

JENNER & BLOCK

Practice Series

ERISA Litigation Handbook

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INTRODUCTION

This is the fourth edition of the ERISA Litigation Handbook volume of Jenner & Block's Practice Series. Like previous editions of the Handbook, this updated and expanded edition provides a basic primer on the issues presented and procedures followed in litigation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 - 1461 ("ERISA"). We recognize that many actuaries, attorneys, bankers, investment managers, labor union officers, fund managers, chief financial officers, general counsels, and human resource officers regard ERISA to be a confusing and complex statute. After surveying federal case law from across the nation, we acknowledge that that belief is well founded. Nonetheless, we believe that by providing a straightforward guide that covers the issues ERISA lawsuits present, we can provide the reader with a quick reference to determine whether an ERISA issue exists and begin the analysis of that issue.

This fourth edition discusses the wide range of issues that arise in litigation under ERISA. In Section I, the Handbook addresses the Supreme Court's decisions defining ERISA's preemption of state laws. Section II addresses the question of standing to bring a claim against an ERISA fiduciary. Section III describes the creation and termination of fiduciary status under ERISA. Section IV details the remedies available for breach of ERISA fiduciary duties. Sections V through VIII describe ERISA's fiduciary duties, including the duties of loyalty, prudence, diversification, and adherence to plan documents. Sections IX and X address transactions ERISA prohibits. Sections XI and XII discuss issues related to ERISA's civil enforcement provisions, and Section XIII provides an expanded discussion of procedural considerations like jury trials in ERISA cases and class actions. Section XIV considers the federal courts' power to create a federal common law of ERISA. Section XV highlights specific types of ERISA litigation, including developing issues such as employer stock litigation and 401(k) fee litigation, among others. In Section XVI, the Handbook considers the validity of releases of ERISA claims and benefits. Finally, Section XVII addresses the special considerations for plan fiduciaries relating to securities litigation, and Section XVIII considers important professional responsibility issues attorneys commonly face when representing clients in the ERISA arena.

We hope that this Handbook will provide a basic starting point for analyzing the issues ERISA litigation presents.

We wish to thank William L. Scogland, Matthew J. Renaud, Reena Bajowala, Michaelene Martin, Chris Meservy, Omar Jafri, and Joshua Rafsky for their assistance in the preparation of this edition of the Handbook.

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I. SUPREME COURT PRECEDENT DEFINING ERISA’S PREEMPTION OF STATE LAWS

ERISA preempts a broad range of state statutes, regulations, and administrative schemes. ERISA completely preempts state law claims for which it provides remedies in § 502, 29 U.S.C. § 1132, in effect replacing state claims with federal claims and giving rise to federal jurisdiction over them. Because ERISA was enacted with the goal of establishing uniform national standards for the administration of employee benefits plans, ERISA also preempts state laws that seek to regulate those plans through conflict preemption. Through its saving clause, however, ERISA excepts from this broad preemption laws regulating insurance, as well as securities regulations, banking law and generally applicable criminal law, but stipulates in its “deemer” clause that ERISA plans are not to be regulated as insurance companies.

ERISA’s broad preemption language has produced a complicated and often confusing body of case law. This section addresses *only* Supreme Court case law on the topic of preemption, and does not provide an overview of the holdings of lower federal courts on the subject.

See:

Boggs v. Boggs, 520 U.S. 833, 839 (1997). “In large part the number of ERISA preemption cases reflects the comprehensive nature of the statute, the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation’s workforce. ERISA is designed to ensure the proper administration of pension and welfare plans, both during the years of the employee’s active service and in his or her retirement years.”

A. ERISA COMPLETELY PREEMPTS STATE LAWS THAT COINCIDE WITH ITS CIVIL ENFORCEMENT PROVISIONS

By operation of the supremacy clause of the Constitution, ERISA’s civil enforcement provisions completely preempt “any state law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy.” Aetna Health Ins. v. Davila, 542 U.S. 200, 208 (2004). State causes of action are completely preempted and are replaced by a limited number of ERISA causes of action giving rise to federal question jurisdiction.

The Supreme Court in Pilot Life v. Dedeaux described the function and effect of ERISA’s civil enforcement provisions:

Under the civil enforcement provisions of § 502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant’s rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator’s improper refusal to pay benefits. A participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause

of action may seek removal of a fiduciary. §§ 502(a)(2), 409. In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. § 502(g) Our examination of these provisions [makes] us "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 53-54 (1987) (holding that ERISA does not apply and quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985)), overruled in part on other grounds by Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003).

Based on a review of ERISA's legislative history, the Supreme Court has concluded that, in enacting ERISA's virtually unique preemption provisions, Congress intended that a body of substantive federal law would be developed by the courts to apportion rights and obligations among private welfare and pension plans and participants. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983), superseded by statute on other grounds, 28 U.S.C. § 1441(e). The Court has similarly described Congress's intent, in creating ERISA, to devise an exclusively federal system under which employee benefits plans would be evaluated. Pilot Life, 481 U.S. at 52. Thus, unless state laws varying the obligations of ERISA plans are preempted in favor of ERISA's civil enforcement provisions, Congress's intent would be thwarted. See id.; Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990).

See:

Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004). "*The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions. . . . which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern.*" (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 (1983), superseded by statute on other grounds, 28 U.S.C. § 1441(e). "*ERISA contains provisions creating a series of express causes of action in favor of participants, beneficiaries, and fiduciaries of ERISA-covered plans, as well as the Secretary of Labor. § 502(a), 29 U.S.C. § 1132(a). It may be that . . . any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law.*"

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987) (holding that ERISA does not apply), overruled in part on other grounds by Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). "*Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for action by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and . . . varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress.*"

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990). “It is clear to us that the exclusive remedy provided by § 502(a) is precisely the kind of special feature that warrants preemption in this case.”

B. CONFLICT PREEMPTION AFFECTS STATE LAWS THAT RELATE TO EMPLOYEE BENEFITS PLANS

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts state laws that relate to ERISA plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91-92 (1983). “[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” 29 U.S.C. § 1144(a). “A law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such plan.” *Shaw*, 463 U.S. at 96-97. State laws regulating insurance, banking, or securities, as well as generally applicable state criminal laws, are exempt from § 514(a) preemption. *Id.* Section 514(d) provides that “[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.” *Id.* Section 4(b)(3) exempts employee benefit plans “maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws” from ERISA coverage. *Id.*

1. The “relates to” language is broadly interpreted

The Supreme Court has read the reach of ERISA’s preemption provisions broadly. *See, e.g., Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (holding that ERISA does not apply), *overruled in part on other grounds by Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Shaw*, 463 U.S. at 97. The Court has held that Congress’s intent in enacting § 514 was to establish the regulation of employee welfare benefit plans as exclusively a federal concern. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). “The basic thrust of [§ 514(a)], then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.” *Travelers Ins.*, 514 U.S. at 657. To that end, the Court has concluded, ERISA has a broad definition of state law that encompasses both state statutes and state administrative agencies. *Ingersoll-Rand*, 498 U.S. at 141. “[E]ven indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.” *Alessi*, 451 U.S. at 525.

The Supreme Court holds that a state law may relate to an ERISA plan and be preempted under § 514(a) if the state law makes *reference to* an ERISA plan or has a *connection with* an ERISA plan. *Travelers Ins.*, 514 U.S. at 656.

See:

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995). “In *Shaw*, we explained that ‘[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.’ The latter alternative, at least, can be ruled out But this still leaves us to question whether the surcharge laws have a ‘connection with’ the ERISA plans, and here an uncritical literalism is no more help than in

trying to construe ‘relate to.’ For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining this key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”

District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 (1992). Statute that regulated both ERISA and ERISA-exempt benefit plans was preempted.

a. ERISA § 514(a), 29 U.S.C. § 1144, preempts state laws that refer to ERISA benefit plans

ERISA preempts state laws that refer directly to ERISA benefit plans or that rely on the existence of ERISA plans for their operation. “Where a State’s law acts immediately and exclusively upon ERISA plans, as in Mackey, or where the existence of ERISA plans is essential to the law’s operation, as in Greater Washington Board of Trade and Ingersoll-Rand, that ‘reference’ will result in pre-emption.” Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 324 (1997). Thus, ERISA preempts state laws mandating employee benefit structures or their administration, as well as state laws providing alternative enforcement mechanisms. Travelers Ins., 514 U.S. at 658.

See:

UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 363 (1999) (*holding that ERISA does not apply*), *overruled in part on other grounds by* Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). *California’s agency law was preempted by ERISA to the extent that it referred to ERISA plans.*

District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 129-30 (1992). *Statute that regulated both ERISA and ERISA-exempt benefit plans was preempted. The employer-sponsored health insurance programs referred to in the statute were subject to ERISA regulation, and any state law imposing requirements by reference to ERISA plans is preempted.*

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 136 (1990). *Texas common law cause of action for wrongful discharge based on employer’s desire to avoid paying into an employee’s pension fund was preempted. “[I]n order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the court’s inquiry must be directed to the plan, this judicially created cause of action ‘relat[es] to’ an ERISA plan [T]here simply is no cause of action if there is no plan.”*

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 831 (1988). *Georgia law specifically exempting ERISA plans from generally applicable garnishment procedure was preempted by § 514(a).*

b. ERISA § 514(a), 29 U.S.C. § 1144, preempts state laws that have a connection with ERISA benefit plans

Section 514(a) also preempts laws that do not refer to ERISA plans, but nonetheless have a connection with the plans. “[T]o determine whether a state law has the forbidden connection, [the Court] looks both to the ‘objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,’ as well as to the nature of the effect of state law on ERISA plans.” Dillingham Constr., 519 U.S. at 325. Although generally applicable laws that regulate areas in which ERISA “has nothing to say” are not preempted by § 514(a), statutes that govern central matters of plan administration are preempted because they interfere with nationally uniform plan administration. Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001).

See:

Egelhoff v. Egelhoff, 532 U.S. 141, 142 (2001). Statute that bound ERISA plan administrators to pay benefits “to the beneficiaries chosen by state law, rather than to those identified in the plan documents” was preempted because it implicated an area of core ERISA concern, and was contrary to ERISA’s requirements that a plan must specify the basis on which payments are made to and from the plan (§ 1102(b)(4)), and that the fiduciary shall administer the plan in accordance with the documents and instruments governing the plan (§ 1104(a)(1)(D)) and make payments to a beneficiary designated by a participant, or by the terms of the plan (§ 1002(8)).

Boggs v. Boggs, 520 U.S. 833, 836 (1997). ERISA preempts a state law allowing a non-participant spouse to transfer an interest in undistributed pension plan benefits through a testamentary trust.

But see:

Mackey v. Lanier Collection Agency & Serv. Inc., 486 U.S. 825, 831 (1988). ERISA preemption falls short of barring application of a general state garnishment statute to participants’ benefits in the hands of an ERISA welfare benefit plan, even if statute did impose some administrative costs on plans.

2. The “relates to” language does not apply to an arrangement that is not a “plan” under ERISA

Despite the mandate that the scope of ERISA’s preemption be broadly construed, the Supreme Court has limited its extent, declining to extend preemption to the full range of state laws with any effect on ERISA plans or plan benefits. One major limitation on the reach of preemption is that it applies only to state laws that relate to something considered a “plan” under ERISA. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 6-7 (1987).

Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing

administrative program to meet the employer's obligation. It is for this reason that Congress preempted state laws relating to *plans*, rather than simply to *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

Fort Halifax, 482 U.S. at 11-12. The Court has distinguished between state laws that regulate plans and are therefore preempted, *see id.*, and those that have merely an "indirect economic influence," which are not, *see Travelers Ins.*, 514 U.S. at 662 (noting cost uniformity not goal of ERISA). Thus, the Court has held that a generally applicable insurance surcharge is not preempted even though it may increase the ultimate costs of an employee benefits plan and require plan administrators to "shop for the best deal [they] can get." *Id.* at 659-60. "If a State law creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems." Fort Halifax, 482 U.S. at 19.

See also:

Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 319 (1997). *California statute excepting contractors on public works projects from prevailing wage law for workers participating in approved apprenticeship programs was not preempted because the law did not 'relate to' employee benefits plans.*

Voelske v. Mid-South Ins. Co., 572 S.E.2d 841, 844 (N.C. Ct. App. 2002). *Plaintiff's state law insurance claims were preempted because they related to an ERISA plan, even though the only employee eligible for the plan was the company's owner. Citing Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *the court held that a business owner is considered an employee for the purpose of determining who is a participant under the plan. Under North Carolina law, the specific state insurance law claims were not exempt from the preemption clause because they did not regulate the business of insurance.*

C. LAWS REGULATING INSURANCE

State laws regulating insurance are not generally preempted by ERISA and are the chief exception to the broad sweep of ERISA's preemption. State laws regulating insurance fall under ERISA's savings clause, § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) and are not preempted. However, ERISA's deemer clause, § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), makes it clear that state laws "cannot deem an ERISA plan to be an insurance company" and therefore subject to regulation by state insurance law. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987). The Court has also noted that the insurance provisions of ERISA are not models of legislative drafting: "While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time." Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). The Court has most recently determined that "even a state law that can arguably be characterized as 'regulating insurance' will be preempted if it

provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." Aetna Health Inc. v. Davila, 542 U.S. 200, 218 (2004) .

1. The saving clause excepts from preemption state laws that regulate insurance

Under the saving clause, "except as provided in [the deemer clause], nothing in [ERISA] shall be construed to exempt or relieve any person from any law of any State which regulates insurance" 29 U.S.C. § 1144(b)(2)(A). The operative question in determining whether a state law is excepted from preemption under the saving clause is whether it regulates insurance. UNUM Life Ins. Co. v. Ward, 526 U.S.358, 367-68 (1999)

The Court has recognized the presumption that Congress did not intend to preempt areas of traditional state regulation. Metro. Life, 471 U.S. at 740. Furthermore, it has stated that "[u]nless Congress intended to include laws regulating insurance contracts within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are all applied directly to benefit plans." Id. at 741. The Court has also concluded that Congress clearly intended § 502(a) to be the exclusive remedy for asserting claims for benefits. Pilot Life, 481 U.S. at 52-53.

See:

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987). "Certainly a common-sense understanding of the phrase 'regulates insurance' does not support the argument that the Mississippi law of bad faith falls under the saving clause. A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry. Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law."

In 2004, the Supreme Court held that ERISA preempted Texas state law claims regarding the regulation of denial of benefits by HMOs, because the state law liability was derived wholly from the rights and obligations of the ERISA plan. Aetna, 542 U.S. at 217.

In Aetna, the Court, in a unanimous decision by Justice Thomas, ruled that patients cannot use state health care liability laws to sue the administrators of ERISA-regulated employee benefit plans for claims relating to the denial of coverage of treatment or service. The Court first reiterated ERISA's broad preemption provisions as well as Congress's intent to limit ERISA remedies to those listed in § 502(a). Id. at 209. Therefore, the Court determined that "any state law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Id.

The Court rejected the Plaintiffs' argument that the legal violations complained of were independent state duties finding that because plaintiffs' causes of action were brought to remedy only the denial of benefits under ERISA-regulated benefit plans, their state law claims fall within the scope of ERISA's civil enforcement mechanism and were completely preempted by ERISA. Id. at 213.

Finally, despite the Plaintiffs' claim that the Texas law regulated insurance, the Court held that it was preempted by ERISA and the action should be removed to Federal Court because "[u]nder ordinary principles of conflict preemption . . . even a state law that can arguably be characterized as 'regulating insurance' will be preempted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." Id. at 217.

Aetna did not involve any action against the physicians or their employers, it only addressed pure eligibility decisions by HMOs acting in their fiduciary capacity, even though those decisions might involve medical judgments.

In previous actions involving the regulation of HMOs, the Court held that ERISA did not preempt two state laws each regulating HMOs because the laws fell under ERISA's saving clause for laws regulating insurance. See Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 334 (2003); Rush Prudential HMO, Inc., v. Moran, 536 U.S. 355, 359 (2002).

In Rush Prudential, the Court, in a 5-4 decision by Justice Souter, concluded ERISA did not preempt an Illinois state law that required an independent review by a physician when an HMO and a patient disagreed over whether a procedure was medically necessary. 536 U.S. at 375. The Court determined that the law regulated insurance. Id. The Court first found that because HMOs are risk-bearing organizations, perform much of the business formerly performed by traditional indemnity insurers and are regulated by state laws as insurers, they are insurers even though they provide medical care as well. Id. at 366-68. Second, the Illinois law was "specifically directed at the insurance industry" because it was unlikely that the Illinois law would apply beyond orthodox HMOs, which the Court had already concluded were insurers. Id. at 372. Factors under the McCarran-Ferguson Act confirmed the Court's conclusion that the Illinois law regulated insurance. Id. at 373-74.

Shortly after Rush Prudential, the Court again considered a state law purporting to regulate insurance and articulated a new two-part test that a law must satisfy to be a law that regulates insurance under the saving clause. See Ky. Ass'n of Health Plans, 538 U.S. at 341-342. Kentucky passed an "Any Willing Provider" ("AWP") statute that prevented HMOs from limiting the number of health care providers in their networks by requiring that the HMOs not discriminate against any provider that is willing to meet the terms set by the HMO for participation. Id. at 333. The HMOs claimed that ERISA preempted the law, but the Sixth Circuit found that the law regulated insurance and was saved under § 1144(b)(2)(A). Id. at 334. The Court unanimously affirmed the Sixth Circuit in an opinion by Justice Scalia.

The Court stated that the law was specifically directed at insurers because it only applied to the HMOs and not health care providers. Id. at 334-335. While the laws would impact healthcare providers indirectly, the Court found such indirect affects on non-insurers

insignificant to whether the law was specifically directed at insurers. Id. at 335-36. The HMOs also argued that the act did not regulate insurance because it only affected the relationship between the insurers and the providers and not the actual terms of an insurance policy. Id. The Court rejected this argument as well, finding that because the statute imposes conditions on the right to engage in the insurance business, it regulates insurance as contemplated in the saving clause. Id. at 337-38. The law also was specifically directed at regulating insurance because it affected the “risk pooling arrangement between the insurer and the insured [by] expanding the number of providers from whom an insured may receive health services [in a way that] alter[s] the scope of permissible bargains between insurers and insureds.” Id. at 338-39.

In Rush Prudential and earlier cases interpreting § 1144(b)(2)(A), the Court looked to factors under the McCarran-Ferguson Act as part of its analysis of whether a law regulated insurance. Id. at 341. The Court concluded in Kentucky Ass’n of Health Plans, however, that its reliance on McCarran-Ferguson was misdirected, failed to provide clear guidance to lower courts and ultimately added little to the analysis. Id. Instead, the Court made a “clean break” from those factors and now holds that for a state law to “regulate insurance” under § 1144(b)(2)(A), it must (1) “be specifically directed towards entities engaged in insurance;” and (2) “must substantially affect the risk pooling arrangement between the insurer and the insured.” Id. at 341-42.

2. The deemer clause prohibits employee benefit plans from regulation as insurance companies

ERISA’s deemer clause exempts ERISA plans from regulation as insurance companies. “Neither an employee benefit plan . . . , nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts” 29 U.S.C. § 1144(b)(2)(B).

Under the Supreme Court’s holding in Shaw v. Delta Air Lines, Inc., “[o]nly separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3).” 463 U.S. 85, 108 (1983). States may, however, require employers to maintain separate plans to comply with state laws. Id. “In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the same state-mandated benefits in its ERISA plan. Id. If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.” Id.

The deemer clause is also given a fairly expansive interpretation. Citing ERISA’s legislative history, the Court declined to read the word “purporting” as limiting the scope of the clause. FMC Corp. v. Holliday, 498 U.S. 52, 63-64 (1990) (“Indeed, the Conference Report, in describing the deemer clause, omits the word ‘purporting,’ stating, ‘an employee benefit plan is not to be considered as an insurance company, bank, trust company, or investment company (and is not to be considered as engaged in the business of insurance or banking) for purposes of any State law that regulates insurance companies, insurance contracts, banks, trust companies, or investment companies.’”).

The Court has also rejected the view that the deemer clause is directed solely at laws governing the business of insurance. Id. at 64. The Court in FMC Corp. noted that “the savings and deemer clauses employ differing language to achieve their ends—the former saving, except as provided in the deemer clause, ‘any law of any State which regulates insurance,’ and the latter referring to ‘any law of any State purporting to regulate insurance companies [or] insurance contracts.’” Id. It concluded, however, that the language of the deemer clause is “either coextensive with or broader, not narrower, than that of the saving clause.” Id. The Court’s “rejection of a restrictive reading of the deemer clause does not lead to the deemer clause’s engulfing the saving clause” because the savings clause has the independent effect of protecting state insurance regulation of insurance contracts purchased by employee benefit plans from preemption. Id. at 64.

II. STANDING TO BRING A CLAIM AGAINST A FIDUCIARY UNDER ERISA

The four classes of parties who possess express statutory standing to sue an ERISA fiduciary are stated in § 502(a) of ERISA, 29 U.S.C. § 1132(a)(2). In addition to the parties expressly granted standing to sue an ERISA fiduciary, courts have granted standing to members of the three named classes of § 1132(a)(3) (participants, beneficiaries, and fiduciaries) to sue fiduciaries for individual, rather than plan, relief under the more open-ended language of § 1132(a)(3). Some courts have either included certain parties as falling within the expressly-listed classes of parties who may sue ERISA fiduciaries, or they have granted standing to other parties who are not expressly empowered to sue under § 1132(a) on the theory that the list of parties who are empowered to sue ERISA fiduciaries under § 1132(a) is not exclusive. See generally David P. Kallus, *ERISA: Do Health Care Providers Have Standing to Bring a Civil Enforcement Action Under Section 1132(a)?*, 30 SANTA CLARA L. REV. 173 (1990); Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief For Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233 (Spring 1995).

Before analyzing the statutory language in § 1132(a) that confers standing to sue an ERISA fiduciary, however, it is necessary to briefly review the constitutional and prudential considerations involved in the concept of standing.

A. CONSTITUTIONAL AND PRUDENTIAL REQUIREMENTS FOR STANDING

Constitutional standing, at its root, involves justiciability. The standing inquiry “focuses on whether the plaintiff is the proper party to bring the suit,” even if the inquiry “often turns on the nature and source of the claim asserted.” Raines v. Byrd, 521 U.S. 811, 818 (1997) (citations omitted). The threshold requirement for standing involves presenting a “case or controversy” within the meaning of Article III, § 2, cl. 1 of the Constitution. See C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3531 (2d ed. 1984). Supreme Court decisions have set an “irreducible minimum” for the Article III requirement for constitutional standing: A plaintiff must “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,” and that his or her injury “is likely to be redressed by a favorable decision” in order for the federal courts to have jurisdiction over the dispute. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted). For a discussion of the preemptive effects of ERISA, which may also have an effect on the availability of federal jurisdiction, see generally Section I of this Handbook.

Along with the constitutional requirement for standing, prudential standing involves determinations that courts make in the interest of self-restraint in order to avoid overstepping the Article III limitations on the federal court’s ability only to hear disputes involving a “case or controversy.” Courts without such a concern could become “judicial versions of college debating forums.” Valley Forge Christian Coll., 454 U.S. at 473.

This prudential concern is especially important when a statute does not expressly grant a class of individuals standing to sue. In Ass’n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-54, 156 (1970), the Supreme Court articulated a three-part test

to determine whether the plaintiff had standing to sue where a statute had not clearly and expressly granted the plaintiff standing. The plaintiff must: (1) “suffer an injury in fact,” which “at times . . . may reflect ‘aesthetic, conservational, and recreational’ as well as economic values;” (2) fall “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question;” and (3) not be precluded from judicial review by the statute in question (the issue of statutory “standing”). Id. (citation omitted); see, e.g., Fentron Indus., Inc. v. Nat’l Shopmen Pension Fund, 674 F.2d 1300, 1304-05 (9th Cir. 1982) (using the three-part Ass’n of Data Processing Serv. Orgs. test to determine that an employer, although not one of the four classes of parties explicitly empowered to sue ERISA fiduciaries under § 1132, had suffered specific and personal injuries in its relationship with the union because of the fiduciary trustees’ decision to cancel certain union employee pension credits; it fell within the ERISA “zone of interest” by involving the “successful development of industrial relations,” and there was “nothing in the legislative history of ERISA to indicate that the list in § 1132(a) was exclusive”). The third part of the prudential standing test has yielded the greatest divergence in decisions.

In conclusion, even where ERISA expressly grants a class of individuals standing to sue an ERISA fiduciary, each individual must also meet the constitutional standing “case or controversy” and “injury in fact” requirements. When it is unclear whether § 1132(a) of ERISA grants a party standing to sue an ERISA fiduciary, the three-part test outlined in Ass’n of Data Processing Serv. Orgs. applies.

B. EXPRESS STATUTORY GRANTS OF STANDING

Three ERISA provisions, §§ 1132(a)(2), 1132(a)(3), and 1132(c), contain express grants of standing to enumerated parties. Although in some circumstances courts have held that parties not enumerated in these sections also have standing to bring ERISA actions against fiduciaries, the majority of the standing cases center around enumerated parties.

1. Parties enumerated in ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)

Unlike the situation exemplified by Fentron, where constitutional and prudential considerations may limit the access of a party who was not expressly granted statutory standing to the federal courts, the four classes of parties expressly granted standing to sue an ERISA fiduciary under § 1132(a) are determined categorically, although in some cases there are questions of interpretation as to whether a party is a member of one of the four classes expressly granted standing.

§ 1132(a)(2) states that a civil action may be brought:

1. by the Secretary [of Labor], or
2. by a participant,
3. beneficiary or
4. fiduciary

for appropriate relief under section 1109 of this title.

29 U.S.C. § 1132 (a)(2).

Section 1109 outlines liability for breaches of fiduciary duty. Section 1109 states that a fiduciary to a plan must make good to the plan any losses resulting from the breach of any of the responsibilities, obligations, or duties imposed upon fiduciaries by ERISA. 29 U.S.C. § 1109(a) (2001).

The definitions of the four classes of parties expressly empowered to bring a civil action under § 1132(a)(2) are provided by § 1002:

- (7) The term “participant” means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
- (8) The term “beneficiary” means 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.
- (9) The term “person” means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization. . .
- (13) The term “Secretary” means the Secretary of Labor. . .
- (21) Except as otherwise provided in subparagraph (B) [which deals with investment companies], 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. . .

29 U.S.C. § 1002. For more on these expressly named parties to a § 502(a)(2) action, see Section XI.A.1.

Section 1132(a)(2) incorporates § 1109(a), which states that fiduciaries who are found liable for breach of their fiduciary duties must make good *to the plan* any losses resulting from that breach. 29 U.S.C. §§ 1109(a), 1132(a)(2)(emphasis added). Therefore, although the Secretary of Labor, participants, beneficiaries, and fiduciaries all have standing to bring a civil action against an ERISA fiduciary, any resulting awards are paid to the plan as a whole, rather

than to the party who brings the suit. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985). Russell was a beneficiary of an employee benefit plan with standing to sue under § 1132(a)(2) whose disability payments were temporarily terminated and then later paid retroactively. Id. at 136. She sued under § 1132(a)(2) for damages sustained as a result of the refusal to pay her claims. Id. The majority opinion stated that, because § 1132(a) incorporated § 1109(a), damages could only be paid to the plan, and not to the individual bringing the suit. Id. at 140. Furthermore, because of “ERISA’s interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a ‘comprehensive and reticulated statute[,]’” the Court doubted that Congress had intended to authorize individual remedies which it then forgot to expressly include. Id. at 146 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

Justice Brennan’s concurrence in Russell has been adopted by many courts which have adopted individual claims under § 1132(a)(3) for breach of fiduciary duty.

The Court, however, has limited Russell’s restriction on individual damages to defined-benefit plans. In LaRue, the Supreme Court held that the “entire plan” language in Russell spoke to the consequences of § 409 on employee benefit plans that paid defined benefits. LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 1025, 552 U.S. 248 (2008). The court turned to § 404(c) to extrapolate a new rule for defined contribution plans. § 404(c) bars a participant from recovering against a fiduciary for any breach if the participant exercises discretion and control over his or her own account. Id. Therefore, a rule of law that prohibited participants from seeking individual damages in connection with their defined contribution plans would render § 404(c) nugatory. Id. at 1026. Section 502(a)(2) now allows plan beneficiaries to personally recover for all losses incurred by their individual accounts.

Participants, beneficiaries, and fiduciaries have another limitation: the temporal limitation. The plaintiff must have been a member of one of the four established classes of parties at the time of the events from which the cause of action arose.

Courts often do not distinguish between standing to sue and ability to bring an action, treating them as largely the same. For example, a participant has standing to sue an ERISA fiduciary under § 1132(a)(2), but relief runs to the plan, not to the individual. The individual participant may have standing to sue the fiduciary, but is nonetheless unable to bring the action for his or her own relief.

See:

Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986 (7th Cir. 1993). *An action to recover for a breach of fiduciary duty is distinct from an action to recover plan benefits under § 1132(a)(1)(B). ERISA allows for an action to enforce and seek appropriate relief because of a breach of fiduciary duty, but relief goes to the plan.*

Lee v. Burkhardt, 991 F.2d 1004 (2d Cir. 1993). *Plaintiffs, who are seeking damages for breach of fiduciary duty on their own behalf, are barred from suing under § 1132(a)(2), which gives participants standing to sue a fiduciary with respect to a plan.*

Bryant v. Int'l Fruit Prod. Co., 886 F.2d 132 (6th Cir. 1989). ERISA § 409, which is incorporated into § 502(a)(2), permits recovery for a violation of the defendant's fiduciary duty to the plan and not to the individual plaintiff.

McMahon v. McDowell, 794 F.2d 100 (3d Cir. 1986). Employee plan participants had standing to sue defendant employer for breach of fiduciary duty under 29 U.S.C. § 1132(a)(2), but not under 29 U.S.C. § 1132 (a)(1)(B).

2. Parties enumerated in ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)

Section 1132(a)(3) states:

A civil action may be brought by a participant, beneficiary, or fiduciary

- (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
- (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

Justice Brennan's concurrence in Russell agreed with the majority that extra-contractual relief in § 1132(a)(2) went to the plan, and approvingly noted that the majority did not address whether extracontractual damages running to an individual rather than the plan might be a form of "other appropriate relief" under § 1132(a)(3) because it was not part of the controversy in Russell. 473 U.S. at 150. Justice Brennan opined that such relief should be available under § 1132(a)(3), noting that the legislative history showed that Congress intended to incorporate the fiduciary standards of trust law into ERISA, and under principles of trust law, "fiduciaries owed strict duties running directly to beneficiaries in the administration and payment of trust benefits." Id. at 152-53. He thus concluded that § 1132(a)(3)'s authorization of "appropriate equitable relief" "to redress . . . any act or practice which violates any provision of this title" [emphasis in original] meant that the section entitled participants, beneficiaries, or fiduciaries to equitable relief running to themselves rather than to the plan. Id. at 153-54.

A more recent Supreme Court case, Mertens v. Hewitt Assocs., 508 U.S. 248, 260 (1993), held that § 1132(a)(3)'s wording permitting "appropriate equitable relief" did not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty.

One of the Supreme Court's most important cases addressing relief under § 1132(a)(3), Varity Corp. v. Howe, 516 U.S. 489, 491 (1996), solidified the view of most circuits that § 1132(a)(3) authorizes ERISA plan beneficiaries to bring a suit that seeks individualized equitable relief for beneficiaries for violations of fiduciary duties. Equitable relief under § 1132(a)(3), however, was only "appropriate" where other ERISA provisions did not provide redress. Id. at 515. The Supreme Court heard the case in order to resolve a split among the circuits; the Ninth Circuit in particular had held that no individual redress was permissible

under § 1132(a)(3) until Varity, while the Third Circuit had even permitted actions against fiduciaries for individual legal relief.

Varity has validated the opinions of the many courts that had been influenced by Brennan's concurrence and interpreted § 1132(a)(3) to mean that participants, beneficiaries, and fiduciaries may sue ERISA fiduciaries for relief running to themselves and not to the plan so long as the relief is equitable and not legal (compensatory damages or monetary relief).

See:

Tolson v. Avondale Indus., Inc., 141 F.3d 604 (5th Cir. 1998). *Because plaintiff has adequate redress for disavowed claims through his right to bring suit pursuant to § 1132(a)(1)(B), he has no claim for breach of fiduciary duty under § 1132(a)(3).*

Hall v. LHACO, Inc., 140 F.3d 1190 (8th Cir. 1998). *Plaintiff was not entitled to injunctive relief under § 1132(a)(3) because defendant was no longer the administrator of his plan, and injunctive relief is prospective in nature.*

Wald v. S.W. Bell Corp. Customcare Med. Plan, 83 F.3d 1002 (8th Cir. 1996). *Where adequate relief may be obtained through another section of ERISA, § 1132(a)(1)(B), plaintiff does not have a cause of action for injunctive relief under § 1132(a)(3).*

Switzer v. Wal-Mart Stores, Inc., 52 F.3d 1294, 1302 (5th Cir. 1995). *Equitable remedies under ERISA are narrowly drawn; the statute does not constitute a "roving commission to do equity."*

Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226 (3d Cir. 1994). *The Third Circuit recognized individual claims for breach of fiduciary duty, affirming a judgment for plaintiff of \$150,000 in damages without mentioning either that individual awards were prohibited under § 1132(a)(2) or that they were limited to equitable relief in § 1132(a)(3).*

Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986 (7th Cir. 1993). *An individual may seek equitable relief for a breach of fiduciary duty under § 1132(a)(3).*

Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986), *overruled on other grounds by Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 103 (1989). *Section 1132(a)(3) cannot be interpreted as including extra-contractual damages such as damages for emotional distress.*

Roig v. Ltd. Long Term Disability Program, No. CIV.A.99-2460, 2000 WL 1146522, at *10 (E.D. La. Aug. 4, 2000), *aff'd in part*, 275 F.3d 45 (5th Cir. 2001) (table). *Where a claim for equitable relief under § 1132(a)(3) is merely duplicative of a claim for relief under another ERISA provision, the claim under § 1132(a)(3) must be dismissed.*

Anderson v. Ill. Bell Tel. Co., 961 F. Supp. 1208 (N.D. Ill. 1997). Because the plaintiff sought unpaid benefits allegedly owed to her, which was a monetary form of relief, her action did not meet the requirements of § 1132(a)(3).

Kessen v. Plumbers' Pension Fund, Local 130, 877 F. Supp. 1198 (N.D. Ill. 1995). Plaintiff could not maintain an action under § 1132(a)(3) because the relief he sought was monetary and not equitable.

3. Parties enumerated in ERISA § 502(c), 29 U.S.C. § 1132(c)

Section 1132(a)(1)(A) states:

A civil action may be brought—

- (1) by a participant or beneficiary—
- (A) for the relief provided in subsection (c) of this section . . .

29 U.S.C. § 1132(a)(1)(A). Section 1132(c)(1) provides:

- (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such relief as it deems proper.

29 U.S.C. § 1132(c)(1).

Under § 1002's definition of a fiduciary as a person who "has any discretionary authority or discretionary responsibility in the administration of such plan," 29 U.S.C. § 1002(21)(A)(iii), a plan administrator is usually considered a fiduciary (although at least one case has held that a plan administrator was not a fiduciary, see *Hunt v. Hawthorne Assocs., Inc.*, 119 F.3d 888 (11th Cir. 1997)), and so a suit under § 1132(c) for the administrator's refusal to supply requested information is thus a form of breach of fiduciary duty suit. In general, due to the limited relief involved and the discretionary nature of that relief, a suit by a participant or beneficiary under § 1132(c) is unlikely, unless it exists as a count of a larger lawsuit.

In Porcellini v. Strassheim Printing Co., Inc., 578 F. Supp. 605 (E.D. Pa. 1983), a former employee who had been a participant and beneficiary of pension and profit-sharing plans sued the administrator under § 1132(c). The court found that it was not necessary to find harm to the plaintiff in order for plaintiff to prevail because the purpose of the statutory award was punitive in nature, but that such a consideration was a proper matter to consider in awarding damages. Id. at 613. The court determined that the administrator had not intentionally withheld the requested documents, but merely procrastinated in sending them out, so it awarded the plaintiff \$25 per day in damages. Id. at 614.

See:

Hunt v. Hawthorne Assocs. Inc., 119 F.3d 888 (11th Cir. 1997). *Plaintiff did not prove that the plan fiduciary actually served as the plan administrator, so plaintiff was not entitled to relief under § 1132(c).*

Jones v. UOP, 16 F.3d 141 (7th Cir. 1994). *For the § 1132(c) penalty to apply, the administrator must be the entity so designated in the plan documents.*

Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992). *Although the employer was not designated in plan documents as plan administrator, it acted as such and so may be treated as such for purposes of liability under § 1132(c).*

C. RIGHTS OF PARTIES NOT ENUMERATED IN ERISA § 502(a), 29 U.S.C. § 1132(a), TO BRING SUITS AGAINST FIDUCIARIES

Even after applying the three-part Ass'n of Data Processing Serv. Orgs. test in order to determine whether the plaintiff has standing to sue when § 1132(a) does not clearly and expressly grant standing, courts have diverged widely in granting standing to parties who are not expressly entitled to sue fiduciaries by § 1132(a). Some courts have looked to the legislative intent behind ERISA and assumed that the list of parties granted standing to sue was not exclusive. See, e.g., Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982). Others have noted the careful drafting of ERISA and assumed under the general statutory construction rule of *expressio unius est exclusio alterius* that the specific expression of parties granted standing to sue their fiduciaries in § 1132(a) implies the exclusion of parties who are not named. See, e.g., Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co., 700 F.2d 889 (2d Cir. 1983). The Ninth Circuit takes a broader view and the Second Circuit takes a narrower view of non-party standing under § 1132(a). Other courts have avoided the question altogether. See, e.g., Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226 (3d Cir. 1994). Still others have created inclusive definitions of “participant,” “beneficiary,” or “fiduciary.” See, e.g., Michael Reese Hosp. & Med. Ctr. v. Solo Cup Employee Health Benefit Plan, 899 F.2d 639, 640 (7th Cir. 1990) (implying that hospital, as assignee of participant in plan, has standing to sue under ERISA).

The current trend toward resolution of this question is textualist. In Pilkington PLC v. Perelman, 72 F.3d 1396, 1397-1401 (9th Cir. 1995), a case in which the court held that a fiduciary has standing to sue a predecessor fiduciary, the court said that “Fentron has largely been undermined by subsequent Supreme Court authority.”

See:

Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66 (D.C. Cir. 1987). *Employer may not use the fact that an employer may maintain an action under Article IV of ERISA to bring an action against a fiduciary under Article I of ERISA.*

Dime Coal Co. v. Combs, 796 F.2d 394, 398-99 (11th Cir. 1986). *A federal ERISA action brought by an employer who is not a participant or fiduciary does not exist against a trustee fiduciary. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."*

Tuvia Convalescent Ctr., Inc. v. Nat'l Union of Hosp. & Health Care Employees, 717 F.2d 726, 730 (2d Cir. 1983). *Employer does not have standing to bring an action under § 1132 of ERISA.*

Cent. States, S.E. & S.W. Areas Pension Fund v. Admiral Merchs. Motor Freight, Inc., 511 F. Supp. 38, 47-48 (D. Minn. 1980), *aff'd sub nom.*, Cent. States, S.E. & S.W. Areas Pension Fund v. Jack Cole-Dixie Highway Co., 642 F.2d 1122 (8th Cir. 1981). *The court found that ERISA was enacted for the benefit of participants and beneficiaries of pension plans, and not employers, and that letting employers sue fiduciaries would not aid in the accomplishment of goals Congress had intended when writing the statute.*

III. FIDUCIARY STATUS UNDER ERISA

When a person is a fiduciary to an ERISA plan, he is liable for any breach of his duty. ERISA provides that “[n]o fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed . . . after he ceased to be a fiduciary.” 29 U.S.C. § 1109(b). Thus, under ERISA, a person who has taken on fiduciary status can avoid fiduciary liability for subsequent actions by ceasing to be a fiduciary under the Act. Terminating such fiduciary status, however, is not always easily accomplished. As one writer has said, “it is easier under ERISA to assume fiduciary status than to shed it.” Jane Kheel Stanley, *The Definition of a Fiduciary Under ERISA: Basic Principles*, 27 REAL PROP. PROB. & TR. J. 237 (1992). As a result, it is extremely important for those who have acquired fiduciary status, either as the result of formal position, or as the result of exercising a fiduciary function, to know how to divest themselves of that status once they no longer wish to serve in a fiduciary capacity.

A. CREATION OF FIDUCIARY STATUS

Plaintiffs may only bring an ERISA breach of fiduciary duty claim against a “fiduciary.” E.g., Plumb v. Fluid Pump Serv., Inc., 124 F.3d 849, 854 (7th Cir. 1997). Under ERISA, a person or entity can become a fiduciary if (i) he or she is a named or designated fiduciary in the plan documents or (ii) he or she functions as a fiduciary by exercising discretionary authority or control over the management or operation of the plan. 29 U.S.C. § 1102(a)(2); 29 U.S.C. § 1002(21)(A); Plumb, 124 F.3d at 854; Woods v. Southern Co., 396 F. Supp. 2d 1351, 1364 (N.D. Ga. 2005).

Under 29 U.S.C. § 1102(a)(2), the term “named fiduciary” means “a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.”

ERISA also functionally defines a “fiduciary” as one who has discretionary responsibility or discretionary authority in the administration of an employee benefit plan or discretionary control over the management and disposition of its assets. 29 U.S.C. § 1002(21)(A)(i), (iii). “Fiduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions.” McGath v. Auto-Body N. Shore, Inc., 7 F.3d 665, 670 (7th Cir. 1993); United Indep. Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1262, 1267 (7th Cir. 1985).

Under ERISA, a person is a fiduciary only “to the extent” he or she performs an enumerated task, and a person may be an ERISA fiduciary for some purposes, but not for others. Plumb, 124 F.3d at 854 (citing Leigh v. Engle, 727 F.2d 113, 133 (7th Cir. 1984).) In assessing whether a person can be held liable for breach of fiduciary duty, courts must ask whether the person is a fiduciary with respect to the particular activity the plaintiff seeks to challenge. Id. “In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan’s beneficiary interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the actions subject to complaint.”

Pegram v. Herdrich, 530 U.S. 211, 226 (2000). Therefore, to determine whether a person can be held liable for a breach of fiduciary duty, “a court must ask whether [that] person is a fiduciary with respect to *the particular activity at issue*.” Id. (emphasis added); accord Maniace v. Commerce Bank of Kansas City, N.A., 40 F.3d 264, 267 (8th Cir. 1994).

There are a number of articles available that provide additional insight into the process of determining whether fiduciary duties under ERISA have attached. See, e.g., James Lockhart, Annotation, *When is Employer, Labor Union, Affiliated Entity or Person, or Pension or Welfare Plan “Fiduciary” Within the Meaning of §3(21)(A)(i) or (iii) of Employee Retirement Security Act of 1974 (29 U.S.C.A. §1002(21)(A)(i) or (iii))*, 178 A.L.R. Fed. 129 (2004); Jane Kheel Stanley, *The Definition of a Fiduciary Under ERISA: Functions Covered Under Subsections 3(21)(A)(i), (ii) & (iii)*, 27 REAL PROP. PROB. & TR. J. 467 (1992); William L. Scogland, *Fiduciary Duty: What Does it Mean?*, 29 TORTS & INS. L.J. 803 (1989).

B. TERMINATING FIDUCIARY STATUS ARISING FROM FORMAL TITLE OR POSITION

There is a small body of case law addressing the topic of how and when termination of fiduciary status arising from a formal title or position can be effected under ERISA. Although there are no hard, clear rules as to how such fiduciary status may be resigned or terminated, federal case law provides some guiding principles.

1. Fiduciary status cannot be terminated informally

Fiduciary status that arises as the result of holding a formal title or position cannot be terminated informally. Rather, to relinquish fiduciary status, the fiduciary must unequivocally cease all fiduciary functions and terminate, in writing, all contracts or arrangements with the plan concerning the fiduciary position. See Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1219 (2d Cir. 1987). “[A]bsent such a clear resignation or removal under permissible circumstances,” a court may hold that fiduciary status continued despite an attempt to terminate that status informally. Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 (W.D. Wis. 1979); see also Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1497 (W.D. Pa. 1983), aff’d, 727 F.2d 1100 (3d Cir. 1984). The reason for requiring such a formal resignation is that “[t]he protection which ERISA is intended to afford private pension and benefit plans would be vitiated” if an ERISA fiduciary were able to simply walk away from a plan. Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc., 93 F.3d 1171, 1184 (3d Cir. 1996).

See:

Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1218-19 (2d Cir. 1987). *An investment manager who had a formal contract with a plan could not claim that he ceased to be a fiduciary when the plan’s trustees orally modified the plan’s agreement with him.*

Chitkin v. Lincoln Nat’l Life Ins. Co., 15 F.3d 1083, No. 92-55406, 1993 WL 484720 (9th Cir. Nov. 24, 1993) (table). *An insurance company that had issued a*

group life insurance policy to an ERISA plan did not relinquish its fiduciary status merely by ceasing to serve as an insurer of the plan.

Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 (W.D. Wis. 1979). *The fiduciary status of certain plan trustees did not automatically terminate when their employees dropped out of the plan and they ceased their business relationship with the company that originally formed the plan.*

But see:

Coleman Clinic, Ltd. v. Mass. Mut. Life Ins. Co., 698 F. Supp. 740, 746-747 (C.D. Ill. 1988). *A defendant's fiduciary duty to an ERISA plan ended when he ceased his employment with the plan's insurer.*

2. Termination must be unequivocal

In order for a person to effectively resign or terminate fiduciary status under ERISA the resignation or termination must be unequivocal. The rule is that a person cannot claim to have been divested of fiduciary status and also continue to perform fiduciary functions. See *Lowen*, 829 F.2d at 1219 (stating “fiduciary obligations may not be turned on and off like running water”). Instead, courts have consistently held that fiduciary status continues to the extent that the fiduciary continues to exercise discretionary functions in relation to a plan. See, e.g., *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999); *Wilson Land Corp. v. Smith Barney Inc.*, No. 5:97-CV-51 9-BR(2), 1999 WL 1939270, at *3 (E.D.N.C. May 17, 1999); *Conway v. Marshall & Ilsley Trust Co.*, No. 87 C 20379, 1988 WL 124924, at *2 (N.D. Ill. Nov. 1, 1988). Thus it is not enough for an ERISA fiduciary merely to formalize the intent to terminate or resign from fiduciary status. Instead, a fiduciary who wishes to shed all fiduciary obligations must also unequivocally cease to perform any of the functions described in § 3(21) of ERISA, 29 U.S.C. § 1002(21). See *Lowen*, 829 F.2d at 1219.

See also:

Smith v. Provident Bank, 170 F.3d 609, 613 (6th Cir. 1999). *Bank that had no discretionary authority over a plan which was charged only with the “ministerial” task of transferring plan assets to another bank, was nevertheless held liable as an ERISA fiduciary because it controlled plan assets.*

Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1497 (W.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir. 1984). *The plaintiffs' attempt to resign as trustees was ineffective to terminate their fiduciary status because they continued to perform trustee functions and retained possession of the plan's checkbooks, passbooks and other documents.*

3. Fiduciary status can only be resigned or terminated in the manner specified in the plan

Typically, fiduciary status is not terminated under ERISA unless it is resigned or terminated in compliance with the plan's documents. See *Reich v. Mercantile Bank*, No. 591-11 C, 1994 U.S. Dist. LEXIS 21308, at *16-*17 (E.D. Mo. Apr. 16, 1994) (*Reich v. Mercantile*

Bank I). Absent such compliance, a court may hold that fiduciary obligations continued regardless of whether the fiduciary intended to terminate the fiduciary obligations. See Chambers v. Kaleidoscope, Inc. Profit-Sharing Plan & Trust, 650 F. Supp. 359, 369 (N.D. Ga. 1986) (holding that defendant remained obligated as plan administrator and trustee because there was no evidence that he complied with plan's prerequisites for resignation).

The same rule applies to the removal of plan trustees. For example, in Burud v. Acme Electric Co., 591 F. Supp. 238, 243 (D. Alaska 1984), the court concluded that a trustee's resolution removing a fellow trustee from his fiduciary position was ineffective as a matter of law because the plan documents did not vest the trustees with the power of removal.

Finally, it should be noted that compliance with plan documents must be precise for a termination, resignation, or removal to be effective. Thus, in Greene, the court held that two trustees who had provided notice of their resignation to the remaining trustees had not tendered a valid resignation, because they failed to also provide notice to the company as specifically required in the plan documents. Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1497-98 (W.D. Pa. 1983). As a result, the court held that the trustees' fiduciary obligations to the plan remained intact. Id. at 1498.

4. The resigning fiduciary must make adequate arrangements for the continued prudent management of the plan

Courts have consistently held that ERISA's requirement that a fiduciary discharge his duties "with care, skill, prudence, and diligence," extends to his resignation under ERISA. See 29 U.S.C. § 1104(a)(1)(B); Glaziers & Glassworkers, 93 F.3d at 1183; Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 (W.D. Wis. 1979). Thus, "once a fiduciary relationship exists, the fiduciary duties arising from it do not necessarily terminate when a decision is made to dissolve that relationship." Glaziers, 93 F.3d at 1183. Rather, "an ERISA fiduciary's obligations to a plan are extinguished only when adequate provision has been made for the continued prudent management of plan assets." Id.; see also Ream v. Frey, 107 F.3d 147, 154 (3d Cir. 1997); Allison v. Bank One-Denver, 289 F.3d 1223, 1239 (10th Cir. 2002).

There are no clearly defined rules as to what constitutes adequate provision for the continued prudent management of plan assets. However, at the very least, it appears that a resigning fiduciary has a "turnover duty" to determine who the successor fiduciary will be, and to investigate the successor's qualifications. See Reich v. Mercantile Bank, No. 1:91 CV00011 ELF, 1996 U.S. Dist. LEXIS 21963, at *71 (E.D. Mo. Feb. 2, 1996) (Reich v. Mercantile Bank II); Chambers v. Kaleidoscope, Inc. Profit-Sharing Plan & Trust, 650 F. Supp. 359, 369 (N.D. Ga. 1986).

See also:

Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 (W.D. Wis. 1979). A fiduciary who had merely obtained representations that an ERISA plan would be continued, and that successor trustees would be appointed, had not made adequate provision for the continued prudent management of the plan. A

fiduciary's responsibilities to a plan do not end until a qualified successor fiduciary is appointed.

Some courts have also held that a resigning fiduciary has a duty to disclose to the plan's trustees or beneficiaries all material information which is necessary for the protection and continuation of the plan.

See:

Ream v. Frey, 107 F.3d 147, 154 (3d Cir. 1997). *It would be contrary to the explicit statutory directives of ERISA to allow a fiduciary to resign without notice to the plan beneficiaries under circumstances where the fiduciary has information indicating that the beneficiaries' interests might need protection.*

Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171, 1183 (3d Cir. 1996). *A securities broker-dealer had a fiduciary duty to advise several group benefit plans of information that they needed for their own protection, despite the fact that the plans had terminated their relationship with the broker-dealer.*

However, although courts may require resigning fiduciaries to appoint a qualified successor and to disclose all material information necessary for the protection and continuation of the plan, courts have rejected the argument that a resigning fiduciary must investigate his successor's intentions prior to terminating his fiduciary status. Reich v. Mercantile Bank II, 1996 U.S. Dist. LEXIS 21963, at *71-*72.

See:

Reich v. Mercantile Bank, No. 1:91 CV00011 ELF, 1996 U.S. Dist. LEXIS 21963, at *71 (E.D. Mo. Feb. 2, 1996). *Rejecting the argument that a resigning trustee had a fiduciary turnover duty to determine what its successor's plans were for an Employee Stock Ownership Program.*

Coleman Clinic, Ltd. v. Mass. Mut. Life Ins. Co., 698 F. Supp. 740, 747 (C.D. Ill. 1988). *A resigning fiduciary had no fiduciary duty with respect to his successor's decision to terminate an ERISA plan, because a resigning fiduciary's duty to provide for the continued prudent management of a plan does not extend to events which were not foreseeable at the time he resigned.*

5. A fiduciary may relinquish some obligations to a plan by delegating some fiduciary responsibilities

Although fiduciary responsibilities may not be waived, they can be delegated by express provision in the plan instrument. Presley v. Blue Cross-Blue Shield of Ala., 744 F. Supp. 1051, 1058 (N.D. Ala. 1990). ERISA § 405(c)(1) specifically provides that a plan's documents may allow "named fiduciaries to designate persons . . . to carry out fiduciary responsibilities," other than the management and control of plan assets. 29 U.S.C. § 1105(c)(1). Upon delegation of fiduciary responsibilities in this manner, "the fiduciary is not thereafter liable for the acts or omissions of the person carrying out the fiduciary responsibility, except to the extent it participates knowingly in the breach, or fails to act reasonably in discharging its own responsibilities and thereby enables the other fiduciary to commit the breach, or it has knowledge of a breach by such other fiduciary and makes no reasonable efforts under the circumstances to remedy the breach." Presley, 744 F. Supp. at 1058; see 29 U.S.C. § 1105(c)(2); 29 C.F.R. § 2509.75-8 FR-14. As such, a plan fiduciary may terminate fiduciary obligations to the extent that fiduciary responsibilities can be delegated in accordance with the plan's documents.

See:

Presley v. Blue Cross-Blue Shield of Ala., 744 F. Supp. 1051, 1058 (N.D. Ala. 1990). *The defendant had not breached its fiduciary duty to notify the plaintiff of her employer's failure to make premium payments on an employee medical plan, because the defendant had effectively delegated that responsibility to the plaintiff's employer.*

However, if the plan documents do not provide "a procedure for the designation of persons who are not named fiduciaries to carry out fiduciary responsibilities, then any such designation which the named fiduciaries make will not relieve the named fiduciaries from responsibility or liability for the acts and omissions of the persons so designated." 29 C.F.R. § 2509.75-8 FR-14; see also In re Sears, Roebuck & Co. ERISA Litig., No. 02 C 8324, 2004 WL 407007, at *7 (N.D. Ill. Mar. 3, 2004).

Finally, a named fiduciary may reduce his fiduciary duty to prudently manage and control plan assets by appointing an investment manager under ERISA § 402(d)(1), 29 U.S.C. § 1102(c)(3). See Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1219 (2nd Cir. 1987). Under § 405(d)(1), "once such an appointment has been made, the trustees cannot be held liable for any act or omission of that investment manager so far as the assets entrusted to the manager are concerned." Id. As a result, the investment advisor "becomes a fiduciary with a duty of care and duty of loyalty to the plan while the trustees' legal responsibilities regarding the wisdom of the investments are correspondingly reduced." Id.

C. TERMINATING FIDUCIARY STATUS ARISING FROM THE EXERCISE OF FIDUCIARY FUNCTIONS

Courts have not yet addressed the question of how and when a person who has obtained fiduciary status informally, through the exercise of fiduciary functions, may terminate or resign fiduciary duties to a plan. As a result, there is a question as to whether such a person can terminate fiduciary obligations informally, by ceasing to serve in a fiduciary capacity, or

whether some formal action is required to terminate the fiduciary status. There is simply no clear answer to that question. Until a court specifically addresses that question, informal fiduciaries may be able to protect themselves by resigning or terminating their fiduciary duties in the same manner required of formal fiduciaries.

1. Resign formally

In order to resign effectively, courts have held that a formal fiduciary must “terminate in writing all contracts or arrangements with the plan” concerning the fiduciary position. Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1219 (2d Cir. 1987). Absent such a clear resignation, courts have held formal fiduciaries to have continued in fiduciary status. See Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1497 (W.D. Pa. 1983), aff’d, 727 F.2d 1100 (3d Cir. 1984).

There is no reason to expect that future courts will apply a different standard to informal fiduciaries. Thus, an informal fiduciary who wishes to relinquish fiduciary status should resign or terminate fiduciary obligations formally, in writing, to the appropriate parties responsible for the plan.

2. Resign unequivocally

Courts have consistently held that a person retains fiduciary status to the extent that he continues to exercise any of the discretionary functions set forth in ERISA § 3(21), 29 U.S.C. § 1002(21). See Smith v. Provident Bank, 170 F.3d 609, 613 (6th Cir. 1999); Wilson Land Corp. v. Smith Barney Inc., No. 5:97-CV-51 9-BR(2), 1999 WL 1939270, at *3, *10 (E.D.N.C. May 17, 1999); see also Conway v. Marshall & Ilsley Trust Co., No. 87 C 20379, 1988 WL 124924, at *1-*2 (N.D. Ill. Nov. 1, 1988). Therefore, an informal fiduciary who wishes to relinquish fiduciary duties must unequivocally cease to perform any of the functions set forth in ERISA § 3(21). See Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1219 (2d Cir. 1987). This not only means that fiduciaries must explicitly cease to serve in fiduciary positions, but it also means that they must relinquish possession of the plan’s checkbooks, passbooks, and other documents. See Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1497 (W.D. Pa. 1983).

3. Resign in the manner specified in the plan documents

Courts have held that formal fiduciary status is not terminated under ERISA unless it is resigned or terminated in the manner specified in the plan documents. See Reich v. Mercantile Bank I, 1994 U.S. Dist. LEXIS 21308, at *16-*17; see also Chambers v. Kaleidoscope, Inc. Profit Sharing Plan & Trust, 650 F. Supp. 359, 369 (N.D. Ga. 1986). Although no court has held that an informal fiduciary must also resign in this way, such resignation, if possible, would serve to make the fiduciary’s intent to terminate fiduciary obligations undeniably clear. As a result, an informal fiduciary who follows the plan’s requirements for resignation may be able to protect himself against later challenges that the resignation was void for lack of adequate notice to the plan. Accordingly, any resigning fiduciary should resign in accordance with the plan documents if possible.

4. Make adequate arrangements for the continued prudent management of the plan

Courts have held that an ERISA fiduciary's obligations to a plan are extinguished only when the fiduciary has made adequate arrangements for the continued prudent management of the plan. See Freund, 485 F. Supp. at 635; Ream, 107 F.3d at 154. Such arrangements include a "turnover duty" to determine who the successor fiduciary will be, and investigation of the successor's qualifications, although they do not include a duty to investigate the successor's intentions. See Reich v. Mercantile Bank II, 1996 U.S. Dist. LEXIS 21963, at *71; Chambers, 650 F. Supp. at 369. In addition, some courts have held that a resigning fiduciary also has a duty to disclose all material information necessary for the protection and continuation of the plan. See Ream, 107 F.3d at 154; see also Glaziers & Glassworkers, 93 F.3d at 1183.

Although no court has held that a resigning informal fiduciary has a duty to make arrangements for the continuation of the plan, courts may apply the same rule to them as well. For example, in Chambers, the court noted that "the very purpose of imposing a fiduciary duty upon plan trustees and administrators is defeated if a fiduciary may abandon his or her duties in derogation of plan requirements, and without ensuring that the fiduciary obligations will be met." 650 F. Supp. at 369. Likewise, it would seem contrary to ERISA to allow an informal fiduciary, who has exercised fiduciary functions, to abandon his fiduciary status without making adequate arrangements for the plan's continued prudent management. Accordingly, an informal fiduciary who wishes to effectively terminate his fiduciary status would do well to make sure that the plan's trustees appoint a qualified successor fiduciary to take his place.

IV. ERISA REMEDIES FOR BREACH OF FIDUCIARY DUTIES

A. ERISA-AUTHORIZED ACTIONS FOR BREACH OF FIDUCIARY DUTIES

Two ERISA provisions, §§ 502(a)(2) and 502(a)(3), codified at 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3), authorize actions for breaches of fiduciary duties. Although compensatory and punitive damages are not available under ERISA, restitution, imposition of constructive trusts, injunctions, and specific performance may be available to ERISA claimants.

Section 1132(a)(2) states: “A civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.” 29 U.S.C. § 1109 states: “Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.” In Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985), the Supreme Court declared that the only relief authorized under this section is to the plan itself. Thus an individual plaintiff can bring an action under § 1132(a)(2), but any recovery goes to the plan itself and not to the individual.

But see:

LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 1025, 552 U.S. 248 (2008). *Beneficiaries of defined contribution plans may personally recover for losses to individual accounts incurred as a direct result of a § 1132(a)(2) breach of fiduciary duty.*

The second section under which an action for breach of fiduciary duty may be brought is 29 U.S.C. § 1132(a)(3). Section 1132(a)(3) states, “A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” In contrast to § 1132(a)(2), § 1132(a)(3) has been interpreted to provide relief to individuals rather than the plan as a whole. See Mertens v. Hewitt Assocs., 508 U.S. 248 (1993). Also in contrast to § 502(a)(2), relief is limited to “appropriate equitable relief.” See id. For a discussion of the extent to which these provisions preempt state claims see Section I of this Handbook.

The Supreme Court initially interpreted the phrase “appropriate equitable relief” in Mertens. Justice Scalia, writing for the majority of the court, stated that “equitable relief” as used in the statute refers to “categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).” Id. at 256. The Court stated that “[a]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of

the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief.” Id. at 255.

Circuit court opinions following Mertens then varied in what they determined was “equitable relief.” Plaintiffs bringing § 502(a)(3) claims often attempted to frame their claim for relief as a claim for restitution to meet the standard for “equitable relief” articulated in Mertens. Thus, many circuit courts had to determine when a plaintiff sought the equitable remedy of “restitution” versus a simple attempt to contort compensatory damages into equitable relief.

For example, the Eighth Circuit determined that restitution was sought in Varity Corp. v. Howe, 516 U.S. 489 (1996). In Varity, a group of beneficiaries of a firm’s employee welfare benefit plan sued their plan’s administrator alleging that the administrator, who was also their employer, led them to withdraw from the plan and forfeit their benefits. The Eighth Circuit Court of Appeals ordered the plaintiffs reinstated in the plan and ordered monetary damages equivalent to the benefits that the plaintiffs would have received had they remained in the original plan. The majority for the appeals court reasoned that this remedy was equitable relief “in the nature of restitution” because it put the plaintiffs back in the position in which they would have been had there been no breach of fiduciary duty. While the Supreme Court agreed that an individual may sue for relief under § 502(a)(3), it did not address whether the monetary damage award qualified as restitution and therefore “equitable relief.” Because the Supreme Court did not address the nature of the remedy, there was significant doubt as to the exact relief available under § 502(a)(3).

In 2002, the Supreme Court addressed this issue and concluded that a judicial order to pay money is not “equitable relief” and therefore not authorized in a § 502(a)(3) claim merely because party claims it is seeking “restitution.” Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002). In Knudson, the respondent was injured in an automobile accident and the petitioners paid her medical expenses pursuant to a medical plan. Id. at 207. The plan provided that if the respondent recovered any amount from a third party for her injuries, she was obligated to reimburse Great West and the other petitioners for the medical expenses they had paid. Id. When the respondent settled a tort claim stemming from the accident with a third party, the petitioners sued under ERISA § 502(a)(3) to enforce the plan’s terms, claiming that they were entitled to an order that the respondent reimburse them for their payments. Id. The Ninth Circuit affirmed summary judgment for the respondent, concluding that the petitioners did not seek an appropriate equitable remedy as § 502(a)(3) requires.

The Supreme Court affirmed the Ninth Circuit in a 5-4 decision. The Court first reiterated that, under Mertens, “equitable relief” refers only to relief that *typically* was available in equity and that “money damages are, of course, the classic form of legal relief.” Id. at 210. The Court concluded that the petitioners sought a remedy that would “impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity.” Id. While the petitioners argued that they sought an equitable remedy of restitution, the Court distinguished between restitution at law and restitution in equity. Great West and the other petitioners sought restitution at law because:

[t]he basis for petitioners’ claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but

that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents.

Id. at 214. Because the petitioners sought legal relief which sought to impose personal liability on a contractual obligation to pay money, § 502(a)(3) did not authorize the action. Id. at 221.

B. REMEDIES

1. Compensatory and punitive damages are not available

The Supreme Court has clearly ruled that compensatory and punitive damages are not recoverable in an ERISA action for breach of fiduciary duty. In Russell, the court held that neither compensatory nor punitive relief was available under ERISA. 29 U.S.C. § 1109. The Court declared that “[t]he six carefully integrated civil enforcement provisions found in [§1132] of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.” Russell, 473 U.S. at 146-47. Thus remedies for breach of fiduciary duty under ERISA are limited to remedies of an equitable rather than a legal nature.

See:

Mertens v. Hewitt Assocs., 508 U.S. 248, 257 (1993). *Participants in benefits plan sued actuary claiming that the actuary had caused losses by allowing the plan sponsor to select improper actuarial assumptions, failing to disclose that the plan sponsor was one of Hewitt’s clients, and not identifying the plan’s funding shortfall. The Supreme Court held that petitioners were seeking compensatory damages and that ERISA does not authorize awards of compensatory damages for breach of fiduciary duty. Equitable relief refers to categories of relief that were typically available in equity, such as injunction, mandamus, and restitution, but not to compensatory damages.*

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985). *Beneficiary of employee benefit plan brought an action to recover damages for improper processing of her claims for disability benefits. The Supreme Court held that the relevant text of ERISA, the structure of the entire statute, and the legislative history all supported the conclusion that Congress did not provide and did not intend the judiciary to provide a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims.*

See also:

Amschwand v. Spherion Corp., 505 F.3d 342, 348 (5th Cir. 2007). *Plaintiff sued under § 502(a)(3) to recover the combined life insurance benefits she would have been entitled to if her husband had complied with a certain rule under the policy.*

The court held that the plaintiff's attempt to recover the lost proceeds was a form of "make-whole" damages that she was not entitled to in equity.

Allinder v. Inter-City Prods. Corp. (USA), 152 F.3d 544, 552 (6th Cir. 1998), cert. Former employee sued employer for alleged violations of ERISA, alleging that employer refused to complete a form necessary for her to file a long-term disability insurance claim. Employee was eventually paid the benefits due under the policy but sought compensatory and punitive damages for the initial misrepresentation and resultant delay in payment. The Sixth Circuit affirmed the district court's decision to dismiss the case because ERISA §1132(a)(3) does not authorize suits for either compensatory or punitive damages.

Weir v. Fed. Asset Disposition Ass'n, 123 F.3d 281, 290-91(5th Cir. 1997). Employees brought class action against their former employer under ERISA seeking benefits under their employer's severance plans. The Fifth Circuit affirmed the district court's decision that extracontractual compensatory or punitive damages arising from an alleged wrongful denial of benefits were not recoverable as "appropriate equitable relief" under ERISA.

Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc., 999 F.2d 298, 304-05 (8th Cir. 1993). Actions were brought against insurer as a result of delay in surgery for insured under employee welfare benefit plan. The Eighth Circuit held that monetary damages are not available because such damages are a legal remedy, not an equitable one.

2. Restitution

Following Mertens, most circuit courts treat Justice Scalia's list of equitable remedies (injunction, mandamus, and restitution) as exhaustive. As discussed above, a controversy continued to exist as to the definition of restitution and when courts could order monetary damages or order a constructive trust. Even though Justice Scalia identified monetary damages as the classic form of legal relief, some circuit courts maintained that restitution may take the form of a monetary payment and therefore qualified as an equitable remedy.

Knudson clarified, however, that an order that imposes a personal liability for a contractual obligation to pay money is not relief typically available in equity, even if the plaintiffs call it "restitution." By distinguishing between "restitution at law" and "restitution in equity," the Court found that for restitution to be equitable relief under § 502(a)(3) it must impose a constructive trust or equitable lien on particular property that in good conscience belongs to the plaintiff and not merely the obligation to pay money to the plaintiff. See Knudson, 534 U.S. at 214.

It is currently unclear how circuit courts will interpret their previous decisions after Knudson. See Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 110 n.8 (1st Cir. 2002).

See:

Knieriem v. Group Health Plan, Inc., 434 F.3d 1058, 1061 (8th Cir. 2006). Beneficiary sued insurer after insurer denied coverage of a stem-cell transplant. Plaintiff claimed that he was entitled to the procedure under the policy and sought restitution of the foregone benefit. The court denied relief, holding that plaintiff essentially sought monetary relief rather than any recoupment of expenses already paid.

Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 384-85 (4th Cir. 2001) (Griggs I). Employee who took early retirement in mistaken belief that early retirement benefits offered in conjunction with employer-administered pension plan could be rolled over into employee's tax-deferred retirement savings vehicle brought state court action against employer for negligent misrepresentation. The Fourth Circuit held that the employer breached its duty by failing to inform employee that general information concerning rollovers did not apply to employee and that the requested remedy of "reinstatement" was potentially available as "other appropriate equitable relief."

Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000). Employee sued Wal-Mart after Wal-Mart's Associates' Health and Welfare Plan refused to cover medical expenses she incurred during pregnancy. The court ruled that the employee was entitled to the equitable remedy of restitution. The court ordered that the employee should have the opportunity to tender payment that would have been paid if the plan had lived up to its obligation to inform the employee fully of the operation of the plan. Once that payment was made, the Plan was then ordered to pay the pregnancy related expenses that it had previously refused to pay.

Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944-46 (8th Cir. 1999). Pension plan participant brought action under ERISA against plan administrator seeking remedy for a three and a half year delay in payment of his account. The court held that § 1132(a)(3) provides relief for the individual harm that Kerr may have suffered from Vatterott's breach of fiduciary duties, but that that relief was limited to "appropriate equitable relief," which the court declared included "injunctive, restitutionary, and mandamus relief," but not compensatory damages. The court held that the difference between what Kerr hypothetically could have earned on the funds in his 401(k) account and what the plan actually earned was not restitution, but was simply compensatory.

Farr v. U.S. W. Communications, Inc., 151 F.3d 908, 916 (9th Cir. 1998), *amended*, 179 F.3d 1252 (9th Cir. 1999). Former employees of US West filed an action alleging that U.S. West breached its fiduciary duties under ERISA by misrepresenting facts relating to the tax consequences of an early retirement program and providing misleading information about potential adverse tax consequences. While the defendants did breach their fiduciary duties, nevertheless ERISA did not authorize monetary damages and therefore the plaintiffs could not recover their tax benefit losses.

Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1010-11 (9th Cir. 1998). Survivors of employee benefit plan participant brought action against plan administrator, alleging various state law and ERISA causes of action arising from alleged bad faith refusal to authorize autologous bone marrow transplant procedure. The court held that the survivors could not recover monetary damages because the Supreme Court's Mertens decision stated that "appropriate equitable relief" did not authorize suits for money damages for breach of fiduciary duty. Imposition of a constructive trust for breach of fiduciary duty was an appropriate remedy under ERISA in some cases, but the amount of money in controversy in this case was not an "ill-gotten profit" and therefore a constructive trust was not appropriate. Even though the survivors' state law claims were preempted by ERISA, ERISA provided no remedy.

McLeod v. Or. Lithoprint Inc., 102 F.3d 376 (9th Cir. 1996). Employee brought action for damages against her employer and its ERISA plan administrator for failing to give her timely notification that she had become eligible for coverage under a cancer insurance policy. The employee could not recover damages because § 502(a)(3) limited relief to equitable remedies and did not extend to compensatory damages.

Reich v. Stangl, 73 F.3d 1027 (10th Cir. 1996). The Secretary of Labor brought civil action under ERISA for restitution and other equitable relief against nonfiduciary "party in interest" who participated in prohibited transaction with employee welfare benefit plan. The definition of "appropriate equitable relief" is broad enough to include the recovery of ill-gotten plan assets or profits from a prohibited transaction.

Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722 (6th Cir. 1995). Sixth Circuit overruled its decision in Warren v. Society National Bank, 905 F.2d 975 (6th Cir. 1990) that monetary damages were recoverable under ERISA, §502(a)(3). The court cited Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), and declared the Supreme Court's opinion compelled the Sixth Circuit to overrule Warren.

Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995). Former employee brought action against employer and financial planning association alleging breach of fiduciary duty and retaliatory discharge under ERISA. The Sixth Circuit upheld the district court's ruling and held that back pay and front pay were both equitable remedies available under ERISA.

Novak v. Andersen Corp., 962 F.2d 757 (8th Cir. 1992). Beneficiary of plan under ERISA brought action against former employer seeking monetary damages for alleged breach of fiduciary duty in failing to give employee notice when he cashed out his accumulated benefits or "roll-over" option, as required by the Internal Revenue Code. The damages sought by the plaintiff were not available because monetary damages are a legal remedy and therefore do not constitute "appropriate equitable relief."

3. Rescission

A rescission is an avoidance of a transaction. Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.3 at 254 (West 1973). Like the restitution claim involved in Knudson, a rescission claim can sound in law or in equity. Rescission at law occurs when the plaintiff gives notice to the defendant that the transaction has been avoided and tenders to the defendant the benefits received by the plaintiff under the contract. Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 445-46 (4th Cir. 2004) (Griggs II). An action for rescission in equity, however, is a suit to have the court terminate the contract and order restitution. Id. at 446. Distinguishing between “rescission at law” and “rescission at equity,” the Fourth Circuit has held that equitable actions for rescission are appropriate under ERISA. Id.

See:

Adams v. Brink’s Co., 261 Fed. Appx. 583, 596 (4th Cir. 2008). *Employer sought rescission where overpaid benefits would be reduced by a reduction in future payments to the employee. The court denied the employer relief because the employee detrimentally relied on an incorrect calculation of benefits prepared by the employer. Thus, it would be “ inequitable” to grant the employer rescission in light of the misrepresentations.*

Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440 (4th Cir. 2004) (Griggs II). *Employee who took early retirement brought action against employer claiming that employer negligently misrepresented the tax consequences of his election to take early retirement. The Fourth Circuit found that the plaintiff could not unilaterally “unretire” by returning his benefits and returning to work, so his action to amend his benefit election to select a monthly annuity rather than a lump sum payment clearly involved equitable rescission. The court held, as a matter of federal common law, rescission may be granted as “appropriate equitable relief” under ERISA, even if a full restoration of benefits conferred in the transaction cannot be accomplished.*

4. Imposition of constructive trust

Another remedy that is clearly equitable and within the power of the court in an ERISA action for breach of fiduciary duty is the imposition of a constructive trust. “If A wrongfully appropriates money or other property belonging to B, the court can order A to hold the property in trust for B.” Clair v. Harris Trust & Sav. Bank, 190 F.3d 495, 498-99 (7th Cir. 1999). This remedy operates much like restitution and there is a similar emphasis on ill-gotten gain. This remedy may be more attractive to courts that are reluctant to order any type of monetary payment given Justice Scalia’s discussion of monetary damages in Mertens as the classic legal remedy and therefore inappropriate under ERISA.

See:

Admin. Comm. of Wal-Mart Stores, Inc. Assocs.’ Health & Welfare Plan v. Varco, 338 F.3d 680, 686-88 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2904 (2004). *Administrator brought action seeking to impose constructive trust on funds*

received by participant in state court personal injury action and currently held in a reserve bank account established by participant in anticipation of litigation. Because the funds were identifiable, had not been dissipated, were still in participant's control, and in good conscience belonged to the administrator, the Seventh Circuit held that administrator's action sought "appropriate equitable relief," not a claim for a legal remedy and could be pursued under ERISA.

Clair v. Harris Trust & Sav. Bank, 190 F.3d 495 (7th Cir. 1999). Participants brought class action against retirement plan administrator under ERISA challenging delay in payment of benefits. Judge Posner stated that plaintiff's plea for the court to impose a constructive trust on the interest that the defendants earned on benefits withheld in violation of the terms of the plan was an equitable remedy and "squarely within the scope of section 502(a)(3)(B)."

