library, ERISA File, *cited in Bartling*, 29 F.3d at 1070.

160. *See id.*

161. *See id.*

162. *See* Pension and Welfare Benefits Administration Opinion Letter 87-10A, 6 Pens. & Profit Sharing 2d (RIA) ¶ 90,279 (1987), *cited in Bartling*, 29 F.3d at 1070. This letter is also cited in *Faircloth*, but no further conclusion was reached because both the majority and the dissent agreed that the participant's request for three years of trustee meeting minutes was overly broad. *See* Faircloth v. Lundy Packing Co., 91 F.3d 648, 655 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997).

163. Board of Trustees of the CWA/ITU v. Weinstein, 107 F.3d 139, 145 (2d Cir. 1997); *Faircloth*, 91 F.3d at 653; Hughes Salaried Retirees Action Comm. v. Administrator of Hughes, 72 F.3d 686, 689 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1676 (1996); *Bartling*, 29 F.3d at 1069.

tially countless trustee discussions that an administrator would be obligated to disclose. Even if the entire set of trustee meeting minutes is not required, the DOL opinion letters provide no further guidance on what discussions would satisfy the section 104(b)(4) requirement.

DOL has, however, reached two firm decisions. First, when disclosure of documents is demanded, the information can be released to third parties upon authorization by the beneficiary.[164] The second decision appears to be a breakthrough because, after reviewing legislative history, DOL took a firm stance and determined that:

> any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute an instrument under which the plan [is] established or operated, regardless of whether such information is contained in a document designated as the "plan document."[165]

Although it is risky to draw firm conclusions on the basis of only one affirmative decision, this language suggests that DOL appears to be moving toward a stance requiring broader disclosure.

CONVENTIONAL METHODS OF STATUTORY CONSTRUCTION

Why did the four circuits reach different conclusions concerning the disclosure required under section 104(b)(4)? The first answer to this question, addressed above, is that the courts have stressed different methods of statutory construction.[166]

164. *See* Pension and Welfare Benefits Administration Opinion Letter 82-21A (1982), *available in* LEXIS, Labor Library, ERISA File, *cited in Bartling*, 29 F.3d at 1070.

165. Pension and Welfare Benefits Administration Opinion Letter 96-14A, 6 Pens. & Profit Sharing 2d (RIA) ¶ 90,589 (1996).

166. *See supra* notes 50-155 and accompanying text.

Textualism: The Formalist Approach to Statutory Construction

The first tier of statutory interpretation, allegedly employed by all four courts, is the plain meaning approach. A primary advocate of this method, and the founder of what one commentator termed "the new textualism," is Justice Antonin Scalia.[167] Justice Scalia believes that there is no need to consult legislative history if the statutory language is clear.[168] If the judiciary must seek guidance outside of the language of the provision in question, then according to Justice Scalia, only the following techniques are acceptable: looking to the structure of the statute; reviewing interpretations given to other, similar provisions; and consulting the canons of statutory construction.[169]

For the limited purposes of this Note, the canons can be summarized as three basic concepts. First, inclusion of one thing should be considered as the exclusion of another (*expressio unius est exclusio alterius*).[170] Second, the specific should prevail over the general.[171] Finally, each word, clause, and provision of a statute must be given effect.[172] In addition to the canons of statutory construction, Justice Scalia is also willing to give context to the statute through the use of grammar books and dictionaries.[173]

As discussed above, each of the four circuits applied their interpretation of the plain meaning approach. In *Bartling*, for example, the court held that the participants were entitled to the actuarial report "under the plain language of [section 104(b)(4)]."[174] In a similar remark, the Ninth Circuit majority in *Hughes* stated that it began its analysis by relying on the

167. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

168. *See id.*

169. *See id.* at 624.

170. *See* Jeffrey A. Branch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233, 1279 (1995).

171. *See id.* at 1282.

172. *See id.* at 1283.

173. *See* Eskridge, *supra* note 167, at 669.

