William & Mary Law Review

Volume *59 (2017-2018)*
Issue 3

Article 6

2-15-2018

Untrustworthy: ERISA's Eroded Fiduciary Law

Peter J. Wiedenbeck

UNTRUSTWORTHY: ERISA'S ERODED FIDUCIARY LAW[†]

PETER J. WIEDENBECK[*]

ABSTRACT

The trust law analogy has come to dominate judicial thinking about employee benefit plans. Yet despite its rise to rhetorical prominence, ERISA fiduciary law has been dramatically transformed by a series of uncoordinated, low-visibility judicial decisions on multiple fronts. These apparently unconnected case law developments reveal a startling pattern of mutually reinforcing restrictions on ERISA's protection of pension and welfare benefits. This study chronicles ERISA's trust law turn to expose how untrustworthy workers' benefit safeguards have become. Both the scope and the intensity of fiduciary oversight have been radically pruned back in the courts. Notwithstanding the congressional declaration that attempts to relax workers' federal fiduciary protections "shall be void as against public policy," the Supreme Court has shown the way to curtail fiduciary obligations. That de facto or implicit exculpation, combined with unilateral employer control over both plan terms and plan interpretation, indicate that the federal courts have defanged—or deranged—ERISA's fiduciary regime. Despite their importance to personal financial security and overall economic welfare, workers repeatedly discover the fragility of the interests they earn under

* Peter J. Wiedenbeck is the Joseph H. Zumbalen Professor of the Law of Property, Washington University in St. Louis. Comments should be directed to peter.wiedenbeck@wustl.edu. The author is grateful for the helpful comments of Cheryl Block, Donald Bogan, Thomas E. Clark, Jr., Kevin Collins, Rebecca Hollander-Blumoff, Pauline Kim, Ronald Levin, Brendan Maher, Colleen Medill, Dana Muir, Russell Osgood, Rachel Sachs, Elizabeth Sepper, Peggie Smith, Norman Stein, Andrew Tuch, James Wooten, and workshop participants at the University of Connecticut School of Law, the University of Minnesota Law School, and Washington University School of Law.

employer-sponsored health insurance and retirement savings programs. The new property in employee benefits is, along multiple dimensions, remarkably weak property.

TABLE OF CONTENTS

INTRODUCTION

ERISA, the Employee Retirement Income Security Act of 1974,[1] is often hailed as a landmark achievement in labor and social welfare legislation.[2] Congress declared as its central goal "to protect ... the interests of participants in employee benefit plans and their beneficiaries."[3] One prominent strategy to that end was the imposition of broadly applicable, stringent federal fiduciary standards. This trust law aspect of ERISA rapidly rose to doctrinal and rhetorical prominence, even as the force of ERISA fiduciary law slowly corroded.

The scope and force of fiduciary principles in the employee benefit context is an area of continuing controversy and a focus of ongoing scholarly debate.[4] Originally viewed as a fearsome threat to longstanding business practices, most of the details of ERISA's fiduciary regime were left to be worked out by the federal courts in civil enforcement actions. Distinguished scholars advocated flexibility in the application of ERISA's fiduciary duties, allowing courts to take account of the sponsoring employer's interests in employee benefit programs to maximize the joint welfare of the employer and covered employees.[5] Federal courts did not follow that path. Instead, they developed an alternative restraint: categorically excluding plan design decisions (adoption, amendment, or termination of a plan—so-called "settlor functions") from the definition of fiduciary actions.

1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.). In conformity with the common practice among employee benefit law specialists, citations to specific provisions of ERISA point to the section numbers of the original statute followed by a parallel citation to the location of the provisions in the U.S. Code.

2. *E.g.*, JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1 (2004) (describing ERISA as "landmark legislation" and quoting Senator Jacob Javits calling ERISA "the greatest development in the life of the American worker since social security"); Norman P. Stein & James A. Wooten, *Foreword*, 6 DREXEL L. REV. 257, 257 (2014) (calling ERISA "arguably the last major piece of social legislation" of the twentieth century).

3. ERISA § 2(b), 29 U.S.C. § 1001(b) (2012).

4. *See infra* Part I.

5. *See infra* Part I.A.

This settlor/fiduciary distinction, or settlor function doctrine, is now widely recognized as a central tenet of employee benefit law.[6]

This Article relates the settlor function doctrine to ERISA's accrued benefit anti-reduction rule, and shows that many troubling results produced by the settlor function doctrine can be understood as staking out the boundaries of a worker's limited "property" interest in employee benefits. That property interest has two dimensions: breadth and depth. The settlor function doctrine, by restricting the range of application of ERISA's fiduciary regime, limits the breadth of property. The thesis of this Article is that case law developments have also covertly limited the intensity or strictness of ERISA fiduciary duties within their limited domain of application.[7] Property in employee benefits is weak property.

The weaknesses of pension and welfare benefit property are traceable to several sources in addition to the settlor function doctrine and ERISA's minimal restraints on plan amendment. Employee benefit plans that the employer unilaterally establishes are interpreted to carry out the employer's intent.[8] Plans that are collectively bargained, in contrast, are read in light of contract norms, but the Supreme Court's guidance on plan interpretation skews the inquiry to favor the employer.[9] These interpretive doctrines sometimes operate to retrospectively curb or redefine employees' interests in benefits.

The courts apply the limited abuse-of-discretion standard of review to fiduciary decisions if the plan grants the fiduciary discretion to construe its terms, as virtually all plans now do.[10] Even if the fiduciary is a company insider acting under a conflict of interest, her decisions are accorded considerable deference—effectively given a presumption of good faith and regularity. The practical result is a species of implicit exculpation of employer-regarding decisions,

6. *See infra* Part I.B.
7. *See infra* Part II.
8. *See infra* Part IV.A.
9. *See infra* Part IV.B.
10. *See infra* notes 282-87 and accompanying text. Pursuant to the settlor function doctrine, a plan may be amended to confer discretionary authority to interpret its terms, thereby relaxing judicial oversight of fiduciary decisions, without the amendment itself being subject to any duties of loyalty or care to plan participants or beneficiaries. *See infra* Part I.B. Put another way, the settlor function doctrine allows a plan sponsor to adopt, immune from fiduciary exposure, plan terms that will reduce fiduciary exposure.

notwithstanding ERISA's express override of plan provisions that would relax fiduciary obligations. This crypto-exculpation teaches that the new property in employee benefits is weak property, both because it is narrowly defined and loosely enforced.[11]

The emergence of weak property in employee benefits—the quiet coup in ERISA fiduciary law—rebalances competing legislative policies. It accords greater weight to employer autonomy and the related desire to promote voluntary plan sponsorship, and increases the vulnerability of employees' anticipated health and retirement benefits. Without undertaking to identify the optimal trade-off, this Article briefly addresses the mechanisms by which workers' interest in pension and welfare benefits could be reinforced.[12] Whether or not such a strengthening is pursued, the essential fragility of purportedly robust federal protections is labor's vital lesson.

I. TAMING ERISA FIDUCIARY LAW

Comprehensive private pension reform legislation underwent a decade-long gestation.[13] Strict federal fiduciary obligations applicable to both pension and welfare plans became an early component of the package.[14] Support for enhanced fiduciary oversight was

---

11. *See infra* Part V.

12. *See infra* Part VI.

13. *See* S. SPECIAL COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 6-25 (Comm. Print 1984) (prepared by Michael S. Gordon); WOOTEN, *supra* note 2, at 116-18, 269-70.

14. *See* S. REP. NO. 89-1348, at 38-39 (1966); 116 CONG. REC. 7566-70 (1970) (statement of Rep. Ayres) (explaining the 1970 Employee Benefits Protection Act, the Nixon Administration proposal); 113 CONG. REC. 3924-25 (1967) (explaining the Welfare and Pension Plan Protection Act of 1967, the Johnson Administration proposal); WOOTEN, *supra* note 2, at 117-18, 122 (reporting that the fiduciary responsibility recommendations stemmed from findings by the Permanent Subcommittee on Investigations, chaired by Senator McClellan, that several million dollars had been diverted from two local unions' welfare funds).

The McClellan Committee revelations triggered a rapid turnaround in attitudes on this issue. In January 1965, a Cabinet-level committee on private pensions had released a report that did not recommend adoption of federal fiduciary standards. PRESIDENT'S COMM. ON CORP. PENSION FUNDS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS, at xv (1965) ("On the basis of present evidence, the Committee does not propose the substitution of a new set of statutory standards for the recognized [state law] standards of fiducial responsibility, although there appears to be a need for strengthening statutory provisions for assuring compliance with these standards.").

widespread,[15] including among business groups and their representatives.[16] Once ERISA emerged from the legislative arena, however, the broad scope and apparently unyielding force of the responsibilities imposed on benefit plan administrators aroused concern. Congress, it seemed, had crafted an alarmingly strict and expansive version of trust law that threatened to unbalance ordinary operations of employee benefit plans.[17] Benefit specialists

---

15. *See* Panel 1, *Setting the Stage: History Before the Ninety-Third Congress*, 6 DREXEL L. REV. 265, 280-81 (2014) (remarks of Henry Rose) (suggesting the fiduciary responsibility provisions were noncontroversial and largely unchanged after 1970); Panel 4, *ERISA and the Fiduciary*, 6 DREXEL L. REV. 359, 360-62, 374-75 (2014) (remarks of Frank Cummings, Robert Nagle, and Henry Rose) (describing fiduciary provisions as noncontroversial and subject to little pressure to change).

16. Opponents of substantive pension regulation (including minimum standards governing vesting, funding, and termination insurance) sought separate consideration of fiduciary standards and enhanced disclosure. *See* Panel 1, *supra* note 15, at 281-82 (remarks of Frank Cummings) (describing strategy of pension reform opponents). Passage of fiduciary and disclosure rules was expected to delay consideration and weaken support for a broad overhaul of private pension plans. "If you do these fiduciary standards, that will fix all the problems. You don't have to worry about funding, vesting, plan termination insurance ... all you gotta do is catch the crooks and thieves." Panel 4, *supra* note 15, at 376 (remarks of Frank Cummings) (characterizing employer opinions on fiduciary standards). This strategy—advocating prompt passage of fiduciary standards but further study of controversial issues (vesting, funding, termination insurance, and pension portability)—was initially followed by the Nixon Administration. *See Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 91st Cong. 463-65 (1970) (statement of George P. Shultz, Secretary of Labor); *see also* WOOTEN, *supra* note 2, at 127-128, 152-53, 158 (suggesting that a focus on misconduct by plan administrators threatened to derail comprehensive pension reform).

17. *See, e.g.*, *Pension Reform's Expensive Ricochet*, BUS. WK., Mar. 24, 1975, at 144, 144 ("Fiduciary rules are shaping up as the most controversial part of the new law.... [P]ension administrators and investment managers are scrambling to protect themselves against lawsuits."); James C. Hyatt & Kenneth H. Bacon, *Pension Tension: New Law Regulating Retirement Benefits Is Full of Likely Problems for Fiduciaries*, WALL ST. J., Feb. 14, 1975, at 28, 28; Edmund Faltermayer, *A Steeper Climb up Pension Mountain*, FORTUNE, Jan. 1975, at 78, 162 (concluding that ERISA fiduciary duties have "clearly increased the legal liabilities of anyone concerned with managing pension funds"); Alvin D. Lurie, IRS Assistant Comm'r for Emp. Plans and Exempt Orgs., Address on Prohibited Transactions Before the ABA National Institute on Fiduciary Responsibility, *in* Pens. Rep. (BNA) No. 39, at R-3 (June 16, 1975) ("To put it plainly, the new [prohibited transaction] rules have scared the daylights out of everyone caught in their net."); *Plan Administration: Pension Law Inhibits New or Continued Qualified Plans, Attorney Says*, Pens. Rep. (BNA) No. 7, at A-4 (Oct. 28, 1974) ("[T]he provisions in the pension reform law that seem to be creating the greatest consternation among employers, especially among small companies, are the new rules on fiduciary responsibility. The absolute restrictions on many types of transactions, such as sales and loans between an employer and a plan, are viewed with alarm by employers."); PENSION TASK FORCE OF THE SUBCOMM. ON LABOR STANDARDS, H. COMM. ON EDUC. AND LABOR, 94TH CONG.,

complained of "overkill" and looked for ways to rein in potentially far-reaching and disruptive applications of ERISA's fiduciary responsibility regime.[18]

ERISA's fiduciary rules were derived from traditional trust law, modified to adapt it to the mission of controlling mismanagement and abuse of employee benefit programs.[19] A trustee may be subject

---

ERISA OVERSIGHT REP. 3 (Comm. Print 1977) ("In the course of our oversight activities we have been inundated with testimony and comments about the fiduciary standards provisions of the Act and their implementation."); Pens. Rep. (BNA) No. 78, at A-10 (Mar. 22, 1976) ("The basic problem with ERISA noted by most speakers [at the Eleventh Annual Mutual Funds and Investment Management Conference] is its failure to adequately define fiduciary, party in interest, and prohibited transactions. Panelists indicated that if the terms are literally construed, the Act could paralyze those even remotely connected with pension funds."); Panel 4, *supra* note 15, at 376-77 (comments of Karin Feldman) (suggesting that once ERISA became law, everyone was worried about being a fiduciary).

18. John N. Erlenborn, Pension Reform: The Next Step, Address Before the Society of Actuaries (1975), *in* 1 REC. SOC'Y ACTUARIES 465, 466 (1975) (influential Republican congressman who had been a leading member of the ERISA Conference Committee complains that "[t]his prohibited transactions section, it seems to me, is a clear case of legislative overkill"); Walter S. Rothschild, *Fiduciary Responsibilities*, *in* PENSION AND PROFIT-SHARING PLANS, ser. D, fol. 2, at 3 (David C. Rothman ed., 1979) ("The objectives are laudatory, and probably a majority of responsible and informed people agree that change was called for. Many believe, however, that the complex, highly articulated regulatory web of ERISA's fiduciary responsibility provisions represent legislative overkill."); *Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the S. Comm. on Human Res.*, 95th Cong. 606-07 (1978) (statement of Ernest J.E. Griffes on behalf of the American Society for Personnel Administration) ("[T]he uncertainties of fiduciary responsibilities placed upon plan administrators is the other area that is of great concern to our members. Perhaps no other single area of ERISA has caused greater consternation among persons with responsibility for benefit plan administration."); *id.* at 613 ("The fiduciary liability provisions and the so called 'Prudent Man Rule' of ERISA seem to our members to be unduly onerous and an unnecessary overkill in protecting the rights of plan participants."); GEORGE E. RAY & HARRY V. LAMON, JR., FIDUCIARY RESPONSIBILITIES UNDER THE NEW PENSION REFORM ACT 85 (1976 Supp.) (observing that it remains to be seen whether regulations to be issued by the Secretaries of Labor and Treasury will ameliorate a situation of "overkill," and guessing that the statute will soon need to be amended). The "overkill" refrain seems to have been picked up from a January 1975 story in *Fortune* magazine, which quoted Preston C. Bassett, Vice President of Towers, Perrin, Forster & Crosby, describing the pension reform law generally as "overkill." Faltermayer, *supra* note 17, at 81.

19. *See infra* note 40. In *Varity Corp. v. Howe*, the Supreme Court explained:

> [ERISA's] fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment. See *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility") ....

to exacting duties of loyalty and care backed by personal liability in the event of breach, but that exposure is readily sidestepped. The intended trustee can decline appointment, or can agree to serve only if the settlor relaxes the force of fiduciary obligations by including exculpatory clauses in the trust instrument.[20] Under ERISA, in contrast, robust fiduciary responsibility appears inescapable. Congress adopted a functional definition of fiduciary so that all benefit plan decision makers, asset custodians, and paid investment advisors can be called to account—not just the legal owner of the fund.[21] Hence actions and authority, rather than formal conveyancing and consent, establish who owes duties to plan participants. And by voiding exculpatory clauses, Congress prohibited employee benefit plan sponsors from lowering ERISA's prescribed standards of acceptable fiduciary conduct.[22] Compared to the status quo ante, ERISA apparently created an entirely new high-risk environment for pension and welfare benefit plan sponsors and service providers, a regime that imposed broadly applicable uncompromising obligations.

Early administrative action calmed industry nerves by postponing the effective date of certain provisions,[23] establishing procedures for applying for administrative exemptions from ERISA's prohibited

---

> We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.

516 U.S. 489, 496-97 (1996).

20. RESTATEMENT (SECOND) OF TRS. §§ 102(1), 222 (AM. LAW INST. 1959); *see* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 650-51, 659-60 (1995).

21. *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2012); PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 16, 110 (2010).

22. *See* ERISA § 410(a), 29 U.S.C. § 1110(a); WIEDENBECK, *supra* note 21, at 124-25 (discussing the policy rationale for the prohibition of exculpatory provisions).

23. *See* ERISA § 414(b)(2), 29 U.S.C. § 1114(b)(2); 29 C.F.R. § 2550.414b-1 (1975) (removed by 61 Fed. Reg. 33,847-01 (July 1, 1996)) (postponing the effective date of ERISA sections 402, 403, and 405 for plans in existence on the date of ERISA's enactment until January 1, 1976, but delaying the ban on exculpatory provisions only until July 1, 1975); *see also* Steven J. Sacher, Assoc. Solicitor of Labor, Address Before the ABA National Institute on Fiduciary Responsibility (June 11, 1976), *in* Pens. Rep. (BNA) No. 91, at A-5 (June 21, 1976) (equating the first phase of Labor Department implementation of ERISA, which included postponing the effective date of various provisions of Title I and granting certain temporary prohibited transaction exemptions, to "firefighting, or if you prefer, administering combinations of aspirin and tranquilizer on a very selective basis to alleviate certain splitting headaches and badly jangled nerves").

transactions,[24] and setting some regulatory boundaries on the reach of "fiduciary" classification.[25] Yet ERISA's wide-ranging authorization

---

24. ERISA Procedure 75-1, 40 Fed. Reg. 18,471 (Apr. 28, 1975) (implementing ERISA § 408(a), 29 U.S.C. § 1108(a)); Rev. Proc. 75-26, 1975-1 C.B. 722 (establishing exemption procedures under I.R.C. § 4975(c)(2)); *see also* Prohibited Transaction Class Exemption (PTCE) 75-1, 40 Fed. Reg. 50,845 (Oct. 31, 1975) (permitting for a limited time certain transactions involving employee benefit plans and broker-dealers), extended by 43 Fed. Reg. 32,196 (July 25, 1978); PTCE 76-1, 41 Fed. Reg. 12,740 (Mar. 26, 1976) (permitting certain transactions involving multiemployer and multiple employer plans, including delinquent contributions, construction loans by plans covering employees in the building and construction trades, and arrangements for provision of office space administrative service by the plan to a participating employer or union).

25. 29 C.F.R. § 2509.75-5, Q&A D-1 (2017) (interpretive bulletin issued June 25, 1975, stating that professional service providers, such as attorneys, accountants, actuaries, and consultants, are not ordinarily fiduciaries because such advisers usually lack ultimate decision-making responsibility for benefit plans); 29 C.F.R. § 2509.75-8, Q&A D-2 (2017) (interpretive bulletin issued October 3, 1975, providing that "a person who performs purely ministerial functions ... for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan," nor does he "exercise any authority or control respecting management or disposition of the assets of the plan").

The statute classifies as a fiduciary any person who renders investment advice for a fee or other direct or indirect compensation regardless of authority or control over plan or asset management. ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii). Regulations issued in 1975 restricted that category to persons rendering investment advice on a regular basis pursuant to an understanding that the advice would be individualized and would form the primary basis of investment decisions with respect to plan assets. 29 C.F.R. § 2510.3-21(c)(1)(ii) (2015) (amended by Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (codified at 29 C.F.R. pts. 2509, 2510, 2550)).

That narrowing of the fiduciary definition has been a source of controversy recently, as under the Obama Administration the Employee Benefits Security Administration moved to treat the provision of investment advice or recommendations in a broader range of circumstances as giving rise to fiduciary status under ERISA and the Code. The new definition captures compensated investment advice provided to an individual retirement account (IRA) or IRA owner, not just regular advisory services rendered to an employee benefit plan, plan fiduciary, participant, or beneficiary. 29 C.F.R. § 2510.3-21 (2017). The objective of the new rule is to protect retirement savings from being diverted into high-cost investment alternatives on the basis of recommendations provided by investment advisers acting under conflicts of interests, a problem that has become acute in recent years as participant-directed 401(k) plans have risen to dominate the U.S. private pension system. *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21,928, 21,932 (Apr. 20, 2015) (notice of proposed rulemaking and explanation of background and purpose of revised fiduciary definition). When first aired, the proposal was met with organized, widespread, and intense opposition and lobbying by financial advisers and the securities industry. Pitched opposition to the original 2010 proposed expansion of the fiduciary definition led to its withdrawal and the development of the 2015 notice of proposed rulemaking. *See id.*; *see also Definition of the Term "Fiduciary" Proposed Rule*, U.S. DEP'T LABOR, https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-of civil enforcement actions[26] left most issues that would determine the effect of the new fiduciary responsibility regime to be worked out, for good or ill, by the federal courts.

---

comments/1210-AB32 [https://perma.cc/7W8A-SC2G] (withdrawn Apr. 20, 2015) (October 2010 notice of proposed rulemaking and public comments thereon).

Financial industry opposition to the rule continued post-adoption, and shortly after taking office President Donald Trump directed the Labor Department to reconsider the rule. Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9675 (Feb. 3, 2017). That reconsideration resulted in an initial sixty-day delay—to June 9, 2017—in the applicability date of the rule, and allowed fiduciaries to qualify for certain prohibited transaction exemptions (PTEs) from the rule for the duration of 2017 solely by complying with impartial conduct standards. Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 82 Fed. Reg. 16,902 (Apr. 7, 2017). A relaxed temporary enforcement policy and transition period guidance was also announced. *See Conflict of Interest FAQs*, U.S. DEP'T LABOR (Aug. 2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-2.pdf [https://perma.cc/A8SH-XC3N]. While nominally in force as of June 9, 2017, the Labor Department sought additional public input on the fiduciary rule while considering further revisions and additional postponement. *Field Assistance Bulletin No. 2017-02*, U.S. DEP'T LABOR (May 22, 2017), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02 [https://perma.cc/2Z9D-PS8S] [hereinafter *Field Assistance Bulletin No. 2017-02*, U.S. DEP'T LABOR] (announcing that during the period before January 1, 2018, the Labor Department "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions," nor will the IRS apply the prohibited transaction excise tax of I.R.C. § 4975); *see* Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278 (July 6, 2017). Indications are that the Labor Department will move to revise the rule in conjunction with the SEC, which during the Obama Administration declined to become involved. Alexander Acosta, *Deregulators Must Follow the Law, so Regulators Will Too*, WALL ST. J., May 23, 2017, at A19 ("[T]he SEC has critical expertise in this area. I hope in this administration the SEC will be a full participant."); *Field Assistance Bulletin No. 2017-02*, U.S. DEP'T LABOR, *supra*. The special transition period for the prohibited transaction exemptions was extended until July 1, 2019,

> to give the Department of Labor the time necessary to consider public comments under the criteria set forth in the Presidential Memorandum of February 3, 2017, including whether possible changes and alternatives to these exemptions would be appropriate in light of the current comment record and potential input from, and action by, the Securities and Exchange Commission and state insurance commissioners.

18-Month Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 56,545 (Nov. 29, 2017).

26. ERISA § 502(a)(2)-(3), (e)-(g), 29 U.S.C. § 1132(a)(2)-(3), (e)-(g) (authorizing suits by plan participants or beneficiaries to enforce ERISA's fiduciary responsibility standards, or to obtain appropriate equitable relief to prevent or redress violations of ERISA or the terms of an employee benefit plan, conferring exclusive jurisdiction on the federal courts regardless of the amount in controversy, and permitting discretionary awards of attorney's fees and costs).

A. The Fischel-Langbein Proposal

Judicial implementation of the fiduciary regime was not entirely for the good, according to a famous study by Professors Daniel Fischel and John Langbein that analyzed a dozen years of case law under ERISA.[27]

> ERISA fiduciary law has not been widely reckoned to be on the list of ERISA's major blunders. In the present article we show that it belongs there. We observe that the central concept of ERISA fiduciary law, the exclusive benefit rule, misdescribes the reality of the modern pension and employee benefit trust. We show that the contradictions of the exclusive benefit rule bedevil a remarkable array of the main issues in modern pension trust administration: takeover cases, social investing, employee stock ownership schemes, asset reversions from terminated plans, and judicial review of benefit denials and other plan decisions. We emphasize that the mess in ERISA fiduciary law cannot be ameliorated until courts and other decision makers recognize the multiplicity of interests that inhere in the modern pension and employee benefit trust.[28]

Adopting a law and economics perspective,[29] Fischel and Langbein identify two central problems with straightforward application of the exclusive benefit rule. First, it ignores the sponsoring employer's interests in employee benefit programs.[30] Second, it treats the interests of plan participants as monolithic and homogenous, neglecting the often conflicting priorities of different groups of employees.[31]

---

27. *See* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988).