Buckley Dement, Inc. v. Travelers Plan Adm'rs of Ill., Inc., 39 F.3d 784 (7th Cir. 1994). Sponsor, administrator and fiduciary of health care plan sued third-party claims administrator for violation of alleged fiduciary duty under ERISA and for breach of contract, negligence, and breach of common law fiduciary duty. The complaint generally alleged that Travelers failed to submit the appropriate claims before the expiration of its policy. Buckley requested monetary relief and punitive damages. The Seventh Circuit held that the relief sought by the plaintiffs was not equitable in nature and therefore could not be recovered under §502(a)(3). The substance of the remedy sought was monetary relief for all losses sustained as a result of the breach of fiduciary duty, and such recovery was not sanctioned under ERISA §502(a)(3).

5. Injunctions and specific performance

An injunction is one of the specific remedies that Justice Scalia cites in the Mertens decision. Circuit courts of appeals have upheld decisions to grant both preliminary and permanent injunctions. The most common injunction sought for breach of fiduciary duty is reinstatement in the benefit plan. See Varity, 516 U.S. 489; Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 384-85 (4th Cir. 2001) (Griggs I). An injunction ordering specific performance can function in much the same way as monetary damages when the clause at issue in the plan determines whether or not the plaintiff will receive benefits. For example, in In re Unisys Corp. Retiree Med. Ben. ERISA Litig., 57 F.3d 1255, 1269 (3d Cir. 1995), the Third Circuit upheld an order that required an employer to continue benefits for its employees after retirement. In Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347, 1353-54 (11th Cir. 1998), the Eleventh Circuit also granted specific performance as "appropriate equitable relief." The court held that specific performance was appropriate because legal remedies were inadequate due to the fact that ERISA preemption precluded Blue Cross from bringing an action for damages in state court.

See:

Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347, 1353-54 (11th Cir. 1998). Claims administrator brought reimbursement action under ERISA against participants in a employee health benefits plan. Specific performance of a

reimbursement provision was an equitable remedy and therefore could constitute “appropriate equitable relief” under 29 U.S.C. §1132(a)(3).

In re Unisys Corp. Retiree Med. Ben. ERISA Litig., 57 F.3d 1255, 1268-69 (3d Cir. 1995). *Retirees brought a class action suit against former employer, as plan administrator, under ERISA seeking post-retirement medical benefits. Company representatives misinformed employees that once they retired, their medical benefits would “be continued for the rest of your life.” The circuit court relied on Varity v. Howe and held that reimbursement for back benefits and an injunction ordering specific performance of the assurances Unisys made were remedies which were restitutionary in nature and thus equitable. The case was remanded to the district court for determination of which of these equitable remedies were appropriate.*

See also:

Beck v. Levering, 947 F.2d 639 (2d Cir. 1991). *A permanent injunction enjoining defendants from serving as ERISA fiduciaries was an appropriate remedy where \$30 million of assets was invested in companies in which one or more defendants owned an interest and the plan lost more than \$20 million.*

Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1121 (3d Cir. 1989). *Fechter and the class of plan participants that he represented could have lost their ERISA entitlement to surplus benefits and therefore a preliminary injunction was granted against transferring or dissipating any real or personal property except as necessary in the ordinary course of business.*

V. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A): THE DUTY TO ACT SOLELY IN THE INTEREST OF PARTICIPANTS AND BENEFICIARIES AND FOR THE EXCLUSIVE PURPOSE OF PROVIDING BENEFITS TO THEM AND DEFRAYING ADMINISTRATIVE COSTS

The Supreme Court has indicated that the ERISA fiduciary duties “have the familiar ring of their source in the common law of trusts,” which “charges fiduciaries with a duty of loyalty to guarantee beneficiaries’ interests.” Pegram v. Herdrich, 530 U.S. 211, 224 (2000). But unlike the trust situation, wherein the 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,” the ERISA scheme recognizes that “a fiduciary may have financial interests adverse to beneficiaries.” Id. at 225 (internal quotation omitted). This duty of loyalty and the permissible range of dual loyalty is established through the strong delineations of the trustee’s specific duties toward the trust. For example, 29 U.S.C. § 1104(a)(1)(A) mandates that a fiduciary “shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of” providing benefits to the participants and beneficiaries and defraying administrative costs. 29 U.S.C. § 1104(a)(1)(A).

A. ERISA OBLIGATES FIDUCIARIES TO ADHERE TO A STRICT STANDARD OF LOYALTY

Courts have characterized § 1104(a)(1) as establishing either a two- or three- part regime of duties, depending on whether the language “solely in the interest of” and “exclusive purpose” are aggregated as part of one duty or split off into separate obligations. See, e.g., Gregg v. Transp. Workers of Am. Int’l, 343 F.3d 833, 840-41 (6th Cir. 2003); Krohn v. Huron Mem’l Hosp., 173 F.3d 542, 547 (6th Cir. 1999) (finding § 1104 sets up tripartite scheme requiring of fiduciary (a) loyalty, (b) prudent care, (c) action with exclusive purpose of providing benefits/defraying costs); Kuper v. Iovenko, 66 F.3d 1447, 1458 (6th Cir. 1995) (describing section as establishing duties of loyalty, prudence and performance for exclusive purpose of providing benefits); Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) (Bierwirth II) (finding § 1104 imposes three distinct but “overlapping duties”); Grindstaff v. Green, 946 F. Supp. 540, 548-49 (E.D. Tenn. 1996) (noting three components of ERISA fiduciary duties), aff’d, 133 F.3d 416 (6th Cir. 1998). But see Authier v. Ginsberg, 757 F.2d 796, 799 (6th Cir. 1985) (proposing two part scheme wherein fiduciary is obligated to act prudently and solely in interest of participants and beneficiaries); Eaves v. Penn., 587 F.2d 453, 454 (10th Cir. 1978) (stating trustee governed by “solely in the interest” and “prudence” tests); Ogden v. Mich. Bell Tel. Co., 595 F. Supp. 961, 964 (E.D. Mich. 1984) (finding statute imposes two duties on fiduciary).

Regardless of the particular architecture of the duties, § 1104(a)(1) clearly obligates the fiduciary to an utmost loyalty to the interests of the trust participants and beneficiaries. See Gregg, 343 F.3d at 840-41 (finding § 1104(a)(1) establishes duty of loyalty requiring fiduciary to make all decisions regarding ERISA plan solely in interests of participants and beneficiaries and for exclusive purpose of providing benefits or defraying costs). Such loyalty requires an “eye single to the interest of the participants and beneficiaries.” Bierwirth II, 680 F.2d at 271; see also Morris v. Winnebago Indus., 936 F. Supp. 1509, 1522 (N.D. Iowa 1996) (finding unwavering duty to make decisions with single-minded devotion to ERISA

participants and beneficiaries). This duty includes more than mere fiscal accountability, as it charges the fiduciary with an “undivided loyalty, not just responsibility for sound stock-picking and bookkeeping.” Int’l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval, 925 F. Supp. 815, 823 (D.D.C. 1996). This loyalty requires vigorous advocacy of the fiduciary on the part of the plan participants and beneficiaries. See, e.g., Adams v. Gen. Tire & Rubber Co. Supplemental Unemployment Benefit Plan, 794 F.2d 164, 166-67 (4th Cir. 1986) (finding employer violated duties by suspending payments to eligible participants).

1. A fiduciary may have limited interests adverse to those of plan beneficiaries

Generally, a fiduciary must not engage in any activities or have any interests which conflict with those of the beneficiaries. However, in ERISA plans, a fiduciary may often also represent a union or an employer as an officer, employee, or agent in addition to managing the plan trust. Evans v. Bexley, 750 F.2d 1498, 1499 (11th Cir. 1985). This dual representation thus gives rise to a situation of dual loyalty that could potentially undermine the fiduciary’s commitment to the plan. In attempting to understand the scope of the duty of loyalty and its concomitant singular interest, one district court noted that § 1104 is promulgated as subject to §§ 1103(c) and (d), 1342, and 1344, leading that court to conclude that “the obvious intent of Congress is that § 1104(a)(1)(A) shall mean that ‘the assets of a plan shall never inure to the benefit of any employer,’ thus forever forbidding employer self-dealing in the Fund’s assets.” Winpisinger v. Aurora Corp., Precision Castings Div., 456 F. Supp. 559, 565-66 (N.D. Ohio 1978) (quoting 29 U.S.C. §1103(c)); see Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 639-40 (W.D. Wis. 1979) (holding where trustees either stood to benefit personally or represented persons who stood to benefit from plan investment choices, ERISA absolutely prohibited trustees from even attempting to act on behalf of plan).

a. The fiduciary must protect the interests of plan beneficiaries

The anti-inurement or “exclusive benefit” policy of § 1103(c) is intended to protect participants’ financial expectations by precluding trustees/employers from diverting funds to themselves. See Maez v. Mountain States Tel. & Tel., Inc., 54 F.3d 1488, 1506 (10th Cir. 1995). However, despite the absolutist interpretation offered by the district courts in Winpisinger and Freund, the more appropriate guideline has been formulated, providing that “the exclusive benefit rule can only be violated if there has been a removal of plan assets for the benefit of the plan sponsor or anyone other than the plan participants.” Aldridge v. Lily-Tulip, Inc. Salary Ret. Plan Benefits Comm., 953 F.2d 587, 592 n.6 (11th Cir. 1992) (holding trustee’s failure to provide plan assets for contingent early retirement benefits was not violation of exclusive benefit rule). Such an interpretation of the anti-inurement requirements which frame and inform § 1104 permits the kind of dual loyalty arising from trustee decisions to invest in an employer’s securities, thus granting a “benefit” to the trustee/employer from the plan assets but not removing assets to do so. See Brown v. Am. Life Holdings, Inc., 190 F.3d 856, 860 (8th Cir. 1999); Moench v. Robertson, 62 F.3d 553, 568 (3d Cir. 1995).

b. The fiduciary must make plan decisions independent of conflicting interests

Regarding the prevalence of such dual loyalties, the Supreme Court has firmly expressed that ERISA requires “that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.” Pegram, 530 U.S. at 225; see Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443-44 (1999); Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

The “two hats” doctrine relates to situations where the fiduciary has two roles: that of plan fiduciary and then another role potentially adverse to the beneficiaries. The “two hats” doctrine limits an employer’s fiduciary duty to three specific situations: (1) when a fiduciary exercises discretion regarding the plan’s management or when he controls the plan’s management or the distribution of its assets, (2) when he gives investment advice regarding plan property or funds for compensation, and (3) when the fiduciary has the authority or discretionary responsibility for the plan’s administration. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 412-13 (5th Cir. 2003) (citing Melissa Elaine Stover, *Maintaining ERISA’s Balance: The Fundamental Business Decision v. The Affirmative Fiduciary Duty to Disclose Proposed Changes*, 58 WASH & LEE L. REV. 689, 698 n.44 (2001)).

When the “fiduciary hat” is on, the requirements that decisions be made “solely in the interest” and for “the exclusive purpose” of benefiting participants place a “duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.” Bierwirth II, 680 F.2d at 271.

2. The fiduciary may make business management decisions that are contrary to the interests of plan benefits when he acts other than in his capacity as a fiduciary

The dual-loyalty doctrine recognizes that every corporate decision, despite the fact that it may be made by a fiduciary and may have a collateral effect on employee benefits, will not necessarily be a “fiduciary act” requiring singular attention to the interests of the plan participants or beneficiaries. An employer who also acts as a plan’s administrator may also have “financial interests adverse to beneficiaries.” Pegram v. Herdrich, 530 U.S. 211, 225 (2000). The employer may also “take actions to the disadvantage of employee beneficiaries, when they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (e.g., modifying the terms of a plan allowed by ERISA to provide less generous benefits).” Id. at 225.

See:

Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 646 (8th Cir. 2007). *The business decision to merge with one company over another did not trigger the defendants’ fiduciary obligations. Thus, there was no breach of any duty owed the plaintiff beneficiaries of the plan.*

Adams v. LTV Steel Mining Co., 936 F.2d 368, 370 (8th Cir. 1991). An employer/trustee's conclusion that early retirements were not in company's interest was a business decision not subject to sole interest and exclusive purpose requirements.

Dzingski v. Weirton Steel Corp., 875 F.2d 1075, 1079 (4th Cir. 1989). While an employer/trustee was obligated to disclose reasons for its denial of an employee/plan participant's application for early retirement benefits, specific reasons for its discharge of the employee were elements of business information not subject to fiduciary disclosure.

Trenton v. Scott Paper Co., 832 F.2d 806, 809 (3d Cir. 1987). The design of an early retirement plan was purely an employer's business management decision, permitting it sole authority to determine eligibility pursuant to determination of which plants needed fewer employees.

Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986). No ERISA violation was found when employer/trustee sold company and non-vested employees did not receive credit for past work with new owner/employer.

Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985), overruled on other grounds by *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). ERISA employers assume fiduciary status only when functioning in their capacity as plan administrators, not when conducting business.

Sengpiel v. B.F. Goodrich Co., 970 F. Supp. 1322, 1333 (N.D. Ohio 1997), aff'd, 156 F.3d 660 (6th Cir. 1998). An employer's decision to transfer the participants/beneficiaries to the retirement rolls of a new company as part of the creation of a joint venture was not subject to fiduciary duties.

Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 567 F. Supp. 1184, 1193 (N.D. W.Va. 1983), aff'd, 724 F.2d 406 (4th Cir. 1983). When a corporate employer negotiates the sale of a division whose employees are plan participants, the negotiations that affect the terms and conditions of future benefits not protected by vesting and non-forfeiture provisions do not implicate employer/trustee's fiduciary duties as to the pension fund.

The distinction between actions of administration and investment subject to fiduciary responsibility and non-fiduciary business decisions gives a dually-allied employer/trustee broad control over the terms and content of its benefits plans. "Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefit employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). In *Lockheed Corp.*, the Supreme Court reiterated with regard to all benefit plans that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" benefit plans. *Id.* at 890 (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)).

See also:

Loskill v. Barnett Banks, Inc. Severance Pay Plan, 289 F.3d 734, 737 (11th Cir. 2002), *cert. denied*, 537 U.S. 1167 (2003). Citing *Lockheed Corp., the Eleventh Circuit held that conditioning benefits on release of all employment-related claims does not violate anti-cutback provision because employer is free to establish any conditions precedent it chooses.*

But see:

Warren v. Cochrane, 235 F. Supp. 2d 1, 7 (D. Me. 2002). *Although employers are free to modify and amend plans, such modifications are invalid if they are informal or not adopted in accordance with the plan's procedures. The plaintiff was entitled to benefits when the court determined that the amendment excluding the plaintiff from a benefit increase was not adopted in accord with the plan's procedures.*

Thus, an employer's decisions about the content of a plan are not themselves fiduciary acts and are therefore not subject to fiduciary duty. *Pegram*, 530 U.S. at 226-27 (treatment and eligibility decisions by HMO physicians do not generate fiduciary duties). Nor need the trustee/employer's decisions regarding the conditions of eligibility be "solely in the interest" of the participants and beneficiaries. *See Dzingski v. Weirton Steel Corp.*, 875 F.2d 1075, 1078 (4th Cir. 1989); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988), *superseded by statute on other grounds*, 29 U.S.C. § 1054(g). But see Section V.B (below; discussing the duty to disclose information).

a. Fiduciary status during creation and amendment of the plan

Generally, "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." *Hughes Aircraft*, 525 U.S. at 443-44 (holding that employer/trustee's amendment providing for early retirement program and noncontributory benefit structure did not invoke fiduciary duties).

See:

Sears v. Union Cent. Life Ins. Co., 222 Fed. Appx. 474, 481 (6th Cir. 2007). *Employer did not breach any obligation to the employees because it did not act as a fiduciary when the plan was unilaterally amended.*

Akers v. Palmer, 71 F.3d 226, 230 (6th Cir. 1995). *Trustee is only subject to fiduciary duties when managing a plan according to its terms, not when it decides what those terms are to be, because "ERISA is simply not involved in regulating conduct affecting the establishment of a plan or with its terms."*

Milwaukee Area Joint Apprenticeship Training Comm. for Elec. Indus. v. Howell, 67 F.3d 1333, 1338 (7th Cir. 1995). *Fiduciary duties apply solely to plan administration, not its formation, amendment or modification.*

Averhart v. US W. Mgmt. Pension Plan, 46 F.3d 1480, 1488 (10th Cir. 1994). Selective provision of benefits under amendment was an element of plan design not subject to ERISA's fiduciary duties.

Elmore v. Cone Mills Corp., 23 F.3d 855, 862 (4th Cir. 1994). Fiduciary duties apply only to actions taken in accordance with duty to administer plan, not to the creation of the plan.

Belade v. ITT Corp., 909 F.2d 736, 737-38 (2d Cir. 1990). Design of employee benefit plan is strictly a business decision and does not give rise to any fiduciary duties under ERISA.

Adams v. Avondale Indus., Inc., 905 F.2d 943, 949 (6th Cir. 1990). When an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Severs v. Allied Const. Servs., Inc., 795 F.2d 649, 650 (8th Cir. 1986). The conditioning of a lump-sum benefits payment on a non-compete covenant did not violate fiduciary duty, and, in general, dutifully benefited the plan participants by securing a substantial and sustaining investment in the company.

Gaynor v. Ephrata Cmty. Hosp., 690 F. Supp. 373, 378-79 (E.D. Pa. 1988). Trustee/employer is not prohibited from bargaining with employees with respect to their right to prospective participation in plan.

Streeter v. Board of Trs. of Const. Laborers Pension Trust for S. Cal., 435 F. Supp. 1168, 1171 (C.D. Cal. 1977), *aff'd*, *Tomlin v. Board of Trs. for S. Cal.*, 586 F.2d 148 (9th Cir. 1978). The preservation of the actuarial soundness of a plan satisfies the exclusive purpose requirement and supports trustee's decision to adopt, or not to adopt, particular eligibility conditions for benefits.

b. The duty of loyalty during creation and amendment of the plan

No responsibilities to participants exist during the creation phase, since the plan itself has not yet been solidified. However, because amendments do affect individuals to whom the fiduciary is already obligated, some amendments can be subject to the duty of loyalty.

See:

Chappel v. Lab. Corp. of Am., 232 F.3d 719, 726-27 (9th Cir. 2000). When a fiduciary writes and implements an arbitration clause, it is constrained by fiduciary duty to create reasonable procedures and to notify participants of changed circumstances.

Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572, 579-80 (11th Cir. 1987). Amendments concerning provisions of benefits or classifications of participants cannot be arbitrary; trustees used their positions as fiduciaries to

further goals of the union by using plan amendment to restrict retirees from accepting further employment with non-union companies.

B. THE DUTY TO DISCLOSE INFORMATION AND AVOID MISREPRESENTATIONS

ERISA fiduciaries have a fiduciary duty to disclose complete and accurate information about benefits to plan participants and beneficiaries. This duty includes a duty not to mislead plan participants in response to plan-relevant questions as well as a duty to supply information not specifically requested in certain circumstances. It also can require a fiduciary to give accurate information regarding trustee decisions that impact the plan.

If the employer/fiduciary breaches its fiduciary duty by making misrepresentations, employees may bring claims for individual relief under ERISA § 502(a)(3), codified at 29 U.S.C. § 1132(a)(3). To prevail, the plaintiff must show: (1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that the representations constituted material misrepresentations; and (3) that plaintiff detrimentally relied on those misrepresentations. Burstein v. Ret. Account Plan for Employees of Allegheny Health, Ed. & Research Found., 334 F.3d 365, 384 (3rd Cir. 2003). For more on the procedural considerations in an action under § 502(a)(3) see Section XI.B, and for available remedies in such actions, see Section IV.

1. Duty not to mislead

The fiduciary has a duty not to mislead the plan participants regarding material information about benefits. When the plan administrator gives plan participants information, it must speak truthfully.

See:

Varity Corp. v. Howe, 516 U.S. 489, 506 (1996). *An employer/fiduciary breached its fiduciary duty when it intentionally mislead employees about the chance of financial success and the security of benefits of a new subsidiary to persuade them to transfer to the subsidiary with the goal of terminating their benefits and reducing costs. The Court determined that when making these statements, the employer was acting in its fiduciary capacity.*

Mathews v. Chevron Corp., 362 F.3d 1172, 1183 (9th Cir. 2004) (quoting *Wayne v. Pac. Bell*, 238 F.3d 1048, 1055 (9th Cir. 2001)). *Misinformation also includes “saying something is true when the person does not know whether it is or not.”*

Gregg v. Transp. Workers of Am. Int’l, 343 F.3d 833, 844 (6th Cir. 2003). *Employers’ misleading or false statements violate fiduciary duty of responding completely and accurately regarding the plan.*

Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994). *When the employer/fiduciary makes affirmative material misrepresentations about changes to the employee benefit plan, it breaches its fiduciary duty.*

Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993). When a senior benefits counselor told employees that no early retirement incentive plan was being considered, though there was, the employer breached its fiduciary duty because it constituted an affirmative material misrepresentation.

But see:

Crowley ex rel. Corning, Inc., Inv. Plan v. Corning, Inc., 234 F. Supp. 2d 222, 230 (W.D.N.Y. 2002). Without applying heightened pleading standard of Rule 9(b), court dismissed claim that fiduciary committee breached duty to disclose information to beneficiaries where plaintiff's complaint failed to allege that fiduciary had actual knowledge of material information about the value of the employer's stock.

a. Materiality defined

A misrepresentation is only actionable if it is material. A misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994). Materiality is a mixed question of law and fact. *Id.*; see also *Gregg*, 343 F.3d at 844 (quoting *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999) and stating something is material "if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing . . . benefits to which she may be entitled").

b. Duty to disclose future plans or plan amendments

When a new plan or changes in a plan are being considered, an employer/fiduciary may not purposely keep its benefits counselors uninformed so that they may speak truthfully, yet incorrectly, when stating that no plan or plan changes are under consideration.

See:

Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993). The employer/fiduciary may not build a "Chinese wall" around the people on whom employees reasonably rely for information and guidance about retirement so that these people can give truthful, yet incorrect, information that they know of no future changes in the benefit plan.

Mullins v. Pfizer, Inc., 147 F. Supp. 2d 95, 109 (D. Conn. 2001). A truthful statement by a benefits counselor that she had no knowledge of forthcoming retirement benefits enhancements constitutes a misrepresentation when the employer/fiduciary purposely withheld the existence of such a plan from the counselor.

The circuit courts are currently split on the issue of when a fiduciary has a duty to inform beneficiaries about a change in a plan or the contemplation of a future plan. The majority

of the circuits hold that a fiduciary has a duty to inform beneficiaries of possible changes to a plan or a new plan only when such changes are under “serious consideration.”

The majority view holds that a duty of accurate disclosure begins “when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.” Fischer v. Phila. Elect. Co., 96 F.3d 1533, 1539 (3d Cir. 1996) (Fischer II); see also Mathews v. Chevron Corp., 362 F.3d 1172, 1180-182 (9th Cir. 2004) (utilizing Fischer II test but also citing Wayne v. Pac. Bell, 238 F.3d 1048, 1054 (9th Cir. 2001) and stating that duty not to actively misinform applies even before serious consideration begins); Winkel v. Kennecott Holdings Corp., 3 Fed. Appx. 697, 703 (10th Cir. 2001); Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1049 (9th Cir. 2000) (adopting Fischer II serious consideration test but also stating that factors should not be applied too rigidly, and courts should consider larger picture of fiduciary’s conduct); McAuley v. IBM Corp., 165 F.3d 1038, 1043 (6th Cir. 1999) (adopting Fischer II serious consideration test but also stating that factors are not rigid and larger picture is also important); Vartanian v. Monsanto Co., 131 F.3d 264, 270 (1st Cir. 1997) (adopting Fischer II test but explicitly stating what court felt was inherent requirement in Fischer II: that plaintiff “must show that a specific proposal under serious consideration would have affected him”). But see Beach v. Commonwealth Edison Co., 382 F.3d 656, 659-61 (7th Cir. 2004) (noting majority rule but leaving Seventh Circuit standard undecided).

The other view taken by the Second Circuit and the Fifth Circuit looks at a number of factors in determining whether a statement about a future plan is material: (1) “how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes,” (2) “the special relationship of trust and confidence between the plan fiduciary and beneficiary,” (3) “whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee and the employee’s reliance of the plan administrator for truthful information,” and (4) “the specificity of the assurance.” Ballone v. Eastman Kodak Co., 109 F.3d 117, 125 (2d Cir. 1997).

The Fifth Circuit calls its approach “fact-specific.” In Martinez v. Schlumberger Ltd., 338 F.3d 407, 428 (5th Cir. 2003), the court stated that the question courts must ask is “whether there is a substantial likelihood that a reasonable person in the plaintiffs’ position would have considered the information an employer-administrator allegedly misrepresented important in making a decision to retire.” The court considers the Ballone factors in determining whether the representation was material. Id. The court also stated that although it was not adopting the “serious consideration” test, the more seriously a new plan is considered, the more a representation about the plan is material. Id. at 428. “[A]n employer has no affirmative duty to disclose the status of its internal deliberations on future plan changes even if it is seriously considering such changes, but if it chooses to speak it must do so truthfully.” Id. at 430.

2. Duty to disclose additional material information

The majority position is that the fiduciary’s duty to disclose is not limited to responding truthfully to questions by the plan participant. In Varity Corp. v. Howe, the Supreme

Court expressly declined to rule whether fiduciaries have a duty to disclose information in the absence of inquiry. 516 U.S. 489, 506 (1996). Post-Varity, most circuit courts have found the fiduciary must provide information that it knows or should know would be harmful to withhold based on the fiduciary's knowledge of the specific participant's situation. See, e.g., Gregg v. Transp. Workers of Am. Int'l, 343 F.3d 833, 847-48 (6th Cir. 2003); Horvath v. Keystone Plan E., Inc., 333 F.3d 450, 461-62 (3d Cir. 2003); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 380 (4th Cir. 2001); Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590 (7th Cir. 2000); Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000); Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 547-48, 550 (6th Cir. 1999); Shea v. Esensten, 107 F.3d 625, 628 (8th Cir. 1997); Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995); Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 751 (D.C. Cir. 1990).

The failure to disclose will not be excused because the plan participant failed to ask precisely the right question. Krohn, 173 F.3d at 548; Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993); Eddy, 919 F.2d at 751. In Eddy, the plaintiff found out shortly before he planned to undergo surgery that his health care benefits were to be discontinued the day of the surgery. Eddy, 919 F.2d at 748. He asked if he had any right to "convert" his coverage, and was told he did not. Id. at 749. In reality, he had the right to "continue" his coverage, and the plan administrator defended the breach of fiduciary duty claim on the ground that the plaintiff did not ask about continuation. Id. The D.C. Circuit found that "[r]egardless of the precision of his questions, once a beneficiary makes known his predicament, the fiduciary is under a duty to communicate . . . all material facts in connection with the transaction which the trustee knows or should know." Id. at 751 (internal citations omitted).

See:

Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 548 (6th Cir. 1999). When the husband of a recently-injured employee whose prognosis was uncertain requested general information on benefits for his wife, the employer/fiduciary breached its fiduciary duty by failing to provide information about long-term disability benefits, though the husband did not specifically request this information.

Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 10 (2d Cir. 1997). The employer/fiduciary breached its fiduciary duty when its benefits counselor provided materially misleading information by advising a seriously ill employee to delay retirement and take disability benefits, failing to mention that the employee could receive a lump sum at retirement, that she could not retire immediately upon election, and that if she died before the effective date of her retirement, she would forfeit the lump sum and her husband would receive considerably less in monthly installments. The fiduciary also breached its fiduciary duty because its summary plan description ("SPD") did not make this benefits information clear.

Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993). The duty to inform of material information about benefits is "a constant thread in the relationship," between the beneficiary and the fiduciary, including a duty not to misinform as well as an affirmative duty to inform the beneficiary when it knows that silence might be harmful.

3. Limitations on the duty to disclose

While ERISA's fiduciary duty imposes significant requirements on fiduciaries to give full and accurate information to plan participants, there are limits to the duty. First, employer/fiduciaries are under no obligation to disclose accurate information about future changes in benefits when those changes are not presently ascertainable. An employer/fiduciary must be forthright in the information it gives, but courts recognize that fiduciaries are not able to tell the future and are not expected to do so. Ballone, 109 F.3d at 123; Fischer, 994 F.2d at 135; Drennan v. Gen. Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992) (citing Berlin v. Mich. Tel. Co., 858 F.2d 1154, 1164 (6th Cir. 1988)).

Second, there is no general duty to provide individualized, unsolicited advice. Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 115 (1st Cir. 2002). At times, the fiduciary must provide additional information that the plan participant did not request. Id. However, this duty only arises when the plan participant gives a particular reason that the fiduciary would know the information would be important. Id.; Griggs, 237 F.3d at 381 ("ERISA does not impose a general duty requiring ERISA fiduciaries to ascertain on an individual basis whether each beneficiary understands the collateral consequences of his or her particular election.").

Third, courts recognize that employer/fiduciaries wear "two hats" and that some internal deliberations are conducted as a business, while others are conducted as a fiduciary. Fletcher v. Kroger Co., 942 F.2d 1137, 1139 (7th Cir. 1991). The employer/fiduciary must disclose certain internal fiduciary deliberations but is under no obligation to disclose the internal deliberations it conducts as a business. Drennan, 977 F.2d at 251 (finding duty does not interfere with substantive aspects of bargaining). Also, fiduciaries are not required to disclose to individual participants names and addresses of other participants since disclosure would not provide information relating to the provision of benefits or defrayment of expenses. Hughes Salaried Retirees Action Comm. v. Adm'r of Hughes Non-Bargaining Ret. Plan, 72 F.3d 686, 690-691 (9th Cir. 1995).

C. THE DUTY TO MANAGE PLAN FUNDS IN THE INTERESTS OF PARTICIPANTS AND BENEFICIARIES

The duty of loyalty requires that trustees manage all plan funds in the interest of participants and beneficiaries. See Palino v. Casey, 664 F.2d 854 (1st Cir. 1981). But this requirement does not prohibit every indirect benefit to people other than plan beneficiaries or participants, including the fiduciaries themselves, so long as the interests of the plan and those covered were first in mind.

A number of courts have held that, in some circumstances, a fiduciary may benefit indirectly from plan investments.

See:

Metzler v. Graham, 112 F.3d 207, 213 (5th Cir. 1997). *Fiduciary did not violate duty by buying land near other parcels in which he had interest when he reasonably believed that he was acting in the participant's best interests and*

there was no evidence that fiduciary ever placed his interests over plan's interests.

Ershick v. United Mo. Bank of Kansas City, N.A., 948 F.2d 660, 666-68 (10th Cir. 1991). *Trustee did not violate fiduciary duties with respect to investments in employer which benefited trustee and which were allowed by ESOP and undertaken only at specific direction of plan administrator, absent any indication that trustee ever utilized its position to further its own interest to detriment of plan participants.*

Lynch v. J.P. Stevens & Co., 758 F. Supp. 976, 998 (D.N.J. 1991). *A course of action which reasonably best promoted interests of plan participants did not violate responsibilities of sole interest and exclusive purpose simply because it incidentally benefited employer.*

Donovan v. Walton, 609 F. Supp. 1221, 1245-246 (S.D. Fla. 1985), *aff'd sub nom.*, *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986). *In adopting the "exclusive purpose" standard, Congress did not intend to make illegal the fact of life that most often a transaction benefits both parties involved and therefore trustee's restructuring of retirement plan and recapture of assets deemed surplus did not violate duties of sole interest and exclusive purpose.*

District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468, 1481 (S.D.N.Y. 1983). *Fact that purchase by profit-sharing plan of employer's stock also benefited employer did not necessarily indicate violation of fiduciary standards or exclusive purpose provisions of ERISA.*

Morse v. Stanley, 566 F. Supp. 1455, 1458-459 (S.D.N.Y. 1983), *aff'd in part and rev'd in part on other grounds*, 732 F.2d 1139 (2d Cir. 1984) *Refusal by trustees of an accelerated payment to a departing employee from employer's profit-sharing trust did not violate sole interest and exclusive purpose duties.*

1. Careful and impartial obligation

The standard of trust requires that in making investment decisions, the trustee must conduct a careful and impartial investigation, with an eye single to the interests of participants and beneficiaries. *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001). The duty of loyal management in the sole interest of the participants and beneficiaries and for the exclusive purpose of providing benefits is not a duty focused singularly on the maximization of pecuniary benefits. *See Foltz v. U.S. News & World Report, Inc.*, 865 F.2d 364, 372-73 (D.C. Cir. 1989).

See:

In re Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008). *The Ninth Circuit reversed the district court's order, which granted summary judgment because the district court held that the employer stock remained a financially viable investment. The court opined that mere financial viability of an investment*

does not meet the “prudent man” standard because an investment could be inflated and dramatically fall in value at a later time. Thus, plan fiduciaries could be liable if they knew or should have known that an “illegal scheme” directly caused the rise in Syncor’s “value.”

Moench v. Robertson, 62 F.3d 553, 566-67 (3d Cir. 1995). Plan committee was unreasonable in interpreting Employee Stock Ownership Plan to require investment only in employer’s common stock, and therefore acted arbitrarily and capriciously and violated duty inasmuch as that interpretation limited ability to act in sole interest of beneficiaries.

Eaves v. Penn, 587 F.2d 453, 459-60 (10th Cir. 1978). Fiduciary is bound by duty of exclusive interest when determining whether to invest plan funds in employer’s securities.

Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 632 (D. Minn. 1988). High turnover rate and predominance of commission-based investments demonstrate that investment decisions were made in best interest of fiduciary, not plan participants and beneficiaries.

Whitfield v. Tomasso, 682 F. Supp. 1287, 1302 (E.D.N.Y. 1988). By permitting or authorizing union to deposit and retain for its own account employer contributions intended for employee welfare benefit fund, trustees failed to act solely in interest of fund’s participants for the exclusive purpose of providing benefits.

Whitfield v. Cohen, 682 F. Supp. 188, 195 (S.D.N.Y. 1988). Trustee who failed to discern whether investment management company or its manager was registered as investment manager with SEC or what fees company would charge for services acted in violation of fiduciary duties.

IAM Stock Ownership Inv. Trust v. E. Air Lines, Inc., 639 F. Supp. 1027, 1040 (D. Del. 1986). The duty to manage funds for the exclusive purpose of benefiting participants was not violated where fiduciary spent money to determine stock value where there was a contemplated merger, since decision of sale merits independent evaluation.

Sandoval v. Simmons, 622 F. Supp. 1174, 1215-216 (C.D. Ill. 1985). Trustee violated its fiduciary duty by taking no steps to monitor performance of investment committee charged with managing plan assets.

Dimond v. Ret. Plan for Employees of Michael Baker Corp. & Affiliates, 582 F. Supp. 892, 898 (W.D. Pa. 1983). Trustee’s investment of fund assets in employer without seeing purchase agreement and without seeking independent advice was a violation of duty to manage fund with the exclusive purpose of providing benefits and defraying costs.

Davidson v. Cook, 567 F. Supp. 225, 236 (E.D. Va. 1983), aff'd, 734 F.2d 10 (4th Cir. 1984). Trustees and administrators violated their fiduciary duties when they did not hold union local's proposal for loan at arms length and compare it to other available investments, but rather accommodated union local's needs.

Donovan v. Bierwirth, 538 F. Supp. 463, 470 (E.D.N.Y. 1981), order modified by 680 F.2d 263, 269 (2d Cir. 1982). Independent investigation into basis for investment decision which presents potential conflict of interest must be both intensive and scrupulous and must be discharged with greatest degree of care that could be expected under all circumstances by reasonable beneficiaries and participants.

VI. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B): THE DUTY OF PRUDENCE

The duty of prudence mandates that a fiduciary's actions with respect to a plan must be performed "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C.

§ 1104(a)(1)(B). Borrowed from the common law of trusts, this duty is also known as the duty of care. Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985). The standard is objective and therefore independent of a fiduciary's lack of bad faith. Lanka v. O'Higgins, 810 F. Supp. 379, 387 (N.D.N.Y. 1992) (citing Donovan v. Bierwirth, 538 F. Supp. 463, 465 (E.D.N.Y. 1981) (Bierwirth I), order modified by 680 F.2d 263, 269 (2d Cir. 1982) (Bierwirth II)).

A. REQUIREMENTS OF THE DUTY OF PRUDENCE

Though the end result is usually the same, courts differ in their approach to determining whether a fiduciary has met the duty of prudence under § 1104(a)(1)(B). Most courts agree that the question is whether a fiduciary has conducted a "thorough, impartial investigation" of the contemplated transaction and made the decision that the fiduciary has reasonably concluded is the best for the beneficiaries. Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 300 (5th Cir. 2000) (Bussian II); Bierwirth II, 680 F.2d at 271.

[T]he extent of the trustee's investigation and evaluation is often the focus of inquiry in imprudent-investment suits . . . because the determination of whether an investment was objectively imprudent is made on the basis of what the trustee knew *or should have known*; and the latter necessarily involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate.

Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., dissenting) (citations omitted); see In re Unisys Sav. Plan Litig., 74 F.3d 420, 436 (3d Cir. 1996) (Unisys I).

Accordingly, most courts carefully analyze first whether the fiduciary conducted an adequate investigation. Bussian II, 223 F.3d at 302. If so, courts typically look to whether the decision was reasonable in light of the beneficiaries' interests. Id. at 302-03. Because there is no formal rule or guideline to determine the reasonableness of a fiduciary's behavior, a court must consider "all relevant circumstances." Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 921 (8th Cir. 1994). If a court decides that an investigation was insufficient, the proper inquiry is whether a hypothetical prudent fiduciary would have made the same decision in light of what an investigation would have revealed. Bussian II, 223 F.3d at 303.

1. The duty to invest prudently

Because fiduciary duty cases usually involve loss to the plan that could have been prevented by a careful investigation, many courts do not separate the duty to investigate from the duty to invest prudently, and do not consider fully whether a hypothetical prudent fiduciary would have made the same decision. See generally Howard v. Shay, 100 F.3d 1484, 1489-90

(9th Cir. 1996) (holding that pension plan fiduciaries acted imprudently in self-dealing transaction by completing transaction without negotiation, relying on independent valuation without questioning it, despite fact that cursory review of valuation revealed carelessness of assessment); Brock v. Robbins, 830 F.2d 640, 646 (7th Cir. 1987) (holding that trustees of employee pension, health and welfare fund acted imprudently in not adequately investigating basis and justification for fee of claims processor before entering contract in connection with conversion to self-funding); Katsaros v. Cody, 744 F.2d 270, 279-80 (2d Cir. 1984) (holding that pension fund trustees acted imprudently in deciding to make loan to bank by failing to seek outside assistance and relying exclusively on the borrower's representations as to its financial strength); Donovan v. Mazzola, 716 F.2d 1226, 1234 (9th Cir. 1983) (holding that union pension fund trustees acted imprudently in granting loan to union's convalescent fund by failing to inquire into consultant's qualifications and to follow accepted standards for hiring consultant); Bierwirth II, 680 F.2d at 263. In such cases, a court usually determines that the duty was breached because testimony of experts established that the fiduciary's behavior did not comport with industry standards at the time, Mazzola, 716 F.2d at 1233, or that investigation would have revealed information important to the beneficiaries that would compel an opposite decision, Bierwirth II, 680 F.2d at 272-73 (holding that trustees of corporate pension plan acted imprudently in their efforts to fend off tender offer by failing to consult independent counsel for legal advice).

A few cases involve a determination that although a fiduciary's investigation was inadequate, the fiduciary did not violate § 1104(a)(1)(B) because a hypothetical prudent person would have made the same decision. See Herman v. Mercantile Bank, N.A., 143 F.3d 419, 421 (8th Cir. 1998) (although fiduciary did not independently evaluate the merits of a stock buy-back, he paid the same amount a hypothetical prudent fiduciary would have paid; therefore, he was not liable); Roth, 16 F.3d at 919; GIW Indus. v. Trevor, Stewart, Burton & Jacobsen, Inc., No. CV188-90, 1989 U.S. Dist. LEXIS 2946, at *35-*36 (S.D. Ga. Mar. 10, 1989), aff'd, 895 F.2d 729 (11th Cir. 1990).

Even though a fiduciary's lack of prudent investigation did not cause a loss to the plan, a court may award "appropriate injunctive relief such as removing the offending trustees from their positions." Robbins, 830 F.2d at 647 (injunctive relief applied to "honest but imprudent trustees" who caused no loss to a plan would be in accordance with the purpose of ERISA).

a. Extent of the duty to investigate

One court has labeled the duty to investigate "the most basic of ERISA's . . . fiduciary duties." Unisys I, 74 F.3d at 435. In fact, most courts focus their analysis wholly on the fiduciaries' investigation. See, e.g., Eyler v. Commissioner, 88 F.3d 445, 456 (7th Cir. 1996) (lower court was not clearly erroneous in finding fiduciaries had not met the duty of prudence in making a decision the same day they heard of project and relying only on an outdated estimated price range). To meet the duty of prudence, fiduciaries must demonstrate that, "at the time they engaged in the challenged transaction, [they] employed the appropriate methods to investigate the merits of the investment and to structure the investment." Mazzola, 716 F.2d at 1232.

Investigation is not all that is required prior to making investment decisions, however; indeed, a fiduciary “acts judiciously . . . in hesitantly exercising an ambiguous power.” Bidwill v. Garvey, 943 F.2d 498, 507 (4th Cir. 1991) (trustees, who owed money to fund depending on whether it was deductible, were prudent in obtaining an IRS ruling and delaying irrevocable payments to fund). The conduct of fiduciaries during the investigation leading to a decision is more important than the result of their decisions. In re Unisys Sav. Plan Litig. (Unisys II), 173 F.3d 145, 153 (3d Cir. 1999); Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983). Furthermore, the standard is flexible: “the level of knowledge required of a fiduciary will vary with the nature of the plan.” Donovan, 716 F.2d at 1467 n.26. It is clear, however, that a fiduciary’s total ignorance of important features about a particular investment constitutes a breach of the duty of prudence. White v. Martin, 286 F. Supp. 2d 1029, 1041 (D. Minn. 2003).

See:

White v. Martin, 286 F. Supp. 2d 1029, 1041 (D. Minn. 2003). Fiduciary’s ignorance of the Canadian non-resident tax incurred by the fund as a result of fiduciary’s decision to invest through a Canadian firm constituted a breach of the duty of prudence.

Conner v. Mid S. Ins. Agency, 943 F. Supp. 647, 658-59 (W.D. La. 1995). Whether a plan can pay for an asset is not the only relevant question in evaluating potential plan investments. The opportunity cost of the chosen investment, or the expected return on investments which would be made if the chosen investment was not made, is also important. If investment A will yield X dollars and investment B will yield X+1 dollars, this seriously calls into question investment in A. Not even to consider investment B, however, is certainly imprudent.

(1) Reliance on expert assistance

Fiduciaries may rely on experts to assist with investigation and evaluation; however, fiduciaries must ultimately rely on their own independent judgment. Bussian II, 223 F.3d at 300-01; Cunningham, 716 F.2d at 1474. Once an expert is retained, “the fiduciary must (1) investigate the expert’s qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert’s advice is reasonably justified under the circumstances.” Howard, 100 F.3d at 1489.

Reliance is reasonably justified depending on “the expert’s reputation and experience, the extensiveness and thoroughness of the expert’s investigation, whether the expert’s opinion is supported by relevant material, and whether the expert’s methods and assumptions are appropriate to the decision at hand.” Bussian II, 223 F.3d at 301. Fiduciaries need not replicate the analysis of hired experts nor hire others to evaluate expert information; however, reports should be reviewed and independently assessed by the fiduciaries themselves. Id. at 301; Unisys I, 74 F.3d at 435; Unisys II, 173 F.3d at 152. Fiduciaries must also supplement expert information to keep it up to date. Unisys I, 74 F.3d at 435; Cunningham, 716 F.2d at 1474.

See:

In re Unisys Sav. Plan Litig., 173 F.3d 145 (3d Cir. 1999) (*Unisys II*). The fiduciaries performed a sufficiently prudent investigation in investing in Guaranteed Income Contracts issued by an insurance company that went into receivership because the investigation was performed in part by an experienced investment consultant who used reliable information provided by national ratings services. Moreover, the fiduciaries made their own evaluation of the investment risks, and did not “passively” accept the consultant’s appraisal.

(2) Retention of additional experts

If expert reports are unclear or seem insufficient after a fiduciary’s careful review, the fiduciary may need to retain additional experts. *Howard*, 100 F.3d at 1489; *but cf. Cunningham*, 716 F.2d at 1491 (O’Scannlain, J., dissenting) (“once [fiduciaries] have carefully selected and adequately informed the expert, they should be able to rely on the expert’s conclusions”); *Bidwill*, 943 F.2d at 509 (stating that if trustees have acted prudently, there is no duty to hire outside counsel).

See:

Riley v. Murdock, 890 F. Supp. 444, 457-58 (E.D.N.C. 1995), *aff’d*, 83 F.3d 415 (table), No. 95-2414, 1996 WL 209613 (4th Cir. Apr. 30, 1996). The fiduciaries performed a sufficiently prudent investigation in selecting an insurance company from whom to purchase an annuity because the investigation and decision-making process was performed by a committee of experienced financial managers. The committee sought assistance from attorneys and a top employee benefits consulting firm in addition to performing its own investigation, including conducting financial analyses, personally meeting with the bidding companies’ senior management, reviewing financial documents, hiring specialists in insurance company evaluation, and asking advice from independent sources and parties who had purchased annuities from the ultimate choice.

Mazur v. Gaudet, 826 F. Supp. 188, 191-92 (E.D. La. 1992). Though granting summary judgment to the plaintiff in an ERISA action for breach of fiduciary duty is rare, the defendant’s conduct was so imprudent that a jury could not reasonably find otherwise. The trustees played no significant managerial role in the fund and, without any investigation, relied on their accountant who committed malpractice by conducting audits wholly out of accordance with general accounting principles.

Whitfield v. Cohen, 682 F. Supp. 188, 195 (S.D.N.Y. 1988). Trustee’s investigation of investment manager was imprudent in that trustee did not adequately evaluate the qualifications or the reasonableness of fees of the investment manager. Furthermore, the trustee’s failure to monitor the investment manager’s ongoing behavior once retained was imprudent.

Blackwell v. Transamerica Occidental Life, 707 F. Supp. 437, 441 (D. Nev. 1987). A trust administrator acted imprudently by failing to maintain an adequate computerized system to store fund eligibility information and solely relying on a union business agent to provide information about which union employees were eligible to receive benefits.

Donovan v. Walton, 609 F. Supp. 1221, 1244 (S.D. Fla. 1985), *aff'd sub nom.*, *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986). Trustees performed an ideal investigation in planning and carrying out a construction project, when they obtained the advice of two law firms, the fund's general counsel, and numerous experts to advise on every material aspect of the project. The trustees did not violate the prudent man standard because they ensured the information provided was constantly up to date, verified, and reviewed at board meetings. The court concluded that the trustees' behavior could not have been more prudent "short of foregoing the project altogether, [which] would [have been] imprudent given the plethora of information available to the [t]rustees suggesting that the project was going to be a smashing success!"

Marshall v. Kelly, 465 F. Supp. 341, 349 (W.D. Okla. 1978). The court adopted a sliding scale advocated by legislative history, suggesting that the more complex and significant the transaction, the more investigation is needed to satisfy the prudent man standard.

Additionally, fiduciaries should take care that they meet the prudence standard in retaining experts. See *Mazzola*, 716 F.2d 1226, 1234 (finding imprudence in failing to comply with industry standards in the bidding process to hire a consultant, resulting in overpaying for an inadequate study).

(3) Reliance on non-experts

With respect to persons who are not experts but whose tasks are administrative, fiduciaries "may rely on information, data, statistics or analyses furnished by [them] . . . provided that [the fiduciary] has exercised prudence in the selection and retention of such persons." 29 C.F.R. § 2509.75-8 FR-11 (2001). Furthermore, the fiduciary must not have any reason to doubt the trustworthiness of the person. *Id.*

B. APPLICATIONS OF THE DUTY OF PRUDENCE

A number of cases have discussed the requirements of the duty of prudence in specific plan management decisions.

See:

Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171 (3d Cir. 1996). The duty of prudence includes a duty to disclose to the fund material information a reasonable fiduciary would believe to be in the best interest of the beneficiaries to disclose.

Lodge v. Shell Oil Co., 747 F.2d 16, 19 (1st Cir. 1984). *There was no breach of duty where a fund refrained from disbursing benefits to a man whose divorce decree did not specify a division of those benefits; the jury's finding that it was prudent to wait until clarification of ownership was reasonable.*

Utilicorp United, Inc. v. Kemper Fin. Servs., Inc., 741 F. Supp. 1363, 1366 (W.D. Mo. 1989). *Adherence to trust documents does not excuse trustees from duty to act according to prudent man standard.*

Wright v. Nimmons, 641 F. Supp. 1391, 1403 (S.D. Tex. 1986). *Willful violation of ERISA's duty of prudence was found where a fiduciary ignored and evaded IRS requests, causing the plan to lose qualified status as compliant with ERISA and contributions to be no longer tax deductible.*

1. Prudent investing

Under the authority given by 29 U.S.C. § 1135, the Secretary of Labor has adopted specific rules for fiduciary responsibility with respect to investment duties. See 29 C.F.R. § 2550.404a-1 (2001); Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313, 317 (5th Cir. 1999). Courts have held that a fiduciary's prudence is to be evaluated according to the modern portfolio theory of investing rather than by judging each investment individually. Laborers Nat'l Pension Fund, 173 F.3d at 318 (district court erroneously looked to traditional trust law rather than modern portfolio theory in determining interest-only mortgage backed securities were imprudent investments). The regulation provides a safe-harbor for compliance with § 1104(a)(1)(B) if the fiduciary:

- (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
- (ii) Has acted accordingly.

29 C.F.R. § 2550.404a-1 (b)(1) (2001).

"Appropriate consideration" has an open-ended definition that includes, among other things, contemplating the investment's risk and reward in light of the plan's portfolio. 29 C.F.R. § 2550.404a-1(b)(2) (2001).

See:

DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 420-421 (4th Cir. 2007). *Plaintiffs sued airline for including employer stock fund in company investment plan, and sought recovery when the stock was cancelled after the airline filed for bankruptcy. The court held that the airline did not violate the "prudent man"*

standard because it hired two independent advisors and employed a non-company fiduciary to determine the future of the company fund.

Flanigan v. Gen. Elec. Co., 242 F.3d 78, 86 (2d Cir. 2001). *Trustees acted prudently in investing plan funds earmarked for transfer to corporate successor. Because short-term liquidity was needed to transfer the funds, it was prudent to invest them in solid short-term assets, eliminating the risk that additional plan assets would have to be liquidated to satisfy the contractually required transfer of funds.*

In re Unisys Sav. Plan Litig., 74 F.3d 420, 435 (3d Cir. 1996) (*Unisys I*). *Maturity dates of Guaranteed Investment Contracts should have been discussed by fiduciaries because of importance in assessing the risk of the investment.*

Jones v. O'Higgins, No. 87-CV-1002, 1989 WL 103035, at *8-*9 (N.D.N.Y. Sept. 5, 1989). *Because the fiduciary used a contrarian investment strategy, prudent according to industry standards, failure to sell securities that were declining in value was not imprudent.*

But see:

Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1044-45 (9th Cir. 2001). *Fiduciary was imprudent in investing too much of a trust's assets in risky investments, given the conservative guidelines of the trust.*

2. Prudent loans

Courts determine the prudence of loans by considering the investigation conducted prior to making the loan and whether the loan would be a sound investment according to industry standards. *Katsaros*, 744 F.2d at 279-80. Reliance on the representations of the borrower without more investigation is insufficient to meet the duty of prudence. *Id.* at 279.

See:

Brock v. Walton, 794 F.2d 586 (11th Cir. 1986) (*per curiam*). *Dicta suggested that the interest rate offered by fiduciaries as lenders could be so low as to be *per se* imprudent.*

Davidson v. Cook, 567 F. Supp. 225, 232 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4th Cir. 1984). *Imprudence in real estate lending occurred where fiduciaries did not conduct a proper appraisal of the proposed construction, future rental income, or the borrower's finances, and did not obtain assignment of rents, sureties on the loan, or a principal repayment schedule.*

Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan, 507 F. Supp. 378, 384 (D. Haw. 1980). *The trustees' honest belief that their conduct was in the plan's best interests is irrelevant in determining whether they failed to meet the prudent man standard. The court denied the trustees' request to be treated more leniently than a larger financial institution. Extending a loan where the*

plan had the most risk and least potential return of any party involved was imprudent.

Freund v. Marshall & Isley Bank, 485 F. Supp. 629, 636 (W.D. Wis. 1979).
Plan's loan of its assets in exchange for unsecured notes without sufficiently high interest rates was imprudent; others extending arms-length loans to the company received valuable security and higher interest rates.

3. Prudent management of Employee Stock Ownership Plans

Employee Stock Ownership Plans (“ESOP’s”) were created to encourage employee ownership by investing in the plan-sponsoring company’s securities. Moench v. Robertson, 62 F.3d 553, 568 (3d Cir. 1995). ESOP fiduciaries, though exempt from other provisions of ERISA such as the duty to diversify and restrictions on dealing with interested parties, must meet the duty of prudence under § 1104(a)(1)(B). Eaves v. Penn, 587 F.2d 453, 459 (10th Cir. 1978). ESOP fiduciaries do, however, receive the benefit of the doubt in the form of a presumption of having complied with ERISA. Moench, 62 F.3d at 571. For example, mere stock fluctuations, even those that trend downward significantly, are insufficient to establish the imprudence required to rebut the Moench presumption; plaintiffs must establish a causal link between the failure to investigate and the harm suffered by the fund. Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004). However, because ESOP fiduciaries are often directors of the company sponsoring the plan, they must conduct an extremely thorough and impartial investigation in order to meet the duty of prudence in those instances that implicate both loyalties. Moench, 62 F.3d at 572; Martin v. Feilen, 965 F.2d 660, 670 (8th Cir. 1992). For a more detailed discussion of litigation related to ESOPs and employer stock, see Section XV.D of this Handbook.

a. Investment in the employer’s securities

Under 29 U.S.C. § 1108(e), a plan may invest in the securities of its sponsor, the employer of the plan’s beneficiaries, in exchange for “adequate consideration.” 29 U.S.C. § 1108(e); Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996). “Adequate consideration” is defined, “[i]n the case of an asset other than a security for which there is a generally recognized market, [as] the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.” 29 U.S.C. § 1002(18)(B). This section works together with § 1104 in that a fiduciary may be found to have violated the duty of prudence if he has failed to conduct a sufficient investigation as to the adequacy of consideration. Howard, 100 F.3d at 1489; Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983).

In 1988, the Department of Labor proposed a regulation that establishes a two-part test for “adequate consideration” under § 1002 (18)(B): (1) whether the consideration properly represents the fair market value of the securities, and (2) whether the fiduciary has made a good faith determination of the adequacy of consideration according to an objective standard. Regulation Relating to the Definition of Adequate Consideration, 53 Fed. Reg. 17632 (proposed May 17, 1988); see Montgomery v. Aetna Plywood, Inc., 39 F. Supp. 2d 915, 936-38 (N.D. Ill. 1998).

In reviewing the adequacy of consideration, a court will normally not determine the appropriate price *de novo*; rather, the important inquiry is into the investigation performed by the fiduciaries in arriving at their decision. Montgomery, 39 F. Supp. 2d at 936; Cunningham, 716 F.2d at 1467-68. But see Mercantile Bank, 143 F.3d at 421 (focusing on stock's price rather than fiduciaries' investigation and concluding that if hypothetical prudent person would have paid same price, level of investigation was irrelevant).

b. Sell-back options

ESOPs often allow beneficiaries to sell their stock back to their employer in exchange for notes repayable over a certain period. Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 916 (8th Cir. 1994). If payments to beneficiaries of an ESOP who have exercised such a put option to sell the stock owned in the ESOP are deferred, there must be adequate security and a reasonable interest rate. Id. at 916; 29 C.F.R. § 2550.408b-3(1)(4) (2001). A fiduciary breaches the duty of prudence in failing to properly investigate the value of the security over the full payment period. Roth, 16 F.3d at 918.

4. Prudent purchasing of annuities in connection with plan termination

In the context of purchasing an annuity in connection with plan termination, fiduciaries must take care to conduct a thorough investigation of annuity providers before purchasing the annuity. Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 300 (5th Cir. 2000) (Bussian II); Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) (Bierwirth II). The Department of Labor has issued an interpretive bulletin containing written guidelines for purchasing an annuity; these guidelines have been adopted in part by at least one court as consistent with the fiduciary duty of prudence. 29 C.F.R. § 2509.95-1 (2001); Bussian II, 223 F.3d at 300. Courts have, however, rejected the standard advocated by the Department of Labor that a fiduciary must purchase the "safest available annuity." Id. at 298; Riley v. Murdock, 83 F.3d 415 (table), No. 95-2414, 1996 WL 209613 (4th Cir. Apr. 30, 1996). Instead, as with other duty of prudence cases, the proper analysis concentrates more on the behavior of the fiduciary than the quality of the decision. Bussian II, 223 F.3d at 298.

In particular, fiduciaries may not merely rely on an insurance company's ratings to satisfy the level of investigation under the duty of prudence. Id. at 300; 29 C.F.R. § 2509.95-1(c) (2001). Moreover, "price cannot be the motivating factor until the fiduciary reasonably determines, through prudent investigation, that the providers under consideration are comparable in their ability to promote the interests of participants and beneficiaries." Bussian II, 223 F.3d at 302. Factors on which a fiduciary should base the decision include:

- (a) The quality and diversification of the annuity provider's investment portfolio;
- (b) The size of the insurer relative to the proposed contract;
- (c) The level of the insurer's capital and surplus;
- (d) The lines of business of the annuity provider and other indications of an insurer's exposure to liability;

- (e) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;
- (f) The availability of additional protection through state guaranty associations and the extent of their guarantees.

29 C.F.R. § 2509.95-1(c) (2001); Bussian II, 223 F.3d at 300.

VII. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C): THE DUTY TO DIVERSIFY

ERISA requires a fiduciary to act solely in the interests of the participants and beneficiaries of a plan by “diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.”

29 U.S.C. § 1104(a)(1)(C). Breach of the duty to diversify constitutes an independent cause of action, separate from a breach of the duty of prudence. Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1241 (2d Cir. 1989); Liss v. Smith, 991 F. Supp. 278, 301 (S.D.N.Y. 1998).

29 U.S.C. § 1104(a)(1)(C) does not contain a definition of a properly diversified plan; however, the legislative history of ERISA offers:

The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) The purposes of the plan (2) The amount of the plan assets (3) Financial and industrial conditions (4) The type of investment (5) Distribution as to geographical location (6) Distribution as to industries (7) The dates of maturity. . . . Ordinarily the fiduciary should not invest the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon conditions in one locality, since the effect is to increase the risk of large losses.

H.R. REP. NO. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5084-5085.

A. PURPOSE OF DIVERSIFICATION

Diversification of investments is the practice whereby funds are committed to different classes of investments which are characterized by different types of risks. The theory upon which this practice is based is that by allocating funds to different types of investments the potential losses which might occur in one area due to a particular economic event will be offset by gains in another area. Even if such a loss is not offset, its impact is at least limited to a relatively small portion of the fund. Donovan v. Guar. Nat’l Bank of Huntington, No. 81-3154, 1983 U.S. Dist. LEXIS 18042, at *6 (S.D. W. Va. Apr. 1, 1983).

Courts have referenced the legislative history passages and taken up a very fact-sensitive approach in their analysis of a properly diversified plan. Metzler v. Graham, 112 F.3d 207, 209 (5th Cir. 1997) (“[T]he foregoing open-ended facts and circumstances list ought to caution judicial review of investment decisions.”); In re Unisys Sav. Plan Litig., 74 F.3d 420, 438 (3d Cir. 1996) (“ERISA’s duty to diversify is not measured by hard and fast rules or formulas”); Reich v. King, 861 F. Supp. 379, 383 (D. Md. 1994) (“the appropriate level of diversification in this case must be considered in light of the facts and circumstances particular to it”). Consequently, summary judgment on this issue is incredibly rare. Liss, 991 F. Supp. at 301

(stating that defendants never considered their statutory duty to diversify, but refusing to enter summary judgment on issue).

There is no such thing as a *per se* violation of the duty to diversify. Only when a finding of fact has been entered that non-diversification was not prudent will a court find liability for failure to diversify. King, 861 F. Supp. at 383; Lanka v. O'Higgins, 810 F. Supp. 379, 387 (N.D.N.Y. 1992).

B. ASSETS SUBJECT TO THE DUTY TO DIVERSIFY

The diversity of plan assets can be challenged on a discrete basis per investment vehicle within the plan as well as challenging the plan as a whole. Similarly, if a fiduciary is responsible only for a portion of the plan's total assets, that fiduciary must adequately diversify her portion as if it were a separate plan and cannot rely on the total plan's overall diversity as a defense. Unisys Sav. Plan, 74 F.3d at 438-439; GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729, 733 (11th Cir. 1990); see H.R. REP. NO. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5085.

Below are some of the more common areas of dispute associated with certain investment vehicles used by plan fiduciaries.

1. Final distributions of assets

The duty to diversify extends only to the investments of the plan. Section 1104(a)(1)(C) does not require that a fiduciary investigate or insure the diversification of any final distribution of assets. Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 294 (5th Cir. 2000) (Bussian II) ("the purchase of an annuity to facilitate plan termination is not an investment of the plan. . . . [A] fiduciary [has no] obligation to . . . ensure the adequate diversification of an annuity provider's portfolio").

2. Investments in employer securities

Investments in employer securities, including employee stock ownership plans (ESOPs), are immune from the duty to diversify. 29 U.S.C. § 1104(a)(2); Steinman v. Hicks, 352 F.3d 1101, 1106 (7th Cir. 2003); Brown v. Am. Life Holdings, Inc., 190 F.3d 856, 860 (8th Cir. 1999) ("Congress intended to permit an ESOP to be used as a technique of corporate finance as well as a retirement benefit plan for employees. Therefore an ESOP is exempt from the ERISA duty to diversify."); Moench v. Robertson, 62 F.3d 553, 568-569 (3d Cir. 1995). Yet a plan provision that completely prohibits diversification of ESOP assets violates ERISA and will not provide a defense to a fiduciary because a fiduciary may only follow plan terms to the extent they are consistent with ERISA. Kuper v. Iovenko, 66 F.3d 1447, 1458 (6th Cir. 1995) (citing Ershick v. United Mo. Bank, N.A., 948 F.2d 660, 666 (10th Cir. 1991)). For a more detailed discussion of ESOPs and litigation related to employer stock, see Section XV.D.

3. Annuities

A fiduciary's responsibilities under the duty to diversify may not extend to consideration of the diversification of an annuity portfolio purchased by the plan, but such a duty

may exist under the duty of care. Bussian II, 223 F.3d at 294. In regard to a plan's use of annuities, one court has stated "[ERISA's] legislative history informs that a plan may invest wholly in insurance or annuity contracts, since generally an insurance company's assets are to be invested in a diversified manner." Unisys Sav. Plan, 74 F.3d at 438.

If a company buys an annuity for part of its plan and makes a reasonably prudent decision in choosing an insurer, it has no further responsibility to the plan. Bussian v. RJR Nabisco, Inc., 21 F. Supp. 2d 680, 684 (S.D. Tex. 1998) (Bussian I), rev'd in part and vacated in part on other grounds, 223 F.3d 286, 294 (5th Cir. 2000).

4. Real estate and mortgages

The legislative record indicates that Congress foresaw real estate as being at issue in failure to diversify cases and offered the following guidance:

If the fiduciary is investing in mortgages on real property he should not invest a disproportionate amount of the trust in mortgages in a particular district or in a particular class of property so that a decline in property values in that district or of that class might cause a large loss.

H.R. REP. NO. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5085.

The legislative history does not indicate that a fiduciary may not concentrate in mortgages, but it does require the mortgages to be secured by a diverse array of real estate. King, 861 F. Supp. at 383.

C. SCOPE OF THE DUTY TO DIVERSIFY

Typically courts rely heavily on the specific facts of a given case to determine whether the duty to diversify has been breached, and have traditionally been willing to extend a fair amount of deference to a fiduciary's judgment. Very high percentage allocations have been found to be a prudent non-diversification, while much smaller ones have been found to constitute an imprudent failure to diversify. The key factors seem to be a fiduciary's expertise in the relevant field of investment and the extent of pre-investment investigation performed by the fiduciary. As the ultimate decision rests on the ability to show that non-diversification is prudent, this area of fiduciary duty mixes a great deal with the prudence standard.

In Hunter v. Caliber Sys., Inc., 220 F.3d 702, 721 (6th Cir. 2000), the plaintiffs brought suit alleging, among other things, that the defendant fiduciaries breached their duty to diversify by not diversifying soon enough in conformity with plan documents. The court rejected this argument, finding that the plan documents in fact did not require the administrator to follow certain exchange dates. Id. Furthermore, the court noted that where diversification of a plan is achieved by the sudden sale of a subsidiary's stock and that sale may have negative consequences on the parent company's stock and the plan as a whole, non-diversification is prudent. Id. at 722.

See:

GIW Indus., Inc. v. Trevor, Stewart, Burton, & Jacobsen, Inc., 895 F.2d 729, 731 (11th Cir. 1990). Finding a breach of duty to diversify given cash flow requirements of plan which investor did not adequately investigate where 70% of plan consisted of 30 year T-Bonds.

Brock v. Citizens Bank of Clovis, 841 F.2d 344, 346 (10th Cir. 1988). Finding a breach of duty to diversify where 65% to 85% of plan's assets were devoted to mortgages in the Clovis area.

Whitfield v. Tomasso, 682 F. Supp. 1287, 1301 (E.D.N.Y. 1988). Duty to diversify was violated where between 25% and 89% of fund's assets were placed in CDs and none of fiduciaries were familiar with investing or CDs, yet no investigation into financial soundness was performed before investing.

Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan, 507 F. Supp. 378, 383 (D. Haw. 1980). Fiduciaries' decision to commit 23% of plan's assets to a single real estate investment to develop time shares in Hawaii was on its face a violation of duty to diversify, and such violation was not prudent where Plan trustees lacked prior lending experience, did not follow commonly accepted lending procedures, and did not consider other real estate investment vehicles.

1. The plaintiff's burden to show lack of diversification

The initial burden of proof lies with the plaintiff. "To establish a violation, a plaintiff must demonstrate that the portfolio is not diversified 'on its face.'" *Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997) (holding plaintiff Secretary of Labor had not met the initial burden where defendant moved 63% of the plan's assets into one piece of property, but previously invested all assets in short term CD's, short term Treasury Securities, cash and cash equivalents) (quoting H.R. REP. NO. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. at 5084); *Reich v. King*, 861 F. Supp. 379, 383 (D. Md. 1994).

When determining whether plaintiffs have met their burden, consideration should be given to the seven factors listed in the legislative history. *Demoulis v. Sullivan*, No. 91-12533, 1993 WL 81500, at *4 (D. Mass. Feb. 26, 1993).

2. The defendant's burden to show that non-diversification was prudent under the circumstances

Once the plaintiff has established a failure to diversify, the burden shifts to the defendant to show that it was clearly prudent not to diversify under the circumstances. H.R. REP. NO. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5084; *Metzler*, 112 F.3d at 209 (assuming *arguendo* that plaintiff met initial burden, defendant proved it was prudent not to diversify because investment in land was an effort to avoid inflation, fiduciary was knowledgeable in relevant real estate market, fiduciary arranged for formal appraisals prior to purchase, and the youth of the plan beneficiaries made retirement payments unlikely in the near future); *Unisys Sav. Plan*, 74 F.3d at 438; *King*, 861 F. Supp. at 383.

The defendant must show not only that the challenged investment is prudent, but that there is no risk of large losses because of a lack of diversification. King, 861 F. Supp. at 383; Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan, 507 F. Supp. 378, 383 (D. Haw. 1980). When evaluating whether the duty to diversify was breached and if so, whether or not such breach was prudent, courts look to the seven factors cited in the legislative history of the Act. Liss v. Smith, 991 F. Supp. 278, 301 (S.D.N.Y. 1998). The seven factors are: (1) the purpose of the plan; (2) the amount of plan assets; (3) financial and industrial conditions; (4) the type of investment; (5) the distribution as to geographical location; (6) the distribution as to industries; and (7) the dates of maturity. Id. at 301 (citing Lanka v. O'Higgins, 810 F. Supp. 379, 387 (N.D.N.Y. 1992)). The analysis of these factors requires factual findings which are usually established through expert testimony following the trial. Id. (citing King, 861 F. Supp. at 383). For a further summary of cases detailing the duty to diversify see James Lockhart, Annotation, *Fiduciary Duty to Diversify Investments of Benefit Plan as Required by § 404(a)(1)(c) of Employee Retirement Income Security Act 29 U.S.C.A. 1104(a)(1)(e)*, 155 A.L.R. FED. 349 (2004).

VIII. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D): THE DUTY TO ACT IN ACCORDANCE WITH THE DOCUMENTS AND INSTRUMENTS GOVERNING THE PLAN

Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), requires a fiduciary to act “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] or Title IV.” Typically, the fiduciary must therefore act in accordance with the plan documents, its amendments, SPDs, and other formally issued plan documents.

A. FAILURE TO FOLLOW PROCEDURES DELINEATED IN PLAN DOCUMENTS

Courts find that fiduciaries can violate § 404(a)(1)(D) when they have acted in contravention of plan terms.

See:

Donovan v. Cunningham, 716 F.2d 1455, 1468 (5th Cir. 1983). Corporation’s CEO and sole shareholder, who also belonged to administrative committee overseeing corporation’s ESOP, violated § 404(a)(1)(D) when he participated in the committee’s decision to pay \$200 per share for corporation’s stock. ESOP plan document provided that “[a]ny Committee member having any interest in a transaction being voted upon by the Committee shall not vote thereon nor participate in the decision.”

Iron Workers Local No. 272 v. Bowen, 695 F.2d 531, 534-35 (11th Cir. 1983). Under ERISA trust fund’s agreement and declaration trust, trustees were required to comply with arbitrator’s decisions. Management trustees’ refusal to comply with arbitrator’s decision that trustees file suit for alleged improprieties in relationship to losses fund had sustained was therefore a breach of fiduciary duty under § 404(a)(1)(D).

Brock v. Self, 632 F. Supp. 1509, 1523 (W.D. La. 1986). Profit sharing plan trustees violated § 404(a)(1)(D) by failing to revalue store buildings owned by the plan as required by the plan documents.

Sandoval v. Simmons, 622 F. Supp. 1174, 1216 (C.D. Ill. 1985). Corporate committee violated § 404(a)(1)(D) by failing to take steps necessary to delegate formally investment authority to committee chairman.

Marshall v. Teamsters Local 282 Pension Trust Fund, 458 F. Supp. 986, 991 (E.D.N.Y. 1978). Pension fund trustees violated § 404(a)(1)(D) by committing 36% of fund assets to loan transaction without specifically finding that loan was prudent. Trust agreement prohibited commitment of more than 25% of assets to any single investment absent specific prudence finding.

Courts have granted plaintiffs prevailing on § 404(a)(1)(D) claims both benefits to which they were entitled under the plan and equitable relief. See, e.g., Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1259-60 (5th Cir. 1980) (holding that district court had jurisdiction to order plan trustees to comply with arbitrator's decree).

Where courts grant such relief, however, fiduciaries often have not only failed to follow plan documents but have also violated other ERISA fiduciary duties. See, e.g., Donovan v. Cunningham, 716 F.2d 1455, 1473 (5th Cir. 1983) (holding that stock transaction also violated ERISA § 406 as defendants failed to investigate sufficiently whether purchase by ESOP was made for "adequate consideration"). A failure to follow plan documents by itself may be treated as harmless error, not warranting relief. Cf. District 65, UAW v. Harper & Row, Publishers Inc., 670 F. Supp. 550, 557 (S.D.N.Y. 1987) (holding that failure to conform to plan documents precisely did not warrant "drastic" relief of rescinding distribution of assets of terminated plan); Burke v. Latrobe Steel Co., 775 F.2d 88, 91 (3d Cir. 1985) (no violation of fiduciary duty "simply by showing that the administrator did not follow the terms of the plan. . . . To establish liability, willful or bad faith conduct must be proved.").

However, courts have stressed that § 404(a)(1)(D) imposes a duty of "independent significance" and that compliance with subdivision (B)'s general duty to act with "care, skill, prudence, and diligence" will not excuse a fiduciary who fails to act in accordance with plan documents.

See:

Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1241 (2d Cir. 1989).
Investment advisor violated § 404(a)(1)(D) by exceeding a fifty percent ceiling on common stock holdings set by plan documents. Advisor was liable for losses sustained by plan without regard to the overall prudence of the advisor's actions.

B. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), IN THE BENEFITS CONTEXT

ERISA § 502, 29 U.S.C. § 1132, authorizes suits against fiduciaries for breach of their duties under § 404(a)(1)(D) for improper denial of benefits. See Ret. Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1280 n.62 (9th Cir. 1990). In evaluating such claims, courts have applied the standards prescribed by Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

Under Firestone, a court adjudicating a claim under § 1132(a)(1)(B) reviews a fiduciary's denial of benefits de novo unless the plan grants the fiduciary discretionary authority to determine eligibility for benefits or to construe plan terms, in which case the court reviews the fiduciary's determination under an abuse-of-discretion standard. Id. at 115. There are several other approaches that circuit courts have taken to create a third intermediate tier of deference. For a more detailed discussion of the standard of review, see Section XII.C.

A fiduciary's duty to act in accordance with plan documents is arguably relevant to any action in which plaintiffs challenge a denial of benefits based on an interpretation of the plan's language. Nonetheless, in evaluating such actions, courts typically have undertaken the

Firestone analysis without explicitly referencing § 404(a)(1)(D). See, e.g., Sanford v. Harvard Indus., Inc., 262 F.3d 590, 592 (6th Cir. 2001); Cozzie v. Met. Life Ins. Co., 140 F.3d 1104, 1108 (7th Cir. 1998). Most often, courts invoke the section only when a denial of benefits is considered arbitrary and capricious or taken in bad faith.

See:

Lusk v. Ameriserv Fin. Inc., No. 06-cv-1820, 2007 WL 2228561, at *5 (S.D. Ind. July 31, 2007). *Plaintiffs attempted to allege a breach of fiduciary duty due to contradictory statements made by the defendants about the trust agreement. The district court held that a mere contradiction, absent bad faith, is insufficient to establish a breach of fiduciary duty.*

Morgan v. Indep. Drivers Ass'n Pension Plan, 975 F.2d 1467, 1468-69 (10th Cir. 1992). *Plan trustees who acted in good-faith reliance on the advice of experts did not breach fiduciary duties under § 404(a)(1)(D) although their amendment terminating the plan was contrary to the terms of the plan's governing documents. 29 U.S.C. § 1104(a) is not a strict liability statute and its fiduciary provisions are not violated when fiduciaries make a "good faith, albeit erroneous, interpretation" of plan terms.*

Burke v. Latrobe Steel Co., 775 F.2d 88, 91 (3d Cir. 1985). *An action that violates plan terms does not constitute a violation of fiduciary duties if it was undertaken in good faith. "To establish liability, willful or bad faith conduct must be proved."*

Challenger v. Local Union No. 1 of Int'l Bridge, Structural, & Ornamental Ironworkers, 619 F.2d 645, 649 (7th Cir. 1980). *Good-faith interpretation of plan by trustees does not breach fiduciary duties, even if interpretation is incorrect. Trustees have a duty to interpret plans that is discharged "when they make a good faith interpretation and act accordingly."*

But see:

Yochum v. Barnett Banks, Inc. Severance Pay Plan, 234 F.3d 541, 545-46 (11th Cir. 2000). *In declining successor bank's offer of guaranteed employment at same salary for one year, with more responsibility, employee did not turn down offer of "comparable employment" under ERISA severance pay plan. Plan administrator's determination to the contrary was "arbitrary and capricious" and administrators consequently breached fiduciary duties under § 404(a)(1)(D).*

Markes v. Aluminum Co. of Am., 114 F. Supp. 2d 108, 109 (N.D.N.Y. 2000). *Administrators' determination of proper beneficiary was neither arbitrary nor capricious; consequently, administrators did not breach fiduciary duties under § 404(a)(1)(D).*

Two circumstances in which courts have found violations of § 404(a)(1)(D) are those in which fiduciaries' actions controverted the plain language of plan documents and those where fiduciaries paid benefits to persons other than those the plan documents designate.