174. *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1070 (6th Cir. 1994).

ordinary language of the statute.[175] The *Faircloth* opinion started with a listing of the dictionary definitions of each word within the key phrase of section 104(b)(4).[176] Finally, in *Weinstein*, the Second Circuit began its substantive discussion with the same listing of the various definitions of the word "instrument" previously set forth by the Fourth Circuit.[177] The fact that the four circuits used what they considered to be a plain meaning approach to reach varying conclusions should caution against sole reliance upon it.

Though Justice Scalia's approach appears to have faltered in this context, his "new textualism" has the marked benefit of causing the Supreme Court to rethink its role in the context of statutory construction.[178] This method has not garnered unanimous support, but it has opened the door to "exciting analytical possibilities,"[179] which, this Note argues, allow the judiciary to consider using the pragmatic inquiry later proposed.[180]

The textualist approach may have revitalized statutory interpretation, but even if applied as mandated by Scalia, many problems exist. The first, and most important, is that language is sometimes ambiguous, and consequently words have different dictionary definitions.[181] An extraordinary example of this arose in the Fourth Circuit in *Faircloth*.[182] As noted above, the majority itself conducted a word by word "analysis" of the key

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175. *See* Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686, 689 (9th Cir. 1995) (en banc) (explaining that the statutory construction of ERISA "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (citations omitted)), *cert. denied*, 517 U.S. 1189 (1996).

176. *See* Faircloth v. Lundy Packing Co., 91 F.3d 648, 653 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997).

177. *See* Board of Trustees of the CWA/ITU v. Weinstein, 107 F.3d 139, 142 (2d Cir. 1997).

178. *See* Eskridge, *supra* note 167, at 624.

179. *Id.* at 667.

180. *See infra* notes 220-48 and accompanying text. Ironically, this proposal would probably be vigorously opposed by Justice Scalia. *See infra* text accompanying note 210.

181. *See* Richard Rouco, Commentary, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631, 666 (1994) (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 418-19 (1989)).

182. *See* Faircloth v. Lundy Packing Co., 91 F.3d 648, 652-53 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997).

phrase of section 104(b)(4), relying on definitions set forth in *Black's Law Dictionary* and *Webster's New World Dictionary*.[183] The litigants each included their own version of dictionary construction: the appellees argued in favor of using *Webster's New Collegiate Dictionary* in defining "instrument;"[184] the appellants criticized this usage, claiming that *Black's Law Dictionary* is a superior authority.[185] The court apparently tried to appease both sides by looking to each litigant's dictionary of choice,[186] but the problems in relying upon dictionary definitions to elicit the clear meaning of the text are clear.

The textualist approach can raise other less glaringly obvious problems. Textualists construe the statute as a whole in order to gain an understanding of one provision. The problem with this approach is that in promulgating the statute, Congress may have chosen purposely to leave gaps, with the understanding that the judiciary will fill them in depending on the facts presented.[187] Furthermore, textualists assume that internal consistency within a statute exists, when, in fact, such consistency may be missing due to a variety of factors.[188] Finally, even if the statute is consistent, the judiciary is still obligated to make a primary selection of the interpretation,[189] which leads the interpreter back to the word ambiguity problem.

The "formalist" method of statutory interpretation also suffers from its own set of formalist problems. In the eighteenth century, the practice of statutory interpretation was not to limit interpretation to plain meaning, but to allow for judicial elaboration of statutes.[190] The use of the canons of statutory construction is also problematic. First, these canons emanate from the judicial process and can be manipulated as easily as the legislative his-

183. *See id.*
184. *See* Brief for Appellee at 14, *Faircloth* (No. 95-1275).
185. *See* Reply Brief for Appellants at 6 n.1, *Faircloth* (No. 95-1275).
186. *See Faircloth*, 91 F.3d at 653.
187. *See* Rouco, *supra* note 181, at 666-67.
188. *See id.* at 667 (noting the influence of interest groups, compromise, and irrationality on legislation).
189. *See id.*
190. *See* Eskridge, *supra* note 167, at 670-71.