28. *Id.* at 1107.

29. *See id.* at 1113-17 (discussing "[e]conomic [p]erspectives on [t]rust [l]aw [f]iduciary [d]uties").

30. *See id.* at 1117-19, 1122, 1124, 1127-28, 1137 (arguing that "[p]ension and other benefit plans will not be established unless they are in the mutual interest of employers and employees" and providing examples of employer interests).

31. *See id.* at 1119-21, 1139-42, 1144-49, 1159-60 (examining conflicts between younger and older workers during takeover cases and over investments made to preserve jobs).

To accommodate those varying interests and achieve Congress's goal of broad provision of pension and welfare benefits to workers in private industry, they argue that ERISA should be interpreted and applied in a manner that will maximize the value of the benefit plan to all interested parties.[32] As a component of the employment contract, an employee benefit plan should be construed from an ex ante perspective to augment, to the fullest extent possible, the joint welfare of the employer and employee-participants.[33] Notwithstanding the narrow traditional focus of the private trust law duty of loyalty, Fischel and Langbein hypothesized that ERISA's exclusive benefit rule could be adapted to that end. Only two steps would be required to do so, they suggested. First, instead of treating the employer as functioning solely as trust settlor, federal courts ought to recognize that the sponsoring employer is in substance a co-beneficiary of the employee benefit plan.[34] As such, the employer has sometimes-distinct interests that deserve ongoing furtherance.[35] Second, the divergent priorities of different subgroups of employees should be acknowledged, respected, and accommodated by crafting reasonable compromises between their competing objectives.[36] This could be accomplished by importing the traditional trust law duty of impartiality into ERISA's fiduciary responsibility regime.[37] In applying the impartiality mandate, the authors apparently envisioned taking into account both the heterogeneous goals of various subsets of plan participants and the employer's interests as co-beneficiary

32. *Id.* at 1125 ("In a world of voluntary plan formation, if the contracting parties understood that the legal standards for evaluating plan decisionmaking had become more realistic and more reasonable, they would be more likely to form plans and to establish higher levels of pension saving.").

33. *Id.* at 1158-59 (emphasizing the importance of the ex ante perspective wherein the employee and employer interests converge and arguing that "[t]he correct interpretation of fiduciary duties is the rule that maximizes the joint welfare of both"); *accord id.* at 1118-19, 1125, 1127-28, 1137-38.

34. *See id.* at 1158 ("We believe that ERISA permits the courts to be more forthright in recognizing the employer's interest as beneficiary.").

35. *See id.* at 1128, 1143.

36. *See id.* at 1141-42 (arguing that diversity of worker priorities "is an argument for balancing the conflicting interests among [employees], not for denying the existence of conflicts").

37. *See id.* at 1159-60 (advocating that courts should recognize an implied duty of impartiality under ERISA); *accord id.* at 1121.

(from the first step, described above).[38] The article, however, never quite says that in so many words.

Fischel and Langbein seemed to think that their recommended doctrinal innovations would do no great violence to ERISA's fiduciary policing system. While the exclusive benefit rule was derived from the trust law duty of loyalty,[39] Congress was aware of differences between private trusts (most commonly used as vehicles for intergenerational donative transfers of family wealth) and employee benefit plans, and it intended the courts to interpret and apply ERISA in a manner that would adjust for those differences.[40] In particular, the absence of effective monitoring by the (often deceased or incapacitated) settlor or the (often minor, unborn, or inexpert) beneficiaries calls for holding the trustee of a private trust to a strict and inflexible duty of loyalty.[41] In contrast, both the employer and employees continually monitor the performance of employee benefit plan fiduciaries, so "there may be less need for strict fiduciary duties that limit the discretion of the trustee to engage in conduct that may be mutually beneficial to both groups."[42] Nevertheless, the authors

---

38. *See id.* at 1158 ("The correct interpretation of [ERISA] fiduciary duties is the rule that maximizes the joint welfare of both [employer and employees].").

39. *Id.* at 1113.

40. H.R. REP. NO. 93-1280, at 302 (1974) (Conf. Rep.), *reprinted in* 3 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4277, 4569 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY] ("The conferees expect 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."); H.R. REP. NO. 93-533, at 12 (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra*, at 2348, 2359 ("[R]eliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) .... [T]he typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature."); S. REP. NO. 93-127, at 29 (1973), *reprinted in* 1 ERISA LEGISLATIVE HISTORY, *supra*, at 587, 615 (same). Moreover, a leading proponent of comprehensive pension reform legislation emphasized that "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra*, at 4733, 4771.

41. *See* Fischel & Langbein, *supra* note 27, at 1114-15 (suggesting that strict fiduciary duties substitute for monitoring by parties interested in private trust); *see also* Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 197, 198-200 (Andrew S. Gold & Paul B. Miller eds., 2014).

42. Fischel & Langbein, *supra* note 27, at 1119; *see also id.* at 1113 ("[I]t is far from clear

caution that in some situations "conventional safeguards such as union monitoring and the employer's reputational incentives are not adequate to protect the interests of employees. In these cases, the courts have been properly sensitive to the possibility of self-interested action by nonneutral fiduciaries to the detriment of the employees."[43]

The Fischel-Langbein proposal would sensitively modulate the content of the exclusive benefit rule, ERISA's duty of loyalty, according to the context. The judiciary would be assigned the task of maximizing the joint welfare of the employer and covered employees, evaluated from an ex ante perspective. To do so, courts would adjust traditional trust doctrine by subsuming the employer into the category of plan beneficiaries and invoking a duty of impartiality to discriminatingly craft sensible compromises between the competing goals of all parties with a stake in the benefit program. That's a tall order.

Conceptually, the Fischel-Langbein proposal is compelling. It is apparently the most frequently cited ERISA article in the scholarly literature, yet it has gotten no traction in the courts.[44] Perhaps it asks too much of the judiciary. Overwhelmed judges struggling to get control of their dockets might be expected to prefer reliance on formal rules that facilitate resort to summary disposition. More likely, judicial reluctance to adopt or engage the approach stems from its poor fit with the statutory language. Fiduciaries are commanded to act "solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries."[45] The "participant" category is

---

that the private gratuitous trust and the employee benefit plan are really comparable.... We suggest that these differences undercut the rationale for routine application of trust law rules to employee benefit plans.").

43. *Id.* at 1133.

44. *See* Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 462 & n.6 (2015). The author conducted a Westlaw search for "ERISA's Fundamental Contradiction" and found that the Fischel-Langbein article had been cited in only 15 federal cases as of mid-June 2015, while 135 articles appearing in law reviews and journals cited it. The same search conducted on Lexis returned citations in 14 federal cases and 121 law journal articles.

45. ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i) (2012); *accord* ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (Supp. III 2016) (subject to specified exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying rea-

restricted to employees or former employees of an employer,[46] and although in this usage "benefits" is not explicitly defined, in context it clearly refers to the type of benefit—pension, health care, life insurance, et cetera—that the plan was established to provide to the company's workforce.[47] Consequently the employer's goals, whether they be reducing compensation expense or promoting personnel policies (for example, reducing workforce turnover, increasing productivity, or encouraging retirement of older workers), do not sit well as "benefits" provided "to participants."[48]

Transplanting a duty to act impartially into ERISA is similarly problematic, even if limited to employee-participants. ERISA does not broadly commission the fiduciary to advance any interest of participants and beneficiaries; rather, it narrowly authorizes the fiduciary to discharge her duties for the purpose of providing plan benefits or defraying reasonable expenses of administering the

sonable expenses of administering the plan"); I.R.C. § 401(a)(2) (2012) (stating that qualified pension, profit-sharing, or stock bonus plan must be "for the exclusive benefit of [the employer's] employees or their beneficiaries").

46. ERISA § 3(7), 29 U.S.C. § 1002(7). The term "beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8). While it could be argued that the sponsoring employer is designated by the terms of the plan to receive certain advantages, those employer advantages are not "plan benefits" as commonly understood, and the plan designation to which the statute refers seems to contemplate the specification of a substitute taker for benefits earned by the employee-participant. Nevertheless, some lower courts have opined that the plan designation prong of the definition of "beneficiary" might be stretched to comprehend partners or sole proprietors (working owners of unincorporated businesses) who are covered under a welfare or pension plan. *See, e.g.*, Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 408-09 (9th Cir. 1995); Lain v. UNUM Life Ins. Co. of Am., 27 F. Supp. 2d 926, 934-35 (S.D. Tex. 1998).

47. *See* ERISA § 3(1), 29 U.S.C. § 1002(1) (defining welfare plan as "any plan, fund, or program ... to the extent that [it] was established or is maintained for the purpose of providing for its participants or their beneficiaries" any benefit of a type listed in the statute); ERISA § 3(2), 29 U.S.C. § 1002(2) (defining pension plan as a plan, fund, or program "to the extent that by its express terms or as a result of surrounding circumstances" it "provides retirement income to employees, or ... results in a deferral of income by employees for periods extending to the termination of covered employment or beyond").

48. *See* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014) ("Read in the context of ERISA as a whole, the term 'benefits' in [ERISA's exclusive benefit rule] must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries.... The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.").

plan.[49] Hence the interest of a group of young employees in retaining their jobs, for example, cannot be taken into consideration in administering a pension plan, and surely cannot justify compromising older workers' interest in financial security in retirement.[50] The plain meaning of the statute suggests that Congress set an immutable priority, leaving the courts no room to tinker or adjust interests in response to changes in the workplace (such as the employer's financial condition, employment levels, or workforce demographics).[51] If the daunting rigors and inflexibility of ERISA's fiduciary obligations were to be ameliorated, then the courts would have to find some other relief valve.

---

49. *See supra* note 45.

50. *See* ERISA Interpretive Bulletin 2015-01, 29 C.F.R. § 2509.2015-01 (2017) (detailing the Labor Department's position concerning economically targeted investments that "an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return"); *id.* (stating that the exclusive benefit rule "prohibit[s] a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives"); ERISA Interpretive Bulletin 08-2, 29 C.F.R. § 2509.08-2 (2016) (withdrawn and replaced by ERISA Interpretive Bulletin 2016-01, 81 Fed. Reg. 95,879, 95,882 (Dec. 29, 2016) (codified at 29 C.F.R. pt. 2509.2016-01)) (stating the Labor Department position concerning exercise of shareholder rights, which provides that in voting proxies a fiduciary should "consider only those factors that relate to the economic value of the plan's investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives"; the "use of pension plan assets by plan fiduciaries to further policy or political issues through proxy resolutions that have no connection to enhancing the economic value of the plan's investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of section 404(a)(1)(A) and (B)"). *Compare* Fischel & Langbein, *supra* note 27, at 1120-21, 1159-60 (advocating resort to duty of impartiality to mediate competition between retirement security and interests of other participants), *with* WIEDENBECK, *supra* note 21, at 123-24 (asserting that interests other than obtaining plan benefits are not cognizable under ERISA).

51. In the context of prohibited transactions, the statute twice juxtaposes "the interests of the plan" with "the interests of its participants and beneficiaries," *see* ERISA §§ 406(b)(2), 408(a)(2), 29 U.S.C. §§ 1106(b)(2), 1108(a)(2), which might be taken as congressional acknowledgement that those interests can sometimes diverge. Perhaps that contrast could have been seized upon to create an opening (or interpretive wedge) for judicial recognition of the employer's interests and the sort of nuanced interest balancing that Fischel and Langbein advocated. No such line of analysis emerged. That might be attributable to the uncertain significance of the juxtaposition, or to fact that ERISA's specification of baseline fiduciary duties refers solely to the interests of participants and beneficiaries. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

B. The Muir-Stein Exposition

In time the courts did indeed find another fiduciary relief valve—one that is susceptible to bright-line formal application and far more compatible with ERISA's language. In a 2015 article, Professors Dana Muir and Norman Stein explained that the distinction between settlor and fiduciary functions has emerged as the premier doctrinal mechanism with which the judiciary injects flexibility into ERISA's apparently uncompromising fiduciary standards.[52] Rather than accepting the invitation (by Professors Fischel and Langbein) to recognize the sponsoring employer as a coordinate plan beneficiary, "[c]ourts have used this distinction between 'settlor' and 'fiduciary' functions to recognize the employer's own interests in employee benefit plans and to mediate between those interests and the statute's command that plan decisions be made in the exclusive interest of the plan's participants."[53]

The settlor/fiduciary distinction is founded on ERISA's definition of fiduciary, which provides in part that:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[54]

Putting aside clause (ii) on paid investment advisers, the statutory definition is keyed to "management" or "administration" of the plan or control of its assets,[55] and fiduciary status is expressly limited "to the extent" that one serves in the designated roles.[56] Other relationships to a plan, including establishing, altering, or terminating the benefit program, apparently are not subsumed within the

52. *See* Muir & Stein, *supra* note 44, at 462-64.
53. *Id.* at 459.
54. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).
55. Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996).
56. *See* WIEDENBECK, *supra* note 21, at 110-20.

implementation activities indicated by plan management or administration. Accordingly, fundamental plan design decisions, analogous to a settlor's actions in setting the terms of a private trust, are immune from fiduciary oversight.[57]

> Consequently, the obligation to act "solely in the interest of the participants and beneficiaries" does not attach to plan design decisions, leaving employers free (subject to ERISA's content controls) to structure the program to maximal business advantage. That flexibility to tailor benefit plans to best promote the sponsor's personnel policies is crucial to the maintenance of ERISA's delicate balance between public regulation and private sponsorship.[58]

The Supreme Court impressed the force of the settlor/fiduciary distinction upon lower courts and benefits practitioners in *Hughes Aircraft Co. v. Jacobson*.[59] The controversy involved a defined benefit plan that required participating employees to contribute toward funding.[60] The plan became substantially overfunded, enabling the company to dispense with employer contributions for several years while workers continued paying into the fund.[61] Then, with the plan still overfunded, Hughes amended the plan to provide increased early retirement benefits for one group of employees and to eliminate the employee contribution requirement for newly hired workers.[62] Not surprisingly, participants viewed this application of surplus assets as a diversion of their money (accumulated employee contributions) to serve the employer's interests.[63] In an opinion by

57. *See Lockheed Corp.*, 517 U.S. at 890.

58. WIEDENBECK, *supra* note 21, at 114.

59. 525 U.S. 432 (1999).

60. *See id.* at 435.

61. *See id.* at 436.

62. *See id.*

63. *See id.* at 437. The House version of pension reform legislation included a provision that would have required surplus assets attributable to earnings on employee contributions to be distributed on plan termination to employees in proportion to their contributions. H.R. 2, 93d Cong. § 112(d)(1) (1974) (as passed by House, Feb. 28, 1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 40, at 3898, 3960. The report of the Committee on Education and Labor explained:

> The Committee also has made provision for contributory plans to equitably distribute any surplus funds remaining on plan termination to the participants in accordance with their rate of contribution. This requirement is applicable only

Justice Clarence Thomas, the *Hughes* Court unanimously dismissed numerous asserted ERISA violations on two grounds. First, participants have no rights in a defined benefit plan's surplus assets, even if attributable in part to the growth of their own contributions, because their statutorily protected interest is prescribed by reference to their accrued benefits.[64] Second, ERISA's fiduciary provisions are inapplicable because "without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'"[65] That conclusion applies to both welfare and pension plans, and without regard to whether employees contribute, "for the simple reason that the plain language of the statute defining fiduciary makes no distinction."[66]

As a brake on fiduciary oversight, the settlor/fiduciary distinction offers several advantages. As Justice Thomas emphasized, the doctrine is consistent with, if not compelled by, the statutory language.[67] In broad outline, the doctrine seems to offer a sensible accommodation between ERISA's competing policies of protecting employee reliance and preserving employer autonomy.[68] And it promises ease of application (with an attendant reduction in litigation) through resort to a formal bright-line rule[69]: adoption,

---

> after plan assets have been used to satisfy all liabilities. The Committee believes it is unfair to permit the complete recapture by employers of surplus funds in terminated contributory plans, without regard to the fact that contributions by the workers helped to generate the surplus. The Committee wishes to emphasize that while it is not passing judgment on any particular case now pending, it has concluded that equitable principles require that this particular subject be governed by a specific rule which reflects what the Committee regards as essential protection for the interests of workers in such plans.

H.R. REP. NO. 93-533, at 12-13 (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra* note 40, at 2348, 2359-60.

The surplus-sharing rule of the House bill was dropped in conference, without comment on what "equitable principles require." *See* H.R. REP. NO. 93-1280, at 375 (1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 40, at 4277, 4642.

64. *See Hughes Aircraft*, 525 U.S. at 440-41.

65. *Id.* at 445 (alteration in original) (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996)).

66. *Id.* at 444.

67. *See id. But see* Muir & Stein, *supra* note 44, at 516, 533 (arguing that "the Supreme Court's expansive and rigid iteration of the doctrine was inconsistent with the statute's structure" and could have been avoided with a less "absolutist" interpretation).

68. *See supra* text accompanying note 58.

69. *See* Muir & Stein, *supra* note 44, at 463-64 (claiming the distinction "has become a formalistic and mechanically applied rule" that "has made it relatively easy for courts to decide

amendment, or termination of an employee benefit plan invariably represents a non-fiduciary design decision—a settlor function.

Apart from doctrinal fit and judicial economy, the settlor/fiduciary distinction carries with it some disadvantages as well. Foremost among them is its binary, all-or-nothing nature. Any particular action or decision with respect to a plan is either undertaken in a fiduciary capacity, triggering an unyielding set of statutory protections, or it is done by a nonfiduciary entirely unconstrained by the expectations, needs, and interests of participants and beneficiaries. This categorical approach is the antithesis of the nuanced, fact-intensive balancing of employer and employee interests advocated by Fischel and Langbein.[70] Rather than sensitively modulating the content of fiduciary obligations according to the context, the settlor/fiduciary doctrine mechanically limits the scope of the obligations, arguably using a hatchet instead of a scalpel. Moreover, the doctrine's formalism invites manipulation and evasion: consider, for example, plan amendments calling for administrative action that would otherwise be subject to fiduciary review.[71]

Professors Muir and Stein level two broad indictments against the settlor/fiduciary doctrine. First, it generates "decisions that are unmoored from the nuanced policy considerations that animated Congress in enacting ERISA and ... should anchor ERISA jurisprudence."[72] Second, the doctrine "can allow employers to design plans to permit fiduciary behavior that would be flatly impermissible if not expressly provided by the plan's terms."[73] They back up their charges with an extended bill of particulars—the centerpiece of

---

cases"); *accord id.* at 535.

70. *See supra* Part I.A; *cf.* Muir & Stein, *supra* note 44, at 464 (arguing that "the settlor/fiduciary doctrine ignores policies and concerns that should be balanced against the interests that the doctrine advances" including encouraging employers to sponsor plans); *id.* at 549 ("[T]he Supreme Court's decision to locate [the settlor/fiduciary doctrine's] core in explicit statutory language rather than in a federal common law created doctrinal rigidity.").

71. Examples include adoption of plan terms mandating that the menu of investment choices offered under a participant-directed defined contribution plan include specified investments, *see infra* note 262 and accompanying text, or conditioning access to a new pension distribution option (such as early retirement benefits) on the employee's waiver of claims against the employer, Muir & Stein, *supra* note 44, at 522-23; *infra* notes 143-44 and accompanying text, or even requiring the employee "to tattoo the corporate logo onto the employee's forehead," Muir & Stein, *supra* note 44, at 523.

72. Muir & Stein, *supra* note 44, at 464 (footnote omitted).

73. *Id.* For a possible limitation on this principle, see *infra* note 100.

their article is an extensive catalog of troublesome outcomes produced by the settlor/fiduciary distinction.[74] The doctrine, they conclude, frequently undermines employee expectations, allows the plan sponsor to dilute or negate various statutory requirements, and empowers the employer to exploit regulatory voids created by ERISA's broad preemption of state law.[75]

There is no need to rehearse the full catalog of its faults, but a few examples of problematic applications of the settlor/fiduciary doctrine will prove useful. As described earlier, surplus assets of an overfunded defined benefit pension plan may be redeployed by plan amendment to increase the benefits of a select group of plan participants, even if the surplus is attributable to the growth of employee contributions previously required of all participants.[76] Workers covered under such a contributory defined benefit plan may expect to share the gain from outstanding performance of investments that they helped finance, but they are mistaken. The sponsor may utilize the surplus to reduce future contributions or increase benefits for some workers, yet no fiduciary liability attaches to plan alterations designed to serve the employer's interests (improve company finances or promote its recruitment or personnel policies).

Similarly, a defined benefit plan may be amended to provide subsidized early retirement benefits and condition access to the enhanced benefits on the participant's release of any employment-related claims against the employer.[77] The amendment is a nonfiduciary settlor function because "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."[78] Moreover, plan fiduciaries who implement such an early retirement incentive program do not thereby engage in a prohibited transaction (using plan assets for the benefit of a party in interest)[79] because "the payment of benefits in exchange for the performance of some condition by the employee" is not the sort of transaction Congress

74. *See* Muir & Stein, *supra* note 44, at 484-514.

75. *See id.* at 516-31.

76. See the discussion of *Hughes Aircraft Corp. v. Jacobson*, *supra* text accompanying notes 59-67.

77. *See* Lockheed Corp. v. Spink, 517 U.S. 882, 895 (1996); *see also* Muir & Stein, *supra* note 44, at 522-23 (discussing *Lockheed*).

78. *Lockheed Corp.*, 517 U.S. at 890.

79. *See* ERISA §§ 3(14)(C), 406(a)(1)(D), 29 U.S.C. §§ 1002(14)(C), 1106(a)(1)(D) (2012).

meant to bar.[80] Muir and Stein posit that there is "no overriding limiting principle in ERISA that would prevent an employer from negotiating special benefits to induce a particular employee to settle a lawsuit or barter away other rights."[81] They even suggest that there is nothing in ERISA to stop the employer from writing the plan to require the employee "to tattoo the corporate logo onto the employee's forehead" as a condition on eligibility for benefits.[82]

The settlor/fiduciary doctrine also yields some startling—perhaps shocking—results as applied to welfare plans. Consider *US Airways, Inc. v. McCutchen*, which involved a self-funded health care plan's claim for reimbursement from a participant's tort recovery.[83] McCutchen, a US Airways employee, was seriously injured in an automobile accident as a result of which the plan paid $66,866 in medical expenses.[84] The deadly crash was the fault of the other driver, but due to limited insurance and competing claimants McCutchen's attorneys obtained only $110,000, yielding a net recovery of $66,000 after deducting the lawyers' 40 percent contingent fee.[85] US Airways demanded $66,866 under a plan provision requiring reimbursement of amounts paid by the plan "out of any monies recovered from [a] third party,"[86] even though full reimbursement exceeded McCutchen's net recovery and would have left him worse off for having brought suit.[87] "[I]n effect, he would pay for the privilege of serving as US Airways' collection agent."[88] McCutchen maintained that equity required reimbursement of US Airways only to the extent that he would be overcompensated, and that this "double recovery" doctrine did not apply because the settlement, being less than the damages sustained due to lost earnings and pain and suffering, did not pay for his medical expenses.[89] Alternatively, he asserted that the "common-fund" doctrine required that the costs of obtaining the settlement be fairly apportioned

80. *Lockheed Corp.*, 517 U.S. at 895.
81. Muir & Stein, *supra* note 44, at 523.
82. *Id.* at 522-23.
83. 569 U.S. 88 (2013).
84. *Id.* at 92.
85. *Id.*
86. *Id.*
87. *Id.* at 94.
88. *Id.* at 105.
89. *Id.* at 96.

between all those who benefit.[90] The Court concluded that the terms of the plan ("any monies recovered") negated the double recovery doctrine but did not clearly override the common-fund doctrine.[91] Because the plan's reimbursement provision did not expressly address the costs of obtaining a third-party recovery, it was interpreted to retain the common-fund rule.[92] Presumably, that left McCutchen with nothing from the settlement, but not less than nothing. This decision, Muir and Stein lament, "implies that a plan may enforce any written terms that are not directly inconsistent with ERISA's requirements, suggesting few legal limits on onerous plan terms."[93]

Welfare plan cases also permit the employer to favor one group of participants over another, as in the pension cases described earlier. An amendment reducing the lifetime cap on health care benefits from $1 million to $5000 for expenses related to AIDS, which was imposed soon after the employer learned that one of its employees had contracted AIDS, was tolerated when the change applied prospectively and across the board.[94] The cost-saving amendment, even if it stemmed from prejudice against AIDS or its victims, was not impermissible retaliation (like firing) against the employee for exercising his rights under the plan (filing claims), nor did it interfere with the attainment of any right to which the employee might become entitled, because ERISA does not require vesting of welfare benefits and the employer never promised that the $1 million coverage limit would remain in effect.[95]

---

90. *Id.*

91. *See id.* at 98-101 (enforcing the equitable lien by agreement requires the refusal to apply the general rules of equity "at odds with parties expressed commitments"); *id.* at 103 (noting that the plan gives US Airways the first claim on entire recovery, which is incompatible with the double recovery rules, which "would give *McCutchen* first dibs on the portion of the recovery compensating for losses that the plan did not cover (*e.g.*, future earnings or pain and suffering)").