1. Fiduciaries must act in accordance with the plain meaning of plan documents

Courts have held that fiduciaries' actions violate § 404(a)(1)(D) when they controvert the plain meaning of a plan.

See:

Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co., 491 F.3d 1180, 1194 (10th Cir. 2007). *The court found the defendants' argument that the plan's language did not cover the benefit sought by the plaintiff to be unreasonable as it was illustrative in nature and applied to all employees generally. Thus, the defendants denied benefits arbitrarily and capriciously.*

Swaback v. Am. Info. Techs. Corp., 103 F.3d 535, 540 (7th Cir. 1996). *Plan administrators violated § 404(a)(1)(D) by requiring that disabled worker return to work (which would require medical approval) to opt for lump sum retirement benefits. The court found that the "phantom requirement" was not contained in the plan documents.*

Priority Solutions, Inc. v. CIGNA, No. 98 Civ. 4499, 2000 WL 64884, at *2 (S.D.N.Y. Jan. 25, 2000). *Insurance plan administrators violated § 404(a)(1)(D) by refusing to pay nursing agency more than "average wholesale price" for its services. Plan documents stated that plan would pay charges not exceeding the "normal charge made by most providers of such service or supply in the geographic area where the service is received."*

DeSieno v. Am. Home Prods., 26 F. Supp. 2d 209, 215 (D. Mass. 1998). *Defendant fiduciary's interpretation of form titled "Employees Retirement Plan" as referring not to pension benefits but to a pre-retirement death benefit option varied from "unambiguously manifested meaning" of document. Defendant consequently breached § 404(a)(1)(D) duties.*

2. Benefits must be granted to and only to persons designated by the plan documents

Courts have also invoked § 404(a)(1)(D) where plaintiffs alleged defendant fiduciaries paid benefits to persons other than those designated by documents and instruments governing the plan.

See:

Riordan v. Commonwealth Edison Co., 128 F.3d 549, 553 (7th Cir. 1997). *"[A] plan fiduciary . . . has no right . . . absent a qualified court order . . . to refuse payment of welfare benefits to a beneficiary properly designated according to the terms of the plan."*

Delgrosso v. Spang & Co., 769 F.2d 928, 935-36 (3d Cir. 1985). *Employer breached its fiduciary duty under § 404(a)(1)(D) by unilaterally amending its*

pension plan to provide for reversion of assets to employer in violation of the pension agreement.

Conversely, a fiduciary does not violate § 404(a)(1)(D) as a matter of law if it denies benefits to a person not entitled to those benefits under the terms of the plan.

See:

Averhart v. US W. Mgmt. Pension Plan, 46 F.3d 1480, 1489 n.6 (10th Cir. 1994). “Because the plan must be administered according to its terms . . . [the claimant] cannot complain because he is held to those terms; this is true even if the rules were bent for another individual.”

Short v. United Mine Workers of Am. 1950 Pension Trust, 728 F.2d 528, 537 (D.C. Cir. 1984). A court may not invalidate as arbitrary, capricious, or as a breach of fiduciary duty, actions taken by plan trustees in accordance with the terms of a collective bargaining agreement.

Shaw v. Kruidenier, 470 F. Supp. 1375, 1389-91 (S.D. Iowa 1979), *aff’d*, 620 F.2d 307 (8th Cir. 1980). Individuals who were not part of benefit plan could not recover from trustees after their severance from the plan because they failed to show that their severance was in bad faith or otherwise inconsistent with the trustees’ fiduciary duties.

Indeed, the Supreme Court has held that state statutes that designate beneficiaries other than those designated by plan documents “implicate[] an area of core ERISA concern” and consequently are preempted. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001) (citing 29 U.S.C. 1104(a)(1)(D)). Outside the benefits designation context, however, state statutes may supersede § 404(a)(1)(D) and mandate that fiduciaries act in accordance with plan requirements. See *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 360 (1999) (holding that ERISA does not apply), *overruled in part on other grounds by Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (stating that defendant’s argument that California’s notice-prejudice rule, by altering plan notice provisions, conflicts with § 404(a)(1)(D) requirements “overlooks controlling precedent and makes scant sense”).

C. THE DUTY TO ACT IN ACCORDANCE WITH PLAN DOCUMENTS DOES NOT REQUIRE THE FIDUCIARY TO VIOLATE OTHER ERISA PROVISIONS

A fiduciary is only required to act in accordance with plan documents to the extent that the actions required by the documents are consistent with ERISA. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) (“[T]rust documents cannot excuse trustees from their duties under ERISA and . . . documents must generally be construed in light of ERISA policies.”). Consequently, fiduciaries may act in contravention of the plan documents where acting in accordance with plan documents would violate other ERISA provisions.

See:

Am. Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co., 62 F.3d 574, 579 (3d Cir. 1995). *Employer did not violate § 404(a)(1)(D) by failing to terminate plan by termination date set in plan documents; employer could not have terminated plan in accordance with ERISA as insufficient assets precluded actuarial certification required by 29 U.S.C. § 1341(b)(2).*

Conversely, a plan document's authorization of certain action does not absolve fiduciaries from liability for taking such action when such action violates other ERISA provisions.

See:

In re AEP ERISA Litig., 327 F. Supp. 2d 812, 828 (S.D. Ohio 2004). *A fiduciary cannot escape liability merely by pointing to the Plan as requiring it to act as it did. Even where a fiduciary acts consistent with the plan's directives, the fiduciary may be liable if the actions were not in the participants' best interests (e.g., if they were found to have been imprudent).*

In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig., 312 F. Supp. 2d 1165, 1181 (D. Minn. 2004). *A fiduciary cannot "blindly follow plan directives to the obvious detriment of the beneficiary."*

In re Sears, Roebuck & Co. ERISA Litig., No. 02 C 8324, 2004 WL 407007, at *4 (N.D. Ill. Mar. 3, 2004). *Plaintiffs stated claims for breach of fiduciary duty where they alleged that fiduciaries blindly followed Plan provisions, imprudently investing when the fiduciaries knew or should have known the price of the stock invested in was fraudulently inflated.*

Ershick v. Greb X-Ray Co., 705 F. Supp. 1482, 1487 (D. Kan. 1989). *Although plan document permitted trustees to invest all plan assets in employer stock, trustees nonetheless violated § 404(a)(1)(D) by investing a large percentage of plan assets in investor stock when such an investment decision was imprudent.*

Even if plan documents ostensibly *require* fiduciaries to take certain action, fiduciaries cannot take such action if doing so would violate ERISA provisions. See, e.g., Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572, 577 n.8 (11th Cir. 1987) ("Trustees are prohibited from complying with any provision of a collective bargaining agreement which violates the provisions of ERISA prohibiting arbitrary and capricious payment of retirement benefits and impose fiduciary duties on the Trustees.").

1. The duty of loyalty

Compliance with plan documents ordinarily will not excuse a fiduciary's violation of duties imposed by other ERISA provisions. However, if the fiduciary acted in accordance with the documents and instruments governing the plan, it cannot be held to have violated its fiduciary duty to act "solely in the interest of the participants and beneficiaries."

See:

Dzingski v. Weirton Steel Corp., 875 F.2d 1075, 1080 (4th Cir. 1989). *In denying employee early retirement benefits because doing so would not be in his employer's interest, plan administrators acted in accordance with plan documents. "To adhere to the plan is not a breach of fiduciary duty."*

Courts have also held that the duty to follow plan documents does not require a fiduciary to resolve every issue of plan interpretation in favor of a beneficiary or to maximize pecuniary benefits. *Collins v. Pension & Ins. Comm. of S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns*, 144 F.3d 1279, 1282 (9th Cir. 1998); cf. *Hunt v. Hawthorne Assocs., Inc.*, 119 F.3d 888, 913 (11th Cir. 1997) (holding plan administrators were justified in denying employee benefits when plan documents stressed importance of treating all plan participants alike).

2. Plan provisions that contradict ERISA in part must be followed to the extent that they do not contradict ERISA

As § 404(a)(1)(D) requires fiduciaries to act in accordance with plan documents only to the extent that doing so would comply with other ERISA duties, a plan provision which would be imprudent if followed blindly is not facially invalid; rather, the fiduciary must follow the provision only when doing so would be consistent with ERISA provisions.

See:

Herman v. NationsBank Trust Co. (Georgia), 126 F.3d 1354, 1368-69 (11th Cir. 1997). *A "mirror voting provision" instructing trustees to vote unallocated shares in the same proportion as participants vote their allocated shares is not facially invalid. Rather, trustees should follow a mirror voting provision unless doing so leads to an imprudent result.*

Cf.:

Ganton Techs., Inc. v. Nat'l Indus. Group Pension Plan, 76 F.3d 462, 466-67 (2d Cir. 1996). *Plan trustees promulgated a blanket rule against transferring plan assets to plan participants or to another plan. The rule did not violate the trustees' fiduciary duty to consider the individual merits of each request so long as the trustees periodically reviewed the rule's wisdom and reasonableness.*

D. GRANTS OF DISCRETIONARY AUTHORITY TO CONSTRUE PLAN TERMS

Plan language may provide trustees broad authority to construe plan terms. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan grants the plan administrator such discretion, a reviewing court may reverse the challenged denial of benefits only upon a showing of procedural or substantive abuse of discretion. Although the *Firestone* Court expressly limited its holding to "§ 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations," other courts have extended the *Firestone* analysis to non-benefits contexts. *See generally Ganton Techs., Inc. v. Nat'l Indus. Group Pension Plan*, 76 F.3d 462 (2d Cir. 1996) (considering trustee's denial of employer's request to withdraw from plan); *Moench*

v. Robertson, 62 F.3d 553, 564 (3d Cir. 1995); Ershick v. United Mo. Bank of Kansas City, N.A., 948 F.2d 660, 668 (10th Cir. 1991).

1. Language creating discretionary authority

Language granting fiduciaries discretionary authority over benefits eligibility and construction of plan terms must be incorporated into the plan documents. Language contained in unincorporated trust agreements—which may constitute “other instruments” for the purpose of determining a trustee’s fiduciary duties—is not sufficient to grant the trustee discretion in defining plan terms.

See:

Gentry v. Ashland Oil, Inc., 42 F.3d 1385 (table), No. 93-1425, 1994 WL 706212, at *3-*4 (4th Cir. Dec. 20, 1994). *Language from trust agreement not incorporated into plan agreements was insufficient to grant plan administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan.*

Cf.:

Allison v. Dugan, 951 F.2d 828, 832 (7th Cir. 1992). *When a trust agreement incorporated in the plan documents accords trustees discretionary authority to make binding benefit determinations, a court should not upset the trustees’ benefit determinations unless their decisions or conduct are arbitrary and capricious.*

2. Interpretation of trustee-created rules

Even absent language according discretionary authority over plan terms, courts will ordinarily accord ERISA trustees considerable discretion to interpret and apply rules they have promulgated pursuant to powers delegated by the basic trust instrument. See Diaz v. Seafarers Int’l Union, 13 F.3d 454, 456 (1st Cir. 1994) (drawing “important” distinction between “terms contained in the basic trust instrument” and “rules promulgated by the trustees pursuant to powers delegated by that instrument”) (emphasis removed). Language granting trustees broad authority to promulgate new rules will suffice to grant trustees discretion in interpreting rules they promulgated earlier. Id. at 457.

3. Inherently ambiguous terms

In evaluating § 404(a)(1)(D) claims, courts have accorded fiduciaries discretion in defining inherently ambiguous terms. See DeBruyne v. Equitable Life Assurance Soc. of U.S., 920 F.2d 457, 464 (7th Cir. 1990) (holding that investment manager had “substantial freedom” in determining content of term “balanced fund” for which no “uniform, pre-established definition” existed).

E. ACTIONS EXCEPTED FROM THE DUTY TO COMPLY WITH PLAN DOCUMENTS

Under ERISA, an individual is a fiduciary with respect to a plan if he exercises discretionary authority over the management or administration of that plan. 29 U.S.C. § 1002(21)(A). Therefore, as a matter of law, ERISA's fiduciary duties do not apply to parties engaged in business decisions or plan design. See Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3d Cir. 1990) ("Fiduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions.").

1. Business decisions

Business decisions employers or other parties make are not governed by § 404(a)(1)(D) and other ERISA provisions imposing fiduciary duties. For example, the Third Circuit has held that an employer acted in a management capacity in reducing an employee's salary and contemporaneously creating a defined benefit plan. Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1496 (3d Cir. 1994). Consequently, the court held that the employer was not bound by ERISA's fiduciary duty provisions. Id. ("Section 404(a)(1)(D) imposes a fiduciary duty on a trustee when administering an ERISA plan to act in accordance with the documents and interests governing the plan, but it does not impose fiduciary duties on an employer making a management decision.").

2. Plan design activities

The activity of plan design encompasses creation of an ERISA plan, amendment of an existing plan, and termination of an ERISA plan. When a party engages in any of these pure activities, it is not subject to the fiduciary duties § 404(a)(1)(D) and other ERISA provisions impose.

See:

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443-44 (1999). *ERISA's fiduciary provisions are inapplicable to parties amending ERISA plans. Parties amending ERISA plans are not subject to fiduciary duties regardless of whether the plan is a "pension benefit plan" or a "welfare benefit plan;" whether the plan is "a contributory plan, a noncontributory plan, or any other type of plan." ERISA, in defining the term "fiduciary," draws no distinction between persons exercising authority over these different plan types.*

Averhart v. US W. Mgmt. Pension Plan, 46 F.3d 1480, 1488 (10th Cir. 1994). *In adopting a plan amendment, an employees' benefit committee acted in its capacity as a plan "drafter" and was therefore not subject to ERISA's fiduciary standards.*

McGath v. Auto-Body N. Shore, Inc., 7 F.3d 665, 670-71 (7th Cir. 1993). *"An employer can wear two hats: one as a fiduciary administering a pension plan and the other as the drafter of a plan's terms. Therefore, because the functions are*

distinct, an employer does not act as a fiduciary when it amends or otherwise sets the terms of a plan.”

F. DETERMINING WHICH DOCUMENTS AND INSTRUMENTS GOVERN THE PLAN

Because modifications to ERISA plans must be in writing, 29 U.S.C. § 1102(a)(1), and there are required procedures for amending plans, 29 U.S.C. § 1102(b)(3), courts construing § 404(a)(1)(D) have adopted a narrow definition of “documents and instruments governing the plan.” In general, such documents and instruments include “[o]nly representations adopted in accordance with . . . amendment procedures outlined in . . . formal plan documents.” See Elmore v. Cone Mills Corp., 23 F.3d 855, 861 (4th Cir. 1994). Even an employer representation that “constitute[s] a clear and unambiguous promise of benefits that [is] formal, authorized, and ratified” will ordinarily not qualify as a “document or instrument governing” an employee pension benefit plan. Id.; see Friz v. J & H Marsh & McLennan, Inc., 2 Fed. Appx. 277, 283 (4th Cir. 2001) (King, J., dissenting) (“An ERISA plan may be construed *only* by its written terms, without reference to unincorporated ancillary documents.”); Miller v. Coastal Corp., 978 F.2d 622, 624 (10th Cir. 1992) (holding plan administrators’ oral and written representations could not entitle plaintiff to benefits denied him by plan’s unambiguous terms); Moore v. Metro. Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (“Congress intended that plan documents and [summary plan descriptions furnished to plan participants and beneficiaries under 29 U.S.C. § 1022] exclusively govern an employer’s obligations under ERISA plans.”). But see DeBruyne, 920 F.2d at 464 n.11 (assuming, *arguendo*, that investment manager’s reports and prospectuses constituted “plan documents”). Consistent with this principle, several courts have held that oral agreements cannot amend a formal plan. See, e.g., Gen. Am. Life Ins. Co. v. Castonguay, 53 F.3d 1078, 1080 (9th Cir. 1995) (holding that § 404(a)(1)(D) precludes trustees’ oral representation to plan participants from altering terms of written ERISA plan).

1. Summary plan descriptions and trust agreements are governing

There are at least two widely recognized exceptions to the rule that “documents and instruments governing the plan” be limited to representations incorporated into the plan through amendment procedures described in formal plan documents. First, 29 U.S.C. § 1022 requires that participants and beneficiaries of an employee benefit plan be provided a summary plan description (SPD) apprising them of their rights and obligations under the plan. Several courts have recognized SPDs as “documents and instruments governing the plan.” See, e.g., Bergt v. Ret. Plan for Pilots Employed By Mark/Air, Inc., 293 F.3d 1139, 1143 (9th Cir. 2002); Chiles v. Ceridian Corp., 95 F.3d 1505, 1511 (10th Cir. 1996); Faircloth v. Lundy Packing Co., 91 F.3d 648, 658 (4th Cir. 1996); Switzer v. Wal-Mart Stores, Inc., 52 F.3d 1294, 1302 (5th Cir. 1995); Jensen v. Sipco Inc., 38 F.3d 945, 949 (8th Cir. 1994); Alday v. Container Corp. of Am., 906 F.2d 660, 665-55 (11th Cir. 1990).

In fact, where SPDs differ from or conflict with other plan language, several courts have held that the SPD language will control. Burstein v. Ret. Account Plan for Employees of Allegheny Health Ed. & Research Found., 334 F.3d 365, 378 (3d Cir. 2003); Barker v. Ceridian Corp., 122 F.3d 628, 633 (8th Cir. 1997); Chiles, 95 F.3d at 1515; Atwood v. Newmont Gold Co., 45 F.3d 1317, 1321 (9th Cir. 1995), overruled on other grounds by Abatie v.

Alta Health & Life Ins. Co., 458 F.3d 955 (9th Cir. 2006); Pierce v. Sec. Trust Life Ins. Co., 979 F.2d 23, 27 (4th Cir. 1992); Senkier v. Hartford Life & Accident Ins. Co., 948 F.2d 1050, 1051 (7th Cir. 1991); Hansen v. Cont'l Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991); Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134, 135 (6th Cir. 1988).

Second, courts have recognized that trust agreements, even when not formally incorporated into a plan, remain “governing documents.” See, e.g., Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Const. Co., 932 F.2d 1443, 1450 (11th Cir. 1991); Delgrosso v. Spang & Co., 769 F.2d 928, 935 (3d Cir. 1985).

2. Informal benefit plans may be subject to ERISA

Some courts have allowed employees to recover promised benefits that are not contained in a formal written plan document if the benefits are contained in an informal benefit plan. See, e.g., Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc). In Dillingham, the Eleventh Circuit held that an informal ERISA plan has been established “if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.” Id. at 1373. An informal plan may exist independent of, and in addition to, a formal plan as long as the informal plan meets all of the elements outlined in Dillingham. See Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees, 974 F.2d 391, 400 (3d Cir. 1992). In the context of informal benefit plans, courts have provided little guidance on what representations may be construed as governing. However, courts have suggested that fiduciaries may be bound by oral representations in the context of an informal plan. See, e.g., id. at 401 (stating that while oral representation cannot modify written ERISA plan, “oral remarks give evidence of a separate plan not precluded by a written plan”); see also Elmore, 23 F.3d at 861-62 (suggesting that employer would be bound by letters sent to employees if such letters constituted informal plan).

See:

Deboard v. Sunshine Mining & Refining Co., 208 F.3d 1228, 1238-39 (10th Cir. 2000). Letters from employer to employees considering early retirement offering a lifetime guarantee of insurance benefits constituted an ERISA plan, where a reasonable employee would have perceived an ongoing commitment by the employer to provide employee benefits.

Cvelbar v. CBI Ill. Inc., 106 F.3d 1368, 1373-79 (7th Cir. 1997). Written agreement entered into by plaintiff, a management employee, and defendant, the employer/bank, constituted an ERISA plan because it provided for continuing severance benefits upon plaintiff's termination.

Williams v. Wright, 927 F.2d 1540, 1544-45 (11th Cir. 1991). Letter to an employee outlining pension and insurance benefits the employee would receive upon retirement created both an employee pension benefit plan and an employee welfare benefit plan for purposes of ERISA.

IX. ERISA § 406(A), 29 U.S.C. § 1106(A): THE PROHIBITION ON TRANSACTIONS BETWEEN THE FIDUCIARY AND A PARTY IN INTEREST

The prohibition on a fiduciary's transactions with a party in interest is codified in ERISA § 406(a), which states as follows:

Except as provided in section 1108 of this title:

- (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect:
 - (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
 - (B) lending of money or other extension of credit between the plan and a party in interest;
 - (C) furnishing of goods, services, or facilities between the plan and a party in interest;
 - (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
 - (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.
- (2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

29 U.S.C. § 1106(a).

A. PROHIBITED CONDUCT

Congress adopted § 406(a) to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of plan participants and beneficiaries. Reich v. Compton, 57 F.3d 270, 275 (3d Cir. 1995). Congress specifically prohibited transactions “that are potentially harmful to the plan.” Lockheed Corp. v. Spink, 517 U.S. 882, 893 (1996); see also Comm’r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 160 (1993) (noting that Congress sought to bar categorically transactions that were likely to injure plan); Marshall v. Kelly, 465 F. Supp. 341, 354 (W.D. Okla. 1978) (noting that enumerated transactions “offer a high potential for loss of plan assets or for insider abuse”).

1. Party in interest

ERISA's long and detailed definition of "party in interest" found at ERISA § 3(14), 29 U.S.C. § 1002(14) was designed to encompass "those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 242 (2000).

The term "party in interest" broadly includes: (1) fiduciaries; (2) plan employees; (3) employers whose employees are covered by the plan; (4) service providers; (5) employee organizations whose members are covered by the plan; (6) owners of more than fifty percent of the stock of these employers and employer organizations; (7) relatives of fiduciaries; (8) majority stock holders; and (9) others who own ten percent or more of entities that are themselves parties in interest. Id.

Some courts have held that lawyers who provide legal services to the plan can also be parties in interest. Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212, 1221 (9th Cir. 2000), amended and superseded by, 208 F.3d 1170 (9th Cir. 2000); Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988).

Courts strictly interpret the definition of party in interest, deferring to the "carefully crafted and detailed legislative scheme reflected in section 3(14)." Owen v. SoundView Fin. Group, Inc., 54 F. Supp. 2d 305, 323 (S.D.N.Y. 1999) (holding that plan beneficiary is not party in interest), aff'd, 208 F.3d 203 (2d Cir. 2000) (table); see also Compton, 57 F.3d at 277 (holding that § 406 does not necessarily prohibit transactions between plan and alter ego of party in interest).

The fact that a transaction occurred via a third party is not relevant. Indirect transactions that benefit a party in interest are also prohibited by § 406(a). Brock v. Citizens Bank of Clovis, 841 F.2d 344, 347 (10th Cir. 1988) (rejecting argument that "interjection of a third party into an otherwise prohibited transaction will sanitize an illegal dealing"); McDougall v. Donovan, 552 F. Supp. 1206, 1216 (N.D. Ill. 1982) (holding that trustee's acquisition on behalf of fund of jet aircraft was prohibited transaction where, though plane was not acquired directly from party in interest, party in interest had traded aircraft in on another plane and traded-in aircraft was then sold to trustees at a premium).

2. Actual or imputed knowledge on the part of the fiduciary

Section 406(a) imposes liability only when the fiduciary "knows or should have known" that the transaction benefited a party in interest. Courts may find a fiduciary liable even if the fiduciary had no actual knowledge that such a transaction occurred by making a finding of constructive knowledge. Marshall v. Mercer, No. 4-79-390-K, 1983 U.S. Dist. LEXIS 16656 (N.D. Tex. May 27, 1983), rev'd in part on other grounds sub nom., Donovan v. Mercer, 747 F.2d 304 (5th Cir. 1984) (imputing knowledge to fiduciary where fiduciary "is intimately involved with the operations of the party in interest"). Some courts have held that plan fiduciaries must have knowledge not only of the party in interest status, but also of the unlawful nature of the transaction. Laborers' Pension Fund v. Arnold, No. 00 C 41132001, 2001 WL 197634, at *8 (N.D. Ill. Feb. 27, 2001); Marks v. Independence Blue Cross, 71 F. Supp. 2d 432,

438 (E.D. Pa. 1999) (finding no violation absent evidence that fiduciary knew or should have known that compensation paid to party in interest was unreasonable within meaning of ERISA § 406 and § 408). For a fiduciary to be guilty of a transgression of § 406(a)(1)(D), the Third Circuit requires that the fiduciary “know or should know” that “the transaction ‘uses’ plan assets . . . [and] the transaction’s use of the assets is ‘for the benefit of’ a party in interest.” Saxton v. Cent. Penn. Teamsters Pension Fund, No. 02-CV-186, 2003 WL 22952101, at *20 (E.D. Pa. Dec. 9, 2003).

A fiduciary is obligated to thoroughly investigate the status of any party to a transaction with the plan. Donovan v. Schmoutey, 592 F. Supp. 1361, 1393 (D. Nev. 1984) (requiring a thorough investigation in any significant transaction to determine if borrower is party in interest); M&R Inv. Co. v. Fitzsimmons, 484 F. Supp. 1041, 1055 (D. Nev. 1980) (M&R Inv. Co. I) (same), aff’d, 685 F.2d 283 (9th Cir. 1982); Kelly, 465 F. Supp. at 351 (“fiduciary must act with prudence in investigating whether party in interest relationship exists.”) Knowledge will be imputed to a fiduciary where such an investigation would have revealed the party’s status as a party in interest. Id.

3. Good faith, legitimate business purpose, and lack of harm not relevant

Congress intended § 406(a) to be a *per se* prohibition against the enumerated transactions. Good faith or legitimate business purpose cannot cure an otherwise prohibited transaction. Reich v. Polera Bldg. Corp., No. 95 Civ. 3205, 1996 WL 67172, at *2 (S.D.N.Y. Feb. 15, 1996) (stating “[t]he transactions enumerated in § 406(a)(1) are *per se* violations of ERISA regardless of the motivation which initiated the transaction, the prudence of the transaction, or the absence of any harm arising from the transaction”); Mercer, 1983 U.S. Dist. LEXIS 16656, at *29 (noting that “plans are prohibited from engaging in transactions with such ‘parties in interest’ regardless of the prudence of the transactions”), McDougall, 552 F. Supp. at 1215 (stating “[p]rohibited transactions may include transactions that have independent business purposes as well as transactions that are ‘fair’ under some independent measure”); Donovan v. Daugherty, 550 F. Supp. 390, 403 (S.D. Ala. 1982) (stating “[t]he fact that a fiduciary may have acted in good faith is no defense where breaches of his fiduciary duties are established”).

Courts are currently divided as to whether there is a “subjective intent” requirement for § 406(a). Most courts have found there to be no intent requirement under § 406(a). Congress’s intent to have be a *per se* rule required that there be no intent requirement in § 406(a). Chao v. Hall Holding Co., 285 F.3d 415, 441-42 (6th Cir. 2002), cert. denied, 537 U.S. 1168 (2003); Brock v. Citizen of Citizens Bank of Clovis, 841 F.2d 344, 347 (10th Cir. 1988); Gray v. Briggs, 45 F. Supp. 2d 316, 326 (S.D.N.Y. 1999). However, some courts have found there to be a subjective intent requirement for violations under § 406(a)(1)(D). Jordan v. Mich. Conference of Teamsters Welfare Fund, 207 F.3d 854, 860 (6th Cir. 2000); Reich v. Compton, 57 F.3d 270, 278 (3d Cir. 1995) (quoting section 406(a)(1)(D) and stating that in order to show a violation of the section five elements must be satisfied: (1) person is fiduciary for the plan (2) the fiduciary ‘causes’ the plan to engage in transaction; (3) transaction ‘uses’ plan assets; (4) transaction’s use of assets is ‘for benefit of’ a party in interest; and (5) fiduciary ‘knows or should know’ that elements three and four are satisfied.)

Likewise, a plaintiff need not show that actual harm to the plan resulted from the challenged transaction. M&R Inv. Co. I, 484 F. Supp. at 1055 (stating “[l]ack of harm to the plan and the good faith or lack of the same on the part of the borrower are not relevant”); Reich v. Hall Holding Co., 990 F. Supp. 955, 967 (N.D. Ohio 1998) (finding “proof of harm or loss resulting from a prohibited transaction is not necessary to establish a violation under ERISA § 406”); McDougall, 552 F. Supp. at 1215 (stating “[t]he *per se* nature of the prohibitions is emphasized by the fact that whether one of the provisions has been violated does not depend on whether any harm results from the transaction”); Kelly, 465 F. Supp. at 354 (stating fact that prohibited loan is or may be ultimately repaid does not render loan lawful).

B. TRANSACTIONS PROHIBITED BY STATUTE

Section 406(a) enumerates five types of prohibited transactions. All five of these transactions are “commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm’s length.” Lockheed Corp. v. Spink, 517 U.S. 882, 893 (1996). Courts have held that because these provisions describe *per se* violations of ERISA, they should be interpreted narrowly. Jordan v. Mich. Conference of Teamsters Welfare Fund, 207 F.3d 854, 858 (6th Cir. 2000) (stating § 406(a) “should be interpreted narrowly”); Phillips v. Amoco Oil Co., 614 F. Supp. 694, 720 (N.D. Ala. 1985) (finding that Congress did not intend a broad interpretation of § 406), aff’d, 799 F.2d 1464 (11th Cir. 1986). If a transaction is not specifically listed in the statute, courts will not invalidate it as a *per se* violation of fiduciary obligations. Citizens Bank of Clovis, 841 F.2d at 347 (fiduciary’s investment of plan assets in third parties to pay off interim financing received from a party in interest to the plan is not prohibited). Once a court makes the determination that a fiduciary engaged the plan directly or indirectly in a prohibited transaction with a party in interest, the only remaining inquiry is whether the transaction is subject to one of the statutory exemptions provided for in ERISA § 408, 29 U.S.C. § 1108.

1. Sale, exchange, or lease of property and acquisition of employer security or real property

Direct or indirect purchases or sales of goods between plans and parties in interest are prohibited transactions. McDougall, 552 F. Supp. at 1216 (finding indirect purchase of airplane from party in interest prohibited). Stock transactions between a plan and a party in interest also violate this provision. Herman v. S.C. Nat’l Bank, 140 F.3d 1413, 1418 (11th Cir. 1998). In particular, the purchase of employer securities by a plan is prohibited because of the high risk of self-dealing. Hall Holding Co., 990 F. Supp. at 955. However, an exemption under § 408(e) allows certain types of transactions, including purchases of employer’s securities by the plan, under certain conditions. 29 U.S.C. § 1108(e).

The acquisition or sale by the plan of employer securities or an employer’s property is exempt from the prohibition under certain circumstances. ERISA § 408, 29 U.S.C. § 1108(e). Such transactions are permissible if they are for adequate consideration, no commission is charged, and the plan is an eligible individual account plan as defined in § 1107(d)(3). Adequate consideration is defined as the “fair market value as determined in good faith.” 29 U.S.C. § 1002(18)(B). Fair market value is defined as “the price that a willing buyer would pay a willing seller, both having reasonable knowledge of the pertinent facts.” Sommers

Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1461 (5th Cir. 1986). Good faith requires fiduciaries to use a “prudent method of determining the value” of the transaction. Donovan v. Cunningham, 716 F.2d 1455, 1473-74 (5th Cir. 1983); see also Cosgrove v. Circle K Corp., 915 F. Supp. 1050, 1064 (D. Ariz. 1995) (holding that plan’s sale of property to party in interest was not prohibited transaction where plan received fair market value as determined in good faith for its interest in property and plan trustees acted reasonably and prudently in relying upon third party appraisal), aff’d, 107 F.3d 877 (9th Cir. 1997). See Section XV.D.3 for additional discussion regarding sales of employer securities to a plan.

2. Loans and other extensions of credit

Explicit loan agreements between a plan and a party in interest are prohibited transactions. See, e.g., Citizens Bank of Clovis, 841 F.2d 344, 346 (prohibiting loan made by party in interest to plan); Brock v. Gillikin, 677 F. Supp. 398, 401 (E.D.N.C. 1987) (prohibiting loan to corporation owned wholly by plan’s trustee); Davidson v. Cook, 567 F. Supp. 225, 236-37 (E.D. Va. 1983) (prohibiting loan to corporation whose directors also served as trustees and administrators of pension fund), aff’d, 734 F.2d 10 (4th Cir. 1984); M&R Inv. Co. v. Fitzsimmons, 484 F. Supp. 1041, 1054-55 (D. Nev. 1980) (M&R Inv. Co. I) (prohibiting loan to corporation whose parent company also owned company that contributed to plan), aff’d, 685 F.2d 283 (9th Cir. 1982).

Where fiduciaries have failed to enforce loan agreements adequately, courts have characterized such behavior as an indirect extension of credit. Schmoutey, 592 F. Supp. at 1391 (holding that by failing to exercise their rights to accelerate principal and interest and to foreclose on collateral for loans owed by party in interest, fiduciaries indirectly extended further credit); Huge v. Old Home Manor, Inc., 419 F. Supp. 1019, 1021 (W.D. Pa. 1976) (holding failure to enforce contract strictly and collect royalties from party in interest would be prohibited extension of credit).

Breaking the party in interest relationship before the dispersal of funds under a loan agreement does not cleanse the transaction. As long as the borrower was a party in interest at the time the contract was negotiated, the transaction violates ERISA. M&R Inv. Co. v. Fitzsimmons, 685 F.2d 283, 286-87 (9th Cir. 1982) (M&R Inv. Co. II) (finding *ex ante* disposal of subsidiary and removal of party in interest standing not sufficient to legitimize transaction).

Loans made by the plan to parties in interest who are participants in or beneficiaries of the plan are, under certain circumstances, exempt from this prohibition under ERISA § 408, 28 U.S.C. § 1108(b)(1). Such loans are permissible if: (1) they are available to all participants and beneficiaries on a reasonably equivalent basis; (2) they are not made available to highly compensated employees in an amount greater than the amount made available to all employees; (3) they are made in accordance with any relevant provisions of the plan; (4) they bear a reasonable interest rate; and (5) they are adequately secured. Id.

3. Furnishing goods, services or facilities

Section 406(a)(1)(C) forbids fiduciaries from contracting for goods, services or facilities with a party in interest. See, e.g., Nieto, 845 F.2d at 873 (finding party in interest may

not furnish legal services to plan); Marshall v. Snyder, 572 F.2d 894, 900 (2d Cir. 1978) (holding fund may not pay trustees for services performed for party in interest); N.Y. State Teamsters Council Health & Hosp. Fund v. DePerno, 816 F. Supp. 138, 145 (N.D.N.Y. 1993) (finding fiduciary may not hire parties in interest as employees of fund), aff'd in part 18 F.3d 179 (2d Cir. 1994). However, contracting with a party in interest for office space, legal, accounting, or other necessary services is permissible if no more than reasonable compensation is paid. ERISA § 408, 28 U.S.C. § 1108(b)(2); see Jordan, 207 F.3d 854, 861 (holding reimbursement for funds expended by party in interest in support of fund participants' lawsuit was permissible transaction falling within § 408(b)(2)). Such services must be necessary for the operation of the plan. DePerno, 816 F. Supp. at 146 (finding hiring of particular cooks who were parties in interest was not necessary for the plan's operation).

4. Transfer or use of plan assets

Courts have construed ERISA's definition of "plan assets" broadly. Assets of the plan are not limited to financial holdings. See Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1466-467 (9th Cir. 1995) (finding vested right to receive future residual distributions of plan surplus is plan asset); Reich v. Polera Bldg. Corp., No. 95 Civ. 3205, 1996 WL 67172, at *3 (S.D.N.Y. Feb. 15, 1996) (finding giving up means of collecting repayment on loan by releasing certain loan guarantees constitutes improper use of plan assets). But see Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986) (employer's contingent and non-vested future retirement liabilities under a plan are not assets of the plan).

The Ninth Circuit has adopted a two-prong test for determining whether an item is a plan asset. Under the first prong, the court inquires whether the item may be used to the benefit, financial or otherwise, of the fiduciary. Under the second prong, the court inquires whether such use is at the expense of the plan participants or beneficiaries. Kayes, 51 F.3d at 1467; Acosta v. Pac. Enters., 950 F.2d 611, 620 (9th Cir. 1991); see In re Consolidated Welfare Fund ERISA Litig., 839 F. Supp. 1068, 1073 (S.D.N.Y. 1993) (adopting Ninth Circuit's test).

Direct transfers of plan assets to a party in interest are quintessential violations of this provision. See, e.g., Pension Benefit Guar. Corp. v. Morin, No. 99-246-P-C, 2000 WL 760737, at *4-5 (D. Me. Apr. 24, 2000) (granting summary judgment against trustee who wrote checks from pension fund accounts to himself and his company). Transactions held to be prohibited under this provision are often explicitly prohibited in some other provision of § 406(a). For example, payment of wages to parties in interest violates this provision, even though payment for services is explicitly prohibited under § 406(a)(1)(C). DePerno, 816 F. Supp. at 145. Stock transactions between a plan and a party in interest violate this provision, as well as § 406(a)(1)(A). S.C. Nat'l Bank, 140 F.3d at 1418; Leigh v. Engle, 727 F.2d 113, 126-27 (7th Cir. 1984) (finding fiduciary may not buy shares in party in interest corporation to help corporation's management fend off hostile takeover); Dimond v. Ret. Plan for Employees of Michael Baker Corp. & Affiliates, 582 F. Supp. 892, 899-900 (W.D. Pa. 1983) (enjoining use of plan assets to purchase employer stock to protect employer's incumbent management).

Similarly, although loans and extensions of credit to parties in interest are explicitly prohibited under § 406(a)(1)(B), courts have also invalidated such transactions under this provision, particularly where the facts do not conclusively establish the existence of a formal

loan agreement. See, e.g., Whitfield v. Tomasso, 682 F. Supp. 1287, 1302 (E.D.N.Y. 1988) (holding trustees liable for transferring employer contributions intended for fund to party in interest); Mercer, 1983 U.S. Dist. LEXIS 16656, at *39 (finding violation of both § 406(a)(1)(B) and § 406(a)(1)(D) in absence of formal loan agreement), rev'd in part on other grounds 747 F.2d 304 (5th Cir. 1984).

Some courts have held that failure to use fund leverage to enforce a loan agreement against a party in interest is an impermissible use or transfer of fund assets. See Schmoutey, 592 F. Supp. at 1391 (finding trustees liable for failing to pursue party in interest on loan guaranty). But see Davidson, 567 F. Supp. at 238 (holding failure to raise interest rates on loans to party in interest and waiver of penalties for prior failure to make interest payments does not constitute transfer of assets).

The payment of benefits under a plan is a not a prohibited transaction. Spink, 517 U.S. at 892-93 (finding early retirement programs which conditioned payment of increased benefits upon retirees' release of employment-related claims against employer were not prohibited transfers of assets under ERISA). "Section 406(a)(1)(D) simply does not address what an employer can and cannot ask an employee to do in return for benefits." Id. at 894.

Section 406(a)(1)(D) prohibits two kinds of transactions: (1) a transfer of plan assets to a party in interest; and (2) the use of plan assets for the benefit of the party in interest. The latter prohibition requires proof that the fiduciary acted with the subjective intent to benefit the party in interest. Voluntary Employees Beneficiary Ass'n v. Ross, 191 F.3d 462 (9th Cir. 1999) (table) (stating "liability under this theory will require proof that [the fiduciary] acted with the intent to benefit [the party in interest]"); Compton, 57 F.3d at 279 (holding rule is not meant to prohibit transactions that "would be highly advantageous for the plan" where "the benefit for the party in interest would be unintended, indirect, and slight"). The intent to benefit test is meant to protect transactions that are likely to benefit rather than injure the plan. Jordan, 207 F.3d at 859 (finding remittance of attorney fees to party in interest is permissible where there is no intent to benefit and failure to remit would discourage such parties in interest from "assisting plan members to right the wrongs committed by fiduciaries"); Etter v. J. Pease Const. Co., 963 F.2d 1005, 1009 (7th Cir. 1992) (holding that investment of plan assets in venture involving party in interest was permissible where parties in interest had enabled plan to take advantage of valuable investment opportunity and venture resulted in annual return of nearly 65%).

X. ERISA § 406(b), 29 U.S.C. § 1106(b): SELF-DEALING EXPRESSLY PROHIBITED BY ERISA

In addition to detailing the general fiduciary duties of loyalty and prudence, ERISA specifically prohibits certain types of “self-dealing” transactions in which fiduciaries may not engage or cause their plans to engage. These provisions, set out at ERISA § 406, prohibit certain transactions between a plan and a party in interest or between a plan and a fiduciary. 29 U.S.C. § 1106.

ERISA § 406(b) provides that: “A fiduciary with respect to a plan shall not (1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.” 29 U.S.C. § 1106(b).

While the scope of who is considered a fiduciary is broad, fiduciary duties and ERISA’s prohibited transaction rules apply only to decisions made by an employer if the employer is acting in its fiduciary capacity. See 29 U.S.C. §§ 1104(a), 1106(a). The Fifth Circuit held that anyone who exercises authority over an employee benefit plan can properly be held an ERISA fiduciary because Congress intended that term to be interpreted broadly. Donovan v. Mercer, 747 F.2d 304, 308 (5th Cir. 1984). The Fifth Circuit stated that “‘fiduciary’ should be defined not only by reference to particular titles, such as trustee, but also by considering the authority which a particular person has or exercises over an employee benefit plan.” Id. Thus, business decisions regarding the plan’s composition or design do not implicate ERISA’s fiduciary duties or prohibited transaction rules. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443-44 (1994). Furthermore, any action an employer takes to establish, modify, or terminate an ERISA-covered plan is not an action in the fiduciary capacity. Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996).

See:

Flanigan v. Gen. Elec. Co., 242 F.3d 78, 87 (2d Cir. 2001). *Employer’s decision to spin off a division of the company, along with its pension plan, was a corporate business decision, and not one of a plan administrator.*

Hunter v. Caliber Sys., Inc., 220 F.3d 702, 719 (6th Cir. 2000). *The transfer of assets from one plan to another was not a decision subject to ERISA’s fiduciary obligations.*

Ames v. Am. Nat’l Can Co., 170 F.3d 751, 757 (7th Cir. 1999). *Employer’s decision regarding how to structure plan was not a fiduciary decision.*

Sys. Council EM-3 v. AT&T Corp., 159 F.3d 1376, 1379-80 (D.C. Cir. 1998). *Employer’s allocation of a restructured plan’s excess was not a fiduciary decision.*

Waller v. Blue Cross of Cal., 32 F.3d 1337, 1345-46 (9th Cir. 1994). Despite in-firm bidding process and alleged improper motives, the purchase of replacement annuities as a part of a plan termination was not a transaction covered by § 406.

Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc., 998 F.2d 1185, 1189 (3d Cir. 1993). Decision to sell off a division and transfer plan assets was not a fiduciary decision.

Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 957 (D.C. Cir. 1985). Plan's acquisition of employer securities, in and of itself, does not violate any of the absolute prohibitions of ERISA.

Evans v. Bexley, 750 F.2d 1498, 1499-1500 (11th Cir. 1985). Trustee was permitted to represent employer in negotiations with union concerning the plan because he was acting in a corporate capacity.

Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985), overruled on other grounds by *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). Amendment of plan that reduced certain early retirement benefits for which beneficiaries were or would have become eligible did not constitute a transaction under § 406. ERISA clearly allows employers to "wear 'two hats'" and they assume fiduciary status "only when and to the extent" that they function as plan administrators.

Generally, courts have found prohibited transactions in two categorical circumstances: loans or extensions of credit, and investment of plan assets.

A. LOANS OR EXTENSIONS OF CREDIT

Courts have generally held that fiduciaries that serve on both sides of a loan from plan assets to another entity engage in prohibited transactions under ERISA. At the heart of the fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust. *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 638 (W.D. Wis. 1979). Fiduciaries acting on both sides of a loan transaction cannot negotiate the best terms for either plan. *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979). Thus, courts have held that loans from plan assets to various other entities violate § 406(b).

1. Loans from plan assets to another plan

Courts have differed in determining whether certain loans from plan assets to another plan violate ERISA's prohibited transactions provisions. In *Cutaiar*, the Third Circuit held that when identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between plans without a § 408 exemption, a *per se* violation exists. The Court reasoned that the extensive procedural requirements to receive a § 408 exemption demonstrate that Congress intended to create a blanket prohibition on certain transactions, no matter how fair. *Id.* at 529-30. In addition, the *Cutaiar* court reasoned that the statutory language of § 406(b)(2) speaks of the "interests of the plan or the interests of its participants or beneficiaries." *Id.* at 530. It does not speak of "some" or "many" or "most"

participants. Id. Thus, if a single member participates in only one plan, his plan must be administered without regard for the interests of any other plan. Id.

See:

Donovan v. Mazzola, 716 F.2d 1226, 1238 (9th Cir. 1983). *Holding that the district court did not err in not permitting the defendant fiduciaries to offer proof that the two plans had “substantial identity” in their participants and beneficiaries. The Court thus agreed with the reasoning in Cutaiar, holding that if there is a single member who participates in only one plan, his interests are not being represented in any loan transaction between the plans.*

The Third Circuit held that the Cutaiar holding was not limited to circumstances when the trustees of each plan are identical. Reich v. Compton, 57 F.3d 270, 288 (3d Cir. 1995). The Third Circuit held that the duty imposed by § 406 is for each individual fiduciary, not just for fiduciaries as a group. Id. at 289. Thus, a fiduciary may act on behalf of, or represent, an adverse party even if the group controlling the plan and the adverse party are not identical. Id.

The Tenth Circuit, however, reached a different conclusion. In Brock v. Citizens Bank of Clovis, 841 F.2d 344, 347 (10th Cir. 1988), the Tenth Circuit held that unless a *per se* violation is evident, the transaction is not prohibited by § 406(b). In that case, the court found no violation of § 405(b)(1) when a bank, as plan trustee, made loans to borrowers that enabled the borrowers to repay commercial loans to the bank. Id. Thus, in the Tenth Circuit, a transaction that does not literally fall within the text of § 406(b) is permitted.

2. Loans from plan assets to the sponsor/employer

Where the fiduciary makes a loan from the assets of the plan to the employer or plan sponsor, the transaction constitutes a deal with plan assets in the fiduciary's own interest in violation of § 406(b)(1) and an action on behalf of a party with interests adverse to those of the plan in violation of § 405(b)(2).

See:

White v. Martin, 286 F. Supp. 2d 1029, 1042 (D. Minn. 2003). *Guaranties of loans to employer constituted improper transfer of funds under § 406(a).*

Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 638 (W.D. Wis. 1979). *The court found a violation of both § 406(b)(1) and (b)(2) where the plan fiduciaries engaged in a series of loans of plan assets to each of several sponsoring employers. Each fiduciary served as a top management official in one of the sponsoring companies. Furthermore, the court held that although each of the defendant fiduciaries did not hold an ownership interest in each of the borrowing companies, the companies were so interrelated that each fiduciary had an interest in each borrower and thus represented both sides in all of the transactions.*

3. Loans from plan assets to labor unions

When a fiduciary has caused a plan to make a loan from plan assets to himself, courts have held that such a transaction violates ERISA's self-dealing provisions.

See:

Raff v. Belstock, 933 F. Supp. 909, 915-16 (N.D. Cal. 1996). *Prohibited transactions between an ERISA plan and fiduciary include loans from the plan to the fiduciary. The fact that the alleged violation did not cause any harm to the plan was irrelevant; such a loan is a per se violation of 406(b).*

Brock v. Gillikin, 677 F. Supp. 398, 401-402 (E.D.N.C. 1987). *An employee benefit plan trustee acted with the assets of the plan in his own interest, in violation of § 406(b)(1), when he executed a loan of plan assets to a corporation that he owned. The court also held that the loan constituted action with a party whose interests are adverse, in violation of § 406(b)(2).*

B. INVESTMENTS OF PLAN ASSETS

The various circuit courts have treated investments of plan assets differently. In *Donovan v. Bierwirth*, 680 F.2d 263, 270 (2d Cir. 1982), the Second Circuit held that the plan fiduciaries' decision to purchase stock in the sponsoring employer for whom they served in an executive capacity was not a prohibited transaction under § 406(b)(1). The court implied that the sponsoring employer was not a party having an adverse interest, and reasoned that Congress could not have intended the expansive interpretation of the specific prohibitions of § 405(b) because of the sweeping requirements of prudence and loyalty contained in § 404. *Id.*

In contrast, the Seventh Circuit in *Leigh v. Engle*, 727 F.2d 113, 126-27 (7th Cir. 1984), held that the prohibited transaction provisions were to be interpreted broadly. That court reasoned that ERISA's entire statutory scheme demonstrates Congress's overriding concern with the protection of plan beneficiaries, and thus it would be illogical to narrowly construe the protective provisions. In that case, the court held that the plan trustees' use of plan assets to purchase stock in a corporate control battle was clearly within § 406(b)(1)'s "own interest" and was therefore prohibited.

See:

Lowen v. Tower Asset Mgmt. Inc., 829 F.2d 1209, 1214 (2d Cir. 1987). *Fiduciaries' investment of plan assets in companies that they owned substantial equity interests in violated 405(b)(1).*

C. PLAN ASSETS UNDER § 406(b)(1), 29 U.S.C. § 1106(B)

In *Acosta v. Pacific Enterprises*, 950 F.2d 611, 620-21 (9th Cir. 1991), the Ninth Circuit held that § 406(b)(1)'s "assets of the plan" has a broader scope than just financial contributions received by plan administrators. The Court reasoned that the sweeping duty of loyalty upon plan fiduciaries indicates that Congress intended to effect a more functional approach. *Id.* at 620. The court held that the determinative test is whether the item in question

may be used, financially or otherwise, for the benefit of the fiduciary at the expense of plan participants or beneficiaries. Id. at 620. However, the court held that no violation of § 406 occurred unless the fiduciary “actually used its power . . . for its own benefit or account.” Id. at 621.

Courts have also found that there is no compensation exception to the rule against self-dealing. In Patelco Credit Union v. Salini, 262 F.3d 897, 911 (9th Cir. 2001), the Ninth Circuit determined that the § 408 exception did not apply to compensation to a fiduciary. Therefore, fiduciaries are liable for self-dealing under § 406(b) if they provide themselves with any compensation. This is not true for transactions with parties in interest under § 406(a) where the exception does apply.

D. ADVERSE INTERESTS UNDER § 406(b)(2), 29 U.S.C. § 1106(b)(2)

Under § 406(b)(2), the general trend has been to attribute broad meaning to the term “adverse,” and to hold that interests need not be “antithetical,” only “different.” Sandoval v. Simmons, 622 F. Supp. 1174, 1213-14 (C.D. Ill. 1985). However, courts have generally refused to find a violation where a fiduciary employed by the sponsoring employer in a corporate capacity takes action adverse to the plan. Thus, violations have been found most frequently in the context of loans or extensions of credit from plan assets where courts have held that parties on both sides of the loan cannot negotiate the terms most favorable to each individual entity. See Cutaiar, 590 F.2d at 530. However, courts have also found violations of § 406(b)(2) in other instances.

See:

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1261 (5th Cir. 1980).
Trustee would violate § 406(b)(2) by participating in decision whether plan should sue him.

Arakelian v. Nat’l W. Life Ins. Co., 680 F. Supp. 400, 406-07 (D.D.C. 1987).
Fiduciary insurer violated § 406(b)(2) where his “interests” were adverse to plan since it controlled the amount of investment return to be paid under insurance contract purchased by the plan.

XI. CLAIMS FOR BREACH OF FIDUCIARY DUTY BROUGHT ON BEHALF OF PLAN OR BY INDIVIDUALS

A. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2): ACTIONS ON BEHALF OF THE PLAN

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), allows civil actions by participants and beneficiaries for relief for breaches of ERISA fiduciary provisions under ERISA § 409, 29 U.S.C. § 1129. Consequently, this language permits the participants and beneficiaries of benefits plans to allege that, under the circumstances of their cases, the denial of benefits constitutes a breach of fiduciary duty. In Massachusetts Mutual Life Insurance Co. v. Russell, the Supreme Court held that an action under § 409 is limited to relief for the plan and does not provide individual relief, which severely limits the effectiveness of § 502(a)(2) in litigation involving individual claims for benefits. 473 U.S. 134, 140 (1985). But see LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 1025, 552 U.S. 248 (2008) (holding that Russell's interpretation of Section 409 does not apply to defined contribution plans).

1. Appropriate parties

A civil claim under ERISA § 502(a)(2) can be brought by the Secretary of Labor, a participant, beneficiary, or fiduciary against “any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed” upon that fiduciary. 29 U.S.C. § 1109. Most courts have held that only the parties expressly named in § 502(a)(2) are authorized to institute a civil action to enforce ERISA. See, e.g., Giardono v. Jones, 867 F.2d 409, 413 (7th Cir. 1989); Tuvia Convalescent Ctr., Inc. v. Nat’l Union of Hosp. & Health Care Employees, 717 F.2d 726, 730 (2d Cir. 1983) (holding that employer is not entitled to bring suit under § 502(a)(2) because it is not expressly named in ERISA); Pedre Co. v. Robins, 901 F. Supp. 660, 665 (S.D.N.Y. 1995); St. Francis Hosp. & Med. Center v. Blue Cross & Blue Shield of Conn., Inc., 776 F. Supp. 659, 661 (D. Conn. 1991). However, the way those enumerated classes are defined can expand the universe of available parties eligible to bring an ERISA action. For example, while employers are not expressly named in ERISA, employers who are working owners of their businesses, may also be defined as “participants.” Raymond B. Yates Profit Sharing Plan v. Hendon, 541 U.S. 1, 5 (2004).

a. Definition of Participant

A “participant” is defined under 29 U.S.C. § 1002(7) as “any employee or former employee . . . , or any member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . , or whose beneficiaries may be eligible to receive any such benefit.” That a person bringing a § 502(a)(2) suit is a “participant” is both a standing requirement and a subject-matter jurisdiction requirement. See Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1221-22 (5th Cir. 1992).

The Supreme Court has read the term “participant” “naturally,” claiming that it means either an “employee in, or reasonably expected to be in, currently covered employment or a former employee who has a reasonable expectation of returning to covered employment or a colorable claim to vested benefits.” Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117

(1989). The Supreme Court, however, has found ERISA's definition of the term "employee" circular and inadequate. Instead of looking to § 1002(6) for the definition, courts must use the "common-law test for determining who qualifies as an 'employee' under ERISA." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). The common-law test looks to agency principles instead of the law of any particular state. Id. at 323 n.3; see also Section XIV.

Once the court determines whether the plaintiff is an "employee" or "former employee," it must determine whether that party "is or may become eligible to receive benefits." § 1002(7). To establish this, the Supreme Court requires the claimant to have a "colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Firestone Tire, 489 U.S. at 117-18. For example, plaintiffs who have received all of their benefits in a lump sum payment are not "participants" for standing purposes. See, e.g., Joseph v. New Orleans Elec. Pension & Ret. Plan, 754 F.2d 628, 630 (5th Cir. 1985).

In 2004, the Supreme Court rejected the position that a working owner of a business may rank only as an "employer" and not also as an "employee" for purposes of ERISA plan participation. Yates, 541 U.S. at 5. This position, adopted by several lower courts, missed a key point -- under ERISA, a working owner can wear "two hats." Id. at 14. That is, he can be an employee entitled to participate in a plan and, at the same time, the employer who established the plan. Id. As long as the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. Id. at 5. Under Yates, "a working owner, in common with other employees, qualifies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies." Id. It remains clear, however, that plans covering only sole owners or partners and their spouses do *not* fall under ERISA's domain. Id. at 21.

As a general rule, a person who gives up his right to belong to a plan cannot be a "participant." Swinney v. Gen. Motors Corp., 46 F.3d 512, 518 (6th Cir. 1995). Some courts, however, have found an exception to this rule and held that "if the employer's breach of fiduciary duty causes the employee to either give up his right to benefits or to fail to participate in a plan, then the employee has standing to challenge that fiduciary breach." Id.; see also Mullins v. Pfizer, Inc., 23 F.3d 663, 668 (2d Cir. 1994); Vartanian v. Monsanto Co., 14 F.3d 697, 703 (1st Cir. 1994). Other courts have rejected this "but for" test. One court held that "to say that but for [the employer's] conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such." Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1536 (10th Cir. 1993); see also Stanton v. Gulf Oil Corp., 792 F.2d 432, 435 (4th Cir. 1986) (rejecting "but for" test for participant status).

b. Definition of Beneficiary

A "beneficiary" is defined under 29 U.S.C. § 1002(8) 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." Like a "participant," a beneficiary must have a reasonable or colorable claim to vested benefits. Neuma, Inc. v. AMP, Inc., 259 F.3d 864 (7th Cir. 2001); Crawford v. Roane, 53 F.3d 750, 754 (6th Cir. 1995). Merely claiming to be a beneficiary is insufficient to grant standing. Crawford, 53 F.3d at 754. Furthermore, most circuits have rejected the notion that beneficiary standing is granted to any person within the "zone of interests" that ERISA was

designed to protect, even if that person is not expressly mentioned in § 1132(a). See, e.g., Giardono v. Jones, 867 F.2d 409, 413 (7th Cir. 1989); Grand Union Co. v. Food Employers Labor Relations Ass’n, 808 F.2d 66, 71 (D.C. Cir. 1987); Dime Coal Co. v. Combs, 796 F.2d 394, 396 (11th Cir. 1986).

Some courts have held that ERISA was passed to protect the entire family, thus the term “beneficiary” should be interpreted in a broad sense. See, e.g., Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1220 (D. Md. 1990); Cartledge v. Miller, 457 F. Supp. 1146, 1156 n.53 (S.D.N.Y. 1978). A person need not be a family member or a dependent, however, to be considered a beneficiary. Any person that a participant or the plan’s terms designates can bring suit to enforce ERISA on behalf of the plan. Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 409 (9th Cir. 1995). Moreover, an assignee of plan benefits may be considered a “beneficiary” for standing purposes so long as that person has an arguable claim. Neuma, 259 F.3d at 878. Jurisdiction is lacking “[o]nly if the language of the plan is so clear that any claim as an assignee must be frivolous.” Id.

c. Definition of Fiduciary

A “fiduciary” is defined under 29 U.S.C. § 1002(21)(A) as a person “with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or . . . disposition of its assets, (ii) [he] renders investment advice for a fee or other compensation . . . or (iii) [] has any discretionary authority or . . . responsibility in the administration of such plan.”

When determining whether a person is a fiduciary, courts focus on the “function performed rather than on the title held.” Blatt v. Marshall & Lassman, 812 F.2d 810, 812 (2d Cir. 1987). Furthermore, having absolute discretion over a plan is not required; having discretion over any part is enough. Id. Therefore, just because a person is a fiduciary for one purpose does not automatically make that person a fiduciary for every purpose. “A person ‘is a fiduciary to the extent that’ he performs one of the described duties,” allowing that person to act in his own interests in certain circumstances. Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1188 (7th Cir. 1994); see also Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992) (“[A] court must ask whether a person is a fiduciary with respect to the particular activity at issue.”). Thus, a fiduciary has standing only to bring claims related to those fiduciary responsibilities it possesses. In other words, a fiduciary does not have standing for all purposes. Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996). Courts do not consider those who perform merely ministerial or mechanical duties fiduciaries because they exercise no discretion. Pohl v. Nat’l Benefits Consultants, Inc., 956 F.2d 126, 128 (7th Cir. 1992).

Because only the parties expressly mentioned in § 502(a)(2) may bring suit, see e.g., Giardono, 867 F.2d at 413, courts have held that a former fiduciary does not have standing to bring claims on behalf of the plan to recover for plan losses. See, e.g., Corbin v. Blankenburg, 39 F.3d 650, 655 (6th Cir. 1994); Chemung Canal Trust Co. v. Sovran Bank/Md., 939 F.2d 12, 14 (2d Cir. 1991).

2. Jurisdiction

29 U.S.C. § 1132(e) and § 1132(f) provide the federal jurisdictional basis for a § 502(a)(2) action. Section 1132(e) states that for § 502(a)(2) actions, “the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary” 29 U.S.C. § 1132(e)(1). Section 1132(f) provides that the federal district courts will have jurisdiction “without respect to the amount in controversy or the citizenship of the parties.” 29 U.S.C. § 1132(f).

While it is clear that federal courts will exclusively hear § 502(a)(2) claims, a circuit split exists concerning personal jurisdiction. The controversy arises from § 1132(e)(2), which provides for nationwide service of process and states “process may be served in any other district where a defendant resides or may be found.” Several courts read this language to say that personal jurisdiction lies in any federal district court so long as the defendant has minimum contacts with the United States as a whole. Courts refer to this as the “national contacts test.” Under the national contacts test, whether a connection exists between the defendant and the forum state in which the court sits is irrelevant. Instead, the personal jurisdiction inquiry focuses on whether the defendant in the proceeding has sufficient contacts within the United States. Aetna Life & Cas. v. Owen, No. 3:04CV817, 2004 WL 2381744, at *2 (D. Conn. Oct. 13, 2004). This would, for example, allow a defendant in Florida to be haled into court in Alaska even though he has no contact with Alaska.

For courts following the national contacts test, the minimum contacts analysis of International Shoe Co. v. Washington, 326 U.S. 310 (1945), which examined the sufficiency of the contacts between the defendant and the forum to establish personal jurisdiction, does not apply. Rather, as set forth by the Sixth Circuit, the due process inquiry of International Shoe applies only when a state long-arm statute is applied to reach out-of-state defendants. Med. Mut. of Ohio v. deSoto, 245 F.3d 561, 567 (6th Cir. 2001). If Congress provided for national service of process, as it did in § 1132(e)(2), the district court is able to exercise jurisdiction nationwide because the extra-territorial concerns for state courts are simply not present.

See:

Aetna Life & Cas. v. Owen, No. 3:04CV817, 2004 WL 2381744, at *1-2 (D. Conn. Oct. 13, 2004). *Where defendant resided in the United States, worked in the United States, and received benefits from a disability plan administered in the United States, personal jurisdiction in an ERISA case was proper under the national contacts test even though defendant’s contacts with the forum state were minimal.*

Abercrombie v. Cont’l Cas. Co., 295 F. Supp. 2d 604, 606-07 (D.S.C. 2003). *Applying the national contacts test, the court found that personal jurisdiction in an ERISA case was proper even if the parties had no contacts at all with the forum state, as sufficient contacts anywhere in the United States are enough to confer personal jurisdiction.*

Vivien v. WorldCom, Inc., No. Co 02-01329 WHA, 2002 WL 31640557, at *2-*3 (N.D. Cal. July 26, 2002). Where individual defendants resided in Mississippi and Florida and worked for the corporate defendant in Mississippi, personal jurisdiction in an ERISA case was proper under the national contacts test.

DeFelice v. Daspin, No. CIV.A. 01-1760, 2002 WL 1373759, at *4 (E.D. Pa. June 25, 2002). The Third Circuit has not squarely adopted the national contacts test but has recognized the test's legitimacy. Even where the national contacts test applies, courts must not discard notions of fundamental fairness. Personal jurisdiction in an ERISA case existed under the national contacts test even though defendants lived in New Jersey, Connecticut, and South Carolina and had no presence or property in Pennsylvania. Defendants held management positions in a company which employed the Pennsylvania plaintiffs and in a company which administered the payroll; thus, defendants' activities had an impact in Pennsylvania and could reasonably anticipate being called to answer there for the use of their positions to deprive persons in Pennsylvania of rights earned under a benefit plan.

Hudson County Carpenters Local Union No. 6 v. V.S.R. Constr. Corp., 127 F. Supp. 2d 565 (D.N.J. 2000). The court applied the national contacts standard in an ERISA case, citing *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 n.3 (3d Cir. 1985) which stated "The constitutional validity of national contacts as a jurisdictional base is confirmed by those statutes which provide for nationwide service of process"

See also:

In re Fed. Fountain, Inc., 165 F.3d 600, 602 (8th Cir. 1999). The Eighth Circuit adopted the national contacts test for personal jurisdiction in a Chapter 7 bankruptcy proceeding.

Busch v. Buchman, Buchman & O'Brien Law Firm, 11 F.3d 1255, 1258 (5th Cir. 1994). The national contacts test was applied in a suit brought under the Securities Exchange Act of 1934.

Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671-72 (7th Cir. 1987). The Seventh Circuit held that the national contacts test would be applied for personal jurisdiction in RICO cases.

Schrader v. Trucking Employees of N.J. Welfare Fund, Inc., 232 F. Supp. 2d 560, 571 (M.D.N.C. 2002). The court noted that while the Fourth Circuit has not expressly ruled on whether the national contacts test is applicable in ERISA cases, it has clearly held the test applicable in RICO and Bankruptcy Act cases, both of which provide for nationwide service of process.

Cole v. Cent. States S.E. & S.W. Areas Health & Welfare Fund, 225 F. Supp. 2d 96, 97 (D. Mass. 2002). The district court ruled that the First Circuit follows the

national contacts test, but nonetheless questioned the test's validity under the Due Process Clause.

Other courts have rejected the national contacts test and instead held that the Fifth Amendment's Due Process Clause governs personal jurisdiction where a nationwide service of process statute exists. These courts hold that Congress cannot circumvent the traditional due process requirement simply by enacting nationwide service of process rules.

As the Tenth Circuit stated in an ERISA case, "the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant." Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1212 (10th Cir. 2000). The Peay court found the Fifth Amendment virtually identical to the Fourteenth Amendment (where International Shoe applies), and ruled that a defendant "must first demonstrate 'that his liberty interests actually have been infringed'" to establish that jurisdiction offends the Due Process Clause. Id. "The burden is on the defendant to show that the exercise of jurisdiction in the chosen forum will 'make litigation so gravely difficult and inconvenient that he unfairly is at a severe disadvantage in comparison to his opponent.'" Id. The Peay court also listed several factors district courts must consider when determining inconvenience, such as: "(1) the extent of the defendant's contacts with the place where the action was filed; (2) the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business . . . ; (3) judicial economy; (4) the probable situs of the discovery . . . ; and (5) the nature of the regulated activity in question and the extent of impact that the defendant's activities have beyond the borders of his state of residence or business." Id. The court further noted that only in very rare cases will the inconvenience "rise to a level of constitutional concern," and that inconvenience can normally be accommodated through a change of venue. Id. at 1212-13. Finally, even if the defendant can show such undue inconvenience, personal jurisdiction will satisfy due process "only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." Id. at 1213.

See also:

Republic of Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 (11th Cir. 1997). The Eleventh Circuit favored the due process inquiry for personal jurisdiction over the national contacts test in a RICO case.

Bellaire Gen. Hosp. v. Blue Cross & Blue Shield of Mich., 97 F.3d 822, 825 (5th Cir. 1996). The Fifth Circuit applied the national contacts test due to Busch, 11 F.3d at 1258, but disagreed with the test, noting that, "We fail to apprehend how personal jurisdiction can be separated from due process by Congressional enactment of nationwide service of process provisions."

I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc., 699 F.2d 1254, 1258 (D.C. Cir. 1983). "[F]or service of process on a corporation to be valid under Section 1132(e)(2), a corporation's contacts with the district of service must meet the International Shoe test."

Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1106 (D. Ga. 1994). The court criticized the national contacts test for providing

defendants with inadequate due process protection and noted that “[t]o allow Congress to dictate personal jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary, is nonsensical.”

The Supreme Court has twice declined to rule on this issue. See Omni Capital Int’l v. Rudolf Wolff & Co., 484 U.S. 97, 103 n.5 (1987); Asahi Metal Indus. Co., Ltd. v. Sup. Ct. of Cal., 480 U.S. 102, 111 (1987).

3. Venue

29 U.S.C. § 1132(e)(2) provides the venue requirements for a § 502(a)(2) action. It states:

Where an action under this subchapter is brought in a district court of the United States, it 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, and process may be served in any other district where a defendant resides or may be found.

Section 1132(e)(2) “is to be liberally interpreted [because] Congress intended to expand, rather than restrict, the ERISA plaintiff’s choice of forum.” Trs. of Hotel Employees & Rest. Employees Int’l Union Welfare Pension Fund v. Amivest Corp., 733 F. Supp. 1180, 1182 (N.D. Ill. 1990). The plaintiff’s choice of forum is to be given deference “unless it is clearly outweighed by other factors.” Id. at 1183.

Courts have construed the term “found” in § 1132(e)(2) liberally, holding that it means any court that has personal jurisdiction over the defendant. See, e.g., Varsic v. United States Dist. Court for the Cent. Dist. of Cal., 607 F.2d 245, 248 (9th Cir. 1979); see also Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804, 810 (7th Cir. 2002) (following Varsic); I.A.M. Nat’l Pension Fund v. Wakefield Indus., Inc., 699 F.2d 1254, 1257 (D.C. Cir. 1983) (same). For venue purposes, personal jurisdiction is determined under the minimum contacts test of International Shoe v. Washington, 326 U.S. 310 (1945). To establish minimum contacts under International Shoe, a defendant must have “purposefully avail[ed] itself of the privilege of conducting activities within the [district], thus invoking the benefits and protections of its law[.]” Hanson v. Denckla, 357 U.S. 235, 253 (1958), so that it “should reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). In sum, a defendant “can be found” in a judicial district if it has the sort of minimum contacts with that district that would support the exercise of personal jurisdiction under International Shoe. Waeltz, 301 F.3d at 810; see also Abercrombie v. Cont’l Cas. Co., 295 F. Supp. 2d 604, 607-08 (D.S.C. 2003) (even though plaintiff’s employer was located in North Carolina and plan administered in Pennsylvania, defendant’s contacts satisfied International Shoe where defendant insured welfare benefit plans for other employers in forum state of South Carolina).

It is important to note that the use of International Shoe for venue purposes is completely separate from the concept of personal jurisdiction in which many courts use the “national contacts test.” See supra Section XI.A.2. At least one court has collapsed the personal jurisdiction and venue analysis, however. Moore v. St. Paul Co., Inc., CIV A. No. 94-1329, 1995 WL 11187, at *2 (D.N.J. Jan. 3, 1995). The court in Moore claimed that if the defendant

had sufficient personal contact with the district court to satisfy International Shoe, then it must have sufficient personal contact with the United States as a whole to satisfy the personal jurisdiction requirement. Id.

Under § 1132(e)(2), “where the breach took place” is considered by courts to be the “district where the beneficiary receives his benefits,” Shrader v. Trucking Employees of N. J. Welfare Fund, Inc., 232 F. Supp. 2d 560, 573 (M.D.N.C. 2002); see also Cole v. Cent. States S.E. & S.W. Areas Health & Welfare Fund, 225 F. Supp. 2d 96, 98 (D. Mass. 2002) (“[T]he place of breach is the place where payment was to be received.”). Alternatively, some courts have found the place “where the breach took place” is the place “where the decision to deny benefits is made.” Brown Sch., Inc. v. Fl. Power Corp., 806 F. Supp. 146, 149 (W.D. Tex. 1992) (citing Helder v. Hitachi Power Tools, USA Ltd., 764 F. Supp. 93, 95 (E.D. Mich. 1991)). Brown notes that “breach of fiduciary duty, as opposed to the plan itself, takes place ‘where the defendants commit or fail to commit the actions their duties require.’” Id.

4. Applicable statute of limitations

The statute of limitations for a § 502(a)(2) breach of fiduciary duty action is set out in 29 U.S.C. § 1113. Under § 1113, no action for breach of fiduciary duty may be brought the earlier of:

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

For part (1), the six-year limitations period “starts to run when the plaintiff’s right to resort to the courts is complete, whether or not she has discovered the injury . . . rather than when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis for the action.” Larson v. Northrop Corp., 21 F.3d 1164, 1174 (D.C. Cir. 1994).

For part (2), the statutory period begins not when the violation or breach occurred, but when the plaintiff obtained “actual knowledge.” Rush v. Martin Petersen Co., 83 F.3d 894, 896 (7th Cir. 1996). Though the plaintiff in an ERISA case brings suit on behalf of the plan, the statute of limitations begins to run when the *person bringing suit* had knowledge of the breach or violation; not when the covered plan, through any of its agents, learns of the breach. Landwehr v. DuPree, 72 F.3d 726, 732 (9th Cir. 1995). “Actual knowledge” has been defined as “knowledge of the essential facts of the transaction or conduct constituting the violation.” Rush, 83 F.3d at 896 (citing Martin v. Consultants & Adm’rs, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992)). The plaintiff need not know of every last detail of the transaction or of its illegality. Id. The Third Circuit interprets the three-year statute of limitations period even more liberally,

stating that for the three-year statute of limitation to apply, the plaintiff must have actual knowledge not only of the breach, but also actual knowledge that those events supported a claim for breach of fiduciary duty or a violation under ERISA. Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 777 (3d Cir. 2001).

Importantly, constructive knowledge is insufficient to establish actual knowledge. Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216 (7th Cir. 1990). Likewise, actual knowledge means more than simple knowledge that something is awry. Instead, specific knowledge of an actual breach of duty is required. Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987); see also Maier v. Strachan Shipping Co., 68 F.3d 951, 955 (5th Cir. 1995).

The circuits are split concerning the section dealing with “fraud or concealment,” to which the six-year standard applies. The generally accepted rule adopted by most circuits has been that this six-year period applies only where the defendant allegedly concealed the breach (i.e., fraudulent concealment). See, e.g., Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1552 (3d Cir. 1996); J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1253 (1st Cir. 1996); Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401-02 (9th Cir. 1995); Larson v. Northrop Corp., 21 F.3d 1164, 1172-73 (D.C. Cir. 1994); Radiology Ctr., 919 F.2d at 1220; Shaefer v. Ark. Med. Soc’y, 853 F.2d 1487, 1491-92 (8th Cir. 1988). The Second Circuit, however, held that this six-year period is not limited to cases of fraudulent concealment. Instead, it reads the text literally to refer to either fraud *or* concealment so that “the six-year statute of limitations should be applied to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty.” Caputo v. Pfizer, Inc., 267 F.3d 181, 190 (2d Cir. 2001).

Because courts have inferred that ERISA claimants must exhaust any administrative remedies before bringing an action in federal court, see *infra* Part XI.B.6, this creates tolling concerns for the statute of limitations. In the context of a § 502(a)(3) action, the Fifth Circuit held that § 1113 is a statute of repose setting an outside limit on when suit can be brought, and that courts need not “toll the statute of limitations pending the exhaustion of administrative remedies.” Radford v. Gen. Dynamics Corp., 151 F.3d 396, 400 (5th Cir. 1998). While Radford was a case under § 502(a)(3), it is likely that a court would approach the § 1113 statute of limitations under § 502(a)(2) in the same way.

5. Availability of a jury trial

While the overwhelming majority of courts have held that no right to a jury trial exists for § 502(a)(2) ERISA claims, there have been at least two district courts that have disagreed with the majority. Several older cases suggest that there is never a right to a jury trial in ERISA actions because such actions are equitable in nature. Cases decided after the Supreme Court’s ruling in Great West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) (dealing with § 502(a)(3) claims), however, suggest that a right to a jury trial does exist for § 502(a)(2) claims.

The right to a jury trial is available in an ERISA action only when a legal remedy is sought. Donovan v. Robbins, 579 F. Supp. 817, 820 (N.D. Ill. 1984). A simple request for

monetary relief is not enough, in itself, for a claim to be considered “legal” in nature. Borst v. Chevron Corp., 36 F.3d 1308, 1324 (5th Cir. 1994). A “request for monetary recovery sounds in equity . . . when it is restitutionary in nature or is intertwined with claims for injunctive relief.” Id. (citing Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570-71 (1990)).