tory that Scalia abhors.[191] Furthermore, no indication exists that Congress has these canons of statutory construction in mind when it develops statutes.[192] To assume otherwise is to engage in what Justice Scalia calls a "benign fiction."[193]

In the ERISA arena, the Supreme Court recently has rejected the textualist approach. Initially, in *Mertens v. Hewitt Associates*,[194] the textualist approach yielded a decision that no individual claims for relief existed under ERISA section 502(a)(3).[195] The four Justices dissenting from Justice Scalia's opinion[196] split with the majority about the importance of ERISA's legislative history in construing the statute.[197] The dissenting viewpoint in *Mertens*, however, gained favor three years later in *Varity Corp. v. Howe*[198] in which the Court held that the wronged participants were entitled to individual relief under ERISA section 502.[199]

Legislative History: Only a Partial Response to Textualism

The problems with textualism often force judges to move to the next level of analysis—legislative history.[200] As discussed earlier, this was the route taken by three of the four courts to construe ERISA section 104(b)(4) because of its ambiguous language.[201] The basic theory supporting the use of legislative his-

191. *See id.* at 674-75.

192. Judge Abner Mikva wrote: "When I was in Congress, the only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight." Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987).

193. *See* Eskridge, *supra* note 167, at 679 (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring)).

194. 508 U.S. 248 (1993).

195. *See Mertens*, 508 U.S. at 255-58 (explaining that ERISA section 502(a)(3) precludes awards for compensatory or punitive damages).

196. The lineup of Justices who dissented from Scalia's opinion demonstrates that the issue of statutory construction cuts across the traditional liberal-conservative lines. Justice White wrote the dissenting opinion and was joined by Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor. *See id.* at 263 (White, J., dissenting).

197. *See id.* at 264-73 (White, J., dissenting).

198. 516 U.S. 489 (1996).

199. *See id.* at 515.

200. *See generally* Eskridge, *supra* note 167, at 686 (arguing that although there are advantages to the Scalia approach, textualism must be modified to allow for the use of legislative history when, among other circumstances, there are two or more plausible meanings for the words in a statutory provision).

201. *See supra* notes 66-68, 86-89, 102-03, 147-48 and accompanying text. The

tory suggests that in order to understand a statute's meaning, the interpreter should look beyond the language of the statute to determine the intent of the writer.[202] This theory was well summarized by Justice Frankfurter: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose."[203]

In the area of pension benefits, Congress recognized an imbalance of power between employer and worker, which neither market mechanisms nor the developing common law was able to correct.[204] As discussed previously, this imbalance was part of the driving force behind the enactment of ERISA and is particularly why ERISA requires disclosure by trustees.[205] As to section 104(b)(4), the legislative history anticipates that employees receive enough information to ensure that they can "police their plans."[206] Congress also believed that the threat of disclosure would itself be effective:

> [T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.[207]

Fourth Circuit was the only court to conlcude that the language was unambiguous, a conclusion sharply criticized by Judge Michael. *See supra* notes 117-18.

202. *See* William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 865 (1993).

203. United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting). Several modern critics of the plain meaning approach, and specifically of new textualism, also argue that context is necessary because statutory terms are not self-defining, and words have no meaning without interpretation. *See* Eskridge, *supra* note 167, at 669; *see also* Rouco, *supra* note 181, at 664-65 (quoting the criticism set forth by Sunstein, *supra* note 181, at 416).

204. *See* Fisk, *supra* note 15, at 159 (citing 29 U.S.C. § 1001 (1994)).

205. *See supra* notes 14-17 and accompanying text.

206. H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649; S. REP. NO. 127, at 27 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863.