92. *See id.* at 101-04.

93. Muir & Stein, *supra* note 44, at 507.

94. *See* McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991).

95. *See id.* at 405; *see also* ERISA § 510, 29 U.S.C. § 1140 (2012). Although acceptable under ERISA at the time the case arose, subsequent legislation now prohibits the kind of health condition discrimination exemplified by *McGann*. The Americans with Disabilities Act outlaws disability-based coverage distinctions. *See* 42 U.S.C. § 12112(a) (2012); 29 C.F.R. §§ 1630.4(a)(1)(vi), 1630.6(b) (2016). In addition, the Affordable Care Act prohibits monetary caps on benefits, and its requirements were imported into ERISA. *See* 42 U.S.C. § 300gg-11; ERISA § 715, 29 U.S.C. § 1185d; 29 C.F.R. § 2590.715-2711 (2017).

Even without a formal plan amendment, welfare benefits can sometimes be redirected without fiduciary oversight. Professors Muir and Stein call this the business decision strand of the settlor/fiduciary doctrine.[96] For example, the president of a company that wanted to induce certain key engineers to relocate from New Jersey to Tennessee following a merger announced that engineers refusing to transfer would not receive severance pay under a plan that "provided for benefits to employees who were 'involuntarily terminated' when 'the terminating manager believes the granting of such pay is appropriate.'"[97] Other employees who declined to relocate were granted severance,[98] but the court upheld the denial of benefits to engineers who would not move as a "business decision" not subject to fiduciary obligations.[99] Certain actions, it seems, are inherently design decisions—settlor functions—and are immune from fiduciary monitoring even if they are not accomplished by the adoption, amendment, or termination of a plan.[100] Such core plan design

---

96. *See* Muir & Stein, *supra* note 44, at 485; *accord id.* at 490-93, 496, 502, 504, 512-14.

97. Noorily v. Thomas & Betts Corp., 188 F.3d 153, 156 (3d Cir. 1999). Professors Muir and Stein discuss the case at some length. *See* Muir & Stein, *supra* note 44, at 491-93, 508, 528.

98. *Noorily*, 188 F.3d at 160.

99. *Id.* at 158 (holding that employer does not act as fiduciary "when designing or making business decisions allowed for by a plan").

100. Conversely, it can be argued that certain acts are inherently fiduciary in nature, and as such remain subject to intensive scrutiny under ERISA's fiduciary responsibility provisions even if the acts are expressly mandated by the terms of the plan. Under this view, essential components of plan management or administration cannot be hard-wired by plan amendment. Recognizing such a category of inherently fiduciary actions would prevent deliberate abuse of the settlor function doctrine, *see supra* text accompanying note 73, but it could not be accomplished without a retreat from the Court's uncompromising dicta that "without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'" Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 445 (1999) (alteration in original) (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996)). That brash pronouncement could—and should—be moderated by the sentences that precede it, which treat plan design decisions as settlor acts and seem to acknowledge that in some exceptional instances a plan amendment may not involve a design decision.

> *In general*, an employer's decision to amend a pension plan concerns the *composition or design of the plan itself* and does not implicate the employer's fiduciary duties which consist of such actions as the *administration of the plan's assets*. ERISA's fiduciary duty requirement simply is not implicated where Hughes, *acting as the Plan's settlor*, makes a *decision regarding the form or structure of the Plan* such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated.

Id. at 444 (emphasis added) (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983)).

elements presumably include the identification of plan participants or beneficiaries and the formula for determining the amount of their contributions or benefits.[101]

This sample of cases supports the conclusion of Professors Muir and Stein, that the settlor/fiduciary doctrine, while maintaining a zone in which the plan sponsor may freely pursue its own interests, exhibits certain excesses. From the standpoint of the average participant's expectations and understanding, the results in many cases hardly seem "protect[ive] [of] ... the interests of participants in employee benefit plans and their beneficiaries."[102]

Fischel and Langbein cautioned that, absent intervention, the exclusive benefit rule would prove *overly* protective of employees: by disregarding the employer's interest in the plan it "will actually harm employees by discouraging plan formation."[103] Needed flexibility could be achieved, they hypothesized, by treating the employer

---

In the author's opinion, ERISA's central focus on the integrity of asset management shows investment decision-making to be an inherently fiduciary function. In addition, *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), arguably supports this conclusion, as explained *infra* text accompanying notes 266-68.

A statutory exception grants plan fiduciaries immunity from liability for losses resulting from a participant or beneficiary's "exercise of control" over the investment of his account under a participant-directed defined contribution plan. ERISA § 404(c), 29 U.S.C. § 1104(c)(1)(A). Determination of the investment menu of a participant-directed plan (selection of investment alternatives) is a necessary predicate for investment decision-making (that is, participant "exercise of control"). Under an inherent fiduciary function analysis, selection of the investment menu would be a fiduciary act even if the menu were prescribed by the terms of the plan. Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,906, 46,924 n.27 (Oct. 13, 1992) (observing that constructing menu of available investment alternatives "is a fiduciary function ... whether achieved through fiduciary designation or express plan language"). *Contra* Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) (suggesting that the determination of the investment menu of a section 404(c) plan may be an inherently *settlor* function and therefore immune from fiduciary oversight even if the determination is made by plan officials and not set forth in the plan document). The Labor Department responded to *Deere* in 2010 by amending the regulation. *See* 29 C.F.R. § 2550.404c-1(d)(2)(E)(4)(*iv*) (2017).

101. Professors Muir and Stein also categorize as falling within the business decision strand of the settlor function doctrine employer actions that impact benefit programs, but which relate directly to the payment of corporate obligations, setting employee compensation, or securities law disclosures. *See* Muir & Stein, *supra* note 44, at 496, 502, 512-13. Such actions are nonfiduciary, not because they inherently involve central elements of plan design, but rather because they do not involve "management of [the] plan," "management or disposition of its assets," rendering investment advice respecting plan assets, or "administration of [the] plan." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

102. ERISA § 2(b), 29 U.S.C. § 1001(b) (providing ERISA's statutory declaration of policy).

103. Fischel & Langbein, *supra* note 27, at 1158; *accord id.* at 1125, 1127-28.

as a plan beneficiary and importing a duty of impartiality to mediate conflicts among employees.[104] That did not happen. Instead, the distinction between settlor and fiduciary functions emerged as the doctrinal mechanism that preserves a safe space for employer action. Muir and Stein contend that the pendulum has swung too far in the opposite direction: the settlor/fiduciary doctrine "largely lacks nuance" and "accommodates, if not invites, sharp practices."[105] Inadequate protection of employees' interests, of course, similarly discourages plan formation by leading workers to over discount benefit promises as so much untrustworthy palaver.

II. EMPLOYEE BENEFITS AS WEAK PROPERTY

The scholarly analyses of ERISA fiduciary law surveyed in the preceding Part make important contributions. But even considered together, the existing literature is incomplete. Fischel and Langbein identified a pervasive problem—indeed, a "fundamental contradiction"—in the statutory resort to private trust principles to mediate competing economic interests in the inherently contractual domain of employee benefits.[106] Their prescribed remedy sought to moderate the force of the exclusive benefit rule by inviting courts to forthrightly take account of the plan sponsor's objectives.[107] The courts declined the invitation, instead adopting another way to accommodate the employer's interest in benefit programs—the settlor function doctrine.[108] Muir and Stein exposed how that work-around brought with it serious problems of its own.[109] Yet each of these seminal studies focused on only one dimension of a two-dimensional puzzle: adapting private trust law to employee benefit plans requires specification of both the scope of fiduciary oversight and its intensity.

The reaction of alarm by many pension and benefits professionals in the immediate aftermath of ERISA's enactment reflects a perception that the new law exposed them to very serious risks of

104. *See id.* at 1158-60.
105. Muir & Stein, *supra* note 44, at 536.
106. *See* Fischel & Langbein, *supra* note 27, at 1113-25.
107. *Id.* at 1158.
108. *See* Muir & Stein, *supra* note 44, at 462-64.
109. *See id.* at 464-65.

personal liability. The statute's text and legislative history seemed to call for broadly applicable fiduciary obligations, strictly applied.[110] Professors Fischel and Langbein took the breadth of fiduciary accountability for granted, but argued that the sponsoring employer's interest in a benefit plan should be accommodated by moderating the intensity (strictness) of the exclusive benefit rule.[111] Their proposal would have alleviated the apparent inflexibility of ERISA's fiduciary duties without circumscribing their scope. The settlor function doctrine explored by Professors Muir and Stein grants employers some freedom to pursue their interests, but speaks only to breadth.[112] It limits scope—the range of actions protected by fiduciary obligations—but does not address the intensity or strictness of fiduciary obligations in the domain in which they apply.

This Article argues that ERISA's fiduciary regime is now both narrowly applied and flexibly enforced. The Article will demonstrate that a narrow focus on the preservation of accrued benefits, operating in combination with two components of case law—one governing employee benefit plan interpretation and the other addressing conflicts of interest—actually limits both the extent and the intensity of ERISA's fiduciary oversight. This perspective—which might be thought to stand the original understanding of ERISA's fiduciary regime on its head—will be called the "weak property thesis."

The composite force of ERISA's fiduciary regime can be envisioned as a two-by-two matrix with rows reflecting the extent or range of application of fiduciary oversight and columns representing the intensity or stringency of fiduciary duties when they apply. As shown in the following table, the four quadrants correspond roughly to the original understanding of ERISA's fiduciary scheme (broad and strict), the Fischel-Langbein proposal (broad and flexible), the Muir-Stein exposition of the settlor function doctrine (narrow and strict), and the weak property thesis developed here (narrow and flexible). The weak property thesis (shaded quadrant), it will be shown, substantially curtails both the operational range and the rigor of fiduciary obligations by ceding to the employer broad authority

110. *See supra* note 17 and accompanying text.

111. *See* Fischel & Langbein, *supra* note 27, at 1158.

112. *See* Muir & Stein, *supra* note 44, at 493-513 (discussing the breadth and scope of the settlor function doctrine).

over both plan amendment and plan interpretation, and combining that control with sub-rosa relaxation of ERISA's duties of loyalty and care (implicit exculpation).

<table>
<tr><td></td><td colspan="2">Intensity: Strict Versus Flexible Duties</td></tr>
<tr><td rowspan="2">Extent: Broad
Versus
Narrow Application</td><td><u>Broad & Strict</u>:
ERISA text and legislative history
(Initial industry fears)</td><td><u>Broad & Flexible</u>:
Employer as plan beneficiary
(Fischel-Langbein proposal)</td></tr>
<tr><td><u>Narrow & Strict</u>:
Settlor function doctrine
(Muir-Stein exposition)</td><td><u>Narrow & Flexible</u>:
Employer amendment authority, interpretive primacy & implicit exculpation
(Weak property thesis)</td></tr>
</table>

Industry's concern that imposing expansive and uncompromising duties of loyalty and care would disrupt desirable business practices and curtail employee benefits (coverage or generosity) could, in principle, be addressed by pulling back on either the scope or the strictness of legal accountability. Fischel and Langbein endorsed the latter approach, moderating the stringency of fiduciary obligations.[113] Muir and Stein demonstrated that the courts adopted the former approach, employing the settlor function doctrine to cabin the application of fiduciary standards.[114] In fact, however, both restrictive strategies are in play, as the courts have covertly degraded

113. *See* Fischel & Langbein, *supra* note 27, at 1116-19, 1158. Such a relaxation of duties to accommodate competing interests is analogous to the "more is less" phenomenon identified by experts in other fields, which posits that expansion of a right into new arenas leads to a dilution of the right even when invoked at its traditional core. *E.g.*, Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 885-86 (2004). Constitutional law scholars have observed that expanding the coverage of First Amendment rights could cause courts to shift from affording absolute protection to core interests, to engaging in a contingent balancing of free exercise claims. *See id.* at 874-75. *But see* John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 485-90 (2014) (arguing that expanding the scope of a right does not always lead to a reduction in protection).

Such a dynamic breadth/depth tradeoff might also manifest itself as "less is more." In other words, limiting the scope of operation of the right could preserve (or increase) its force in the limited domain where it applies. The settlor function doctrine might be viewed as exhibiting this phenomenon. Alternatively, over time, powerful antagonistic interests could cause deterioration along both dimensions ("less *and* less"), which, as a descriptive matter, is the characterization of contemporary ERISA fiduciary law developed here.

114. *See* Muir & Stein, *supra* note 44, at 462-63, 493-514.

the intensity of fiduciary obligations while categorically exempting from fiduciary oversight actions that alter the terms of a benefit program. The balance of this Article lays bare the limited and adulterated trust regime that protects employee benefits. Rather than broadly safeguarding workers' reasonable expectations, ERISA has evolved to admit only a narrow and diluted set of rights in pension and welfare benefits.

The settlor/fiduciary distinction limits fiduciary oversight to matters involving plan administration, not plan design.[115] Eligibility for benefits, along with the amount and type of benefits, are central components of plan design, hence exempt from fiduciary oversight. Does that mean plan sponsors have unchecked power, on an ongoing basis, to reassign benefits among employees or eliminate them altogether by plan amendment? If so, ERISA's fiduciary responsibility provisions would provide no real protection to workers. The security they purportedly offer could be wiped out in an instant by an amendment rejiggering earlier plan design decisions. That consideration implies there must be some limit on plan amendments that is not grounded in fiduciary law. ERISA does indeed impose such a limit, which operates to indirectly define workers' "property" in employee benefits.[116] Moreover, many troubling applications of the settlor function doctrine proceed unavoidably from the narrowness of the property interest so defined.[117]

Employee benefits are weak property for two reasons beyond their narrow definition. Prevailing judicial approaches to plan interpretation accord primacy to the employer's reading. In some situations that interpretive dominance allows the plan sponsor to redefine rights previously granted. And because plan interpretations apply retroactively, trimming and hedging under the guise of interpretation can sometimes work a withdrawal of benefits that would be flatly illegal if accomplished by plan amendment.[118]

The second vulnerability that makes employee benefits weak property involves the intensity of fiduciary duties rather than their extent (or range of application). The courts apply the limited abuse-of-discretion standard of review to fiduciary decisions if the plan

115. *See id.* at 480-84.
116. *See infra* Part III.
117. *See infra* Part III.
118. *See infra* Part IV.

grants the fiduciary discretion to construe its terms, as virtually all plans now do.[119] Even if the fiduciary is a company insider acting under a conflict of interest, her decisions are accorded considerable deference—effectively given a presumption of good faith and regularity.[120] The practical result is a species of covert or implicit exculpation of employer-regarding decisions, notwithstanding ERISA's express override of plan provisions that would relax fiduciary obligations.[121]

III. PROPERTY DEFINITION: AMENDMENT AUTHORITY

Muir and Stein rightly censure many applications of the settlor function doctrine as incompletely theorized and highly suspect.[122] They think it needs to be pruned back, and they suggest strategies for doing so.[123] Still, the doctrine has a strong conceptual coherence that is not simply rooted in the appeal of a plain meaning approach to statutory interpretation. The settlor function doctrine also re-

119. *See infra* notes 282-85 and accompanying text.

120. *See infra* notes 193-97 and accompanying text.

121. *See infra* Part V.B.

122. *See* Muir & Stein, *supra* note 44, at 536.

123. *See id.* at 536-48. Not all of their proffered remedies appear viable. They admit that statutory readjustment is a political non-starter, so remediation must be left to the courts. *See id.* at 536-37. In many situations judicial retrenchment could take the form of collateral limitation: instead of fundamentally revising the Court's construction of the statutory definition of fiduciary, this approach would emphasize the implications of ERISA's substantive protections to set boundaries on unchecked settlor action. *See id.* at 538-45. They justify this collateral limitation approach at length, and the strategy seems promising.

Muir and Stein also advocate a direct assault on the settlor/fiduciary doctrine in the form of an appeal to the courts to treat some plan design decisions, specifically those impacting the control or disposition of plan assets, as fiduciary acts. *Id.* at 545-47. The Supreme Court's blanket treatment of all plan amendments as non-fiduciary, they argue, "conflates administrative and management decisions, which are referred to in separate clauses of the statutory definition of fiduciary and were almost certainly intended by Congress to have different meanings." *Id.* at 545. No authority is offered for that clairvoyance, and in this author's view, such a distinction between administration and management was almost certainly *not* intended by Congress. *See* Panel 4, *supra* note 15, at 374 (comments of Robert Nagle) (asserting that congressional staffers drafting the bill could not discern a uniformly recognized difference in meaning between the terms management and administration, and so, "After we talked about this endlessly, we decided the heck with it, we'll just cover all bases.").

Instead of trying to import a spurious distinction between synonyms, a more promising path to placing sensible limits on the settlor function doctrine (in this writer's opinion) would urge the courts to recognize that certain acts are inherently fiduciary in nature. *See supra* note 100.

flects a property law conceptualization of compensation claims founded on employee benefit plans.

Employee benefit plans entail an exchange of services—the participant's labor—for a promise of contingent compensation. The deferred compensation promised by a pension plan may be expressly contingent, as when the plan imposes minimum service (vesting rules) or survival conditions.[124] Welfare benefits are necessarily contingent on the participant or beneficiary experiencing the need for medical care, disability income, et cetera. In addition, however, pension and welfare benefits are always implicitly contingent on the plan sponsor's right to alter, amend or terminate the program. ERISA requires that every employee benefit plan be amendable,[125] and to the extent of that amendment authority, the plan sponsor's apparent obligations are latently revocable.

How far does the plan sponsor's reserved amendment authority extend? The central answer, in the case of a pension plan, is given by the rule that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan."[126] This anti-reduction (or anti-cutback) rule renders a participant's interest under a pension plan irrevocable, but only to the extent of her accrued benefit.[127] The definition of "accrued benefit," therefore, functions as a measure of an employee's protected property right in

---

124. *See* ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2) (2012) (establishing maximum duration of forfeitability of accrued benefits derived from employer contributions); ERISA § 203(a)(3)(A), 29 U.S.C. § 1053(a)(3)(A) (permitting forfeiture on death); *accord* I.R.C. § 411(a)(2), (a)(3)(A) (2012) (prescribing corresponding qualified retirement plan rules).

125. ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3).

126. ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). The anti-reduction rule is also imposed as a condition for obtaining favorable tax treatment as a qualified retirement plan. I.R.C. § 411(d)(6)(A). It does not apply to welfare plans. ERISA § 201(1), 29 U.S.C. § 1051(1).

In addition, certain amendments that would alter a pension plan's vesting schedule, as by extending the period of forfeitability of accrued benefits, are also restricted. ERISA § 203(c)(1), 29 U.S.C. § 1053(c)(1); *accord* I.R.C. § 411(a)(1) (prescribing corresponding qualification condition). The anti-reduction rule is subject to a few limited exceptions. *See infra* note 128.

127. As the text implies, not all benefits and features provided under a pension plan fit within the definition of "accrued benefit," which generally refers only to retirement-type benefits and so does not comprehend ancillary benefits such as life insurance or medical benefits. Treas. Reg. § 1.411(a)-7(a). Such ancillary benefits reflect the provision of welfare-type benefits under a pension plan. Limiting the definition of accrued benefit to retirement-type benefits ensures that incorporation of welfare benefits under a pension plan does not change their statutory protection.

promised deferred compensation.[128] No corresponding rule applies to welfare plans, and indeed the statutory term "accrued benefit" refers exclusively to pension benefits.[129] Hence, an employee's interest under a welfare plan remains at all times revocable in full except insofar as (1) all specified conditions on entitlement to benefits have been satisfied, or (2) the plan sponsor has made a binding commitment to continue the plan into the future.[130]

---

128. Most property rights are not absolute, of course (for example, real property zoning regulation), and Congress has sanctioned a few limited exceptions to the anti-reduction rule. Although safeguarding the amount of previously earned retirement benefits is fundamental to retirement security, in exigent circumstances deferred compensation earned in a preceding plan year may be reduced if funding the additional accrued benefits would impose substantial business hardship, provided that stringent conditions are satisfied. *See* ERISA §§ 204(g)(1), 302(d)(2), 29 U.S.C. §§ 1054(g)(1), 1082(d)(2) (2012 & Supp. IV 2017); *accord* I.R.C. §§ 411(d)(6)(A), 412(d)(2) (prescribing corresponding qualified retirement plan rules). Such funding-based benefit cutbacks can be made only to benefits earned in the plan year immediately preceding adoption of the amendment, or the preceding two plan years in the case of a multiemployer plan. ERISA § 302(d)(2), 29 U.S.C. § 1082(d)(2). Benefit reductions are also authorized when an underfunded multiemployer pension plan terminates as a result of mass withdrawals. *See* ERISA §§ 204(g)(1), 4281, 29 U.S.C. §§ 1054(g)(1), 1441 (2012); *accord* I.R.C. § 411(d)(6)(A).

The Multiemployer Pension Reform Act of 2014 also authorizes, in narrow circumstances and subject to special procedures, more general benefit reductions. These include reductions of benefits already in pay status under ongoing but critically underfunded multiemployer pension plans when that action is necessary to avoid insolvency. ERISA § 305(e)(9), 29 U.S.C. § 1085(e)(9) (Supp. IV 2017); I.R.C. § 432(e)(9) (Supp. IV 2017).

129. *See* ERISA §§ 3(23), (34)-(35), 201(1), 29 U.S.C. §§ 1002(23), (34)-(35), 1051(1).

130. The first listed exception refers to accrued but unpaid claims, such as medical expenses already incurred by an employee participant (or beneficiary) and timely presented for reimbursement under a health care plan. When all plan conditions have been satisfied, the employer cannot simply refuse to make payment because the claim is unexpectedly large or the company is experiencing financial difficulty, for example. The initial claim for AIDS treatment expenses submitted by McGann illustrates this case; it was presumably paid in full. *See* McGann v. H & H Music Co., 946 F.2d 401, 405 n.5 (5th Cir. 1991). Once fully performed, the unilateral offer of welfare benefits becomes a binding contract enforceable against the employer; it is not an unenforceable promise to make a future gift. However restricted or evanescent the rights instituted by a welfare plan may be, they establish some legal entitlement (albeit often minimal or highly contingent) and hence amount to more than a mere gratuity. *But see infra* notes 173-75 and accompanying text.

The second exception acknowledges the possibility that, although the statute does not demand that welfare plans be continued to cover conditions or expenses not yet incurred, an employer may nevertheless relinquish the right to call off the program (so-called vesting by contract), and can thereby establish a robust ongoing entitlement. Such a continuing commitment is not lightly inferred. *See* M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 932-35 (2015) (rejecting court of appeals inference of intent to vest retirement benefits for life); *see also infra* Part IV.B.

Many disquieting applications of the settlor/fiduciary doctrine can be understood as simple examples of the limited scope of ERISA's anti-reduction rule. The doctrine's harsh results can be reframed to equate a worker's "property" in pension benefits with his accrued benefit. These propositions can be illustrated by reference to a few cases selected from the parade of horrors presented by Muir and Stein and discussed in the last Section.

A. Pension Benefits

ERISA defines an employee's accrued benefit as follows:

> The term "accrued benefit" means—
> (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [29 U.S.C. § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age, or
> (B) in the case of a plan which is an individual account plan, the balance of the individual's account.
> The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) [29 U.S.C. § 1054(c)(2)(B)] with respect to the employee's accumulated contribution.[131]

Defined benefit plans and individual account plans (defined contribution plans) are by definition pension plans.[132] That the accrued benefit provided by a defined benefit plan is "determined under the plan" reflects the sponsor's freedom to set the amount of deferred compensation. While the statutory definition defers to the plan's definition, it is not devoid of content. The focus on the "annual benefit commencing at normal retirement age" indicates that, whatever else might be provided under the plan, accrued benefit is concerned with periodic retirement support payments.[133]

131. ERISA § 3(23), 29 U.S.C. § 1002(23); *accord* I.R.C. § 411(a)(7)(A), (D) (prescribing corresponding definition for tax qualification purposes).

132. *See* ERISA § 3(34)-(35), 29 U.S.C. § 1002(34)-(35); *accord* I.R.C. § 414(i)-(j) (prescribing corresponding qualified plan definitions).