Several years before its decision in Knudson, the Supreme Court held that “ERISA abounds with the language and terminology of trust law. ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions ‘codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.’” Firestone, 489 U.S. at 110. As the Fifth Circuit noted, because ERISA is so analogous to trust law, this is “an area within the exclusive jurisdiction of the courts of equity,” and thus “ERISA claims do not entitle a plaintiff to a jury trial.” Borst, 36 F.3d at 1324.

The Second Circuit likewise has ruled that no right to a jury trial exists in ERISA claims seeking the equitable remedy of restitution. Katsaros v. Cody, 744 F.2d 270, 278-79 (2d Cir. 1984). As one lower court noted, § 502(a)(2) actions are “restitutional in nature,” and therefore no right to a jury trial exists. Raff v. Travelers Ins. Co., No. 90 CIV 7673, 1996 WL 154171 (S.D.N.Y. Apr. 3, 1996).

See also:

Mathews v. Sears Pension Plan, 144 F.3d 461, 468 (7th Cir. 1998). “[T]here is no right to a jury trial in an ERISA case.”

Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1527 (11th Cir. 1996). “[N]o Seventh Amendment right to a jury trial exists in actions brought pursuant to ERISA.”

Houghton v. SIPCO, Inc., 38 F.3d 953, 957 (8th Cir. 1994). “[T]here is no right to money damages or to a jury trial under ERISA.”

Broadnax Mills, Inc. v. Blue Cross & Blue Shield of Va., 876 F. Supp. 809, 816 (E.D. Va. 1995). The court held that § 502(a)(2) is equitable in nature despite the availability of damages, and thus denied the right to a jury trial.

White v. Martin, No. CIV 99-1447, 2002 WL 598432 (D. Minn. Apr. 12, 2002). The district court found no right to a jury trial under § 502(a)(2) because the plaintiff’s action sought the equitable relief of restitution that did not fit into definition of “legal” under Knudson.

Pereira v. Cogan, No. 00 CIV 619, 2002 WL 989460 (S.D.N.Y. May 10, 2002). The court, in a bankruptcy case, held that notwithstanding Knudson, suits for breaches of fiduciary duty are necessarily equitable in nature and thus no right to a jury trial exists.

With the Supreme Court’s decision in Knudson, however, some courts have concluded that the possibility that the right to a jury trial may exist for plaintiffs seeking

restitution under § 502(a). Knudson, 534 U.S. at 213. In Knudson, the Court held that restitution actions are “legal” in nature when the plaintiff seeks to impose “merely personal liability upon the defendant to pay a sum of money” such as in a breach of contract case. Id. Restitution actions are “equitable” in nature where the action seeks to “restore to the plaintiff particular funds or property in the defendant’s possession.” Id. at 214. Thus, under Knudson, not all remedies when sought for breach of fiduciary duty, are equitable in nature. See Rego v. Westvaco Corp., 319 F.3d 140, 145 (4th Cir. 2003).

Applying Knudson, at least one court has found a right to a jury trial under § 502(a)(2). A federal district court ruled that after Knudson, plaintiffs who seek money damages in § 502(a)(2) claims are seeking a legal remedy and are therefore entitled to a jury trial. Bona v. Barasch, No. 01 CIV 2289(MBM), 2003 WL 1395932, at *34-35 (S.D.N.Y. Mar. 20, 2003). In Bona, the court stated that because the plaintiffs were suing on behalf of the plan under § 502(a)(2), they could seek either damages or equitable relief. Id. at *34. After noting that the Second Circuit repeatedly holds that no jury trial is available when plaintiffs seek equitable relief, the district court in Bona stated that the plaintiffs sought monetary damages. Id. at *35. Bona shows that after Knudson, the question of whether a right to a jury trial in a § 502(a)(2) action exists may undergo revision in the appellate courts. As of now, however, most courts have denied a jury trial in § 502(a)(2) cases.

See also:

Utilicorp United, Inc. v. Kemper Fin. Servs., Inc., 741 F. Supp. 1363, 1367 (W.D. Mo. 1989). *The court stated that the controlling Eighth Circuit decision denying a right to a jury trial in ERISA actions applied only to actions brought under § 502(a)(1), and therefore allowed a jury trial due to lack of binding precedent and “the strong federal policy favoring jury trials.”*

B. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3): ACTIONS FOR INDIVIDUAL RELIEF

1. Permissible causes of action

ERISA § 502(a)(3) provides causes of action for any plaintiff seeking: (1) to enjoin any act or practice which violates any provision of ERISA Title I or the terms of the benefit plan, and (2) to obtain other appropriate equitable relief to address such violations, to enforce any provision of Title I, or to enforce the terms of the plan. 29 U.S.C. § 1132 (a)(3). It is well settled that a plaintiff “may file a civil action [under § 502(a)(3)] to ‘enjoin any act or practice’ which violates ERISA or the terms of the plan.” Patterson v. Shumate, 504 U.S. 753, 760 (1992); see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 19-20 (1983) (holding that § 502(a)(3) specifically grants trustees of ERISA-covered plans cause of action for injunctive relief when rights and duties under ERISA are at issue), superseded by statute on other grounds, 28 U.S.C. § 1441(e). The extent of a plaintiff’s ability to obtain “other appropriate equitable relief” under § 502(a)(3) is still debated. Currently, courts strictly follow the textual guidelines of the statute and limit claims for “other appropriate equitable relief” to causes of action that seek a traditionally equitable remedy. See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993). A variety of claims qualify as actions for appropriate equitable relief under § 502(a)(3).

See:

Schwartz v. Gregori, 45 F.3d 1017, 1023 (6th Cir. 1995). Plaintiff seeking back pay in § 510 claim brought under § 502(a)(3) sought appropriate equitable relief because the back pay was restitution.

Resner v. Arc Mills, No. 95 Civ. 2924 (JSM), 1996 WL 554571, at *3 (S.D.N.Y. Sept. 30, 1996). Plaintiff seeking lost wages and benefits stated a claim for appropriate equitable relief under § 502(a)(3).

Central States, S.E. & S.W. Areas Health & Welfare Fund by Baker v. Boyd, 762 F. Supp. 1263 (S.D. Miss. 1991). Action by beneficiaries seeking to enforce benefits claim was an action for appropriate equitable relief under § 503(a)(3).

But see:

Novak v. Andersen Corp., 962 F.2d 757, 759 (8th Cir. 1992). Plaintiff seeking injunction requiring defendant to pay monetary damages to compensate him for defendant's alleged breach of the plan did not state a claim for equitable relief under § 502(a)(3).

a. Equitable relief requirement

The controversy as to the scope of the “other appropriate equitable relief” provision results largely from Justice Brennan’s concurrence in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 148 (1985) (Brennan, J., concurring) (holding that extracontractual damages for breach of fiduciary duty are not allowed under § 502(a)(2)). In his concurrence, Justice Brennan emphasized that the Russell holding was tailored narrowly to causes of action under § 502(a)(2) and that extracontractual damages are not foreclosed for suits under § 502(a)(3). Id. at 150. Justice Brennan further argued that the legislative history of ERISA and § 502(a)(3)’s broad wording - “appropriate equitable relief” - counsel against the Russell majority’s constrictive view of the judicial role in enforcing ERISA’s remedial scheme. Id. at 155-156.

While Justice Brennan’s construction of this provision essentially opened the door to judicial discretion in determining which causes of action are allowed as “other appropriate equitable relief,” see id. at 155, this approach has been greatly constrained by subsequent Supreme Court decisions. See, e.g., Mertens, 508 U.S. at 255. Even though the Supreme Court has not expressly repudiated Brennan’s expansive construction, its more recent holdings have chipped away at the judicial discretion inherent in Brennan’s reading of the provision.

In Mertens, the Supreme Court held that a suit for monetary damages against a nonfiduciary who knowingly assists in a fiduciary’s breach of duty is outside the scope of “appropriate equitable relief” under § 502(a)(3) because such relief is based on compensatory damages, which, rather than being a traditional equitable remedy, is a classic form of legal relief. Mertens, 508 U.S. at 255. The Supreme Court reaffirmed its “unwillingness to infer causes of action in the ERISA context, since that statute’s carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.’” Id. at 254 (quoting Russell, 473 U.S. at 146). Thus,

where the relief sought is traditionally of a legal nature, the suit cannot be maintained under the “other appropriate equitable relief” clause of § 502(a)(3).

The Supreme Court further limited judicial discretion by adding an additional caveat that § 502(a)(3) “does not . . . authorize ‘appropriate equitable relief’ *at large*, but only ‘appropriate equitable relief’ for the purpose of ‘redress[ing any] violations or . . . enforc[ing] any provisions’ of ERISA or an ERISA plan.” *Id.* at 253 (alteration in original). In other words, the equitable relief sought must be necessary to enforce ERISA or a benefit plan, or to remedy a violation of ERISA or a benefit plan.

In *Knudson*, the Supreme Court bolstered its *Mertens* precedent by holding that a suit based on a contractual obligation to pay money is also traditionally based on legal relief and is thus outside the scope of 502(a)(3). *Knudson*, 534 U.S. at 214. The Supreme Court reasoned that for the term “equitable” not to be rendered superfluous, “equitable relief” in § 502(a)(3) must refer to “those categories of relief that were *typically* available in equity” *Id.* at 210 (quoting *Mertens*, 508 U.S. at 256) (emphasis added). Accordingly, the plaintiff may not circumvent the equitable requirement by seeking an injunction to enforce a contractual obligation to pay money, as that would render the limitation “utterly pointless.” *Id.* at 216. *Mertens* and *Knudson* show that where the statutory instructions are open-ended, the Supreme Court will seek to use judicial tradition as a limiting factor for judicial discretion in the enforcement of the provision.

While the general trend in the case law has supported the more restrictive *Mertens* construction, the Supreme Court has backtracked on one aspect of its *Mertens* holding by clarifying the Court’s intended restriction of the “other appropriate equitable relief” provision. In *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, the Supreme Court unanimously held that because § 502(a)(5) allows for “other persons” (including nonfiduciaries) to be sued, nonfiduciaries can be sued under the similarly-worded § 502(a)(3). 530 U.S. 238, 248-49 (2000). This holding clarifies the scope of *Mertens* by removing any limitation on who can be sued under § 502(a)(3). Essentially, the Supreme Court wanted to ensure that future litigants understand that *Mertens* is intended as a limitation to causes of action under § 502(a)(3), not as a limitation on possible defendants. Because the cause of action in *Harris Trust* was equitable, namely restitution, the Supreme Court upheld a suit against a nonfiduciary defendant under § 502(a)(3). *See id.* at 253 (citing *Mertens*, 508 U.S. at 260).

Knudson reinforces the proposition that the dispositive issue is whether the relief sought is equitable in nature. In *Knudson*, the Supreme Court distinguished *Harris Trust* by drawing a distinction between legal restitution and equitable restitution. *Knudson*, 534 U.S. at 213-14. The court held that because the restitution sought by the plaintiff was based on a legal obligation, it was unavailable under § 502(a)(3). *Id.* at 214. Thus, after *Knudson*, every cause of action—besides injunctive causes of action which are explicitly authorized—will be examined to ensure that it is equitable in nature notwithstanding the label litigants attach to it.

Following *Knudson*, courts struggled to determine when a claim for restitution is equitable (permissible under § 503(a)(3)) or legal (impermissible under § 503(a)(3)). Circuits were split on whether an action for restitution by an ERISA fiduciary is equitable if the participant or beneficiary has recovered from another entity and possesses that recovery in an

identifiable fund. Compare Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 355-57 (5th Cir. 2003) (concluding that action sought equitable relief because funds paid to participant were held in a bank account in name of participant's attorneys), cert. denied, 124 S. Ct. 2412 (2004); Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco, 338 F.3d 680, 686-88 (7th Cir. 2003) (concluding that action sought equitable relief because funds paid to participant were placed in a reserve account bearing participant's name), cert. denied, 124 S. Ct. 2904 (2004); see also Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 547-48 (7th Cir. 2003) (concluding that action sought equitable relief because plan participant possessed only uncashed check from insurer and money remained with insurer; therefore, participant did not possess identifiable fund); Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 445 (5th Cir. 2002) (concluding that action sought legal relief because settlement money had been paid into registry of Mississippi Chancery Court; therefore, the beneficiary did not possess identifiable fund) with Westhaff (USA), Inc. v. Arce, 298 F.3d 1164, 1166 (9th Cir. 2002) (participant's possession of identifiable fund did not alter nature of what court determined was legal action), cert. denied, 537 U.S. 1111 (2003).

The Supreme Court resolved this disagreement in Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356, 361 (2006), however. The facts in Sereboff are very similar to Knudson. In Sereboff, a plan fiduciary was seeking an equitable lien against funds that a plan beneficiary recovered in a settlement against third party tortfeasors. Id. at 359-60. The Court held that obtaining an equitable lien on a specifically identified fund was an "appropriate equitable remedy." Id. at 369. The key distinguishing feature between the outcome in Sereboff and Knudson was that in Sereboff the fiduciary sought "to recover a particular fund from the defendant." Id. at 363. Although the fiduciary alleged a breach of contract and sought money, the fiduciary did not seek to "impose personal . . . liability for a contractual obligation to pay money" like in Knudson. Id. (quoting Knudson, 534 U.S. at 210).

b. Catchall requirement

The Supreme Court further constrained application of § 502(a)(3) by holding that equitable relief under the provision was only appropriate where other ERISA provisions did not provide redress. Varity Corp., 516 U.S. at 515. In Varity, the Supreme Court interpreted § 502(a)(3) as a "catchall provision" that provides relief for injuries that are not adequately remedied by other sections of § 502. Id. at 512. Accordingly, potential plaintiffs must not only ask whether the relief they are seeking is traditionally equitable in nature, but whether the relief they are seeking is available under other provisions in the statute. One court has interpreted this to mean that a plaintiff is only precluded from seeking equitable relief under § 502(a)(3) when a court determines that plaintiff *will certainly receive or actually receives* adequate relief for her injuries under another ERISA section; in other words, the mere availability of potential alternate relief is not enough. Parente v. Bell Atl. Penn., No. CIV. A. 99-5478, 2000 WL 419981, at *3 (E.D. Pa. Apr. 18, 2000). In addition, the failure of a plaintiff's contract-based benefits claim may not foreclose a claim for relief based on a breach of fiduciary duty. See, e.g., Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 228 (3d Cir. 1994); see also Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1074 (11th Cir. 2004) ("[P]articipants in an ERISA-governed plan that rely to their detriment on a fiduciary's misrepresentations of the plan's terms may state a claim for 'appropriate equitable relief' under § 502(a)(3) if they have no adequate remedy elsewhere in ERISA's statutory framework.").

2. Proper defendants

After the Supreme Court declared in Harris Trust that “§ 502(a)(3) admits of no limit (aside from the “appropriate equitable relief” caveat . . .) on the universe of possible defendants,” Harris Trust, 530 U.S. at 246, lower courts have diligently followed this broad instruction. See, e.g., Bombardier, 354 F.3d at 354 (refusing to impose any limitations on proper defendants to § 502(a)(3) action because Congress chose, in text of § 502(a)(3), to place limits on proper plaintiffs to suit for equitable relief and did not include any similar limitations on proper defendants to such actions); Lyons v. Philip Morris Inc., 225 F.3d 909, 913 (8th Cir. 2000) (finding it well-settled that because other ERISA provisions specifically address who may be sued, omission of such instructions in § 502(a)(3) implies potential defendants under provision should not be limited).

In McDannold v. Star Bank, N.A., 261 F.3d 478, 486 (6th Cir. 2001), the Sixth Circuit elaborated the limiting principles that follow from the Harris Trust dictum. While finding that the fiduciary/nonfiduciary distinction is no longer dispositive after Harris Trust, the court stated that any cause of action against a nonfiduciary is limited to “appropriate equitable relief” (which excludes legal relief) for damages from the nonfiduciary’s “knowing participation” in a fiduciary’s breach, and to the nonfiduciary’s role as a party-in-interest to the prohibited transaction (although this last limitation may be limited to the facts of Harris Trust). Id. Thus, the current state of the law allows nonfiduciaries to be sued under § 502(a)(3) as long as the suit falls within the limitations stated in McDannold.

3. Standing

A corollary to the broad inclusive construction of possible defendants under Harris Trust is the Supreme Court’s narrow construction of possible plaintiffs. Section 502(a)(3) names plan “participant[s], beneficiary[ies], or fiduciary[ies]” as proper plaintiffs under the section and the case law considers this list to be exclusive. See, e.g., McBride v. PLM Int’l, Inc., 179 F.3d 737, 742 (9th Cir. 1999) (finding potential claimants in § 502 suits limited); Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002) (holding state cannot sue *in parens patriae* because Congress “carefully drafted” § 502(a)(3) so parties other than those named in statute may not bring suit). In Harris Trust, the Supreme Court contrasts § 502(a)’s lack of textual instructions for possible defendants with its detailed lists of possible plaintiffs. 530 U.S. at 247. It follows that because the failure to specify proper defendants manifests an intent not to limit the class of possible defendants, the detailed specification of proper plaintiffs manifests an intent to create an exclusive list.

Accordingly, most courts, even prior to Harris Trust, hold that the list of proper plaintiffs under § 502(a) is limited to the parties explicitly named in the statute. See, e.g., Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1265 (9th Cir. 1992); Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 302 (5th Cir. 1992). Further, the case law indicates that only the classes specifically identified within the particular section of ERISA can bring a cause of action under that section. See, e.g., Allstate Ins. Co. v. 65 Sec. Plan, 879 F.2d 90, 94 (3d Cir. 1989) (holding that only participants and beneficiaries can sue under § 502(a)(1)(b) because Congress made no provision allowing other parties to sue under that section). While no court has yet held that only participants, beneficiaries, and fiduciaries can sue

under § 502(a)(3), the narrow reading on which Allstate relies was based on a general interpretation of § 502 suits. See N.E. Dep’t ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 153 (3d Cir. 1985). In sum, only plan participants, beneficiaries, and fiduciaries will be able to sue under § 502(a)(3).

Only the Ninth Circuit has ruled that the list is not necessarily exclusive. See Fentron Indus., Inc. v. Nat’l Shopmen Pension Fund, 674 F.2d 1300, 1305 (9th Cir. 1982). The Ninth Circuit has effectively overruled Fentron, however, acknowledging that the Supreme Court and all other circuits had rejected its holding. Cripps, 980 F.2d at 1265; see also Pilkington PLC v. Perelman, 72 F.3d 1396, 1401 (9th Cir. 1995) (acknowledging subsequent Supreme Court authority has largely undermined Fentron). Currently, all circuits agree that the list provided in the statute is exclusive. See Physicians Health Servs., 287 F.3d at 121 (finding that, absent claim assignment, courts have consistently read [§ 502(a)(3)] to strictly limit “the universe of plaintiffs who may bring certain civil actions”). The way each plaintiff class is defined, however, may open the door to a larger class of possible plaintiffs.

a. Definition of participant

29 U.S.C. § 1002(7) defines “participant” as “any employee or former employee . . . or any member or former member of an employee organization, who is or may become eligible to receive . . . [any benefit] from a[] plan . . . or whose beneficiaries may be eligible to receive any such benefit.” 29 U.S.C. § 1002(7). In addressing the proper definition of “employee” under ERISA, the Supreme Court has held that because 29 U.S.C. § 1002(6) does not define “employee” adequately, it will interpret the term according to traditional common law agency law criteria. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). These criteria are based on many factors, and “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” Id. at 324 (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)). The Supreme Court has also prevented an overly broad interpretation of benefit eligibility. To foreclose a barrage of plaintiffs suing under the remote possibility that they may be eligible for benefits, the Supreme Court in Firestone Tire & Rubber Co. v. Bruch required that for plaintiffs to “establish that [they] ‘may become eligible’ for benefits, [they] . . . must have a colorable claim that (1) [they] will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.” 489 U.S. 101, 117-18 (1989). Thus, after realizing the uncertainty inherent in “who may become eligible for benefits,” the Supreme Court imposed a requirement designed to limit the possible class of plaintiffs suing as plan participants.

Where benefits are paid in the course of litigation, courts are currently split as to whether a participant loses standing. Compare Crotty v. Cook, 121 F.3d 541, 545 (9th Cir. 1997) (holding that standing is not lost) with Crawford v. Lamantia, 34 F.3d 28, 32 (1st Cir. 1994) (holding that standing is lost).

b. Definition of beneficiary

29 U.S.C. § 1002(8) defines the term “beneficiary” 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.” 29 U.S.C. § 1002(8). Courts interpret this definition to allow benefits to be

assigned, thereby broadening the scope of plaintiffs who can sue as “beneficiaries” of a plan. See, e.g., St. Francis Reg’l Med. Ctr. v. Blue Cross & Blue Shield of Kansas, Inc., 49 F.3d 1460, 1464 (10th Cir. 1995) (finding that “Congress did not intend to enact a policy precluding [welfare plan benefits] assignability”); Davidowitz v. Delta Dental Plan of Cal., Inc., 946 F.2d 1476, 1478 (9th Cir. 1991) (holding that ERISA does not preclude welfare plan benefit assignments); Kennedy v. Conn. Gen. Life Ins. Co., 924 F.2d 698, 700 (7th Cir. 1991) (holding health care provider to which benefits were assigned is ERISA beneficiary). Importantly, however, the grant of standing to assignees is not unqualified. See, e.g., City of Hope Nat’l Med. Ctr. v. Healthplus, Inc., 156 F.3d 223, 229 (1st Cir. 1998) (holding that, while ERISA does not prohibit assignment of benefits, assignment is invalid if it violates plan terms); Allstate Ins. Co., 879 F.2d at 94 (holding that subrogated insurer lacks standing under § 502(a)). Thus, third party assignees have standing where there is a bargained-for assignment of benefits, see City of Hope, 156 F.3d at 229, but third party assignees do not have standing where the bargained-for contract prohibits the assignment of benefits (as when assignment would violate the terms of the plan) or where there is no bargained-for assignment (as in the case of subrogated insurers).

c. Definition of fiduciary

29 U.S.C. § 1002(21)(A) defines a fiduciary as anyone who “[1] exercises any discretionary authority or discretionary control respecting management of [the] plan or . . . its assets, [2] 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 [3] has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A). Courts have generally held that the term should be construed broadly. See, e.g., Bannistor v. Ullman, 287 F.3d 394, 411 (5th Cir. 2002); LoPresti v. Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997). In applying this definition, courts have adopted a textualist approach, evaluating whether the party seeking fiduciary status fits within any of the ERISA subsections. See Reich v. Lancaster, 55 F.3d 1034, 1046 (5th Cir. 1995). Interestingly, any plaintiff who seeks to sue as a fiduciary exposes himself to liability since the other party may file a counterclaim for breach of fiduciary duty. Consequently, where a plaintiff has the option to sue under another plaintiff class (i.e., as a participant or a beneficiary), the plaintiff should carefully consider choosing the class over suing as a fiduciary.

4. Proper jurisdiction and venue

Federal district courts have exclusive jurisdiction over § 502(a)(3) claims. See 29 U.S.C. § 1132(e)(1) (stating that federal district courts have exclusive jurisdiction over all ERISA claims except for claims under § 502(a)(1)(B)); 29 U.S.C. § 1132(f) (stating district courts have exclusive jurisdiction without regard to amount in controversy or parties’ citizenship). Where state law claims are combined with ERISA claims, federal courts will often assert pendent jurisdiction over the state claims. See, e.g., Finz v. Schlesinger, 957 F.2d 78, 83-84 (2d Cir. 1992). A district court’s decision to assert pendent jurisdiction is reviewed under an abuse of discretion standard. Id. Further, the case may be removed to federal court where a “well-pleaded complaint” in state court results in a federal question under ERISA. See Nishimoto v. Federman-Bachrach & Assoc., 903 F.2d 709, 713 (9th Cir. 1990). If removal is proper, the entire case may be removed to federal court, including any state law claims. See Richmond v. Am. Sys. Corp., 792 F. Supp. 449, 453 (E.D. Va. 1992). Removal is not proper

where the plaintiff lacks standing under ERISA. Donald I. Galen, M.D., Inc. v. McAllister, 833 F. Supp. 761, 763 (N.D. Cal. 1992) (finding no federal cause of action where employer did not meet requirements to sue under ERISA).

Claims under § 502(a)(3) are subject to ERISA's general venue provision, which allows suits to be brought in any one of the following three forums: "[1] where the plan is administered, [2] where the breach took place, or [3] where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). Courts have construed this provision liberally, finding that "Congress intended to open the federal forum to ERISA claims to the fullest extent possible." Fulk v. Bagley, 88 F.R.D. 153, 167 (M.D.N.C. 1980). Because the provision allows suit in any one of the three designated forums, the plaintiff enjoys the ability to "forum shop." See Wallace v. Am. Petrofina, Inc., 659 F. Supp. 829, 830 (E.D. Tex. 1987) (denying defendant's motion to dismiss because of improper venue where forum was one of those ERISA designates).

5. Applicable statute of limitations

Plaintiffs suing under § 502(a)(3) must be aware of two important issues: when the limitations period begins to run, and how long it will run before it expires. The statute of limitations period differs between § 502(a)(3) claims and other ERISA claims. For § 502(a) claims not alleging a breach of fiduciary duty, such as claims under § 502(a)(1)(B) for wrongful denial of benefits, courts apply the statute of limitations for the most analogous state law action because § 502(a) does not provide a limitations period. See Syed v. Hercules, Inc., 214 F.3d 155, 159 (3d Cir. 2000); Johnson v. State Mut. Life Assurance Co. of Am., 942 F.2d 1260, 1261-62 (8th Cir. 1991). For claims alleging a breach of fiduciary duty, like § 502(a)(3) however, ERISA does provide a limitations period. 29 U.S.C. § 1113; see, e.g., Cole v. Travelers Ins. Co., 208 F. Supp. 2d 248, 258 (D. Conn. 2002). Under § 1113, plaintiffs must bring these claims within the earlier of six years after the last action that constituted the breach or three years after the earliest date the plaintiff had actual knowledge of the breach. 29 U.S.C. § 1113. Section 1113 determines when the period begins to run and provides its length.

6. Possible exhaustion requirement

ERISA requires every benefit plan to include provisions establishing procedures for reviewing employees' claims under the plan. 29 U.S.C. § 1133. See Section XII.A-B and Appendix A for a detailed discussion of claims exhaustion. While ERISA does not expressly require plan claimants to exhaust these procedures, courts have inferred from the above provision and ERISA's legislative history that Congress intended for courts to apply an exhaustion requirement. Mason v. Cont'l Group, Inc., 763 F.2d 1219, 1226-27 (11th Cir. 1985) (following Amato v. Bernard, 618 F.2d 559, 567-68 (9th Cir. 1980)). This generally has been the interpretation for contractual causes of action, where the claim is based on the interpretation and application of the terms of the plan. See, e.g., Bernard, 618 F.2d at 567. Exhaustion will not be required if the plan does not contain a claims procedure that applies to the particular plaintiff, however. See Anderson v. Alpha Portland Indus., Inc., 752 F.2d 1293, 1299 (8th Cir. 1985) (reversing dismissal for lack of exhaustion where claims procedure identifies only "employees" and plaintiff was "retiree"). Thus, courts require plaintiffs who are suing to enforce plan provisions under § 502(a)(3) to exhaust the plan's claim review procedures.

In contrast, some courts have distinguished statutory claims as outside the scope of the exhaustion requirement. See, e.g., Licensed Div. Dist. No. 1 MEBA/NMU v. Defries, 943 F.2d 474, 478-79 (4th Cir. 1991). Currently, circuits are split over whether to require exhaustion for claims based on the terms of ERISA. Compare Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649-50 (7th Cir. 1996) (holding that district court has discretion to require exhaustion for statutory claim), and Simmons v. Willcox, 911 F.2d 1077, 1081 (5th Cir. 1990) (requiring exhaustion for statutory claim to prevent claimants from skirting exhaustion rule in § 502(a)(1)(B) cases by re-framing benefits claims as statutory), and Mason v. Cont'l Group, Inc., 763 F.2d 1219, 1226-27 (11th Cir. 1985) (holding that exhaustion is required for statutory claim) with Chailland v. Brown & Root, Inc., 45 F.3d 947, 950-51 (5th Cir. 1995) (holding that exhaustion is not required for statutory claim), and Richards v. Gen. Motors Corp., 991 F.2d 1227, 1235 (6th Cir. 1993) (same), and Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir. 1990) (same), and Zipf v. Am. Tel. & Tel. Co., 799 F.2d 889, 891-92 (3d Cir. 1986) (holding exhaustion not required in § 502(a)(3) case), and Amaro v. Cont'l Can Co., 724 F.2d 747, 752 (9th Cir. 1984) (holding plaintiff not required to exhaust remedies before bringing statutory claim to federal court). This split is especially relevant in the § 502(a)(3) context which provides a cause of action for the enforcement of ERISA's statutory terms. The Supreme Court has not yet acted to reconcile this rift in the case law and, therefore, a circuit-by-circuit approach is the most appropriate way to determining how this issue is resolved.

Where the plan's claims review procedures include an arbitration provision, courts apply the same contractual/statutory distinction. See Zipf, 799 F.2d at 892 (holding that plan's arbitration provision will be enforced only for claims based on terms of plan; if claim is statutory plaintiff may go directly to court). Accordingly, arbitration procedures are treated similarly to the plan's internal claims review procedures.

If the court applies an exhaustion requirement, the plaintiff must plead and prove that he either has met the exhaustion requirement or that he qualifies for an exhaustion exemption, otherwise the complaint will be dismissed. See Byrd v. MacPapers, Inc., 961 F.2d 157, 160-61 (11th Cir. 1992); Smith v. Blue Cross & Blue Shield United, 959 F.2d 655, 658-59 (7th Cir. 1992). The plaintiff bears the burden of making a "clear and positive showing" that his claim is exempt from exhaustion. Makar v. Health Care Corp. of the Mid-Atl. (Carefirst), 872 F.2d 80, 83 (4th Cir. 1989); see also Fizer v. Safeway Stores, Inc., 586 F.2d 182, 183 (10th Cir. 1978) (considering exhaustion under § 301 of LMRA). The plaintiff is exempted from the exhaustion requirement in a variety of ways.

See:

Byrd v. MacPapers, Inc., 961 F.2d 157, 160 (11th Cir. 1992). Plaintiff need not exhaust internal procedures where exhaustion would be futile.

Horan v. Kaiser Steel Ret. Plan, 947 F.2d 1412, 1416 (9th Cir. 1991). Courts have discretionary authority to waive the exhaustion requirement due to the exceptions to the exhaustion requirement.

Springer v. Wal-Mart Assocs. Group Health Plan, 908 F.2d 897, 899 (11th Cir. 1990). No exhaustion required where the remedy sought is not available through the claims procedure.

Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 846 (11th Cir. 1990) abrogated on other grounds in *Murphy v. Reliance Standard Life Ins. Co.*, 247 F.3d 1313, 1314 (11th Cir. 2001). Plaintiffs are exempted from exhaustion requirements if they have not been informed of the procedures or have been denied access to the procedures.

Hall v. Tyco Int'l Ltd., 223 F.R.D. 219, 237 (M.D.N.C. 2004). Plaintiffs may be exempted from exhaustion requirements where defendants have failed to comply with the provisions of 29 C.F.R. § 2560.503-1(g)(1) requiring notification of any adverse benefits determination.

Tomczysyn v. Teamsters Local 115 Health & Welfare Fund, 590 F. Supp. 211, 213 (E.D. Pa. 1984). Exhaustion is not required if delay would result in irreparable harm to the plaintiff, especially because irreparable harm is also a requirement for injunctive relief.

Where the plaintiff must exhaust the plan's procedures but has failed to do so, courts may dismiss the case without prejudice and remand the claim to the plan's review procedure. See *Byrd*, 961 F.2d at 161; *Makar*, 872 F.2d at 83. Additionally, where the plaintiff makes both contractual and statutory claims based on the same facts, the court may stay the statutory claim pending resolution of the contractual claim. *Amaro*, 724 F.2d at 752.

7. Availability of a jury trial

Suits under ERISA § 502(a)(3) are consistent with the well-settled doctrine that limits the right to a jury trial to legal, and not equitable, causes of action. Because Congress intended to provide a jury trial only for legal causes of action under ERISA, a jury trial is therefore inappropriate in equitable causes of action. See *Donovan v. Robbins*, 579 F. Supp. 817, 820 (N.D. Ill. 1984). Accordingly, no right to a jury trial exists because § 502(a)(3) provides only equitable relief. *Sullivan v. LTV Aerospace and Def. Co.*, 82 F.3d 1251, 1258 (2d Cir. 1996) (noting distinction between §§ 502(a)(1) and 502(a)(3) and finding no jury trial right under the latter because it provides only for equitable relief); *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 393 (3d Cir. 1988) (noting § 502(a)(3), which provides for explicitly equitable relief, does not supply one with right to jury trial); *Bona v. Barasch*, No. 01 CIV 2289(MBM), 2003 WL 1395932, at *33 (S.D.N.Y. Mar. 20, 2003) (holding no right to a jury trial on § 503(a)(3) claims); *Gieger v. UNUM Life Ins. Co. of Am.*, 213 F. Supp. 2d 813, 818 (N.D. Ohio 2002) (same); *Pickering v. USX Corp.*, 809 F. Supp. 1501, 1509 (D. Utah 1992) (same). When faced with a constitutional challenge to this position, courts have found that the Seventh Amendment is limited to "suits at common law," and therefore does not come into play in suits under § 502(a)(3) which are based in equity. *Cox*, 861 F.2d at 393. Thus, it is well-settled that there is no right to a jury trial for suits under § 502(a)(3).

8. Effect of failure to comply with procedural rules under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)

When discussing procedural issues related to § 502(a)(3) claims, it is important to distinguish between procedural considerations which prove fatal if the plaintiff fails to satisfy

them, and procedural considerations which are curable. For example, the plaintiff may amend the pleading to claim an equitable remedy or to name a defendant properly. Further, a suit dismissed so that the plan's claims review procedures may be exhausted can be reheard once the exhaustion requirement is met, and a suit not brought in the proper federal jurisdiction may be removed to the federal district court. In contrast, the absence of a right to a jury trial is absolute, and once the statute of limitations has expired, the ability to bring suit expires with it.

The standing requirement occupies a more tenuous position within this framework. A plaintiff who clearly does not fit within the three designated classes of a plan will not be able to sue under that plan; however, a plaintiff who may not be able to sue under one class may be able to sue under another. In other words, because the standing provision allows for three classes of plaintiffs, the suit will fail if the plaintiff cannot qualify under any of the three classes, but the plaintiff's failure to qualify under one class does not necessarily preclude the plaintiff from suing as a member of another class. In sum, § 502(a)(3) is replete with procedural obstacles, but only some of which bring an immediate end to the case.

XII. CLAIMS RELATED TO A DENIAL OF PLAN BENEFITS

Under ERISA § 502, 29 U.S.C. § 1132 (2002), participants and beneficiaries of employee benefit plans can challenge benefits claim denials by plan administrators. These claims typically arise when the plan administrator or other plan fiduciary deny or partially pay a claim for welfare or pension benefits. Typical welfare benefits litigation includes claims for medical and health benefits, disability benefits and death benefits. 29 U.S.C. § 1002(1). Most pension benefits disputes involve claims seeking retirement income or deferred income. 29 U.S.C. § 1002(2). ERISA § 502(a)(1)(B) provides participants and beneficiaries a contractual cause of action to recover benefits, enforce rights, or clarify rights to future benefits. 29 U.S.C. § 1132(a)(1)(B).

ERISA also sets minimum procedural requirements that plans must follow in processing benefit claims. ERISA requires that every plan provide adequate written notice with “specific reasons” to any participant or beneficiary that his or her claim for benefits under the plan has been denied, and afford the claimant a reasonable opportunity for a full and fair review of the denial. 29 U.S.C. § 1133. Department of Labor (“DOL”) regulations require that plan administrators set up reasonable procedures for processing benefits claims, including consideration of such claims, notification of the denial or partial denial of a benefits claim, and internal procedures for appeal and review in the plan. 29 C.F.R. § 2560.503-1 (2002). A claims procedure is reasonable only if it:

- (1) complies with specific requirements relating to claim filing, initial determination and notification, and review of denied claims;
- (2) is described in the plan’s summary plan description;
- (3) does not contain any provision, and is not administered in a way, that unduly inhibits or hampers the initiation or processing of claims; and
- (4) provides for informing participants in writing, in a timely fashion, of the various time limits with respect to claims processing.

29 C.F.R. § 2560.503-1(b)(1).

Except for Taft-Hartley plans, plans established and maintained under collective bargaining agreements comply with the regulations if the agreement provides a procedure for the filing and initial disposition of benefits claims and a grievance or arbitration procedure for denied or partially denied claims. 29 C.F.R. § 2560.503-1(b)(6).

The claims procedure need not be written into the plan itself nor communicated in written form to participants or beneficiaries, except by means of the summary plan description (“SPD”). It is sufficient to explain the claims procedure orally to a claimant and to give the claimant an opportunity to submit evidence to the benefits committee to support the claim. Brown v. Ret. Comm. of Briggs & Stratton Ret. Plan, 797 F.2d 521, 533-34 (7th Cir. 1986) (where plan lacked written rules and claim procedures, letters between administrator and claimant and her attorney clearly set forth applicable review procedure).

Failure by a plan to set forth or adhere to claims procedures can serve as a basis for successful challenges of decisions denying benefits. On the other hand, a claimant's failure to exhaust procedural requirements may preclude an action in court.

Often claimants challenging a benefits denial can allege additional violations of ERISA, federal common law or non-preempted state laws. These claims are considered in other sections of this Handbook but have been presented here briefly due to their effect on options available to participants and beneficiaries for recovery in cases where benefits were denied.

A. PREREQUISITES TO AN ACTION FOR DENIED BENEFITS

Generally, ERISA actions based on a denial of benefits accrue once a claim for benefits is made and has been formally denied. See, e.g., Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771, 774 (7th Cir. 2003) (holding that ERISA claim accrues when benefits are denied); Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1159 (9th Cir. 2001) (stating circuit precedent holds "ERISA cause of action based on a denial of benefits accrues [when] benefits are denied"); Hall v. Nat'l Gypsum Co., 105 F.3d 225, 230 (5th Cir. 1997) (holding that ERISA claim accrues when benefits are denied); Martin v. Constr. Laborer's Pension Trust for S. Cal., 947 F.2d 1381, 1385 (9th Cir. 1991) (holding that participant's cause of action to enforce rights under pension plan accrues upon "clear and continuing repudiation of his claim"); Mason v. Aetna Life Ins. Co., 901 F.2d 662, 664 (8th Cir. 1990); Cotter v. E. Conference of Teamsters Ret. Plan, 898 F.2d 424, 428-29 (4th Cir. 1990) (noting "ERISA cause of action does not accrue until a claim of benefits has been made and formally denied").

1. Filing a claim

A "claim" is a request by a participant or beneficiary for a plan benefit. 29 C.F.R. § 2560.503-1(e). The claim is properly filed when all of the requirements of the plan's claims filing procedure have been met. Id. An employee's failure to submit a claim properly may excuse a plan's compliance with statutory and regulatory procedures for the handling of claims. See Tolle v. Carroll Touch, Inc., 23 F.3d 174, 181 (7th Cir. 1994) (Tolle II) (employer not required to comply with procedural requirements for denying claim where claim was never denied due to employee's failure to properly submit it for consideration).

A claim may be filed through a written or oral request for benefits made to: (1) the officer or the department who handles employee benefits matters; (2) the committee administering the plan or the organizational unit that handles plan matters if more than one employer contributes or the plan is established by employee organizations; or (3) the insurer or organizational unit which handles the claims for benefits under the plan if an insurer provides or administers the plan.

2. Denial of claim

A denial of plan benefits is lawful only if the plan administrator provides employees with written notice that follows the minimum requirements ERISA establishes. 29 U.S.C. § 1133. Regulations from the Secretary of Labor provide additional guidance in complying with § 1133. See 29 C.F.R. § 2560.503-1. Under these regulations, the initial notice

of claim denial must include (1) the specific reason(s) for the denial; (2) specific reference to the plan provisions on which the denial is based; (3) a description of additional material or information the claimant may need to perfect the claim and an explanation of why such material or information is necessary; and (4) information as to the steps the claimant must take to submit the claim for review. 29 C.F.R. § 2560.503-1(f).

3. Internal appeal procedures

ERISA § 503(2) and the Secretary's regulations require that plans provide an internal appeal process to review denials of benefits. 29 U.S.C. § 1133(2); 29 C.F.R. § 2560.503-1(g)-(h). Every plan must provide "claimant[s] . . . a reasonable opportunity to appeal [a denied claim] to an appropriate named fiduciary, and under which there will be a full and fair review of the claim." 29 C.F.R. § 2560.503-1(h)(1). A claimant must have at least 60 days from the receipt of the written notice of the denial of benefits to appeal the denial to the plan administrator or fiduciary. 29 C.F.R. § 2560.503-1(h)(2). Claimants who fail to appeal during the prescribed period risk losing their ability to challenge the benefits denial. See, e.g., Allen v. Unionmutual Stock Life Ins. Co., 989 F. Supp. 961, 964 (S.D. Ohio 1997) (holding failure to appeal within 60 day period barred claim under § 502(a)(1)(B) due to failure to exhaust where plaintiff could not show it would be futile); Tiger v. AT&T Techs. Plan for Employees' Pensions, Disability Benefits, 633 F. Supp. 532, 534 (E.D.N.Y. 1986) (noting "absent equitable considerations, a claimant's failure to pursue administrative remedies within [plan's mandated time frame] shall preclude judicial review of his underlying claim for benefits"). Substantial failure of a plan to comply with ERISA procedures might prevent the triggering of the 60-day appeal period, however. White v. Aetna Life Ins. Co., 210 F.3d 412, 416 (D.C. Cir. 2000) (holding deadline not triggered if administrator failed to substantially comply with § 1133).

A plan's review procedure must allow claimants to (1) request a review upon written application to the plan; (2) review pertinent documents; and (3) submit issues and comments in writing. 29 C.F.R. § 2560.503-1(h)(2). Otherwise, the review of denied claims must be conducted by the "appropriate named fiduciary," who is defined as "the plan administrator or any other person designated by the plan." 29 C.F.R. § 2560.503-1(h)(1). Courts hold that § 503(2) does not require the examination be performed by a second or new party the proposition that a review under. See Sweatman v. Commercial Union Ins. Co., 39 F.3d 594, 598 (5th Cir. 1994) (holding that plan administrator's reconsideration of its prior decision satisfies § 503(2)); Ret. Comm. of Briggs & Stratton, 797 F.2d at 534-35 (holding committee's review of its own decision "satisfied the § 1133 requirement of 'a full and fair review by the appropriate named fiduciary'"); Wade v. Life Ins. Co. of N. Am., 245 F. Supp. 2d 182, 189-90 (D. Me. 2003) (holding that § 502(3) does not require review by outside arbitrator or independent source, and review by plan administrator was sufficient).

The regulations require that a decision on appeal be made within 60 days of the filing, or within 120 days in special circumstances (e.g., when the hearing is required). 29 C.F.R. § 2560.503-1(i)(1)(i). If, under the plan, benefit denials are reviewed by a committee or board that meets at least quarterly, decisions on review must be issued at the board meeting after the appeal unless the appeal is filed within 30 days of the meeting. 29 C.F.R. § 2560.503-1(i)(1)(ii).

4. Exhaustion of administrative procedures and plan remedies

ERISA § 503, 29 U.S.C. § 1133, provides that plans must establish a claims procedure providing any participant “a reasonable opportunity . . . for a full and fair review by the appropriate named fiduciary of the decision denying the claim.”

a. Exhaustion is required for actions brought under ERISA § 502, 29 U.S.C. § 1132

While ERISA does not expressly mandate exhaustion, the prevailing view among courts is that before an ERISA plan participant can commence a legal action challenging a denial of benefits under § 502(a)(1)(B), he must exhaust the plan’s administrative remedies. See, e.g., Whitehead v. Okla. Gas & Elec. Co., 187 F.3d 1184, 1190 (10th Cir. 1999); Morais v. Cent. Beverage Corp. Union Employees’ Supplemental Ret. Plan, 167 F.3d 709, 712 n.4 (1st Cir. 1999) (noting firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases); Doe v. Blue Cross & Blue Shield United, 112 F.3d 869, 873 (7th Cir. 1997) (requiring plaintiff to exhaust internal remedies as matter of federal common law of ERISA). Multiple reasons have justified the exhaustion requirement. Courts have noted, for example, that through incorporation of claims resolution procedures into the statutory scheme of ERISA, Congress intended to “reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of class settlement, and to minimize the cost of claims settlement” Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980); see also Thygeson v. U.S. Bancorp, No. CV-03-467-ST, 2004 WL 2066746, at *7 (D. Or. Sept. 15, 2004) (observing that courts can be assisted by requirement of exhaustion because courts then have available trustees’ interpretation of their own plans). Reducing settlement and litigation costs, in turn, serves the congressional aim of encouraging employers to offer employee benefits plans. The doctrine “is necessary to keep from turning every ERISA action, literally, into a federal case.” Denton v. First Nat’l Bank, 765 F.2d 1295, 1300 (5th Cir. 1985).

Some courts hold that to best effectuate Congress’s intent, district courts should have discretion to require administrative exhaustion before allowing a federal suit. Gallegos v. Mount Sinai Med. Ctr., 210 F.3d 803, 808 (7th Cir. 2000). Other courts have declined to impose a judicially-created exhaustion requirement and require exhaustion only when the particular plan terms require it. See Conley v. Pitney Bowes, Inc., 34 F.3d 714, 716 (8th Cir. 1994). Whether to require exhaustion is a question of law that is considered *de novo*. Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50 F.3d 1478, 1483 (9th Cir. 1995). But if that question is answered affirmatively, the district court’s decision not to grant an exception to the application of those principles is reviewed for abuse of discretion. Id.; Costantino v. TRW, Inc., 13 F.3d 969, 974 (6th Cir. 1994); Bernard, 618 F.2d at 569. But see Wert v. Liberty Life Assur. Co. of Boston, Inc., 447 F.3d 1060, 1066 (8th Cir. 2006) (modifying the Costantino rule and holding that exhaustion is required when plaintiff is provided with notice of the administrative procedures and denial letter or plan document employs permissive language to describe relevant procedures).

Exhaustion of remedies, though, is not a prerequisite to a federal court’s jurisdiction. Hager v. NationsBank, N.A., 167 F.3d 245, 248 n.3 (5th Cir. 1999).

Claimants should exercise their right to administrative remedies in a timely fashion. Failure to comply with reasonable time constraints prescribed by a plan's review procedure may preclude judicial review of a benefits claim. See Graham v. Fed. Express Corp., 725 F. Supp. 429, 437-38 (W.D. Ark. 1989) (barring action where plan language unambiguously required claimant to seek administrative review of claim within 60 days of written notice and claimant failed to do so); Helton v. Jim Walter Res. Inc., 724 F. Supp. 866, 868 (N.D. Ala. 1989) (dismissing action due to failure to exhaust); Ridens v. Voluntary Separation Program, 610 F. Supp. 770, 778 (D. Minn. 1985) (finding benefits claim failed because administrative procedures were not exhausted).

b. Consequences of the failure to exhaust

If the claimant fails to exhaust available review procedures before filing a lawsuit, a court may dismiss the case with prejudice or grant a defendant's motion for summary judgment. See Baxter v. C.A. Muer Corp., 941 F.2d 451, 453-56 (6th Cir. 1991) (upholding summary judgment where district court ruled that claimant failed to exhaust appeal procedures plan prescribed and such exhaustion was prerequisite to suit); Springer v. Wal-Mart Assocs. Group Health Plan, 908 F.2d 897, 901-02 (11th Cir. 1990) (finding district court plainly abused its discretion in not dismissing lawsuit for plaintiff's failure to take advantage of plan's internal appeals process and remanding with instructions to dismiss).

Alternatively, courts have often remanded actions to the plan administrator for further consideration, dismissing lawsuits without prejudice, or staying them until the completion of administrative proceedings. See, e.g., Lindemann v. Mobil Oil Corp., 79 F.3d 647, 650-51 (7th Cir. 1996) (Lindemann I) (noting that district court has discretion to stay case pending completion of administrative review or grant summary judgment); Makar v. Health Care Corp. of the Mid-Atlantic (Carefirst), 872 F.2d 80, 83 (4th Cir. 1989) (vacating district court's order and remanding appellants' ERISA action for dismissal without prejudice to allow claimants opportunity to pursue their remedies under plans); Balasa v. Valaitis, No. 85 C 7460, 1987 WL 7822, at *1 (N.D. Ill. Mar. 9, 1987) (granting defendant's motion to stay ERISA claims pending plaintiff's exhaustion of administrative remedies provided in relevant plans).

Failure to exhaust administrative remedies is generally an affirmative defense subject to waiver. McCoy v. Board of Trs. of the Laborers' Int'l Union Local No. 222 Pension Plan, 188 F. Supp. 2d 461, 467 (D.N.J. 2002); see also 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1278 (citing Massey v. Helman, 196 F.3d 727 (7th Cir. 1999)). A defendant bears the burden of proving exhaustion as an affirmative defense by a preponderance of the evidence. Jones v. State Wide Aluminum, Inc., 246 F. Supp. 2d 1018, 1023 (N.D. Ind. 2003).

Plaintiffs in benefits denial cases brought under the terms of a plan who wish to avoid the exhaustion requirement, or who missed the deadline to file a timely appeal with the plan, might rely on several exceptions to the requirement of exhaustion.

c. Exceptions to the exhaustion requirement

Courts have recognized four situations in which a claimant may be excused from exhausting the administrative remedies: futility, denial of meaningful access to the review process, the likelihood of irreparable harm, and failure to comply with the notice requirements of ERISA § 503, 29 U.S.C. § 1133.

(1) Futility

The first exception applies if resorting to the administrative procedure provided for in a plan would be futile or the remedy would be inadequate. See Hall v. Nat'l Gypsum Co., 105 F.3d 225, 232 (5th Cir. 1997) (holding no need to exhaust when plan's review scheme has been abolished and plan is equitably estopped from defending action based upon alleged failure to exhaust administrative remedies); Wilczynski v. Lumbermens Mut. Cas. Co., 93 F.3d 397, 405 (7th Cir. 1996) (excusing plaintiff from failure to exhaust administrative remedies where exhaustion of internal remedies would be futile); United Agric. Employee Welfare Benefit Plan, 50 F.3d at 1485 (noting that futility exception "is designed to avoid the need to pursue in administrative review what is demonstrably doomed to fail"). This exception is a narrow one, and the claimant must make a "'clear and positive' showing of futility" before the exhaustion doctrine will be suspended. See, e.g., Coomer v. Bethesda Hosp., Inc., 370 F.3d 499, 505 (6th Cir. 2004); Makar, 872 F.2d at 83; Davis v. Featherstone, 97 F.3d 734, 737 (4th Cir. 1996) (clear and positive showing of futility is required). The claimant has to show that it is certain that his claim will be denied on appeal and not that it merely is doubtful that the appeal will result in a different decision. Ames v. American Nat'l Can Co., 170 F.3d 751, 756 (7th Cir. 1999); Lindemann I, 79 F.3d at 650.

For example, in Coomer, the claimant demonstrated that his plan limited disbursements above \$5,000, and the plan had denied another claimant's requested disbursement exceeding \$5,000. 370 F.3d at 505 The claimant argued that requiring exhaustion in his case would be futile, because the court could infer that his requested disbursement, also in excess of \$5,000, similarly would be rejected. Id. However, because the plan provided that plan administrators had the right to amend it at any time, the court found that exhaustion would not be futile, as the administrators were never given an opportunity to determine whether the claimant's request involved special circumstances that might warrant an amendment. Id. As such, the claimant did not demonstrate clear and positive evidence of the futility of exhaustion. Id. at 506.

The Third Circuit has identified several factors which influence its futility analysis, including: "(1) whether plaintiff diligently pursued administrative relief; (2) whether plaintiff acted reasonably in seeking immediate judicial review under the circumstances; (3) existence of a fixed policy denying benefits; (4) failure of the insurance company to comply with its own internal administrative procedures; and (5) testimony of plan administrators that any administrative appeal was futile." Harrow v. Prudential Ins. Co. of Am., 279 F.3d 244, 250 (3d Cir. 2002). In Harrow, the court rejected plaintiff's futility argument on the basis that the plaintiff was aware of the plan's procedures for administrative review and was given the impression by the plan itself that internal procedures would *not* be futile, and made only one phone call to the plan before instituting an ERISA suit. Id. at 252.

See also:

Stark v. PPM Am., Inc., 354 F.3d 666, 672 (7th Cir. 2004). *When a claimant fails to exhaust his administrative remedies and proceeds directly to federal court, the fact that the plan defended itself in the lawsuit is not evidence of futility.*

Preston v. Am. Fed'n of Television & Radio Artists Health Fund, No. 90 Civ. 7094, 2002 WL 1009458, at *4 (S.D.N.Y. May 16, 2002), *aff'd*, 63 Fed. Appx. 536 (2d Cir. 2003). *Because the facts and circumstances surrounding each claimant's eligibility are unique, "the futility of any one claim cannot be assumed based upon the Fund's denial of any other claim."*

(2) Denial of meaningful access to review process

The second exception applies if a claimant has been denied meaningful access to the plan's administrative review procedures. Wilczynski, 93 F.3d at 402; Curry v. Contract Fabricators, Inc. Profit Sharing Plan, 891 F.2d 842, 846 (11th Cir. 1990). To invoke this exception, a claimant must show that his attempt or ability to obtain administrative review was impeded by the person or entity who would have conducted the review. Curry, 891 F.2d at 846.

In McGowin v. Manpower Int'l, Inc., 363 F.3d 556, 560 (5th Cir. 2004), the plaintiff claimed that she was denied "meaningful access" to her plan's administrative process because her status as a third-party employee left her ineligible to receive a copy of the governing plan documents. As a result, she did not know how, or to whom, her claims should be presented. Id. The court rejected plaintiff's "meaningful access" claim on the basis that there was no indication that she requested the plan documents or was told specifically that she could not obtain them. Id. Moreover, the court observed that "it [strained] credulity to think that [plaintiff] -- whether through counsel or not -- [possessed] the sophistication to pursue a lawsuit in state and federal courts but [lacked] the basic capacity to ask a plan administrator for information on the filing of a claim." Id.

Estoppel may also preclude the defense of failure to exhaust administrative remedies. Gallegos, 210 F.3d at 810 (noting "estoppel may . . . preclude the assertion of failure to exhaust administrative remedies as a defense where that failure results from the claimant's reliance on written misrepresentations by the insurer or plan administrator"). The Eleventh Circuit adopted a similar rule, though it refused to rely on estoppel. See Watts v. BellSouth Telecomms., Inc., 316 F.3d 1203, 1209-10 (11th Cir. 2003). Rather, it held that "[i]f a plan claimant reasonably interprets the relevant statements in the summary plan description as permitting her to file a lawsuit without exhausting her administrative remedies, and as a result she fails to exhaust those remedies, she is not barred by the court-made exhaustion requirement from pursuing her claim in court." Id.

(3) Irreparable harm

The third exception applies if, due to exceptional circumstances, irreparable harm would ensue from requiring a claimant to exhaust internal plan procedures, especially when urgent medical treatment is necessary. Cent. States, S.E. & S.W. Areas Pension Fund v. T.I.M.E.-DC, Inc., 826 F.2d 320, 329 (5th Cir. 1987); Campbell v. Prudential Ins. Co. of Am.,

No. Civ. A. 01-5229, 2002 WL 1020811, at *3 (E.D. Pa. May 17, 2002); Nierenberg v. Heart Ctr. of S.W. Fla., P.A., 835 F. Supp. 1404, 1407 (M.D. Fla. 1993).

**(4) Failure to comply with notice requirement of ERISA
§ 503, 29 U.S.C. § 1133**

Finally, a claimant may be excused from exhausting administrative remedies when the claim administrator fails to comply with the notice requirements of § 1133. See, e.g., Hall v. Tyco Int'l Ltd., 223 F.R.D. 219, 237 (M.D.N.C. 2004) (observing that plaintiffs may be exempted from exhaustion requirements where defendants have failed to comply with 29 C.F.R. § 2560.503-1(g)(1) requiring notification of any adverse benefits determination); De Pina v. Gen. Dynamics Corp., 674 F. Supp. 46, 49-51 (D. Mass. 1987) (excusing failure to exhaust administrative remedies due to inadequate denial letter). Some courts also have ruled that while deficiencies in the denial letter do not absolve a claimant from the exhaustion requirement, they may toll the time for requesting administrative review. See, e.g., White v. Jacobs Eng'g Group Long-Term Disability Benefit Plan, 896 F.2d 344, 351-52 (9th Cir. 1989) (reversing lower court with instructions to remand to plan appeals board for adjudication on merits because inadequate notice did not trigger plan's time bar to appeal).

d. The requirement of arbitration

According to federal regulations, “a plan established and maintained pursuant to a collective bargaining agreement” complies with ERISA’s requirements for a reasonable claims procedure if it “sets forth or incorporates by specific reference:”

- (A) provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and
- (B) a grievance and arbitration procedure to which denied claims are subject.

29 C.F.R. § 2560.503-1(b)(6)(i)(A)-(B).

Courts generally require benefit claimants to pursue relief through these collectively bargained grievance and arbitration procedures. Smith v. Gen. Motors Corp., 809 F. Supp. 555, 556 (S.D. Ohio 1992). Failure to follow the arbitration process when required may violate the exhaustion requirement. Kilkenny v. Guy C. Long, Inc., 288 F.3d 116, 122 (3d Cir. 2002) (“Under ERISA, internal administrative remedies like the arbitration procedures mandated in labor agreements must be exhausted prior to bringing suit in federal court.”); Perrino v. S. Bell Tel. & Tel. Co., 209 F.3d 1309, 1318-19 (11th Cir. 2000) (affirming summary judgment on plaintiff’s ERISA claims for plaintiff’s failure to pursue arbitration as mandated by collective bargaining agreement with employer); Graphic Communications Union, Dist. Council No. 2 v. GCIU - Employer Ret. Benefit Plan, 917 F.2d 1184, 1187 (9th Cir. 1990) (affirming dismissal of § 502(a)(2) action for failure to follow plan’s arbitration procedure).

e. Distinguishing contractual from statutory causes of action

The federal circuits are currently split as to whether claims for violation of ERISA's statutory causes of action, such as claims for breach of fiduciary duty or claims for unlawful interference under § 510, are excused from an exhaustion requirement or binding arbitration. See Perrino, 209 F.3d at 1316 n.6 (noting split); Smith v. Sydnor, 184 F.3d 356, 364 (4th Cir. 1999) (Sydnor I) (collecting cases).

For claims brought under ERISA § 510, several courts require exhaustion or at least that the district court should have discretion to require exhaustion. See, e.g., Lindemann I, 79 F.3d at 650; Mason v. Cont'l Group, Inc., 763 F.2d 1219, 1226-27 (11th Cir. 1985). These courts require exhaustion because the requirement builds a factual record that would assist the court if it later had to hear the case and because Congress intended to promote internal claims procedures as cheaper options to litigation. See Lindemann I, 79 F.3d at 650. These advantages outweigh the "minor inconvenience" exhaustion imposes on the plaintiff. Id. Other courts, however, hold that exhaustion is not required prior to filing a § 510 claim. See, e.g., Horan v. Kaiser Steel Ret. Plan, 947 F.2d 1412, 1416 n.1 (9th Cir. 1991); Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir. 1990).

A similar disagreement exists regarding exhaustion in breach of fiduciary duty claims. Compare, e.g., Hickey v. Digital Equip. Corp., 43 F.3d 941, 945 (4th Cir. 1995) (holding district court did not abuse discretion in requiring exhaustion), and Simmons v. Willcox, 911 F.2d 1077, 1081 (5th Cir. 1990) (same), with Sydnor I, 184 F.3d at 365 (holding exhaustion is not required), and Fujikawa v. Gushiken, 823 F.2d 1341, 1346 (9th Cir. 1987) (same). Some courts that require exhaustion, however, still allow district courts discretion to excuse a failure to exhaust for the reasons stated above. See Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 419 (6th Cir. 1998).

B. ERISA § 503, 29 U.S.C. § 1133: ACTIONS TO ENFORCE ERISA'S PROCEDURAL REQUIREMENTS

Unlike contractual claims under § 502(a)(1)(B), claims asserted under ERISA § 503, 29 U.S.C. § 1133, are procedural. Substantial compliance is sufficient to establish that a plan complied with ERISA § 503 and applicable regulations. See, e.g., Brehmer v. Inland Steel Indus. Pension Plan, 114 F.3d 656, 662 (7th Cir. 1997); Brogan v. Holland, 105 F.3d 158, 165 (4th Cir. 1997). Courts determine substantial compliance on a case-by-case basis and assess the information provided by the insurer in the context of the beneficiary's claim. See, e.g., Kinhead v. S.W. Bell Corp. Sickness & Accident Disability Benefit Plan, 111 F.3d 67, 69 (8th Cir. 1997); White, 210 F.3d at 414. Consequently, before ERISA plan administrators fully enjoy the deference to which they are statutorily entitled, they must comply with the requirements embodied in procedural regulations. Booton v. Lockheed Med. Benefit Plan, 110 F.3d 1461, 1465 (9th Cir. 1997). Whether a denial notice is consistent with ERISA regulations is a question of law reviewed *de novo*. Brogan, 105 F.3d at 165.

Numerous courts have addressed the specific procedural issues that arise in the course of procedural compliance review. The most important ones relate to specificity of

reasons for denial, sufficiency of denial notices, and opportunities for full and fair review of denied benefits.

1. Specificity of reasons for denial

A plan administrator must give the “specific reasons” for the denial of benefits. 29 U.S.C. § 1133(1); 29 C.F.R. § 2560.503-1(f)(1); Donato v. Metro. Life Ins. Co., 19 F.3d 375, 382 (7th Cir. 1994). “Specific reasons” differ from both the reasoning and the interpretive process that generated the reason for the denial. Gallo v. Amoco Corp., 102 F.3d 918, 922 (7th Cir. 1996) (holding because plan administrator is not administrative agency, administrator need not articulate grounds for its interpretation) overruled on other grounds by Diaz v. Prudential Ins. Co. of America, 424 F.3d 635, 638 (7th Cir. 2005).

Plan administrators can defend their interpretations with any arguments that bear upon its rationality. Id. at 923. While the administrative record cannot be augmented with new facts bearing upon the application for benefits such as earnings or years of service, Voliva v. Seafarers Pension Plan, 858 F.2d 195, 196 (4th Cir. 1988), the administrator is not limited to repeating what he told the applicant. It need merely give the applicant the reason for the denial and need not explain why it is a good reason. The justification is undermined if the justification that the plan administrator offers in court is inconsistent with the reason the applicant received, however. Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 696 (7th Cir. 1992).

In 2003, the Supreme Court resolved a circuit split regarding ERISA’s procedural requirements in one specific context -- a plan administrator’s consideration of a treating physician’s opinion in denying benefits. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003). While under § 1133 an administrator must give specific reasons for a benefits denial, administrators do not have a heightened burden of explanation when they reject a treating physician’s opinion and credit reliable evidence that conflicts with such an opinion. Id. at 834. The Supreme Court therefore rejected the application of the treating physician rule, which applies in social security cases, to benefit denials under ERISA.

The plan administrator also must provide the claimant with its reasons for denial at the time of the denial, and may not litigate its case piecemeal by providing, for the first time, additional reasons in support of the denial while the case is on appeal. Reich v. Ladish Co., 306 F.3d 519, 524 n.1 (7th Cir. 2002); see also Glista v. UNUM Life Ins. Co. of Am., 378 F.3d 113, 130 (1st Cir. 2004) (administrator “violated ERISA and its regulations by relying on a reason [for denying benefits] in court that had not been articulated to the claimant during its internal review”); Vega v. Nat’l Life Ins. Servs., Inc., 188 F.3d 287, 302 n.13 (5th Cir. 1999) (allowing administrator to supplement the record causes case to oscillate between courts and administrative process, prolonging litigation of matters that can be resolved quickly).

See:

Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 460-61 (6th Cir. 2003).
Letters to claimant substantially complied with § 503, even though they did not set forth specific reasons for denying certain of claimant’s claims, where claimant did not clearly express that those claims were distinct and required independent analysis.

Booton v. Lockheed Med. Benefit Plan, 110 F.3d 1461, 1463 (9th Cir. 1997). “In simple English, what this regulation calls for is a meaningful dialogue between ERISA plan administrators and their beneficiaries. If benefits are denied . . . the reason for the denial must be stated in reasonably clear language . . . [and] if the plan administrators believe that more information is needed to make a reasoned decision, they must ask for it. There is nothing extraordinary about this: it’s how civilized people communicate with each other regarding important matters.”

Donato v. Metro. Life Ins. Co., 19 F.3d 375, 382 (7th Cir. 1994). *Insurer’s letter was sufficient because it specifically referenced pertinent plan provision and information on the steps to be taken to submit the claim for review. While letter failed to meet all requirements of regulations, it was sufficiently substantial compliance with the regulations because the information the insurer supplied provided claimant with a sufficiently clear understanding of the benefits decision and afforded her a later opportunity for a full, fair and effective review.*

Collins v. Cent. States, S.E. & S.W. Areas Health & Welfare Fund, 18 F.3d 556, 561 (8th Cir. 1994). *Letters from trustees to the claimant, when combined with other correspondence between the parties, sufficiently set out the rationale behind the trustees’ denial of benefits even though letters were not overly detailed or analytical. By referencing pertinent plan provisions, they permitted the claimant to challenge the denial in federal court and the court to review it.*

But see:

Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 694 (7th Cir. 1992). *Administrator’s response was not substantially compliant with ERISA because it failed to identify adequately the items that the administrator considered.*

Rakoczy v. Travelers Ins. Co., 914 F. Supp. 166, 172 (E.D. Mich. 1996). *A merely conclusory statement that benefits should be denied does not constitute a “specific reason” for the denial.*

2. Sufficiency of written denial notice

Generally, courts hold that a plan administrator’s substantial compliance with ERISA § 503’s notice requirements is sufficient. *Davis v. Combes*, 294 F.3d 931, 941 (7th Cir. 2002); *Donato*, 19 F.3d at 382. To determine what constitutes substantial compliance, “the purpose of [§ 503] and its implementing regulations . . . serve as [a] guide: was the beneficiary supplied with a statement of reasons that, under the circumstances of the case, permitted a sufficiently clear understanding of the administrator’s position to permit effective review.” *Combes*, 294 F.3d at 941. “[T]he rule is that a harmless, technical slip-up on the plan administrator’s part is not enough to undermine the legal sufficiency of her actions; a similarly minor inadvertence on the employee’s part should lead to a parallel result.” *Id.* at 941-42.

“ERISA’s notice requirement obligates plan administrators ‘to set out in opinion form the rationale supporting [the decision to deny benefits] so [claimants] could adequately prepare . . . for any further administrative review, as well as an appeal to the federal courts.’”

Davidson v. Prudential Ins. Co. of Am., 953 F.2d 1093, 1096 (8th Cir. 1992) (quoting Richardson v. Cent. States, S.E. & S.W Areas Pension Fund, 645 F.2d 660, 665 (8th Cir. 1981)). The notice of the decision on review must include specific reasons for the denial of benefits, be written in a manner calculated to be understood by the claimant, and contain specific references to the pertinent plan provisions on which the decision is based. 29 C.F.R. § 2560.503-1(g)(1). For the review to be full and fair requires “knowing what evidence the decision-maker relied upon, having an opportunity to address the accuracy and reliability of that evidence, and having the decision maker consider the evidence presented by both parties prior to reaching and rendering his decision.” Ret. Comm. of Briggs & Stratton, 797 F.2d at 534. This enables the claimant to prepare adequately “for any further administrative review, as well as an appeal to the federal courts.” Matuszak v. Torrington Co., 927 F.2d 320, 323 (7th Cir. 1991) (quoting Richardson, 645 F.2d at 665).

The sufficiency of the written denial notice is often the subject of individual inquiry by courts and the decisions are based on judicial assessment of the actions and language employed by the fiduciaries to inform the beneficiaries or participants adequately.

See:

Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50 F.3d 1478, 1484-85 (9th Cir. 1995). *A plan is not required to notify the participants in language other than English of the reason for the denial of benefits.*

Davidson v. Prudential Ins. Co. of Am., 953 F.2d 1093, 1096 (8th Cir. 1992). *Insurer’s letters in conjunction with phone calls sufficiently gave former employee adequate notice of the denial of claim for disability benefits.*

But see:

Thompson v. J.C. Penney Co., No. 00-3504, 2001 WL 1301751, at *4 (6th Cir. Aug. 7, 2001). *Telephone call denying benefits did not substantially comply with § 1133, because the administrator’s statement that plaintiff was not a participant in the plan did not give sufficient reasons for the denial, and there was no information about his right to appeal.*

Reedstrom v. Nova Chems., Inc., 234 F. Supp. 2d 787, 802 (S.D. Ohio 2002), *aff’d*, 96 Fed. Appx. 331 (6th Cir. 2004). *Notice denying benefits did not substantially comply with § 1133 where plaintiff was told he was not eligible for plan, but was not referred to any section of the plan documents or provided with information about how to appeal that determination.*

Olive v. Am. Express Long Term Disability Benefit Plan, 183 F. Supp. 2d 1191, 1197 (C.D. Cal. 2002). *Plan administrator’s letter denying benefits did not substantially comply with § 1133 because it failed to make clear whether claim was being denied as procedurally deficient as a result of certain required records being missing, or whether it was substantively deficient because participant’s medical condition was not disabling, or both; the letter merely presented four*

conclusory statements as to the reasons for denial, without indicating sufficiency of any reason by itself.

Schaub v. Consol. Freightways, Inc. Extended Sick Pay Plan, 895 F. Supp. 1136, 1143 (S.D. Ind. 1995). *Notice denying disability benefits was inadequate when plan had evidence in file raising doubts as to its conclusion and plan failed to address those doubts in its notice.*

Rutledge v. Am. Gen. Life & Accident Ins. Co., 871 F. Supp. 272, 277 (N.D. Miss. 1994). *Notices and communications were conclusory where they did not specifically alert the beneficiary what medical evidence would assist his claim.*

McLean Hosp. Corp. v. Lasher, 819 F. Supp. 110, 119 (D. Mass. 1993). *Notice is insufficient where it provides only sparse information on the procedure for the review or appeal rights.*

3. Opportunity for full and fair review by fiduciary

The plan administrator must communicate specific reasons for a benefit denial to the claimant in order to afford him a “full and fair review.” *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 236-37 (4th Cir. 1997). The “full and fair review” procedural requirements serve two complementary purposes. First, they permit plan administrators to resolve disputes in an efficient, streamlined, non-adversarial manner. Second, the procedures protect plan participants from arbitrary or unprincipled decision-making. *See Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 157 (4th Cir. 1993). Courts interpret the procedural review and notice requirements of 29 C.F.R. § 2560.503-1 so as to ensure that a full and fair review is conducted by the administrator, that a claimant is enabled to prepare an appeal for further administrative review or recourse to the federal courts, and that the courts can perform the task entrusted to them by ERISA and review claim denials. *See Wilczynski*, 93 F.3d at 402 n.3 (interpreting 29 C.F.R. § 2560.503-1); *Halpin*, 962 F.2d at 693 (interpreting 29 C.F.R. § 2560.503-1(h)(3)). ERISA does not require extensive initial claim denial notice, and a denial notice is sufficient if it explains a basis for the adverse initial decision sufficiently enough to permit claimant to prepare informed request for further review. *Kinkead*, 111 F.3d at 69.

Compliance that substantially fulfills these goals suffices. *Ellis*, 126 F.3d at 237; *see also Militello v. Cent. States, S.E. & S.W. Areas Pension Fund*, 360 F.3d 681, 690 (7th Cir. 2004) (where claimant failed to show that failure of fund to follow its own appeal procedures resulted in arbitrary or unsupported decision, plan administrator offered claimant full and fair review of denial of benefits), *cert. denied*, 125 S. Ct. 106 (2004). *But see Krodel v. Bayer Corp.*, 345 F. Supp. 2d 110, 115 (D. Mass. 2004) (plan administrator’s request that insurer provide “only pertinent back-up information that *supports* your summary and decision” demonstrated that administrator intended merely to “rubber-stamp” denial of benefits and cannot be said to have offered claimant a full and fair review). A notice of denial that does not provide claimants and courts with a sufficiently precise explanation of the grounds for the denial as to permit reasonable possibility of meaningful review is inadequate. *Schleibaum v. Kmart Corp.*, 153 F.3d 496, 499-500 (7th Cir. 1998) (finding denial inadequate where it neglected to provide specific reason for denial and failed to advise that additional information could perfect claim or that right

to appeal adverse finding existed). Furthermore, a failure to provide the notice of required appeals procedures might excuse the claimant's failure to exhaust the plan remedies, despite receipt of a plan booklet that detailed the appeal procedure. Conley, 34 F.3d at 718-19.

The Second, Third, Seventh, and Eighth Circuits will also consider the process afforded the plaintiff when deciding whether to defer to the plan administrator's interpretation. Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 394 (3d Cir. 2000) (considering "procedural anomalies" in applying "high degree of skepticism" to arbitrary and capricious review); Marolt v. Alliant Techsystems, Inc., 146 F.3d 617, 621 (8th Cir. 1998) (holding that denial of benefits based on obscure passage in 115-page divestiture document that only lawyers will read and understand was arbitrary and capricious); Crocco v. Xerox Corp., 137 F.3d 105, 108 (2d Cir. 1998) (holding that denial of "full and fair" review constituted arbitrary and capricious decision so conflict of interest need not be considered); Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995) (listing process afforded claimant as one factor under arbitrary and capricious standard). The Second Circuit has also held that the denial of a "full and fair review" to the participant is evidence that the plan administrator's decision was arbitrary and capricious. Crocco, 137 F.3d at 108.

The Supreme Court has clarified that while plan administrators must give claimants a full and fair review of the denial of benefits, plan administrators need not accord special deference to the opinions of treating physicians. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003) (resolving circuit split). So long as a plan administrator does not arbitrarily refuse to credit a claimant's reliable evidence, which may include the opinion of a treating physician, the administrator is free to rely on other conflicting evidence. Id. at 834.

4. Remedies for procedural defects

Generally, a claimant who successfully shows a technical failure of the plan's fiduciary to comply with ERISA's procedural requirements is not entitled to substantive remedy, i.e., the award of the denied benefits. McKenzie v. Gen. Tel. Co. of Cal., 41 F.3d 1310, 1315 (9th Cir. 1994) overruled on other grounds by Saffon v. Wells Fargo & Co. Long Term Disability Plan, 522 F.3d 863, 873 (9th Cir. 2008); Hozier v. Midwest Fasteners, Inc. 908 F.2d 1155, 1167-68 (3d Cir. 1990) (noting ERISA does not entitle participant to benefits whenever administrator behaves arbitrarily but only if plan terms so provide).

Commonly, the courts have remedied violations of claims handling procedures by remanding the case with instructions for the plan fiduciary to make a proper review of the claim. See Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 461 (6th Cir. 2003) ("Where administrators have failed to comply with the procedural requirements of § 503, it is ordinarily appropriate to reverse the denial of benefits and to remand the case to the plan administrators or the district court."); Gallo, 102 F.3d at 923 (holding remedy when administrator fails to make adequate findings or to explain its grounds adequately is to send case back for further findings or explanation unless case is so clear cut that it would be unreasonable for plan administrator to deny benefits on any ground); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 n.4 (4th Cir. 1985). A *de novo* review of all the evidence trustees might have considered would transfer the administration of benefit and pension plans from their designated fiduciaries to federal judges whose exposure to these issues is "episodic and occasional." Johannssen v. District No. 1-

Pacific Coast Dist., MEBA Pension Plan, 292 F.3d 159, 169 (4th Cir. 2002) (citing Berry, 761 F.2d at 1006).