207. H.R. REP. NO. 93-533.

The open question is, of course, what documents are needed in order to achieve the enumerated goals? In the Senate Report's discussion of the disclosure requirements, the legislative history indicates that the participant must have access to "underlying plan documents, such as bargaining agreements [and] trust agreements."[208] This statement logically encourages the reader to construe the key provision narrowly. Unfortunately, Congress did not stop there. The legislative history also includes the following statement: "The participant may obtain from the administrator a copy of any or all underlying documents relating to the plan upon the payment of a reasonable charge . . . ."[209] The earlier inference that Congress intended only bargaining and trust agreements is destroyed by the next sentence broadening—and making ambiguous—the disclosure requirements.

Although there are benefits in looking to legislative history, Congress's intended result under ERISA section 104(b)(4) is unclear. Even if the legislative history were clear, however, this would not solve the issue. Many legal scholars, including, of course, Justice Scalia, argue that legislative history is not an appropriate method of interpreting statutes. Justice Scalia's argument against using legislative history stems from his views on the separation of powers. Scalia argues that when the judiciary looks to legislative history, it exercises discretion at the expense of the legislature's promulgated statute, and democratic governance is threatened.[210] Scalia also argues that legislative history is irrelevant to the Court's decision making,[211] and that it lacks Congress's "imprimatur" because the representatives pay little attention to statements made in committee reports.[212]

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208. S. REP. NO. 93-127, at 28 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4864.

209. *Id.*

210. *See* Eskridge, *supra* note 167, at 649-50. Such criticism would also apply to the proposal made in this Note for a pragmatic judicial inquiry. *See infra* notes 220-48 and accompanying text. As discussed above, the response to this objection is that the application of the contextual methods that Scalia is willing to accept, such as the use of canons of statutory interpretation, also allows for judicial discretion. *See supra* text accompanying notes 181-86.

211. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and concurring in the judgment).

212. *See* Eskridge, *supra* note 167, at 650 n.114 (explaining that this argument by Justice Scalia first appeared in *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985),

At least three other criticisms of legislative history exist. First, Judge Frank Easterbrook, in his "public choice" model,[213] rejects legislative history on three grounds:[214] (1) because legislatures are comprised of many members, they have no legislative purpose, but instead "only outcomes";[215] (2) legislation is the result of compromise rather than of individual purpose;[216] and (3) statutes are merely the result of private interest bargaining, not the result of congressional purpose.[217]

Second, realists criticize legislative history, stating that the collective intent is, by definition, only a construction of the interpreter because legislatures do not have a determinative collective expectation.[218] Third, there is criticism from a historical perspective: it is impossible to reconstruct collective intent because the interpreter will invariably be influenced by the current context in which the decision is reached.[219]

THESIS: PROPOSING ALTERNATIVES TO TRADITIONAL STATUTORY CONSTRUCTION

With the litany of criticisms made of the two traditional methods of statutory interpretation, what is left? This Note proposes that courts should employ a third-tier approach in interpreting section 104(b)(4). Both textualists and those using legislative history have an Article I[220] perspective because both look exclusively to the legislature for guidance.[221] The pragmatic judicial inquiry suggested by this Note would force the judiciary to

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while he was sitting on the District of Columbia Circuit).

213. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

214. *See* Popkin, *supra* note 202, at 870.

215. Easterbrook, *supra* note 213, *cited* in Popkin, *supra* note 202, at 870.

216. *See In re* Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987), *cited in* Popkin, *supra* note 202, at 870.

217. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-18, 44, 54 (1984), *cited in* Popkin, *supra* note 202, at 870.

218. *See* Eskridge, *supra* note 167, at 642.

219. *See id.* at 644.

220. Article I refers to Article I of the U.S. Constitution in which legislative power is vested in the Congress. *See* U.S. CONST. art. I, § 1.

221. *See* Popkin, *supra* note 202, at 865 n.3.

take an Article III,[222] "reader-based approach."[223] Such an approach would have particular relevance in the difficult area of disclosure under section 104(b)(4).