133. Treas. Reg. § 1.411(a)-7(a) (as amended in 2000), provides in part that:

> In general, the term "accrued benefits" refers only to pension or retirement

Accrued benefit contains both qualitative and quantitative components. Quantitatively, accrued benefit is dynamic or time-dependent: the accrued benefit at any time is the total amount of pension benefits that the employee has earned by the performance of services up to that time, expressed as an annuity (meaning the dollar amount to be paid each year starting at normal retirement age).[134] The corresponding definition for a defined contribution plan—"the balance of the individual's account"—similarly measures the total amount of retirement savings accumulated as of a specific date.[135] The accrued benefit of an active participant (current employee covered under the plan) will ordinarily increase with additional years of service, either by the operation of a service-based benefit formula under a defined benefit plan or by additional contributions under a defined contribution plan.[136]

> benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h).

The foregoing definition is reinforced by the regulation that marks off the scope of the anti-reduction rule by specifying what are, and are not, "section 411(d)(6) protected benefits." *See* Treas. Reg. § 1.411(d)-4, Q&A (1)(a), (d) (as amended in 2012). As observed previously, ancillary benefits amount, in substance, to the inclusion of welfare-type benefits under a pension plan. *See supra* note 127. Limiting the application of the anti-reduction rule to retirement-type benefits, rather than all benefits that might be provided under a pension plan, confirms the inherently contingent and potentially evanescent status of welfare benefits. This limitation is consistent with ERISA's careful stipulation that a pension plan exists only "to the extent that" the program either provides retirement income to employees or results in a deferral of income to the termination of covered employment. ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

134. ERISA § 3(23), 29 U.S.C. § 1002(23).

135. *See id.* Observe, however, that the total earned pension is measured by different standards: *future* annual payment amount in the case of a defined benefit plan versus *current* accumulated savings under a defined contribution plan. Actuarial conversion between the two scales is readily accomplished (using interest rates and mortality tables) and frequently necessary.

136. Under a defined contribution plan, losses and expenses are charged against a participant's account and may sometimes exceed contributions and gains for a particular period, so a decrease in the participant's accrued benefit is possible. *See* ERISA § 3(34), 29 U.S.C. § 1002(34). That is, employees under a defined contribution plan bear the investment risk, not the employer, as is the case under a defined benefit plan. *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999).

Recall that in *Hughes Aircraft* the company amended an overfunded contributory defined benefit plan to increase early retirement benefits for one group of employees and to eliminate required contributions from newly hired workers.[137] This disposition of the surplus, the Court concluded, was an unexceptionable settlor (re)design decision.[138] "[P]lan members generally have a non-forfeitable right only to their 'accrued benefit,' so that a plan's actual investment experience does not affect their statutory entitlement."[139] Even though the excess was traceable to gains from the investment of participant contributions,[140] because it was a defined benefit plan, the investment gains (overfunding) did not belong to the employees—it was not their property.[141]

In *Lockheed Corp. v. Spink*, Lockheed amended its defined benefit plan to provide subsidized early retirement benefits and condition access to the enhanced benefits on the participant's release of any employment-related claims against the company.[142] The advantage to the employer did not violate fiduciary obligations (including the exclusive benefit rule), said the Court, because Lockheed acted as a settlor when it amended the plan.[143] Nor did the plan amendment *reduce* the participant's accrued benefit.[144] Rather, without limiting preexisting pension rights or distribution alternatives, it added a new option: *increased* (subsidized) early retirement benefits conditioned on release of employment claims.[145]

Careful attention to the scope of the anti-reduction rule explains why there may be nothing in ERISA to stop the employer from writing the plan to require the employee "to tattoo the corporate logo onto the employee's forehead" as a condition on eligibility for

---

137. *See Huges Aircraft*, 525 U.S. at 436.

138. *See id.* at 444.

139. *Id.* at 440.

140. *See id.* at 435-36.

141. *See id.* at 439-41. Upon termination of an overfunded defined benefit pension plan, the excess assets may be distributed to the employer, provided that the terms of the plan so provide. *See* ERISA §§ 403(c)(1), (d)(1), 4044(d), 29 U.S.C. §§ 1103(c)(1), (d)(1), 1344(d) (2012 & Supp. III 2016). Such reversions are subject to a special excise tax (at a rate that can be as high as 50 percent) to recapture tax benefits (deferral) that Congress deemed undeserved. *See* I.R.C. § 4980 (2012).

142. 517 U.S. 882, 885 (1996).

143. *Id.* at 891.

144. *See id.* at 885.

145. *See id.*

benefits.[146] Distribution options cannot be retroactively extinguished because "a plan amendment which has the effect of ... eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined by regulations), or ... eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits" in violation of the anti-reduction rule.[147] Observe that if such a logo tattoo requirement were added by plan amendment as a condition on access to previously earned pension benefits, it would indeed violate ERISA (specifically the anti-reduction rule, not fiduciary obligations). If instead the tattoo condition were only imposed to determine eligibility for a *new* distribution option, it would not impair a participant's property rights (that is, the amount of or access to previously accrued benefits). Moreover, it seems perfectly permissible to impose the tattoo requirement prospectively, as an additional condition on earning additional benefits by the performance of future services. Despite its effrontery, this eligibility condition would have been lawful upon initial establishment of the plan, falling as it does within the design autonomy reserved to the plan sponsor.[148] A pension plan is not required to cover all employees or any particular group of employees; ERISA only prohibits certain age and service conditions.[149]

---

146. Muir & Stein, *supra* note 44, at 522-23.

147. ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2) (2012); *accord* I.R.C. § 411(d)(6)(B) (prescribing corresponding qualification condition).

148. *See* WIEDENBECK, *supra* note 21, at 18-19.

> The pattern of substantive pension regulation deserves special notice. To preserve a system of voluntary plan sponsorship, Congress trod lightly. Most matters were left unregulated, including the central design issues of a pension plan, namely, the extent of workforce coverage and the level of benefits. Where it chose to regulate, Congress restricted but did not eliminate freedom of contract. Instead of mandating particular plan features, it set minimum standards for certain key terms, leaving sponsors the flexibility to exceed the baseline.

Id. at 210.

149. *See* ERISA § 202, 29 U.S.C. § 1052; *accord* I.R.C. § 410(a) (prescribing the corresponding qualification condition).

Even though ERISA would permit a pension plan to require a forehead logo tattoo as an eligibility condition, most pension plans are designed to qualify for favorable tax treatment, and the Code demands that the group of workers who benefit under a qualified retirement plan not discriminate in favor of highly compensated employees. I.R.C. §§ 401(a)(3), 410(b). The tattoo eligibility condition also would not violate this tax law relative coverage requirement. The percentage of highly compensated employees (HCEs), *see id.* § 414(q) (defining

B. Welfare Benefits

ERISA's definition of accrued benefit does not speak to welfare plans.[150] Nor is there any corresponding concept or measure of benefits earned by the performance of services as of a given date. That's understandable, inasmuch as most welfare benefits insure participants or their beneficiaries against the financial impact of specified conditions, such as health care needs or income loss attributable to the worker's disability or death rather than steadily accumulating savings for future distribution.[151] What, then, is the metric of a participant's entitlement to benefits—what defines the participant's "property"—under a welfare plan?

When it comes to welfare benefits, the only "property" is contract. Welfare plan benefits may be financed by insurance, but need not be, nor is advance funding required, so as a formal matter there is often no trust holding welfare plan assets.[152] Functionally of course, ERISA fiduciary obligations apply to any person having discretionary authority in the management or administration of a welfare plan, even if unfunded and uninsured.[153] In administering the plan,

---

HCEs), willing to sport a tattoo of the employer's logo is unlikely to be disproportionately greater than the share of lower-paid workers who would do so. Consequently, if plan membership were limited to "branded" employees, the qualified plan coverage nondiscrimination requirement would be unlikely to pose an obstacle. *See id.* §§ 401(a)(3), 410(b) (imposing coverage nondiscrimination tests as condition on qualified retirement plan tax treatment). If a logo tattoo were instead required as a condition on eligibility to receive a particular form of distribution (such as a single-sum payout rather than life annuity), the tax law nondiscrimination rules would not be offended because availability of the restricted optional form of benefit would not favor HCEs. *See id.* § 401(a)(4); Treas. Reg. § 1.401(a)(4)-4 (as amended in 2004).

150. *See supra* note 129 and accompanying text.

151. Promises of future welfare benefits, as under a plan providing post-retirement health care benefits, are in principle amenable to systematic advance funding, but ERISA does not require it. *See* ERISA §§ 3(1), 301(a)(1), 29 U.S.C. §§ 1002(1), 1081(a)(1); *cf.* I.R.C. §§ 419, 419A (limiting tax-advantaged advance funding of certain welfare benefits). Nor is the payout of pension benefits necessarily certain—a pension plan may call for forfeiture in the event of the death of an unmarried participant prior to retirement. *See* ERISA §§ 203(a)(3)(A), 205, 29 U.S.C. §§ 1053(a)(3)(A), 1055; *accord* I.R.C. §§ 411(a)(3)(A), 401(a)(11), 417 (prescribing corresponding qualified retirement plan rules). In the case of defined contribution pension plans (such as 401(k) plans), however, forfeiture on death is virtually unheard of.

152. *See* ERISA §§ 3(1), 301(a)(1), 403(b)(1), 29 U.S.C. §§ 1002(1), 1081(a)(1), 1103(b)(1). If a welfare plan is funded, ERISA mandates that its assets be held in trust. ERISA § 403(a), 29 U.S.C. § 1103(a).

153. *See* ERISA §§ 3(21)(A), 404(a)(1), 29 U.S.C. §§ 1002(21)(A), 1104(a)(1).

such a fiduciary is just implementing the contract. In the absence of a collective bargaining agreement, the contract is unilateral: the employer offers to pay or reimburse specified amounts, subject to specified conditions, and covered workers (generally at-will employees) accept the deal by performing services. Welfare plan sponsors can and routinely do reserve the right to amend or terminate the plan at any time for any reason.[154] If the plan sponsor has not made a binding commitment to continue the plan into the future (the typical case), then an employee's interest under a welfare plan remains fully revocable except insofar as all specified conditions on entitlement to benefits have been satisfied.[155] The plan may define the insured event as expansively or narrowly as the sponsor wishes. Health care plans, for example, typically promise to pay or reimburse specified medical care costs *incurred* by a participant or beneficiary *while* a participant or beneficiary. They do not ordinarily cover health care needs that may arise in the future simply because those needs stem from an injury or disease that occurs while the individual is a plan participant or beneficiary. Plan liability, in other words, is keyed to an existing obligation to pay for health care received; it does not extend to all health care that will be required to treat a condition originating while one is a participant or beneficiary. The plan sponsor's ongoing authority to halt the program allows the employer to retract coverage of future treatments that will result from a condition or life event that has already happened. To that extent, welfare benefits are in effect subject to an implicit condition subsequent.

McGann v. H & H Music Co. illustrates this point.[156] There, a plan amendment that lowered the lifetime cap on health care benefits from $1 million to $5000 for expenses related to AIDS was

154. *See* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."). Muir and Stein suggest that the "reference to 'generally' might ... be viewed as a bit of hedging, allowing the development of limiting principles on settlor freedom in subsequent cases." Muir & Stein, *supra* note 44, at 484 n.151. More likely, this qualification was included in recognition of the possibility that an employer's freedom to amend or terminate a welfare plan is sometimes limited by contract, as in the case of a collectively bargained plan that unambiguously promises irrevocable rights to future benefits, such as retiree health care (in other words, vesting by contract). *See supra* note 130 and accompanying text.

155. *See supra* note 130 and accompanying text.

156. 946 F.2d 401 (5th Cir. 1991).

applied to an employee who had contracted AIDS and whose notification of his employer of that fact triggered the adverse change in coverage.[157] Clearly, no right to medical benefits becomes fixed upon contracting the disease or condition that gives rise to health care needs.[158] Apparently McGann's claim for benefits came into being only as the medical expenses were incurred (goods or services received), and was subject to plan conditions and limitations in effect at that time, even though his situation had irrevocably changed for the worse. When the plan was amended, there was no longer anything McGann could do to avoid the need for costly future medical care. Moreover, when the events in *McGann* transpired, preexisting condition exclusions in health plans and health insurance policies were common and enforceable: McGann likely could not obtain alternative or supplemental coverage on his own.[159]

Noorily v. Thomas & Betts Corp., a case upholding an employer's denial of severance pay to induce key engineers to relocate to a distant facility, provides another example.[160] There the plan terms made payment of severance pay contingent on manager belief that "the granting of such pay is appropriate."[161] The court considered the denial of severance pay an appropriate business decision.[162] But the benefit reduction could have been done by plan amendment.[163] Severance pay is ordinarily classified as a welfare benefit,[164] so here

157. *See id.* at 403.

158. *See id.* at 405 ("The right referred to in [ERISA] section 510 is not simply any right to which an employee may conceivably become entitled.").

159. Subsequent legislation outlaws the kind of health condition discrimination exemplified by the plan amendment in *McGann* and forbids permanent preexisting condition exclusions. *See supra* note 95. Even though antidiscrimination and health insurance reform measures now prevent such cutbacks in health care coverage, the point here is that ERISA does not generally prohibit such adverse amendments; a legally enforceable (or perfected) claim to welfare benefits is very narrowly defined.

160. 188 F.3d 153 (3d Cir. 1999).

161. *Id.* at 161-62.

162. *Id.* at 162.

163. In view of the vagueness of its terms (saying, in effect, that we will pay severance if it seems good for business), the original plan arguably violated ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4) (2012), which requires that every employee benefit plan specify the basis on which payments are to be made from the plan. From that standpoint, the business decision denying severance to engineers who refused to relocate perhaps operated as de facto plan adoption (rather than amendment) by supplying a central omitted component of plan design. *See supra* text accompanying notes 100-01.

164. As applied to severance pay, ERISA's definitions of pension and welfare plans actually overlap, but Congress authorized the Labor Department to issue regulations exempting

again affected employees had no accrued benefits protected by the anti-reduction rule. And unlike in *McGann*, the workers at least had some opportunity to adjust their circumstances to the employer's revised program.[165]

Welfare benefits can also be made dependent on plan terms imposing express conditions subsequent. *US Airways, Inc. v. McCutchen* illustrates this proposition.[166] A self-funded health care plan sought reimbursement from a participant's tort recovery of the full cost of medical care it had paid on behalf of the employee due to injuries he sustained in an auto accident.[167] The plan's terms called for reimbursement of amounts paid by the plan "out of any monies recovered from [a] third party."[168] The company asserted that this language entitled it to any amounts paid by or on behalf of the negligent driver regardless of the expenses incurred (here, attorney's fees) to obtain the payment.[169] The plan's reimbursement clause operated as a condition subsequent: when triggered it retracted previous benefit disbursements to the employee. The issue before the Supreme Court was whether equitable defenses based on principles of unjust enrichment limited the plan's reimbursement claim.[170] While the Court interpreted the plan's reimbursement language consistently with the common-fund doctrine, it actually held that "equitable rules [cannot] override the clear terms of a plan."[171] Consequently, nothing in ERISA would prevent US Airways from amending its plan to require that in the future a participant in McCutchen's position must "pay for the privilege of serving as US Airways' collection agent."[172] In other words, with proper drafting the plan could be written to take back all benefit payments even if

---

severance programs from pension classification. *See* ERISA § 3(2)(B), 29 U.S.C. § 1002(2)(B); 29 C.F.R. § 2510.3-2(b) (2017) (generally excusing severance pay plans from pension plan treatment provided that total payments do not exceed twice the employee's annual compensation and payments are completed within twenty-four months after the termination of the employee's service).

165. *See Noorily*, 188 F.3d at 156-57.
166. 569 U.S. 88 (2013).
167. *See id.* at 92-93.
168. *Id.* at 92.
169. *See id.* at 92-93.
170. *See id.* at 94.
171. *Id.* at 91.
172. *Id.* at 105.

that leaves the participant out-of-pocket for attorney's fees and costs!

Reconsider the reduction of the lifetime cap on AIDS-related health care in this context. Harsh as the *McGann* result seems, *McCutchen* indicates that the result could be harsher still. Although ordinarily medical benefit claims would be understood to arise as medical expenses are incurred, with express language in the plan document the employer could impose repayment obligations that would hold benefits hostage to still later events. For example, the plan might be modified to require the employee to repay all benefits disbursed in the previous year if the employee fails to adhere to a prescribed treatment, such as smoking cessation for emphysema or a prescription drug regimen for the treatment of HIV.

In principle, it appears that employers could go even further than imposing conditions subsequent. A plan might be drafted to expressly disclaim any contractual commitment, declaring the payment of health or welfare benefits a gratuity.[173] By negating any contractual obligation, the program would merely announce a current intention to make a future gift, but the promise to make a gift is ordinarily unenforceable.[174] Accordingly, in the welfare plan context the gratuity theory—which courts in an earlier era invoked to equate a pension promise with an unenforceable promise to make a gift—could endure.[175] While that's true in theory, real-world welfare plans

173. Observe that the term "welfare plan" is defined to mean "any plan, fund, or program" established or maintained to provide specified types of benefits. *See* ERISA § 3(1), 29 U.S.C. § 1002(1) (2012). The existence of a contract is not required. Certain unfunded gratuitous payments to pre-ERISA retirees are excluded by regulation from the definition of a pension plan, 29 C.F.R. § 2510.3-2(e) (2017), but there is no comparable gratuitous payment exception to the welfare plan definition.

174. American courts refuse to enforce gratuitous promises not made to charities that have not induced reliance. *See generally* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821 (1997); Robert A. Prentice, *"Law &" Gratuitous Promises*, 2007 U. ILL. L. REV. 881.

175. The gratuity theory of pensions prevailed before 1938. A series of federal enactments limited pension plan sponsors' ability to disclaim liability, eventually prohibiting such disclaimers altogether for plans subject to ERISA. The major events followed this timeline:

> (1) Pre-1938—Pension, profit-sharing, and stock bonus trusts could be revoked and the assets reclaimed by the employer despite having received preferential income tax treatment, provided that the terms of the plan expressly reserved to the employer the right to terminate the program and reclaim trust assets at any time for any reason, *see* H.R. REP. NO. 75-1860, at 46 (1938);
>
> (2) 1938-1976—Qualified pension, profit-sharing, and stock bonus trusts were

do not go to that extreme to evade responsibility. It is not necessary to contain costs, and such a declaration does not send the right message to workers.

To summarize, a participant's right to a particular type of welfare benefit does not just depend on the specified event or condition (such as sickness, accident, disability, or death) befalling the participant or covered beneficiary. The plan must also continue in force until the claim for benefits arises according to the terms of the plan, and there must be no lingering condition subsequent that could trigger forfeiture of an otherwise-perfected claim.[176] Until perfected claim status is attained, a participant's interest in welfare benefits may be contingent virtually to the point of evanescent. While a welfare plan can be drafted to restrict the employer's freedom to reduce or eliminate benefits, commitments of continuing coverage are not the norm, and the enforceability of such assurances is often highly con-

---

effectively made irrevocable by enactment of the predecessor to I.R.C. § 401(a)(2), Revenue Act of 1938, Pub. L. No.75-554, § 165(a)(2), 52 Stat. 447, 518, but such trusts were systematically underfunded and employers routinely disclaimed liability for any shortfall, *see* Norman P. Stein, *Reversions from Pension Plans: History, Policies, and Prospects*, 44 TAX L. REV. 259, 279-81 (1989);

(3) 1976-1988—ERISA ostensibly outlawed the fund-specific pension promise by imposing liability on the employer for underfunded guaranteed benefits, but that liability to the PBGC was capped at 30 percent of the employer's net worth, ERISA § 4062(b);

(4) 1988-present—Employer liability extended to all members of controlled group and cap repealed, Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9312(b)(2)(A), 101 Stat. 1330, 1330-361.

Observe that the final two phases of this evolution apply only to private pension plans subject to ERISA. Pension plans that are governmental plans or church plans can still disclaim liability for unfunded benefits. *See* ERISA §§ 3(32)-(33), 4(b), 29 U.S.C. §§ 1002(32)-(33), 1003(b); Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1658 (2017) (holding that the church plan exemption applies broadly to plans maintained by related religiously affiliated tax-exempt charitable organizations, such as hospitals and schools). And of course advance funding is not required of welfare plans. ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1).

176. While reimbursement obligations (subrogation rights) were the focus in *McCutchen*, *see supra* notes 166-72 and accompanying text, the most common condition subsequent is the requirement of filing a timely claim for benefits (or proof of loss). *See* 29 C.F.R. § 2560.503-1(b)(2)-(3) (stating that plans must maintain reasonable procedures for filing claims, including notification of applicable time frames, and must not contain any provision or be administered in a way that unduly inhibits or hampers the initiation or processing of benefit claims); *see also id.* § 2520.102-3(*l*), (s) (providing information required in the summary plan description concerning loss of benefits and procedures governing filing claims for benefits).

tested.[177] A promise of welfare benefits, in other words, is ordinarily for the time being only. Assurances that the program will be available to address *future* needs are typically "no better than the aggregate of an employer's decency and solvency."[178]

Looking to the private trust analogy, a participant's interest in welfare plan benefits is ordinarily comparable in its (lack of) robustness to the interest of a beneficiary in the assets of a revocable inter vivos trust that designates the settlor as sole trustee (a declaration of trust). The trust beneficiary's interest may be extinguished without liability at any moment at the whim of the settlor, but could ripen into future financial advantage by default, should the settlor fail to revoke before distribution is required by the trust's terms. Trust law recognizes such a tenuous interest and treats it as equitable property,[179] even though it has no greater substance than a potential devisee's interest under a will during the life of the testator, an interest generally treated as a mere expectancy and not entitled to legal protection.[180] In contrast, a participant's interest in pension plan benefits is, to the extent of accrued benefits (and only to that extent), comparable to the interest of a beneficiary in the assets of an irrevocable trust. Non-pension benefits (frequently called ancillary benefits)[181] and other rights and features promised under a pension plan, however, are just as susceptible to the

177. *See* WIEDENBECK, *supra* note 21, at 70-74, 93-98.

178. *See* Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, A.B.A. SEC. LAB. & EMP. L. (2014), https://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/faith.html [https://perma.cc/9WKC-PRZY]. The quoted passage actually refers to the gratuity theory of pensions, by which courts in the early twentieth century treated the unregulated and largely unfunded pension plans of that era as unenforceable promises to make gifts. *Id.* The theory still retains some force with respect to church plans, to which ERISA does not apply. *See supra* note 175.

179. *See* RESTATEMENT (SECOND) OF TRS. § 57 & cmt. h (AM. LAW INST. 1959); IA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 57.6 (4th ed. 1987).

180. *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. d (AM. LAW INST. 1999) (stating that before the death of the property owner "a potential heir has no property interest but merely an 'expectancy' (an inchoate interest) in the decedent's intestate estate"). *But see* RESTATEMENT (FIRST) OF PROP. §§ 315-316 (AM. LAW INST. 1940) (noting that a court of equity would enforce the relinquishment or transfer for fair consideration of an expectant distributee's interest in property (as potential heir, devisee, or legatee), even though such a transfer was historically ineffective at law).

181. *See supra* note 133; *see also* Treas. Reg. § 1.401(a)(4)-4(e)(2) (as amended in 2004) (defining ancillary benefits for purposes of qualified plan nondiscrimination testing).

employer's withdrawal or unilateral alteration as welfare plan benefits.

The ultimate economic origin of a worker's claim to employee benefits (whether accrued pension benefits or welfare benefits, and whether or not collectively bargained) lies in the labor contract: the provision of services in exchange for contingent compensation. Recall that a participant's "accrued benefit" is at base "determined under the plan."[182] The settlor function doctrine accords the plan sponsor freedom to set or revise the terms of that contract free of the *fiduciary* obligation to act "solely in the interest of the participants and beneficiaries."[183] But the anti-reduction rule and contract law still operate to prevent retroactive elimination of accrued pension benefits and perfected welfare benefit claims (respectively).[184] These constraints in effect recognize that sufficient performance by a participating employee generates a limited species of property in employee benefits. The contours of that property are set by the terms of the plan, which can be altered prospectively but cannot, according to the property perspective, be revised retroactively to the worker's detriment. Or can they be? Plan terms frequently require interpretation. Who does the interpreting?