In some circumstances, then, even while remand is generally proper in cases of an administrator's procedural noncompliance, a court might find it unnecessary and award benefits, especially when it finds that the fiduciary abused its discretion or failed to meet its burden of proof.

See:

Caldwell v. Life Ins. Co. of N. Am., 287 F.3d 1276, 1289 (10th Cir. 2002).
Remand for further action is unnecessary only if the evidence clearly shows that the administrator's actions were arbitrary and capricious, or where the case is so clear cut that it would be unreasonable for the plan administrator to deny the application for benefits on any ground.

Clark v. Metro. Life Ins. Co., 67 F.3d 299 (table), No. 94-3840, 1995 WL 592102, at *3-*4 (6th Cir. Oct. 5, 1995). *Benefits denial was reversed and remanded when the plan administrator failed to meet the plan's burden to establish an exclusion from coverage and failed to provide specific reasons as to why it considered the claimant's condition to be pre-existing.*

Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154, 159 (4th Cir. 1993).
Judgment for the claimant was ordered because the trustee abused its discretion where it did not know the standards by which the decision to deny benefits was made and where the trustee produced no evidence indicating that it even remotely considered any specific reasons for denying the claim.

Furthermore, where "[s]ignificant procedural deficiencies occur[.]" and the plan's decision terminates benefits previously granted, a court may order a reinstatement of those benefits. Halpin, 962 F.2d at 697 (reinstating benefits terminated four years before).

Courts have held that a plan administrator's violation of § 503 does not impose liability on the plan administrator pursuant to § 502(c), because violations of duties stated in § 503 are not violations that § 502(c) seeks to remedy. See Groves v. Modified Ret. Plan for Hourly Paid Employees of Johns Manville Corp. & Subsidiaries, 803 F.2d 109, 116 (3d Cir. 1986) (noting that plan's failure to comply with § 503 duty does not create liability for plan administrator under § 502(c), because "plan" and "plan administrator" refer to two entirely distinct actors and § 502(c) imposes liability only for failure to release information that ERISA specifically requires plan administrator to release); Walter v. Int'l Ass'n of Machinists Pension Fund, 949 F.2d 310, 315-16 (10th Cir. 1991) (violation of § 503 cannot form basis for penalties under § 502(c)); VanderKlok v. Provident Life & Accident Ins. Co., 956 F.2d 610, 618 (6th Cir. 1992) (same).

C. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B): ACTIONS TO ENFORCE SUBSTANTIVE BENEFIT RIGHTS UNDER ERISA

ERISA § 502(a)(1)(B) specifically provides the civil causes of action by which participants and beneficiaries can challenge benefits claim denials. 29 U.S.C. § 1132(a)(1)(B). As discussed in other sections of this Handbook, § 502 also may allow participants and beneficiaries to bring causes of action alleging fiduciary duty violations by plan administrators, claims for interference with protected rights under ERISA § 510 and claims of misrepresentation and estoppel under the federal common law of ERISA. Actions under other federal statutes and certain non-preempted state laws might also be available.

1. Standard of review applicable to decisions denying benefits

a. Firestone standard

In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), the United States Supreme Court held that “a denial of benefits challenged under [§ 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.” In that case, because Firestone, the plan administrator, was not expressly given power to construe the ambiguous terms in its severance plan, it was also not entitled to the deference inherent in the arbitrary and capricious standard. The Court agreed that a deferential standard of review was appropriate where the plan administrator or fiduciary was given discretion with respect to the interpretation of the plan. Id. Referring to the principles of trust law, however, the Court noted that “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.” Id.

Firestone thus established three guiding principles:

1. When the language of a plan does not give discretion to a fiduciary to determine eligibility or construe the terms of a plan, a claims denial by a fiduciary should be reviewed under *de novo* standard;
2. If the language in a plan gives the fiduciary discretion to determine eligibility or construe the terms of a plan, a court should not disturb the decision unless it constitutes an abuse of discretion;
3. If a plan fiduciary could sustain a gain as a result of denying a claim, the potential conflict of interest should be considered as a factor in determining whether there has been an abuse of discretion.

Id.

Despite the Supreme Court’s decision, unsettled issues remain concerning language necessary to delegate discretionary authority to a plan’s administrators, and the scope of a court’s review under the *de novo* and abuse of discretion standards, especially when a plan’s fiduciary operates under a conflict of interest.

b. Application of the Firestone standard

In applying the Firestone standard, courts must determine whether a “benefit plan gives the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” Firestone, 489 U.S. at 115. If the plan confers discretion on the administrator, the abuse of discretion standard is applied; if no discretion was conferred, a *de novo* review of decisions denying benefits is required. The Firestone Court directed courts to use contract law in construing the terms of the plan and other manifestations of the parties’ intent. Firestone, 489 U.S. at 112-13.

A grant of discretion must be included in the terms of plan documents, and cannot come from a plan decision maker’s exercise of discretion. Id.; Brigham v. Sun Life of Canada, 317 F.3d 72, 80-81 (1st Cir. 2003). Some courts maintain that the discretionary authority must be expressly granted in the language of the plan. See, e.g., Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local Union 4-447, 47 F.3d 139, 142 (5th Cir. 1995) (holding administrator has no discretion to determine eligibility or interpret plan unless plan language expressly confers such authority).

There are, however, a few courts that have held that a grant of discretion might be inferred from a plan. See, e.g., Gutta v. Standard Select Trust Ins. Plans, 530 F.3d 614, 619 (7th Cir. 2008) (finding magic words unnecessary); see also Post v. KidsPeace Corp., 98 Fed. Appx. 116, 120 n.2 (3d Cir. 2004); Rego v. Westvaco Corp., 319 F.3d 140, 146 (4th Cir. 2003).

No “magic words” are necessary to grant a trustee discretion, but the plan must offer “unambiguous indication” that the trustee has discretion. Kosakow v. New Rochelle Radiology Assoc., P.C., 274 F.3d 706, 739 (2d Cir. 2001); Jordan v. Ret. Comm. of Rensselaer Polytechnic Inst., 46 F.3d 1264, 1271 (2d Cir. 1995). The Seventh Circuit has introduced a “safe harbor” provision which, in that Circuit, is certainly sufficient to establish discretion: “Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them.” Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000); see also Brigham, 317 F.3d at 80-81 (1st Cir. 2003) (fully endorsing Seventh Circuit’s safe harbor provision). The courts have found a variety of language sufficient to confer discretion on the plan’s administrator or fiduciary.

See:

Cook v. Liberty Life Assurance Co. of Boston, 320 F.3d 11, 19 (1st Cir. 2003). *The policy plan phrase “to construe the terms of this policy and to determine benefit eligibility hereunder” was sufficient to confer discretion.*

Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1147 (7th Cir. 1998). *Discretion was granted by language stating that the “[a]dministrator shall be entitled to use its discretion in good faith in reviewing claims submitted under this [p]lan, and*

its decisions shall be upheld absent any arbitrary and capricious action on the part of the [c]laims [a]dministrator.”

Cagle v. Bruner, 112 F.3d 1510, 1517 (11th Cir. 1997). Discretion can be granted by plan provision reserving to administrator the “full and exclusive authority to determine all questions of coverage and eligibility,” and “full power to interpret [ambiguous] provisions.”

Yeager v. Reliance Standard Life Ins. Co., 88 F.3d 376, 381 (6th Cir. 1996). Discretion established where it was required that the claimant submit “satisfactory” proof of disability to the plan administrator.

Ganton Tech., Inc. v. Nat’l Indus. Group Pension Plan, 76 F.3d 462, 466 (2d Cir. 1996). Plan granted discretion by stating that trustees had authority to “resolve all disputes and ambiguities relating to the interpretation of the [p]lan.”

Donaho v. FMC Corp., 74 F.3d 894, 898 (8th Cir. 1996), overruled on other grounds by Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003). Provision granting the administrator power to “construe” or “interpret” the plan was sufficient to provide discretion.

Bailey v. Blue Cross & Blue Shield of Va., 67 F.3d 53, 56 (4th Cir. 1995). Statement that administrator had “sole discretion” was sufficient.

Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local Union 4-447, 47 F.3d 139, 142-43 (5th Cir. 1995). Discretion was properly provided where the administrator “[had] the authority to control and manage the administration and operation of the [p]lan” and to “prescribe such forms, make such rules, regulations, interpretations and computations and . . . take such other action to administer the [p]lan as [the administrator] may deem appropriate.”

Kennedy v. Georgia-Pacific Corp., 31 F.3d 606, 609 (8th Cir. 1994). Discretion conferred by language stating that the administrator “shall be solely responsible for the administration and interpretation” of the plan.

Diaz v. Seafarers Int’l Union, 13 F.3d 454, 457 (1st Cir. 1994). A trust document conferred discretion by giving trustees “without limitation . . . the power . . . to . . . promulgate and establish rules . . . and formulate and establish conditions of eligibility” and to do all acts they deem necessary. The court construed the power to create “rules” governing “conditions of eligibility as carrying with it a similarly broad implied power to interpret those rules.”

Block v. Pitney Bowes Inc., 952 F.2d 1450, 1452 (D.C. Cir. 1992). Administrator has discretion when the plan vests in it power “to interpret and construe the [p]lan, [and] to determine all questions of eligibility and the status and rights of [p]articipants.”

de Nobel v. Vitro Corp., 885 F.2d 1180, 1186 (4th Cir. 1989). *The administrator was given discretion because it had the power to “determine all benefits and resolve all questions pertaining to administration, interpretation and application of [p]lan provisions, either by rules of general applicability or by particular decisions.”*

Although the grant of discretion must appear in the plan documents, several cases have found that the required discretion can be derived from a number of plan documents, including insurance contracts and trust instruments. *Exbom v. Cent. States, S.E. & S.W. Areas Health & Welfare Fund*, 900 F.2d 1138, 1142 (7th Cir. 1990) (trust agreement); *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1559 (11th Cir. 1990) (ERISA contract plan document); *Jett v. Blue Cross & Blue Shield, Inc.*, 890 F.2d 1137, 1139 (11th Cir. 1989) (plan document and plan booklet). When a trust agreement incorporated in the plan documents accords trustees discretionary authority to make binding benefit determinations, the court generally will not upset the trustees’ determinations unless their decisions or conduct are arbitrary and capricious. *Allison v. Dugan*, 951 F.2d 828, 832 (7th Cir. 1992).

If, however, the language regarding discretion can only be derived from a number of documents which have not been incorporated into the plan agreements, it is likely to be insufficient to grant the plan administrator discretion to determine eligibility for benefits or to construe the terms of the plan. *Gentry v. Ashland Oil, Inc.*, 42 F.3d 1385 (table), No. 93-1425, 1994 WL 706212, at *4 (4th Cir. 1994).

Absent additional language conferring discretion, plan provisions that merely describe the decision maker’s responsibility for making benefit determinations or categorically require certain benefits to be paid will not confer the level of discretion necessary to apply a deferential standard of review. *See O’Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 59 (2d Cir. 1994). A wide variety of other provisions have been held insufficient to grant discretion to the administrator.

See:

Woods v. Prudential Ins. Co. of Am., 528 F.3d 320, 323-24 (4th Cir. 2008).
“‘When [the administrator] determines’ or ‘determined by [the administrator]’ language did not give discretion to the administrator, only authority.”

Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 269 (4th Cir. 2002).
Where plan would “pay monthly benefits if the Insured . . . submits satisfactory proof of ‘Total Disability,’” language did not give discretion to the plan administrator.

Perugini v. Homestead Mortgage Co., 287 F.3d 624, 626-27 (7th Cir. 2002).
Plan requirement of “satisfactory proof of ‘Total Disability’” not sufficient to grant discretion to the plan administrator.

Kearney v. Standard Ins. Co., 175 F.3d 1084, 1089-90 (9th Cir. 1999). Where plan would pay benefits upon “receipt of satisfactory written proof [of total

disability],” there was an ambiguity resolved against trustee and discretion was not conferred to trustee.

Brown v. Seitz Foods, Inc. Disability Benefit Plan, 140 F.3d 1198, 1200 (8th Cir. 1998). *The proper way to secure deferential court review of an ERISA plan administrator’s claims decisions is through express discretion-granting language; requiring written proof of loss does not suffice.*

Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1373-74 (6th Cir. 1994). *Discretion was not provided to plan administrator where plan provision merely stated that rules, rather than benefits determinations, administrator made were to be “conclusive.”*

Kirwan v. Marriott Corp., 10 F.3d 784, 789 (11th Cir. 1994). *Discretion not provided where administrator had power to grant or deny benefits in accordance with the terms of the plan.*

Heasley v. Belden & Blake Corp., 2 F.3d 1249, 1254, 1257-58 (3d Cir. 1993). *Applying the rule of contra proferentem, the court found discretion was not conferred where the plan stated that “[w]e will evaluate the proposed admission for certification of medical necessity and appropriateness under the terms of the [m]aster [g]roup [p]olicy and send a letter documenting the recommendation to you.”*

Michael Reese Hosp. & Med. Ctr. v. Solo Cup Employee Health Benefit Plan, 899 F.2d 639, 641 (7th Cir. 1990). *“Authority to control and manage the operation and administration of the [p]lan” language did not give administrator discretion under the plan.*

But see:

Rego v. Westvaco Corp., 319 F.3d 140, 147 (4th Cir. 2003). *Plan giving administrator the responsibility for “determination of participants’ eligibility to receive benefits,” among other things, was sufficient to give discretion to plan administrator.*

c. Considerations when review is *de novo*

When reviewing denial of benefits *de novo* under the Firestone standard, the examining court interprets the governing plan documents without any deference to interpretation by either party to the dispute. Firestone, 489 U.S. at 112-13. The Supreme Court indicated that a court should review the claims of employees under a benefits plan as it would “any other contract claim - by looking to the terms of the plan and other manifestations of the parties’ intent.” Id.

(1) Scope of *de novo* review

Whether an ERISA plan is ambiguous is a question of law. Lettrich v. J.C. Penney Co., 90 Fed. Appx. 604, 608 (3d Cir. 2004); State Street Bank & Trust Co. v. Denman Tire Corp., 240 F.3d 83, 87 (1st Cir. 2001); Bill Gray Enters., Inc. Employee Health & Welfare Plan v. Gourley, 248 F.3d 206, 218 (3d Cir. 2001); In re Unisys Corp. Long-Term Disability Plan ERISA Litig., 97 F.3d 710, 715 (3d Cir. 1996). Similarly, benefit determinations made by non-fiduciary providers of administrative services are subject to *de novo* review. Baker v. Big Star Div. of Grand Union Co., 893 F.2d 288, 292 (11th Cir. 1989). ERISA's statutory language is always interpreted under the *de novo* standard. Penn v. Howe-Baker Eng'rs, Inc., 898 F.2d 1096, 1100 (5th Cir. 1990).

Circuits are split on whether *de novo* review applies only to issues of plan interpretation or whether it also applies to the review of a plan administrator's factual determinations as well. The Fifth Circuit held that factual determinations should be reviewed under a deferential standard of review. Vercher v. Alexander & Alexander, Inc., 379 F.3d 222, 226 (5th Cir. 2004); Sweatman v. Commercial Union Ins. Co., 39 F.3d 594, 597-98 (5th Cir. 1994). Other circuits have held, however, that factual determinations should be reviewed under a *de novo* standard unless the plan documents give the administrator discretion. Locher v. UNUM Life Ins. Co. of Am., 389 F.3d 288, 293 (2d Cir. 2004); Shaw v. Connecticut Gen. Life Ins. Co., 353 F.3d 1276, 1285 (11th Cir. 2003); Riedl v. Gen. Am. Life Ins. Co., 248 F.3d 753, 756 (8th Cir. 2001); Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 250-51 (2d Cir. 1999); Ramsey v. Hercules Inc., 77 F.3d 199, 204-05 (7th Cir. 1996); Luby v. Teamsters Health, Welfare, & Pension Trust Funds, 944 F.2d 1176, 1183 (3d Cir. 1991) (holding ERISA plan administrator's decision as to entitlement between beneficiary claimants based solely on factual determinations is reviewed *de novo*).

(2) Interpretation of plan provisions under *de novo* standard

Whether an ERISA plan is ambiguous is a question of law. Lettrich v. J.C. Penney Co., 90 Fed. Appx. 604, 608 (3d Cir. 2004); State Street Bank & Trust Co., 240 F.3d at 87; Bill Gray Enters., Inc., 248 F.3d at 218; In re Unisys Corp. Long-Term Disability Plan ERISA Litig., 97 F.3d at 715.

Difficulties arose concerning the proper interpretive principles courts should use while interpreting plan documents. The Supreme Court in Firestone pointed to the Restatement (Second) of Trusts, stating that "[t]he terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intent of the settlor with respect to the trust as is not inadmissible.'" Id. at 112 (quoting Restatement (Second) of Trusts § 4, comment d (1959)). Other courts explicitly or implicitly turned to state law contract principles in interpreting plan documents. See, e.g., Kamler v. H/N Telecomm. Servs., 305 F.3d 672, 680 (7th Cir. 2002), cert. denied, 538 U.S. 946 (2003); Cassidy v. AKZO Nobel Salt, Inc., 308 F.3d 613, 615 (6th Cir. 2002); Wheeler v. Dynamic Eng'g, Inc., 62 F.3d 634, 638 (4th Cir. 1995); Saltarelli v. Bob Baker Group Med. Trust, 35 F.3d 382, 386 (9th Cir. 1994). Other courts fashioned their own set of interpretive principles based both on trust and contract law, and referred to the final result as

“federal common law.” See, e.g., Dixon v. Life Ins. Co. of N. Am., 389 F.3d 1179, 1183 (11th Cir. 2004); Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 255-56 (2d Cir. 2004); Wahlin v. Sears, Roebuck & Co., 78 F.3d 1232, 1235 (7th Cir. 1996); Wheeler, 62 F.3d at 638.

Differing interpretation rules lead to varying results by ascribing a different meaning to the terms of a contract under construction. For example, the application of the state insurance law principle of *contra proferentem* leads a court to construe the ambiguous terms of a contract against the insurer in a *de novo* review. See, e.g., HCA Health Servs. of Ga., Inc. v. Employees Health Ins. Co., 240 F.3d 982, 994 n.24 (11th Cir. 2001); Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1196 (9th Cir. 1996); O’Neil, 37 F.3d at 61. The rule of *contra proferentem* is a device for determining the intended meaning of a contract term that, in the context of ERISA, provides that ambiguous terms in benefit plans should be construed in favor of beneficiaries. This principle, although not part of the common law trust doctrine, has often been incorporated by courts into the federal common law and applied in ERISA litigation. See, e.g., Vercher v. Alexander & Alexander, Inc., 379 F.3d 222, 228 n.8 (5th Cir. 2004); Morton v. Smith, 91 F.3d 867, 871 n.1 (7th Cir. 1996). Other courts have disagreed, holding that construing ambiguities against insurers under common law contract principles is not appropriate in cases under ERISA. See, e.g., Bernards v. United of Omaha Life Ins. Co., 987 F.2d 486, 489 n.1 (8th Cir. 1993); see also Bond v. Cerner Corp., 309 F.3d 1064, 1067-68 (8th Cir. 2002) (construing terms against drafters only as a last step).

(3) Admissibility of extrinsic evidence in plan’s interpretation

The interpretive principles a court uses also affect the type and extent of extrinsic evidence that it allows when construing a plan’s language. Generally, courts allow extrinsic evidence to construe ambiguous terms of an employee benefit plan to determine intent of the parties on *de novo* review. See, e.g., Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 261 (2d Cir. 2004) (evidence regarding plan interpretation is authorized on a *de novo* review); Johannssen v. Dist. No. 1-Pacific Coast Dist., 292 F.3d 159, 171-72 (4th Cir. 2002) (court may allow additional evidence to interpret the terms of the plan at its discretion); Schachner v. Blue Cross & Blue Shield, 77 F.3d 889, 893 (6th Cir. 1996) (requiring patent ambiguity in plan before admitting evidence of intent, but holding that courts cannot create ambiguity by using extrinsic evidence; after finding ambiguity, extrinsic evidence is admissible to aid interpretation); Glocker v. W.R. Grace & Co., 974 F.2d 540, 544 (4th Cir. 1992) (holding that, under state law principles, relevant extrinsic evidence may be considered to determine parties’ intent); Delk v. Durham Life Ins. Co., 959 F.2d 104, 105 (8th Cir. 1992) (*per curiam*) (allowing extrinsic evidence to determine parties’ intent when applying federal common law).

Some courts, however, have questioned whether under the *de novo* standard, the evidence considered should be limited to that contemplated by the administrator, or whether the evidence not presented to the administrator can be considered by a court. See, e.g., Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co., 32 F.3d 120, 125 n.3 (4th Cir. 1994) (stating it is sometimes proper for district court to consider evidence not before administrator when conducting a *de novo* review in appeals of benefit determinations under ERISA). But see Jones v. Metro. Life Ins. Co. of N.Y., 385 F.3d 654, 660 (6th Cir. 2004); Wilkins v. Baptist Healthcare Sys. Inc., 150 F.3d 609, 619 (6th Cir. 1998) (limiting evidence to that presented to

administrator); Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc., 900 F.2d 963, 966-67 (6th Cir. 1990) (limiting evidence to that presented to administrator).

Some circuit courts require a showing of good cause before admitting evidence the administrator did not consider. Kearney v. Standard Ins. Co., 175 F.3d 1084, 1090-91 (9th Cir. 1999); see also Locher v. UNUM Life Ins. Co. of Am., 389 F.3d 288, 294 (2d Cir. 2004) (conflict of interest in administrator not *per se* good cause); DeFelice v. Am. Int'l Life Assurance Co., 112 F.3d 61, 65-66 (2d Cir. 1997) (stating that upon *de novo* review, even purely factual interpretation cases may provide district court with good cause to exercise its discretion to admit evidence not available at administrative level if administrator was not disinterested); Ravenscraft v. Hy-Vee Employee Benefit Plan & Trust, 85 F.3d 398, 402 (8th Cir. 1996) (allowing “parties to introduce evidence in addition to that presented to the fiduciary” under *de novo* standard of review if good cause is shown to district court); Donatelli v. Home Ins. Co., 992 F.2d 763, 765 (8th Cir. 1993) (allowing district court to consider evidence in addition to that presented to fiduciary if necessary for adequate *de novo* review of fiduciary’s decision and court has good cause to do so); Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1025 (4th Cir. 1993) (permitting district court discretion to allow evidence not before administrator but holding that court should exercise discretion only when circumstances clearly establish additional evidence necessary to conduct adequate *de novo* review).

d. Considerations when review is for abuse of discretion

Under Firestone, an abuse of discretion standard of review applies when “the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” Firestone, 489 U.S. at 115. Consequently, where a plan gives an administrator or other fiduciary discretion limited to particular circumstances, an abuse of discretion standard should be applied only to the decisions of the administrator with respect to which the discretion has been expressly given. See, e.g., Anderson v. Great W. Life Assurance Co., 942 F.2d 392, 395 (6th Cir. 1991) (noting that fiduciary or administrator does not have discretion with respect to all aspects of plan simply because administrator has discretion to interpret some provisions); IBEW, AFL-CIO, Local 47 v. S. Cal. Edison Co., 880 F.2d 104, 108 (9th Cir. 1989).

The Supreme Court explained in Firestone that the abuse of discretion standard should apply in accordance with common law trust principles, which make a deferential standard of review appropriate when a trustee exercises discretionary powers. 489 U.S. at 111. Under these principles, when a plan grants discretion to a fiduciary to interpret the terms of the plan, a court should not disturb the fiduciary’s interpretation if it is reasonable and made in good faith. Id.; Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co., 491 F.3d 1180, 1189 (10th Cir. 2007); Smith v. United Television, Inc. Special Severance Plan, 474 F.3d 1033, 1035-36 (8th Cir. 2007); Semien v. Life Ins. Co. of N. Am., 436 F.3d 805, 812 (7th Cir. 2006); Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 520 (3d Cir. 1997). An incorrect application of law is an abuse of discretion. See Owner-Operator Indep. Driver Ass’n. v. Landstar Systems, Inc., 541 F.3d 1278, 1294 (11th Cir. 2008); Koon v. United States, 518 U.S. 81, 100 (1996) (holding error of law is abuse of discretion), superseded by statute on other grounds, 18 U.S.C. § 3742(e).

The post-Firestone judicial decisions have not developed a uniform methodology for applying a deferential standard of review. Courts have focused on the evidence that they may consider in applying the abuse of discretion standard, factors relevant in deciding whether the decision of plan's decision maker was reasonable, and the standard to apply when the administrator or other fiduciary acted under the conflict of interest.

(1) Scope of evidence considered on deferential review

Most courts of appeals hold that when review under ERISA is deferential, courts are limited to the information submitted to the plan's administrator. See, e.g., Robinson v. Aetna Life Ins. Co., 443 F.3d 389, 394 (5th Cir. 2006); Jones v. Metro. Life Ins. Co., 385 F.3d 654, 660 (6th Cir. 2004); Finley v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan, 379 F.3d 1168, 1176 (10th Cir. 2004); Vercher, 379 F.3d at 222, 231 n.11; Militello v. Cent. States, S.E. & S.W. Areas Pension Fund, 360 F.3d 681, 686 (7th Cir. 2004), cert. denied, 125 S. Ct. 106 (2004); Vega v. Nat'l Life Ins. Servs., 188 F.3d 287, 299-300 (5th Cir. 1999) (stating that Fifth Circuit permits only evidence that was available to administrator before filing of lawsuit in a way that he had a fair opportunity to evaluate it); see also Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 981-82 (7th Cir. 1999).

Some courts, however, note that the plan's administrator or other fiduciary might abuse his discretion by failing to obtain necessary information. See, e.g., Duhon v. Texaco, Inc., 15 F.3d 1302, 1309 (5th Cir. 1994) (allowing reviewing courts to decide on case-by-case basis whether under particular facts plan administrator abused discretion by not obtaining opinion of vocational rehabilitation expert); Camerer v. Cont'l Cas. Co., 76 Fed. Appx. 837, 840 (9th Cir. 2003). Moreover, if a court considers the record to be incomplete, it can remand a case for further administrative review. See Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan, 85 F.3d 455, 461 (9th Cir. 1996) (holding remand for reevaluation of claim's merits is correct course when plan administrator with discretion to apply plan misconstrues plan and applies wrong standard to determination); see also Schadler v. Anthem Life Ins. Co., 147 F.3d 388, 398-99 (5th Cir. 1998) (remanding case to administrator to develop full factual record and to decide whether to grant or deny benefits on basis of intentionally self-inflicted injury); Miller v. United Welfare Fund, 72 F.3d 1066, 1073-74 (2d Cir. 1995) (noting remand is proper when uncertain whether only proper determination was to grant claim).

The Circuits are split about whether remand orders are appealable. Remand orders are usually held non-appealable. See, e.g., Rekstad v. First Bank Sys., Inc., 238 F.3d 1259, 1262 (10th Cir. 2001) (stating in administrative context remand order is "'generally considered a non-final decision . . . not subject to immediate review in the court of appeals'"). However, some courts have held that remand orders are final and appealable. See Perlman, 195 F.3d at 979-80 (predicating jurisdiction on notions that ERISA remands should be treated like statutorily governed Social Security Administration remands and that administrative remands in general are normally appealable); see also Kistler v. Fin. Am. Group Long Term Disability Plan, 35 Fed. Appx. 516, 517 (9th Cir. 2002); Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d 956, 959 n.1 (9th Cir. 2001) (remand orders are appealable and final orders) (citing Hensley v. N.W. Permanente P.C. Ret. Plan & Trust, 258 F.3d 986 (9th Cir. 2001)). But see Zervos v. Verizon N.Y., Inc., 277 F.3d 635, 646 n.8 (2d Cir. 2002) (stating appealability is unresolved question in the Second Circuit).

Courts have also held that the plan administrator's determination must be supported by substantial evidence to be sustained under the deferential review. Buzzard v. Holland, 367 F.3d 263, 268-69 (4th Cir. 2004) (when plan grants discretion, denial of benefits will be upheld if supported by substantial evidence); Roberts v. Union Pac. R.R., 16 Fed. Appx. 730, 733 (9th Cir. 2001) (when plan grants discretion, court upholds denial of benefits unless it was "arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on question of law"); United Welfare Fund, 72 F.3d at 1072 (allowing court to reverse only if fiduciary's decision was arbitrary and capricious or without reason, unsupported by substantial evidence or erroneous as matter of law); Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995). Substantial evidence is evidence that a reasonable mind might accept as adequate to support the determination made, and it requires more than a scintilla but less than a preponderance of the evidence. United Welfare Fund, 72 F.3d at 1072; see also Lawrence v. Westerhaus, 780 F.2d 1321, 1323 (8th Cir. 1985) (citing with approval case where administrator's was upheld because "some evidence" supported it and it could not be called arbitrary, capricious, or abuse of discretion).

(2) Reasonableness justifies deference

Under the deferential standard of review, most circuits affirm the plan administrator's decision unless it was arbitrary, capricious, made in bad faith, or not supported by substantial evidence. See, e.g., Brogan v. Holland, 105 F.3d 158, 161 (4th Cir. 1997); Donaho v. FMC Corp., 74 F.3d 894, 898 (8th Cir. 1996), overruled on other grounds by Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003). The standard has been equated to one that affirms the administrator's decision unless "whimsical, random, or unreasoned," or "downright unreasonable." Gingold v. Unum Life Ins. Co. of Am., 74 Fed. Appx. 660, 662 (7th Cir. 2003) (quoting Carr v. Gates Health Care Plan, 195 F.3d 292, 294 (7th Cir. 1999)); Teskey v. M.P. Metal Prods. Inc., 795 F.2d 30, 32 (7th Cir. 1986).

Thus, the most important inquiry underlying the application of an abuse of discretion standard focuses on whether a plan decision maker's interpretation of a plan is reasonable and not on whether it is a correct decision that a court would have made based on its own interpretation of the plan. See McGee v. Reliance Standard Life Ins. Co., 360 F.3d 921, 924 (8th Cir. 2004); Neumann v. AT&T Commc'n., Inc., 376 F.3d 773, 781 (8th Cir. 2004); Jordan, 46 F.3d at 1271-73. The court must not disturb the administrator's decision if it is reasonable, even if the court itself would have reached a different conclusion. Feder v. Paul Revere Life Ins. Co., 228 F.3d 518, 522 (4th Cir. 2000); Dyce v. Salaried Employees' Pension Plan of Allied Corp., 15 F.3d 163, 166 (11th Cir. 1994) (recognizing court's function is to determine whether decision had reasonable basis based upon facts as known to administrator at time decision was made). Likewise, if the plan administrator's decision is reasonable, a court should not overturn the administrator merely because the claimant has an equally reasonable interpretation. See Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield, 41 F.3d 1476, 1481 (11th Cir. 1995) (holding that where no conflict of interest is present, administrator's wrong but reasonable interpretation will not be arbitrary and capricious).

The arbitrary and capricious standard of review is highly deferential to a plan administrator. The decision of a plan administrator is reasonable if it is: (1) the result of a deliberate, principled reasoning process; and (2) supported by substantial evidence. See Ellis,

126 F.3d at 232. The question before a reviewing court under this standard is whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Jordan, 46 F.3d at 1271-73; see also Kirk v. Readers Digest Ass'n Inc., 57 Fed. Appx. 20, 23 (2d Cir. 2003). The court may not upset a reasonable interpretation by the administrator even if the claimant's competing interpretation was equally reasonable. Jordan, 46 F.3d at 1272-73.

Because ERISA plans are contractual documents their interpretation is governed by established principles of contract and trust law, even though they are also subject to regulation. See Firestone, 489 U.S. at 110; Haley v. Paul Revere Life Ins. Co., 77 F.3d 84, 88 (4th Cir. 1996). Like other contractual provisions, courts construe the plan's terms without deferring to either party's interpretation. Wheeler, 62 F.3d at 638 (stating that ERISA plans are interpreted "under ordinary principles of contract law"). To decide whether an administrator has abused its contractually conferred discretion, a court may consider:

(1) the scope of the discretion conferred; (2) the purpose of the plan provision in which the discretion is granted; (3) any external standard relevant to the exercise of that discretion; (4) the administrator's motives; and (5) any conflict of interest under which the administrator operates in making its decision.

Haley, 77 F.3d at 89 (quoting Restatement (Second) of Trusts § 187 cmt. d (1957)).

The Fifth Circuit has considered additional factors: (1) the internal consistency of the plan under the administrator's interpretation; (2) any appropriate regulations formulated by the appropriate administrative agencies; and (3) the factual background of the determination and any inferences of lack of good faith. Ellis v. Liberty Life Assurance. Co. of Boston, 394 F.3d 262, 272 n.23 (5th Cir. 2004).

A starting point in evaluating the reasonableness of the administrator's interpretation is the plain language of the plan because, in most cases, a plan administrator's interpretation will be overturned if it is inconsistent with the plan's plain meaning. See, e.g., Shelby County Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust, 203 F.3d 926, 934 (6th Cir. 2000); Wald v. S.W. Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1007-08 (8th Cir. 1996). On the other hand, if the language of a plan is reasonably susceptible to more than one interpretation, the court will have to determine whether the plan decision maker's determination is reasonable, although not necessarily in accord with the one which the court would have reached on its own. Although courts are not uniform as to the particular factors they consider in each case, commonly invoked factors include consistency with plan terms and purposes, consistency with prior interpretations of the plan language, and the logic (or lack thereof) of the decision.

See:

Fought v. UNUM Life Ins. Co. of Am., 379 F.3d 997, 1003 (10th Cir. 2004) (citing Kennedy, Judicial Standard of Review in ERISA Benefit Claim Cases, 50 AM. U. L. REV. 1083, 1135 (2000)). Once court finds administrator has

discretion, it reviews the administrator's interpretation as (a) a "result of a reasoned and principled process (b) consistent with any prior interpretations by the plan administrator (c) reasonable in light of any external standards and (d) consistent with the purposes of the plan."

Butts v. Cont'l Cas. Co., 357 F.3d 835, 838-39 (8th Cir. 2004). When reviewing for an abuse of discretion, courts consider whether the interpretation was "consisten[t] with ERISA plan goals," and was "consistent or contrary to the plan's clear language" and whether the administrator has interpreted similar provisions consistently in the past.

Tillery v. Hoffman Enclosures, Inc., 280 F.3d 1192, 1199 (8th Cir. 2002). In reviewing an administrator's decision, courts should consider: (1) interpretation consistent with ERISA plan goals, (2) interpretation renders any plan language "meaningless or internally inconsistent," (3) interpretation conflicts with substantial or procedural requirements of ERISA, (4) administrator interprets words consistently, and (5) interpretation is contrary to clear language of plan.

Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan, 201 F.3d 335, 342 (4th Cir. 2000). Among factors court considered was how consistent plan administrator's interpretation was with the underlying purposes of the plan under an eight-factor test.

Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 816 (7th Cir. 1997). Court compared the consistency of the interpretation at issue with the previous interpretations of the plan.

Butler v. Encyclopedia Britannica, Inc., 41 F.3d 285, 290 (7th Cir. 1994). Court considered the consistency of the administrator's interpretation with the relevant regulations promulgated by the appropriate administrative agencies.

Krawczyk v. Harnischfeger Corp., 41 F.3d 276, 279 (7th Cir. 1994). Court determined whether current interpretation gives rise to substantial unanticipated costs to the plan.

Saltarelli v. Bob Baker Group Med. Trust, 35 F.3d 382, 386-87 (9th Cir. 1994). Court determined whether the interpretation comported with the reasonable expectations of the insured because "courts will protect the reasonable expectations of . . . insureds . . . even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer."

DiCioccio v. Duquesne Light Co., 911 F. Supp. 880, 900 (W.D. Pa. 1995). Court considered, among other factors, the factual background of the case, any relevant regulations and any indications that the administrator did not act in good faith.

Various permutations of these factors have been used in different circuits. See, e.g., *Wald*, 83 F.3d at 1007 (considering whether interpretation (1) is consistent with plan goals;

(2) renders other plan language meaningless or inconsistent; (3) conflicts with ERISA's substantive and procedural requirements; (4) interprets words consistently; and (5) is contrary to plan's clear language); Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995) (considering "the impartiality of the decision-making body, the complexity of the issues, the process afforded the parties, the extent to which the decision makers utilized the assistance of experts where necessary, and finally the soundness of the fiduciary's ratiocination"); Donovan v. Carlough, 576 F. Supp. 245, 249 (D.D.C. 1983) (considering whether plan administrator's interpretation was (1) contrary to plan's clear language or rendered other provisions superfluous; (2) consistent with plan's purposes; (3) consistent with purpose of provision in question; and (4) consistent with prior interpretations and that participants had notice of such interpretation).

(3) Review when the trustee acts under a conflict of interest

A conflict of interest can have a tremendous impact on the evaluation of the fiduciary's actions. In Firestone, the Court noted that where a plan fiduciary exercising its discretion operates under "a conflict of interest," the conflict is an important "factor" in determining whether discretion has been abused. 489 U.S. at 115. The Supreme Court revisited this issue nearly twenty years later in MetLife Insurance Co. v. Glenn, and stated that "the significance of th[is] factor will depend upon the circumstances of the particular case." 128 S. Ct. 2343, 2346 (2008); see Burke v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016, 1025-27 (9th Cir. 2008). As further described below, courts are divided as to what constitutes a conflict and how the factor is to be weighed. See, e.g., Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263, 1265 (8th Cir. 1997) (finding conflict and reviewing decisions *de novo*); Chambers v. Family Health Plan Corp., 100 F.3d 818, 825-26 (10th Cir. 1996) (adopting sliding scale approach); Sullivan v. LTV Aerospace & Def. Co., 82 F.3d 1251, 1255 (2d Cir. 1996) (placing burden on claimant to prove conflict and how it improperly motivated decision).

(a) Courts must first determine whether a conflict of interest exists.

Courts must first determine whether a conflict of interest exists. In Glenn, the Court held that where a plan administrator "both determines whether an employee is eligible for benefits and pays benefits out of its own pockets" that dual role creates a conflict of interest. 128 S. Ct. at 2346. In Pinto v. Reliance Standard Life Co., the Third Circuit noted that two types of funding arrangements do not, in themselves, present a conflict of interest: (1) where the employer funds a plan but hires a third party to interpret it, or (2) where the employer funds the plan and creates an internal benefits committee that interprets the plan. 214 F.3d 377, 383 (3d Cir. 2000). It did find a conflict of interest, however, where a third-party insurer is hired to both fund and interpret the plan. *Id.* at 383-84. The Sixth Circuit also noted that designating the partners of a law firm, or a committee appointed by the plan sponsor's board of directors, as plan administrator constituted a conflict of interest. Univ. Hosps. of Cleveland v. Emerson Elec. Co., 202 F.3d 839, 846 (6th Cir. 2000); Borda v. Hardy, Lewis, Pollard & Page, P.C., 138 F.3d 1062, 1069 (6th Cir. 1998). But see Kimber v. Thiokol Corp., 196 F.3d 1092, 1098 (10th Cir. 1999) (refusing to presume *per se* conflict merely because administrator who managed plan was employee of employer that funded plan); Smathers v. Multi-Tool Inc., 298 F.3d 191, 197 (3d Cir. 2002) (risk of conflict less when administrator and funder is employer because it has incentives to pay benefits rather than having employees be discontent or having increased wages).

Most conflict of interest cases involve either the insurance company as plan administrator and insurer of the benefits under the plan, or the employer as plan administrator of a self-funded plan. See Pinto, 214 F.3d at 382-83 (comparing respondent insurance company, which both funded and administered plan, with employer in Firestone, who was also plan administrator). An apparent conflict of interest may also exist if the administrator of the plan also funds or provides the plan. See Friedrich v. Intel Corp., 181 F.3d 1105, 1109-10 (9th Cir. 1999); Chambers, 100 F.3d at 826. This inherent conflict usually is premised on the “perpetual conflict with [a] profit-making role as business.” Pinto, 214 F.3d at 384. But see Pegram v. Herdrich, 530 U.S. 211, 226-28 (2000) (retreating from sole use of economic analysis).

See also:

Nord v. Black & Decker Disability Plan, 356 F.3d 1008, 1010 (9th Cir. 2004), on remand from 538 U.S. 822 (2004), cert. denied, 125 S. Ct. 62 (2004). Finding apparent conflict of interest when same entity both funds and administers plan year.

Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 457 (6th Cir. 2003). Finding a conflict of interest exists where same entity funds and administers plan.

Tillery v. Hoffman Enclosures Inc., 280 F.3d 1192, 1197 (8th Cir. 2002). Eighth Circuit allows a rebuttable presumption of a conflict exists when an entity both funds and administers a plan.

Holder v. Woodmen of the World/Omaha Woodmen Life Ins. Soc’y Long-Term Disability Plan for Field Assocs., 11 Fed. Appx. 103, 105 (4th Cir. 2001). Finding a self-funded plan constituted a conflict of interest.

In 2008, the Supreme Court held that when the administrator determines eligibility and pays the benefits out of its own pockets, a conflict of interest arises. Glenn, 128 S. Ct. at 2346. Also, most courts have held that an insurance company acting both as a plan’s insurer and administrator was inherently self-interested. See, e.g., Welch v. UNUM Life Ins. Co. of Am., 382 F.3d 1078, 1087 (10th Cir. 2004) (inherent conflict if the Insurer is also the administrator (citing Pitman v. Blue Cross & Blue Shield, 217 F.3d 1291, 1296 n.4 (10th Cir. 2000)); Evans v. Metro. Life Ins. Co., 358 F.3d 307, 311 (4th Cir. 2004) (when decision maker is both the insurer and the administrator there is an inherent conflict); Lemaire v. Hart Life & Accident Ins. Co., 69 Fed. Appx. 88, 91 (3d Cir. 2003) (conflict is presumed if insurer both funds and administers the plan); Peruzzi v. Summa Med. Plan, 137 F.3d 431, 433 (6th Cir. 1998) (finding conflict of interest inherent in self-funded plans); Lee v. Blue Cross/Blue Shield, 10 F.3d 1547, 1552 (11th Cir. 1994) (finding that insurer’s desire to maintain competitive rates constitutes conflict of interest). But see Farley v. Ark. Blue Cross & Blue Shield, 147 F.3d 774, 777 n.5 (8th Cir. 1998) (noting that where administrator was nonprofit corporation plaintiff failed to show palpable conflict of interest even though disability decision maker was also insurer); de Nobel v. Vitro Corp., 885 F.2d 1180, 1191 (4th Cir. 1989) (finding that plan administrators’ decisions which had favorable impact on trust’s balance sheet suggested no conflict). However, courts may revisit these earlier decisions in light of Glenn.

Once a conflict is alleged or found, the circuit courts have applied varied approaches as to how the administrator's conflict will impact the court's review. The circuit courts have adopted a variety of standards of review but these approaches are being reevaluated following the Supreme Court's holding in Glenn.

- (b) Various approaches Circuit Courts take in reviewing decisions by conflicted fiduciaries.

- 1. Combination of Factors Method of Review

Both the Ninth and Eleventh circuit had adopted a "heightened arbitrary and capricious" or "presumptively void" standard. However, since Glenn and a decision by the Ninth Circuit, the Ninth and Eleventh circuit have abandoned the use of the "heightened arbitrary and capricious" or "presumptively void" standards. Doyle v. Liberty Life Assurance Co. of Boston, 542 F.3d 1352, 1359 (11th Cir. 2008) ("[Glenn] implicitly overrules and conflicts with precedent requiring courts to review under the heightened standard a conflicted administrator's benefits decision."); Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 965-69 (9th Cir. 2006) (rejecting the prior Ninth Circuit analysis and adopting a test that considers the conflict as a factor in the abuse of discretion analysis); see Burke v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016, 1024 (9th Cir. 2008) (noting that the Abatie decision is similar to the Glenn). Both Circuits now consider a conflict as merely a factor in the decision. See Doyle, 542 F.3d at 1360; Burke, 544 F.3d at 1025.

Additionally a district court in the Second Circuit has held that Glenn has "overturn[ed] Second Circuit law providing for *de novo* review when the plaintiff can demonstrate that the conflict actually influences the benefits determination." Badawy v. First Reliance Standard Life Ins. Co., 581 F. Supp. 2d 594, 602 (S.D.N.Y. 2008). The court used the Glenn approach and considered the conflict as one factor in the overall analysis. Id.

- 2. "Sliding scale" standard

Prior to Glenn, the Third, Fourth, Fifth, Seventh, and Tenth Circuits used the sliding scale approach, under which the reviewing court applies the abuse of discretion standard, but the court would decrease the level of deference afforded the conflicted administrator's decision in proportion to the seriousness of the apparent conflict. See, e.g., Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 815 (7th Cir. 1997); see also Lemaire v. Hartford Life & Accident Ins. Co., 69 Fed. Appx. 88, 92 (3d Cir. 2003); Doe v. Group Hospitalization & Med. Servs., 3 F.3d 80, 87 (4th Cir. 1993). The Seventh Circuit, for example, noted that "the more serious the conflict, the less deferential our review becomes" and that a court should not interfere with an administrator's benefit decision unless the administrator "not only made the wrong call, but [also] a 'downright unreasonable' one." Chojnacki, 108 F.3d at 815, 816.

However, since Glenn, several of these courts have reevaluated the application of the sliding scale standard. The Third and Fourth Circuits have repudiated the sliding scale approach and now state that in light of Glenn, the conflict of interest should not change the standard the court applies and should merely be considered as a factor. Estate of Schwing v. Lilly Health Plan, 562 F.3d 522, 525 (3d Cir. 2009); Champion v. Black & Decker (U.S.) Inc.,

550 F.3d 353, 359 (4th Cir. 2008). The Fifth Circuit has also stated that after Glenn, it will no longer apply a sliding scale standard, but that much of the circuit's "sliding scale" precedent is compatible with Glenn. Holland v. Int'l Paper Co. Ret. Plan, 576 F.3d 240, 246 n.2 (5th Cir. 2009) (citing Dunn v. GE Group Life Assurance Co., 289 Fed. Appx. 778, 782 n.2 (5th Cir. 2008)). The Tenth Circuit, however, has held that its sliding scale approach mirrors Glenn. Weber v. GE Group Life Ins. Co., 541 F.3d 1002, 1010 (10th Cir. 2008); see also Miller v. Ameritech Long Term Disability Plan, 584 F. Supp. 2d ----, 2008 WL 4793573, at *8 (C.D. Ill. Nov. 4, 2008) (stating that Glenn did not impact Seventh Circuit authority).

3. Modified "sliding scale" approach

In the Eighth Circuit, courts have not applied the sliding scale until the participant has presented "material, probative evidence demonstrating that (1) a palpable conflict of interest of a serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator's fiduciary duty to her." Barnhart v. UNUM Life Ins. Co. of Am., 179 F.3d 583, 588 (8th Cir. 1999); Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998). In the Eighth Circuit, once the claimant has shown a "palpable conflict of interest or serious procedural irregularity, he must show the conflict or irregularity caused a serious breach of the plan administrator's fiduciary duty," i.e., he must show "serious doubts as to whether the result reached was the product of an arbitrary decision or the plan administrator's whim." Tillery v. Hoffman Enclosures, Inc., 280 F.3d 1192, 1198 (8th Cir. 2002). In Woo, for example, the claimant satisfied her burden when she showed that the plan administrator had a financial conflict of interest and that a serious breach of fiduciary duty occurred when the insurer only used an in-house medical reviewer to review her disability claims. See 144 F.3d at 1161.

It is unclear how Glenn will be applied in the Eighth Circuit, but since Glenn, the Eighth Circuit has applied both a modified sliding scale approach and the combination of factors method under Glenn. Wakkinen v. UNUM Life Ins. Co. of Am., 531 F.3d 575, 581-82 (8th Cir. 2008). Also, the Eighth Circuit has recognized that under its pre-Glenn precedents such as Woo, a financial conflict of interest would not trigger less-deferential review unless the claimant could show that the conflict was causally connected to the specific decision at issue, but that Glenn made clear that "while a causal connection might be important in determining the appropriate level of scrutiny for a plan administrator's decisionmaking, such a connection is not required." Chronister v. UNUM Life Ins. Co. of Am., 563 F.3d 773, 775 (8th Cir. 2009). Instead, under Glenn, courts must analyze the facts of the case at issue, taking into consideration not only the conflict of interest, but also other factors that might bear on whether the administrator abused its discretion. Id.

4. Reasonableness approach

The reasonableness approach has been applied in the First and Sixth Circuits. Gannon v. Metro. Life Ins. Co., 360 F.3d 211, 212-13 (1st Cir. 2004); Pari-Fasano v. ITT Hartford Life & Accident Ins. Co., 230 F.3d 415, 419 (1st Cir. 2000); Univ. Hosps. of Cleveland v. Emerson Elec. Co., 202 F.3d 839, 846 (6th Cir. 2000); see also Roumeliote v. Long Term Disability Plan for Employees of Worthington Indus., 292 Fed. Appx. 472, 473 (6th Cir. 2008) (noting that Glenn did not change analysis); Cusson v. Liberty Life Assurance Co. of Boston,

No. 05-12455-GAO, 2008 WL 4457862, at *1 (D. Mass. Sept 30, 2008) (applying the reasonableness approach with Glenn).

In the First Circuit, the reasonableness of the insurer's decision determines whether or not the insurer abused its discretion. Pari-Fasano, 230 F.3d at 419. A possible conflict of interest necessarily affects the court's determination of what was reasonable conduct by the insurer under the circumstances. Id. Courts in the First Circuit ask whether the circumstances indicate that the insurer was improperly motivated and, if it finds no impropriety, determines whether the benefits decision is objectively unreasonable considering the available evidence. Id.

Under the Sixth Circuit's analysis, a court upholds a benefit determination if it is "rational in light of the plan's provisions," but this review is tempered by evidence of a conflict of interest. Univ. Hosps., 202 F.3d at 846. When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious. While the court's review mandates consideration of the administrator's self-interest, the Sixth Circuit has rejected the notion that the conflict of interest inherent in a self-funded and self-administered plan alters the standard of review. Instead, that fact should be taken into account as a factor in determining arbitrariness or capriciousness. See Peruzzi v. Summa Med. Plan, 137 F.3d 431, 433 (6th Cir. 1998). If the plan's language is susceptible to more than one interpretation, the Sixth Circuit applies the rule of *contra proferentem* and construes any ambiguities against the insurers as the drafting parties. Univ. Hosps., 202 F.3d at 847 (citing Perez v. Aetna Life Ins. Co., 150 F.3d 550, 557 n.7 (6th Cir. 1998)).

e. Courts may not impose "treating physician rule" on administrators

The Supreme Court has made it clear that courts may not require plan administrators to defer to the opinions of a plan participant's treating physician when the administrator must determine whether the participant is disabled. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003). Under the regulations that the Commissioner of Social Security has adopted for determining whether a person is eligible for Social Security disability payments, the Commissioner must defer to the claimant's treating physician. Id. at 825. The Ninth and Eighth Circuits had decided that this treating physician rule should also apply in cases where the administrator of an ERISA benefits plan must determine whether a plan participant is disabled. See id. at 828-30. These circuits held that an administrator could reject the treating physician's opinion only if it provided an adequate justification for rejecting that opinion. Id. Other circuits did not impose the treating physician rule, and the Supreme Court granted *certiorari* to resolve the circuit split.

The Court unanimously concluded that courts could not require administrators to defer to the treating physician's opinion for four reasons. First, no language in ERISA requires administrators to defer to the treating physician's opinion or imposes a heightened burden on administrators to explain why they are rejecting it. See id. at 831. Second, unlike the Commissioner of Social Security, the Secretary of Labor has not adopted a regulation requiring the treating physician rule. Id. As neither Congress nor the Secretary has required the treating physician rule, the Court was reluctant to allow courts to impose such a rule. Id. Third, the court

was skeptical of the Ninth Circuit’s conclusion that a treating physician rule would “increase the accuracy of disability determinations” and that Congress or the Secretary were in a better position than courts to determine whether such a rule would make determinations more accurate. See id. at 832.

Finally, and “of prime importance,” because the Social Security system is an “obligatory, nationwide” program, it is more necessary that a presumption such as the treating physician rule be adopted for efficient benefits administration. Id. Because ERISA benefit programs are smaller, varied and more likely to turn on the terms of the plan, however, the Court concluded that plan administrators should be given more flexibility to make disability determinations. Id. at 833-34. While recognizing that administrators cannot arbitrarily refuse to credit a treating physician’s opinion, the Court concluded that federal courts cannot require administrators to defer to such opinions and cannot impose on administrators a heightened standard to explain why they rejected the opinions. Id.

2. Remedies available to claimants in actions for denial of benefits

A participant or beneficiary who successfully asserts a claim for wrongful denial of benefits may recover the benefits in an action brought under ERISA § 502(a)(1)(B). 29 U.S.C. § 1132(a)(1)(B). The availability of additional relief, including consequential and punitive damages, has been more problematic since the Supreme Court in Massachusetts Mutual Life Insurance Co. v. Russell admonished lower courts to resist reading into ERISA remedies not expressly incorporated into an enforcement scheme that had been “crafted with such evident care.” 473 U.S. 134, 147 (1985). The lower courts have grappled to reconcile this directive with the Supreme Court’s statement in Firestone Tire & Rubber Co. v. Bruch that the courts are to “develop a federal common law of rights and obligations under ERISA-regulated plans.” 489 U.S. 101, 110 (1989) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (holding that ERISA does not apply), overruled in part on other grounds by Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)). Although certain general tendencies can be identified, the lower courts continue to disagree over available remedies under ERISA.

a. Recovery is limited to benefits owed under a plan

ERISA § 502(a)(1)(B) expressly provides participants and beneficiaries of employee benefit plans with a private right of action to recover benefits owed under a plan. See Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1008 (9th Cir. 1998); Lake v. Metro. Life Ins. Co., 73 F.3d 1372, 1375 n.3 (6th Cir. 1996); Kemmerer v. ICI Ams., Inc., 70 F.3d 281, 289 (3d Cir. 1995). Any money judgment against a benefit plan is enforceable only against the plan and not against any other person unless liability in an individual capacity is established. 29 U.S.C. § 1132(d)(2); see also Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1287 (9th Cir. 1990).

b. Other forms of monetary relief generally unavailable

Under ERISA § 502(a)(1)(B) a participant or beneficiary only enjoys a right to recover benefits. Therefore, the efforts of claimants to recover other monetary relief, including consequential and punitive damages, have focused on other civil enforcement provisions of

ERISA, common law remedies, or state-law based causes of action. Generally, with a few exceptions, courts preclude the recovery of such monetary damages.

In Russell, the Supreme Court ruled that an individual claimant could not recover punitive damages as a result of a denial of benefits in an ERISA § 502(a)(2) action for breach of fiduciary duty. 473 U.S. at 144. The Court held that relief in actions for breach of fiduciary duty brought under §§ 502(a)(2) and 409 was expressly limited to relief for a plan as distinguished from individual claimants. Id. The Court cautioned against awarding remedies that Congress did not expressly provide under ERISA's civil enforcement provisions. Id. at 147-48.

Following Russell, most courts have held that consequential and punitive damages are not available under § 502(a)(3) as "other appropriate equitable relief" to remedy a violation or to enforce rights under ERISA. See, e.g., Mertens v. Hewitt Assocs., 508 U.S. 248, 257-58 (1993) (holding monetary damages not recoverable under § 502(a)(3) as equitable relief); Nero v. Indus. Molding Corp., 167 F.3d 921, 931 (5th Cir. 1999) (ruling out-of-pocket expenses and mental anguish damages not recoverable under ERISA); Medina v. Anthem Life Ins. Co., 983 F.2d 29, 32 (5th Cir. 1993) (holding § 502(a)(1)(B) does not provide extra-contractual or punitive damages); First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc., 960 F.2d 1546, 1553 (11th Cir. 1992). Courts have also refused to award consequential or punitive damages under a federal common law theory. See, e.g., U.S. Steel Mining Co. v. Dist. 17, United Mine Workers, 897 F.2d 149, 152-53 (4th Cir. 1990). Claimants seeking compensatory or punitive damages under state law also have failed due to ERISA's preemption provisions. See Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66-67 (1987); Pilot Life, 481 U.S. at 57; Anderson v. Humana, Inc., 24 F.3d 889, 892 (7th Cir. 1994). A minority of courts have awarded compensatory damages under certain circumstances. See, e.g., Warren v. Soc'y Nat'l Bank, 905 F.2d 975, 980 (6th Cir. 1990), overruling recognized by Fraser v. Lintas, 56 F.3d 722, 725 (6th Cir. 1995).

The Supreme Court's decision in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), has caused some confusion over this issue, however. Although the Court held that ERISA preempted the claimant's state law tort and contract claims for mental anguish, compensatory and punitive damages, the majority opined that:

[t]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' It is clear the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ingersoll-Rand, 498 U.S. at 145.

Relying on this language, several lower courts have expanded the scope of remedies available under ERISA § 502(a). See, e.g., East v. Long, 785 F. Supp. 941, 943 (N.D. Ala. 1992); UAW v. Midland Steel Prods. Co., 771 F. Supp. 860, 863-64 (N.D. Ohio 1991); Blue Cross & Blue Shield of Ala. v. Lewis, 753 F. Supp. 345, 347 (N.D. Ala. 1990). Most courts, however, have decided to wait for stronger language from the Supreme Court before expanding

recovery beyond the line established by Russell. See, e.g., Kemmerer, 70 F.3d at 289-91; Buckley Dement, Inc. v. Travelers Plan Adm'rs, of Ill. Inc., 39 F.3d 784, 789-90 (7th Cir. 1994); McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821 (11th Cir. 1991).

c. Equitable relief in actions for denial of benefits does not include monetary damages

As noted above, the Supreme Court ruled that monetary damages are not available under ERISA § 502(a)(3) as “other appropriate equitable relief.” Mertens, 508 U.S. at 257-58. Some courts, however, provide other forms of equitable relief for the claimants of benefits.

Interest is available as equitable relief. Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193, 209-10 (3d Cir. 2004). But see Flint v. ABB, Inc., 337 F.3d 1326, 1330-31 (11th Cir. 2003) (casting doubt on interest based on Knudson but not holding that interest is unavailable).

Rescission is available “even if a full restoration of the benefits conferred in the transaction cannot be accomplished.” Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 499 (4th Cir. 2004) (beneficiary’s suit to rescind benefit selection which was only partial because it involved switching from lump sum to monthly payments but not repaying the entirety of the lump sum, was still equitable and valid under ERISA).

See:

Varity Corp. v. Howe, 516 U.S. 489, 515 (1996). *Individual participants and beneficiaries were allowed to bring actions to obtain relief under ERISA § 502(a)(3) for breach of fiduciary duty.*

Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 225 (1st Cir. 1996). *Court held that trial court had broad discretion in choosing a rate for computing prejudgment interest and awarded prejudgment interest on wrongfully withheld benefits.*

In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig., 57 F.3d 1255, 1269 (3d Cir. 1995) *modified by* *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). *Court would allow § 502(a)(3) plaintiffs to seek an injunction barring fiduciaries from violating the terms of a plan because such relief was equitable.*

Blue Cross & Blue Shield of Ala. v. Weitz, 913 F.2d 1544, 1549 (11th Cir. 1990). *Fiduciaries were allowed to recover erroneously paid benefits under § 502(a)(3).*

d. Award of costs and attorney’s fees

Under ERISA § 502(g)(1), the court has the discretion to award either party in a benefits action reasonable attorney’s fees and costs. 29 U.S.C. § 1132(g)(1). When deciding the issue of costs awards under § 502, courts often apply a five-factor test adopted in Eaves v. Penn, 587 F.2d 453, 465 (10th Cir. 1978). Accordingly, these courts look at the following factors:

1. the offending parties’ culpability or bad faith;

2. the ability of the offending parties to satisfy personally a fee award;
3. whether an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances;
4. the amount of benefit conferred on members of the pension plan as a whole;
5. the relative merits of the parties' position.

Id.

No single factor is determinative. Riley v. Adm'r of the Supersaver 401(k) Capital Accumulation Plan for Employees of Participating AMR Corp. Subsidiaries, 209 F.3d 780, 782 (5th Cir. 2000); see also Locher v. UNUM Life Ins. Co. of Am., 389 F.3d 288, 298-99 (2d Cir. 2004) (failure to satisfy fifth factor does not preclude award of attorney's fees); Heffernan v. UNUM Life Ins. Co. of Am., 101 Fed. Appx. 99, 108 (6th Cir. 2004) (only three factors weighed for awarding fees but court analyzed parties' behavior and affirmed); Sheehan v. Guardian Life Ins. Co., 372 F.3d 962, 968 (8th Cir. 2004) (affirming fee award even though fourth factor weighed against granting fees). Most of these factors, however, place emphasis upon the behavior of the offending or losing party, which tends to lead courts to award costs to the prevailing party.

The Seventh Circuit recognizes two tests for determining whether a prevailing party should be granted attorney's fees. The Seventh Circuit will grant fees to the prevailing party if either the five factors weigh in favor of their being granted or unless the losing party's position was "substantially justified." Quinn v. Blue Cross & Blue Shield Ass'n, 161 F.3d 472, 478 (7th Cir. 1998) (internal citations omitted). Quinn also stated that the basic question asked in the Seventh Circuit, which underlies each test, is whether the losing party's position was substantially justified and taken in good faith or whether it was taken to harass the plaintiff. Id.; see also Stark v. PPM Am. Inc., 354 F.3d 666, 673 (7th Cir. 2004) (asking basic question stated in Quinn); Fritcher v. Health Care Serv. Corp., 301 F.3d 811, 818 (7th Cir. 2002). In the second test, a prevailing party is entitled to attorney's fees unless the court determines that the losing party's position was "substantially justified." Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co., 57 F.3d 608, 616-17 (7th Cir. 1995). Under this standard, a court may decline to award fees and costs if it finds that (1) the losing party's position had a reasonable or "solid" basis in law and fact; or (2) special circumstances make an award unjust. Id.; see also Prod. & Maint. Employees' Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1405 (7th Cir. 1992) (finding modest presumption in favor of awarding fees to prevailing party unless losing party's position had solid basis).

Generally, courts have been willing to award attorney's fees to prevailing participants and beneficiaries in actions for benefits. A minority of circuits has even mandated a presumption favoring prevailing beneficiaries. See, e.g., Camerer v. Cont'l Cas. Co., 76 Fed. Appx. 837, 841 (9th Cir. 2003) (citing Canseco v. Constr. Laborers Pension Trust, 93 F.3d 600,

609-10 (9th Cir. 1996) and stating that ordinarily the prevailing participant/beneficiary should get attorney's fees award unless there is a showing that it is unjust to do so); see also Senese v. Chicago Area Int'l Bhd. of Teamsters Pension Fund, 237 F.3d 819, 826 (7th Cir. 2001) (modest presumption in favor of prevailing parties); Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1468 (9th Cir. 1995) (stating that § 502(g)(1) "should be read broadly to mean that a [prevailing] plan participant or beneficiary . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"). Most circuits have rejected such a mandatory presumption. See, e.g., Janeiro v. Urological Surgery Prof'l Ass'n, 457 F.3d 130, 143 (1st Cir. 2006) (noting that there is no presumption favoring prevailing parties in ERISA action); Martin v. Ark. Blue Cross & Blue Shield, 299 F.3d 966, 971 (8th Cir. 2002) (describing majority rule holding Eighth Circuit no longer has presumption and factors for granting a fee are not determinative; courts should also consider other financial aspects of the parties), cert. denied, 537 U.S. 1159 (2003); Freeman v. Cont'l Ins. Co., 996 F.2d 1116, 1121 (11th Cir. 1993) (leaving fees to court's discretion).

In addition, some courts tend not to award fees to defendants who prevail against plan beneficiaries and participants unless the suit was frivolous or brought in bad faith. See Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust, 3 F.3d 1246, 1253 (9th Cir. 1993) (rejecting defendants' fee request and finding no reason to displace court's common perception that attorney's fees should not be charged against ERISA plaintiffs); see also Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Accident Ins. Co., 25 F.3d 743, 752 (9th Cir. 1994). But see Gettings v. Bldg. Laborers Local 310 Fringe Benefits Fund, 349 F.3d 300, 310 (6th Cir. 2003) (defendant can get fees if plaintiff's actions were frivolous, unreasonable or without foundation, and only if the plaintiff's action was groundless at the outset or plaintiff continued litigation after cause of action was apparently groundless); Senese, 237 F.3d at 826 (defendant can get fees unless plaintiff's claim was substantially justified (more than non-frivolous) and plaintiff acted in good faith or unless special circumstances make it unjust to provide fees); FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 913-14 (8th Cir. 1994) (awarding attorney's fee from plan for defending against participants' claims).

Based on ERISA's authorization of awards of reasonable fees and costs to "either party" under § 502(g)(1), courts may award fees to parties that were unsuccessful. See, e.g., Tourangeau v. Uniroyal, Inc., 101 F.3d 300, 308 n.6 (2d Cir. 1996) (stating that party need not succeed on merits for its counsel to receive fees); Miller v. United Welfare Fund, 72 F.3d 1066, 1074 (2d Cir. 1995) (stating that ERISA "contains no requirement that the party awarded attorneys' fees be the prevailing party"); Kayes, 51 F.3d at 1469 (holding court may award interim fees to ERISA plaintiff).

On the other hand, many courts hold that only a prevailing party can recover costs in an ERISA action. Griggs v. E.I. DuPont de Numours & Co., 385 F.3d 440, 453 (4th Cir. 2004); Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 276 n.13 (4th Cir. 2002); see also Phelps v. U.S. West, Inc., No. 97-1270, 1998 U.S. App. LEXIS 6667, at *10 (10th Cir. Apr. 3, 1998) (holding that health plan beneficiary was not prevailing party within meaning of § 502(g)(1) and not entitled to attorney's fees); Flanagan, 3 F.3d at 1253 (9th Cir. 1993) (noting that court "said in dictum that [the ERISA fee provision] permits an award of fees to a non-prevailing party," but holding that "plaintiffs cannot recover fees under [§ 502(g)(1)] until they succeed on any significant issue in litigation which achieves some of the benefit [they] sought in

bringing suit”). The courts have also declined to award fees after settlement unless the plaintiff proves he would have prevailed had the case gone to judgment. McManus v. Gitano Group, Inc., 59 F.3d 382, 384 (2d Cir. 1995).

Lower court decisions awarding or refusing to award the costs or fees are given deference on appeal. See, e.g., Dabertin v. HCR Manor Care, Inc., 373 F.3d 822, 834 (7th Cir. 2004); Florence Nightingale Nursing Serv., Inc., 41 F.3d at 1485 (reviewing district court’s denial of fees for abuse of discretion); Tiemeyer v. Cmty. Mut. Ins. Co., 8 F.3d 1094, 1102 (6th Cir. 1993) (same). But see Bellaire Gen. Hosp. v. Blue Cross & Blue Shield of Mich., 97 F.3d 822, 833 (5th Cir. 1996) (vacating trial court’s decision on fee amount and remanding case for recalculation where record contained no discussion of how court arrived at fee award).

3. Due process issues related to actions under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)

a. Proper party defendants

Courts are split over whether a party other than an ERISA plan can properly be named as a defendant in suits under ERISA § 502(a)(1)(B). The United States Supreme Court decided not to settle a circuit split on the issue in Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) (holding that ERISA does not apply), overruled in part on other grounds by Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). Compare Riordan v. Commonwealth Edison Co., 128 F.3d 549, 551 (7th Cir. 1997) (noting “ERISA permits suits to recover benefits only against the plan as an entity”), with Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997) (labeling proper defendant in ERISA action “party that controls [plan’s] administration”) and Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989) (“In a recovery of benefits claim, only the plan and the administrators and trustees of the plan in their capacity as such may be held liable.”). The list of potential defendants is fairly extensive.

See:

Mein v. Carus Corp., 241 F.3d 581, 585 (7th Cir. 2001). The employer or employee organization sponsoring the plan can be properly named as defendant, although ordinarily the plaintiff should name the ERISA plan as defendant.

Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997). All named fiduciaries and plan administrators, including party that controls the administration of the plan, are properly named as defendants in the benefits action.

But see:

Gibson v. Prudential Ins. Co. of Am., 915 F.2d 414, 418 (9th Cir. 1990). An insurance company that was the plan’s claims-handling agent but not an ERISA fiduciary “cannot be sued to recover benefits or [for damages] for breach of fiduciary duty,” but an “equitable remedy may have been available” under § 502(a)(3).

Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir. 1988). “Unless an employer is shown to control administration of a plan, it is not a proper party defendant in an action concerning benefits.”

ERISA defines a plan “administrator” as (i) the person the plan instrument specifically designates as the administrator; (ii) the plan sponsor if the instrument does not designate an administrator, or (iii) a person prescribed by the Secretary in regulations if no administrator is designated and a plan sponsor cannot be identified. 29 U.S.C. § 1002(16)(A). The Seventh Circuit noted a split among the circuit courts of appeals as to whether a party other than the one designated in the plan instrument can be a *de facto* administrator of the plan. See *Jones v. UOP*, 16 F.3d 141, 145 (7th Cir. 1994). The significance of this distinction is that an entity not designated in ERISA plan documents, such as an insurance company who merely processes the claims, could be sued under § 502(a)(1)(B) as a *de facto* plan administrator.

The First, Fifth and Eleventh Circuits are likely to consider these non-administrators *de facto* administrators. See *Rosen v. TRW, Inc.*, 979 F.2d 191, 193-94 (11th Cir. 1992); *Law v. Ernst & Young*, 956 F.2d 364, 373-74 (1st Cir. 1992); *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990) (finding idea of *de facto* administrator had intuitive appeal, but not deciding issue). The other circuits that have decided the issue will not. See *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 843 (6th Cir. 2007); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 994 n.5 (7th Cir. 1993); *Lee v. Burkhardt*, 991 F.2d 1004, 1010 n.5 (2d Cir. 1993); *McKinsey v. Sentry Ins.*, 986 F.2d 401, 404-05 (10th Cir. 1993); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 62 (4th Cir. 1992); *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 298-99 (9th Cir. 1989); *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1138 (D.C. Cir. 1989). The Third and Eighth Circuits remain undecided on the issue. See *Slayhi v. High-Tech Inst., Inc.*, No. 06-CV-2210, 2007 WL 4284859, at *8 (D. Minn. Dec. 3, 2007). But see *Campo v. Oxford Health Plans, Inc.*, No 06-4332, 2007 WL 187220, at *5 (D.N.J. June 26, 2007) (noting that the Third Circuit has not decided the issue but also declining to adopt “the minority view recognizing a non-administrator as the *de facto* plan administrator”).

b. Right to trial by jury

Most circuits hold that there is no right to a jury trial in actions for benefits brought under ERISA § 502(a)(1)(B) because these claims are equitable rather than legal and thus the Seventh Amendment to the United States Constitution does not guarantee the right to a jury trial. See, e.g., *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1162 (10th Cir. 1998) (describing ERISA’s remedies as primarily equitable, so that there is no right to jury trial under 7th Amendment); *Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 568 (2d Cir. 1998) (labeling claims for ERISA benefits inherently equitable in nature, not contractual, and denying right to jury trial); *Hunt v. Hawthorne Assocs., Inc.*, 119 F.3d 888, 907 (11th Cir. 1997); see also *Muller v. First UNUM Life Ins. Co.*, 341 F.3d 119, 124 (2d Cir. 2003); *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 996-97 (9th Cir. 2000) (because the remedies available to participants or beneficiaries are equitable, there is no Seventh Amendment right to a jury).

Several courts, however, have cast doubt on the majority position by suggesting that the Supreme Court’s opinion in *Firestone* implies a contrary result. See, e.g., *Hulcher v. United Behavioral Sys.*, 919 F. Supp. 879, 885 (E.D. Va. 1995) (stating “action[s] to recover

[ERISA] benefits under the subject plan are legal in nature” and plan beneficiaries are “constitutionally entitled to trial by jury on any claim raised under [§ 502](a)(1)(B)”); Vaughn v. Owen Steel Co., 871 F. Supp. 247, 250 (D.S.C. 1994) (finding that § 502 claims are most analogous to state law contract claims and consequently must be tried before jury); see also Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning, 934 F.2d 35, 40 (3d Cir. 1991) (holding right to jury exists when plan fiduciary seeks delinquent contributions). Some courts have found a right to a jury trial by concluding that certain benefits claims have both legal and equitable elements. See Weems v. Jefferson-Pilot Life Ins. Co., 663 So. 2d 905, 913-14 (Ala. 1995) (holding that right to recover compensation and punitive damages leads inexorably to right to jury trial); Lewis, 753 F. Supp. at 347-48.

In addition, hybrid claims brought under other federal statutes or state law and joined with ERISA action for benefits may be tried before a jury. See, e.g., Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1528 (11th Cir. 1996) (finding claimant entitled to jury trial in hybrid action under Labor Management Relations Act (“LMRA”) and ERISA). If a case requires bifurcation of jury and non-jury claims, the jury’s resolution of factual issues in common with the non-jury ERISA claims will have a binding effect on the non-jury claims. Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 627-28 (D. Minn. 1988); see also Brown v. Sandimo Materials, 250 F.3d 120, 127-28 (2d Cir. 2001) (court must heed any factual determination jury makes and determine if any equitable remedy is available as they are only available if the legal remedies are inadequate). In Golden v. Kelsey-Hayes Co., however, the Sixth Circuit denied a jury trial in a hybrid action brought under the LMRA and ERISA on the ground that the LMRA claim was an equitable one and thus not triable by jury. 73 F.3d 648, 662-63 (6th Cir. 1996).

c. Applicable statute of limitations

For § 502(a)(1)(B) claims for wrongful denial of benefits, courts will apply the most closely analogous statute of limitations under state law because § 502(a) does not provide an express statute of limitations. See Syed v. Hercules, Inc., 214 F.3d 155, 159 (3d Cir. 2000) (noting 28 U.S.C. § 1658, which established four-year statute of limitations for all federal acts, does not apply to statutes enacted before 1990); Johnson v. State Mut. Life Assurance Co. of Am., 942 F.2d 1260, 1261-62 (8th Cir. 1991). Most courts have found that the most closely analogous state statute of limitations is that for a state contract action. Syed, 214 F.3d at 159; see also, e.g., Shaw v. McFarland Clinic P.C., 363 F.3d 744, 747 (8th Cir. 2004); Harrison v. Digital Health Plan, 183 F.3d 1235, 1239-40 (11th Cir. 1999); Daill v. Sheet Metal Workers’ Local 73 Pension Fund, 100 F.3d 62, 65 (7th Cir. 1996). In ERISA § 502(a)(1)(B) cases, the limitations period begins to run “when a request for benefits is denied.” Hall v. Nat’l Gypsum Co., 105 F.3d 225, 230 (5th Cir. 1997); see also Stafford v. E.I. DuPont de Nemours & Co., 27 Fed. Appx. 137, 140-141 (3d Cir. 2002).

If the plan expressly provides a reasonable statute of limitations, however, the court will enforce it. Northlake Reg’l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301, 1303 (11th Cir. 1998) (following Doe, 112 F.3d at 874-75). In Northlake Regional Medical Center, a contractual limitations period was found to be reasonable (1) where there was no evidence that the limitations period was a “subterfuge to prevent lawsuits;” (2) where the limitations period was commensurate with other claim processing provisions; and (3)

where there was adequate opportunity to investigate the claim and file a suit because the limitations period did not run until after the plan's internal appeals process was exhausted. Id. at 1304. Thus, a suit under § 502(a)(1)(B) must be filed after the benefits claims procedure has been exhausted, i.e. the request for benefits is denied, but before the contractual limitations period or the most closely analogous state limitations period expires.

4. Other actions to recover denied ERISA benefits

a. Actions for equitable relief

Participants and beneficiaries may also seek equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Section 502(a)(3) enables benefit claimants to bring civil actions (1) to enjoin any act or practice that violates Title I of ERISA or the terms of the plan, or (2) to obtain other appropriate equitable relief to redress such violations or enforce any provisions of Title I of ERISA or the terms of the plan.