The Theory Behind a Searching Judicial Inquiry

The theory behind this pragmatic approach is to abandon the fiction of legislatively determined statutory meaning and to recognize that, in reality, courts "mak[e] decisions with little legislative guidance."[224] Proceeding with this assumption, judges have a responsibility to read a statute and accept a law-making authority beyond that granted by the legislature.[225] One of the important benefits of such a reader-based approach is that it reminds the judiciary that its interpretive choice is a responsible act.[226]

As one scholar has noted, searching judicial inquiry is particularly appropriate in instances in which "the facts to which the statute might be applied did not exist at the time of the statute's adoption."[227] In *Faircloth*, the participants were part of an ESOP,[228] which as discussed above, is a defined contribution plan.[229] When Congress wrote section 104(b)(4), there were very few defined contribution plans, especially those as risky as the ESOP. Employers have only recently begun the trend towards defined contribution plans, which shift the risk of loss to the participant.[230] *Faircloth* thus presents optimal

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222. Article III of the U.S. Constitution vests power in the federal judiciary. *See* U.S. CONST. art. III, § 1.

223. Popkin, *supra* note 202, at 865.

224. Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 39 n.19 (1996).

225. *See* Popkin, *supra* note 202, at 867 (citing John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1630 n.135 (1992)). In his article, Choon argued that plenary judicial power stems from the Marshall Court's early "suggestion that certain powers inhere to courts qua courts." Yoo, *supra*, at 1630 n.15.

226. *See* Popkin, *supra* note 202, at 867.

227. *Id.* at 878.

228. *See* Faircloth v. Lundy Packing Co., 91 F.3d 648, 651 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997).

229. *See supra* text accompanying note 38.

230. *See* Keville, *supra* note 20, at 534-43 (explaining the recent shift by employers

circumstances for employing a searching judicial inquiry.

The Proposed Inquiry for Determining Whether Disclosure is Mandated under ERISA Section 104(b)(4)

This Note proposes that the judiciary employ the following five-prong inquiry in order to determine the level of disclosure required for defined contribution plans under section 104(b)(4):[231] (1) why the employee sought disclosure of the documents; (2) whether a reasonable employee would have made a similar request; (3) why the employer refused disclosure; (4) whether the employer was reasonable in refusing to grant the employee's request; and (5) the general effects on society of the judicial decision on disclosure.

The first and third prongs of the test are straightforward. Prong one requires the court to review the employees' cited reasons for requesting the documents. Similarly, the third prong requires the court to conduct a review of each reason cited by the employer supporting its refusal to disclose the requested documents.

The remainder of the inquiry is much more difficult. Prongs two and four require the court to make a determination of "reasonableness." Admittedly, this is a nebulous standard; however, the reasonableness standard is commonly used in legal analysis, particularly in the area of tort law. This Note proposes that the "reasonable man" standard that serves as an element in determining negligence in torts[232] should also ap-

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toward defined contribution plans).

231. This Note distinguishes defined benefit plans, such as that which existed in *Hughes*. *See* Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686, 688 (9th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1189 (1996). The premise is that a searching judicial inquiry is less important with respect to defined benefit plans because Congress originally geared its rulemaking protection toward the defined benefit plan, and employers bear the risk of investment loss and, hence, have an enormous added incentive to make wise investments. Employees therefore are less in need of protection in defined benefit plans than they are in defined contribution plans. This phenomenon was demonstrated in *Hughes*: the employees' disclosure requests were only made to help them negotiate or litigate for increased guaranteed benefits. *See id.*

232. "[T]he standard below which conduct must not fall if it is to avoid being negli-

ply to both an employee and an employer in the section 104(b)(4) disclosure context.

When a court makes a determination regarding a defendant's negligence, the court must determine whether a hypothetical reasonable man would have acted in a similar manner.[233] This Note suggests that a court faced with a document disclosure issue under section 104(b)(4) should ask the same question: would a hypothetical reasonable employer or employee have acted in a similar manner when presented with the same facts?