IV. PROPERTY REDEFINITION BY INTERPRETATION: THE NEW GRATUITY THEORY

Under the settlor function doctrine the plan sponsor has unilateral control over plan design, apart from reducing accrued pension benefits or repudiating perfected welfare benefit claims. The exceptions mean that detrimental design changes cannot be applied retrospectively. Yet insofar as the employer controls plan interpretation, even these defenses may be breached: benefit rights earned by prior service (accrued pension benefits or perfected welfare claims) may be subjected to retroactive trimming and adjustment. Careful analysis of federal courts' handling of plan interpretation questions reveals a formally neutral methodology dominated in practice by the plan sponsor. Instead of enforcing the deal as workers are given to

182. ERISA § 3(23), 29 U.S.C. § 1002(23) (2012); *see supra* text accompanying notes 131-35.
183. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).
184. *See supra* notes 127, 133, 147, 176 and accompanying text.

understand it, courts now privilege as contract the employer-controlled formal plan document, and that control is generally extended to encompass questions of interpretation.[185] Today, an employee benefit plan is scarcely more than what the employer's lawyers say it is, which may be markedly different than what the employer told workers to expect.

A. Employer Primacy

"Courts construe ERISA plans, as they do other contracts, by 'looking to the terms of the plan' as well as to 'other manifestations of the parties' intent.'"[186] Invoking this principle, the Court has supplemented the language of the plan document by resort to "background legal rules ... that typically or traditionally have governed a given situation when no agreement states otherwise."[187] Background rules incorporated by default have included the equitable common-fund doctrine, used as an aid to interpreting a health plan provision calling for reimbursement out of any monies recovered from a third-party tortfeasor,[188] and the notice-prejudice rule of state insurance law, applied to determine whether a claim for benefits under an insured disability plan was timely.[189] This effort to understand plan terms evenhandedly by reference to "the parties' intent" is far less than it seems, because the Court has endorsed approaches to plan interpretation that are decidedly—and often decisively—employer-centric. For employer-instituted plans, a strong convention of employer primacy in plan interpretation emerges from four strands of ERISA jurisprudence.

First, the Court equates the "*terms* of the plan" with the *language of the plan document*.[190] The parties' (plural) intent, in other words,

185. *See* CIGNA Corp. v. Amara, 563 U.S. 421, 435-38 (2011) (refusing to treat the summary plan description—a communication mandated by Congress to facilitate workers' career and financial planning by providing them with accessible, understandable, and actionable information about the major features of the benefit program—as setting the core terms of the deal).

186. US Airways, Inc. v. McCutchen, 569 U.S. 88, 102 (2013) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)).

187. *Id.*

188. *See id.* at 103.

189. *See* UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 364, 375-76 (1999).

190. *See CIGNA Corp.*, 563 U.S. at 436-38.

is not used to define the central features of the benefit program (that is, the essential components of the deal) by taking into account the understanding of employees as well as the employer. Instead, "other manifestations of the parties' intent" come into play only when necessary to put into effect the often technical and generally undisclosed language of the formal plan document.[191] The employer typically exercises almost complete control over the language of a benefit plan that is not the product of collective bargaining,[192] and so the interpretive exercise ordinarily focuses on the meaning of terms adopted unilaterally by the employer to serve its purposes.

Second, if the plan document expressly grants the fiduciary discretion to interpret the terms of the plan, then those interpretations are not second-guessed by the courts.[193] Instead of independently determining the meaning of plan language (de novo review), the court will set aside the fiduciary's reading only if it is found to be an abuse of discretion.[194] The courts give effect to that restricted scope of review rather than disregarding it as a prohibited exculpatory clause.[195] Moreover, that limited scope of judicial review applies even if the fiduciary is a company insider whose reading of the plan

---

191. Upon written request and payment of a reasonable charge for copying, a plan participant or beneficiary is entitled to be furnished a copy of the plan document, the key instrument "under which the plan is established or operated." ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4) (2012). The summary plan description (SPD), a mandatory disclosure vehicle, serves as the generally available source of information on plan terms, but it does not supply "the *terms* of the plan." *CIGNA Corp.*, 563 U.S. at 438. The Court cited this proposition in *McCutchen*, a subsequent case that had been litigated in the lower courts under the assumption that the interpretation of the SPD controlled the outcome. *McCutchen*, 569 U.S. at 92 n.1. The language of the plan itself surfaced only when the controversy was before the Supreme Court. *See id.* Given that posture, the Court treated the language of the SPD as if it supplied the terms of the plan, but took pains to note the parties' oversight. *See id.*

192. Although the accrued benefit anti-reduction rule prohibits amendments that would reduce the amount of previously earned pension benefits or materially restrict distribution options applicable to those benefits, such detrimental changes can be imposed prospectively (that is, applied to benefits to be earned by future service). *See supra* notes 146-48 and accompanying text.

193. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

194. *See id.*; *infra* notes 282-87 and accompanying text. In *McCutchen*, the Court construed the plan (actually the SPD, *see supra* note 191) reimbursement obligation independently (de novo), apparently because (in another litigation oversight) US Airways failed to argue that the plan granted the administrator "sole discretion to determine all matters relating to interpretation and operation of the Plan." Joint Appendix at 18, US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) (No. 11-1285), 2012 WL 3758081.

195. *See infra* note 283.

might be influenced by a conflict of interest.[196] Reluctance to disturb judgment calls by a conflicted insider fiduciary absent compelling evidence of impropriety—abuse of discretion with deference, effectively indulging a strong presumption of good faith—renders a fiduciary's employer-regarding reading of plan terms nearly unimpeachable. And because interpretation is by nature retrospective, a restrictive reading of a pension plan's benefit formula effectively revises the plan's definition of accrued benefit and applies that understanding to benefits attributable to all prior service, thereby impacting the financial consequences of events that occurred long before the interpretation crystallized. The result can be dramatic, and could not be achieved by the amendment of a pension plan, because such a change would offend the accrued benefit anti-reduction rule.[197]

Third, the limited scope of review accorded plan interpretations by a discretion-clad insider fiduciary is reinforced by the settlor function doctrine. Founded as it is on the analogy between an employee benefit plan and a private trust, the doctrine brings to

---

196. *See infra* Part V.B.1.

197. *Conkright v. Frommert*, 559 U.S. 506 (2010), illustrates the sometimes-startling consequences of this limited judicial oversight. There, the Xerox pension plan provided that if an employee who left the company and took distribution of his accrued benefit were later rehired, his pension on eventual retirement would be computed under the plan's benefit formula by taking into account all years of service with the company, and then applying an offset to account for the distribution received on the earlier separation from service. *See id.* at 509-10. The plan failed to specify how this offset would be computed, but did expressly grant the administrator, a company insider, discretion to interpret the plan. *See id.* at 509-10, 512. Affected participants argued that the plan should be interpreted to limit the offset to the nominal dollar amount of the lump sum distribution received on separation from service, while the administrator sought to apply an offset increased by the time value of money. *Id.* at 510-11. The difference, as Justice Breyer demonstrated in an appendix to his dissenting opinion, could easily impact annual retirement payments by a factor of five or greater. *Id.* at 540-41 (Breyer, J., dissenting) (finding that the participant's plan would award $3500 annuity versus $690 under the administrator's approach). The case is analyzed at length in Part V.B.1, because it is the foundation for flexible application of ERISA's duty of loyalty, which amounts to implicit exculpation. For comparison, in *Cottillion v. United Refining Co.* the employer argued that *Frommert* required deference to an insider administrator's plan reinterpretation. 781 F.3d 47, 55 (3d Cir. 2015). That interpretation called for actuarial reduction to pensions commencing before age sixty-five, which would have required certain early retirees to repay a large share of pension payments already received. *See id.* at 51-52. The *Cottillion* court held this "reinterpretation" of the plan's definition of benefits was so far removed from the plan language—which said nothing about actuarial reduction for the workers in question—that it amounted to a plan amendment that violated the accrued benefit anti-reduction rule. *See id.* at 57-58.

mind the image of donative wealth transfers. That image suggests that an employee benefit plan is more akin to a unilateral conveyance—like a deed, a gift in trust, or a will—than it is like a contract, the meaning of which must be determined by examining the understanding of both parties. The settlor function cases, along with many other high court ERISA pronouncements, invite resort to private trust law as the model of legal relations.[198] That subconscious paradigm molds the judicial point of view in subtle but momentous ways, insinuating a psychology of magnanimity, paternalism, and dependency. Once the employer is conceived as the sole settlor of a private trust, it is natural to interpret plan terms to carry out the "donor's intent" so as to best effectuate the apparently gratuitous transfer. This mode of thinking extends the employer's control over plan terms to employer control over the interpretation of plan terms, according supremacy to the employer-settlor's intent. The settlor function doctrine habituates and naturalizes the private trust analogy: the comparison implies that in determining the meaning of plan terms, the employer's purpose ought to govern; the contributions (labor) and understanding of employees need not inform the decision. In the realm of plan interpretation, the discredited gratuity theory still holds sway, even in construing pension promises.[199] At minimum, the settlor function doctrine and the private trust analogy encourage deference to the employer's interpretation of a plan that was not collectively bargained.

The private trust analogy tends to elide the contract dimension of employee benefit plans. Years ago, Professors Fischel and Langbein explained the economic reality that a sponsoring employer and its participating employees function as co-settlors of a benefit plan, whether or not the plan calls for employee contributions.[200] They noted that, even if the employer writes all the checks,

> these benefits are not free to employees. Employees pay for pension benefits in the form of lower wages. Thus, employees will bargain for plans only if the benefits anticipated exceed the

198. *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 496-97 (1996); *Conkright*, 559 U.S. at 512-13; Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015); *see also* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

199. *See supra* note 175.

200. *See* Fischel & Langbein, *supra* note 27, at 1117.

> income foregone. In this vital sense, each employee is, together with the employer, the settlor of his own pension and benefit plans.[201]

Despite mutual advantages founded in employment, the Court has never suggested that participants should be treated as co-settlors. Indeed, it has passed over invitations to so analyze employee benefit plans.[202]

Cost concerns are the fourth factor militating in favor of employer primacy on questions of plan interpretation. When interpreting ERISA's fiduciary duties, the Supreme Court instructs that "the law of trusts often will inform, but will not necessarily determine" the question.[203]

> In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements. And, in doing so, courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.[204]

---

201. *Id.* (footnotes omitted).

202. Recently, the Court was squarely presented with a trust law argument founded on participants' status as co-settlors. The case involved a challenge to the prudence of continued investment in employer stock by an employee stock ownership plan. *See Dudenhoeffer*, 134 S. Ct. at 2464. Respondents and their amici asserted that under traditional trust law principles defined contribution plan participants should be recognized as co-settlors. As such, in the event that the employer's financial health declines precipitously and unforeseeably, participants' objectives must be taken into account in assessing the propriety of continued investment in employer stock. *See* Brief for Respondents at 35-36, Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) (No. 12-751) (citing Peter J. Wiedenbeck, *Trust Variation and ERISA's "Presumption of Prudence,"* 142 TAX NOTES 1205 (2014)); Brief for Law Professors as Amici Curiae in Support of the Respondents at 25-26, Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) (No. 12-751) (citing Wiedenbeck, *supra*). The opinion made no mention of the co-settlor line of analysis and decided the case on other grounds. *See Dudenhoeffer*, 134 S. Ct. at 2463.

203. *Varity Corp.*, 516 U.S. at 497.

204. *Id.*

In principle this approach seems sufficiently nuanced to be adaptable to ERISA's multiple and sometimes conflicting objectives. In recent practice, however, the Court has repeatedly invoked Congress's alleged "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ... benefit plans in the first place" while paying little heed to the desire to protect employee benefits.[205] In the context of plan interpretation, prioritization of (or obsession with) cost concerns generally aligns with and buttresses the employer's reading, because reducing indirect compensation costs (plan administration and litigation expenses) increases profits.

In summary, employer-observant readings of the plan document can rarely be set aside. If the plan is not collectively bargained, the employer maintains unilateral control over plan terms under the settlor function doctrine. Hence, the inclusion of a provision (initially or by amendment) granting fiduciaries discretion to interpret the plan is accepted, and that discretion brings with it the limited abuse-of-discretion standard of review. Moreover, in conducting abuse-of-discretion review judicial monitoring is further relaxed by granting deference to the fiduciary's judgment calls. That deference flows from several sources. In the case of the insider fiduciary, ERISA's tolerance of conflicted fiduciaries is taken to imply a presumption of regularity and good faith (implicit exculpation). But in addition, the employer maintaining a benefit plan is likened (by the settlor function doctrine) to the sole settlor of a private trust, and that analogy suggests that plan terms should be interpreted to best effectuate the donor's intent—translated in this context as meaning the employer-settlor's intent. Lastly, judicial deference to employer-friendly readings of the plan gains further support from the Supreme Court's heightened sensitivity to the importance of controlling plan administration and litigation expenses.

---

205. *Id.* The Court has quoted *Varity*'s cost concern language on multiple occasions. *See* M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 933 (2015); Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604, 612 (2013); Conkright v. Frommert, 559 U.S. 506, 517 (2010). To date, the Court has quoted *Varity*'s employee protection language in only two cases, and in both of those cases Justice Breyer, who wrote for the majority in *Varity*, authored the Court's opinion. *See Dudenhoeffer*, 134 S. Ct. at 2470; Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 114 (2008).

It is noteworthy that the foregoing analysis is informed at virtually every step along the way by the trust law analogy. Things could have been different. Viewed as a contract, a benefit plan that is not the product of collective bargaining is in effect a unilateral contract: an offer accepted by the performance of services.[206] As such, ambiguities would be resolved against the employer who drafted the document.[207] That is, the courts might have resorted to the rule of *contra proferentem*, as state courts commonly do in the interpretation of insurance contracts.[208] In fact, many federal district and appellate court ERISA opinions discuss the rule. Further, most circuits have adopted the rule for cases subject to de novo review, though not for cases in which a grant of discretion triggers the abuse-of-discretion standard.[209] As will be shown, plans today routinely include a provision giving the administrator discretion to interpret the plan's terms.[210]

B. "[Extra-]Ordinary Contract Principles"

An employer-centric conceptualization of benefit plans is exemplified by Justice Thomas's opinion for the Court in *M & G Polymers USA, LLC v. Tackett*, which involved the interpretation of a retiree health care plan.[211]

---

206. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. a (AM. LAW INST. 1981).

207. *See id.* § 206.

208. *See generally* KENNETH S. ABRAHAM, DISTRIBUTING RISK 101-32 (1986).

209. *See, e.g.*, Porter v. Lowe's Cos., Inc.'s Bus. Travel Accident Ins. Plan, 731 F.3d 360, 365 & n.13 (5th Cir. 2013); Becker v. Chrysler LLC Health Care Benefits Plan, 691 F.3d 879, 890 (7th Cir. 2012); Carden v. Aetna Life Ins. Co., 559 F.3d 256, 260-61 (4th Cir. 2009) (finding *contra proferentem* inapplicable when an administrator has interpretive discretion even if the administrator is subject to a conflict of interest); Mitzel v. Anthem Life Ins. Co., 351 F. App'x 74, 81-82 (6th Cir. 2009); Scruggs v. ExxonMobil Pension Plan, 585 F.3d 1356, 1366 (10th Cir. 2009); Stamp v. Metro. Life Ins. Co., 531 F.3d 84, 93-94 (1st Cir. 2008); White v. Coca-Cola Co., 542 F.3d 848, 857 (11th Cir. 2008); Fay v. Oxford Health Plan, 287 F.3d 96, 103-04 (2d Cir. 2002); Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir. 1995); Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 231 (3d Cir. 1994). Some circuits further limit the application of *contra proferentem* to cases involving insurance companies. *See, e.g.*, Hughes v. Bos. Mut. Life Ins. Co., 26 F.3d 264, 268 (1st Cir. 1994); Lee v. Blue Cross/Blue Shield of Ala., 10 F.3d 1547, 1551 (11th Cir. 1994).

210. *See infra* notes 284-85 and accompanying text.

211. 135 S. Ct. 926 (2015).

> Welfare benefits plans must be "established and maintained pursuant to a written instrument," [ERISA § 402(a)(1), 29 U.S.C.] § 1102(a)(1), but "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S. Ct. 1223, 131 L.Ed.2d 94 (1995). As we have previously recognized, "[E]mployers have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833, 123 S. Ct. 1965, 155 L.Ed.2d 1034 (2003). And, we have observed, the rule that contractual "provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. —, —, 134 S. Ct. 604, 611-612, 187 L.Ed.2d 529 (2013). That is because the "focus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place." *Id.*, at —, 134 S. Ct., at 612 (internal quotation marks, brackets, and citation omitted).[212]

Here we observe the confluence of: (1) the settlor function doctrine (in the quote from *Curtiss-Wright*); (2) the identification of the plan with the written plan document; and (3) the elevation of administrative cost concerns to paramount importance, to the exclusion of all other ERISA policies, which go unmentioned. Benefit plans are to be "enforced as written" rather than as publicized and reasonably understood. In isolation this encapsulated summary of unilateral control—the new gratuity theory—seems to lay the groundwork for acceptance of the employer's reading. And so it did. Yet remarkably, the plan at issue in *M & G Polymers* was collectively bargained,[213] and so the employer was *not* free to modify or terminate the plan at will!

The specific interpretive issue before the Court in *M & G Polymers* was whether retirees were entitled to lifetime contribution-free healthcare benefits under a pension and insurance agreement that their union had negotiated with the company, in which the benefit agreement was ambiguous on the duration of retiree healthcare

212. *Id.* at 933 (all except first alteration in original).
213. *Id.* at 930.

coverage.[214] The Sixth Circuit had found for the plaintiffs, ruling that retirees were entitled to lifetime employer-provided healthcare coverage, but allowing reasonable adjustments in their coverage (such as imposition of co-pays and deductibles) to accommodate increased costs.[215] The Supreme Court, asserting that "[w]e interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law," vacated the judgment below and remanded the case.[216] It concluded that the Sixth Circuit had mistakenly relied on a set of inferences supporting vesting of retiree health benefits that were drawn from an earlier case, *International Union, UAW v. Yard-Man, Inc.*[217]

> As an initial matter, *Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law. And it distorts the attempt "to ascertain the intention of *the parties*."[218]

In effect, the majority accused the Court of Appeals of treating the *Yard-Man* inferences as erecting a presumption of vested retiree healthcare absent explicit durational language in the agreement.[219]

After repudiating *Yard-Man*, the majority opinion offered some guidance on "ordinary contract principles."[220] That guidance, however, seriously distorts the prevailing modern approach to handling ambiguity or omission in a contract. Professor Robert Hillman convincingly demonstrates that the majority's "discussion and application of 'ordinary contract principles' was quite amateurish" and is destined to perpetuate confusion in contract interpretation.[221] While agreeing that the durational inferences drawn from *Yard-Man* do

214. *Id.*
215. Tackett v. M & G Polymers USA, LLC, 733 F.3d 589, 600-01 (6th Cir. 2013), *vacated*, 135 S. Ct. 926 (2015).
216. *M & G Polymers*, 135 S. Ct. at 930, 933.
217. *Id.* at 933-36 (citing Int'l Union, UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983)).
218. *Id.* at 935 (quoting 11 WILLISTON ON CONTRACTS § 30:2, at 18 (4th ed. 2017)).
219. *See id.* at 935-36.
220. *See id.* at 936-37.
221. Robert A. Hillman, *The Supreme Court's Application of "Ordinary Contract Principles" to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire*, 32 A.B.A. J. LAB. & EMP. L. 299, 300 (2017).

not support a presumption in favor of lifetime retiree healthcare coverage, Professor Hillman shows that the inferences should not be rejected out-of-hand.[222] Instead, they are relevant to the issue of coverage duration, and they provided sufficiently probative evidence to submit the question to the trier of fact.[223] Worse, the majority opinion seems to endorse a presumption of its own, that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life."[224] The majority's proffered "ordinary contract principles" are an incomplete and arbitrary selection and are so abstract that they are not much help at all.[225] Moreover, the Court's resort to ascertaining the "intention of *the parties*"[226] as the touchstone for contract interpretation slights the modern objective approach to interpretation, by which courts seek a reasonable interpretation of the language rather than hunting for subjective meaning.[227] Hillman argues that *M & G Polymers* is better analyzed as a case in which the parties never reached agreement on the durational issue.[228] Instead of focusing on intentions, he suggests the Court should have concentrated on alternative approaches to filling the gap.[229] From that perspective, the Sixth Circuit's decision is shown to be plausi-

222. *See id.* at 309-10.

223. *Id.* at 310.

224. *M & G Polymers*, 135 S. Ct. at 937; *see* Hillman, *supra* note 221, at 308 ("By ruling out the use of *Yard-Man* inferences to prove the parties intended benefits to last for life, the Court created a bit of a mystery on what the Sixth Circuit was to do on remand to review the case 'under the correct legal principles.'" (quoting *M & G Polymers*, 135 S. Ct. at 937)).

225. *See* Hillman, *supra* note 221, at 314-15.

226. *M & G Polymers*, 135 S. Ct. at 935 (quoting 11 WILLISTON ON CONTRACTS § 30.2, at 18 (4th ed. 2017)).

227. *See* Hillman, *supra* note 221, at 310-11.

228. *Id.* at 315.

229. *Id.* at 315-20. Another scholar suggests that the ambiguity was deliberate and served both parties' interests. The employer and union in *M & G Polymers* negotiated a "cap letter" setting maximum employer contributions toward retiree health costs in order to control the liability required to be reported pursuant to FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 106; EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PENSIONS (1990), http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220123671&acceptedDisclaimer=true [https://perma.cc/W6RN-RKV2]. The caps apparently were not disclosed to participants in the summary plan description or otherwise. Maria O'Brien Hylton, *After* Tackett*: Incomplete Contracts for Post-Employment Healthcare*, 36 PACE L. REV. 317, 339 (2016) (quoting a union official who testified at trial that "the company representatives could not say publically [sic] that there would never be retiree contributions because the accountants would then not certify the FASB statements").

ble, and "arguably provided the fairest solution" to the controversy.[230]

In the realm of collectively bargained benefit plans, unilateral employer modification of terms is not possible, and interpretations that take account of only the employer's intent would seem correspondingly inappropriate. Yet even here, in the setting of a clear bilateral agreement, the Court's approach to plan interpretation betrays a sort of employer-friendly ERISA exceptionalism. As applied to employee benefit plans, *M & G Polymers* endorses a set of "ordinary contract principles" that is really quite extraordinary. As a cost-conscious, employer-deferential version of trust law emerged in ERISA jurisprudence, the trend was accompanied by the suppression and distortion of contract norms.

The interpretive approaches canvassed here lend credence to the characterization of a worker's interest in employee benefits as "weak property." Returning to an earlier comparison, an employee's interest under an employer-instituted (that is, not collectively bargained) welfare plan was shown to be analogous to a beneficiary's interest in a revocable inter vivos private trust administered by the settlor.[231] While technically property, its substance amounts to little more than a hope of eventual gain, a hope that depends on both the settlor's future financial circumstances and continuance in the settlor's good graces. In light of the fragility of a beneficiary's rights under such a revocable trust, it may be unsurprising that a worker's interest in welfare benefits remains vulnerable to both revision and reinterpretation. Perhaps it is surprising that an employee's interest in accrued pension benefits remains subject to the employer-settlor's interpretation. The analogy to a beneficiary of an irrevocable private trust is imperfect: the proper comparison is to the rights of a beneficiary under an irrevocable private trust, the terms of which appoint the settlor as sole trustee and expressly grant the trustee wide latitude to interpret its provisions.[232]

230. Hillman, *supra* note 221, at 320.

231. *See supra* notes 176-80 and accompanying text. The analogy holds as well for an employee's interest in welfare-type (ancillary) benefits provided under a pension plan.

232. *See* RESTATEMENT (SECOND) OF TRS. § 187 & cmts. j-k (AM. LAW INST. 1959); *see also id.* §§ 170 cmt. t, 222 (explaining that, notwithstanding exculpatory provision and broad grant of discretion, a trustee must act in good faith).

The breadth of the settlor function doctrine—or more precisely, the minimal brake on the plan sponsor's amendment authority—narrowly confines the range of operation of ERISA's fiduciary regime. Insofar as benefits attributable to prior service remain subject to trimming and adjustment at the behest of the employer under the guise of plan interpretation, that power to redefine property further restricts the scope of ERISA's protections. For a plan that is not the product of collective bargaining, the employer's interpretive primacy often borders on hegemony, and even under collectively bargained benefit plans the employer's understanding is accorded special weight.

The restricted scope of ERISA fiduciary law establishes one dimension of employee benefits. That narrow scope supports characterization of workers' claims as weak property. Still to be considered is the intensity or strictness of fiduciary obligations in the limited domain in which they apply. Exploration of that dimension reveals a fundamental dissonance or disconnect between an uncompromising law on the books[233] and a seriously compromised law in action.[234]

V. PROPERTY PROTECTION: EXCULPATION

A. Express Exculpation

ERISA's general standards of fiduciary conduct were derived from private trust law.[235] There are four major imperatives: (1) the exclusive benefit rule, which is based on the trust law duty of loyalty;[236] (2) the prudence requirement, which follows the trust law duty of reasonable care;[237] (3) the diversification rule, which under state

233. *See infra* Part V.A.