In Great West Life & Annuity Ins. Co. v. Knudsen, 534 U.S. 204 (2004), Great West and the plan sought "restitution" for payments made to a beneficiary when the beneficiary subsequently recovered compensation from the car manufacturer whose car she alleged caused her accident. The Court, however, said that they were seeking inherently legal relief as they were seeking monetary relief, which was not available in equity. The Court distinguished between equitable restitution, seeking to restore particular funds or property (by constructive trust or equitable lien), and restitution at law, where the petitioner is seeking to impose personal liability on the defendant. 534 U.S. 204, 213-14. As the petitioners in Knudsen were attempting to obtain solely monetary restitution, their actions were for legal restitution and ERISA did not provide any remedy. The Supreme Court in Knudsen reaffirmed that only equitable remedies are available under ERISA.

Although the Supreme Court ruled in Mertens v. Hewitt Associates that monetary damages are not recoverable as equitable relief under ERISA § 502(a)(3), the Third Circuit noted that equitable restitution might encompass monetary damages. See Ream v. Frey, 107 F.3d 147, 153 n.5 (3d Cir. 1997).

b. Estoppel and misrepresentation

Plan administrators or other fiduciaries routinely provide participants and beneficiaries with ERISA-required written disclosures, employment-related literature and oral statements about employee benefits. Disputes arise when this information is not correct. Under such circumstances, claimants often argue that a plan should be estopped from denying claims that are at odds with the actual plan provisions. In some cases, courts have ruled that state law estoppel claims are generally preempted. See Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1278-79 (6th Cir. 1991) (ruling ERISA preempted action for misrepresentation to former plan beneficiary about whether or not she was still covered); see also Caffey v. UNUM Life Ins. Co., 302 F.3d 576, 582 (6th Cir. 2002); Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030, 1034 (9th Cir. 2000); Rodriguez v. W. & S. Life Ins. Co., 948 F.2d 969, 971-72 (5th Cir. 1991). On the other hand, many courts have recognized a federal common law of estoppel as applicable to denial of benefits, which prevents a party from benefiting from its misleading conduct.

Some Circuits have stated that whether there is an equitable estoppel claim available under ERISA is an open question. Mausser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51, 57 (1st Cir. 2001).

See:

Gallegos v. Mount Sinai Med. Ctr., 210 F.3d 803, 811 (7th Cir. 2000). “[E]stoppel arises when one party has made a misleading representation to another party and the other has reasonably relied to his detriment on that representation.”

Russo v. Health, Welfare & Pension Fund, Local 705, 984 F.2d 762, 769 (7th Cir. 1993). Absent a showing of detriment, trustees are not estopped by the alleged oral promise of a prior plan administrator.

Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 (3d Cir. 1991). To prevail on equitable estoppel theory, plaintiff must show (1) material representation, (2) reasonable reliance upon that representation, and (3) damage resulting from that representation.

c. State law causes of action are limited

The Supreme Court and lower courts have broadly applied the ERISA preemption provisions of § 514, 29 U.S.C. § 1144, to preclude actions for recovery of benefits and damages brought under state common law of tort and contract, state unfair insurance practices, employment, civil rights, disability, and other state statutes that “relate to employee benefit plans” or are perceived as inconsistent with ERISA’s statutory enforcement scheme.

See:

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990). ERISA preempted employee’s state law wrongful discharge claim based on allegation that his discharge was based on his employer’s desire to avoid making contributions to his pension fund.

Mackey v. Lanier Collection Agency & Serv. Inc., 486 U.S. 825, 829 (1988). ERISA preempted Georgia statute that singled out ERISA welfare plan benefits for protective treatment under state garnishment procedures, but ERISA did not forbid garnishment of welfare benefits plan even where it collected judgments against plan participants.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (holding that ERISA does not apply), overruled in part on other grounds by Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). Federal law preempted a state lawsuit asserting improper processing of claim for benefits under ERISA-regulated plan where state common-law cause of action did not regulate insurance, within meaning of saving clause in ERISA preemption provision, and Congress clearly expressed intent that ERISA’s civil enforcement scheme be exclusive.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108-09 (1983). New York's Human Rights Law was preempted with respect to ERISA benefit plans only insofar as it prohibited practices lawful under federal law but state Disability Benefits Law was not preempted by ERISA, although New York could not enforce its provisions through regulation of ERISA-covered benefit plans.

But see:

Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985) (holding that ERISA does not apply), overruled in part on other grounds by Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). Massachusetts statute requiring certain minimum mental health care benefits be provided to those covered by an insurance policy was not preempted by either ERISA or National Labor Relations Act (NLRA).

Geweke Ford v. St. Joseph's Omni Preferred Care Inc., 130 F.3d 1355, 1360 (9th Cir. 1997). An employer's state contract claim against health plan third-party administrator and excess insurer for failure to process reimbursement was not preempted as traditional state law claim.

Geller v. County Line Auto Sales, Inc., 86 F.3d 18, 23 (2d Cir. 1996). ERISA does not preempt fraud claims.

Smith v. Texas Children's Hosp., 84 F.3d 152, 156-57 (5th Cir. 1996). State fraudulent inducement claim not preempted.

Padeh v. Zagoria, 900 F. Supp. 442, 448 (S.D. Fla. 1995). ERISA does not preempt state law negligence and negligent misrepresentation claims against an investment advisor and insurance representative.

XIII. PROCEDURAL CONSIDERATIONS FOR ERISA LITIGATION

A. AVAILABILITY OF A JURY IN ACTIONS UNDER ERISA

ERISA does not create a statutory right to a jury trial, but the Seventh Amendment allows for jury trials in “suits at common law where the value in controversy shall exceed twenty dollars.” U.S. CONST. amend. VII. “‘Suits at common law’ refers to legal actions involving the determination of legal, rather than equitable rights and remedies.” Termini v. Life Ins. Co. N. Am., 474 F. Supp. 2d 775, 777 (E.D. Va. 2007) (citing Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990)). Therefore, the right to a jury trial can be available only when a legal remedy is sought. Donovan v. Robbins, 579 F. Supp. 817, 820 (N.D. Ill. 1984). To determine whether the remedy is legal or equitable courts will examine both (1) “the nature of the issues involved,” to determine if they would have historically been brought in a court of law or a court of equity, and (2) “the remedy sought.” The second prong is the more important of the analysis.” Termini, 474 F. Supp. 2d at 777 (citing Chauffeurs, 494 U.S. at 565). A simple request for monetary relief is not enough, in itself, for a claim to be considered “legal” in nature. Borst v. Chevron Corp., 36 F.3d 1308, 1324 (5th Cir. 1994). A “request for monetary recovery sounds in equity . . . when it is restitutionary in nature or is intertwined with claims for injunctive relief.” Id. (citing Chauffeurs, 494 U.S. at 570-71).

The majority of courts have held that no right to a jury trial exists for ERISA actions. With the Supreme Court’s recent decision in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) however, some courts have concluded that the possibility that the right to a jury trial may exist for plaintiffs seeking restitution under § 502(a). See Chao v. Meixner GPTA, No. 1:07-cv-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. Nov. 27, 2007); Bona v. Barasch, No. 01 CIV 2289(MBM), 2003 WL 1395932, at *34-35 (S.D.N.Y. Mar. 20, 2003). In Knudson, the Court held that restitution actions are “legal” in nature when the plaintiff seeks to impose “merely personal liability upon the defendant to pay a sum of money” such as in a breach of contract case. Id. Restitution actions are “equitable” in nature where the action seeks to “restore to the plaintiff particular funds or property in the defendant’s possession.” Id. at 214. Thus, under Knudson, not all remedies sought for breach of fiduciary duty are equitable. See Rego v. Westvaco Corp., 319 F.3d 140, 145 (4th Cir. 2003).

Many courts have been reluctant to read Knudson to grant a right to jury trials in ERISA litigation. See George v. Kraft Foods Global, Inc., Nos. 07 C 1713, 07 C 1954, 2008 WL 780629, at *3-*5 (N.D. Ill. Mar. 20, 2008); Cherepinsky v. Sears Roebuck & Co., 455 F. Supp. 2d 470, 476 (D.S.C. 2006).

See:

Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156, 1160-62 (10th Cir. 1998). The Tenth Circuit applied the Seventh Amendment analysis and denied the right to a jury trial in a § 502(a)(1)(B) claim. Applying the Seventh Amendment analysis, the court found the first prong weighed against a jury trial because the “ERISA action [was] analogous to a trust action and therefore equitable in nature.” The relief sought was equitable because it was “intertwined with equitable relief” and it was more restitutionary relief than legal or compensatory relief.

Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994). The court applied the Seventh Amendment analysis and determined that the nature of the issue was analogous to trust law and therefore equitable, and the relief sought was equitable because the monetary relief was “intertwined with claims for injunctive relief.”

Termini v. Life Ins. Co. of N. Am., 474 F. Supp. 2d 775, 777 (E.D. Va. 2007). The court applied the Seventh Amendment analysis to claims under § 502(a)(1)(B) and (a)(2) and denied the right to jury trial in both. The § 502(a)(1)(B) claim was equitable because the “plaintiff’s claim for monetary relief [was] intertwined with equitable relief.” The § 502(a)(2) claim was denied because it turned on the breach of a fiduciary duty so the nature and relief sought were equitable in nature.

Lamberty v. Premier Millwork & Lumber Co., 329 F. Supp. 2d 737, 744-45 (E.D. Va. 2004). The court held that there was a right to a jury trial after applying the Seventh Amendment analysis. The court held that “while the overall ERISA action is equitable in nature, the particular issues involved in that action may be legal. [In this case] . . . plaintiff’s suit to recover what is due and owing under a benefits plan essentially presents an action at law to recover a legal entitlement.” The remedy sought was also legal because the plaintiff sought compensatory damages that were not intertwined with equitable relief.

Several years before its decision in *Knudson*, the Supreme Court held that “ERISA abounds with the language and terminology of trust law. ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions ‘codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.’” *Firestone*, 489 U.S. at 110. As the Fifth Circuit has stated, because ERISA is so analogous to trust law, this is “an area within the exclusive jurisdiction of the courts of equity,” and thus “ERISA claims do not entitle a plaintiff to a jury trial.” *Borst*, 36 F.3d at 1324. Courts have used this language to conclude that there is no right to a jury trial without considering the other prongs of the Seventh Amendment analysis.

See also:

Patton v. MFS/SON Life Fin. Distributions Inc., 480 F.3d 478, 484 (7th Cir. 2007). In a case under § 502(a)(1)(b) the court stated “in ERISA cases . . . the plaintiff has no right to a jury trial.”

Mathews v. Sears Pension Plan, 144 F.3d 461, 468 (7th Cir. 1998). “[T]here is no right to a jury trial in an ERISA case.”

Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1527 (11th Cir. 1996). In a case under § 502(a)(1)(b) and (a)(3) the court stated “no Seventh Amendment right to a jury trial exists in actions brought pursuant to ERISA.”

Houghton v. SIPCO, Inc., 38 F.3d 953, 957 (8th Cir. 1994). “[T]here is no right to money damages or to a jury trial under ERISA.”

The right to a trial by jury depends on the nature of action and the relief sought. Considering that ERISA § 502(a) provides different remedies and causes of action for (a)(1)(B), (a)(2), and (a)(3) claims, the result of Seventh Amendment analysis may depend on what provision of §502(a) is used. The next sections look at the right to a jury trial under § 502(a)(1)(B), (a)(2), and (a)(3).

1. Availability of a jury trial under ERISA §502(a)(1)(B)

Most circuits hold that there is no right to a jury trial in actions for benefits brought under ERISA § 502(a)(1)(B) because these claims are equitable rather than legal and thus the Seventh Amendment to the United States Constitution does not guarantee the right to a jury trial. See, e.g., Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156, 1162 (10th Cir. 1998) (describing ERISA’s remedies as primarily equitable, so that there is no right to jury trial under 7th Amendment); Tischmann v. ITT/Sheraton Corp., 145 F.3d 561, 568 (2d Cir. 1998) (labeling claims for ERISA benefits inherently equitable in nature, not contractual, and denying right to jury trial); Hunt v. Hawthorne Assocs., Inc., 119 F.3d 888, 907 (11th Cir. 1997); see also Muller v. First UNUM Life Ins. Co., 341 F.3d 119, 124 (2d Cir. 2003); Thomas v. Or. Fruit Prods. Co., 228 F.3d 991, 996-97 (9th Cir. 2000) (because remedies available to participants or beneficiaries are equitable, there is no Seventh Amendment right to a jury).

Some courts, however, have suggested that the Supreme Court’s opinion in Firestone implies a result contrary to the majority position. See, e.g., Hulcher v. United Behavioral Sys., 919 F. Supp. 879, 885 (E.D. Va. 1995) (stating “action[s] to recover [ERISA] benefits under the subject plan are legal in nature” and plan beneficiaries are “constitutionally entitled to trial by jury on any claim raised under [§ 502](a)(1)(B)”); Vaughn v. Owen Steel Co., 871 F. Supp. 247, 250 (D.S.C. 1994) (finding that § 502 claims are most analogous to state law contract claims and consequently must be tried before jury); see also Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning, 934 F.2d 35, 40 (3d Cir. 1991) (holding right to jury exists when plan fiduciary seeks delinquent contributions). Some courts have found a right to a jury trial by concluding that certain benefits claims have both legal and equitable elements. See Weems v. Jefferson-Pilot Life Ins. Co., 663 So. 2d 905, 913-14 (Ala. 1995) (holding that right to recover compensation and punitive damages leads inexorably to right to jury trial); Blue Cross & Blue Shield of Ala. v. Lewis, 753 F. Supp. 345, 347-48 (N.D. Ala. 1990).

In addition, hybrid claims brought under other federal statutes or state law and joined with ERISA action for benefits may be tried before a jury. See, e.g., Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1528 (11th Cir. 1996) (finding claimant entitled to jury trial in hybrid action under Labor Management Relations Act (“LMRA”) and ERISA). If a case requires bifurcation of jury and non-jury claims, the jury’s resolution of factual issues in common with the non-jury ERISA claims will have a binding effect on the non-jury claims. Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 627-28 (D. Minn. 1988); see also Brown v. Sandimo Materials, 250 F.3d 120, 127-28 (2d Cir. 2001) (District Court must heed any factual determination made by the jury and determine if any equitable remedy is available as they are only available if the legal remedies are inadequate). In Golden v. Kelsey-Hayes Co., however,

the Sixth Circuit denied a jury trial in a hybrid action brought under the LMRA and ERISA on the ground that the LMRA claim was an equitable one and thus not triable by jury. 73 F.3d 648, 662-63 (6th Cir. 1996).

2. Availability of a jury trial under ERISA § 502(a)(2)

The overwhelming majority of courts have held that no right to a jury trial exists for § 502(a)(2) ERISA claims. Cases conclude that there is never a right to a jury trial in ERISA actions because such actions are equitable in nature. For example, the Second Circuit has ruled that no right to a jury trial exists in ERISA claims seeking the equitable remedy of restitution. Katsaros v. Cody, 744 F.2d 270, 278-79 (2d Cir. 1984). As one lower court noted, § 502(a)(2) actions are “restitutional in nature,” and therefore no right to a jury trial exists. Raff v. Travelers Ins. Co., No. 90 CIV 7673, 1996 WL 154171 (S.D.N.Y. Apr. 3, 1996).

See also:

George v. Kraft Foods Global, Inc., Nos. 07 C 1713, 07 C 1954, 2008 WL 780629, at *5 (N.D. Ill. Mar. 20, 2008). *The court held that a “claim under § 502(a)(2) was an equitable [claim] for which there is no constitutional right to a jury trial.”*

Pereira v. Cogan, No. 00 CIV 619, 2002 WL 989460, at *4 (S.D.N.Y. May 10, 2002). *The court, in a bankruptcy case, held that notwithstanding Knudson, suits for breaches of fiduciary duty are necessarily equitable in nature and thus no right to a jury trial exists. While not decided under ERISA, this case considers the availability of the jury by applying ERISA decisions.*

White v. Martin, No. CIV 99-1447, 2002 WL 598432, at *3-*4 (D. Minn. Apr. 12, 2002). *The district court found no right to a jury trial under § 502(a)(2) because the plaintiff’s action sought the equitable relief of restitution that did not fit into definition of “legal” under Knudson.*

Broadnax Mills, Inc. v. Blue Cross & Blue Shield of Va., 876 F. Supp. 809, 816 (E.D. Va. 1995). *The court held that § 502(a)(2) is equitable in nature despite the availability of damages, and thus denied the right to a jury trial.*

While most courts have denied a jury trial in § 502(a)(2) cases, a few courts applying Knudson have found a right to a jury trial under § 502(a)(2). A federal district court ruled that after Knudson, plaintiffs who seek money damages in § 502(a)(2) claims are seeking a legal remedy and are therefore entitled to a jury trial. Bona, 2003 WL 1395932, at *34-35. In Bona, the court stated that because the plaintiffs were suing on behalf of the plan under § 502(a)(2), they could seek either damages or equitable relief. Id. at *34. After noting that the Second Circuit repeatedly holds that no jury trial is available when plaintiffs seek equitable relief, the district court in Bona stated that the plaintiffs sought monetary damages. Id. at *35. Bona suggests that after Knudson, appellate courts may be asked to consider whether there is a right to a jury trial in a § 502(a)(2) actions.

See also:

Chao v. Meixner GPTA, No. 1:07-cv-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. Nov. 27, 2007). The court granted a right to jury trial in § 502(a)(2) claim after applying the Seventh Amendment's two-prong test. The court found that the plaintiff sought a legal remedy and the action arose in part at law.

Utilicorp United, Inc. v. Kemper Fin. Servs., Inc., 741 F. Supp. 1363, 1367 (W.D. Mo. 1989). The court stated that the controlling Eighth Circuit decision denying a right to a jury trial in ERISA actions applied only to actions brought under § 502(a)(1), and therefore allowed a jury trial due to lack of binding precedent and "the strong federal policy favoring jury trials."

3. Availability of a jury trial under ERISA § 502(a)(3)

Suits under ERISA § 502(a)(3) are consistent with the well-settled doctrine that limits the right to a jury trial to legal, and not equitable, causes of action. Because Congress limited the relief for suits under § 502(a)(3) to "other appropriate equitable relief," a jury trial is inappropriate in such causes of action. See Donovan v. Robbins, 579 F. Supp. 817, 820 (N.D. Ill. 1984); see also George, 2008 WL 780629, at *6 ("The Seventh Circuit has recognized that congressional silence on the right to a jury trial in ERISA reflects an intent that claims brought under the statute be equitable in nature") (citing Brown v. Retirement Comm. of the Briggs & Stratton Retirement Plan, 797 F.2d 521, 527 (7th Cir. 1986)). Accordingly, no right to a jury trial exists because § 502(a)(3) provides only equitable relief. Sullivan v. LTV Aerospace and Def. Co., 82 F.3d 1251, 1258 (2d Cir. 1996) (noting distinction between §§ 502(a)(1) and 502(a)(3) and finding no jury trial right under the latter because it provides only for equitable relief); Cox v. Keystone Carbon Co., 861 F.2d 390, 393 (3d Cir. 1988) (noting § 502(a)(3), which provides for explicitly equitable relief, does not supply one with right to jury trial); Bona, 2003 WL 1395932, at *33 (holding no right to a jury trial on § 503(a)(3) claims); Gieger v. UNUM Life Ins. Co. of Am., 213 F. Supp. 2d 813, 818 (N.D. Ohio 2002) (same); Pickering v. USX Corp., 809 F. Supp. 1501, 1509 (D. Utah 1992) (same). When faced with a constitutional challenge to this position, courts have found that the Seventh Amendment is limited to "suits at common law," and therefore does not come into play in suits under § 502(a)(3) which are based in equity. Cox, 861 F.2d at 393. Thus, it is well-settled that there is no right to a jury trial for suits under § 502(a)(3).

B. RULE 23 AND ERISA CLASS ACTION LITIGATION

A class action, if available, may be an individual plaintiff's best legal recourse in ERISA litigation especially for benefits claims, because the amount any single plaintiff may be able to recover is relatively low. In addition, because the attorney's fee award provision of ERISA is generally discretionary, the provision does not provide a great incentive for attorneys to represent single plaintiffs. See ERISA § 502(g)(1), codified as 29 U.S.C. § 1132 (g)(1); ALAN M. SANDALS, ERISA CLASS ACTIONS AND STRATEGIC ISSUES: THE PLAINTIFF'S PERSPECTIVE, American Bar Association Center for Continuing Legal Education, N99ELI ABA-LGLED K-1, 10 (1999).

Considering the representative nature of an ERISA § 502(a)(2) claim, class actions are a useful tool to protect the interests a plan participant may represent. Congress considered requiring class actions for claims brought under ERISA § 502(a)(2) but so far it has remained silent on the issue. Coan v. Kaufman, 457 F.3d 250, 259-61 (2d Cir. 2006). Claims brought under § 502(a)(2) still must be brought on a “representative capacity on behalf of the plan” and, by following the class action requirements, courts will likely perceive them to be acting in a representative capacity of the plan that satisfies § 502(a)(2). Id. (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 n.9 (1985)).

Because ERISA preempts state law in most situations, class action litigation related to ERISA must comply with the Federal Rules of Civil Procedure. The requirements for class certification under Federal Rule of Civil Procedure 23 and the dynamics of ERISA can create unique considerations for both sides of a potential class action suit.

1. Procedural considerations

a. Considerations under Rule 23

To gain class certification, the prospective class must satisfy the four requirements of Rule 23(a) and one of three requirements under Rule 23(b). The four requirements of a putative class under Rule 23(a) are (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The three grounds for certification under Rule 23(b) are (1) risk of inconsistent and binding decisions; (2) defendant subject to injunctive or declaratory relief; or (3) common questions predominate and a class action is a superior method of adjudication. Fed. R. Civ. P. 23.

Plaintiffs must establish that the proposed class satisfies the requirements of Rules 23(a) and 23(b). See Walker v. Asea Brown Boveri, Inc., 214 F.R.D. 58, 63-64 (D. Conn. 2003) (citing E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 407 (1977)). Allegations in the complaint are to be taken as true, and a court has wide discretion in deciding whether to certify a class. Ries v. Humana Health Plan, Inc., No. 94 C 6180, 1997 WL 158337, at *3 (N.D. Ill. Mar. 31, 1997) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974)). However, courts will occasionally examine the evidentiary record to determine certification. See Sanft v. Winnebago Indus., Inc., 214 F.R.D. 514, 519 (N.D. Iowa 2003) (citing Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)). “[W]hile a court should not determine the merits of a claim at the class certification stage, it is appropriate to ‘consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.’” Heffner v. Blue Cross & Blue Shield of Ala., Inc., 443 F.3d 1330, 1337 (11th Cir. 2006) (quoting Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1188 n.15 (11th Cir. 2003)).

Rule 23(c) requires a court to make a determination on class certification “at an early practicable time.” Fed. R. Civ. P. 23(c)(1). Courts can, however, revisit the question of class certification at any time. Also, if individual issues become too numerous or complex, a class action can be limited to one particular issue or a class may be divided into subclasses in accordance with Rule 23(c)(4). Generally, “the preferred approach is to err on the side of certification.” SANDALS, supra, at 2. When examining class certification, it should be remembered that the underlying principle of the federal civil rules is the “just, speedy, and

inexpensive determination of every action.” FED. R. CIV. P. 1. Thus, judicial economy will often trump other concerns when examining class certification. See Bradford v. AGCO Corp., 187 F.R.D. 600, 605 (W.D. Mo. 1999)).

b. Considerations under ERISA

In examining the different requirements of Rule 23, it must be remembered that there is great interplay among the requirements, and an attempt to shape a class to satisfy one prong may affect other prongs. For example, although adding more plaintiffs may help satisfy the numerosity requirement, the other requirements of Rule 23 may become more difficult to satisfy if the added number of plaintiffs presents more individual circumstances that frustrate a common strategy. In addition, fundamental ERISA litigation decisions, such as whether a plaintiff is suing on behalf of the plan under ERISA § 502(a)(2) or for individual relief under § 502(a)(3), can drastically change the way the class is defined and in turn the potential certification of the class. For example, if a claim is based on breach of fiduciary duty and plan-relief is sought under ERISA § 409(a), a single plaintiff under § 502(a)(2) could suffice and could avoid class certification problems. Steuart H. Thomsen, ERISA CLASS ACTIONS, American Bar Association, 28-Sum Brief 36 (1999). But see Coan, 457 F.3d at 260 (requiring procedural safeguards to protect other interested parties be taken by a plan participant who brings a suit on behalf of the plan).

2. Requirements of Rule 23(a) in ERISA class actions

Plaintiffs seeking class certification must at a minimum prove that the putative class meets all four of the requirements under Rule 23(a).

a. Numerosity

Rule 23(a)(1) permits class certification only where “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Courts have consistently ruled that “impracticability” does not mean “impossible,” and that courts should consider several factors beyond mere numbers when examining the difficulty and inconvenience of joinder. Sanft, 214 F.R.D. at 520-21 (providing in-depth analysis of numerosity factors). These factors include the geographic location of class members, the amount and nature of the claims, the difficulty of identifying class members, the impact on judicial economy, the “inconvenience of trying individual suits, and any other factor relevant to the practicality of joinder.” Paxton v. Union Nat’l Bank, 688 F.2d 552, 559 (8th Cir. 1982) (citing C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE 2D. § 1762).

See:

Sanft v. Winnebago Indus., Inc., 214 F.R.D. 514, 526 (N.D. Iowa 2003). *Class of 51 current and former employees alleging improper reduction of benefits did not satisfy numerosity requirement where most of class resided in Northern Iowa and where each member of the putative class was known, thus making joinder more practical.*

Plaintiffs do not need to specify the exact number of potential class members, but should clearly identify the class. See C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE 2D. § 1762 at 164. Although no bright-line rule exists, a class of forty members has repeatedly been cited as a rule-of-thumb for presuming that joinder would be impractical. Coffin v. Bowater Inc., 228 F.R.D. 397, 402 (D. Me. 2005); La Flamme v. Carpenters Local # 370 Pension Plan, 212 F.R.D. 448, 452 (N.D.N.Y. 2003); Grunewald v. Kasperbauer, 235 F.R.D. 599, 604 (E.D. Pa. 2006); see also Dameron v. Sinai Hosp. of Balt., Inc., 595 F. Supp. 1404, 1407-08 (D. Md. 1984) (“A class consisting of as few as 25 to 30 members raises the presumption that joinder would be impractical.”). When the action is brought on behalf of the plan, individual members of the plan can be counted in the class even though the action is on behalf of the plan. In re CMS Energy ERISA Litig., 225 F.R.D. 539, 543 (E.D. Mich. 2004).

In the ERISA context, numerosity - as well as other Rule 23(a) requirements such as commonality - can be satisfied where the class is defined by an employer’s general practice or, for example, a plan change affecting all employees’ benefits. For example, in Bittinger v. Tecumseh Products Co., a class of 1,100 retirees alleged that their former employer denied them fully-funded insurance benefits where the employer terminated their benefits at the expiration of a collective bargaining agreement and offered them new partially-funded benefits upon signing a release of claims against employer. 123 F.3d 877, 884 (6th Cir. 1997). The retirees, seeking relief under ERISA § 502(a)(1)(B) for benefits due, satisfied numerosity despite the employer’s claims that retirees failed to address numerosity. Id. The court held that where 1,100 retirees based their claim on the common question of the original bargaining agreement, numerosity was “obvious.” Id. Indeed, in many ERISA cases where class certification is at issue, numerosity is rarely disputed when the other Rule 23 requirements are satisfied.

See:

Bradford v. AGCO Corp., 187 F.R.D. 600, 604-05 (W.D. Mo. 1999). *Retirees claiming breach of fiduciary duty where benefits under collective bargaining agreement were allegedly denied satisfied numerosity, commonality, and typicality requirements despite the potential existence of individual reliance issues. Because they met commonality and typicality, the class also satisfied numerosity where the class consisted of only twenty to sixty-five members and the court was concerned about judicial resources that would be expended in individual trials.*

See also:

Wiseman v. First Citizens Bank & Trust Co., 212 F.R.D. 482, 485-488 (W.D.N.C. 2003), *reaffirmed on reconsideration*, 215 F.R.D. 507 (W.D.N.C. 2003). *Class of 3,580 participants of a 401(k) pension plan claiming breach of fiduciary duty for alleged misleading related to a fund available under the 401(k) satisfied numerosity but did not satisfy typicality or commonality where there were issues of independent control of accounts.*

Mueller v. CBS, Inc., 200 F.R.D. 227, 235-37 (W.D. Pa. 2001). *Class of 3,300 former employees claiming interference with benefits where employees were fired*

before retirement satisfied numerosity but did not satisfy the commonality and typicality requirements because the class was overly broad.

Generally, when injunctive relief is sought, some courts have held that the numerosity requirement should not be applied rigorously. See Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir. 1984) (citing other circuits in agreement). An injunction is one of the remedies available under the “appropriate equitable relief” language of ERISA § 502(a)(3). 29 U.S.C. § 1132(a)(3). Courts hold that if the issue of an ERISA class action is whether benefits or reimbursement for benefits will be paid, injunctive relief requiring specific performance can lead to a result similar to monetary damages. See Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347, 1353 (11th Cir. 1998) (ruling that injunction requiring specific performance of reimbursement by participants to claims administrator was equitable relief).

See:

In re Unisys Corp. Retiree Med. Ben. ERISA Litig., 57 F.3d 1255, 1268-69 (3d Cir. 1995). *Class of retirees claiming breach of fiduciary duty based on employer/plan administrator’s alleged representations that benefits were for life was not entitled to monetary damages but was entitled to an injunction ordering specific performance of the assurances made by employer. Court ruled that the award of those assurances was restitutionary in nature and thus equitable.*

McHenry v. Bell Atl. Corp., No. 97-6556, 1998 WL 512942, at *3, *8 (E.D. Pa. Aug. 19, 1998). *Class of employees who accepted employment at subsidiary of parent company was certified to seek injunction for restoration of their retirement and savings plan benefits that they alleged were reduced under the subsidiary, and the possibility of the reduction was not shared with employees.*

b. Commonality

The requirements of commonality and typicality “tend to merge.” Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982). However, the difference between the two requirements can implicate other prongs of Rule 23 and determine class certification. See Walker, 214 F.R.D. at 63-64 (finding commonality satisfied but not typicality). Typicality considers the sufficiency of the named plaintiffs, and commonality considers the sufficiency of the class itself. Mueller v. CBS, Inc., 200 F.R.D. 227, 237 (W.D. Pa. 2001) (citing Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3d Cir. 1998)). Although courts tend to rule consistently on the requirements of typicality and commonality, this Handbook examines the two requirements separately. Any case citations, however, will acknowledge both typicality and commonality where the requirements were decided on the same grounds. See also Section XIII.B.2.c discussing Typicality, below.

Rule 23(a)(2), often referred to as the “commonality” element, requires that there be “questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2). Courts read this requirement liberally and do not require that all questions raised be common or that class members be situated identically. See Califano v. Yamasaki, 442 U.S. 682, 701 (1979). Normally, one common question can suffice if it is related to the resolution of the case. Id.;

Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 424 (6th Cir. 1998); Bradford v. AGCO Corp., 187 F.R.D. 600, 603 (W.D. Mo. 1999).

Class actions for injunctive or declaratory relief, regularly sought under ERISA § 502(a)(3) claims, often present common questions by their nature. Furthermore, because an act affecting many plan participants or beneficiaries often triggers ERISA claims, the commonality requirement is readily satisfied in many ERISA class actions. See Bittinger, 123 F.3d at 884 (finding commonality satisfied where each class member's claim was based on collective bargaining agreement that employer altered). Courts have even found that plaintiffs covered by different plans can satisfy the commonality requirement where a sole triggering event is at issue. For example, in Forbush v. J.C. Penney Co., a class of retired employees satisfied commonality and typicality requirements despite being covered under four different plans because the common question related to the employer's method of calculating social security benefits. 994 F.2d 1101, 1006 (5th Cir. 1993).

See:

Doe v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466, 473 (N.D. Ill. 1992). *Beneficiaries and participants of employee health insurance plan who claimed insurers breached fiduciary duties and violated disclosure requirements by denying claims for treatment of bipolar disorder satisfied commonality and typicality requirements despite concerns about how individual issues would affect Rule 23(b) requirements.*

ERISA plaintiffs often encounter commonality and typicality problems where representations to participants or employees about potential plan changes were not uniform. Where a court must examine different representations to individual plaintiffs, especially where the ERISA claims allege breach of fiduciary duty through misrepresentations or corresponding issues of reliance, commonality and typicality are more difficult to satisfy. Some circuits allow class actions to proceed to determine whether there was a fiduciary breach based on common representations, while reserving questions of reliance and individual harm based on any diverse representations for later hearings or subclass treatment. See In re Sears Retiree Group Life Ins. Litig., 198 F.R.D. 487, 492-93 (N.D. Ill. 2000) (discussing different approaches of circuits on this issue). In evaluating whether different communications will defeat commonality and typicality the degree of variation in the representations is an important inquiry. Id.

See:

Fotta v. Trs. of the United Mine Workers of Am., 319 F.3d 612, 618-19 (3d Cir. 2003), *cert. denied*, 540 U.S. 982 (2003). *Commonality requirement not satisfied when plaintiffs had to prove the distinct benefits that were wrongfully withheld or delayed for each plaintiff.*

Sprague v. Gen. Motors Corp., 133 F.3d 388, 397-98 (6th Cir. 1998). *Retirees seeking lifetime health care coverage at no cost and making ERISA claims based on theories of bilateral contract and estoppel did not satisfy commonality and typicality requirements where the claims depended on which documents each retiree signed and what representations were made to each retiree. Thus, the*

individualized interactions with each retiree, the subjective understanding of each retiree, and their respective reliance on those understandings were too varied for certification.

Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 457-58 (11th Cir. 1996). *Retirees claiming breach of contract, interference through misleading statements, and breach of fiduciary duty did not satisfy commonality requirement where employer made different oral and written communications about impending changes in the benefits plan. The court held that even if plaintiffs could have shown that employer disseminated a uniform message to all putative class members, individual reliance issues would remain.*

In re Sears Retiree Group Life Ins. Litig., 198 F.R.D. 487, 492-93 (N.D. Ill. 2000). *Retirees seeking certification after employer amended group life insurance plan by reducing benefits for some employees did not satisfy commonality and typicality requirements for claims of breach of fiduciary duty and estoppel where allegations of misrepresentation relied on a variety of oral and written communications. Plaintiffs attempted to remedy their claims based on two documents received by all putative class members, but the court rejected this attempt, holding that communications must be looked at within the “total mix” of information that was available to plaintiffs.*

But see:

Richards v. Fleet Boston Fin. Corp., 238 F.R.D. 345, 349 (D. Conn. 2006). *Employees claimed the employer breached its fiduciary duties in drafting plan descriptions, benefit statements, and employee reference guide. Employees satisfied the commonality requirement because the documents suggested a presumption of “likely prejudice” common to all member of the class. The court held that it did not need to look at individual assessments of the information in the documents drafted by the employer.*

Bradford v. AGCO Corp., 187 F.R.D. 600, 604-05 (W.D. Mo. 1999). *Retirees claiming breach of fiduciary duty where benefits under collective bargaining agreement were allegedly changed or denied satisfied commonality and typicality requirements despite the potential existence of individual reliance issues. The similarities of the class members and the fact that the terms of the contract and retirement plan would govern the outcome of case “trumped” reliance issues.*

Differing representations not only pose commonality and typicality problems but can affect virtually every element of Rules 23(a) and (b). See *Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955, 957 (7th Cir. 1998) (finding class satisfied commonality but not Rule 23(b)(3)); see also Section XIII.B.3.c discussing Common Questions, below.

Although not explicit in Rule 23, courts considering motions for class certification generally require that a proposed class be “sufficiently identifiable without being overly broad.” *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 445-46 (E.D. Pa. 2000) (discussing requirements of class definition and relevant circuit court decisions). This “definiteness” element implicates

various Rule 23 requirements, but is most often examined in conjunction with the commonality and typicality requirements.

See:

Mueller v. CBS, Inc., 200 F.R.D. 227, 233-34 (W.D. Pa. 2001). *Putative class of employees claiming interference with benefits where employees were fired before retirement did not satisfy the commonality and typicality requirements due to “indefiniteness.” The class was “overly broad, unacceptably vague, and arbitrary” because some in the class were employed in foreign countries and not subject to ERISA, and plaintiffs provided no temporal limitation for those who would be included in the class.*

Because the commonality requirement also overlaps with all three of the alternative requirements of Rule 23(b), the commonality requirement may actually be a “superfluous provision, or at least partially redundant, since the existence of common questions can be viewed as an essential ingredient of a finding that the class will satisfy one of the 23(b) requirements.” C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE 2D. § 1763 at 227; see also In re LifeUSA Holding Inc., 242 F.3d 136, 144 (3d Cir. 2001) (describing that Rule 23(b)(3) as more demanding inquiry of commonality).

c. Typicality

Rule 23(a)(3) requires that the claims or defenses of the class representative be typical of the class. FED. R. CIV. P. 23(a)(3). In other words, the typicality requirement assures that the claims of the representative are similar enough to the claims of the class that the representative can adequately represent the class. Falcon, 457 U.S. at 157 n.13. In this way, the typicality requirement also buttresses the adequacy of representation in Rule 23(a)(4) requirement. While the two requirements are related, some courts read the typicality requirement independently and require plaintiffs to demonstrate that other class members have the same or similar grievances. See Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir. 1977) (listing courts adopting this interpretation).

In ERISA cases, typicality is most commonly the cause for denial of certification where there are the types of varied representations that also cause problems for the commonality requirement. See In re Sears Retiree Group Life Ins. Litig., 198 F.R.D. 487, 492-93 (N.D. Ill. 2000) (discussing circuits’ differing approaches on issue of non-uniform communications to class members); see also Retired Chicago Police Ass’n v. City of Chicago, 7 F.3d 584, 597 (7th Cir. 1993) (finding typicality not met where representations regarding health care plan varied among class members). Although factual distinctions may exist between the circumstances of class representatives and members of the class, claims based on different interests or different interactions with employer - which are less likely to satisfy typicality. See Thomsen, supra, at 39. Such differences most often occur when potential plan changes are communicated to different groups of participants.

See:

Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 884-85 (6th Cir. 1997). Retirees claiming denial of benefits after a collective bargaining agreement terminated benefits and a new offer required a release of claims against employer meet requirements of typicality and commonality. The common issue was that the original agreement guaranteed lifetime benefits, and the plaintiffs were typical in that they followed a “pattern,” despite not receiving uniform communications and despite the fact that only some retirees had signed the releases. Instead of denying class certification, the court held that any individualized issues of estoppel could be remedied in other ways, such as the creation of subclasses.

Forbush v. J.C. Penney, Co., 994 F.2d 1101, 1105-06 (5th Cir. 1993). Despite class members’ participation in different pension plans, the employer’s general practice of overestimating social security benefits allowed plaintiffs to satisfy typicality and commonality.

Kohl v. Ass’n of Trial Lawyers, 183 F.R.D. 475, 484 (D. Md. 1998). Pension plan participants claiming denial of accrued benefits satisfied typicality and commonality requirements because they suffered the same harm where plan administrator failed to include cost of living adjustments.

But see:

Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998). Retirees seeking lifetime health care coverage at no cost and making ERISA claims based on theories of bilateral contract and estoppel did not satisfy typicality and commonality requirements where there were different representations to different retirees. The typicality premise, “as goes the claim of the named plaintiff, so goes the claims of the class,” was not satisfied.

Walker v. Asea Brown Boveri, Inc., 214 F.R.D. 58, 64 (D. Conn. 2003). Retirees alleging interference with accrued benefits where pension plan issued lump sum payments less than statutory minimum and where retirees had signed releases against employers satisfied commonality but did not satisfy typicality. The commonality requirement was satisfied where the issues were related to the calculation and distribution of lump sum payments. The typicality requirement was not satisfied because the class representatives were potentially subject to unique defenses because they signed releases that other class members did not and the validity of each waiver was at question.

Gesell v. Commonwealth Edison, 216 F.R.D. 616, 624 (C.D. Ill. 2003). There could be no typicality where conduct involved different meetings with different employees and employees individually based decisions on different reasons or on different statements by employer.

In re Sears Retiree Group Life Ins. Litig., 198 F.R.D. 487, 491-93 (N.D. Ill. 2000). Retirees seeking certification after employer amended group life

insurance plan by reducing benefits for some employees did not satisfy typicality and commonality requirements for claims of breach of fiduciary duty and estoppel because allegations of misrepresentations pertained to a variety of oral and written communications. Plaintiffs attempted to remedy their claims by relying on only two documents received by all putative class members, but the court rejected this attempt, holding that communications must be looked at within the “total mix” of information that was available to plaintiffs. The court also held that the communications were too varied for class certification because the communications differed “from region to region, time to time, retirement seminar to retirement seminar, individual injury to individual injury.”

Likewise, if the class representative is subject to particular defenses due to unique circumstances, typicality will be more difficult to satisfy. Under this “unique defenses” doctrine, for example, if the class representative signed a waiver and other members have not, the validity of the waiver is likely to become a focus of the litigation and affect the class representative’s ability fairly and adequately to represent the class. Walker, 214 F.R.D. at 64-65. A unique defense becomes a factor in considering the class representative’s adequacy and may bar the representative’s ability to represent the class. See generally Scott v. N.Y. City Dist. Council of Carpenters Pension Plan, 224 F.R.D. 353 (S.D.N.Y. 2004). The mere fact that the named plaintiffs could be subject to such defenses may render their claims atypical of other class members. See In re Indep. Energy Holdings PLC, Sec. Litig., 210 F.R.D. 476, 481 (S.D.N.Y. 2002) (stating “a unique defense need not be proven in order to defeat class certification”). The Fifth Circuit has stated that “the key typicality inquiry is whether a class representative would be required to devote considerable time to rebut Defendant’s claim.” Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 138 (5th Cir. 2005) (quoting Lehocky v. Tidel Techs., Inc., 220 F.R.D. 491, 501-02 (S.D. Tex. 2004)); see also Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 314 (5th Cir. 2007).

In Langbecker, a class of participants of a 401(k) defined contribution plan claimed the company breached its fiduciary duty by continuing to allow participants to purchase the company’s own stock when the plan fiduciaries knew that it was not a prudent investment. 476 F.3d at 303-04. One of the named plaintiffs continued to trade in the company stock after the disclosures that led to the decrease in the stock price. Id. at 314. The plan fiduciaries argued that this action prevented him from being a typical member of the class. Id. The Fifth Circuit disagreed. While acknowledging that it might create an intraclass conflict and he might be subject to some unique defenses, the court found the plaintiffs’ act did not mean that he could not be typical of the whole class. Id. The Fifth Circuit found that the named plaintiff’s personal investing strategy is different from the fiduciary’s breach of duty. Id. Therefore, the named plaintiff was a typical class member. Id.

In Wiseman v. First Citizens Bank & Trust Co., a class of participants of a 401(k) pension plan claimed breach of fiduciary duty for alleged misleading statements relating to a fund available under the 401(k) plan. 212 F.R.D. 482 (W.D.N.C. 2003). Under the 401(k), class members had independent control of the accounts and the named plaintiffs, as experienced bankers and investors, were likely to face a different defense strategy than typical class members would. Id. at 488. Thus, the class satisfied numerosity but could not satisfy typicality or commonality.

See also:

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 59 (2d Cir. 2000). *The court affirmed a denial of class certification because the typicality requirement could not be met and “class certification is inappropriate [if] a putative class representative is subject to a unique defense that threatens to become the focus of the litigation.”*

d. Adequacy of representation

Rule 23(a)(4) requires that the “representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). Courts have read this rule to entail two main inquiries: one, whether the class representative’s interests are antagonistic to any of the proposed class members; and, two, whether the class representative’s attorneys are qualified. *See Bradford v. AGCO Corp.*, 187 F.R.D. 600, 605 (W.D. Mo. 1999) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 n.20 (1997)). Also, courts have used “a ‘generic standard’ for the adequacy requirement, noting that ‘the class representatives [must] possess a sufficient level of knowledge and understanding to be capable of ‘controlling’ or ‘prosecuting’ the litigation.’” *Feder*, 429 F.3d at 130 (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-83 (5th Cir. 2001)). Some courts have stated that the class representative may rely on legal counsel to obtain some of that knowledge, but the class representative may not rely completely on counsel. *Id.* at 131, 132 n.4.

Under the first inquiry, antagonism has been defined as a “conflict that goes to the very subject matter of the litigation.” *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 237 (W.D. Pa. 2001) (citing *Ga. State Conference of Branches of NAACP v. Georgia*, 99 F.R.D. 16, 34 (S.D. Ga. 1983)). For example, in *Doe v. Guardian Life Insurance Co. of America*, the lead plaintiff was a partner of a law firm suing on behalf of the beneficiaries and participants of an employee health insurance plan used by his firm. 145 F.R.D. 466 (N.D. Ill. 1992). The plaintiff claimed insurers breached fiduciary duties and violated disclosure requirements by denying claims for treatment of bipolar disorder. *Id.* at 474. The court found no antagonism where the lead plaintiff potentially had a fiduciary duty and conflict due to his firm’s use of the plan. *Id.* The court held that defendants did not provide evidence to rebut the lead plaintiff’s personal stake in the litigation, and any defenses unique to the plaintiff did not affect plaintiff’s general interest in reimbursement for treatment of bipolar disorder. *Id.*

See also:

Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 314-15 (5th Cir. 2007). *The court held that there might be too many intraclass conflicts to satisfy the adequacy of representation requirement. The multiple conflicts included that some members of the class signed releases; many members had continued to purchase the company’s stock; the price drop affected class members in different ways; and plaintiffs were seeking an injunction that could be contrary to the interests of some class members. The court remanded the case to the district court to consider these conflicts to determine if a class could be certified and if there was a need for subclasses within the overall class.*

Mathews v. Sears Pension Plan, No. 95 C 1988, 1996 WL 199746, at *4 (N.D. Ill. Apr. 23, 1996). The district court disqualified a named plaintiff who signed a release as not only atypical but also an inadequate representative because he would have interests adverse to rest of class. As one who signed a potentially valid release, he would have a stronger incentive to settle and maximize his own self-interest, rather than vigorously press the claims of absent class members.

Under the second inquiry, courts assume adequacy of counsel upon a showing of basic experience and qualifications by the plaintiff unless defendants challenge the adequacy of counsel. See *Mueller*, 200 F.R.D. at 238-39. Due ERISA's complexity, plaintiff's counsel for a class action would presumably need experience with ERISA and class actions to satisfy this adequacy requirement. See *Kohl v. Ass'n of Trial Lawyers*, 183 F.R.D. 475, 485 (D. Md. 1998) (citing *Sosna v. Iowa*, 419 U.S. 393, 403 (1975)). A representative plaintiff, however, need only have a basic understanding of the claims and issues to serve as a representative. *Mueller*, 200 F.R.D. at 238 (citing *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 366 (1966)).

The adequacy of representation requirement also overlaps with the other requirements of Rule 23(a). For example, commonality and typicality directly affect the adequacy of representation requirement because if a putative class representative had varied experiences as to circumstances related to a common issue, the interests of the representative and the rest of the class could diverge and become antagonistic. Conversely, where commonality and typicality are met, the adequacy of representation requirement is rarely problematic for plaintiffs.

See:

Kohl v. Ass'n of Trial Lawyers, 183 F.R.D. 475, 484-85 (D. Md. 1998). Retirees claiming denial of accrued benefits were not antagonistic to their class. Whether they were antagonistic to current employees who could potentially lose benefits if suit were successful was not relevant to certification of class that consisted solely of retirees/former employees focusing on the common issue of failure to provide cost of living adjustments.

Dameron v. Sinai Hosp. of Baltimore, Inc., 626 F. Supp. 1012, 1016 (D. Md. 1986), *aff'd. in part, rev'd in part on other grounds*, 815 F.2d 975 (4th Cir. 1987). Court was concerned that because class was comprised of current and former employees, former employees would be antagonistic to current employees who could lose benefits if suit regarding calculation of benefits was successful. Court required a meeting of representatives of the groups. The union representing current employees responded that no conflict existed between current and former employees, and the court permitted the plaintiff to represent both groups.

3. Requirements of Rule 23(b) in ERISA class actions

Besides the four requirements of Rule 23(a), a putative plaintiff class must satisfy one of the three alternative requirements of Rule 23(b). A plaintiff can plead that the class fits under more than one Rule 23(b) section, and the relief sought under ERISA will often determine which of the requirements may be applicable. Furthermore, as under Rule 23(a), if a class does

not meet any requirement of Rule 23(b), the suit can be limited in scope or the class can be divided into subclasses that better satisfy the requirements. See Fed. R. Civ. P. 23(c)(4).

a. Risk of inconsistent or varying decisions

Rule 23(b)(1) allows class certification if the prosecution of separate actions would create a risk of inconsistent adjudications with respect to individual members of a class that would either (A) establish incompatible standards of conduct for defendants; or (B) as a practical matter, be dispositive to the interests of other members not a party to the adjudications. FED. R. CIV. P. 23(b)(1); see generally Ortiz v. Fibreboard Corp., 527 U.S. 815, 830-36 (1999) (discussing history of Rule 23(b)). Also, notice is not required for a class under Rule 23(b)(1), but notice may be directed by the court. Fed. R. Civ. P. 23(c)(2)(A); UAW v. Gen. Motors Corp., 497 F.3d 615, 630 (6th Cir. 2007). The Rule 23(b)(1) requirement, through its two possibilities, is “the most easily satisfied prong of 23(b) in ERISA cases.” SANDALS, supra, at 3. For example, if participants of a plan were to sue individually against a plan administrator who owed the same duty to all participants, the defendant could face incompatible rulings on standards of conduct, thus triggering Rule 23(b)(1)(A). Similarly, with respect to Rule 23(b)(1)(B), the potential costs to individual defendants, as well as the *stare decisis* effect of different cases, could impair other plan members’ ability to sue and recover. Id.

See:

Kohl v. Ass’n of Trial Lawyers, 183 F.R.D. 475 (D. Md. 1998). *Retirees claiming denial of accrued benefits satisfied both Rules 23(b)(1) and 23(b)(2) where calculation of the cost of living adjustments in separate litigations would create inconsistencies and where it appeared that plan administrator acted in consistent manner toward the class members.*

b. Defendant is subject to injunctive or declaratory relief

Rule 23(b)(2) allows for class certification where the party opposing the class has acted on grounds generally applicable to the class, thus making injunctive or declaratory relief appropriate. In the ERISA context, if the relief sought is for an entire plan, this section is almost “automatically” applicable. McHenry v. Bell Atlantic Corp., No. 97-6556, 1998 WL 512942, at *7 (E.D. Pa. Aug. 18, 1998) (citing Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57-58 (3d Cir. 1994)). In addition, because relief will likely have the same effect on all class members under Rule 23(b)(2), notice to class members of the suit or the option to opt out is not required. In re Allstate Ins. Co., 400 F.3d 505, 506-07 (7th Cir. 2005); see also UAW, 497 F.3d at 630. “But when . . . the effect of the declaration on individual class members will vary with their particular circumstances, they should be given notice of the class action so that they can decide whether they would be better off proceeding individually. In re Allstate Ins. Co., 400 F.3d at 508 (citing In re Monumental Life Ins. Co., 365 F.3d 408, 417 (5th Cir. 2004)).

Furthermore, the use of this prong is not precluded even if monetary relief flows from the suit. See In re Unisys Corp. Retiree Med. Ben. ERISA Litig., 57 F.3d 1255, 1269 (3d Cir. 1995) (holding specific performance that entailed restitution of benefits was held to be equitable relief). As the Second Circuit has stated, if a plaintiff seeks monetary relief along with

injunctive relief, “the court must determine whether the requested monetary relief predominates over the claims for equitable relief [because Rule 23(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.” Parker v. TimeWarner Entm’t Co., 331 F.3d 13, 18 (2d Cir. 2003) (citing Fed. R. Civ. P. 23(b) advisory committee’s notes). When making this determination, a district court should “satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” Id. at 20.

See:

Bradford v. AGCO Corp., 187 F.R.D. 600, 605 (W.D. Mo. 1999). *Retirees seeking injunctive relief claiming breach of fiduciary duty where benefits under collective bargaining agreement were allegedly changed or denied satisfied Rule 23(b)(2) requirement despite the fact they sought monetary relief flowing from the injunction.*

Kohl v. Ass’n of Trial Lawyers, 183 F.R.D. 475, 485-86 (D. Md. 1998). *Retirees claiming denial of accrued benefits satisfied both Rule 23(b)(2) and 23(b)(1) because it appeared that plan administrator acted in consistent manner toward the class members by not calculating cost of living adjustments in every instance and because calculation of the cost of living adjustments in separate litigations would create inconsistencies.*

But see:

Mueller v. CBS, Inc., 200 F.R.D. 227, 241 (W.D. Pa. 2001). *Putative class claiming breach of fiduciary duty where employees were advised allegedly they could not receive optional lump sum pension benefits unless they released claims against employer did not satisfy the Rule 23(b)(2) where no class member was employed at time of suit and thus monetary damages through lump sum payments would have been unrelated to any injunction.*

Rule 23(b)(2) is more difficult to satisfy if individual reliance must be shown because a class representative’s success will not establish on its own relief for other class members. Heffner, 443 F.3d at 1344-45; see also Langbecker, 476 F.3d at 317 (denying certification under Rule 23(b)(2) where individual damage calculations will be required). Therefore, if individual reliance is an issue, certification under Rule 23(b)(2) is unlikely.

c. Common questions predominate and a class action is superior

Rule 23(b)(3) allows for class certification where the questions of law or fact common to the class predominate over questions affecting individual class members, and where a class action is superior to other methods of adjudication. Factors relevant to this requirement include: (A) the individual interests of members of class in controlling prosecution or defense of separate actions; (B) any litigation concerning the controversy already commenced by or against class members; (C) the desirability of concentrating litigation in a particular forum; and (D) any

difficulties likely in managing the class. Fed. R. Civ. P. 23(b)(3). Unlike Rule 23(b)(1) & (b)(2), stringent notice is required for a class to be certified under Rule 23(b)(3). *UAW*, 497 F.3d at 630; Fed. R. Civ. P. 23(c)(2)(B).

Although this requirement is often read together with the commonality requirement, the Rule 23(b) commonality component is more demanding. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Whereas the commonality requirement looks at whether the common issues apply to all class members, Rule 23(b)(3) looks at whether the proposed class action is practical for all class members. *Doe v. Guardian Life Ins. Co. of Am.*, 145 F.R.D. 466, 475 (N.D. Ill. 1992) (quoting *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 41-42 (E.D. Va. 1981)). Similar to the commonality prong, defining a class by a general issue such as breach of fiduciary duty instead of individualized issues such as reliance can be the key for ERISA plaintiffs. Whether common questions predominate over individual questions is a matter of “degree.” *SANDALS*, *supra*, at 5. Individual circumstances, even reliance, are not problematic unless they are so voluminous or complex that they bog down examination of common questions. *Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955, 957 (7th Cir. 1998).

See:

Doe v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466, 476-77 (N.D. Ill. 1992). *Beneficiaries and participants of employee health insurance plan who claimed insurers breached fiduciary duties and violated disclosure requirements by denying claims for treatment of bipolar disorder satisfied commonality requirement and typicality requirements. Common questions, however, did not predominate where individual issues of diagnosis, non-coverage, and estoppel could potentially require numerous and lengthy mini-trials.*

In ERISA cases, the cause of injury and the nature of damages are often common questions that do not require individual inquiries. Furthermore, because the common bond for ERISA plaintiffs is often an employer or plan, the Rule 23(b)(3) factors are usually not problematic for class certification as any ERISA suit would likely be known to the other potential class members and will often be initiated in the same forum.

See:

Ries v. Humana Health Plan, Inc., No. 94 C 6180, 1997 WL 158337, at *10 (N.D. Ill. Mar. 31, 1997). *Participants of healthcare plan claiming breach of fiduciary duty and seeking reimbursement for alleged discounted payments to health care providers satisfied Rule 23(b)(3). The court found that management of the class, despite uncertainty of the number of class members and despite various plans involved, did not pose a problem to the management of the class where the various plans likely contained similar language.*

XIV. CLAIMS BASED ON THE FEDERAL COMMON LAW OF ERISA

This section addresses the scope of the federal courts' power to develop federal common law under ERISA, with a special emphasis on remedies and the elements of currently recognized federal common law claims. Justice Brennan observed that "[t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (Brennan, J., concurring). While ERISA is described as a "comprehensive and reticulated statute," Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980), the Supreme Court concluded in an opinion by Justice Brennan "that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (holding that ERISA does not apply), overruled in part on other grounds by Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)) (citations omitted).

A. THE COURTS' POWER TO DEVELOP ERISA FEDERAL COMMON LAW

1. Justifications for the courts' power to develop federal common law

The power of courts to fashion a federal common law under ERISA begins with § 514(a), which states that ERISA preempts state laws "insofar as they may . . . relate to" an employee benefit plan. 29 U.S.C. § 1144(a). Focusing on this language, the Court has concluded that "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive" of traditional state law claims. Pilot Life, 481 U.S. at 54. Furthermore, turning to the legislative history, the Court has maintained that "in light of the Act's virtually unique pre-emption provision, '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.'" Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 25 n.26 (1983) (quoting remarks of ERISA's sponsor) (citations omitted), superseded by statute on other grounds, 28 U.S.C. § 1441(e).

Because "the pre-emptive force of § 502(a) was modeled after § 301 of the LMRA [Labor-Management Relations Act of 1974]," Pilot Life, 481 U.S. at 54, and "ERISA abounds with the language and terminology of trust law," Firestone, 489 U.S. at 110, the Court concluded that, as with the LMRA, Congress intended for the courts to develop a federal common law "guided by principles of trust law." Id. at 111. In accepting this role, courts often insist that they are merely filling gaps in the legislation with federal common law. In some cases, courts have stated that this "gap-filling" power is merely the ability to address questions of statute interpretation and plan construction that ERISA's text leaves unanswered. In other cases, courts find that "gap-filling" includes creating remedies that ERISA specifically does not recognize.

See:

UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of Am., 998 F.2d 509, 512 (7th Cir. 1993). The court affirmed the right of a non-fiduciary employer to claim restitution for erroneous contributions to a plan, even though the employer would have no standing under ERISA's six authorized causes of action. The court noted, "[w]e have . . . been extremely reluctant to find that ERISA creates certain causes of action . . . in addition to those enumerated in the statute itself The Union, however, does not ask us to imply a 'new' cause of action under ERISA but simply urges us to fill in ERISA's interstices with federal common law."

Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 303 (5th Cir. 1992). The court found a similar common law right to restitution for non-fiduciary employers stating "whenever Congress enacts complex and comprehensive legislation, such as ERISA, minor gaps in the legislation are unavoidable. Congress cannot be expected to perceive in advance all the ramifications of its legislation. It is the judiciary's role, therefore, to fill in these gaps."

2. Scope of the power to develop federal common law

As noted above, some courts have used federal common law to fashion remedies not found among ERISA's "exclusive" list of statutory remedies. However, much of the federal common law development under ERISA relates purely to interpretation of the explicit provisions of the Act. Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y, 541, 556 (1998). As noted above, courts interpreting ERISA have been guided by the principles of trust law. For example, courts have used trust principles in their interpretation of fiduciary duties under ERISA. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 502-03 (1996) (relying on common law of trusts to hold that employer acted as fiduciary in informing employees about benefit plan). Similarly, courts apply the common law of agency to determine whether an individual was an "employee" within the meaning of ERISA.

See:

Penn v. Howe-Baker Eng'rs, Inc., 898 F.2d 1096, 1101 n.6 (5th Cir. 1990). Court applied common law principles of agency to an ERISA plan saying "[w]e agree that because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency."

Wardle v. Cent. States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 825 (7th Cir. 1980). In applying common law agency principles, the court noted "[i]n most instances of decision, there is no shorthand formula or magic phrase that can be applied to find an answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."

But see:

Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986). In refusing to apply common law agency principles to an ERISA plan, the court stated, “[w]e conclude, however, that the common-law test for the relationship of master and servant is not the appropriate standard for application here. The Supreme Court has emphasized on two occasions that the definition of ‘employee’ should be tailored to the purposes of the statute being construed.”

Additionally, in Firestone the Supreme Court invoked its power to create federal common law to establish a standard of review for plan administrator decisions under ERISA. Firestone, 489 U.S. at 115. It held that “a denial of benefits challenged under § 1132(a)(1)(B) must 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 plan’s terms.” Id. The circuit courts have further elaborated on this standard.

See:

Luby v. Teamsters Health, Welfare, & Pension Trust Funds, 944 F.2d 1176, 1183-84 (3d Cir. 1991). The court found that ERISA did not set forth a standard for reviewing ERISA administrator decisions of entitlements as to two claiming beneficiaries and concluded “that an ERISA plan administrator’s decision as to entitlement between beneficiary claimants based solely on factual determinations is to be reviewed *de novo*. We believe that this is consistent with Firestone and its emphasis on the goals of ERISA: to protect the interest of plan members and their beneficiaries.”

Lowry v. Bankers Life & Cas. Ret. Plan, 871 F.2d 522, 524-25 (5th Cir. 1989). In deciding when to defer to an administrator’s eligibility decisions, the court stated, “we believe that the unambiguous language in the Plans mandate deference to the plan administrators under the circumstances in this case. Unlike in [Firestone], there is evidence that under the trust instruments the administrator has the power to construe uncertain terms [and] that eligibility determinations are to be given deference Given the language of both the Savings and Retirement Plans, then, [Firestone] dictates that an abuse of discretion standard should apply in this case.”

The courts of appeal have also held, as a matter of federal common law, that while ERISA requires that pension benefits vest upon retirement, the parties to a welfare benefit plan are free to determine contractually when and if those benefits will vest or be terminated. See, e.g., In re White Farm Equip. Co., 788 F.2d 1186, 1193 (6th Cir. 1986).

See:

Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 603 (7th Cir. 1989). Distinguishing between benefit and pension plans, the court observed, “[a]ppellants now recognize that their claims concern the termination of ‘employee welfare benefits’ and that Congress explicitly exempted such welfare benefits from the statute’s accrual, vesting, and funding requirements

Through [the plan documents], the parties are free to subject such welfare benefits to vesting requirements not provided by ERISA, or they may reserve the power to terminate such plans.”

Finally, courts have fashioned a federal common law to address issues of plan interpretation. ERISA does not provide any principles for interpreting the plans it covers. Brauch, supra, at 573. In response, the courts have turned to common law doctrines to fashion a federal common law of ERISA plan interpretation. For instance, several courts have applied common law principles of contract interpretation in construing the terms of ERISA plans. Burnham v. Guardian Life Ins. Co. of Am., 873 F.2d 486, 489 (1st Cir. 1989).

See:

Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1376 (6th Cir. 1994) (quoting *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993)). *The court held that common law contract principles would apply to ERISA plans, stating “[i]f the plan documents are ambiguous with respect to a particular term, then, under federal common law, a court may use traditional methods of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence.”*

Glocker v. W.R. Grace & Co., 974 F.2d 540, 544 (4th Cir. 1992). *“On remand the district court, heeding Firestone, should interpret the Plan in accordance with the principles of contract law. The primary effort should be to ascertain the intent of the parties Alleged ambiguities should be reconciled, if possible, by giving language its ordinary meaning”*

Bellino v. Schlumberger Techs., Inc., 944 F.2d 26, 29 (1st Cir. 1991) (quoting *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989)). *“The federal common law of rights and obligations, while still in formation, must embody common-sense canons of contract interpretation.”*

3. Principles that guide the development of ERISA common law

Although Pilot Life invited federal courts to develop federal common law under ERISA, recent Supreme Court decisions have placed limits upon its development. For example, Mertens v. Hewitt Associates, extended Russell and made clear that legal relief is unavailable under § 1132(a)(3), which limits individual claims to “appropriate equitable relief.” 508 U.S. 248, 257 (1993). Guided by the principles of trust law, the Court found that only “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)” could be obtained. Id.; see also supra Section IV.B (discussing statutory remedies). While the Court’s decision in Mertens recognized restitution as an equitable remedy, more recently the Court has distinguished between restitution “at law,” in which the plaintiff “could not assert title or right to possession of particular property” and restitution “in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.” Great-West Life & Annuity

Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002). The court held that only restitution in equity is appropriate under § 1132(a)(3).

While the Court has never addressed a claim for relief based solely on federal common law, such as in UIU Severance Pay Trust Fund or Jamail, these same principles of equitable relief would no doubt apply to how the Court would address the legitimacy of any federal common law claim. Beyond this, the Court has offered only limited guidance to courts crafting federal common law. Essentially, courts developing a federal common law are guided by ERISA's language, structure and purpose.

See:

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999). *Refusing to apply a common-law theory of wasting trust to terminate a plan, the court unanimously held that "[ERISA] should not be supplemented by extratextual remedies, such as the common-law doctrines advocated by respondents Application of the wasting trust doctrine in this context would appear to be inconsistent with the language of ERISA's termination provisions."*

Varity Corp. v. Howe, 516 U.S. 489, 497 (1996). *Applying the fiduciary duties traditionally recognized under trust law to ERISA plans, the Court noted "we believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." While trust law may be a starting point, courts also consider "the language of the statute, its structure, or its . . . purposes, such as Congress's 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."*

Mertens v. Hewitt Assoc., 508 U.S. 248, 259 (1993). *The Court rejected employees' complaint seeking money damages against a non-fiduciary for knowingly participating in the breach of a fiduciary, noting that "[t]he authority of courts to develop a federal common law under ERISA is not the authority to revise the text of the statute."*

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990). *In rejecting the application of a constructive trust to a plan—for embezzlement of company funds—as contrary to ERISA's express proscription against alienation or assignment of pension benefits, the Court stated "[a]s a general matter, courts should be loathe to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text."*

Consistent with the Court's language in these cases, circuit courts limit the development of federal common law by deferring to ERISA's policies, purposes and specific provisions of the statute. In particular, courts state that they create federal common law only insofar as the provisions of ERISA are silent on an issue; only to the extent that such law is

consistent with ERISA's policies; and may rely upon state law only to the extent that it is not *inconsistent* with those policies.

See:

Coop. Benefit Adm'rs, Inc. v. Ogden, 367 F.3d 323 (5th Cir. 2004). “[F]ederal common law may be applied to fill ‘minor gaps’ in ERISA’s text, as long as the federal common law rule created is compatible with ERISA’s policies [W]e [have] cautioned that the power of the judiciary to develop federal common law pursuant to ERISA does not give carte blanche power to rewrite the legislation to satisfy our proclivities. Thus, federal courts do not have authority under ERISA to create federal common law when that statute specifically and clearly addresses the issue before the court. This is so because, in such instances, the legislative scheme does not contain a ‘gap’ that requires ‘filling’ by application of federal common law. Thus, a court’s general opinion as to what remedies might further ERISA’s underlying policies will not be sufficient to overcome the words of its text regarding the specific issue under consideration.”

United McGill Corp. v. Stinnett, 154 F.3d 168, 171 (4th Cir. 1998). “Courts should only fashion federal common law when necessary to effectuate the purposes of ERISA.”

Thomason v. Aetna Life Ins. Co., 9 F.3d 645, 647 (7th Cir. 1993). “Courts may develop such a federal common law only where ERISA itself does not expressly address the issue before the court. Where the statute is silent, courts must construct a common law that effectuates the policies underlying ERISA. In so doing, they may use state common law as a basis for new federal common law, but only to the extent that state law is not inconsistent with congressional policy concerns.”

Singer v. Black & Decker Corp., 964 F.2d 1449, 1452 (4th Cir. 1992). “[R]esort to federal common law generally is inappropriate when its application would conflict with the statutory provisions of ERISA, discourage employers from implementing plans governed by ERISA, or threaten to override the explicit terms of an established ERISA benefit plan. And, courts should remain circumspect to utilize federal common law to address issues that bear at most a tangential relationship to the purposes of ERISA.”

Nachwalter v. Christie, 805 F.2d 956, 959 (11th Cir. 1986). The court refused to create a federal common law estoppel claim that would recognize oral modification of an ERISA plan, holding “[a] federal court may create federal common law based on a federal statute’s preemption of an area only where the federal statute does not expressly address the issue before the court. Furthermore, even when it is appropriate for a federal court to create federal common law, it may use state common law as the basis of the federal common law only if the state law is consistent with the policies underlying the federal statute in question”

However, several courts warn that the authority to create new federal common law remedies is “far more circumscribed” than is the power to fashion substantive rules based on the laws of contracts and trusts. In particular, courts have consistently rejected attempts to expand ERISA federal common law to include claims for purely legal remedies. Pappas v. Buck Consultants, Inc., 923 F.2d 531, 541 (7th Cir. 1991) (refusing to find cause of action for misrepresentation against non-fiduciaries).

See also:

Buckley Dement, Inc. v. Travelers Plan Admin. of Ill., Inc., 39 F.3d 784 (7th Cir. 1994). *The court would not recognize a federal common law claim by a plan administrator for compensatory damages against a non-fiduciary for failure to process claims in a timely fashion, saying “[t]he statute’s ‘six carefully integrated civil enforcement provisions’ to remedy ERISA violations, found at 29 U.S.C. § 1132(a), demonstrate the evident care with which the remedial aspects of the statute were crafted. This consideration counsels against our concluding that Congress intended the federal courts to fashion any other remedies.”*

Reich v. Rowe, 20 F.3d 25, 31-33 (1st Cir. 1994). *The court refused to recognize non-fiduciary liability for participation in a fiduciary’s breach of duty and observed that “[a]ll things considered, judicial remedies for non-fiduciary participation in fiduciary breach fall within the line of cases where Congress deliberately omitted a potential cause of action rather than the cases where Congress has invited the courts to engage in interstitial lawmaking We are more willing to create common law remedies that are directed toward undoing specific transactions or recovering assets of an ERISA plan. In those situations, the parties are more likely to be in control of plan assets and thus functionally more like fiduciaries.”*

The Supreme Court has also recently stated that while federal courts may “develop a federal common law . . . under ERISA . . . the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged.” Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003) (internal citations omitted) (rejecting courts’ ability to impose treating physician rule absent authorization of Congress or Secretary of Labor).

B. RECOGNIZED FEDERAL COMMON LAW ERISA CLAIMS

When circuit courts recognize federal common law claims not otherwise available under ERISA, they adhere closely to ERISA’s connections with trust law that the Supreme Court recognized in Firestone and to traditional elements of contract law. Thus, courts consistently reject claims for relief that they characterize as purely legal in nature. *See, e.g., Costigan & Co., P.C. v. Costigan*, No. 00CIV.6143, 2000 WL 1693544, at *4 (S.D.N.Y. Nov. 13, 2000) (refusing to find ERISA federal common law claim for conversion, noting remedy was legal and not equitable in nature); Ferry v. Mut. Life Ins. Co., 868 F. Supp. 764, 776-77 (W.D. Pa. 1994) (rejecting federal common law claims for tortious breach of contract conversion and breach of fiduciary duty); Cal. Digital Defined Benefit Pension Fund v. Union Bank, 705 F. Supp. 489 (C.D. Cal. 1989) (dismissing federal common law claims for breach of contract, breach of implied covenant of good faith and fair dealing, conversion, intentional interference with

prospective economic advantage, and negligence). Parties may not refashion their claims under federal common law where they are already expressly provided for in ERISA. See Rego v. Westvaco Corp., 319 F.3d 140, 148 (4th Cir. 2003) (rejecting plaintiff’s attempt to refashion claims for negligent misrepresentation and breach of fiduciary duty under federal common law where plaintiff essentially was seeking damages for denial of benefits and breach of fiduciary duty, two actions for which ERISA already provides remedies).

Unless otherwise noted, the elements of the claims that courts recognize, such as the elements for a claim of restitution, appear to be identical to what they would be in other contexts where these claims might be sought.

1. Federal common law theories of liability used by plaintiffs who are participants or beneficiaries against an ERISA plan

a. Restitution

Courts not only recognize a claim for restitution under § 1132(a)(3)—as one form of the “other appropriate equitable relief” available to parties that have standing as participants, beneficiaries and fiduciaries—but, as noted at the beginning of this section, nearly every circuit also recognizes the right of non-fiduciary employers to seek restitution for amounts mistakenly contributed to ERISA plans. See Young Am., Inc. v. Union Cent. Life. Ins. Co., 101 F.3d 546, 548 (8th Cir. 1996). While ERISA’s anti-inurement principle declares that “the assets of the plan shall never inure to the benefit of any employer,” it contains an exception allowing pension plans to reimburse employers when an excess contribution results from a “mistake of law or fact.” 29 U.S.C. § 1103(c)(1)-(2)(A). However, as the Seventh Circuit noted in UIU Severance Pay Trust Fund, “ERISA *permits* plan trustees to return to employers payments made to a plan which are the result of a mistake of law or fact [I]t does not establish a cause of action by which employers may seek to *compel* such a refund. Absent a judicially-crafted cause of action, employers are left to the mercy of plan trustees who have no financial incentive to return mistaken payments.” 998 F.2d at 512-13 (citation omitted). Acknowledging this fact, every circuit except the Second and Eleventh Circuits recognize the general right of employers to seek restitution for mistaken contributions to plans. Significantly, though not surprisingly, each of these courts has cautioned that they will apply the principles of equity to determine whether or not restitution should be awarded.

See:

Kwatcher v. Mass. Serv. Employee Pension Fund, 879 F.2d 957, 966-67 (1st Cir. 1989), *overruled in part on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004). “Such an anodyne makes the playing field level for employers and employees, reduces the risk of draconian treatment for those who overpay, and is fully consonant with ERISA’s underlying policies as expressed in 29 U.S.C. § 1103(c)(2)(A). Rather than undermining ERISA’s remedial scheme, equity supplements it by providing a tool for courts to use when one party ‘has been unjustly enriched at the expense of another.’ . . . Recoupment will not follow automatically upon a mere showing that a plaintiff has tendered more than required, but only ‘when the equities favor it.’”

Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1057-58 (3d Cir. 1989). "Of course, general equitable principles govern and when it would be inequitable to so order, for example, when restitution would result in the underfunding of the plan, the court should in its sound discretion deny recovery. We believe that creating such a cause of action will fill in the interstices of ERISA and further the purposes of ERISA. We do not believe that by enacting [§ 1103] of ERISA, which simply permits funds to refund mistaken contributions, Congress intended to foreclose the courts from investing employers with a remedy."

Teamsters Local 639-Employers Health Trust v. Cassidy Trucking, Inc., 646 F.2d 865, 868 (4th Cir. 1981). The court emphasized the need to weigh the equities in restitutionary cases and stated, "[w]e believe that if Congress intended by this section to make recovery automatic once a mistake of fact is proved, and thereby alter the traditional principles of equity which otherwise would be applicable to such cases, it would have clearly evidenced its intent to do so."

But see:

Dime Coal Co. v. Combs, 796 F.2d 394, 399-400 (11th Cir. 1986). The court rejected a federal common law claim for restitution by non-fiduciary employers and noted, "[r]egardless of whether we focus on the refund provision as originally enacted or on the 1980 amendment that authorizes the return of the mistaken contributions at issue in this case, we find no indication in the language of the statute or in its legislative history that Congress intended or would approve of the implication of the remedy [of restitution] We are thus confident that the trustees could have refunded the mistaken contributions that are at issue in this case without exposing themselves to the fiduciary liability they fear. But we hold that, as a matter of federal law, a contributing employer may not require multiemployer employee benefit plan trustees to return such contributions if the trustees choose not to do so. Whether such an action might be entertained in the future is a decision that must be left solely in the capable hands of the Congress."