In tort law, the definition of a "reasonable man" can vary according to certain factors. For example, a court will modify the reasonable man standard for a child, unless the child is engaging in adult activities.[234] Just as the tort definition varies depending on circumstances, this Note proposes a similar variation depending on distinctive factors in the employer-employee relationship.

In reviewing a disclosure request, a court should look at factors such as: whether the corporation is unionized, so that employees have third party protection; whether the employer is a large, publicly-traded corporation, in which the employee would know little of management's actions, or a small, closely-held corporation, in which the employee would have access to more information; and whether the employee has access to those who make decisions, such that he can address questions regarding a corporation's operations directly rather than being forced to demand document disclosure in order to answer his questions. Although these factors will vary depending on the facts and circumstances of each case, the three factors presented above offer some standard questions that a court can ask in making its determination.

The final prong of the proposed test calls for a pure policy analysis. The following list is a sample of the types of issues that a court could address in reaching its decision: (1) whether

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gence . . . is ordinarily measured by what the *reasonably prudent person* would do in the circumstances. As everyone knows, this reasonable person is a creature of the law's imagination. He is an abstraction." 3 FAUTER V. HARPER ET AL., THE LAW OF TORTS § 16.2, at 389 (2d ed. 1986) (emphasis added).

233. *See id.*

234. *See, e.g.*, Dellwo v. Pearson, 107 N.W.2d 859, 863 (Minn. 1961); Dunn v. Teti, 421 A.2d 782, 783-84 (Pa. Super. Ct. 1980).

its decision would tend to encourage or discourage unionization; (2) whether its decision would tend to encourage or discourage negotiations; (3) whether its decision would shift the balance of power either toward or away from employees, depending on their bargaining position; (4) whether its decision would tend to increase or decrease the role of the federal government in protecting employees; and (5) how its decision would effectuate the goals of ERISA, balancing congressional intent to arm employees with the ability to police their plan with the congressional intent to encourage employers to create more plans. These factors are general questions which could aid courts. The application of this prong, however, will again vary based on the individual circumstances of each case.

A Demonstration of the Test: Faircloth v. Lundy Packing Co.

Faircloth can be used as a case in point to demonstrate the use of the proposed test for defined contribution plans. The employees' reason for requesting disclosure was straightforward: their account values fell as the result of a forty-two percent drop in Lundy stock in the span of a year.[235] The plaintiffs also wanted the documents in order to give them to the representative of the UFCW.[236] Any reasonable employee would seek company documents if his retirement plan suffered such a significant loss, especially in light of the fact that the company still earned a two million dollar profit. A reasonable employee would also likely be inclined to seek the aid of another to explain the information if he was unable to understand it himself.

The employees' reasons for seeking disclosure were few and

235. *See* Faircloth v. Lundy Packing Co., 91 F.3d 648, 651 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 738 (1997). A 42% stock drop is distinguishable, for example, from a situation in which the company's stock drops only 2%. In this situation, large-scale employee reaction and request for documentation without other extenuating circumstances would not be reasonable. Nor would seeking the documentation for the purpose of selling the information to a competitor be reasonable.

236. *See* Brief for Appellee at 9, *Faircloth* (No. 95-1275) (explaining that Faircloth testified in her deposition that she would give any documents that she received to the UFCW).

straightforward, but the employer presented several reasons to explain its refusal to disclose the documents. First, the employer argued that some of the documents contained sensitive financial information, which they argued was particularly a problem for ESOPs because those plans often contain more sensitive information.[237] This argument does not seem reasonable because the stress on extra protection for ESOPs is not convincing. The balance of power is clearly shifted in favor of the employer, who can choose whatever type of plan it wants. Second, the argument that confidentiality is necessary also falls short because the employer already had provided other participants with the information sought by the plaintiffs.[238]

Lundy also argued that there was no need to provide the documents because the information sought by the participants was listed on the Form 5500.[239] The problem with this argument is that the information is *reproduced* on the Form 5500. There is no way for the participants to review the Form 5500 for accuracy without the original documents, such as the IRS determination letter. The employer also argued that the provision of the documents would have been unduly burdensome. This argument is difficult to accept because section 104(b)(4) contains a provision that the employee must pay the document copying costs.[240] Furthermore, these documents should not be that difficult to locate because the employer is required to retain the records and file them with the DOL under ERISA section 107.[241]

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237. *See id.* at 21-22.