234. *See infra* Part V.B.

235. *See* Varity Corp. v. Howe, 516 U.S. 489, 496 (1996).

236. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (2012); *cf.* RESTATEMENT (THIRD) OF TRS. § 78 (AM. LAW INST. 2007); RESTATEMENT (SECOND) OF TRS. § 170(1) (AM. LAW INST. 1959). The language of ERISA's exclusive benefit rule tracks a long-standing condition on obtaining preferential tax treatment applicable to pension, profit-sharing, and stock bonus plans. *See* I.R.C. § 401(a)(2) (2012) (requiring that a qualified trust instrument must make it "impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be ... used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries").

237. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); *cf.* RESTATEMENT (THIRD) OF TRS. § 77;

trust law is a specific application or corollary of the general duty of reasonable care;[238] and (4) a requirement that the fiduciary act in accordance with plan documents, insofar as they are consistent with the requirements of ERISA.[239] The latter requirement is particularly revealing. It negates plan terms that would override statutory obligations, regardless of whether the program provides pension or welfare benefits. A plan fiduciary's obligation to discharge her duties "in accordance with the documents and instruments governing the plan" extends only "insofar as such documents and instruments are consistent with the provisions" of ERISA.[240] Furthermore, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA's fiduciary regime] shall be void as against public policy."[241] That directive deliberately rejects a well-established doctrine of traditional trust law that ordinarily gives effect to exculpatory provisions—terms of a trust relieving the trustee of liability for breach of trust.[242] Unlike state trust law, ERISA's regulatory agenda goes beyond establishing an enabling set of default rules;[243] Congress meant to impose mandatory minimum standards. This uncompromising aspect of federal fiduciary law

---

RESTATEMENT (SECOND) OF TRS. § 174.

238. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). In certain circumstances an ESOP, profit-sharing plan, or stock bonus plan is permitted to invest heavily in employer securities or employer real estate notwithstanding the diversification rule (or the prudence requirement, to the extent that it would require diversification). *See* ERISA §§ 404(a)(2), 407(d)(3)-(6), 29 U.S.C. §§ 1104(a)(2), 1107(d)(3)-(6). In plan years beginning after 2006, defined contribution plan participants must in some cases be allowed to direct the plan to switch their account investments from employer securities to diversified investment options. *See* ERISA § 204(j), 29 U.S.C. § 1054(j); *accord* I.R.C. § 401(a)(35); *cf.* RESTATEMENT (THIRD) OF TRS. § 90(a)-(b); RESTATEMENT (THIRD) OF TRS.: PRUDENT INVESTOR RULE § 227(b) (AM. LAW INST. 1992); RESTATEMENT (SECOND) OF TRS. § 228.

239. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); *cf.* RESTATEMENT (THIRD) OF TRS. § 76(1) & cmt. b(1).

240. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

241. ERISA § 410(a), 29 U.S.C. § 1110(a).

242. *See* RESTATEMENT (SECOND) OF TRS. § 222. Exculpatory terms in private trust agreements are not permitted to relieve the trustee from liability for actions committed in bad faith, and they are strictly construed. *Id.* §§ 174 cmt. d, 222(2) & cmts. a-b; *accord* RESTATEMENT (THIRD) OF TRS. § 96; GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 542 (rev. 2d ed. 1993); SCOTT & FRATCHER, *supra* note 179, §§ 222, 222.3.

243. *See generally* Langbein, *supra* note 20.

unnerved plan sponsors and benefits experts in the immediate aftermath of the statute's enactment.[244]

To understand the force of federal fiduciary obligations, the pertinent question is how great a hindrance to ERISA's commands or objectives some plan provision must present for a court to conclude that it is not "consistent" with ERISA. Direct negation of a statutory obligation is obviously a nullity, but ERISA embodies multiple policies that do not always live in harmony, such as the goal of providing greater protection to employee benefits and the desire to promote sponsorship by preserving wide latitude for employer autonomy.[245] The capaciousness of the realm of "consistent" plan terms is not yet well defined, but a 2014 Supreme Court decision involving an employee stock ownership plan (ESOP) provides important guidance.[246]

ESOPs are defined contribution pension plans designed to invest primarily in stock of the employer corporation.[247] They are expressly exempted from ERISA's general fiduciary duty to diversify plan investments "so as to minimize the risk of large losses," and are correspondingly excused from the prudence requirement, but "only to the extent that it requires diversification."[248] Concentrated investment in stock of the employer corporation inherently brings with it high risk, but the limited exception to the prudence requirement implies that in some situations the risk is simply unacceptable—that investment in employer stock can become per se imprudent. The dramatic fall in stock prices that accompanied the 2008 financial crisis triggered a spate of ERISA suits charging that ESOP fiduciaries breached their obligation to act prudently when, faced with negative information about economic conditions or the health of the employer, they either continued to buy company stock for the plan or declined to sell shares already owned. In response to such "stock drop" fiduciary breach claims, the courts of appeals developed a presumption that ESOP fiduciaries investing in company stock act

244. *See supra* notes 17-22 and accompanying text.

245. *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

246. *See* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

247. ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6) (2012); *accord* I.R.C. § 4975(e)(7) (2012); *Dudenhoeffer*, 134 S. Ct. at 2463.

248. *See* ERISA §§ 404(a)(1)(C), (a)(2), 407(d)(3), (d)(6), 29 U.S.C. §§ 1104(a)(1)(C), (a)(2), 1107(d)(3), (d)(6) (providing diversification exceptions for ESOPs and other eligible individual account plans); *accord* I.R.C. § 4975(e)(7)-(8), 409(*l*) (providing tax law definition of ESOP).

prudently, which could be overcome only by evidence showing that the employer's viability as a going concern was in serious jeopardy.[249] *Dudenhoeffer* examined this fiduciary-friendly "presumption of prudence" and resoundingly rejected it.[250]

Conceding that ERISA's duty of prudence is in some tension with a statutorily expressed interest in encouraging ESOPs,[251] the Court rejected both the lower court's presumption of prudence and the reconciliation strategies advanced by the employer fiduciaries.[252] In rejecting compromise solutions that would overtly relax ERISA's duty of care, the *Dudenhoeffer* opinion contains important lessons about (1) the effectiveness of exculpatory language in the plan document, and implicitly (2) the limits of the settlor function doctrine.

The employer argued that ERISA's specification of the duty of care, which refers to "the conduct of an enterprise of a like character and with like aims," incorporates in the case of an ESOP the goal of promoting worker ownership.[253] The Court interpreted the "enterprise" or "aims" to refer to the sort of financial benefits which the plan was established to provide—retirement income in the case of a pension plan (of which the ESOP is a special type).[254] Hence a

---

249. *See, e.g.*, White v. Marshall & Ilsley Corp., 714 F.3d 980 (7th Cir. 2013); Pfeil v. State St. Bank & Tr. Co., 671 F.3d 585 (6th Cir. 2012); *In re* Citigroup ERISA Litig., 662 F.3d 128 (2d Cir. 2011); Quan v. Comput. Sci. Corp., 623 F.3d 870 (9th Cir. 2010); Edgar v. Avaya, Inc., 503 F.3d 340 (3d Cir. 2007); Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995); Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995). *Moench* was the first in this line of cases (indeed, the presumption of prudence was sometimes called the *Moench* presumption). *See, e.g.*, *Quan*, 623 F.3d at 877. The conceptual origins of the presumption, which was drawn from the administrative deviation doctrine of private trust law, are critically examined in Peter J. Wiedenbeck, *Trust Variation and ERISA's 'Presumption of Prudence,'* 142 TAX NOTES 1205 (2014), and WIEDENBECK, *supra* note 21, at 146-52.

250. *Dudenhoeffer*, 134 S. Ct. at 2463. The author contributed to and joined the Brief for Law Professors as Amici Curiae in Support of the Respondents, *Dudenhoeffer*, 134 S. Ct. 2459 (No. 12-751), 2014 WL 975493.

251. *Dudenhoeffer*, 134 S. Ct. at 2465-66 (quoting Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 (codified as amended in scattered sections of 26 U.S.C.)). The *Dudenhoeffer* Court failed to acknowledge strong indications that the quoted statutory declaration of intent was enacted as a sop to a single powerful Senator, Russell Long, chairman of the Finance Committee, and legislative history evidencing congressional prioritization of the retirement income security objective also went unremarked. *See* Wiedenbeck, *supra* note 249, at 1214-19.

252. *See Dudenhoeffer*, 134 S. Ct. at 2467-71.

253. *See id.* at 2467-68 (quoting 29 U.S.C. § 1104(a)(1)(B) (2012)).

254. *See id.* at 2468 ("The term [benefits] does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.").

"specific nonpecuniary goal set out in an ERISA plan," such as promoting worker ownership through an ESOP, does not alter the content of ERISA's duty of prudence.[255] In support of this reading, the Court pointed to the obligation to follow the documents and instruments governing the plan "insofar as [they] are consistent with the provisions of [ERISA]."[256] The qualification would be inoperative if special aims set out in the plan documents modified the standard of prudence, because in that case no conflict could arise.[257] The employer also advanced the less nuanced argument that, because the common law countenances exculpatory terms in a private trust, plan documents obligating the ESOP fiduciary to invest primarily in company stock should likewise be read to reduce the prudence standard.[258] To this the Court simply responded that "by contrast to the rule at common law, 'trust documents cannot excuse trustees from their duties under ERISA.'"[259]

This categorical refusal to give effect to plan terms that would grant variances from fiduciary duties marks a limit on the settlor function doctrine. Unlike state trust law, which provides a system of default rules that can be varied by agreement, ERISA put in place a set of mandatory minimum standards.[260] Terms of a plan document that would directly reduce or negate fiduciary duties are ineffective, of course.[261] But can relaxation of fiduciary obligations be achieved indirectly by incorporating language in the plan calling for action that would be imprudent if the choice were left to the fiduciary's discretion? Mechanically applied, the settlor function doctrine would classify the adoption of plan terms that "hard wire" (mandate) a particular investment as a non-fiduciary act, and by removing discretion such terms also seem to eliminate fiduciary status and oversight with respect to the propriety of the obligatory

255. *Id.*
256. *Id.*
257. *Id.*
258. *See id.* at 2469.
259. *Id.* (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568 (1985)). Curiously, the Court gave barely a nod to ERISA's express statutory prohibitions on reducing fiduciary standards. ERISA sections 404(a)(1)(D) and 410(a) appear only as a "see also" cite. *Id.*
260. WIEDENBECK, *supra* note 21, at 210.
261. ERISA § 410(a), 29 U.S.C. § 1110(a) (2012).

investment.[262] In refusing to make allowances for a "specific nonpecuniary goal set out in an ERISA plan," *Dudenhoeffer* implies that this avoidance strategy will not succeed.[263] The opinion makes no mention of the settlor function doctrine however, nor does it cite the cases that established it, leaving the exact defect in the hard-wiring analysis murky.

At a deeper level, *Dudenhoeffer* offers indirect implicit authority for the proposition that investment choice is an inherent fiduciary function. The Court's opinion fails to acknowledge that the "presumption of prudence" line of cases originated as a safety valve that allowed courts to disregard plan terms mandating investment in employer stock in narrowly circumscribed emergency situations. A plan-based investment mandate, by withholding choice in the matter, arguably makes the trustee's purchase and holding of employer stock a non-discretionary—and hence non-fiduciary—action.[264] The "presumption of prudence" recognized by the courts of appeals effectively incorporated the private trust law doctrine of administrative deviation into ERISA, allowing a limited override of plan terms when that is necessary to avoid frustration of the trust's purposes.[265]

---

262. *See, e.g.*, Hecker v. Deere & Co., 556 F.3d 575, 586-87 (7th Cir. 2009) (citing settlor function doctrine cases and noting that decision to restrict investment choices "bears more resemblance to the basic structuring of a Plan than to its day-to-day management" and may not even be "a decision within [the employer's] fiduciary responsibilities").

263. *See Dudenhoeffer*, 134 S. Ct. at 2468.

264. Discretionary authority relating to plan management or administration is not always necessary to create fiduciary status. In addition, any person who actually "exercises any authority or control respecting management or disposition" of plan assets is a fiduciary. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Consequently, anyone handling plan assets, even low-level functionaries assigned purely ministerial roles, can be held accountable under ERISA for losses due to diversion or neglect. *See* WIEDENBECK, *supra* note 21, at 112-13. Hence an ESOP trustee buying and holding employer stock is to that extent acting as a fiduciary even if the plan requires all assets be invested in employer stock. Yet such a trustee is a fiduciary *only* "to the extent" of his exercise of management or control over plan assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Matters that are beyond one's control—in this case, exclusive investment in employer stock—therefore cannot give rise to personal liability for breach of fiduciary duties. That is, a fiduciary with respect to certain actions, roles, or decisions is not a fiduciary at all times and for all purposes. *See* Colleen E. Medill, *The Law of Directed Trustees Under ERISA: A Proposed Blueprint for the Federal Courts*, 61 MO. L. REV. 825, 859 (1996) (discussing limitations on liability of trustees who invest at the direction of other fiduciaries); *see also In re* WorldCom, Inc. ERISA Litig., 354 F. Supp. 2d 423, 441-51 (S.D.N.Y. 2005) (same); *Field Assistance Bulletin 2004-03*, U.S. DEP'T OF LABOR (Dec. 17, 2004) [https://perma.cc/4BY5-HV49] (same).

265. *See* Wiedenbeck, *supra* note 249, at 1206-14 (discussing the origins and application of the administrative deviation doctrine in the context of ERISA).

The Supreme Court's *Dudenhoeffer* opinion ignores the tension between a mandatory duty and fiduciary status. In doing so, it suggests that plan investments, even if prescribed by plan terms adopted by the settlor in an intentional design decision,[266] are necessarily subject to fiduciary oversight. If that inference is correct, then there are two limits on the settlor function doctrine. One is extrinsic—the restrictions on amendments (most significantly, the accrued benefit anti-reduction rule) explored previously.[267] The other is intrinsic—a complementary fiduciary function doctrine.[268]

Outside the realm of fiduciary responsibility, *Dudenhoeffer* does not call into question plan provisions that indirectly encroach upon ERISA policies. Plan terms that work at cross purposes to, but stop short of explicit contradiction of, other ERISA requirements can be imposed without fiduciary accountability under the settlor function doctrine. Consider, for example, a forum selection clause requiring participants to bring civil enforcement claims in a federal district court convenient to the employer (for example, situs of company headquarters) but far distant from the residence of the participant or the location of witnesses. Such a restriction may not directly contradict any statutory obligation,[269] but it burdens and may discourage civil enforcement, and is in tension with Congress's expressed goal of "providing ... ready access to the Federal courts."[270] While the effectiveness of such a forum restriction is open to challenge,[271] that the restriction was imposed to benefit the employer is

266. *See Dudenhoeffer*, 134 S. Ct. at 2464 (observing that "Fifth Third's matching contributions ... are always invested initially" in company stock); Fifth Third Bancorp Master Profit Sharing Plan Arts. 7.1(d), 7.4(d), 2 Joint Appendix 283, 347, 350-51, *Dudenhoeffer*, 134 S. Ct. 2459 (No. 12-751) ("Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs.").

267. *See supra* Part III.

268. *See supra* note 100.

269. *But see* ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) (providing that federal suits under ERISA "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

270. ERISA § 2(b), 29 U.S.C. § 1001(b).

271. *See, e.g.*, Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014) (holding that ERISA plan sponsors are permitted to designate the federal courts in which their participants may bring claims arising under ERISA); Mathias v. Caterpillar, Inc., 203 F. Supp. 3d 570, 578 (E.D. Pa. 2016) (same); Malagoli v. AXA Equitable Life Ins. Co., No. 14-CV-7180 (AJN), 2016 WL 1181708, at *2 (S.D.N.Y. Mar. 24, 2016) (same); Harley v. Bank of N.Y. Mellon, No. 1:15-CV-1384, 2015 WL 6956564, at *4 (M.D. Pa. Nov. 10, 2015) (finding that a

no ground for setting it aside. As Professors Muir and Stein observed, the Supreme Court's ERISA jurisprudence "implies that a plan may enforce any written terms that are not directly inconsistent with ERISA's requirements, suggesting few legal limits on onerous plan terms."[272]

B. Implicit Exculpation

The stringency of fiduciary duties—particularly the force of the exclusive benefit rule, ERISA's duty of loyalty—has been quietly but decisively eroded by the Supreme Court's recent scope of review decisions. Supreme Court decisions reviewing actions of plan fiduciaries who are company insiders make allowances for the resulting conflicts of interest. Limited monitoring of judgment calls by insider fiduciaries creates a safe space or immunity for employer-regarding decisions, so the practice functions like an exculpatory clause. Consequently, appointing employer representatives as fiduciaries introduces a de facto or implicit exculpatory clause into the program.

ERISA allows an officer, employee, or agent of the plan sponsor to *serve* as fiduciary.[273] Nevertheless, such an insider fiduciary is expressly barred from *acting* "in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries."[274] Moreover, the insider fiduciary remains

---

forum selection clause applies to a breach of fiduciary duty claim). *But see* Dumont v. Pepsico, Inc., 192 F. Supp. 3d 209, 219 (D. Me. 2016) (holding that enforcing a forum selection clause would undermine the goal of ready access to federal courts); Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (same). The Labor Department has filed amicus briefs asserting that forum selection clauses should be held invalid under ERISA. *E.g.*, Brief for the United States as Amicus Curiae at 8, 10, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016) (No. 14-1168).

272. Muir & Stein, *supra* note 44, at 507.

273. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3), (authorizing insider fiduciaries); *accord* I.R.C. § 4975(d)(11), (e)(2)(C), (H) (2012) (providing a corresponding exemption from the prohibited transaction excise tax).

274. ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2). Interestingly, this ban on acting on behalf of the employer or representing the employer's interest is omitted from the Tax Code's version of the prohibited transaction rules. *Compare* ERISA § 406(b), 29 U.S.C. § 1106(b), *with* I.R.C. § 4975(c)(1)(E)-(F). That omission presumably stems from the excise tax penalty's dependence on the "amount involved" in the prohibited transaction, I.R.C. § 4975(a), (f)(4), which is not readily ascertainable in situations in which a fiduciary, rather than engaging in self-dealing,

at all times subject to the general imperative that he "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[275] These obligations to disregard the employer's interests were not meant as default rules that could be relaxed by advance arrangement. ERISA declares that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA's fiduciary monitoring scheme] shall be void as against public policy."[276] In operation, that negation of exculpatory clauses has proven to be far less robust than it reads on paper. This Part will identify the origin of that weakness and explain how it has evolved to grant insider fiduciaries latitude to take account of employer interests in plan decision-making, relaxing the apparent rigor of the exclusive benefit rule. Such implicit or crypto-exculpatory clauses moderate the rigidity of ERISA's fiduciary regime, achieving results similar to (but notably less transparent than) the interest balancing approach advanced by Professors Fischel and Langbein.

At the outset it should be understood that ERISA's authorization of insider fiduciaries represents a major departure from private trust law. Traditionally, a trustee committed a breach of trust (specifically, a violation of the duty of loyalty) by engaging in a transaction in which she had a conflict of interest, without regard to whether the trustee acted in good faith or whether the outcome was objectively fair to the trust beneficiaries.[277] This "no-further-inquiry" rule establishes a prophylactic standard designed to bar deals involving a high risk of abuse.[278] Its uncompromising approach can

---

merely privileges the employer's interests.

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

276. ERISA § 410(a), 29 U.S.C. § 1110(a).

277. RESTATEMENT (THIRD) OF TRS. § 78(2) & cmts. a-b (AM. LAW INST. 2007); RESTATEMENT (SECOND) OF TRS. § 170 & cmt. b (AM. LAW INST. 1959); IIA SCOTT & FRATCHER, *supra* note 179, § 170 ("[A trustee] is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.").

278. *See* RESTATEMENT (THIRD) OF TRS. § 78 cmt. b ("[U]nder the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee."); BOGERT & BOGERT, *supra* note 242, § 543. *See generally* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541 (2005).

The canonical judicial formulation of the doctrine was supplied by Judge Cardozo in *Wendt* be relaxed by the settlor's authorization of conflicted transactions, but such exculpatory language is narrowly construed and liability is imposed if the trustee fails to act in good faith.[279] Absent the settlor's authorization, a trustee subject to a conflict of interest could avoid liability only by obtaining advance judicial approval of the transaction or by obtaining the fully informed consent of all trust beneficiaries.[280] ERISA's permission of conflicted fiduciaries operates in effect as a statutory exculpatory clause, displacing the no-further-inquiry rule. Yet consistent with private trust law, conflicted fiduciaries are still commanded to act in good faith—that is, "for the *exclusive purpose* of ... providing benefits to participants and their beneficiaries" and defraying reasonable costs of plan administration.[281] Acceptance of conflicted fiduciaries was apparently deemed a necessary concession to longstanding practice under pre-ERISA benefit plans. Rejecting the no-further inquiry rule, however, did not *directly* cause attenuation of the exclusive benefit rule. After all, the "exclusive purpose" (good faith) command explicitly denounces employer-regarding decisions. Instead, ERISA's toleration of employer-representative fiduciaries diluted fiduciary obligations by a circuitous path involving the scope of judicial review of benefit claim denials.

---

v. Fischer:

> If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.... [W]e are told that the [fiduciaries] acted in good faith, that the terms procured were the best obtainable at the moment, and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer by a trustee forgetful of his duty. The law "does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case." Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion.

154 N.E. 303, 304 (N.Y. 1926) (quoting Munson v. Syracuse, Geneva & Corning R.R., 8 N.E. 355, 358 (N.Y. 1886)).

279. RESTATEMENT (THIRD) OF TRS. § 78 cmt. c(2); RESTATEMENT (SECOND) OF TRS. §§ 170 cmt. t, 222(2); IIA SCOTT & FRATCHER, *supra* note 179, § 170.9; III SCOTT & FRATCHER, *supra* note 179, §§ 222, 222.2-.3.

280. RESTATEMENT (THIRD) OF TRS. § 78 cmts. c, c(1), c(3); RESTATEMENT (SECOND) OF TRS. §§ 170 cmts. a, f, 216(3); IIA SCOTT & FRATCHER, *supra* note 179, § 170.7; III SCOTT & FRATCHER, *supra* note 179, § 216.

281. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

The first fateful step down the road to implicit exculpation was taken with the Supreme Court's announcement in *Firestone Tire & Rubber Co. v. Bruch* that "a denial of benefits challenged under § 1132(a)(1)(B) [ERISA § 502(a)(1)(B)] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[282] The message that the intensity of judicial scrutiny, which often determines the outcome on judicial review, can be dialed back by including appropriate language in the plan document was unmistakable.[283] Sponsors responded by inserting in their plans express grants of fiduciary discretion

---

282. 489 U.S. 101, 115 (1989). *Firestone*'s standard of review analysis was drawn from a comparison to private trust law. *Id.* at 110 ("ERISA abounds with the language and terminology of trust law. ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" (alterations in original) (quoting H.R. REP. NO. 93-533, at 11 (1973))). Reliance on that analogy was the central and perhaps decisive development in ERISA's trust law turn, meaning the judicial privileging of the statute's trust law aspects over its contract law side. After 1989, analytic reference to private trust law was repeatedly invoked in ERISA cases, rose to rhetorical prominence, and became entrenched. The Court's settlor function decisions of the late 1990s, of course, contributed importantly to that entrenchment. *See supra* note 198 and accompanying text.

283. Some commentators recognized that *Firestone*'s relaxation of the standard of review amounts in substance to judicial endorsement of an exculpatory clause, and would seem to be at odds with the statutory prohibition on exculpatory clauses, ERISA § 410(a), 29 U.S.C. § 1110(a). *See* WIEDENBECK, *supra* note 21, at 162 n.37; John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 222 & n.53.