Award Serv., Inc. v. N. Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund, 763 F.2d 1066, 1068 (9th Cir. 1985). Instead of finding a federal common law claim of restitution, the court found that non-fiduciary employers had an implied right of restitution under § 1103, saying "[f]irst, the 1980 amendment to section 403(c)(2)(A), which added subparagraph (ii) concerning payments made by an employer by mistake of fact or law, was clearly designed for the benefit of employers Second, a congressional intent to create a private remedy in favor of the employer is implicit in section 403(c)(2)(A)(ii). Without such a remedy, the decision to return contributions mistakenly paid would be left solely to the interested trustee. Third, implying a private right of action furthers the congressional scheme of permitting restitution of contributions made by mistake when equitable factors militate in favor of such restitution."

For its part, the Second Circuit recognizes a more circumscribed right to restitution by an employer for contributions in error. In addition to demonstrating that the

equities of the case favor restitution, one seeking reimbursement must show that the plan's refund policy is "arbitrary or capricious." Dumac Forestry Serv. Inc. v. Int'l Bhd. of Elec. Workers, 814 F.2d 79, 82 (2d Cir. 1987); see also Frank L. Ciminelli Constr. Co. v. Buffalo Lab. Supp. Unemployment Benefit Fund, 976 F.2d 834, 835 (2d Cir. 1992) (applying arbitrary and capricious standard in restitution case). The court also has applied the arbitrary and capricious standard to cases where employers seek to have their erroneous contributions set off against required future payments. See Brown v. Health Care & Ret. Corp. of Am., 25 F.3d 90, 94 (2d Cir. 1994) ("[W]e extend the requirements of Dumac and Ciminelli to an employer asserting a setoff.").

The Seventh Circuit has offered a non-exclusive list of factors courts should consider in weighing the equity of ordering restitution in a given case. These include the following: (1) whether the erroneous contributions are the sort of mistaken payments that equity demands be refunded; (2) whether the plaintiff delayed in bringing suit, so that laches, or some other equitable defense bars recovery; (3) whether the plaintiff ratified the payments by failing to question them over a period of years; and (4) whether defendant be unjustly enriched if recovery were denied. UIU Severance Pay Trust Fund, 998 F.2d at 513. Moreover, the Seventh Circuit has observed that courts may deny restitutionary relief where overriding and explicit contractual provisions in the plan addressed erroneous contributions. See Cummings v. Briggs & Stratton Ret. Plan, 797 F.2d 383, 390 (7th Cir. 1986).

The Supreme Court's recent decision in Knudson has somewhat changed the landscape of restitutionary claims under ERISA. As noted above, *equitable* restitution under ERISA's § 1132(a)(3) requires the plaintiff to identify a particular set of assets which rightly belong to the plaintiff. 534 U.S. at 214. It is likely that this same limitation would apply to federal common law restitution claims. Otherwise, allowing what the Supreme Court called restitution "at law" under the federal common law would render equitable relief under § 1132(a)(3) less favorable than the relief available under federal common law, clearly defying what the Court identified as congressional intent in Knudson.

See:

Coop. Benefit Adm'rs, Inc. v. Ogden, 367 F.3d 323, 335 (5th Cir. 2004). "ERISA plan fiduciaries do not have a federal common law right to sue a beneficiary for legal (as distinct from equitable) relief on a theory of unjust enrichment or restitution."

Rego v. Westvaco Corp., 319 F.3d 140, 145-46 (4th Cir. 2003). Applying Knudson, the court declined to consider a monetary claim for denied benefits "equitable relief" when the assets could not be particularly identified. The court found that "[i]n this case, defendants possess no particular fund or property that can be clearly identified as belonging in good conscience to the plaintiff. The 'particular fund[] or property' that is the basis of Rego's claim was simply his share of the Savings Plan. And that share has long since been transferred to Rego; it is no longer in defendants' possession."

But see:

Empire Kosher Poultry, Inc. v. United Food & Commercial Workers Health & Welfare Fund of N.E. Pa., 285 F. Supp. 2d 573, 581-82 (M.D. Pa. 2003). Distinguishing *Knudson* as a statutory claim, making it inapplicable to federal common law claims, the court held that a federal common law cause of action for equitable restitution is cognizable in the context of ERISA plans.

UNUM Life Ins. Co. of Am. v. Long, 227 F. Supp. 2d 609, 614 (N.D. Tex. 2002). The court affirmed a restitutionary claim for overpayment of disability benefits and distinguished *Knudson* as a statutory claim under § 1132(a)(3) in saying that “[n]othing in [*Knudson*], which involved only statutory claims brought under section 502(a)(3) of ERISA, precludes an insurer from enforcing its rights through traditional common law remedies. Because UNUM has alleged a claim for unjust enrichment under federal common law, jurisdiction is proper under 28 U.S.C. § 1331.”

b. Rescission

Several courts have determined that federal common law allows for the equitable rescission of an ERISA-governed insurance policy that is procured through the material misstatements or omissions of the insured. See, e.g., *Shipley v. Ark. Blue Cross & Blue Shield*, 333 F.3d 898, 903 (8th Cir. 2003) (holding that “a misrepresentation as to a material matter made knowingly in an application for an ERISA-governed insurance policy is sufficient to rescind the policy”); *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1191 (9th Cir. 1998) (finding that “ERISA must provide a rescission remedy when an insured makes material false representations regarding his health”); *Hauser v. Life Gen. Sec. Ins. Co.*, 56 F.3d 1330, 1333-35 (11th Cir. 1995) (assuming that right of rescission exists under ERISA-created federal common law).

The Fourth Circuit also has concluded that rescission is a remedy available in connection with an ERISA plan.

See:

Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440 (4th Cir. 2004) (*Griggs II*). Employee who took early retirement brought action against employer claiming that employer negligently misrepresented the tax consequences of his election to take early retirement. The Fourth Circuit found that the plaintiff could not unilaterally “unretire” by returning his benefits and returning to work, so his action to amend his benefit election to select a monthly annuity rather than a lump sum payment clearly involved equitable rescission. The court held, as a matter of federal common law, rescission may be granted as “appropriate equitable relief” under ERISA, even if a full restoration of benefits conferred in the transaction cannot be accomplished.

c. Indemnification and contribution

Section 1109(a) imposes personal liability upon fiduciaries for any and all breaches of their fiduciary duties. In response to this personal liability, fiduciaries have sought indemnification or contribution from co-fiduciaries also responsible for breach of fiduciary duties contributing to the loss to the plan. See Brauch, *supra*, at 585-86. The Second and Seventh Circuits have addressed claims for indemnification or contribution and have concluded that these remedies are available in connection with ERISA plans.

See:

Chemung Canal Trust Co. v. Sovran Bank/Md., 939 F.2d 12, 16 (2d Cir. 1991). *The court found a federal common law right to contribution. It concluded “that the traditional trust law right to contribution must also be recognized as a part of ERISA. By so concluding, we are not creating a right from whole cloth. We are simply following the legislative directive to fashion, where Congress has not spoken, a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence.”*

Free v. Briody, 732 F.2d 1331, 1337 (7th Cir. 1984). *In holding that § 1109 includes an implied right to indemnification, the Seventh Circuit stated that the issue is “whether the indemnity Briody seeks is within the appropriate equitable relief he may seek under section 1109.” After finding ERISA grants the courts the power to shape an award so as to make the injured plan whole and apportion the damages equitably between the wrongdoers, it concluded “[an] award of indemnification within the limited circumstances of this case appears . . . properly within the court’s equitable powers.” Because the legislative history of ERISA “demonstrates Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans. General principles of trust law provide for indemnification under the appropriate circumstances.”*

The Ninth Circuit Court of Appeals, however, has taken a contrary position. See *Kim v. Fujikawa*, 871 F.2d 1427, 1432 (9th Cir. 1989) (citations omitted) (“As the Supreme Court noted in *[Russell]*, section 409 of ERISA only establishes remedies for the benefit of the plan. Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary.”). In 2007, the Eighth Circuit Court of Appeals agreed with the Ninth Circuit and held that the right of contribution was not available. *Travelers Cas. and Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 866 (8th Cir. 2007). In addition, having little guidance from the courts of appeals, various district courts have decided the cases without uniformity.

See:

Green v. William Mason & Co., 976 F. Supp. 298, 300-01 (D.N.J. 1997). *The court upheld a counterclaim for contribution or indemnity against a co-fiduciary, observing that “[a] number of other courts have agreed with Chemung’s analysis, and likewise have permitted claims of contribution or indemnity among co-*

fiduciaries.” The court further reasoned that courts rejecting such claims had wrongly “construed Congress’s failure to expressly provide for contribution among fiduciaries despite of its knowledge of traditional trust law principles as a rejection of a scheme of contribution and indemnification.”

Petrilli v. Gow, 957 F. Supp. 366, 375 (D. Conn. 1997). The Court upheld the right to contribution against co-fiduciaries under Chemung but rejected a contribution claim against non-fiduciaries, reasoning that “[s]ince non-fiduciaries cannot be sued directly by plaintiffs, a right of contribution and indemnification in this context would be very unlike Chemung. In Chemung, contribution and indemnification were allowed as a matter of apportionment among fiduciaries, each of whom could have been sued by plaintiffs. Given the Mertens holding, there can be no such right of contribution or indemnification.”

But see:

Roberts v. Taussig, 39 F. Supp. 2d 1010, 1012 (N.D. Ohio 1999). “Having reviewed the existing law within the circuits, as well as the reasoning in several district court cases, it is the opinion of this Court that there is no right to contribution or indemnification under ERISA.”

d. Estoppel

Several cases have addressed claims of estoppel where participants sought to enforce benefits allegedly promised under the plan, though usually not included within the plan itself. Section 1132(a)(1)(B) allows participants to sue for benefits only under the plan itself. In addition, the Supreme Court in Varity found that § 1132(a)(3) may also allow participants to enforce benefits promised under the plan, but only against a fiduciary. 516 U.S. at 515. As a result plaintiffs have sought to use estoppel claims to enforce benefits promised, in one form or another, but not included within the written plan. While most courts recognize some form of estoppel, there is some conflicting authority among the circuits as to the extent of the availability of this claim. See Blum v. Spectrum Rest. Group, 261 F. Supp. 2d 697, 715 n.11 (E.D. Tex. 2003) (noting circuit split regarding estoppel claims).

The Eleventh Circuit has held, for example, that estoppel is only available as a matter of federal common law, (1) where the party seeks only to apply a written representation at issue, (2) to ambiguous plan terms. Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir. 1990). This holding was a gloss on an earlier ruling which rejected an estoppel claim where the claim would have modified a written plan. See Nachwalter, 805 F.2d at 960 (holding that oral agreements or representations could not modify plans because of requirement under ERISA § 1102(a)(1) that plan be “established and maintained pursuant to a written instrument”).

See also:

White v. Provident Life & Accident Ins. Co., 114 F.3d 26, 29 (4th Cir. 1997). “As we recently noted . . . ERISA simply does not recognize the validity of oral or non-conforming written modifications to ERISA plans.”

Miller v. Coastal Corp., 978 F.2d 622, 624-25 (10th Cir. 1992). “An employee benefit plan cannot be modified, however, by informal communications, regardless of whether those communications are oral or written ERISA requires all modifications to an employee benefit plan to be written, and to conform to the formal amendment procedures The facts of this case do not provide us the opportunity to address whether an estoppel claim exists in limited, extraordinary circumstances.”

While nearly every court has adopted Nachwalter’s logic as to oral modifications, a few circuits also follow the limited exception in Kane distinguishing between modification and interpretation of ambiguous plan terms.

See:

Katz v. Comprehensive Plan of Group Ins., 197 F.3d 1084, 1090 (11th Cir. 1999). “This circuit has created a very narrow common law doctrine under ERISA for equitable estoppel. It is only available when (1) the provisions of the plan at issue are ambiguous, and (2) representations are made which constitute an oral interpretation of the ambiguity.”

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1527 (9th Cir. 1993). “[W]e have limited the circumstances in which an ERISA claimant may assert an equitable estoppel claim [A]n estoppel claim will not lie against a trust fund where recovery on the claim would contradict written plan provisions [Moreover] a federal common law claim of equitable estoppel will be available only where (a) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (b) representations are made to the employee involving an oral interpretation of the plan.”

Meanwhile, the Second Circuit maintains that estoppel is available but will only be applied to ambiguous terms of a plan in “extraordinary circumstances.” Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 78 (2d Cir. 1996); see also Bonovich v. Knights of Columbus, 963 F. Supp. 143, 148 (D. Conn. 1997) (citation omitted) (“The elements of a promissory estoppel claim in an ERISA action are: (1) a promise; (2) reliance on the promise; (3) injury caused by the reliance; and (4) an injustice if the promise is not enforced. Further, for purposes of ERISA, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff’s part.”).

The Sixth Circuit holds that while issues of actuarial soundness preclude applying estoppel to pension benefit plans, such considerations do not preclude the application of estoppel principles to welfare benefits plans. Armistead v. Vernitron Corp., 944 F.2d 1287, 1300 (6th Cir. 1991) (“If the effective terms of the plan may be altered by transactions between officers of the plan and individual plan participants or discrete groups of them, the rights and legitimate expectations of third parties to retirement income may be prejudiced. This is not necessarily the case with insurance benefit plans.”).

But see:

Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 59 (4th Cir. 1992). “We do not think, however, that the statutory emphasis on adherence to the written terms of ERISA plans leaves room for this distinction between pension and welfare benefit plans. Section 1102 requires that ‘every employee benefit plan shall be established and maintained pursuant to a written instrument,’ and the requirement that formal amendment procedures be included in the written document similarly applies to ‘every employee benefit plan.’ According to ERISA’s definition, the term ‘employee benefit plan’ includes both welfare benefit and pension plans.”

Finally, the Seventh Circuit has developed its own, somewhat unique, estoppel doctrine. Although it holds that “estoppel principles generally apply to all legal actions,” the court has distinguished, like the Sixth Circuit, between pension plans and welfare plans. *Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). Additionally, the court distinguishes between multi-employer welfare benefit plans and “unfunded, single-employer welfare benefit plans” by applying estoppel only to the single employer plans. *Id.* Moreover, the court has consistently declined to extend this limited application. See *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 280 (7th Cir. 1994). Most recently, the court rejected all distinctions between “estoppel” and “equitable estoppel” in enunciating a new test to apply the general doctrine in the ERISA context. *Coker v. TWA, Inc.*, 165 F.3d 579, 585 (7th Cir. 1999) (“The cause of action has four elements: (1) knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation by the plaintiff; (4) to her detriment.”). Interestingly, it would appear that only the Seventh Circuit requires that the representation (a) be in writing and (b) be a knowing misrepresentation.

e. Prejudgment interest

Prior to *Knudson*, several courts held that prejudgment interest was available for a denial of pension benefits. However, this rule seems to apply only in the benefit context, and not to employer restitutionary claims for erroneous contributions, due to ERISA’s anti-inurement rule. See, e.g., *Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1037 (3d Cir. 1988) (“We agree with the district court that the anti-inurement policy of ERISA bars an award of interest on any refund, regardless of the fund’s financial stability.”).

See:

Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1010 (3d Cir. 1992). “As a general rule, prejudgment interest is to be awarded when the amount of the underlying liability [may be reasonably ascertained] and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of the money which was legally due.”

Sweet v. Consol. Alum. Corp., 913 F.2d 268, 270 (6th Cir. 1990). “ERISA requires that a retirement plan be operated for the exclusive benefit of the employees and beneficiaries Even assuming *arguendo* that the Trustee was acting prudently in withholding the pension funds[,] . . . it cannot be said that this

did not confer a benefit on the trustee. Any additional time one gains, rightfully or wrongfully, in not having to submit payment of a sum of money owed another is without doubt a benefit.”

Short v. Cent. States, S.E. & S.W. Areas Pension Fund, 729 F.2d 567, 576 (8th Cir. 1984) *abrogated on other grounds in Baxter ex rel Baxter v. Lynn*, 886 F.2d 182, 187 (8th Cir. 1989). “Essentially, the Fund has retained money which rightfully belongs to [the beneficiary]. To allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment.”

The circuits appear split as to whether pension beneficiaries are entitled to interest for denial of benefits where the benefits were later restored without resort to litigation.

Compare:

Parke v. First Reliance Std. Life Ins. Co., 368 F.3d 999, 1007 (8th Cir. 2004). *The court allowed a beneficiary’s claim for interest on denied benefits where the benefits were voluntarily restored, so there was no underlying judgment upon which the court could make an award of “prejudgment interest.” The court found that, if interest was an appropriate remedy “to avoid unjust enrichment of a plan provider who wrongfully delays the payment of benefits, the award is appropriate whether a judgment is obtained or not.”*

Fotta v. Trustees of the UMW Health & Ret. Fund of 1974, 165 F.3d 209, 212 (3d Cir. 1998). *The court allowed a beneficiary’s claim for interest on denied benefits where the benefits were eventually restored without litigation, stating “[t]he principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary’s having obtained judgment. The concerns . . . [about] making the claimant whole and preventing unjust enrichment are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through judgment as the result of ERISA litigation.”*

With:

Clair v. Harris Trust & Sav. Bank, 190 F.3d 495, 497 (7th Cir. 1999). *In denying a claim for interest on restored benefits where it was not necessary to resort to litigation, the court said “[t]hese plaintiffs . . . do not seek unpaid benefits. Their complaint is that their benefits were not paid in a timely fashion and as a result they lost the time value of the money. They want the interest they could have earned had they been paid the money in a timely fashion and invested it, but interest is not a benefit specified anywhere in the plan, and only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B).”*

Finally, it appears that an award of interest on wrongfully delayed benefits remains permissible after Knudson as a remedy for a breach of fiduciary duty to a beneficiary.

See generally Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193, 208-09 (3d Cir. 2004); Parke v. First Reliance Std. Life Ins. Co., 368 F.3d 999, 1006-07 (8th Cir. 2004).

2. Federal common law defenses

a. Unconscionability

While finding that it did not have opportunity to decide the issue under the facts presented, one court has raised the possibility that under federal common law unconscionability could be a defense against enforcement of a benefit plan's terms.

See:

Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Constr., 258 F.3d 645, 655 (7th Cir. 2001). “The federal common law of ERISA may include a concept of unconscionability that would entitle an employer to complain if a fund's trustees used the power delegated to it by the plan to establish a completely exorbitant interest rate on delinquent contributions. No case says that, but it may be encompassed by the principle that the trustees are not to act in an arbitrary and capricious manner. However that may be, 1.5 percent a month (or 18 percent a year) is not unconscionable—or at least the defendant made no effort to show that it was so exorbitant as to be unconscionable in the circumstances, and it is too late now for it to attempt to do so. Indeed, it doesn't even call it ‘unconscionable,’ but merely ‘oppressive,’ which has no legal standing.”

b. Waiver

Courts remain somewhat undecided as to the contours of federal common law regarding whether an insurer can be found to waive a defense in an ERISA plan. Courts have left open the larger question of whether waiver might apply in the ERISA context, while constraining their findings to the facts of their specific cases. See Lauder v. First UNUM Life Ins. Co., 284 F.3d 375, 382 (2d Cir. 2002) (“[We] conclude that principles of waiver are appropriately applied in this case. Because we do not consider this the appropriate set of facts on which to create a federal common law doctrine of waiver in the ERISA context, we limit our holding to the circumstances of this particular claim.”); Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1348 (11th Cir. 1994) (“We leave open whether in other circumstances waiver principles might apply under the federal common law in the ERISA context. However, we reject plaintiff's waiver argument under the circumstances of this case.”); Thomason v. Aetna Life Ins. Co., 9 F.3d 645, 650 (7th Cir. 1993) (“While it might be appropriate to apply certain waiver principles to ERISA claims, the waiver principles upon which plaintiff relies are not among them.”). The Fifth Circuit has definitively held that waiver is a viable argument under ERISA. See Pitts v. Am. Sec. Life Ins. Co., 931 F.2d 351, 357 (5th Cir. 1991). The Fourth Circuit has reached the opposite conclusion, holding that “the federal common law under ERISA . . . does not incorporate the principles of waiver.” White v. Provident Life & Accident Ins. Co., 114 F.3d 26, 29 (4th Cir. 1997).

XV. SPECIFIC ISSUES IN ERISA LITIGATION

A. ERISA § 510, 29 U.S.C. § 1140: ACTIONS FOR INTERFERENCE WITH RIGHTS PROVIDED UNDER ERISA

ERISA's anti-retaliation provision, § 510, codified at 29 U.S.C. § 1140, makes it unlawful for "any person" to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary" if the action is taken for any of the following reasons:

- (1) Because an employee exercised any right to which the participant or beneficiary is entitled under an employee benefit plan;
- (2) To "interfer[e] with the attainment of any right to which [a] participant may become entitled under [an employee welfare benefit] plan"; or
- (3) Because the person has given information or is about to testify in a proceeding or inquiry related to the plan.

The Supreme Court has interpreted "plan" to include all employee welfare benefit plans, including those providing unvested benefits. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 514 (1997). This interpretation means that although employers can modify or terminate unvested benefits, they may not act with the intention to prevent employees from enjoying the benefits the plan provides. See Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1503 (3d Cir. 1994).

See:

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe R.R. Co., 520 U.S. 510, 514 (1997). *A plan sponsor may retain the "unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan." Without § 510, the formal amendment process would be undermined and program sponsors could informally amend a plan, one beneficiary at a time.*

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990). *Section 510 counterbalances the flexibility provided to plan sponsors to amend or terminate a welfare benefit plan by requiring that they do not "circumvent the provision of promised benefits."*

Because § 510 claims are tried in a manner similar to disparate treatment employment discrimination claims brought under other federal statutes, it is important to review the general framework for employment claims where the employer's motivation is at issue.

1. General framework of employment discrimination litigation

In both § 510 cases and disparate treatment employment discrimination cases, the primary issue is whether the employer's actions were motivated by a bias against a protected

trait, such as race, age or gender, or in response to a protected activity, such as the exercising of an employee's rights or an employee's participation in an investigation of the employer. Courts rely on one of two methods to determine whether the defendant was motivated by an illegal factor: the direct evidence framework and the indirect evidence, or McDonnell Douglas, framework.

a. Direct evidence framework

Some plaintiffs may be able to present evidence that clearly indicates the defendant intended to discriminate and “can be interpreted as an acknowledgment of discriminatory intent.” Troupe v. May Dep’t Stores Co., 20 F.3d 734, 736 (7th Cir. 1994). Such so-called “direct evidence” includes racial slurs uttered by the employers’ authorized agents, the admission of a decision maker that she acted against a plaintiff due to a protected characteristic, or an employer policy aimed expressly at race, age or religion. See HAROLD S. LEWIS, JR. & ELIZABETH H. NORMAN, LITIGATING EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS CASES: ANALYSIS § 6.2, at 406 (3d ed. 2002). Courts have defined direct evidence as “evidence that, if believed, would prove the existence of the fact without inferences or presumption.” Id.

In actual practice, however, this method is rarely applied, because as one court has stated, “employers are rarely so cooperative as to include a notation in a personnel file that the firing is for reasons expressly forbidden by law.” See Tappe v. Alliance Capital Mgmt., L.P., 198 F. Supp. 2d 368, 373 (S.D.N.Y. 2001). Moreover, employers have “taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written.” Troupe, 20 F.3d at 736. As a result, the direct evidence framework is of limited usefulness because it is only used in cases where it is obvious that the defendant’s agents acted illegally. Moreover, as courts are not mind readers, it is difficult to determine reliably what a person is thinking based on anything short of a clear statement as to motivation. Even seemingly “clear” or “direct” statements by a supervisor may still require a court to make an inferential leap.

Determining whether evidence is “direct” is important to courts because the plaintiff is considered to have a lighter burden under such a framework. See Tappe, 198 F. Supp. 2d at 374. Any plaintiff in a direct evidence case will likely attempt to strengthen a claim, however, by presenting additional evidence that allows a jury to infer that there was discrimination. Thus, direct evidence cases will often involve the same forms of evidence that are used in the McDonnell Douglas framework as described below. See LEWIS & NORMAN, supra, at 407-08. Because full consideration of the direct evidence framework in discrimination litigation is beyond the scope of this Handbook, see LEWIS & NORMAN, supra, at 406 for a more detailed discussion of the topic.

b. Indirect or McDonnell Douglas framework

While a lack of evidence makes proving unlawful intent through direct evidence difficult, proving intent through circumstantial means is difficult due to the volume of facts the fact-finder considers. In cases proved through circumstantial evidence, a fact-finder must consider the parties’ actions and then infer from those acts and circumstances what the parties intended. As it would be impossible to hold complete trials for every such fact-intensive claim,

the Supreme Court developed a framework, beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to allow courts to deal with such cases through summary judgment.

First, the plaintiff must make a prima facie case of discrimination. The prima facie case typically requires plaintiff to show that (1) plaintiff was part of a protected class, (2) sought or wished to maintain a position or benefit, (3) was qualified for the job, and (4) suffered some adverse employment decision, such as termination. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). Courts modify the basic prima facie elements to cover the range of employment situations and there is no rigid set of facts plaintiffs must prove to meet the prima facie case. Also, the burden is intended to be a minimal one. The prima facie case raises a presumption of discrimination because it eliminates the most common non-discriminatory reasons for adverse employment actions—a lack of qualifications and lack of available positions. See LEWIS & NORMAN, supra, § 6.10, at 421.

Once the plaintiff establishes the prima facie case, the defendant must respond by presenting evidence that the plaintiff was rejected or another was preferred due to a “legitimate, nondiscriminatory reason.” Reeves, 530 U.S. at 142. Because the defendant merely faces a burden of producing a reason that is legitimate and non-discriminatory, and not a burden of proving it, there is no weighing of credibility at this stage. Id. Once a defendant presents a legitimate reason, any presumptions in the case, and the McDonnell Douglas framework itself, fall away. Id. The only issue that remains was whether there was discrimination or not. Id. In other words, a fact finder must decide based on the evidence produced, whether, the plaintiff has shown that the defendant discriminated based on a protected trait.

In most cases, plaintiffs present evidence to convince the fact-finder that the reason the defendant has presented is pretextual. A plaintiff’s showing that the employer’s reason was pretextual does not compel a finding for the plaintiff. St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). Rather, a plaintiff proves a discrimination claim by proving discrimination, and not merely by proving the employer’s reason cannot be believed. Id. Some circuits interpreted St. Mary’s to mean that no reasonable fact-finder could find the defendant liable for intentional discrimination when the plaintiff only presented a prima facie case and evidence sufficient to reject the defendant’s proffered explanation. See Reeves, 530 U.S. at 140 (citing Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997)). These circuits granted summary judgment for the defendant unless the plaintiff gave some additional evidence of discrimination. In Reeves, the Court rejected this so-called “pretext-plus” approach and reiterated the holding of St. Mary’s by stating that while defeating the employer’s proffered explanation does not compel a finding for the plaintiff, such a showing, along with the prima facie case, might be sufficient to support a verdict that there was illegal discrimination. See 530 U.S. at 147 (citing St. Mary’s Honor Ctr., 509 U.S. at 511). In Reeves, the evidence the plaintiff presented to demonstrate that the employer’s proffered reason was false did not also have to establish discriminatory intent. The plaintiff could reach a jury based on the prima facie case and the evidence of pretext.

While the McDonnell Douglas framework is frequently called a “burden shifting framework,” the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times on the plaintiff. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Throughout the trial, whether in the plaintiff’s case-in-chief or in cross-examining the defendant’s witnesses, the plaintiff attempts to establish

facts that would allow the finder of fact to conclude by a preponderance of the evidence that the defendant acted with an illegal intent. Likewise, the defendant attempts to present all evidence that would prevent such a finding by the fact finder.

The “burden shifting” approach is analytical only and does not establish an order of proof at trial. See Coates v. Johnson & Johnson Corp., 756 F.2d 524, 531 n.5 (7th Cir. 1985). A plaintiff will not present just enough evidence to establish the prima facie case and then go no further until the defendant presents a nondiscriminatory explanation. Instead, McDonnell Douglas provides a framework that reviewing courts (or a trial court hearing motions for a judgment as a matter of law) use to determine whether to give the case to the trier of fact to resolve the factual dispute that lies at the heart of the case: whether the defendant or its agents acted with an unlawful intent.

2. Procedural prerequisites to an action under ERISA § 510, 29 U.S.C. § 1140

a. Preemption

According to the Supreme Court, ERISA contains numerous safeguards “to completely secure the rights and expectations [of employees and their beneficiaries].” Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990). The most prominent of these are § 514(a), 29 U.S.C. § 1144(a), ERISA’s preemption provision; § 502(a), 29 U.S.C. § 1132(a), the Act’s “carefully integrated civil enforcement scheme”; and § 510, which prohibits interference with ERISA-protected rights. Id. In combination, these provisions will likely preempt state causes of action where the plaintiff alleges that the employer interfered with the plaintiff’s right to benefits under the plan.

In Ingersoll-Rand, the Court decided that state causes of action for wrongful termination were preempted because such claims were the “prototypical [claim] Congress intended to cover under § 510.” 498 U.S. at 143. Protection against termination intended to prevent the vesting of pension rights is a “crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.” Id. While the existence of an enforcement scheme does not dictate preemption of state law remedies, preemption in this case was warranted because Congress intended that § 502(a) be the exclusive remedy for the rights ERISA guarantees. Id. at 143-44 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (holding that ERISA does not apply)), overruled in part on other grounds by Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). The state law cause of action in Ingersoll-Rand clearly provided a remedy for rights expressly guaranteed by § 510 and exclusively enforced by § 502(a). As a result, “due regard for federal enactments require that state jurisdiction [in matters that § 510 protects] must yield.” Id. at 144. Section 510 has preempted a variety of state claims that seek to recover damages for an employer’s actions that have interfered with benefits.

See:

Wood v. Prudential Ins. Co. of Am., 207 F.3d 674, 677-79 (3d Cir. 2000). *Claims of discrimination under state statute and constitution that were essentially § 510 claims were preempted even though the state claims provided remedies that § 510’s enforcement provision, § 502, did not.*

Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124, 1131 (9th Cir. 1992). Plaintiff's state claims of breach of duty of good faith and fair dealing "[fell] squarely within the ambit of ERISA § 510" and were preempted, regardless of whether one of the claims alleged the employer interfered with prospective benefits rather than current benefits.

St. Arnaud v. Chapdelaine Truck Ctr., Inc., 836 F. Supp. 41, 43 (D. Mass. 1993). State claim for wrongful termination based on breach of an implied covenant of good faith and fair dealing was preempted because § 510 protection was similar to the state claim and superseded it.

But see:

Thurkill v. Menninger Clinic, Inc., 72 F. Supp. 2d 1232, 1235-1236 (D. Kan. 1999). State wrongful termination claim was not preempted due to emerging view that where the plaintiff's suit merely impacts an ERISA plan but the suit's factual basis is independent of the rights and duties under the plan, there is no preemption.

b. Appropriate parties

Determining the proper parties in a § 510 action depends partially upon whether the court considers § 510 to apply beyond the employment relationship. Many courts interpret § 510's language to provide a cause of action for a retaliatory act that affects the *employment relationship* in response to an employee asserting rights under the employee welfare benefits plan. See generally *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). Although the term "discriminate" could be broadly interpreted to refer to any time "any person" makes distinctions between persons, most courts have declined to use a broad interpretation. *Haberern*, 24 F.3d at 1503. Rather, they have limited "discriminate" to refer to actions affecting the employer-employee relationship. *Id.*

See:

Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1503 (3d Cir. 1994). Employer did not "discriminate" under § 510 by decreasing benefits of plaintiff even though she was the only employee affected by the change. The reduction did not affect the employment relationship and was not a sufficient action to violate § 510.

McGath v. Auto-Body N. Shore, Inc., 7 F.3d 665, 669 (7th Cir. 1993). Section 510 would include actions like demotion or discharge, but not a discriminatory apportionment of benefits or a plan change that affects only one employee.

But see:

Mattei v. Mattei, 126 F.3d 794, 806 (6th Cir. 1997). The court decided that § 510 applied beyond the employment relationship because while Congress described the prohibited conduct in terms of words used in labor law, the definition it used

for “person” was broader than the employment relationship. To effectuate Congress’s intent, the court resolved the inconsistency by allowing the provision to apply to any defendant who discriminates against a person for enjoying ERISA rights.

The defendants in § 510 actions are most commonly employers who take negative employment actions against employees to circumvent ERISA’s protections. See, e.g., Lindemann v. Mobil Oil Corp., 141 F.3d 290, 292 (7th Cir. 1998); Shahid v. Ford Motor Co., 76 F.3d 1404, 1407 (6th Cir. 1996). The text of § 510, however, makes it illegal for “any person” to “discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary.” 29 U.S.C. § 1140. ERISA defines a “person” as “an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.” 29 U.S.C. § 1002(9). Courts have used this broad language to conclude that Congress did not intend to limit the range of possible defendants to only employers. Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 420-21 (4th Cir. 1993). Thus, even where ERISA § 510 actions involve only the employment relationship, possible defendants are not limited only to employers.

See:

Mattei v. Mattei, 126 F.3d 794, 806 (6th Cir. 1997). After determining that § 510 prohibits actions beyond employee-employer relationship, court determined that plaintiff could properly sue estate that prevented her from obtaining ERISA benefits.

Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe R.R. Co., 80 F.3d 348, 350 n.5 (9th Cir. 1996), rev’d on other grounds, 520 U.S. 510 (1997). Successor who was not the plaintiffs’ employer can be liable under § 510 where it allegedly engaged in conspiracy with employer to interfere with ERISA-protected rights.

Tingey v. Pixley-Richards W., Inc., 953 F.2d 1124, 1132 n.4 (9th Cir. 1992). Action for interference with benefits was proper against both employer and insurer that allegedly coerced employer to fire plaintiff.

Warner v. Buck Creek Nursery, Inc., 149 F. Supp. 2d 246, 257-58 (W.D. Va. 2001). Due to broad definitions for “person” and “discriminate,” corporate directors can be sued individually even if they were acting in their corporate capacity.

Choi v. Mass. Gen. Physicians Org., Inc., 66 F. Supp. 2d 251, 254 (D. Mass. 1999). Accepting that § 510 prohibits actions beyond the employee-employer relationship, the court allowed suit against a defendant who was a former employer at the time of the alleged interference.

But see:

Byrd v. MacPapers, Inc., 961 F.2d 157, 161 (11th Cir. 1992). *Insurer could not be a defendant in § 510 action because § 510 is addressed only at employment relationship and unscrupulous employers.*

To have standing, the plaintiff in an ERISA § 510 action must show that he is eligible for the benefits which he claims triggered the discriminatory reaction. Ameritech Benefit Plan Comm. v. Commc'n Workers, 220 F.3d 814, 824 (7th Cir. 2000). This requirement for standing applies even if the plaintiff became ineligible for the benefits by the very discriminatory provision of the plan that they are challenging. Id. Such plaintiffs cannot challenge discrimination under § 510 because ERISA itself does not proscribe discrimination in the provision of employee benefits. Id. at 825 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983)). Where a group of individuals seek to establish individualized damages under a § 510 action, each person must be a plaintiff, or there must be a representative for the certified class. Inter-Modal Rail Employees Ass'n, 80 F.3d at 350 n.5 (holding that railway association lacks standing to bring suit on plaintiffs' behalf), rev'd on other grounds, 520 U.S. 510 (1997).

c. Applicable statute of limitations

Neither § 510 of ERISA nor its civil enforcement provision, § 502, provides a statute of limitations for actions alleging an interference with benefits. Muldoon v. C.J. Muldoon & Sons, 278 F.3d 31, 32 (1st Cir. 2002); Musick v. Goodyear Tire & Rubber Co., 81 F.3d 136, 137 (11th Cir. 1996). Because neither section falls under 28 U.S.C. § 1658 (see below), and because Congress did not establish a time limitation for a federal cause of action arising under §§ 502 or 510, courts will adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. See Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) superseded on other grounds by statute, 28 U.S.C. § 1658; Muldoon, 278 F.3d at 32. When determining which state statute of limitations should apply, courts frequently consider the language of the statute creating the cause of action and select statutes whose language more specifically and narrowly contemplates the conduct § 510 addresses. Musick, 81 F.3d at 139.

Several courts have considered what the statute of limitations for § 510 claims should be, and they usually apply the relevant state law statute for wrongful termination or retaliatory discharge. Muldoon, 278 F.3d at 32. The First Circuit in Muldoon, for example, decided that Massachusetts's wrongful termination action more closely mirrored a § 510 action than a breach of contract action and ruled that the plaintiff's action was time barred. See id. Because state causes of action vary, however, the applicable statutes of limitations vary by state as well.

See:

Musick v. Goodyear Tire & Rubber Co., 81 F.3d 136, 137 (11th Cir. 1996). *In Alabama, the two-year statute of limitations for the recovery of wages is applied because the statute creating that cause of action more closely tracks the language of § 510 than the general language of the state's cause of action governing contract disputes which has a six-year statute of limitations.*

Byrd v. MacPapers, Inc., 961 F.2d 157, 159-60 (11th Cir. 1992). Because in Florida wrongful discharge actions more closely resemble actions founded on statutory rights than actions for lost wages, § 510 actions in that state are governed by a four-year statute of limitations instead of the two-year statute of limitations for actions based on contracts.

Clark v. Coats & Clark, Inc., 865 F.2d 1237, 1242 (11th Cir. 1989). In Georgia, suits for front and back pay are governed by the state's two-year statute of limitations for recovery of wages, but actions for reinstatement are governed by the twenty-year statute of limitations for equitable actions to enforce statutory rights.

Christopher v. Mobil Oil Corp., 149 F.R.D. 549, 551 (E.D. Tex. 1993). In Texas, § 510 claims are governed by the statute of limitations for the state's wrongful discharge and employment discrimination statutes.

Delisi v. United Parcel Serv. Inc., 580 F. Supp. 1572, 1575 (W.D. Pa. 1984). In Pennsylvania, the most analogous state cause of action is breach of written contract, which has a statute of limitations of six years.

Regardless which statute of limitations applies, courts agree that the statutory period begins to run when the alleged interference occurred and was communicated to the plaintiff. See Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1141 (7th Cir. 1992) (rejecting claim that period begins when termination is effective); see also Muldoon, 278 F.3d at 32.

Federal causes of action "aris[ing] under an Act of Congress enacted" after December 1, 1990, which do not establish a time limitation, are governed by the general federal four-year statute of limitations. 28 U.S.C. § 1658; Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 381-83 (2004). Section 1658's four-year statute of limitations will not apply to ERISA actions such as those under § 510 because ERISA was enacted in 1974. Syed v. Hercules Inc., 214 F.3d 155, 159 (3d Cir. 2000); Hidy v. TIAA Group Long Term Disability Benefits Ins. Policy, No. Civ.A.01-450-SLR, 2002 WL 450084, at *2 (D. Del. Mar. 19, 2002), aff'd, 57 Fed. Appx. 124 (3d Cir. 2003). However, § 1658 does apply to a cause of action based on a post-1990 amendment to a pre-existing statute, as long as that amendment can be said to create a new right of action. Jones, 541 U.S. at 381-83. Thus, it is conceivable that a subsequent amendment to ERISA that creates a new cause of action but does not provide a time limitation would be governed by § 1658's four-year statute of limitations.

3. Elements of an action under ERISA § 510, 29 U.S.C. § 1140

The purpose of § 510 is to "prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining their vested pension rights." Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1113 (6th Cir. 2001). To prove a violation of § 510, a plaintiff must show more than mere loss of benefits and must demonstrate that the defendant had a specific intent to violate the statute. Id.; Lindemann II, 141 F.3d at 295. At the least, the defendant's desire to prevent the plaintiff's enjoyment of benefits must have been a motivating factor. Humphreys v. Bellaire Corp., 966 F.2d 1037, 1043 (6th Cir. 1992).

The purpose prong, however, requires only a showing that the change in benefit status was the predominant motivation to the change in employment, not the sole motivation. Id.

a. Prohibited conduct

Section 510 actions most commonly involve claims that an employer terminated an employee or took some negative action against an employee to interfere with the employee's ability to enjoy ERISA benefits. See, e.g., Lindemann II, 141 F.3d at 292; Dister v. Cont'l Group, Inc., 859 F.2d 1108, 1110 (2d Cir. 1988). In what the Supreme Court has called the "prototypical" § 510 claim, an employee alleged his employer terminated him four months before his pension would have been vested because the company wished to avoid contributing to his pension fund. See Ingersoll-Rand, 498 U.S. at 136. A plaintiff can still state a claim under § 510 even if the employer paid the plaintiff's benefits before the termination. Kowalski v. L & F Prods., 82 F.3d 1283, 1288 (3d Cir. 1996). Because no limiting language in § 510 suggests that only future benefits should be protected, a termination in retaliation for enjoying past benefits violates § 510. Id. at 1287.

Several courts have held that an employer does not violate § 510 when it modifies the terms of a benefit plan that provides unvested benefits, even with the specific intent to prevent employees from gaining those benefits. See Teumer v. Gen. Motors Corp., 34 F.3d 542, 545 (7th Cir. 1994); Haberern, 24 F.3d at 1502-03; see also McGann v. H & H Music Co., 946 F.2d 401, 404-05 (5th Cir. 1991). In these cases, courts have held that § 510 addresses the employment relationship that gives rise to the benefits and does not exist to protect the benefits themselves. See Teumer, 34 F.3d at 545. Even if the plan is modified to prevent a single employee from gaining benefits, at least one court has refused to allow a § 510 action if there is also no change in employment status. See Haberern, 24 F.3d at 1504 (noting actions for discriminatory modifications to plans are properly brought under 29 U.S.C. § 1054(g)). But see Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984) (arguing that changes made to pension plan itself, rather than actions taken within employment relationship to affect pension rights, may constitute discrimination under § 510); Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1225 (D. Md. 1990) (finding plan change improper because it affected only plaintiff).

The range of prohibited conduct under § 510 may also grow if more courts accept the view of the Sixth Circuit in Mattei v. Mattei, where the court found that § 510 applied beyond the employment relationship. See 126 F.3d 794, 806 (6th Cir. 1997). After reviewing the language of § 510 and its legislative history, the court determined that the verbs § 510 uses, such as "discharge, fine, suspend," were drawn primarily from the employment relationship. Id. The definitions the Act uses for "person," "participant" and "beneficiary," however, extend beyond that relationship. Id. at 803. The Sixth Circuit reconciled this inconsistency by reading the scope of § 510 broadly to encompass interference beyond the employment relationship so as to realize the full intent of Congress in creating § 510. Id. Thus, in Mattei, the court found that an estate would violate § 510 if, as alleged, it stopped payments to the deceased's widow because she accepted benefits from her husband's ERISA plan. Id. at 804. The estate "discriminated against" the plaintiff because she was treated differently from other beneficiaries of the estate based on her acceptance ERISA benefits. See id.; see also Heimann v. Nat'l Elevator Indus. Pension Fund, 187 F.3d 493, 507 (5th Cir. 1999) (arguing that § 510 covers retired employees as

well as current employees), overruled in part on other grounds by Arana v. Ochsner Health Plan, 338 F.3d 433 (5th Cir. 2003); Straus v. Prudential Employee Sav. Plan, 253 F. Supp. 2d 438, 448 (E.D.N.Y. 2003) (arguing that § 510 covers former employees and beneficiaries as well as current employees).

In addition to these situations, courts have found other conduct violates § 510 because it interferes with the attainment or enjoyment of the rights ERISA provides.

See:

Lessard v. Applied Risk Mgmt., 307 F.3d 1020 (9th Cir. 2002). Plaintiff awarded judgment under § 510 based on allegations that, following sale of employer's assets and automatic transfer of almost all employees to corporate successor, the benefits of a select group of employees were terminated because those employees were on medical leave, on the condition that their benefits would be reinstated only if they returned to work.

Lojek v. Thomas, 716 F.2d 675, 681 (9th Cir. 1983). If a plaintiff alleges that his employer made conditions so unpleasant so as to create a constructive discharge, the plaintiff states a claim under § 510.

Ahne v. Allis Chalmers Corp., 640 F. Supp. 912, 919-20 (E.D. Wis. 1986). Allegations that an employer lowered employees' salary just prior to termination so as to pay a lower termination benefit state a claim under § 510.

But see:

Becker v. Mack Trucks, Inc., 281 F.3d 372 (3d Cir. 2002). An employer's refusal to rehire former employees does not violate § 510 even if that refusal was based upon the employer's desire to avoid creating future pension liability disproportionately greater than that which would be incurred if it hired new employees without past service or pension credit.

Teumer v. Gen. Motors Corp., 34 F.3d 542, 545 (7th Cir. 1994). An intentional mischaracterization of the cause of layoffs so that fewer benefits would be paid would not violate § 510 because the mischaracterization itself caused no change in the employment status of the employees.

Edes v. Verizon Communications, Inc., 288 F. Supp. 2d 55, 59 (D. Mass. 2003). An employer may hire employees under terms that render them ineligible to receive benefits given to other employees without violating § 510.

b. Proving conduct was based on prohibited motivation

As in employment discrimination cases, § 510's most important element, and most difficult to prove, is that the defendant's conduct was based on a prohibited motivation, specifically a desire to interfere with ERISA rights. It is conceivable that a plaintiff could establish this specific intent through direct evidence. Like employment discrimination cases, however, such direct evidence of animus is rarely available and seldom presented to courts. See

Dister, 859 F.2d at 1111 (noting that “direct evidence of discriminatory intent is . . . scarce or nonexistent”); Phelps v. Field Real Estate Co., 793 F. Supp. 1535, 1542 (D. Colo. 1991) (same).

Absent direct evidence, courts rely on the McDonnell Douglas framework to determine intent based on circumstantial evidence. See, e.g., DiFederico v. Rolm Co., 201 F.3d 200, 205 (3d Cir. 2000); Dister, 859 F.2d at 1112. In § 510 actions, the plaintiff must first establish a prima facie case in which the plaintiff shows he (1) belongs to the protected class; (2) was qualified for the position or benefit and (3) was denied the position or benefit under circumstances that indicate the prohibited intent to retaliate was present. Lindemann II, 141 F.3d at 296; Humphreys, 966 F.2d at 1043-44. Another common formulation of the prima facie case requires the plaintiff to establish “(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled.” Majewski, 274 F.3d at 1114; Gavalik v. Cont’l Can Co., 812 F.2d 834, 852 (3d Cir. 1987). A plaintiff’s burden in establishing a prima facie case is not intended to be an onerous one. Majewski, 274 F.3d at 1114. Some courts may allow the bare minimum of proof to establish the prima facie case if the facts also indicate the negative action occurred near the scheduled vesting of the benefits because that proximity creates an inference of prohibited activity. Humphreys, 966 F.2d at 1043-44; see also Eichorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001) (holding that plaintiff presented sufficient circumstantial evidence of intent to survive summary judgment where employer entered into eight-month re-employment no-hire agreement that extended just beyond vesting period for plaintiff’s pension benefits). They may also presume the prima facie case is established if it is certain that the plaintiff’s case is ultimately doomed because the plaintiff cannot present evidence of pretext in the third stage of McDonnell Douglas.

Under the McDonnell Douglas framework, the defendant must present evidence of a legitimate, nondiscriminatory reason for its action against the plaintiff. See, e.g., Reeves, 530 U.S. at 142-43; Lindemann II, 141 F.3d at 296; Humphreys, 966 F.2d at 1043. If the defendant cannot present a legitimate non-discriminatory reason for its actions, the plaintiff is entitled to judgment in his or her favor. At this point, however, the defendant’s burden is one of production, not persuasion – the defendant need merely present a reason that would be legitimate, and the truthfulness of its proffered explanation will be assumed. Winkel v. Kennecott Holdings Corp., 3 Fed. Appx. 697, 707 (10th Cir. 2001) (noting defendant’s burden at this stage is only one of production and truthfulness assumed); Dister, 859 F.2d at 1112 (noting defendant need not persuade). If the defendant presents a legitimate reason, the presumptions of the McDonnell Douglas framework, along with the framework itself fall away. See Reeves, 530 U.S. at 142. A variety of legitimate non-discriminatory reasons have been accepted by courts in § 510 cases. See Brockett v. Reed, 78 Fed. Appx. 148, 151 (2d Cir. 2003) (accepting as reason plaintiff’s unsatisfactory job performance); DiFederico v. Rolm Co., 201 F.3d 200, 205-06 (3d Cir. 2000) (accepting as reason plaintiff’s failure to return to work even after employer attempted to accommodate her health problems); Lindemann II, 141 F.3d at 296 (accepting as reason excessive absenteeism and tardiness even where absences were due to illness); Shahid, 76 F.3d at 1414 (accepting as reason plaintiff’s misconduct in accepting kickbacks); Humphreys, 966 F.2d at 1044 (accepting as reason evidence that plaintiff was “out for himself” and sale of mine he managed).

As in any case under the McDonnell Douglas approach, the plaintiff then may produce evidence that the proffered legitimate reason is pretext. Shahid, 76 F.3d at 1413.

Although some courts state that at this point the “burden shifts back to the plaintiff,” *id.*, the Supreme Court has noted that at this point all presumptions have fallen away and the issue is whether there was discrimination or not. *See Reeves*, 530 U.S. at 142-43; *DiFederico*, 201 F.3d at 206. The plaintiff has the burden to prove whether the legitimate reason is unworthy of credence or that the interference with benefits was a motivating factor in the defendant’s actions. *Shahid*, 76 F.3d at 1413. This is precisely the issue that the plaintiff must prove from the very start of a § 510 claim and the plaintiff has had this burden throughout the entire case.

When proving pretext, a plaintiff might present evidence that (1) the proffered reason has no basis in fact, (2) the reason did not in fact motivate the defendant or (3) the reason was insufficient to motivate the discharge. *See Imwalle v. Reliance Med. Prod., Inc.*, 515 F.3d 531, 545 (6th Cir. 2008) (citing *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)). Evidence sufficient to establish the prima facie case may be insufficient to establish pretext. In *Humphreys*, the proximity of the termination to the upcoming vesting of benefits allowed for an inference of discrimination that established the prima facie case but was insufficient to prevent the court from granting summary judgment for the employer. 966 F.2d at 1044; *see Dister*, 859 F.2d at 1117 n.1. Although the negative employment action also occurred on or about the time of the proffered legitimate reason, it was insufficient to show pretext merely because of its proximity to the vesting date. *Humphreys*, 966 F.2d at 1044-45; *see also Petrus v. Lucent Techs., Inc.*, 102 Fed. Appx. 969, 971-72 (6th Cir. 2004) (holding that plaintiff could not make a prima facie case of ERISA discrimination by pointing to two year gap between employer’s action and vesting date without additional, highly probative facts that suggest intentional discrimination).

Also, courts have rejected claims that statements to the effect that the employer cannot “afford” the plaintiff demonstrate pretext. Merely citing financial considerations alone does not indicate pretext because then “any actions by an employer that result in savings would be suspect.” *See Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991); *see also Humphreys*, 966 F.2d at 1044. Determining pretext is highly dependent upon the facts of the case and subject to evidence presented by the parties.

See:

Smith v. Hinkle Mfg., Inc., 36 Fed. Appx. 825, 830 (6th Cir. 2002). *Pretext was established where (1) complaints about plaintiff’s performance all were documented in two-week period between informing employer of son’s health problem and her discharge and (2) her recent pay raise suggested employer was not actually dissatisfied with her performance.*

Dister v. Cont’l Group, Inc., 859 F.2d 1108, 1116-17 (2d Cir. 1988). *Evidence that plaintiff’s position had been made unnecessary and plaintiff frequently had nothing to do at work prevented plaintiff from showing termination to reduce costs was pretextual.*

Humes v. McDonnell Douglas Corp., 922 F. Supp. 229, 235 (E.D. Mo. 1996). *By failing to show her low competency score was undeserved and because her termination came five years before her benefits were to vest, plaintiff failed to show her termination for poor performance was pretextual.*

As stated earlier in this section, evidence that the legitimate reason presented was not the true reason for the employer's action does not compel a finding for the plaintiff because, as the Supreme Court notes, establishing that the employer acted for a non-legitimate or even illegal reason does not necessarily mean the defendant acted with an intent prohibited by ERISA. See St. Mary's Honor Ctr., 509 U.S. at 511. For example, under § 510, a defendant is liable if it specifically intended to interfere with ERISA benefits. If it terminated an employee based on race, but claimed the termination was due to absenteeism, merely proving that evidence of absenteeism was pretextual would not establish a violation because race-based animus does not violate § 510.

The Court has expressly noted, however, that after establishing prima facie case and providing evidence of pretext, a reviewing court should not require a plaintiff to provide additional proof of prohibited intent before sending the case to the fact-finder. Reeves, 530 U.S. at 147. So long as a reasonable fact finder could find that the proffered explanation was false and could find evidence sufficient to establish prohibited intent, a court must let the fact-finder have the case if the court is considering a motion for summary judgment. See id. at 148-49. Similarly, the court must accept the fact-finder's verdict if the court is hearing a motion for judgment as a matter of law. Id.

4. Remedies available in an action under ERISA § 510, 29 U.S.C. § 1140

Interference with rights protected under § 510 is remedied exclusively by § 502(a). 29 U.S.C. § 1140. It preempts state remedies, even if the remedies under ERISA are not as complete as those available under state law. See Ingersoll-Rand, 498 U.S. at 144-45; Tolton v. Am. Biodyne, Inc., 48 F.3d 937, 942 (6th Cir. 1995).

Because actions under § 510 are brought through the civil enforcement provision, § 502(a), a plaintiff's remedies are limited to those in other ERISA actions. If the plaintiff was terminated wrongfully and was owed benefits under the plan, the plaintiff may seek the payment of those benefits. See Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 827 (10th Cir. 1995). Plaintiffs also may seek equitable relief such as back pay and front pay or reinstatement. See Schwartz v. Gregori, 45 F.3d 1017, 1021-22 (6th Cir. 1995). While some defendants have argued that equitable relief does not include front or back pay, courts have provided those remedies. Id. at 1022-23 (finding that back pay was appropriate equitable relief because it made plaintiff whole and front pay was appropriate substitute for reinstatement which was not feasible). Attorneys fees are also allowed under ERISA § 502(g). 29 U.S.C. § 1132(g); Filipowicz v. Am. Stores Benefit Plans Comm., 56 F.3d 807, 816 (7th Cir. 1995) (stating five factor test that guides court's discretion in determining whether to award attorney's fees).

Other remedies are not available in § 510 actions, however, because they are not available in other ERISA actions. For example, most courts continue to hold that no extra-contractual damages, such as compensatory or punitive damages, are allowed in ERISA actions. See e.g., McLeod v. Oregon Lithoprint Inc., 102 F.3d 376, 378 n.2 (9th Cir. 1996); Harsch v. Eisenberg, 956 F.2d 651, 660 (7th Cir. 1992). But see Blue Cross & Blue Shield of Alabama v. Lewis, 753 F. Supp. 345, 347 (N.D. Ala. 1990) (holding Ingersoll-Rand gave federal courts "green light" to fashion extra-contractual remedies including punitive damages). Similarly, § 510 plaintiffs cannot recover compensatory damages. Zimmerman, 72 F.3d at 827-29; Warner

v. Buck Creek Nursery, Inc., 149 F. Supp. 2d 246, 255 (W.D. Va. 2001) (noting compensatory damages are not equitable). Also, there can be no damages for mental anguish. Nero v. Indus. Molding Corp., 167 F.3d 921, 932 (5th Cir. 1999).

Because the remedies allowed in § 510 cases are only equitable, there is no right to a jury trial. See, e.g., Langlie v. Onan Corp., 192 F.3d 1137, 1141 (8th Cir. 1999); Spinelli v. Gaughan, 12 F.3d 853, 857-58 (9th Cir. 1993); Morgan v. Ameritech, 26 F. Supp. 2d 1087, 1090 (C.D. Ill. 1998); Thomas v. Allen-Stone Boxes, Inc., 925 F. Supp. 1316, 1321 (W.D. Tenn. 1995). But see Lewis, 753 F. Supp. at 347 (interpreting Ingersoll-Rand to allow extra-contractual remedies and by extension right to jury).

5. Relationship between ERISA's anti-retaliation provision and other federal discrimination statutes

In addition to ERISA, there are numerous other federal statutes that protect employees and apply to benefit plans. Chief among these are the Age Discrimination in Employment Act (ADEA), codified at 29 U.S.C. §§ 621-634 (2002), and the Americans with Disabilities Act (ADA), codified at 42 U.S.C. § 12101-12213 (2002). For a more detailed discussion of how these acts impact employee benefit plans, see Employee Benefits Guide, §§ 10.01, 10.03 (Matthew Bender 2001). This section focuses on the increasing overlap between these statutes and the protections ERISA § 510 affords and the possible dual liability that employers may face under the statutes.

a. Age Discrimination in Employment Act

The ADEA prohibits discrimination against employees forty and older and makes it unlawful for an employer to “limit, segregate, or classify . . . employees in any way that would deprive . . . any individual of employment opportunities . . . because of such individual’s age.” 29 U.S.C. §§ 623(a)(2), 631(a). Claims involving both the ADEA and ERISA § 510 can be established using the McDonnell Douglas framework, although the Supreme Court has not squarely confirmed that the framework is applicable to ADEA claims. See Reeves, 530 U.S. at 142 (assuming McDonnell Douglas applies because parties did not dispute it).

Hazen Paper Co. v. Biggins illustrates one intersection of ERISA § 510 and the ADEA. 507 U.S. 604, 612 (1993). There, the employer terminated an employee a few weeks before his benefits would have vested. Id. at 607. In addition to claiming that the termination violated § 510, the plaintiff claimed that his pension status was a proxy for age and that the termination indicated that the employer fired him because of his age. Id. The question on appeal was whether the evidence that the employer interfered with the vesting of the pension could support the finding of age discrimination. Id.

The Supreme Court vacated the lower court’s ruling and held that interference with the vesting of pension benefits alone does not establish a violation of the ADEA. Id. at 613. Although previous circuit court decisions held that the years of service could be a proxy for age, the Court held that the two were “analytically distinct” and that the two factors were not equivalent. Id. at 611, 613. While the termination clearly violated § 510, that violation did not also violate the ADEA because the employee was not terminated because of age. Id. at 612. A

violation of the ADEA only occurs where an employer wrongly acts based on age, not where it wrongly terminates an older employee for any illegal reason. As discussed above, this is the principle St. Mary's Honor Center established: plaintiffs suing under federal employment statutes must prove a specific intent to violate the statute, not that the employer wrongly terminated an employee.

The Court noted, however, that an employer could have dual liability if in fact it terminated the employee both because it wanted to avoid paying a pension and to get rid of older workers. Id. at 613. Moreover, in cases where the pension status was actually based on age rather than years of service, an employer who terminates an employee to prevent vesting may violate the ADEA. Id. On remand, the First Circuit initially found that there was sufficient evidence to find an ADEA violation even without considering the evidence to the ERISA claim. See Biggins v. Hazen Paper Co., No. 91-1591, 1993 WL 406515, at *5 (1st Cir. Oct. 18, 1993). This decision was subsequently vacated and withdrawn by the First Circuit en banc out of concerns that the jury's factual findings were so contaminated by the ERISA § 510 claim that a new trial was needed on the ADEA count. Biggins v. Hazen Paper Co., No. 91-1591, 1994 WL 398013, at *1 (1st Cir. June 27, 1994) (en banc).

See also:

Szczesny v. Gen. Elec. Co., 66 Fed. Appx. 388 (3d Cir. 2003). *Employer's alleged "totem poling" scheme in which older workers were systematically replaced with younger workers, violated neither ERISA nor the ADEA where there was no evidence that employer's specific intent was to harvest employee's pension funds and no evidence to support employee's claim of age discrimination.*

Another potential intersection between § 510 claims and ADEA claims relates to the procedural requirements of ADEA claims and the ability of plaintiffs to relate ADEA claims back to timely ERISA § 510 actions under Federal Rule of Civil Procedure 15(c). See Louis Maslow II, Comment, *Dual Liability: The Growing Overlap of the Age Discrimination in Employment Act and Section 510 of the Employee Retirement Income Security Act*, 58 ALB. L. REV. 509, 520 (1994). To bring an ADEA claim, a plaintiff must file a complaint with the EEOC within 180 days of the occurrence or, in some cases, 300 days. 29 U.S.C. § 626(d)(1)-(2). As discussed above, the statute of limitations for an ERISA § 510 claim is significantly longer. Rule 15(c) allows a party to add additional claims after the statute of limitations has run where the defendant had notice of the possible other claims and the new claims "arose out of the conduct, transaction or occurrence [as the] . . . original pleading." Fed. Rule Civ. P. 15(c). Some have theorized that a plaintiff that failed to file an ADEA claim in the time allotted could amend a timely ERISA claim by adding an ADEA count under Rule 15(c) because the claims originate from the same conduct or occurrence and a defendant would have likely had notice that an age claim could arise. See Maslow, supra, at 527.

The United States District Court for the Northern District of California allowed a time-barred ADEA claim to continue in Tusting v. Bay View Fed. Sav. & Loan Ass'n, 762 F. Supp. 1381, 1382 (N.D. Cal. 1991). Stating the EEOC deadline was "not a jurisdictional prerequisite to suit," the court determined that the claim could be added. Id. Because the factual basis of the claim was the same as the timely-filed ERISA claim and was brought to the

defendant's attention in the original pleading, the new claim would not prejudice the defendant. Id. (citing 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1497, at 94-95). This case is consistent with other employment discrimination cases where plaintiffs were able to add new claims that arose out of the same transaction or occurrence. See Maslow, supra, at 527. But see Fairchild v. Forma Scientific, Inc., 147 F.3d 567, 575 (7th Cir. 1998) (noting that ADA charge cannot relate back to ADEA charge where factual allegations for original claim could not also support ADA claim). While few other cases have involved this intersection of § 510 and the ADEA, employers should be wary that plaintiffs could use § 510 to resurrect stale ADEA claims that otherwise may have been lost as untimely.

b. Americans with Disabilities Act

The ADA generally provides that “no [employer, employment agency or labor organization] shall discriminate against a qualified individual with a disability because of the disability . . . in . . . hiring, advancement or discharge, employee compensation, [or] other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). Self-funded ERISA plans are “covered entities” under the ADA. Heather J. Blum, Annotation, *The Propriety Under ERISA and the Americans With Disabilities Act of Capping HIV-Related Claims*, 131 A.L.R. FED. 191, 203 (1996). Moreover, the Act provides that no employer may target a disabled person by reducing that person's benefits to avoid the cost of insuring that person. See Interpretive Guidance to Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.5 App. (2002); Employee Benefits Guide, § 10.03. An employer would not violate the Act, however, if it were to reduce benefits for all employees out of concern for the cost of the whole even if disabled employees are more likely to be disadvantaged by the change. 29 C.F.R. § 1630.5 App.

As stated above, ERISA § 510 decisions arising before the ADA held that an employer did not violate § 510 by intentionally changing the benefits it provided even if it did so only to avoid paying the higher cost of treating a single disabled employee. See McGann, 946 F.2d at 404-05. The most notable of these cases is McGann v. H & H Music Co., where the Fifth Circuit held that an employer did not violate § 510 when by capping its AIDS-related insurance benefit at \$5,000 when it found out that one of its employees had AIDS but placed no cap on other catastrophic illnesses. Id. at 403. The court determined the limit was set for all employees who might be afflicted with AIDS and no evidence indicated the change was targeted at the plaintiff even though he was the only employee known to have had AIDS. Id. at 404. Moreover, the court stated that the employer reserved the right to modify the benefits at anytime, so the plaintiff was not entitled to the benefits he sought. Id. at 405. Although not addressed in McGann, other courts have held that a plaintiff cannot bring suit for changes in an unvested benefits plan under § 510 because the change does not affect the employment relationship as a termination or demotion would. See Teumer, 34 F.3d at 545; Haberern, 24 F.3d at 1502-03.

The question in suits arising after the ADA is whether an employer violates federal law if it reduces the benefits of all out of concern for the cost of insuring the whole but does so only because the expected cost of insuring a single disabled employee will raise the cost for the entire pool of workers. Such a reduction would not violate § 510 because, as noted, changes in the benefits plans do not affect the employment relationship and also would affect employees other than the worker who sought the benefits. See Teumer, 34 F.3d at 545; McGann, 946 F.2d at 404.

An employer, however, may be liable under the ADA if a court determines that the reduction was in fact due to “subterfuge,” which the EEOC defines as a disability-based distinction that is not justified by business or insurance costs. See Blum, 131 A.L.R. FED. at 200. In such a case, the employer must prove that the distinction is a bona fide insurance plan and that the change was justified by legitimate actuarial data or actual experience. Id. Most cases on this issue have settled, however. See id. at 205.

B. ERISA LIABILITY OF EMPLOYERS UNDER MANAGED CARE AND EMPLOYER-SPONSORED HEALTH PLANS

Most Americans receive health benefits through plans their employers sponsor. See *Health Insurance Coverage: 2001*, U.S. CENSUS BUREAU, 13 (2002), available at <http://www.census.gov/prod/2002pubs/p60-220.pdf> (finding that in 2001 63% of all Americans received private, employer-based health insurance). Although many ERISA provisions are concerned with pension plans, ERISA also governs these group health plans. Nancy R. Mansfield et al., *Evolving Tension Between HMO Liability Precedent and Legislation*, 36 TORT & INS. L.J. 949, 950 (Summer 2001). When a beneficiary is dissatisfied with his or her benefits and sues under ERISA, the question often arises as to the liabilities of the employer-sponsor.

This section of the Handbook provides an introduction to basic aspects of managed care and considers under what circumstances an employer-sponsor of a managed-care plan has obligations under ERISA and possible grounds for employer liability based on the negligence or malpractice of the administrator of the plan it sponsors.

1. Introduction to basic aspects of managed care

Because healthcare costs since 1960 have increased more than 800%, many employers have turned to managed care products to more effectively control their health care costs. MATTHEW BENDER, *EMPLOYEE BENEFITS GUIDE* § 11.01 (2001). A variety of managed care programs have become popular with employers in recent years. The most common type is the health maintenance organization (“HMO”). HMOs generally involve a group of care providers who work for a single company or as part of an organization that controls both the cost of healthcare and the quantity of healthcare services. Another type of managed care program is a preferred provider organization (“PPO”). PPOs are usually a network of independent care providers who have agreed to perform services at a certain amount which is below what they would charge their fee-for-service customers. Employees are provided incentives to choose providers within the PPO network, or, perhaps more accurately, disincentives in the form of lower reimbursements if they choose providers outside the network.

In both PPO and HMO plans, costs are in part controlled by a process called “utilization review” (“UR”). It is this aspect of managed care that frequently leads to litigation over whether the plan improperly denied the beneficiary’s claim of benefits. The UR process consists of several techniques that attempt to eliminate unnecessary or inappropriate procedures. For example, many plans require “pre-certification” which requires a pre-admission review of the case to determine whether the physician’s order of elective hospitalization is medically warranted. A beneficiary who fails to comply with a plan’s pre-certification procedure may be

charged a penalty. See Nazay v. Miller, 949 F.2d 1323, 1331 (3d Cir. 1991) (finding employer who assessed penalty did not breach any fiduciary duty).

PPOs and HMOs both offer certain advantages to the employer as opposed to traditional benefit plans or fee-for-service arrangements. HMOs, for example, provide a comprehensive benefit package with little out of pocket expense and stress “wellness” and preventative care that may reduce the need for more serious treatment in the future. See Employee Benefits Guide, § 11.08. PPOs offer a wider array of services and a wider choice of providers that allow employees to select their primary physicians. See id. at § 11.12. Both plans offer reduced paperwork and usually do not require employees to pay for services first and then wait for reimbursement. See id. at §§ 11.08, 11.12.

Many managed care plans have been criticized, however, because they limit access to care or contain economic incentives to not provide some forms of treatment. In an effort to lower costs, managed care programs may also reduce the quality of care by relying on less experienced doctors or doctors who are willing to lower their costs to comply with the plan. Another criticism of managed care is that by limiting employees’ ability to choose their own doctor, it prevents the development of a close physician-patient relationship. Id. at § 11.08

2. Determining the scope of the employer-sponsor’s liability

Generally, the employer who merely sponsors an ERISA-governed health care plan will owe no fiduciary duty to the plan beneficiaries under ERISA. Barnes v. Lacy, 927 F.2d 539, 544 (11th Cir. 1991). One court considering the issue noted that the law clearly establishes that a beneficiary may not recover from his employer, provided the employer is only a plan sponsor. Wyluda v. Fleet Fin. Group, 112 F. Supp. 2d 827, 830 (E.D. Wis. 2000). The Wyluda court concluded that “ERISA permits suits to recover benefits only against the Plan as an entity” Id. (citing Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996)). An employer that does not control the administration of the plan is not a proper party in an ERISA suit. Layes v. Mead Corp., 132 F.3d 1246, 1249 (8th Cir. 1998).

See:

Crowley ex rel. Corning, Inc., Inv. Plan v. Corning, Inc., 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002). *Where sponsor does not control investment decisions and is not a fiduciary of the plan, the employer-sponsor cannot be a defendant in a suit alleging that the defendant breached duties by materially misleading beneficiaries. If a committee of the sponsor is the designated administrator or fiduciary, the sponsor cannot be held liable for the committee’s alleged mismanagement under a respondeat superior theory.*

Once an employer chooses to wear “two hats,” however, and acts as both the employer and the plan administrator, fiduciary duties under ERISA attach. Varity Corp. v. Howe, 516 U.S. 489, 498 (1996); Barnes, 927 F.2d at 544. ERISA defines the administrator of a plan as “person specifically so designated by the terms of . . . the plan” 29 U.S.C. § 1002(16)(A). If no administrator is designated, however, the plan sponsor will be the administrator. Id. The plan sponsor is the employer if the benefit plan was established or maintained by a single employer. 29 U.S.C. § 1002(16)(B). Thus, the primary way to determine

if employer-sponsor has fiduciary duties is look to the terms of the plan, because even if the employer is not designated as the administrator, it may be the administrator anyway if no administrator is named.

Even if not formally the administrator, however, employer-sponsors may be liable as fiduciaries if they “exercise[] any discretionary authority or discretionary control respecting management . . . [or] administration of [the] plan.” 29 U.S.C. § 1002(21). Courts have allowed a plan participant to recover benefits from an employer based on the employer’s “discretionary decision-making authority over the plan’s benefits.” Witowski v. Tetra Tech., Inc., 38 F. Supp. 2d 640, 644 (N.D. Ill. 1998). In these cases, however, employer-sponsors become liable only for acts they commit while functioning as plan administrator and not for acts committed while they are conducting business not regulated by ERISA. Barnes, 927 F.2d at 544.

In Varity, for example, an employer was both the sponsor and the designated plan administrator, and it represented to its employees that an impending corporate restructuring would not affect their benefits. 516 U.S. at 498-99. The corporation knew this was false. Id. at 494. The Court found that while Varity’s misrepresentations related to the financial health of the company, Varity was not acting as an employer making business decisions. Id. at 505. Because those statements were intentionally connected to the statements it made about the security of the employees’ benefits, it was exercising “discretionary authority” respecting the plan’s “management” or “administration,” within the meaning of ERISA § 3(21)(A). Id. Communications respecting the future of plan benefits are aspects of plan administration and by failing to communicate truthful information, the employer did not act “solely in the interest of the participants and beneficiaries.” Id. at 505-06. Thus, Varity violated the fiduciary obligations for plan administrators because “lying is inconsistent with the duty owed by all fiduciaries and codified in section 404(a)(1).” Id. at 506.

See also:

Bannistor v. Ullman, 287 F.3d 394, 405-07 (5th Cir. 2002). Officers of bankrupt employer corporation were ERISA “fiduciaries” for the purpose of employees’ action alleging a breach of fiduciary duty through the improper disposal of employee benefit plan assets; the officers had exercised control over plan assets by using cash advances from employer’s lien or to pay accounts other than employee benefit plans, and qualified as ERISA “plan administrators” and “employers” because they acted indirectly in employer’s interest regarding the plan in part by approving a new health plan in their capacity as board members and had check-signing authority for employer.

Law v. Ernst & Young, 956 F.2d 364, 372-73 (1st Cir. 1992). Although plan documents made a committee within the employer-sponsor the administrator, evidence established that employer itself exercised sufficient control over plan to make it a proper defendant in ERISA suit.

Kodes v. Warren Corp., 24 F. Supp. 2d 93, 101 (D. Mass. 1998). Third-party administrator was not a fiduciary because plan documents clearly provided that the employer-sponsor retained “final authority and responsibility for the Plan and its operation.”

Foulke v. Bethlehem 1980 Salaried Pension Plan, 565 F. Supp. 882, 884 (E.D. Pa. 1983). *Suit against employer-sponsor would continue because evidence suggested that employer took active role in administering the plan where plaintiff produced a letter detailing plan changes written on employer's letterhead.*

But see:

Crocco v. Xerox Corp., 137 F.3d 105, 107 (2d Cir. 1998). *The court rejected the argument that an employer can become a de facto administrator and stated that "if a plan specifically designates a plan administrator, then that individual or entity is the plan administrator for the purposes of ERISA."*

Arnold v. F.A. Richard & Assocs., Inc., No. Civ.A. 99-2135, 2000 WL 1693659, at *3 (E.D. La. Nov. 8, 2000). *The court found no evidence that employer had necessary discretion to be considered a fiduciary even though employer was designated as the plan administrator.*

Witowski v. Tetra Tech, 38 F. Supp. 2d 640, 644 (N.D. Ill. 1998). *Although employer was nominal plan administrator, plaintiffs admitted that the service provider exercised "final discretionary authority to determine all questions of eligibility . . . and to interpret and construe the terms of [the policies]." The court refused to allow the suit to continue because the employer did not maintain sufficient discretionary authority over the administration of the plan and the provision of benefits.*

3. Duties and responsibilities of the employer-sponsor if it is the administrator

In addition to potential liabilities for breach of fiduciary duty, ERISA imposes other obligations on employer-sponsors who act as plan administrators. Among the most relevant are the obligations dealing with reporting and disclosures to plan participants.

a. Disclosure obligations under ERISA

ERISA requires that every employee benefit plan "provide adequate notice in writing to any participant or beneficiary whose claim under the plan has been denied setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant." 29 U.S.C. § 1133(1). If terminating coverage, the employer has a duty to notify the beneficiary. If a participant does not receive adequate notice, the action cannot be barred by the statute of limitations.

In *Kodes v. Warren Corp.*, a former employee and his wife were covered by his employer's ERISA-governed insurance plan. 24 F. Supp. 2d 93, 102 (D. Mass. 1998). Although claims were initially reviewed by a third party administrator, the employer-sponsor was a fiduciary and proper defendant because it retained final authority to review and deny claims. *Id.* at 101. When the employee suffered a work related injury, he was told that he and his wife would both be covered as long as he continued to make weekly payments. *Id.* at 97. When the employee later sought coverage for medical procedures for his wife, the coverage was denied

because the employer said he failed to make the required payments. Id. The plaintiffs challenged this decision after the three-year limitations period elapsed, and the defendant argued the claim should be barred. Id. at 102. The court found that the employer could not prove that the employee and his wife actually received formal notification that their participation in the plan was terminated and could have reasonably assumed that they were still covered under the plan despite their failure to make the required contribution. Id. Thus, the employer-sponsor's motion for summary judgment was denied. Id.

See also:

Epright v. Envtl. Res. Mgmt., Inc. Health & Welfare Plan, 81 F.3d 335, 342 (3d Cir. 1996). “When a letter terminating or denying Plan benefits does not explain the proper steps for pursuing review of the termination or denial, the Plan’s time bar for such a review is not triggered.”

White v. Jacobs Eng’g. Group Long Term Disability Benefit Plan, 896 F.2d 344, 350 (9th Cir. 1989). “When a benefits termination notice fails to explain the proper steps for appeal, the plan’s time bar is not triggered.”