238. *See* Brief for Appellant at 2, *Faircloth* (No. 95-1275). Even if the employer had not already provided the documents, this Note argues that the employees should be entitled to confidential documents upon demonstration of a valid reason, much like shareholders are entitled to business records upon showing a proper purpose. This was precisely the position adopted by Judge Michael in his dissenting opinion on section 104(b)(4). *See Faircloth,* 91 F.3d at 665 (Michael, J., concurring in part and dissenting in part).

239. *See* Brief for Appellee at 26-29, *Faircloth* (No. 95-1275).

240. *See* 29 U.S.C. § 1024(b)(4) (1994).

241. *See* 29 U.S.C. § 1027 (1994). Although this Note concludes that Lundy Packing Co. was unreasonable in its refusal, there are legitimate situations in which the employer should not be required to disclose documents to its employees. For example, if the employer denied disclosure of the documents in order to protect a trade secret, this would be reasonable behavior.

Another example of reasonable behavior on the part on an employer was pre-

The final prong of the inquiry focuses on the potential results of the judiciary's decision regarding disclosure. If DOL has received the documents in question, but the employees have not, DOL will bear the burden of reviewing the information to police the plan. DOL will have no choice but to conduct some type of review in light of the danger presented by ESOPs and because there are numerous examples of ESOP abuse.[242] Should the federal government bear the burden of review, or should the employees and their representatives be allowed to look out for their own interests? In an era of government downsizing, the latter option would certainly appear to be more successful. This option is especially attractive in light of the employees' incentive to conduct a vigilant review. Further, this option would be less expensive for taxpayers.

A decision in favor of the employees would also have given them more leverage with which to bargain in the following year before the corporation made decisions that would affect stock value. This shift in power in favor of the employees and the ensuing negotiations would likely decrease litigation costs, creating an overall benefit to society. Finally, this decision would also effectuate the ERISA policy of protecting the employees and would not likely deter the employer from retaining the plan because of the added capital that the plan brings to the corporation.[243]

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sented in *Board of Trustees of CWA/ITU v. Weinstein*: in light of the volume of information presented in the actuarial valuation reports, Foss photocopied the table of contents and sent it to Weinstein in a valid attempt to narrow down the information to be furnished. *See* Board of Trustees of CWA/ITU v. Weinstein, 107 F.3d 139, 140 (2d Cir. 1997).

242. *See, e.g.*, Zabolotny v. Commissioner, 7 F.3d 774, 775 (8th Cir. 1993) (describing the illegal sale of property to an ESOP); *see also* Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (describing violations of fiduciary duties under ERISA in connection with transaction involving ESOP); Norlin Corp. v. Rooney Pace Inc., 744 F.2d 255, 259-60 (2d Cir. 1984) (describing illegal stock transfers on ESOP).

243. "Use of an ESOP provides a corporation with a cheap and ready source of capital that may be used for expansion, to pay down debt, or (as may be the case with a closely-held corporation) to buy out a minority shareholder." *Faircloth*, 91 F.3d at 662 (Michael, J., concurring in part and dissenting in part) (citation omitted).