A number of states have acted to prohibit application of a deferential standard of review in insurance claim litigation. *See* Radha A. Pathak, *Discretionary Clause Bans & ERISA Preemption*, 56 S.D. L. REV. 500, 504-06 (2011) (reporting that nearly one-third of the states have adopted such bans). The National Association of Insurance Law Commissioners promulgated the Prohibition on the Use of Discretionary Clauses Model Act in 2002. PROHIBITION ON THE USE OF DISCRETIONARY CLAUSES MODEL ACT (NAT'L ASS'N OF INS. COMMN'RS 2006), http://www.naic.org/store/free/MDL-42.pdf [https://perma.cc/3DE9-HJUY]. Under ERISA's insurance law savings clause, ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), such a ban is effective as applied to an insured plan. *See* Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, 856 F.3d 686, 695 (9th Cir. 2017); Fontaine v. Metro. Life Ins. Co., 800 F.3d 883, 885 (7th Cir. 2015); Standard Ins. Co. v. Morrison, 584 F.3d 837, 849 (9th Cir. 2009); Am. Council of Life Insurers v. Ross, 558 F.3d 600, 607 (6th Cir. 2009). Insured pension plans are rare, and virtually all large employers also self-insure their health care plans. Consequently, the abuse-of-discretion standard of review continues to be overwhelmingly dominant in ERISA civil enforcement actions. *See* Donald T. Bogan, *ERISA: State Regulation of Insured Plans After* Davila, 38 J. MARSHALL L. REV. 693, 739-40 (2005); *see also* Maria O'Brien Hylton, *Post-*Firestone *Skirmishes: The Patient Protection and Affordable Care Act, Discretionary Clauses, and Judicial Review of ERISA Plan Administrator Decisions*, 2 WM. & MARY POL'Y REV. 1 (2010).

to interpret plan terms and determine benefit eligibility.[284] Therefore, despite the holding that de novo review is the default mode of judicial oversight of ERISA benefit claim denials, the abuse-of-discretion standard quickly became overwhelmingly dominant.[285]

1. Loyalty

Conferring broad authority to construe plan terms on a fiduciary, who may be (and typically is) an officer, employee, or agent of the plan sponsor,[286] naturally invites decisions that accommodate the employer's interests. The *Firestone* Court acknowledged as much in dicta, observing, "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'"[287] Under the exclusive benefit rule, the employer's interests are not germane to fiduciary

---

284. Hylton, *supra* note 283, at 2. For additional discussion and examples, see MICHAEL J. CANAN & WILLIAM D. MITCHELL, EMPLOYEE FRINGE AND WELFARE BENEFIT PLANS §§ 16:26-:28 (2015); *id.* app. F, § 7.4(h) (model group health plan); *id.* app. G, § 7.3(f) (model group term life insurance plan); 3 MICHAEL J. CANAN & CHARLES C. SHULMAN, QUALIFIED RETIREMENT PLANS 457, 708 (2015-2016 ed.) (providing model grant of administrative powers under IRS-approved volume submitter defined benefit plan and 401(k) plan, respectively); [Plans and Clauses] Pens. Plan Guide (CCH) ¶ 30,047 (Sept. 10, 2007) (providing in model defined benefit pension plan § 8.5(a) that the pension committee shall have "discretionary authority to construe and interpret the plan, to decide all questions of eligibility," accompanied by an annotation citing *Firestone*); [Plans and Clauses] Pens. Plan Guide (CCH) ¶ 31,133 (Sept. 24, 2007) (corresponding language in model 401(k) profit-sharing plan).

285. How clear a grant of discretionary authority must be to work a relaxation of the scope of review is an issue that still arises occasionally. *See, e.g.*, Stephanie C. v. Blue Cross Blue Shield of Mass. HMO Blue, Inc., 813 F.3d 420, 428 (1st Cir. 2016) (subjecting a claim denial to de novo review because the plan statement that BCBS "decides which health care services and supplies that you receive ... are medically necessary and appropriate for coverage" fails to "*unambiguously* indicate that the claims administrator has discretion to construe the terms of the plan and determine whether benefits are due in particular instances"); Sandy v. Reliance Standard Life Ins. Co., 222 F.3d 1202, 1204 & n.2 (9th Cir. 2000) (refusing to grant discretion on the requirement that a claimant submit "satisfactory proof" but noting the "awkward position" of interpreting identical plan language differently than the Sixth Circuit); Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 251-52 (2d Cir. 1999) (finding the submission of "satisfactory proof" insufficient to relax the standard of review). *But see* Nance v. Sun Life Assurance Co. of Can., 294 F.3d 1263, 1268 (10th Cir. 2002) (finding the requirement of proof "satisfactory to [insurer]" was sufficient to confer discretion).

286. *See supra* note 273 and accompanying text.

287. *Firestone*, 489 U.S. at 115 (alteration in original) (quoting RESTATEMENT (SECOND) OF TRS. § 187 cmt. d (AM. LAW INST. 1959)).

decision-making; taking such extraneous interests into account—consideration of an issue that Congress declared irrelevant—exemplifies abuse of discretion.[288] Nevertheless, today courts apply a deferential standard of judicial review to decisions made by insider fiduciaries in a manner that is virtually insensitive to the pressure of acutely conflicting interests.

Twice within a two-year period the Supreme Court addressed how a fiduciary conflict of interest should figure into judicial review of determinations made under plans conferring broad discretionary authority.[289] While the holdings are superficially consistent, the opinions bespeak conflicting philosophies and shifting alliances. Read in combination they send a message that employer-inflected fiduciary judgments can ordinarily be expected to escape judicial attention.

Metropolitan Life Insurance Co. v. Glenn confirmed that an employer that both funds the plan and has discretionary authority to evaluate benefit claims acts under a conflict of interest that must be taken into account on judicial review of benefit denials.[290] The same conclusion applies to an insurance company that both evaluates and

---

288. As the concept is deployed in private trust law, abuse of discretion connotes the trustee acting "dishonestly, or with an improper even though not dishonest motive, or fail[ing] to use his judgment, or act[ing] beyond the bounds of ... reasonable judgment." RESTATEMENT (SECOND) OF TRS. § 187 cmt. e (AM. LAW INST. 1959); *accord* RESTATEMENT (THIRD) OF TRS. § 87 cmt. c (AM. LAW INST. 2007); *see also* RESTATEMENT (THIRD) OF TRS. § 50 (AM. LAW INST. 2003) (providing that discretionary power to determine benefits due a trust beneficiary reviewed for abuse of discretion); UNIF. TRUST CODE §§ 814, 1008 (UNIF. LAW COMM'N 2000) (addressing discretionary powers and effect of exculpatory terms). A court will intervene if "the trustee in exercising or failing to exercise a power does so ... to further some interest of his own or of a person other than the beneficiary." RESTATEMENT (SECOND) OF TRS. § 187 cmt. g; *see* III SCOTT & FRATCHER, *supra* note 179, § 187.5 (characterizing improper motive as abuse).

Abuse-of-discretion review is particularly well developed in the context of judicial oversight of administrative decisions. It is a fundamental tenet of administrative law that reliance on an irrelevant or improper consideration is an abuse of discretion. *E.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

289. *See* Conkright v. Frommert, 559 U.S. 506 (2010); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

290. 554 U.S. at 112; *see also* ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 13-62 to -73 (3d ed. 2015); WIEDENBECK, *supra* note 21, at 165-68.

pays claims under an insured plan, notwithstanding Met Life's argument that a commercial insurer's reputational interest in product quality shows that market forces provide sufficient countervailing incentives for fair decision making.[291] Turning to how such structural conflicts of interest affect judicial review, Justice Stephen Breyer, writing for six members of the Court, endorsed the *Firestone* dicta, holding that "a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case."[292]

Instructing that a structural conflict must be evaluated as *one* factor, of variable weight, in a holistic abuse-of-discretion assessment, the Court repudiated appellate decisions that had imposed a heightened standard of review (increasing the intensity of judicial scrutiny to de novo review).[293] Moreover, it disavowed special procedural or evidentiary mechanisms (like shifting the burden of proof), which some courts had adopted to expose whether a conflict tainted the decision.[294] Yet three Justices strongly objected to the majority's formulation on the ground that it makes the process of review indeterminate and unpredictable, and does not go far enough

---

291. *See Glenn*, 554 U.S. at 114-15. The reputational argument had met with some success in the courts of appeals. *See* Rud v. Liberty Life Assurance Co., 438 F.3d 772 (7th Cir. 2006); Wright v. R.R. Donnelley & Sons Co. Grp. Benefits Plan, 402 F.3d 67, 75 (1st Cir. 2005) (following the market forces rationale, while recognizing that other circuits are unpersuaded); Mers v. Marriott Int'l Grp. Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1020-21 (7th Cir. 1998) ("We presume that a fiduciary is acting neutrally unless a claimant shows by providing specific evidence of actual bias that there is a significant conflict. The existence of a potential conflict is not enough." (citations omitted)). Those decisions concluded that the amount involved in an individual benefit claim is too small to affect a large employer or insurer, and that the employer has an interest in maintaining a reputation for fair dealing with its employees. *Contra* Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 388 (3d Cir. 2000).

In *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, Judge Easterbrook discounted an insurer-fiduciary's conflict on the ground that group insurance policies are experience-rated, with the employer agreeing to reimburse the insurer for benefit payments or pay higher premiums for future years' coverage, so that the insurer does not ultimately bear the cost of approved claims. 195 F.3d 975, 981 (7th Cir. 1999).

292. *Glenn*, 554 U.S. at 108 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).

293. *See id.* at 115-16.

294. *See id.* at 116-17.

in insulating benefit denials made by conflicted fiduciaries from challenges in court.[295]

The Chief Justice complained that according a conflict some (unspecified) weight in every case in which it is present

> would allow the bare existence of a conflict to enhance the significance of other factors already considered by reviewing courts, even if the conflict is not shown to have played any role in the denial of benefits. The end result is to increase the level of scrutiny in every case in which there is a conflict—that is, in many if not most ERISA cases—thereby undermining the deference owed to plan administrators when the plan vests discretion in them.[296]

Instead, he would "consider the conflict of interest on review only where there is evidence that the benefits denial was motivated or affected by the administrator's conflict."[297] Observing that "[i]t is the actual motivation that matters in reviewing benefits decisions for an abuse of discretion, not the bare presence of the conflict itself," Chief Justice Roberts asserted that "a conflict of interest can support a finding that an administrator abused its discretion only where the evidence demonstrates that the conflict actually motivated or influenced the claims decision."[298] In dissent, Justice Scalia, joined by Justice Thomas, also emphasized this point, and drew the subtly more restrictive inference that "a fiduciary with a conflict does not abuse its discretion unless the conflict *actually* and *improperly motivates* the decision."[299]

295. *See id.* at 119-22 (Roberts, C.J., concurring) (complaining that the majority accords "varying and indeterminate" weight to conflicts and "leaves the law more uncertain, more unpredictable than it found it"); *id.* at 127-30 (Scalia, J., dissenting) (criticizing the majority's "totality-of-the-circumstance (so-called) 'test'" as "nothing but *de novo* review in sheep's clothing").

296. *Id.* at 120 (Roberts, C.J., concurring).

297. *Id.*

298. *Id.* at 123.

299. *Id.* at 128 (Scalia, J., dissenting); *accord id.* at 133 ("A trustee's conflict of interest is relevant (and *only* relevant) for determining whether he abused his discretion by acting with an improper motive. It does not itself prove that he did so, but it is the predicate for an inquiry into motive, and can be part of the circumstantial evidence establishing wrongful motive.").

ERISA's specification of fiduciary duties does indeed focus on motivation. The exclusive benefit rule, after all, provides that the fiduciary—who is authorized to serve despite being an agent or representative of the employer—shall discharge his duties "for the exclusive *purpose* of ... providing benefits to participants and their beneficiaries" and to defray reasonable expenses of plan administration.[300] Because a fiduciary's decision will never directly admit that benefits were denied to save the employer or insurer money, the crux of the dispute between Justice Breyer, Chief Justice Roberts, and Justice Scalia comes down to the weight (if any) to be accorded circumstantial evidence of improper motivation. Alternatively, their differences concern how reviewing courts should handle indications, which on the facts of a particular case may be more or less troubling, that a conflict *might* have influenced the outcome.

The Chief Justice fears that telling the lower courts that they "should consider the mere existence of a conflict in every case, without focusing that consideration in any way, invites the substitution of judicial discretion for the discretion of the plan administrator."[301] Hence he would focus on whether the conflict "actually affected the decision."[302] Yet the examples he offers of evidence indicating improper motivation or that the conflict actually influenced the decision involve hypothetical or extraordinary situations.[303] Evidence of this sort—virtually a smoking gun standard—would be encountered only in exceedingly rare cases. Justices Scalia and Thomas take an even more restrictive view. They would presume that a conflicted fiduciary "suppressed his selfish interest (as the settlor anticipated) in compliance with his duties of good faith and loyalty. Only such a presumption can vindicate the trust principles and ERISA provisions that permit settlors to appoint fiduciaries with a conflict in the first place."[304]

300. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (2012) (emphasis added).

301. *Glenn*, 554 U.S. at 121 (Roberts, C.J., concurring).

302. *Id.* at 123.

303. *See id.* (mentioning incentives or bonuses for claim savings, a pattern of arbitrary benefits denials, bad faith contract misinterpretations, and other unscrupulous tactics). The example of a pattern of bad faith contract interpretations and unscrupulous tactics is real but exceptional; it refers to the Unum/Provident scandal. *See generally* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315 (2007).

304. *Glenn*, 554 U.S. at 133-34 (Scalia, J., dissenting) (emphasis omitted) (citations

In contrast, the *Glenn* majority's approach would allow district courts leeway to set aside a benefit denial made by a conflicted decision maker if the reviewing court concludes that the conflict of interest *might* have infected the decision. Justice Breyer instructs courts to take "account of several different, often case-specific, factors, reaching a result by weighing all together."[305]

> In such instances, any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary depending upon the tiebreaking factor's inherent or case-specific importance. The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.[306]

This passage captures the essential difference between unusual cases that present persuasive evidence that a conflict "*actually affected* the decision"[307] and circumstances that "*suggest a higher likelihood* that [conflict] affected the benefits decision."[308]

The *Glenn* majority's adoption of the more wide-ranging, context-sensitive, and judicial-discretion-dependent standard permits more

---

omitted). Other parts of Justice Scalia's dissenting opinion suggest that this presumption would be virtually irrebuttable (a rule of law). After positing that "[a] trustee's conflict of interest is relevant (and *only* relevant) for determining whether he abused his discretion by acting with an improper motive," the dissent concedes that reaching an unreasonable decision could be circumstantial evidence tending to show wrongful motive. *Id.* at 133. Yet under trust law an unreasonable decision alone constitutes an abuse of discretion. RESTATEMENT (SECOND) OF TRS. § 187 cmt. e (AM. LAW INST. 1959); *Glenn*, 554 U.S. at 132 ("[A] trustee's conflict of interest is irrelevant to determining the substantive reasonableness of his decision."). Therefore, the conflict arguably plays no independent role on judicial review.

305. *Glenn*, 554 U.S. at 117 (majority opinion).

306. *Id.* (citation omitted).

307. *Id.* at 123 (Roberts, C.J., concurring) (emphasis added).

308. *Id.* at 117 (majority opinion) (emphasis added).

frequent findings that insider fiduciaries abused discretion in denying benefits. That prospect, in turn, can be expected to induce more ERISA litigation challenging benefit denials, compared to the meager chance of success that disappointed claimants would face under the alternative approaches. And the incentive to litigate may be further enhanced by the disposition in *Glenn*. The Court affirmed the judgment of the Court of Appeals, which had ordered reinstatement of Glenn's long-term disability benefits, retroactive to the date on which they had been terminated.[309] Upon finding abuse, the Sixth Circuit rendered decision in Glenn's favor; it did not return the case to the plan fiduciary with instructions to reconsider the matter, this time exercising discretion properly.[310]

Just two years later, such a remand to the fiduciary brought the standard of review question back to the Supreme Court. *Conkright v. Frommert* addressed whether an administrator whose plan interpretation has been set aside on judicial review as an abuse of discretion is entitled to the benefit of the doubt (essentially, another application of the deferential abuse-of-discretion standard) when her revised interpretation is challenged on judicial review.[311] This issue triggered a realignment of positions, with Chief Justice Roberts writing a fiduciary-friendly opinion for the Court, and Justice Breyer vehemently dissenting.[312]

The plan interpretation issue in *Frommert* concerned the effect of lump sum distributions received by Xerox employees upon separation from service in situations in which the employee later returned to work for the company.[313] Under Xerox's defined benefit plan, such rehired employees were entitled to a pension based upon all of their years of service, subject to a setoff to reflect the earlier cash out, but the plan failed to specify the actuarial computation that would be used to determine the setoff.[314] Nor were participants notified of the methodology the plan would utilize in such cases, as required by

309. Glenn v. Metro. Life Ins. Co., 461 F.3d 660, 675 (6th Cir. 2006), *aff'd*, 554 U.S. 105 (2008).

310. *Id.*

311. *See* 559 U.S. 506, 509 (2010).

312. *See id.* at 509, 522.

313. *See id.* at 510.

314. *See id.* at 510-11; *see also* I.R.C. § 401(a)(25) (2012) (requiring that actuarial assumptions used by a qualified defined benefit plan be "specified in the plan in a way which precludes employer discretion").

ERISA's disclosure rules.[315] The plan granted authority to construe its terms to the administrators, who were Xerox executives.[316] In deciding how to plug this gap in the plan, the administrators therefore acted under a structural conflict of interest.[317] The plan administrators' initial response to the problem was to use the "phantom account" method—they calculated the hypothetical growth of the amount that had been distributed on the assumption that it had remained in Xerox's investment funds, and reduced respondent's present benefits accordingly.[318] The district court employed a (deferential) limited scope of review, as required by *Glenn*, and granted summary judgment for the plan.[319] The Second Circuit nonetheless set aside the phantom account approach as an unreasonable interpretation.[320] On remand the administrators instead accounted for the time value of money by using a fixed interest rate determined as of the date of the lump sum distribution.[321] When the parties returned to court for a second round of judicial review, the district court did not accord the administrators' revised interpretation a deferential scope of review.[322] Instead, the district judge substituted his judgment, ordering offset by only the nominal dollar amount of the earlier distribution, with no allowance for the growth in that amount over time.[323] On appeal, the Second Circuit held that the district court was not required to use a deferential standard of review—that it was entitled to reject a reasonable interpretation of the plan and impose its own reading—when the administrators' earlier decision had been set aside as an abuse of discretion.[324]

Calling the Second Circuit's decision "an exception to *Firestone* deference,"[325] the Court held that "a single honest mistake in plan

---

315. *See Frommert*, 559 U.S. at 527 (Breyer, J., dissenting); *see also* ERISA § 204(g)-(h), 29 U.S.C. § 1054(g)-(h) (2012) (providing accrued benefit anti-reduction rule and required advance notice of accrual rate reduction).

316. *Frommert*, 559 U.S. at 512 (majority opinion).

317. *See id.*

318. *Id.* at 510.

319. *Id.*

320. *Id.*

321. *Id.* at 510-11.

322. *Id.* at 511.

323. *Id.*

324. *Id.*

325. *Id.* at 512. Technically, the *Firestone* Court's observations on the standard of review applicable to decisions made by fiduciaries cloaked with discretionary authority is dicta, as

interpretation" does not justify "stripping the administrator of ... deference for subsequent related interpretations of the plan."[326] In drawing that conclusion, the majority observed that authorities on private trust law provide that "a court will strip a trustee of his discretion when there is reason to believe that he will not exercise that discretion fairly—for example, upon a showing that the trustee has already acted in bad faith."[327] In this case, however, "the lower courts made no finding that the Plan Administrator had acted in bad faith or would not fairly exercise his discretion to interpret the terms of the Plan."[328] The absence of a finding of improper motive supports the "single honest mistake" refrain. It also implicates the Chief Justice's position in *Glenn*, that "a conflict of interest can support a finding that an administrator abused its discretion only where the evidence demonstrates that the conflict actually motivated or influenced the claims decision."[329] That resonance, combined with the shift between *Glenn* and *Frommert* in the composition of the Court's majority and dissenting coalitions,[330] suggests that *Frommert* implicitly endorses Chief Justice Roberts's restrictive view of the circumstances that will support a ruling that an insider

---

Justice Scalia emphasized in his *Glenn* dissent. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 128 (2008) (Scalia, J., dissenting) (calling *Firestone* comments on deference "sheer dictum" and stating that the majority "takes that throwaway dictum literally and builds a castle upon it").

326. *Frommert*, 559 U.S. at 509.

327. *Id.* at 514.

328. *Id.* at 515. Following remand the Second Circuit applied "*Firestone* deference" (the abuse of discretion standard of review). *See* Frommert v. Conkright, 738 F.3d 522, 529 (2d Cir. 2013). Although there was no finding of bad faith, it held the administrator's proposed offset to be an unreasonable interpretation of the plan (hence an abuse of discretion) because it would have left the rehired workers worse off than newly hired Xerox employees. *See id.* at 529-30. Thereafter, instead of having the administrator issue yet another interpretation, the district court ordered that the plaintiffs "receive whatever benefits they are due for their second period of employment, the same as if they were new hires. Their prior benefits will neither diminish their later benefits, nor will their prior period of service be used to grant them a windfall." Frommert v. Becker, 153 F. Supp. 3d 599, 606 (W.D.N.Y. 2016).

329. *Glenn*, 554 U.S. at 123 (Roberts, C.J., concurring).

330. Three members of the *Frommert* majority (Chief Justice Roberts and Justices Scalia and Thomas) had objected to *Glenn*'s combination-of-factors approach to review of conflicted decision-making, while the dissenters in *Frommert* (Justices Breyer, Stevens and Ginsburg) were all in the *Glenn* majority. Justices Alito and Kennedy seem to have changed their views, as Alito voted with the majority in each case, while Kennedy, who objected only to the failure to remand *Glenn*, joined the Court's opinion in *Frommert*. Justice Souter, a member of the *Glenn* majority, was replaced by Justice Sotomayor, who did not participate in *Frommert* because she had heard a related case while a judge on the Second Circuit.

fiduciary's conflict of interest led to an abuse of discretion. Remember that *Frommert* involved a structural conflict of interest, in that the plan administrator's choice of method for calculating the offset for prior distributions would directly impact Xerox's funding obligation and pension costs.[331] Those circumstances raise the question, was *Glenn* silently overruled by *Frommert*?[332]

Frommert, of course, did not directly involve the issue that divided the Court in *Glenn*: how a structural conflict of interest should be taken into account on judicial review under the abuse of discretion standard. Writing for the Court in *Frommert*, the Chief Justice cites *Glenn* several times, and indeed the two decisions are facially consistent: "If, as we held in *Glenn*, a systemic conflict of interest does not strip a plan administrator of deference, it is difficult to see why a single honest mistake would require a different result."[333] Yet in *Frommert*, Chief Justice Roberts never mentions, much less confirms or endorses, *Glenn*'s wide-ranging totality-of-the-circumstances approach to determining whether a conflict of interest had pernicious effects. When it comes to operationalizing abuse-of-discretion review of decisions by an insider fiduciary, *Frommert* emphasizes substantive reasonableness—the focus is on assuring prudence, not questioning loyalty.[334] Tacitly, *Frommert* seems to imply that monitoring for employer-regarding decisions should be limited to a cursory scan for glaring signs of favoritism (Chief Justice Roberts's position in *Glenn*), rather than a hard look review

331. *See Frommert*, 559 U.S. at 510.

332. The *Frommert* majority opinion avoids forthrightly acknowledging as much. In light of the brief interval between the decisions, perhaps that omission was deliberate.

333. *Frommert*, 559 U.S. at 513 (citation omitted).

334. The *Frommert* majority insisted that an unreasonable decision by a fiduciary acting under a systemic conflict of interest should simply be treated as an "honest mistake," rather than as supporting an inference that an improper motive was at work. *See id.* (rejecting the view that the district court is entitled to reject the administrator's reasonable interpretation of the plan "solely because" a previous interpretation had been overturned as unreasonable); *id.* at 515 (emphasizing that a district court should not act as a substitute trustee if it has "made no finding that the Plan Administrator had acted in bad faith or would not fairly exercise his discretion to interpret the terms of the Plan"); *id.* at 521 (concluding that "plan administrator's interpretation of the plan 'will not be disturbed if reasonable'" (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989))). This position echoes Justice Scalia's dissent in *Glenn*, which asserted that a "reasonable decision is reasonable whether or not the person who makes it has a conflict" and that "[a] trustee's conflict of interest is relevant (and *only* relevant) for determining whether he abused his discretion by acting with an improper motive." *Glenn*, 554 U.S. at 132-33 (Scalia, J., dissenting).

for telltale indicia of improper influence (as Justice Breyer would have it in *Glenn*).

Several factors lend support to the inference that *Frommert* adopts such a revisionist reading of *Glenn*. Both the *Frommert* majority and dissent rely on ERISA policies, but the majority prioritizes cost containment.[335] Efficient, predictable, and uniform resolution of benefit disputes are touted as advantages of preserving an insider fiduciary's decision-making authority, leading the majority to conclude that internal administrative proceedings are preferable to costly and unpredictable litigation.[336] In contrast, Justice Breyer's dissent in *Frommert* emphasizes that "ERISA's core purpose of 'promot[ing] the interests of employees and their beneficiaries in employee benefit plans'" would be better served by granting reviewing courts wider latitude to intervene once a conflicted fiduciary has abused discretion.[337] This difference in priorities is likewise manifest in the *Glenn* opinions. In both cases the Chief Justice champions narrowly circumscribed judicial oversight to improve predictability and contain costs, while Justice Breyer's concern to protect the interests of employees calls for more skepticism and a larger judicial role in reviewing benefit denials made by conflicted fiduciaries. This common theme reveals that in a short span of time a majority of the Court's members came to prefer a much more hands-off approach to judicial review of conflicted decision-making. One cannot know what induced the turn around, but it may be relevant that in the immediate aftermath of *Glenn* some lower courts granted workers' requests for discovery of evidence outside the decision file compiled by the fiduciary (the usual "record" on review), in an effort to uncover improper inputs or influences, or to determine whether adverse inferences should be drawn from procedural irregularities.[338] Perhaps the prospect of a greatly expanded commitment of judicial resources to ERISA cases

---

335. The cost containment theme is part of a broader trend in ERISA case law. *See supra* note 205 and accompanying text.

336. *See Frommert*, 559 U.S. at 517-21.

337. *See id.* at 535-36 (Breyer, J., dissenting) (alteration in original) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983)).

338. ABA SECTION ON LABOR AND EMPLOYMENT LAW, *supra* note 290, at 201-03, 206-07 (2015 Cumulative Supp.).

curbed the enthusiasm of some Justices for the search for subtle signs of disloyalty.[339]

Whatever the reason for the change, the operation of improper influences will rarely be seen if the reviewing court is not commissioned to look for it. When juxtaposed with *Glenn*, *Frommert* seems to say just that—do not go searching. As a practical matter, that constraint allows insider fiduciaries to render plan interpretations and claims decisions that compromise the employees' interests with the needs of their employer, so long as they refrain from admitting as much. This implicit exculpation of employer-inflected decision-making by insider fiduciaries shows that courts have covertly degraded the intensity of fiduciary obligations. Should we dismiss the obligation to act "solely in the interest of the participants and beneficiaries"[340] as so much hortatory nonsense? Maybe.[341] At minimum, the Court's standard of review decisions evidence a relaxation of the stringency of ERISA's duty of loyalty. The new "property" in employee benefits is weak property, both because it is narrowly defined and loosely enforced.[342]

2. Care

Frommert appears to tacitly concede some space for an insider fiduciary to make allowances for the employer's interest. Does naming a company representative as fiduciary have repercussions

339. This pull back is arguably consistent with general trends in the Roberts Court's decisions, including limits on federal court litigation (such as enhanced pleading standards and restrictions on class actions), and a pro-business philosophy.

340. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (2012).

341. Contrast the implication of *Frommert* with Judge Friendly's famous declaration that decisions of an insider fiduciary must be "made with an eye single to the interests of the participants and beneficiaries." Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982). As for situations of acute conflict, "perhaps ... resignation [is] the only proper course." *Id.* at 276.

342. *See supra* table and text accompanying note 113. In contrast to the implicit exculpation seemingly endorsed by *Frommert*, in *NLRB v. Amax Coal Co.*, the Court disavowed such a reading of the Taft-Hartley Act. 453 U.S. 322 (1981). Although multiemployer pension or welfare plans are administered by "an equal balance between trustees appointed by the union and those appointed by the employer," and despite the statute's designation of the trustees as representatives of the employer or the employees, "nothing in the language of § 302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed." *Id.* at 330.

beyond ERISA's duty of loyalty? Does implicit exculpation extend as well to ERISA's duty of care?

ERISA experts might be startled by that prospect, because courts presented with breach of duty claims against conflicted fiduciaries have commonly shrunk from finding a violation of the exclusive *purpose* standard, thereby sidestepping its unmistakable suggestion of bad faith. Instead, courts have fallen back on review for "procedural prudence."[343] If careful examination of the course of decision-making (such as the extent of fact gathering, consultation with expert advisors, discussion) reveals a rushed, truncated, or cavalier process, then the decision can be set aside as imprudent by reference to objective evidence, without impugning anyone's integrity. In this way, review for prudence has evolved into an important safeguard against egregious violations of the duty or loyalty: incompetence is taken as a proxy for corruption.

Although it may come as a surprise, indications are that the presence of an insider fiduciary in some circumstances indirectly modulates ERISA's duty of care. Ironically, that inference emerges from the case in which the Supreme Court steadfastly—and unanimously—refused to formally relax the prudence standard.[344]

After rejecting the pleas of ESOP fiduciaries for a zone of immunity from prudence scrutiny of employer stock investments, the *Dudenhoeffer* Court expressed sympathy for their plight, and proceeded to lay out an approach to evaluating fiduciary breach claims that might in practice cut them some slack.[345] The opinion observed that "ESOP fiduciaries often are company insiders" and that breach claims frequently allege imprudence "in failing to act on inside information they have about the value of the employer's stock."[346] That concern about conflict between ERISA fiduciary law and the prohibition of insider trading "is a legitimate one."[347] The Court also credited the concern that

343. *See, e.g.*, *Bierwirth*, 680 F.2d at 271-76 (describing the trustee's procedural failings); *see also* WIEDENBECK, *supra* note 21, at 129-30.

344. *See* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2463 (2014).

345. *See id.* at 2468-72.

346. *Id.* at 2469.

347. *Id.*

> in many cases an ESOP fiduciary who fears that continuing to invest in company stock may be imprudent finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of § 1104(a)(1)(B), but if he stops investing and the stock goes up he may be sued for disobeying the plan documents in violation of § 1104(a)(1)(D).[348]

In particular, the Court was persuaded that careful balancing between Congress's goals of encouraging ESOPs and protecting employees' benefits calls for "careful, context-sensitive scrutiny of a complaint's allegations" to "weed[ ] out meritless claims."[349]

Sketching out that scrutiny, the Court pointed to the motion to dismiss for failure to state a claim, as reinforced by *Iqbal* and *Twombly*.[350]

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.[351]

Hence, fiduciaries possessed of non-public information revealing employer stock investments to be imprudent may get a securities law pass.

One might be excused for thinking that conflict with the securities laws and the more-harm-than-good excuse (a sort of global prudence assessment) are in the nature of affirmative defenses. Yet as a matter of initial screening, *Dudenhoeffer* casts them upon the plaintiff. And one might suspect that, as a pleading standard in the hands of district judges, the sufficiency of allegations on these points is likely to become more demanding over time. A per curiam opinion issued in the aftermath of *Dudenhoeffer* will amplify that tendency. In *Amgen Inc. v. Harris*, the Court reversed a Ninth

348. *Id.* at 2470.

349. *Id.* at 2470-71.

350. *Id.* at 2471 (first citing Ashcroft v. Iqbal, 556 U.S. 662, 677-80 (2009); and then citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-63 (2007)).

351. *Id.* at 2472.

Circuit decision on the ground that it "failed to properly evaluate the complaint."[352] The Court insisted that the stockholders (in this case former employees) should have included "facts and allegations" relevant to the *Fifth Third* standard in their complaint.[353] Indeed, in light of the Court's solicitude for the dangerous waters fiduciaries must navigate, one might speculate that some sort of qualified immunity akin to the business judgment rule may yet make an appearance in ERISA fiduciary law. At minimum, *Dudenhoeffer* seems to signal receptiveness to some relaxation of prudence oversight for insider fiduciaries of public company plans holding employer stock.[354]

VI. FORTIFYING EMPLOYEE BENEFIT PROPERTY

This study's approach is descriptive. It provides a critical analysis of doctrinal evolution, but a normative stance has been resolutely avoided. The emergence of weak property from the confluence of the plan sponsor's far-reaching amendment authority, employer-controlled plan interpretation, and implicit exculpation, may be good or bad from a public policy perspective. That determination turns on whether current law (that is, weak property) reaches a socially optimal balance between the interests of sponsoring employers and employee plan participants.[355] That is of course an empirical question, and possibly an unanswerable one.

Nevertheless, it is fair to conclude that the federal courts have gradually remodeled ERISA's fiduciary regime into a pliable employer-friendly system that would startle ERISA's drafters.[356] And many benefit curtailments that have been approved under the settlor function doctrine, or with the aid of employer-controlled

352. 136 S. Ct. 758, 759 (2016) (per curiam).

353. *Id.* at 760.

354. One commentator summarized a review of post-*Dudenhoeffer* lower court decisions with the observation that "one wonders whether the standard is insurmountable." Joe Clark, *Courts Close Their Doors to ERISA Stock-Drop Litigation*, 44 Pens. & Ben. Rep. (BNA) 448 (Apr. 4, 2017); *accord* Jacklyn Wille, *Cliffs Natural Resources Beats ERISA Challenge to Stock Drop*, 85 U.S.L.W. No. 38 (Apr. 13, 2017) (quoting Samuel Bonderoff, who claimed that lower courts have taken language from *Dudenhoeffer* and *Amgen* and "extrapolated from it a pleading standard so biased against plaintiffs that it makes [the prior presumption of prudence approach] look like a day at the beach").

355. *See supra* notes 32-33 and accompanying text.

356. *See supra* notes 13-22 and accompanying text.

interpretation or implicit exculpation, surely took workers by surprise, imposing hardships that many see as unfair. If enhanced safeguards for workers' pensions or welfare benefits are desired, how could that objective be accomplished?

Legislative amendment could rebalance interests in principle. In practice, however, congressional action tightening fiduciary obligations is surely a nonstarter, and not simply due to the current political alignment. ERISA's fiduciary obligations and civil enforcement mechanism have proven extremely stable over four decades, even as other parts of the statute were repeatedly amended. Employer-friendly fiduciary rules affect only one workplace at a time; impacted workers may be outraged, but they are few. ERISA's fiduciary regime is technical. It has low visibility. Hence it has correspondingly low political salience. Unlike many frequent and sweeping ERISA amendments, altering the details of fiduciary oversight would not emerge as a crisis- or revenue-driven legislative imperative.[357]

Judicial relief offers some promise, but only at the margins. Outright reversal of the trend of decisions cannot be realistically expected. Even a wholesale change in the ideological composition of the Supreme Court would not at this point overturn its landmark endorsements of a limited scope of review for benefit denials and plan interpretations, from which implicit exculpation proceeds. Yet as Professors Muir and Stein advocated, some of the more troubling applications of the settlor function doctrine might be avoided by emphasizing the tension between preserving employer autonomy, which supports unchecked settlor action, and competing policies reflected in ERISA's substantive protections.[358]

357. For example, ERISA has been repeatedly amended to prevent abuse of the termination insurance system for defined benefit pensions, and to address the precarious financial condition of the insurer, the Pension Benefit Guaranty Corporation. *See, e.g.*, Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 101-506, 120 Stat. 780, 784-948; Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 9302-9346, 101 Stat. 1330, 1330-333 to 1330-374. For defined contribution plans, the vulnerabilities and excesses revealed in the wake of Enron's collapse fueled many changes. *See* Pension Protection Act §§ 507, 621, 901. Amendments to control and better target the tax subsidy for qualified retirement savings have been another recurrent theme. *See, e.g.*, STAFF OF THE JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 624-851 (Comm. Print 1987).

358. *See* Muir & Stein, *supra* note 44, at 541-43.

Executive action seems to offer the most practicable path to change under existing conditions. Much might be accomplished by rulemaking. The Labor Department's longstanding proclivity to proceed by litigation—in particular, intervening in private civil enforcement suits by filing amicus briefs in the courts of appeals[359]—is slow, uncertain, and dependent on the priorities of private parties. The Labor Department recently engaged in an eight-year-long battle with the financial services industry to promulgate a regulation expanding the definition of fiduciary.[360] At first blush that experience counsels against optimism over rulemaking's efficacy in this context.

The fiduciary conflict-of-interest rule is a legislative regulation that was produced through two rounds of notice and comment and was informed by extensive industry input. Despite intense industry opposition, the rule was finalized and has largely taken effect, although efforts aimed at a legislative override continue.[361] The latter point is revealing. As the product of public rulemaking procedures, the rule is subject to a limited scope of judicial review and (unless found to be arbitrary and capricious[362]) has the force of legislation. The rule is binding on the courts. An alternative to this sometimes lengthy and resource-intensive rulemaking process might serve almost as well. The Labor Department might simply issue interpretive rules, which are exempt from required notice and comment procedures.[363] Interpretive rules, of course, are not binding on the courts.[364] Yet they are often persuasive, the more so if they

359. *See Amicus Briefs Under ERISA*, U.S. DEP'T LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/amicus-briefs [https://perma.cc/YSC4-F82V].

360. *See supra* note 25.

361. *See* Kristen Ricaurte Knebel, *Another House Bill Targets Fiduciary Rule*, Pens. & Ben. Daily (BNA) No. 132 (July 12, 2017); *see also supra* note 25.

362. The fiduciary conflict-of-interest rule survived judicial review at the district court level. *See* Chamber of Commerce v. Hugler, 231 F. Supp. 3d 152, 180, 192 (N.D. Tex. 2017), *appeal docketed sub nom.* Chamber of Commerce v. Dep't of Labor, No. 17-10238 (5th Cir. Mar. 1, 2017).

363. Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (2012). On the difficulty of defining an interpretive rule and distinguishing it from a legislative rule that is invalid because it is issued without required public input, see Ronald M. Levin, *Rulemaking and the Guidance Exemption* (Wash. Univ. in St. Louis Legal Studies Research Paper Series, Paper No. 17-04-05, 2017), https://ssrn.com/abstract=2958267 [https://perma.cc/TDE5-RVMD].

364. Chrysler Corp. v. Brown, 441 U.S. 281, 301-02, 302 n.31, 312-16 (1979); *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

are accompanied by a complete and well-reasoned explanation of the agency's reading of the statute. Interpretations that bolster fiduciary protections would promptly be cited by benefit claimants as authority in ERISA cases nationwide. As such, the Labor Department's announcement of a coherent uniform interpretation would give courts handling ERISA civil enforcement litigation a strong nudge toward developing federal fiduciary law in the direction charted by the rule. This nudge strategy would induce an army of plaintiffs' lawyers to make better-informed and doctrinally consistent arguments before federal district courts nationwide. From the Labor Department's perspective, such interpretive rules would function like a uniform amicus brief filed in all cases that present the relevant issue, at the district court level as well as in the courts of appeals.

What would new regulations—legislative or interpretive—designed to fortify employee benefit property look like? Each of the major weaknesses addressed in this Article appears amenable to strengthening with a well-crafted rule. First, the settlor function doctrine could be contained by a rule stating that certain acts—particularly investment selection, or in the case of participant-directed defined contribution plans, the selection of the investment menu—are inherent (or "core") fiduciary functions.[365] Consequently, plan terms that mandate specified investments, although formally effected by adoption or amendment of the plan instrument, are the product of fiduciary action (asset management) and would not be immunized as plan design decisions.[366] This would address the so-

365. *See supra* note 100; *see also* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465-66 (4th Cir. 1996) (holding that appointing fiduciary is a fiduciary act even if accomplished by plan amendment); Muir & Stein, *supra* note 44, at 540-41 (suggesting that a plan design decision might be logically classified as a "fiduciary act if it required a plan official to act in a way that would be impermissible if the plan official had merely been given broad discretionary authority").

366. *Cf.* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014) (finding that obligation to follow plan instructions consistent with ERISA "makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary" (citing ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (2012))). The Court did not stop to explain why a person subject to such a mandatory investment instruction fits within the fiduciary definition. As explained earlier, at a deeper level *Dudenhoeffer* offers indirect implicit authority for the proposition that investment choice is an inherent fiduciary function. *See supra* text accompanying notes 266-68.

called "hard-wiring" problem.[367] In addition, such a rule might provide that any action or determination that is not accomplished by the adoption, amendment, or termination of a benefit plan is per se *not* a settlor function. This component of the rule would repudiate what Muir and Stein labeled the "business decision strand" of the settlor function doctrine.[368] In combination these two elements would declare the Labor Department's view that creation or alteration of plan terms is necessary but not sufficient to bring an act within the ambit of the settlor function doctrine.

With respect to plan interpretation, a new regulation could authoritatively announce the Labor Department's position that an employee benefit plan confers contractual rights, and even when those rights are hedged with numerous important contingencies (as most health plans are), benefits are not a gift. Consequently, the plan sponsor is not a donor and terms of the plan cannot be solely interpreted to carry out the intent of the sponsor. Although the employer generally maintains ongoing control over plan terms under the settlor function doctrine, at any given point in time the extant provisions of the plan should be interpreted with a view to the reasonable understanding of the language, not the subjective purposes of the sponsoring employer.[369] For plans that are the product of collective bargaining, a regulation on plan interpretation might undertake to better elucidate the "ordinary principles of contract law" than did the Court in *M & G Polymers*.[370] In particular, the rule might emphasize that the factors considered in *M & G Polymers* were selective and case-specific, and should not be understood as laying out a comprehensive set of potentially relevant contract interpretation precepts. It might also disavow a general rule that silence on the duration of retiree benefits necessarily rules out a life-long commitment.[371]

Turning from the range of application of ERISA's fiduciary regime to the intensity of fiduciary oversight, rulemaking (again, legislative or interpretive) could potentially rein in implicit exculpation. The Labor Department could issue a regulation endorsing the majority

367. *See supra* note 262 and accompanying text.
368. *See supra* text accompanying notes 96-101.
369. *See supra* Part IV.A.
370. *See* M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 936-37 (2015).
371. *See supra* Part IV.B.

analysis in *Metropolitan Life Insurance Co. v. Glenn* that a fiduciary conflict of interest is a factor that can in some circumstances show an adverse benefit determination to be an abuse of discretion.[372] Such a rule could expressly provide that, while the mere presence of a conflict does not invalidate the result, if consideration of all the facts surrounding the decision reveals a significant risk that the conflict *might* have tainted the outcome, then the determination involves an abuse of discretion.[373] In issuing such a rule, the Labor Department would emphasize that: (1) *Conkright v. Frommert*[374] did not overturn *Glenn*; and (2) ERISA's "exclusive purpose" standard demands that the right to an unbiased decision be broadly enforced. That is, *Glenn* teaches that the claimant should prevail in cases of causal uncertainty, not just in unusual situations presenting strong evidence that a conflict actually infected the decision.

CONCLUSION

ERISA fiduciary law, which Congress left largely to informed elaboration by the federal courts, has been dramatically transformed by a series of uncoordinated low-visibility judicial decisions on multiple fronts. These apparently unconnected case law developments, when gathered together to expose and compare their unstated implications, reveal a startling pattern of mutually reinforcing restrictions on ERISA's protection of pension and welfare benefits. The least dangerous branch[375] has defanged—some would say deranged—ERISA's fiduciary regime.

This Article has catalogued, integrated, and systematized doctrinal developments in ERISA fiduciary law. Several important conclusions emerge from the analysis. Many of the pathologies of the settlor function doctrine, so ably documented by Professors Muir and Stein, are shown to be attributable to ERISA's minimal limits on the plan sponsor's ongoing amendment authority, and particularly

372. *See* 554 U.S. 105, 115-17 (2008).

373. *See supra* text accompanying notes 290-310.

374. 559 U.S. 506 (2010).

375. *See* THE FEDERALIST NO. 78, at 464, 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[F]irmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of [unjust and partial laws]" that injure "the private rights of particular classes of citizens").

the accrued benefit anti-reduction rule. Muir and Stein demonstrated how the settlor function doctrine curtails the range of application of ERISA's fiduciary regime, but this study makes the case that both the scope and the intensity of fiduciary oversight are subject to interpretation or judicial manipulation. Juxtaposition and careful comparison of the Supreme Court's opinions applying the abuse-of-discretion standard of review to plan interpretations issued by fiduciaries acting under a conflict of interest demonstrate that the appointment of a company insider as fiduciary works a practical relaxation of the exclusive benefit rule (ERISA's duty of loyalty), and therefore amounts to a de facto or implicit exculpatory provision.[376] That implicit exculpation reduces the intensity of judicial review of employer-inflected decisions (benefit claim denials and employer-friendly plan interpretations). Hence, the courts have reined in both the breadth of application (via the settlor-function doctrine) and the stringency of ERISA fiduciary law.

Interestingly, the implicit exculpation phenomenon can also be understood as a sort of backhanded vindication of the famous proposal (or prediction) made by Professors Fischel and Langbein: in practice, ERISA's fundamental contradiction, the exclusive benefit rule, is actually modulated to take into account the employer's interests in a benefit program. Unfortunately, however, the process is not transparent. The courts accept employer-regarding determinations under the rubrics of limited review and deference, rather than forthrightly acknowledging the interest balancing that seems to be going on behind the scenes.

In the common case of an employer-instituted plan that is not the product of bargaining with workers, the settlor function doctrine cedes unilateral control over a plan's terms to the employer. That control is expanded and amplified by the judicial penchant to view the employer as a donor. So viewed, the *author* of the conditional wealth transfer becomes the only party whose objectives matter in the *interpretation* of plan terms, because the courts' mission is to carry out the employer-cum-donor's intent. In combination, the settlor function doctrine, employer interpretive dominance, and implicit exculpation have slowly transformed ERISA fiduciary law,

376. *See supra* Part V.B.1.

revealing a worker's "property" in employee benefits to be quite fragile and weak.

This evolution makes it hard to avoid the conclusion that the federal courts have worked a silent revolution in ERISA's fiduciary regime. The unnoticed case law coup has hollowed out Congress's vaunted protective policy, and largely remade ERISA in the image of private trust law. For employer-instituted plans, ERISA fiduciary law has become a default system of legal relations that can be molded to serve the will of one party, the employer, whose objectives are respected as proxy for the common good.[377]

This assessment may seem unduly harsh, even paranoid. Yet the erosion of ERISA fiduciary law chronicled here has been accompanied by curtailment of ERISA's contract dimension.[378] Those simultaneous retreats lend credence to labor's lament. Arguably, workers' interests in pension and welfare benefit plans would be best served by development of a robust understanding of the

377. *Cf.* Peter J. Wiedenbeck, *Missouri's Repeal of the Claflin Doctrine—New View of the Policy Against Perpetuities?*, 50 MO. L. REV. 805, 831-33 (1985) (suggesting that a settlor's dead-hand control over the dispositive terms of a private trust may be tolerated, not to enhance incentives for productive members of society to accumulate property, but as an affordable surrogate for promoting the welfare of living beneficiaries, with whose needs and capacities the settlor is presumed to have been personally acquainted).

378. This Article tells only one part of the story of how ERISA lost its way—or was led astray. ERISA, in its origin, blended two legal personalities, trust and contract. While the apparently revolutionary trust law aspect of ERISA was being domesticated, it was also elevated to rhetorical prominence. Simultaneously, the contract component of employee benefit plans underwent transformation by the federal courts. ERISA's trust law turn was accompanied by a corresponding de-emphasis and distortion of the contract dimension. Over time, the definition of the benefit commitment shifted: instead of enforcing the deal as workers are given to understand it, courts now privilege as contract the employer-controlled formal plan document.

Just as it initiated ERISA's trust law turn, *supra* note 282 and accompanying text, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), was the turning point in the erosion of the contract component of benefit plans. *Firestone* grounded the scope of review of plan interpretations on a "nonsense reading" of trust law rather than on well-established and less-manipulable contract principles. *See* Langbein, *supra* note 283, at 208-09. The decisive step was taken by *CIGNA Corp. v. Amara*, 563 U.S. 421, 436-38 (2011), which refused to treat the summary plan description—a communication mandated by Congress to facilitate workers' career and financial planning by providing them with accessible, understandable, and actionable information about the major features of the benefit program—as setting the core terms of the deal. Instead, the Court unanimously announced that "the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but ... their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B)." *Id.* at 438.

employer's promissory obligation.[379] Strong contract might be preferable to weak property. As matters now stand, however, joint degradation is the order of the day: ERISA defines and defends workers' interests in pension and welfare benefits through a combination of weak property and weak contract.

379. A framework that would accord priority to promises made in the SPD, allow the plan document to control on less salient technical matters, and obligate workers to take reasonable steps to inform themselves, is set out in some detail in WIEDENBECK, *supra* note 21, at 65-93, 107-08. That approach—which was designed to encourage optimal disclosure based on careful consideration of the materiality of information to plan participants—would prudently balance ERISA's competing policies. *Cigna Corp*. forecloses direct prioritization of the SPD. *See Cigna Corp.*, 563 U.S. at 438. Nevertheless, optimal disclosure to promote economic efficiency (improved worker career and financial planning) might still be attainable by other means. Peter J. Wiedenbeck, *Refining Mandatory Disclosure: Statement Presented to the ERISA Advisory Council, June 6, 2017* (Wash. Univ. in St. Louis Legal Studies Research Paper Series, Paper No. 17-06-01, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982433 [https://perma.cc/F745-BYV3].