Anticipated Criticisms of the Proposed Inquiry

The result of the pragmatic inquiry would have been to allow the Lundy participants access to many more of the documents than they received. The arguments against the approach would be numerous, and some of them may indeed be valid. First of all, in using this type of approach, the opinions of individual judges would more likely come into play, which undermines the legitimacy of the court.[244] The second very real problem is that courts simply may not be sufficiently competent in the ERISA area to make a reasoned decision.[245]

A third argument certainly could be made that the balance between the three branches of government will be threatened;[246] however, the argument also applies equally to a review of legislative history, and even to some of the other methods of statutory construction to which textualists are willing to look.[247] Finally, charges of inefficiency might also be made because the proposed inquiry would be more time consuming than the traditional statutory construction analysis.[248]

A Final Alternative: Amending the Statute

If the judiciary is unwilling to conduct the proposed pragmatic inquiry, Congress could also resolve the current problem by amending ERISA. One such method would simply be to modify section 104(b)(4) by enumerating all documents that must be

244. *See* Fisk, *supra* note 224, at 97-98 (explaining the fear of judicial activism, but also noting that "the use of dictionaries does not constrain judicial activism."). In *Faircloth*, for example, the judges comprising the majority inserted their own opinion when they chose particular dictionary definitions for their explanation of the statute's "plain meaning." *See* Faircloth, 91 F.3d at 653.

245. *See* Fisk, *supra* note 224, at 97.

246. *See id.* at 96 (discussing the argument of textualists that judges can not judicially fix an error of Congress, because this is not the job of the courts).

247. *See supra* notes 187, 211 and accompanying text (discussing various constructions permitted by textualists).

248. The searching inquiry proposed in this Note also could occur through the mediation process, which is a particularly appropriate method of resolving disputes for parties in an ongoing employer-employee relationship. *See* Cindy C. Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment-Related Disputes*, 26 U. MEM. L. REV. 1131, 1135 n.15 (1996) (noting the high success rate in mediating employment disputes). The use of mediation would also alleviate costs.

disclosed and eliminating the phrase "other instruments under which the plan is established or operated." This would decrease the judiciary's role and would create clear black letter law. A second option is related to the summary plan document. Congress could modify the requirements and increase automatic disclosure in the SPD itself. The benefit of amending ERISA is that consistent results would ensue. Furthermore, because ERISA is such a technically complex statute, deference to the legislature might be the best option.[249] The problem with suggesting an amendment to ERISA is that it is difficult to persuade Congress to modify a flawed statute such as section 104(b)(4) because interests in the political process naturally coalesce around the benefits of the existing law, even if it is flawed.[250]

CONCLUSION

The American worker fears for his pension today, and in light of facts such as those presented in *Varity Corp. v. Howe*,[251] the fear is understandable. This fear has manifested itself in participant requests for the disclosure of plan documents to be used to police employers. Prior to the enactment of ERISA, such a request would never have been acceptable.[252] Today, the availability of such requests under section 104(b)(4) has resulted in a circuit split regarding the breadth of disclosure under this section. The courts have failed to reach a consensus using the plain meaning of the statute or its legislative history.

The real reason for these inconsistent results is that statutory construction is simply not neat and scientific. An attempt to treat statutes as if they are is, in reality, an abdication of judi-

249. *See* Popkin, *supra* note 202, at 888 (stating that "[a] judicial decision to allocate law-making responsibility to the legislature makes sense when the legislature is aware of a technically complex or politically controversial issue").

250. *See* Fisk, *supra* note 224, at 99 (explaining that in the world of ERISA, it is easier for Congress to enact new provisions than to modify existing, flawed statutory provisions after enactment).

251. 516 U.S. 489 (1996); *see supra* text accompanying notes 8-11.

252. *See supra* text accompanying notes 14-17.

cial responsibility, which in this instance disserves pension plan beneficiaries. This Note proposes that courts conduct a five-prong inquiry to review the reasons and soundness behind each party's position and to determine the larger effects of its decision regarding disclosure.

In the event that the courts are unwilling to modify their approach to statutory construction, Congress can also amend ERISA. This could be done either through an amendment to the provision at issue or by broadening the automatic disclosure requirements for the SPD. As pension funds represent at least twenty-eight percent of all equity capital in the U.S. economy,[253] the issue of who will monitor the fund investors certainly merits the close attention of Congress if the courts are unwilling to resolve the issue.

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253. *See* Rouco, *supra* note 181, at 631 (footnote omitted).