Several circuit courts also have considered whether ERISA imposes upon a company that acts as administrator of its employee benefit program a duty to truthfully disclose, upon inquiry from plan participants or beneficiaries, whether it is considering amending the benefit plan. The majority view is that a duty of accurate disclosure begins when ““(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.”” Beach v. Commonwealth Edison Co., 382 F.3d 656, 659 (7th Cir. 2004) (quoting Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996); see also Mathews v. Chevron Corp., 362 F.3d 1172, 1180-82 (9th Cir. 2004); McAuley v. IBM Corp., 165 F.3d 1038, 1043-45 (6th Cir. 1999); Vartanian v. Monsanto Co., 131 F.3d 264, 268 (1st Cir. 1997); Hockett v. Sun Co., 109 F.3d 1515, 1522 (10th Cir. 1997); Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1538-44 (3d Cir. 1996); Wilson v. S.W. Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); Barnes, 927 F.2d at 544. Two circuits have concluded that the duty of disclosure arises sometime before the change is under “serious consideration” -- although these circuits have had difficulty determining just what information must be disclosed, and when. Beach, 382 F.3d at 660; see Martinez v. Schlumberger, Ltd., 338 F.3d 407, 425 (5th Cir. 2003); Ballone v. Eastman Kodak Co., 109 F.3d 117, 122-26 (2d Cir. 1997).

See also:

Barrs v. Lockheed Martin Corp., 287 F.3d 202, 207-08 (1st Cir. 2002). *Employer did not have a fiduciary duty under ERISA to inform former employee’s ex-wife that the former employee had substituted a new optional life insurance policy for the optional life insurance policy of which she was the irrevocable beneficiary pursuant to a divorce decree.*

b. Disclosure obligations related to COBRA benefits

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) mandates that plan sponsors give former employees the opportunity to continue coverage under

the employer's group health plan if a qualifying event occurs. 29 U.S.C. § 1161(a). Termination of employment is a qualifying event and requires that the employer-sponsor to notify the administrator of the group health plan within 30 days of the termination. 29 U.S.C. §§ 1163(2), 1166(a)(1). The plan administrator must then notify the discharged employee and other qualified beneficiaries of the COBRA rights within fourteen days. 29 U.S.C. § 1166. When an employer is also a plan administrator, this further obligation to inform falls to it. Regulations from the Department of Labor indicate an employer-sponsor who is also the administrator has forty-four days to notify the employee. See Roberts v. Nat'l Health Corp., 963 F. Supp. 512, 515 (D.S.C. 1997). But see Hamilton v. Mecca, Inc., 930 F. Supp. 1540, 1553 (S.D. Ga. 1996) (requiring notice within fourteen days).

In Bowerman v. Wal-Mart Stores, Inc., the court affirmed the district court and found that under relevant provisions of ERISA and COBRA, health benefit plan participants had to be informed of their plan's requirements through a summary plan description (SPD) that was understandable by the average plan participant and reasonably apprised participants of plan rights and obligations. 226 F.3d 574, 588-89 (7th Cir. 2000) (citing 29 U.S.C. § 1022(a)). In that case, the SPDs were inadequate because they contained inadequate disclosures about the relationship between COBRA coverage, effective dates of rehiring, and susceptibility to preexisting condition limitations that materially misled the employee. Id. Because the employee had reasonably relied on the employer's misrepresentations and omissions when deciding not to pay her COBRA premium, the company was estopped from denying the employee's election of COBRA coverage. Id. at 586-87.

See also:

Emilien v. Stull Techs. Corp., No. 02-1422, 2003 WL 21675343, at *5 (3d Cir. July 18, 2003). *Employer's notice to employee regarding her right to continued medical coverage under COBRA was inadequate and did not fulfill employer's statutory obligation to give accurate and understandable information on conversion; notice was contained in letter that referred to the term "Qualifying Event" without any explanation of the term and it was highly unlikely that a lay person would understand the meaning of such a term without further explanation.*

Underwood v. Fluor Daniel, Inc., 106 F.3d 394 (table), No. 95-3036, 1997 WL 33123, at *4 (4th Cir. Jan. 28, 1997) *The defendant was required to notify terminated employee's wife that she was also eligible for COBRA benefits after husband's termination.*

But see:

Chesnut v. Montgomery, 307 F.3d 698, 702 (8th Cir. 2002). *Employer satisfied notice requirements by providing former employee with sufficient oral notice of her right to elect COBRA continuation coverage; there is no authority indicating that the notice required by § 1166 must be in writing.*

Degruipe v. Sprint Corp., 279 F.3d 333, 337 (5th Cir. 2002). *The law requires only that the employer make a good faith attempt to comply with notification provisions. Good faith can be demonstrated by an attempt to hand deliver a letter*

to an individual or by first class mail and even if the company later learns that the letter was returned as undeliverable, the company has fulfilled its responsibility.

c. More stringent review of decisions by employer-sponsors who are also administrators

Where the employer is both the plan administrator and the sponsor, it also risks being subject to a more stringent review of its decisions, even under the abuse of discretion standard of review. *See Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 553 (9th Cir. 1995). Due to the potential conflict of interest that arises when the employer that pays for the service also has the power to decide whether it is performed, courts may conduct a more searching review to determine if the employer breached its fiduciary obligations under the plan. *Id.*

4. Employer-sponsor's liability related to managed care plans when it is not the administrator

Although no reported cases have so held, many lawyers and employers continue to be concerned that employers will be held liable for the negligence or wrongful denials of benefits committed by the plan administrators the employers choose. Several cases have held that *HMOs* and *plan administrators* can be liable for the malpractice of doctors in their provider network and for the results of a failure to provide quality benefits. *See Rice v. Panchal*, 65 F.3d 637, 642, 646 (7th Cir. 1995) (remanding to state court medical malpractice suit against plan administrator of employer's plan because case did not require interpretation of ERISA plan); *Crum v. Health Alliance-Midwest, Inc.*, 47 F. Supp. 2d 1013, 1019-20 (C.D. Ill. 1999) (allowing wrongful death suit against HMO where provider's negligence prevented patient from receiving care). *But see Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 942 (6th Cir. 1995) (holding state law wrongful death claims against administrator and health provider related to denial of benefits were preempted because they dealt with decision to provide ERISA benefits). When it comes to whether the employer-sponsor should be liable for the negligence of the managed care provider it chose, however, there have been no cases to address the matter.

It has been suspected, however, that a plaintiff could allege that an employer failed to exercise due care in selecting a managed care provider and therefore would be liable for injuries the plaintiff received in the course of treatment. *See* EMPLOYEE BENEFITS GUIDE, § 11.11. To best protect itself against any possible liability, employers should be certain to investigate fully any program they choose, including the organization's management, the criteria the organization uses in selecting its staff and facilities and qualifications and licenses of the providers. *See id.* at § 11.13.

In response to *Pegram v. Herdrich*, 530 U.S. 211 (2000), where the Supreme Court held that HMOs cannot be sued in federal court under ERISA for a treatment decision, numerous states have adopted statutes that subject HMOs to liability to some degree. *See* Mansfield, et al., *supra*, at 957. Most states that have passed these statutes, which include Texas, California, Ohio, Missouri and Georgia, require HMOs to meet the standard of ordinary care in treatment decisions they make. *See id.* at 968 (comparing state standards). Interestingly, only half of these states included a provision that made the employer-sponsor exempt from suit. *See id.* Legislatures in Arizona, California, Georgia, Maine, Ohio, Oklahoma and Washington

established that employers are not liable for the actions of the plans in which they chose to enroll. See id. These provisions are consistent with the Supreme Court's opinion in Pegram because there the Court held that employers are not liable for selecting plans which include financial incentives because in choosing such a plan they are not acting as a fiduciary, but as a settlor of the plan. See id. at 972. Similarly, choosing a certain HMO would not be the act of a fiduciary.

Even if a plaintiff alleged that an employer was liable for the actions of a managed care plan it chose, the employer may still have protection from state law claims due to ERISA's broad preemption provision. See, e.g., Tolton, 48 F.3d at 942; Kuhl v. Lincoln Nat'l Health Plan of Kansas City, 999 F.2d 298, 303 (8th Cir. 1993). In cases where the injuries to the plaintiff were the result of an HMO's decision to deny benefits under an ERISA plan, courts have held that ERISA preempts the state law claims. See Kuhl, 999 F.2d at 302-03. Whether the HMO should be liable for its decision to deny benefits "relates to" an ERISA plan and therefore preempts the state law remedies, even if ERISA does not provide remedies that would replace those provided by state law. Tolton, 48 F.3d at 943. Because courts accept that Congress carefully considered ERISA's regulatory scheme and decided to allow only a limited set of remedies, they ordinarily will not permit additional remedies Congress did not establish. Id. (citing Pilot Life, 481 U.S. at 54.).

Similarly, it is likely that courts would extend this holding to preempt state law claims against employers that are based on decisions under an ERISA plan. In those cases, a court would not allow a state wrongful death or negligence claim against an employer where the injury resulted from a decision to deny ERISA benefits because to do otherwise would allow a recovery that ERISA does not provide in a case that "relates to" an ERISA plan. See Tolton, 48 F.3d at 942; Kuhl, 999 F.2d at 303. But see Rice, 65 F.3d at 642, 646 (suggesting state law claims against employer may be allowed where injuries occurred due to malpractice and not denial of benefits).

C. LITIGATION INVOLVING CASH BALANCE CONVERSION

Federal law, including ERISA, the ADEA, and the Internal Revenue Code (IRC), provide certain protections for the employee benefits of participants in private sector pension and health benefit plans. One way these laws affect benefit plans is through the restrictions they place on plan changes, including amendments that convert a traditional pension plan formula to a cash balance plan formula.

For example, a plan amendment cannot reduce benefits that participants have already earned. Advance notification to plan participants is required if, as a result of the amendment, the rate that plan participants may earn benefits in the future is reduced significantly. Additionally, other legal requirements must be satisfied, including prohibitions against age discrimination. *Frequently Asked Questions about Cash Balance Plans*, UNITED STATES DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION (November 2009) available at http://www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html. This section examines the benefits and risks of conversion to cash balance plans and litigation related to the issue.

1. Characteristics of cash benefit plans

There are three basic types of pension plans employers provide for their employees: defined benefit plans, defined contribution plans, and cash balance plans. Before considering the characteristics of cash benefit plans, it is important to understand the other types of plans.

a. Traditional forms of benefit plans

A defined benefit plan is a retirement plan that provides a specific benefit at retirement for each eligible employee. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) (citing Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 154 (1993)). Employers usually fund defined benefit plans on an actuarial basis, which ensures that the plan will have adequate funds to pay promised benefits to plan participants when they retire. To determine participants' benefits, the pension plan establishes a formula that often considers years of services and salary. Because a defined benefit plan "consists of a general pool of assets rather than individual dedicated accounts," the employer "typically bears the entire investment risk and . . . must cover any underfunding . . . that may occur from the plan's investments." Eaton v. Onan Corp., 117 F. Supp. 2d 812, 816 (S.D. Ind. 2000) (quoting Hughes Aircraft, 525 U.S. at 439).

Until recently, the benefit formulas in defined benefit plans typically were based on a percentage of the participant's salary over the last year or several years before retirement, multiplied by the participant's years of service with the employer. Id. Because this design assumes the typical employee's compensation is highest near the end of that person's career, an employee usually earns the largest share of a retirement benefit near the end of his or her career. Thus, such a plan rewards long-term employment and loyalty. Some pension practitioners refer to this as a "backloaded" accrual of benefits. See Eaton, 117 F. Supp. 2d at 816.

A second common form of benefit plan, the defined contribution plan, establishes an individual account for each participant. ERISA defines defined contribution plans as those that "provide [] for an individual account for each participant and for benefits based solely upon the amount contributed to the . . . account." 29 U.S.C. § 1002(34). The employee will make voluntary contributions to an individual plan account, which may be supplemented by periodic contributions by the employer. The participant's retirement benefit is determined by the balance in the individual account, which will depend on the contributions plus net investment earnings on the contributions. While they bear an investment risk because the benefit is not a fixed amount, the employees may enjoy higher market-based returns. Because benefits in defined contribution plans are based on contributions and investment earnings over an entire career and not just the last year or last few years of employment, defined contribution plans generally do not have the "backloading" problem found in many defined benefit plans. Eaton, 117 F. Supp. 2d at 817.

b. Definition of cash balance plans

The first cash balance pension plan was established in 1986. See Jerry Geisel, IRS, Treasury OK Cash Balance Design, BUSINESS INSURANCE, Dec. 16, 2002, at 22. The IRS has described cash balance plans as follows:

In general terms, a cash balance plan is a defined benefit pension plan that defines benefits for each employee by reference to the amount of the employee's hypothetical account balance. An employee's hypothetical account balance is credited with hypothetical allocations and hypothetical earnings determined under a formula selected by the employer and set forth in the plan. These hypothetical allocations and hypothetical earnings are designed to mimic the allocations of actual contributions and actual earnings to an employee's account that would occur under a defined contribution plan. Cash balance plans often specify that hypothetical earnings [or "interest credits]" are determined using an interest rate or rate of return under a variable outside index (e.g., the annual yield on one-year Treasury securities).

IRS NOTICE 96-8, 1996-1 C.B. 359 (Feb. 5, 1996).

By legal definition, a cash balance pension plan is a defined benefit plan because the individual accounts cash balance plans establish are merely fictional and do not actually exist. See Esden v. Bank of Boston, 229 F.3d 154, 158-59 (2d Cir. 2000). From an economic standpoint, however, a cash balance pension plan resembles a hybrid arrangement where a defined benefit plan functions as a defined contribution plan. See Eaton, 117 F. Supp. 2d at 817. (describing cash balance plans).

Because cash balance plans provide that an individual's account will receive interest credits that are outside the control of the employer, the employer bears the risk that the plan's investment return may fall below the interest credit rate guaranteed by the plan. Id. Similarly, the employer benefits if the plan's net investment return is above the rate guaranteed by the plan. Id. Because the employer bears the risk with these investments, cash balance plans, like defined benefit plans, are subject to a number of statutory requirements that do not apply to defined contribution plans. Id.

A cash balance plan must comply with the same requirements as defined benefit plans under ERISA. Most of these requirements were written between 1974 and 1984, before cash balance plans were developed and began to be widely adopted. Id. Because the rules for defined benefit plans were not developed to address the features of cash balance plans, litigation has resulted from employers and employees trying to apply ERISA and other laws that regulate defined benefit plans to cash balance plans. See Esden, 229 F.3d at 159; Eaton, 117 F. Supp. 2d at 817.

c. Benefits for employers who switch to cash balance plans

Cash balance plans have become increasingly popular among employers in recent years because employers believe that cash balance pension plans are more attractive to younger workers than traditional defined benefit plans that tend to provide the greatest benefits to long-term career employees. Id. Cash balance plans provide greater mobility of benefits from one job

to another over the course of a career. See Esdén, 229 F.3d at 158; Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan, 221 F.3d 1235, 1248 (11th Cir. 2000) (Lyons I) (noting that “one arguable benefit of [cash balance] plans is that they allow younger workers to take a larger benefit with them when changing jobs”); Eaton, 117 F. Supp. 2d at 818. Employers also benefit in that the contributions are actually made to a single fund and they enjoy continued flexibility in funding so long as solvency is maintained. Esdén, 229 F.3d at 158 n.5. Moreover, employers may retain any amount of investment income that exceeds the value of the promised benefits. Id.

Employees also benefit from the cash balance plans in that they are easier to understand, and the benefits accrue more evenly over time. Id. Also, because they are more portable, they are better suited to the modern labor market where there is greater job-mobility than in the past. Id.

d. Drawbacks associated with cash balance plans

Despite these benefits, many older workers have challenged attempts to convert their pension plans to cash balance plans. Eaton, 117 F. Supp. 2d at 818. Most challenges arise because conversion “can affect adversely the expectations of a generation of employees who were too young to derive much benefit from the traditional ‘final average pay’ design, but who are too old to have gotten an early start in their careers on the benefits of a cash balance plan.” Id. Through conversions, this generation has received essentially the worst of both worlds. See generally Hope Viner Samborn, *Now You See It, Now You Don’t, Older Workers Watch Pension Erode as Employers Turn to Cash-Balance Plans*, 85 A.B.A.J. 34 (Nov. 1999) (noting conversions “have spurred groups of older workers to file class action lawsuits alleging age discrimination and other violations of the law” and discussing lawsuits filed by dissatisfied workers).

2. Risks associated with conversion to cash balance plans

a. Conversion to cash balance plans spark age discrimination claims

In Eaton v. Onan Corp., the United States District Court for the Southern District of Indiana rejected the plaintiffs’ allegations that because the rate of benefit accrual in the plan declined with an employee’s age the design of a cash balance plan was age discriminatory as a matter of law. 117 F. Supp. 2d at 826. Employers who switch from a defined benefit plan to a cash balance plan frequently become targets of lawsuits alleging age discrimination. Younger employees will usually do better than they would have under a defined contribution or benefit plan because the accrual pattern under a cash balance plan will provide them with a larger benefit if they leave their current employer. Older workers with more experience who have been working towards their defined benefit plan usually protest the switch to a cash balance plan because the accrual rate they receive leaves them with less at retirement than the original percentage of their salary they expected to receive as their pension.

When these older workers think the new plan reduces their older plan’s earnings they turn to federal law because parallel provisions of ERISA and the ADEA prohibit discrimination under the plan when, “the rate of an employee’s benefit accrual is reduced,

because of the attainment of any age.” 29 U.S.C. § 1054(b)(1)(H)(i); see also 29 U.S.C. § 623(i)(1)(A). Whether a violation of these provisions occurred does not depend upon intent. Eaton, 117 F. Supp. 2d at 823.

Plaintiffs have argued that the rate of benefit accrual must be measured only in terms of an annuity payable at normal retirement age—in effect age 65. Id. In Eaton, the court considered a hypothetical situation in which two employees, one age 25 and the other 45, began employment at the same time with the same pay and their employer credits the same amount to each of their hypothetical cash balance accounts. Id. at 823. If this credit is projected forward using an identical interest rate to when each employee turns 65, the annuity that would be payable to the younger worker obviously would be larger than that paid to the older worker because a given amount of money will be worth more by accruing interest for 40 years than it would be after 20.

If, as the plaintiffs argued, rate of benefit accrual were measured by the value of the annuity paid at retirement age, the employer in the hypothetical situation would violate the law because a younger worker would receive a greater benefit for an equal amount of work. Id. The Eaton court concluded that while ERISA and the ADEA may permit this standard, they do not require it. Id. at 834. Measuring the rate of accrual in terms of the current cash balance of the participant’s account is equally, if not more, appropriate, and the employer will not violate the law so long as the employees’ accounts are credited by amounts that are based on factors other than age. Id.

See:

Campbell v. BankBoston, N.A., 206 F. Supp. 2d 70, 74, 79 (D. Mass. 2002). *Where no accrued benefits were reduced by the conversion to a cash balance system and the plaintiff was credited with what he had accrued up to the date of the conversion, there was no intentional age discrimination by the defendant. Moreover, unvested welfare benefits may be altered or terminated at any time. Thus, the conversion violated no federal statute.*

Eaton v. Onan Corp., 117 F. Supp. 2d 812, 826 (S.D. Ind. 2000). *The plan’s cash balance design did not violate the age discrimination provisions of the ADEA or ERISA because the rate of benefit accrual in the defendant’s plan did not decline based on changes in an employee’s age.*

In December 2002, the IRS and the Treasury Department proposed regulations that would have confirmed that cash balance plans that provide a larger annuity to younger workers would not violate anti-discrimination laws. See Geisel, supra, at 22. The regulations allowed employers to either convert accrued benefits to an opening cash balance or maintain the old accrued benefit in a separate account and start a new cash balance plan with a zero balance. Id. While these regulations sought to fill a regulatory void and reduce the number of age discrimination suits brought against employers, legislation in Congress slowed the adoption of these regulations. See Jerry Geisel, *Bill Would Block Treasury Rules on Cash Balance*, BUSINESS INSURANCE, Sept. 15, 2003, at 1.

In Cooper, the Seventh Circuit became the first Circuit Court to address the legality of a cash-balance plan under § 1054(b)(1)(H)(i), which is the anti-discrimination provision that applies to defined benefit plans. Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 638 (7th Cir. 2006). The court compared § 1054(b)(1)(H)(i) with § 1054(b)(2)(A), which is the anti-discrimination provision that applies to defined contribution plans, and concluded that both sections were identical except that the former was prohibitive while the latter was permissive. Id. Hence, an employer was prohibited from denying “allocations” to an employee’s account as well as changing the rate at which benefits accrued because of the employee’s age. Id. The court held that “benefit accrual” in § 1054(b)(1)(H)(i) was not synonymous with “accrued benefit” as the district court had ruled. Id. at 639. Rather, the term “benefit accrual,” like “allocations” in the rule applicable to defined contribution plans, referred to an employer’s inputs while “accrued benefits refers to outputs after compounding.” Id. Because every employee under the IBM plan received the same 5% pay credit and the same interest credit per year, the court held that the plan did not discriminate against older employees. Id. at 640.

Further, the court found support for its holding in the proposed Treasury regulations, which treated the rate of “benefit accrual” as the contributions to a beneficiary’s hypothetical account for the year rather than the output from the plan at normal retirement age. Id. The court rejected the plaintiffs’ argument that a cash balance plan was discriminatory because a younger worker would have a greater opportunity to earn interest than an older worker. Id. at 639. In the court’s view, “treating the time value of money as a form of age discrimination is not sensible.” Id.; see also Drutis v. Rand McNally & Co., 499 F.3d 608, 615 (6th Cir. 2007) (adopting Cooper’s reasoning to hold that “benefit accrual” as used in § 1054(b)(1)(H)(i) refers to an employer’s inputs to the defined benefit plan); George v. Duke Energy Ret. Cash Balance Plan, 560 F. Supp. 2d 444, 454-459 (D.S.C. 2008) (relying on Cooper and Drutis to grant the defendant’s motion for judgment on the pleadings concerning plaintiffs’ age discrimination claim); Sunder v. U.S. Bank Pension Plan, No. 4:05CV01153, 2007 WL 541595, at *10 (E.D. Mo. Feb 16, 2007) (relying on Cooper and Drutis to conclude that cash balance plans do not violate ERISA’s prohibition on age discrimination).

In Register, the Third Circuit followed Cooper’s lead and went on to hold that cash balance plans do not violate ERISA’s anti age-discrimination provision for three reasons. Register v. PNC Fin. Serv. Group, Inc., 477 F.3d 56, 70 (3rd Cir. 2007). First, the court stated that “benefit accrual” must relate to an individual’s hypothetical account balance rather than an age-65 annuity payable at normal retirement age. Id. at 68. A contrary reading would simply overlook the difference between a cash balance plan from a traditional defined benefit plan. Id. Second, the court adopted Cooper’s rationale, and read § 1054(b)(1)(H)(i) and § 1054(b)(2)(A) *in pari materia* to conclude that the provisions are nearly the same and proscribe the same sort of conduct. Id. Because the defendant’s plan did not reduce the rate of “allocations” under § 1054(b)(2)(A) due to age, it did not reduce the rate of “benefit accrual” due to age either. Id. at 69. The court rejected the appellants’ argument that § 1054(b)(1)(H)(i) and § 1054(b)(2)(A) should be read differently, and noted that applying a different test for discrimination to each would lead to an absurd result. Id. Third, the court agreed with the Seventh Circuit’s decision in Cooper that “benefit accrual” referred to an employer’s input into the hypothetical account rather than to the compounded output after normal retirement age. Id. Thus, the employer’s plan satisfied the requirements of § 1054(b)(1)(H)(i) because contributions in the shape of either earnings or interest credits were not reduced due to an employee’s age. Id. at 70.

In 2008, the Second Circuit also held that cash balance plans do not violate § 1054(b)(1)(H)(i). Hirt v. Equitable Ret. Plan for Employees, Managers & Agents, 533 F.3d 102, 110 (2d Cir. 2008). The court overruled the district courts' rulings, which equated the term "accrued benefit" with "benefit accrual," citing § 204 (b)(1)(G) where Congress outlawed reductions in a beneficiary's "accrued benefit" due to age. Id. at 108. Congress knew how to use the term "accrued benefit" as it had done so in § 204 (b)(1)(G) , but intentionally left out the same term in § 1054(b)(1)(H)(i). Id. Thus, the rate of "benefit accrual" could not be interpreted as the age-65 annuity that can be purchased with the account balance. Id. The court also relied on § 1054(b)(1)(H)'s legislative history to conclude that the rate of "benefit accrual" referred to an employer's contributions rather than the total benefit to be gained at retirement age. Id. at 109. In enacting § 1054(b)(1)(H), Congress chose to prohibit plans from reducing an employee's benefits after the normal retirement age of 65. Id. Thus, because § 1054(b)(1)(H) prohibited reductions after normal retirement age, "it makes little sense to look to the accrued benefit--i.e., the annual benefit commencing at normal retirement age--as a reference point in evaluating whether there has been a reduction in the rate of benefit of accrual." Id.; see also Hurlic v. Southern California Gas Co., 539 F.3d 1024 (9th Cir. 2008) (agreeing with the Second, Third, Sixth and Seventh Circuits that cash balance plans do not violate § 1054(b)(1)(H)'s prohibition on age-discrimination).

b. Wearaway issue (no accrual)

Wearaway occurs when a defined benefit plan based on final average salary is converted to a cash balance plan, and, at the time of conversion, the initial value of a participant's cash balance account is less than the value of benefits accrued under the previous plan. Kenneth R. Elliott & James H. Moore, Jr., *Cash Balance Pension Plans: The New Wave*, COMPENSATION AND WORKING CONDITIONS, Summer 2000, at 7. Until pay and interest credits under the new plan bring their cash account balance up to the value already earned under the old plan, some workers will have a period during which they do not accrue additional benefits. Id. During this wearaway period no additional benefit accrues. Id. Employers are obligated to notify plan participants of amendments that will result in a significant reduction in the rate of future benefit accruals. Id. Although many participants argue that the wearaway period during a conversion should be explained, and the lost potential benefits should be rewarded to each worker, employers are not required to provide individual notices for each plan participant. Id.

Congress amended ERISA in 2002 to provide that a plan may not be amended to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides a notice that is "written in a manner calculated to be understood by the average plan participant and shall provide sufficient information . . . to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(2).

Plaintiffs have also argued that "wearaway" followed by a continuation of benefits once the cash balance account surpasses the frozen pre-conversion formula benefits violates ERISA's anti-backloading provisions. § 1054(b)(1)(A) is one of several anti-backloading provisions that disallows a plan from increasing the rate at which benefits accrue in a given year by more than 133 1/3% of the benefit accrued in any previous year. 29 U.S.C. § 1054(b)(1)(A). Congress designed the anti-backloading provisions to protect short-term workers from plans that concentrate the allocation of benefits in the later years of an employee's

service. Hurlic, 539 F.3d at 1033. In Hurlic, the plaintiffs asserted that, because benefits do not accrue at all during the “wearaway” period, the benefits that resume once the cash balance account exceeds the frozen pre-conversion formula benefits violate the 133 1/3% rule. Id. The Ninth Circuit opined that, under § 1054(b)(1)(B)(i), a plan amendment is treated as in effect for all previous years. Id. at 1035. Thus, only the new cash balance plan is relevant to determine whether the defendants violated the anti-backloading provisions. Id. The plaintiffs’ pre-conversion formula benefits are deemed as if they never existed. Id. The court also observed that problems associated with the conversion to cash balance plans are not pertinent to the objectives of the anti-backloading requirements, which are designed to protect short-term and/or younger employees. Id.; accord Register, 477 F.3d at 70-72; George, 560 F. Supp. 2d at 472; Richards v. FleetBoston Fin. Corp., No. 04-CV-1638, 2006 WL 2092086, at *3 (D. Conn. July 24, 2006); Wheeler v. Pension Value Plan for Employees of Boeing, No. 06-CV-500, 2007 WL 2608875, at *16 (S.D. Ill. Sept. 6, 2007).

c. Lump-sum whipsaw payment problems

Numerous ERISA and IRC provisions and regulations place requirements on defined benefit plans but do not apply to defined contribution plans. Under ERISA, “accrued benefit” for defined benefit plans refers to the benefit determined under the plan and expressed in the form of an annual benefit commencing at normal retirement age while for defined contribution plans, accrued benefit refers only to “the balance of an individual’s account.” 29 U.S.C. § 1002(23). Second, only defined benefit plans are subject to ERISA and IRC provisions which limit backloading and establish valuation rules. See Esden, 229 F.3d at 159. Moreover, these rules envision that distributions from a defined benefit plan be in the form of a single-life annuity payable at retirement age. Id. Any optional forms distribution, may be no less than the actuarial equivalent of the annuity. Id.

In 1984, Congress added § 203(e), 29 U.S.C. § 1053(e), to ERISA and the essentially identical § 417(e), 26 U.S.C. § 417(e), to the IRC. Lyons I, 221 F.3d at 1242. These new provisions made the rate of the Pension Benefit Guaranty Corporation (“PBGC”) the maximum rate an employer could use to discount a normal retirement benefit to present value. Id. Treasury Department regulations that interpret both the IRC and ERISA provisions require that, in distributing optional forms of an accrued benefit, the present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit. See id. at 1244 (citing Treas. Reg. §§ 1.411(a) - 11(d), 1-417(e)). By establishing the maximum discount rate by statute, Congress is able to protect employee benefits, because, mathematically, the higher the rate used to discount a benefit to present value, the lower the present value of the benefit. See Esden, 229 F.3d at 164. If employers could chose a higher rate than the one Congress imposed, the present value of the employee’s accrued benefit would be lower. Id. The regulations under § 417 impose interest rate and mortality assumptions that employers must use when they convert the normal retirement benefit, i.e. a single-life annuity, to a lump-sum payment option. See id. at 165; see also Elayne Robertson Demby, *Cash Balance Whipsaw*, PLANSPONSOR, May 1, 1999, available at www.plansponsor.com.

The unsettled question was whether cash balance plans, which are technically and legally defined benefit plans but function like defined contribution plans, should be subject to these regulations on defined benefit plans. In 1996, the IRS issued IRS Notice 96-8 which

stated, that when calculating a lump-sum distribution, a cash balance plan must project the current balance of the hypothetical account forward to normal retirement age and then discount that benefit to present value and pay out the present value amount. See Esden, 229 F.3d at 165. The Notice required that the benefit be discounted to present value using the rules in Treasury Regulations §§ 1.411(a)-11(d) and 1.417(e)-1(d)(1). Id. If the plan credit interest rate (used to project the account to normal retirement age) exceeded the applicable rate under the regulations (used to discount the benefit back to present value), the result will be a lump-sum whose value is greater than the employee's cash balance account balance. Id.

The Notice stated that if a plan paid out only the current value of the account balance, it must have committed either one of two different violations. Id. at 166. On one hand, the plan would have violated § 417(e) and ERISA § 205(g) because paying out only the current value of the account balance means the plan used a discount rate equal to the plan's credit rate and in excess of the applicable discount rate § 417(e) required. Id. Alternatively, it would have violated § 411(a)(2) and ERISA § 203(a)(2) because paying out only the current value of the account balance means the plan projected the current balance forward at a rate less than the plan's credit rate and worked a forfeiture under the plan's terms. Id. Cash balance plan proponents commonly refer to these IRS standards as the "whipsaw" calculation and argue that they unfairly require employers to provide employees with an unwarranted windfall.

d. Litigation related to the whipsaw issue

Several cases have illustrated the potential pitfalls facing employers in the area of conversion to cash balance plans. In Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 221 F.3d 1235, 1252 (11th Cir. 2000) (Lyons I), the Eleventh Circuit held that benefits under a cash balance plan must be determined by projecting the account balance to age 65 and then discounting back to the employee's actual age to determine the amount of the employee's lump sum distribution. In doing so, the court ruled that employers must comply with the position of the IRS as stated in Notice 96-8. Id. at 1245.

In Lyons I, an employee elected to receive a lump sum payout under the cash balance plan. 221 F.3d at 1239. The employer paid the nominal current value of the employee's personal account. In his suit against the employer, the plaintiff alleged that under the Treasury regulations, the employer should have determined the value of the annuity the plaintiff would have received at age 65 and discounted that amount to its present value using the PBGC rate. Id. Under this approach, the plaintiff personally would have received \$13,000 more but the class as a whole stood to gain \$20 million in benefits. Id.

The interest rate used to credit the employee's account was greater than the PBGC's discount rate. Id. at 1241. Thus if the employer projected the value of the account out to age 65 with the interest credit rate and then discounted to present value with the PBGC rate, there would be more in the account than when the calculations began. Id. Had the plan's interest credit rate been pegged to the PBGC rate, there would have been no dispute in Lyons I because the same rate used to project the value at 65 would have been the same rate used to reduce the benefit to present value and that amount would equal the value of the payment the employer made. Id. There was no dispute that the employer failed to comply with the regulations, so it argued that the regulations were invalid. Id. at 1244.

The Eleventh Circuit held that the regulations were valid and could be applied in cases such as Lyons I, where the distribution was consensual. Id. at 1249. At best, ERISA § 203(e) was ambiguous on the issue, and there was no reason to not defer to the agency's interpretation which was not contrary to the will of Congress. Id. at 1246. Thus, under the Regulations, the employer was obligated to discount to present value using the PBGC rate. Because the interest credit rate exceeded the PBGC rate, merely paying the hypothetical balance was not enough because that amount was less than the present value of the normal retirement benefit. Id. at 1252.

The Retirement Act of 1994 substantially altered the language of ERISA § 203(e), however. On remand from the Lyons I decision, the Northern District of Georgia found that the statute's language was no longer ambiguous and could not support the Treasury's interpretation. Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan, 196 F. Supp. 2d 1260, 1272-73 (N.D. Ga. 2002) (Lyons II). Therefore, for employees who receive their lump sum distribution payment after 1994, the Treasury Regulations that restrict the defined benefit plan's ability to distribute a portion of the participant's accrued benefit without complying with specified valuation rules do not apply because they improperly expand the scope of ERISA. Id. at 1273. In that case, the employee will not receive the more favorable lump sum calculation under ERISA § 203(e). 29 U.S.C. § 1053(e); 26 C.F.R. § 1.411(a)-11; Lyons II, 196 F. Supp. 2d at 1273.

The United States Court of Appeals for the Second Circuit also considered a cash balance plan in Esden v. Bank of Boston and held that the Bank of Boston's cash balance plan violated ERISA and the IRC by failing to use IRS rules to calculate a participant's lump sum distribution. See 229 F.3d at 157. In a case that was somewhat different from Lyons I, the Second Circuit held that a plan may not project a balance using a rate lower than the rate guaranteed by the employer's plan. Id. at 168.

In Esden, the employer's cash balance plan guaranteed a minimum return of 5.5% and a maximum return of 10%. Id. at 161. Applying the Treasury regulations, her minimum accrued benefit discounted to present value was at least \$61.54 more than what her employer actually paid her. Id. The plaintiffs alleged that the employer worked an illegal forfeiture under ERISA § 203(e) by using a rate of 4% to project the value of the benefit at normal retirement age, rather than the Plan's minimum rate of 5.5%. Id. Other members of the plaintiff's class had similar allegations. Esden sued under ERISA § 502(a)(1)(B) and (a)(3) to recover the benefits and injunctive relief and attorney's fees under 502(g). Id. at 162.

The Second Circuit noted that ERISA and IRC provisions and regulations required that the present value of any optional benefit – i.e. a lump sum – cannot be less than the present value of the normal retirement benefit. Id. at 165 (citing Treas. Reg. § 1.417(e)-1(d)(1) from 1991). Next, the court accepted the IRS interpretation as found at Notice 96-8 which requires the benefit's value to be projected to normal retirement age and then discounted to present value as § 417(e) requires. Id. While acknowledging the whipsaw problem, the Notice provides two additional requirements for plans whose interest credit rates are tied to a variable outside index. Id. at 166. First, a plan must prescribe a method to determine which rates will be used to project the benefit to normal retirement age and this method cannot allow an employer discretion to determine this rate. Id. The plan in Esden complied with this rule. Second,

however, the Notice states that a forfeiture occurs if the projection results in a value below that promised by the plan. Id. at 167. The plan failed this portion of the Notice because by projecting the benefit using a rate 1.5% below the promised rate, the plan worked a forfeiture. The court also rejected the employers argument that the regulations were invalid and unreasonable. Id. at 168.

Lyons I and Esden suggest two rules. First, an employer who provides a cash balance plan must project the value of the normal retirement benefit using a projection rate that is at least equal to the plan's interest credit rate. See Esden, 229 F.3d at 167. Second, at least for employees who received benefits before 1994, the applicable discount rate used to determine the present value of that normal retirement benefit must be no greater than the prescribed PBGC rate. See Lyons I, 221 F.3d at 1252. If an employer uses a credit rate that is greater than the PBGC rate, an employee is likely to enjoy a windfall because the present value of the payout will be greater than the balance of the cash account. Employers can avoid this windfall, however if their plans' credit rate equals the PBGC rate. See Lyons I, 221 F.3d at 1241.

Two cases have directly addressed the issue of lump sum disbursements following employees' early termination of their interests in ERISA plans. In Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755, 759 (7th Cir. 2003), the court held that the employer's method of determining lump sum distributions made to participants prior to normal retirement age violated ERISA, which "requires that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit." To determine the lump sum to which ERISA entitles an employee, "the plan must add the [future interest] credits to the employee's cash balance account, and discount the resulting balance at the prescribed discount rate back to the date on which the employee left Xerox's employ." Id. at 760. However, the plan's own description specified a lump-sum entitlement that was not the prescribed actuarial equivalent of the pension benefit to which employees who left their money in the plan until they reached their normal retirement age were entitled. Id. As such, the plan conditioned the employee's right to future interest credits on the form of the distribution that he elected to take -- his pension at age 65 rather than a lump sum at the time of early termination -- which was precisely what the law forbids. Id. at 763.

In another case in the Sixth Circuit, an employer argued that under Treas. Reg. §1.411(a)-7(a)(1)(ii), it was entitled to use the statutory rate to project forward the age-65 annuity as well as to discount the annuity back to present value. West v. AK Steel Corp., 484 F.3d 395, 409 (6th Cir. 2007). There, AK Steel posited that Treas. Reg. §1.411(a)-7(a)(1)(i), which defined an "accrued benefit" as an annual distribution that started at "normal retirement age" was inapplicable because the plan itself defined an "accrued benefit" as an annual distribution equal to the "accrued benefit" under the plan. Id. The Sixth Circuit rejected the appellant's argument because §1.2 of the plan referred to an "accrued benefit" as a single life annuity that started at "normal retirement age." Id. The Court read other provisions of the plan that conflicted with §1.2 against AK Steel, and rejected AK Steel's position that the plaintiffs were only entitled to the value of their hypothetical accounts. Id. Further, the court noted that the plan's terms violated ERISA because AK Steel did not take the plaintiffs' future interest credits into account to calculate the actual amount of the lump-sum payment. Id. In short, the Sixth Circuit affirmed the district court's ruling below as well as its reasoning regarding the whipsaw calculation. Id. at 412.

In addition, AK Steel argued that the plaintiffs should not be entitled to money damages because any award would be a “distribution” under the Pension Protection Act of 2006 (“PPA”). Id. at 411. The PPA amended ERISA § 203 to now validate any plan that distributes a lump sum payment equal to the balance of an individual’s hypothetical account. PPA § 701(a)(2). Under § 701(e)(2) of the PPA, the amendments to ERISA apply to any “distributions” made after the date of the statute’s enactment. PPA § 701(e)(2). The PPA, however, only “applies to periods beginning on or after June 29, 2005.” PPA § 701(e)(1). Hence, appellant argued that any money damages paid to the plaintiffs after the PPA went into effect would constitute as an impermissible “distribution” under the PPA. West, 484 F.3d at 411. The Sixth Circuit stated that § 701(d)(2) of the PPA in conjunction with the legislative history of the Act indicated that there would be no retroactive application of the amendments. Id. at 412. The plaintiffs, who had been deprived of the whipsaw calculation, received their lump sum benefits before the PPA went into effect. Id. Therefore, the PPA posed no bar to claims for monetary relief for prior harms. Id.

In Sunder v. U.S. Bank Pension Plan, the defendants calculated the plan participants’ lump sum distributions upon conversion to a cash balance plan using a variety of factors such as a mortality rate, a discount rate and retirement subsidies. No. 4:05CV01153, 2007 WL 2811078, at *5-7 (E.D. Mo. Sept. 24, 2007). A lump sum amount of the “accrued benefits” under the old plan was discounted to present value at an 8% rate as opposed to the 30-year Treasury rate, which was 6.07% at the time. Id. at *8. The district court ruled that by using the 8% rate, the defendants did not protect the value of the plaintiffs’ “accrued benefits” because § 417(c)(3) provided that an “accrued benefit” must be the “actuarial equivalent” of benefits that start at “normal retirement age.” Id. Thus, the plaintiffs had a right to a higher opening balance of their “accrued benefits” that would have resulted from applying the lower Treasury rate. Id. However, on appeal, the Eighth Circuit reversed. Sunder v. U.S. Bank Pension Plan, 586 F.3d 593, 600-01 (8th Cir. 2009). The appeals court held that the plan did not err in calculating the opening cash balances using the 8% discount rate because using that rate did not decrease any benefits that had already accrued. Id. at 600. Because the plan’s method for calculating the opening balance did not reduce any accrued benefit, the Eighth Circuit ruled that plaintiffs were not entitled to any damages. Id. at 603.

See also:

George v. Duke Energy Ret. Cash Balance Plan, 560 F. Supp. 2d 444, 466-467 (D.S.C. 2008). *Plaintiffs stated sufficient facts to withstand a motion for judgment on the pleadings because factual and expert testimony was required to determine the precise terms of the plan. Plaintiffs alleged that, under the plan, they were entitled to a whipsaw calculation that employed a discount rate equal to the lesser of 4% or the statutory rate prescribed by the treasury.*

Laurent v. PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537, 547-551 (S.D.N.Y. 2006). *The plan must project the cash balance forward to normal retirement age even if a plan is not required by ERISA to set a minimum threshold for how interest is credited to the beneficiaries’ hypothetical accounts. ERISA does not require that benefits under a cash balance plan accrue beyond normal retirement age.*

Parry v. SBC Commc'ns, Inc., 375 F. Supp. 2d 31, 49-51 (D. Conn. 2005).
Defendants' handout of a lump sum amount that was based upon a whipsaw calculation complied with ERISA even though it was less than an "enhanced annuity benefit" under other provisions of the plan.

Courts have also differed on what constitutes "normal retirement age" for purposes of the whipsaw calculation. See Fry v. Exelon Corp. Cash Balance Pension Fund, No. 06 C 3723, 2007 WL 2608524, at *4 (N.D. Ill. Aug. 31, 2007); Laurent, 448 F. Supp. 2d at 545-547. In Laurent, the plaintiffs claimed that the lump sum benefit received was not equivalent to a single lifetime annuity that started at "normal retirement age" because the plan defined "normal retirement age" as a five year term of service. Id. at 542. The district court ruled that a normal retirement age defined pursuant to years of service is invalid under ERISA, and set the "normal retirement age" at 65 as the plan did not refer to a specific age. Id. at 546. The district court relied on Second Circuit precedent and the IRS's revenue ruling to conclude that a plan must utilize a specified age for the whipsaw calculation even if the selected age is below 65. Id. On the other hand, the district court for the Northern District of Illinois in Fry dismissed Laurent's reliance on Second Circuit precedent as *dictum* because the Circuit Court's decision did not "address the issue of a normal retirement date based on service time." Fry, 2007 WL 2608524, at *4. The district court for the Northern District of Illinois ruled that despite the ambiguity of § 1002(24) -- the ERISA section that defines "normal retirement age" -- a plan may choose to either set the "normal retirement age" at a certain age or a period of service or both. Id. at *5.

D. ERISA ISSUES RELATED TO EMPLOYER STOCK

In recent years, there has been significant ERISA litigation related to plan investments in, or plan decisions to allow participants to invest in, employer stock. Often plaintiffs will argue that the plan's fiduciaries breached their duties under ERISA by continuing to either invest in, or offer as an investment option, the employers' stock because they claim that the stock was an imprudent investment. This section provides a background on Employee Stock Ownership Plans ("ESOPs"), discusses trends in ERISA litigation related to employer stock, and also the issue of "adequate consideration" with respect to employer stock under 29 U.S.C. § 1106.

1. Background on ESOPs and investments in employer stock

To promote employee ownership of companies, Congress adopted the ESOP provisions of ERISA. E.g., 29 U.S.C. § 1107; Kuper v. Iovenko, 66 F.3d 1447, 1458 (6th Cir. 1995) ("In drafting the ESOP provisions of ERISA, Congress intended to encourage employees' ownership of their employer company."). Furthermore, Congress contemplated that ESOPs would function as both "an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership." Id. at 1457 (quoting Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992)). An ESOP has been defined as "a plan that primarily invests in the shares of stock of the employer that creates the plan." Chao v. Hall Holding Co., 285 F.3d 415, 425 (6th Cir. 2002) (citing Kuper, 66 F.3d at 1457), cert. denied, 537 U.S. 1168 (2003).

ESOP fiduciaries are "subject to the same fiduciary standards as any other [ERISA] fiduciary except to the extent that the standards require diversification of investments."

Eaves v. Penn, 587 F.2d 453, 460 (10th Cir. 1978). In describing these duties, some courts have stated that ERISA fiduciaries “must act for the exclusive benefit of plan beneficiaries” and that duties of an ERISA fiduciary are “the highest known to the law.” E.g., Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). Another court noted that the “fiduciary standard applicable to ESOP trustees, set out in ERISA § 404, is indisputably rigorous.” Horn v. McQueen, 215 F. Supp. 2d 867, 874 (W.D. Ky. 2002). In particular, when deciding whether to invest plan assets in employer securities, ESOP fiduciaries “are governed by the ‘solely in the interest’ and ‘prudence’ tests of §§ 404(a)(1)(A) and (B).” Eaves, 587 F.2d at 459.

2. Litigation related to employer stock

“Stock drop” suits have become an increasingly common form of ERISA litigation in recent years. These suits are brought by participants in defined contribution plans that are authorized to invest in employer securities. In a typical case, plan participants who held the employer’s stock file suit after a decrease in the stock’s trading price, and they allege that the fiduciaries breached their fiduciary duties by allowing participants to continue to invest in the employers’ stock when it was not prudent to do so.

ERISA generally places upon plan fiduciaries the duty to diversify investments “so as to minimize the risk of large losses.” 29 U.S.C. § 1104(a)(1)(C). Because large losses are easier to avoid if the investments of the plan are diversified, prudence would normally dictate that a fiduciary diversify the assets of the plan. Craig C. Martin, Matthew J. Renaud, & Omar R. Akbar, What’s Up On Stock Drops? Moench Revisited, 39 J. Marshall L. Rev. 605, 609 (2006) However, fiduciaries of plans that are authorized to invest in employer securities — called “Eligible Individual Account Plans” (“EIAPs”) — are exempted from this duty insofar as it relates to investments in employer stock, 29 U.S.C. § 1104(a)(2), and are also exempted from ERISA’s bar on investing more than ten percent of plan assets in employer stock, 29 U.S.C. § 1107(b)(1).

EIAP fiduciaries are not, however, exempted from other duties under ERISA: the duty of loyalty, ERISA § 404(a)(1)(A), the duty of prudence, ERISA § 404(a)(1)(B), and the duty to act in accordance with the plan’s governing documents, ERISA § 404(a)(1)(D). The duty of prudence, in particular, places EIAP fiduciaries in a difficult position when the value of employer stock drops, because despite the policy established in favor of investments in employer stock and plan documents which provide for such investments, they may need to decide whether it would be imprudent to continue investing in employer stock.

This section discusses how courts have dealt with the claims made in stock drop suits, which often allege breaches of all duties incumbent upon fiduciaries.

a. Duty of loyalty

ERISA § 404(a)(1)(A) obligates fiduciaries to act “for the exclusive purpose of (1) providing benefits to participants and their beneficiaries” This duty thus encompasses situations where conflicts of interest or self-dealing arise. See Craig C. Martin et al., supra, at 608. The potential for disloyal self-dealing is “inherently great” in situations where investments

are undiversified. Martin v. Feilen, 965 F.2d 660, 670-71 (8th Cir. 1992). Typical indicators of a breach of the duty of loyalty include that high-ranking company officials sold company stock while the plan purchased shares or that the plan was being used to prop up the stock price in the market. DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 422 (4th Cir. 2007) (DiFelice II).

It is not necessarily a breach of the duty of loyalty, however, for a fiduciary to have financial interests adverse to plan beneficiaries. DiFelice II, 497 F.3d at 421. There is also no *per se* breach if an “officer, employee, agent or other representative” of the plan sponsor also serves as a plan fiduciary, even if that fiduciary purchases company securities on behalf of that plan. Id. ERISA does not prohibit a fiduciary from acting solely in his own interests when he is not acting in a fiduciary capacity. Friend v. Sanwa Bank Cal., 35 F.3d 466, 469 (9th Cir. 1994).

In stock drop litigation, the duty of loyalty is primarily implicated by fiduciaries’ obligations to investigate and provide complete and accurate information to plan participants, which are discussed below in detail.

b. Duty of prudence

Section 404(a)(1)(B) obligates fiduciaries to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use” Thus, whether a fiduciary acted prudently is judged not in comparison to the actions a layperson would take, but the actions of a person “familiar” with ERISA matters. Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984). Prudence generally focuses on the process that a fiduciary undertakes in reaching a decision, rather than results or the performance of the investment. See In re Unisys Sav. Plan Litig., 74 F.3d 420, 434 (3d Cir. 1996); DiFelice v. Fiduciary Counselors, Inc. (DiFelice I), 398 F. Supp. 2d 453, 467 (E.D. Va. 2005) (“[T]he general fiduciary obligation of § 404(a) does not require prescience of fiduciaries, but instead measures a fiduciary’s performance based on the facts then at their disposal.”).

The duty of prudence is a broad obligation which encompasses several derivative obligations discussed separately in subsequent sections, including the duty to investigate and the duty to monitor fiduciaries.

(1) Rebuttable presumption of prudence by fiduciaries of EIAPs with respect to investments in company stock

Given the special status that ERISA affords to EIAPs to promote employee investment in employer securities, numerous courts have concluded that an EIAP fiduciary’s decision to invest in employer stock is entitled to a rebuttable presumption of prudence. See, e.g., Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008); Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995); Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995); Smith v. Aon Corp., No. 04 C 6875, 2006 WL 1006052, at *5-*6 (N.D. Ill. Apr. 12, 2006); see also In re Bausch & Lomb, Inc. Sec. Litig., No. 06-CV-6297, 2008 WL 5234281, at *5 (W.D.N.Y. Dec. 12, 2008) (recognizing that the Second Circuit has not adopted the presumption but still applying the presumption). But see In re Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008); LaLonde v. Textron, Inc., 369 F.3d 1, 6 (1st Cir. 2004).

The first case to establish this rule, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), dealt with ESOPs, which are a form of EIAP designed by ERISA to invest “primarily in qualifying employer securities.” 29 U.S.C. § 1107(d)(6)(A). Given the statutory policy in favor of investments in company stock, the Third Circuit in Moench held that fiduciaries of ESOPs were entitled to a rebuttable presumption that they acted prudently by investing in company stock. 62 F.3d at 571. The court stated that to rebut this presumption, a plaintiff must show that the fiduciary “could not have believed reasonably that continued adherence to [the plan’s terms] was in keeping with the settlor’s expectation of how a prudent fiduciary would operate.” Id. The court alternatively characterized the standard for liability as an “abuse of discretion.” Id. at 566.

Later courts have held that the presumption applies not only to a fiduciaries’ decision to invest plan assets in company stock, but also a decision to make a company stock fund available for participants to select for their investments. Kirschbaum, 526 F.3d at 254; In re Dell, Inc. ERISA Litig., 563 F. Supp. 2d 681, 691-92 (W.D. Tex. 2008). Courts have also rejected the argument that the Moench presumption does not apply to claims that fiduciaries purchased company stock at an artificially inflated value, rather than a “mere” failure to diversify. Kirschbaum, 526 F.3d at 254.

In In re Schering-Plough Corp. ERISA Litigation, the Third Circuit appeared to suggest that the Moench presumption might apply only to ESOPs, given the requirement that they invest *primarily* in employer securities, rather than all EIAPs, which merely are permitted to invest in employer securities. 420 F.3d 231, 238 (3d Cir. 2005). In Edgar v. Avaya, Inc., however, the Third Circuit clarified that Schering-Plough was a case which primarily had involved an issue of standing and had not in fact held that the Moench presumption was limited to ESOPs. 503 F.3d 340, 347 n.12 (3d Cir. 2007). Stating that all EIAPs were intended to promote employee investment in employer stock, and EIAP fiduciaries were exempted from the duty to diversify, the court explicitly extended the presumption from ESOPs to all EIAPs. Id. at 347.

Not every circuit has adopted the Moench presumption. In Wright v. Oregon Metallurgical Corp., the Ninth Circuit considered but did not endorse the Moench presumption, stating it was “difficult to reconcile” with ERISA’s express exemption of EIAPs from the duty to diversify. 360 F.3d 1090, 1097 (9th Cir. 2004); see also In re Syncor ERISA Litig., 516 F.3d at 1102 (“This circuit has not yet adopted the Moench presumption . . . and we decline to do so now.”). The court noted that the Moench standard seemed “problematic to the extent that it inadvertently encourages corporate officers to utilize inside information for the exclusive benefit of the corporation and its employees.” Wright, 360 F.3d at 1098 n.4. The First Circuit has also considered but not yet adopted or rejected the Moench presumption. LaLonde v. Textron, Inc., 369 F.3d at 6.

The Seventh Circuit has not explicitly adopted the presumption, but it appeared to apply it in Pugh v. Tribune Co., 521 F.3d 686, 701 (7th Cir. 2008). In Pugh, plaintiffs alleged that defendants imprudently continued to offer company stock as a plan investment option. Id. at 699-700. In affirming dismissal of plaintiffs’ claim, the Seventh Circuit held that courts “must be mindful of the delicate balance an ESOP fiduciary must achieve: he risks being sued for violating the plan if he diversifies but may impose unwanted risk on the participants if he

doesn't." *Id.* at 701 (citation omitted). In light of these competing concerns, the court held that "plaintiff must show that the ERISA fiduciary could not have reasonably believed that the plan's drafters would have intended under the circumstances that he continue to comply with the ESOP's direction" of continued investment in employer securities. *Id.* (quotation omitted). Applying this standard, the court found that defendants did not act imprudently and affirmed dismissal of plaintiffs' claims. *Id.* at 701-02. Other courts have interpreted the *Pugh* decision as having adopted the presumption. *In re Citigroup ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708, at *16 (S.D.N.Y. Aug. 31, 2009); *Lingis v. Motorola, Inc.*, No. 03 C 5044, 2009 WL 1708097, at *14 (N.D. Ill. June 17, 2009); *In re Bausch & Lomb*, 2008 WL 5234281, at *6.

Some courts have questioned whether the presumption can apply if the plan's documents merely permit investments in employer stock, rather than require it. For example, in *Graden v. Conexant Systems, Inc.*, 574 F. Supp. 2d 456, 462-63 (D.N.J. 2008), the court applied multiple levels of discretion based on the *Moench* decision. First, "[w]here the plan *requires* investment in a particular stock, the fiduciary's conduct is not subject to judicial review." *Id.* at 462. Second, if the fiduciary is not required to invest in employer securities and is "more than simply permitted to make such investment," then a presumption of prudence should be applied and decisions are reviewed according to abuse of discretion standard. *Id.* at 462-63 (quoting *Moench*, 62 F.3d at 571). Lastly, "where the plan *merely permits* investment in a particular stock, the fiduciary's investment decision is subject to de novo review." *Id.* at 462. However, other courts have held that the presumption should apply even if the plan merely permits, and does not require investments in employer stock. *E.g.*, *Kirschbaum*, 526 F.3d at 255; *In re Citigroup*, 2009 WL 2762708, at *16.

Another important issue on which there is a split of authority among the courts that have adopted the *Moench* presumption is whether the presumption applies at the motion to dismiss stage. The majority approach is that the presumption can be applicable at the motion to dismiss stage. *See Edgar*, 503 F.3d at 349; *Wright*, 360 F.3d at 1098; *In re Citigroup*, 2009 WL 2762708, at *16; *In re Dell*, 563 F. Supp. 2d at 692. *But see Smith v. Aon Corp.*, No. 04 C 6875, 2006 WL 1006052, at *5 (N.D. Ill. Apr. 12, 2006) (finding presumption not applicable at motion to dismiss stage); *In re ADC Telecomms., Inc. ERISA Litig.*, No. 03-2989, 2004 WL 1683144, at *6 (D. Minn. July 26, 2004) (same).

(2) The showing required to establish a breach of the duty of prudence (or a rebuttal of the *Moench* presumption)

As stock drop cases have worked their way through the courts and the Courts of Appeals have reviewed lower court decisions, a greater body of authority has developed to more clearly articulate what plaintiffs must show to either rebut the *Moench* presumption or establish that the fiduciaries acted imprudently. For example, the Fifth Circuit has described the general showing required as:

The [*Moench*] presumption ... may only be rebutted if unforeseen circumstances would defeat or substantially impair the accomplishment of the trust's purposes. One cannot say that whenever plan fiduciaries are aware of circumstances that may impair the value of company stock,

they have a fiduciary duty to depart from ESOP or EIAP plan provisions. Instead, there ought to be persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest.

Kirschbaum, 526 F.3d at 256 (citations omitted).

In addition, courts have stated that “[m]ere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the Moench presumption.” Wright, 360 F.3d at 1099. For example, several courts have found that significant declines in stock price are not enough to overcome the Moench presumption. See Kirschbaum, 526 F.3d at 256 (forty percent drop in stock price) ; Kuper, 66 F.3d at 1451, 1459 (eighty percent drop); Wright, 360 F.3d at 1096, 1098 (seventy-five percent drop) ; In re Citigroup, 2009 WL 2762708, at *18 (fifty-two percent drop); In re Duke Energy ERISA Litig., 281 F. Supp. 2d 786, 795 (W.D.N.C. 2003) (fifty-five percent drop); Crowley ex rel. Corning, Inc., Inv. Plan v. Corning, Inc., 234 F. Supp. 2d 222, 227 (W.D.N.Y. 2002) (eighty percent drop).

Likewise, bare allegations of fraud are insufficient to overcome the presumption at the motion to dismiss stage. Edgar, 503 F.3d at 349 n.13.

See:

Ward v. Avaya, Inc., 299 Fed. Appx. 196, 200 (3d Cir. 2008). The Third Circuit affirmed dismissal of a complaint because the plaintiff “fail[ed] to point to anything other than [the company’s] financial struggles to support his breach of fiduciary duty claim. Thus, at most, ‘[plaintiff’s] allegations, if true, indicate that during the Class Period, [the company] was undergoing corporate developments that were likely to have a negative effect on the company’s earnings and, therefore, on the value of the company’s stock. . . . That alone does not suffice to rebut the presumption that the defendants acted within their discretion in refusing to halt or alter the Plan’s investments in [the company’s] stock.”

DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 418-20 (4th Cir. 2007). The Fourth Circuit affirmed judgment for defendants and held that whether fiduciaries exercised prudence in selecting and retaining the investment options depended on the “totality of the circumstances, including, but not limited to: the plan structure and aims, the disclosures made to participants regarding the general and specific risks associated with investment in company stock, and the nature and extent of challenges facing the company that would have an effect on stock price and viability.” In considering the circumstances, the court found that “the trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.”

Summers v. State Street Bank & Trust Co., 453 F.3d 404, 408-10 (7th Cir. 2006). The court affirmed the summary judgment for the defendants and held that

defendant had no duty to diversify the ESOP by selling employer stock. The court stated that, under the theory that the market was efficient, the market price of the employers' stock was the best indicator of its value at every point in its decline. A fiduciary has no obligation to act on the theory that the market is overvaluing the employer's stock.

In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 WL 2762708, at *16 (S.D.N.Y. Aug. 31, 2009). Plaintiffs alleged that Citigroup engaged in imprudent and risky business strategies that resulted in substantial losses to the company and diminished the value of the employer stock. The court dismissed plaintiffs' claims, holding that to overcome the presumption of prudence, the plaintiffs must allege facts "that, if true, would make it plausible that offering [the employer's] stock as an investment during the class period constituted an abuse of discretion" and, on a "motion to dismiss, a complaint must contain facts that, if true, would make it plausible that a fiduciary 'could not have believed reasonably' that 'continued adherence' to the plan's mandates regarding employer stock was in keeping with the settlor's expectations of how a prudent trustee would operate.'"

In re Dell, Inc. ERISA Litig., 563 F. Supp. 2d 681, 690-94 (W.D. Tex. 2008). The court applied the Moench presumption to EIAP sponsored by Dell in granting the defendant's motion to dismiss. Relying on Kirschbaum, the court stated that fiduciaries are not required to divest holdings in company stock "whenever plan fiduciaries are aware of circumstances that may impair the value of company stock." The court also stated that plaintiffs had not pled "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest."

On the other hand, courts have generally rejected the argument that plaintiffs must show that the company was on the verge of collapse to rebut the presumption. Edgar, 503 F.3d at 349 n.13; Syncor, 516 F.3d at 1102.

Courts have suggested that fiduciaries might have a duty to divest an EIAP of employer securities in several situations. For example, the Seventh Circuit has suggested that the duty might exist where a company was acquired in a stock-for-stock deal that would convert the target company's stock into the acquirer's stock and the acquirer had a higher debt to equity ratio that made its stock more risky. Steinman v. Hicks, 352 F.3d 1101, 1106 (7th Cir. 2003) (suggesting employer's complete investment in its own stock during corporate transaction with high bankruptcy risk may have been breach, but declining to address that issue because plaintiffs had not raised that argument). The Ninth Circuit has stated the duty would exist "where a company's financial situation is seriously deteriorating and there is a genuine risk of insider self-dealing." Wright, 360 F.3d at 1098. The Ninth Circuit has also said that fiduciaries could be liable where a company's stock "was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed." Syncor, 516 F.3d at 1102.

See:

In re Syncor ERISA Litig., 516 F.3d 1095, 1102-03 (9th Cir. 2008). Defendant Syncor was the fiduciary of its own ESOP plan. Syncor's stock lost almost half its value when it was discovered that Syncor's board of directors had made illegal bribes in Taiwan. In reversing the district court's summary judgment in favor of the defendants, the court stated "[a] violation may occur where a company's stock did not trend downward over time, but was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed."

Harzewski v. Guidant Corp., 489 F.3d 799, 807-08 (7th Cir. 2007). The Seventh Circuit reversed a dismissal based on lack of standing. It suggested that on remand the plaintiffs might be able to establish a claim by showing that the fiduciaries could have avoided imposing "excessive risk" on plan participants by selling the plan's employer stock based on plaintiffs' allegation that the employer "knew that the price of its stock was overvalued but took no measures to protect the participants in the pension plan, as it could have done by selling [its] stock held by the plan before the overvaluation was discovered by the market and its price plummeted." The court stated however that the plaintiffs might have difficulty showing an injury.

LaLonde v. Textron, Inc., 369 F.3d 1, 2, 6 (1st Cir. 2004). The court chose not to adopt the *Moench* presumption, holding that plaintiffs had stated a claim by alleging that Textron had artificially inflated its stock price by concealing "the disparate problems throughout Textron's segments and their adverse effect on Textron which are the subject of a federal securities lawsuit." The securities suit alleged that Textron concealed "internal problems" that led to a 70% decline in earnings per share and termination of 10% of Textron's workforce.

In re Fremont Gen. Corp. Litig., 564 F. Supp. 2d 1156, 1159 (C.D. Cal. 2008). The court held that the plaintiffs stated a claim where the complaint contained "detailed and specific allegations that Fremont General was in dire financial circumstances and subject to serious mismanagement, all of which circumstances were, or should have been, known to Defendants. The Complaint further alleges that the fiduciaries failed to investigate the prudence of investing in Fremont General stock, resulting in harm to the plaintiffs."

Shirk v. Fifth Third Bancorp., No. 05-cv-49, 2007 WL 1100429, at *10 (S.D. Ohio Apr. 10, 2007). On a motion to dismiss, the court found that the plaintiffs had alleged sufficient facts to rebut a presumption of reasonableness. "In particular, Plaintiffs allege that Defendants knew or should have known that Fifth Third was engaged in numerous practices . . . that put Fifth Third stock at risk, that they failed to take into account whether the stock was inflated in value, that they created or maintained public misconceptions concerning the true financial health of the Company, and despite the availability of other investment options, continued to invest and allow investment of the Plan's assets in Fifth Third stock even as Fifth Third's questionable practices came to public light."

Smith v. Aon Corp, No. 04 C 6875, 2006 WL 1006052, at *5-*6 (N.D. Ill. Apr. 12, 2006). The court held that the Moench presumption did not apply at the motion to dismiss stage and that plaintiffs had adequately pled a breach of the duty of prudence by alleging that defendants (1) had offered Aon stock as an investment option, (2) purchased Aon stock while Aon was involved in numerous improper business practices which had resulted in a complaint filed by the New York Attorney General, among other improprieties.

When determining whether a fiduciary acted prudently as ERISA requires, “courts objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions. ‘[ERISA’s] test of prudence . . . is one of conduct, not a test of the result of the performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed.’ Thus, the proper inquiry is ‘whether the individual [fiduciaries], at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.’” Thompson v. Avondale Indus., Inc., No. 99-3439, 2002 WL 246407, at *2 (E.D. La. Feb. 19, 2002) (quoting Laborers Nat’l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313, 317 (5th Cir. 1999) (citations omitted)).

In other words, when analyzing a fiduciary’s conduct, courts focus “not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction.” Howard, 100 F.3d at 1488 (citing Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983)). Prudence requires “appropriate consideration to those facts and circumstances that . . . the fiduciary knows or should know are relevant to the particular investment or investment course of action followed.” Howell v. Motorola, Inc., 337 F. Supp. 2d 1079, 1086 (N.D. Ill. 2004) (citing 29 C.F.R. 2550.404a-1(b)(1)). One court highlighted the importance of the fiduciary’s investigation by asserting that “a fiduciary’s independent investigation of the merits of a particular investment is at the heart of the prudent person standard.” Fink v. Nat’l Sav. & Trust Co., 772 F.2d 951, 957 (D.C. Cir. 1985).

Despite the apparent importance of the fiduciary’s investigation, one court has asserted that a fiduciary’s failure to investigate the investment decision alone does not constitute a breach of fiduciary duties. Kuper, 66 F.3d at 1458. To establish a claim for breach of fiduciary duty under ERISA in the Sixth Circuit, the plaintiff “must show a causal link between the failure to investigate and the harm suffered by the plan.” Id. at 1459-60; see also Wright, 360 F.3d at 1099 (citing Kuper).

Using independent, expert legal and financial advisors signifies that the fiduciary undertook a comprehensive investigation. Hall Holding Co., 285 F.3d at 430. Relying on independent experts, however, “is not a complete defense to a charge of imprudence.” Id. (citing Howard, 100 F.3d at 1489). Moreover, some courts have held that when relying upon the advice of experts, “for a particular investigation to be reasonable and prudent, a fiduciary must: (1) investigate the expert’s qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert’s advice is reasonably justified under the circumstances.” Id.

c. “Duty to investigate”

In considering the duty of prudence, some courts have referred to the duty to investigate. This is not really a separate duty under ERISA, but it is related to the duty of prudence and it can arise in two separate scenarios. First, fiduciaries may need to investigate when they hold positions within the corporation through which they know or should know of affairs affecting the company stock’s value. Second, they may need to investigate when plan fiduciaries are making decisions regarding where to invest plan assets.

(1) Duty to investigate company affairs potentially affecting stock value

In Hill v. Tribune Co., plaintiffs brought suit after it was revealed that certain employees had reported artificially high circulation figures for its newspapers, resulting in allegedly artificially inflated advertising revenues. No. 05 C 2602, 2006 WL 2861016, at *15 (N.D. Ill. Sept. 29, 2006). The plaintiffs alleged that “internal controls for circulation were so obviously deficient that defendants would have known the circulation figures could not be relied upon.” Id. The court surveyed the case law and stated that “conclusory allegations that all defendants should have known pertinent facts about the corporation generally have not been found to be sufficient unless it is, at a minimum, alleged that each particular defendant was in a position to know or learn the information.” Id. “Thus, allegations a defendant was a director or officer of the corporation, or an employee in a particular position, will generally suffice to support that the defendant should have known certain related information transacted at Board level; but alleging that a defendant was a member of a plan’s investment committee, without more, is generally insufficient to take as true that the defendant should have known specific information about the operations of the corporation that sponsors the plan.” Id. (affirmed by Pugh, 521 F.3d at 701).

See:

In re Westar Energy, Inc. ERISA Litig., No. 03-4032-JAR, 2005 WL 2403832, at *22, *25 (D. Kan. Sept. 29, 2005). *The court rejected the theory that plan fiduciaries were required “to conduct an independent investigation into and/or monitor the merits of investing the Plan’s assets in [company] stock.” The court stated that “[p]lan fiduciaries would not generally be expected to investigate, ascertain or monitor the Company and its officers with respect to matters that Plan administrators are not properly privy to.” The court went on to state, however, that Plan fiduciaries can not turn a “blind eye” to what they might know in their corporate capacity.*

Howell v. Motorola Inc., 337 F. Supp. 2d 1079, 1090-92 (N.D. Ill. 2004). *Plaintiffs brought suit alleging that members of Motorola’s 401(k) committee should have known the riskiness of investing in Telsim, a Turkish telecommunications company. The court dismissed the claim, stating that the plaintiffs had “not alleged that Committee Defendants knew any facts regarding the Telsim transaction” and had not identified the corporate positions of the committee members who were alleged to have been Motorola employees.*

(2) Duty to investigate investment decisions

Several cases have focused on the need for fiduciaries to investigate in the context of investment decisions, as opposed to internal corporate affairs. In this context, a fiduciary satisfies his duty of prudence if he “[h]as given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment . . .” 29 C.F.R. § 2550.404a-1(b)(1)(i). The fact that this regulation makes fiduciaries responsible for facts they “should know” gives rise to a duty to investigate.

A fiduciary is not necessarily required to undertake a formal investigation of the plan’s investment options. In Nelson v. IPALCO, Enters., Inc., 480 F. Supp. 2d 1061, 1099 (S.D. Ind. 2007), the court rejected this contention, holding that although there was “no evidence that the Pension Committee formally considered [continuing investments in company stock] or that it asked any outside adviser to provide an opinion on this question,” the Pension Committee was “thoroughly familiar” with the investment and formal investigation would not have led them to change their decision.

The duty to investigate investment decisions was discussed extensively in DiFelice II, 497 F.3d at 420-21. In this case, the U.S. Airways plan offered participants thirteen different funds, one of which contained company stock. Id. at 415. Participants could readily transfer their money between funds. Id. U.S. Airways was an embattled company, and its stock fell from \$4.48 in October 2001 to \$3.72 in June 2002, the class period covered by the suit. Id. at 416. The plaintiffs alleged that the fiduciaries failed to give sufficient attention to the company’s precarious financial position. Id. at 420.

After reviewing the actions of the plan committee, the court concluded that the defendants had satisfactorily discharged their obligations with respect to the performance of the company fund. Id. at 420-21. The plan committee met formally four times to consider whether to continue to offer the fund. Id. at 421. On at least two occasions, the committee sought outside legal opinions regarding the fund. Id. The court noted that the fact that the court had twice sought independent advice distinguished the case from Armstrong v. LaSalle Bank National Ass’n, 446 F.3d 728, 734 (7th Cir. 2006), in which the court questioned whether the fiduciaries ever considered other options. DiFelice II, 497 F.3d at 421.

The court qualified the importance of independent advice, however, by stating that while independent advices provides “evidence of a thorough investigation,” id. (citing Howard v. Shay, 100 F.3d 1484, 1489 (9th Cir. 1996)), defendants cannot use it as a “whitewash,” id. (citing Donovan v. Bierwith, 680 F.2d 263, 272 (2d Cir. 1982)).

d. Duty to monitor appointed fiduciaries

The duty to monitor is another fiduciary duty that is derived from the duty of prudence. Courts have found that ERISA imposes on fiduciaries a duty to monitor those they appoint to make decisions about the plan. Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996); Martin v. Feilen, 965 F.2d 660, 669-70 (8th Cir. 1992); Leigh v. Engle, 727 F.2d 113, 135 (7th Cir. 1984); In re Enron, 284 F. Supp. 2d 511, 553 (S.D. Tex. 2003); see In re

Bausch & Lomb, 2008 WL 5234281, at *10 (“Under ERISA, fiduciaries who have appointed other fiduciaries have a continuing duty to monitor the actions of the appointed fiduciaries.”); In re Xerox Corp. ERISA Litig., 483 F. Supp. 2d 206, 215 (D. Conn. 2007).

In defining this duty, courts have followed the reasoning in a Department of Labor Interpretative Bulletin: “At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.” In re Elec. Data Sys. Corp., ERISA Litig., 305 F. Supp. 2d 658, 671 (E.D. Tex. 2004) (citing 29 C.F.R. § 2509.75-8).

While acknowledging the duty to monitor, courts have stated that the duty is a limited one. Id. Accordingly, a monitoring fiduciary need only “review the performance of its appointees at reasonable intervals in such a manner as may be reasonably expected to ensure compliance with the terms of the plan and statutory standards.” In re Calpine Corp. ERISA Litig., No. C-03-1685, 2005 WL 1431506, at *6 (N.D. Cal. Mar. 31, 2005); see also Shirk v. Fifth Third Bancorp, No. 05-cv-049, 2009 WL 692124, at *19 (S.D. Ohio Jan. 29, 2009). Moreover, a monitoring fiduciary who delegates to an appointee is “not required to monitor the prudence of the individual investments offered under the Plan.” E.g., Lingis v. Motorola, Inc., No. 03 C 5044, 2009 WL 1708097, at *18 (N.D. Ill. June 17, 2009).

See:

Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1466 n.10 (4th Cir. 1996). “[C]ourts have properly taken a restrictive view of the scope of this duty and its attendant potential for liability.”

In re Calpine Corp., No. C-031685, 2005 WL 1431506, at *6 (N.D. Cal. Mar. 31, 2005). “The duty of an ERISA fiduciary to review the performance of its appointees is a limited one.”

In re Excel Energy, Inc., Sec., Derivatives, & ERISA Litig., 312 F. Supp. 2d 1165, 1176 (D. Minn. 2004). “The scope of the duty to monitor appointees is relatively narrow.”

Liss v. Smith, 991 F. Supp. 278, 311 (S.D.N.Y. 1998). “The ‘limited’ fiduciary obligations imposed on one who appoints trustees thus includes the obligation to ensure that the appointees are performing their fiduciary obligations.”

See also:

In re Westar Energy, Inc., ERISA Litig., No. 03-4032-JAR, 2005 WL 2403832, at *24 (D. Kan. Sept. 29, 2005). “[The defendant’s] limited fiduciary duty to appoint and remove Committee members included a duty to monitor and evaluate their competence and performance, for purposes of exercising his duty to appoint and remove them.”

While courts are continuing to define the scope of the duty to monitor, some courts have articulated conduct the duty to monitor includes. For example, it includes the duty to

take action when the appointed fiduciaries are not performing their duties properly. See In re Bausch & Lomb, 2008 WL 5234281, at *10; Liss, 991 F. Supp. at 311. Other courts have stated that it includes the duty to disclose information about the employers' stock as to which the appointing fiduciary had actual knowledge. Hill, 2006 WL 2861016, at *21. Because the "scope of the duty to monitor is often unclear, many courts have declined to dismiss a duty to monitor claim on a motion to dismiss" because of the intensive fact analysis required to determine the scope of the duty. In re Syncor ERISA Litig., 351 F. Supp. 2d 970, 986 (C.D. Cal. 2004).

See:

In re Elec. Data Sys. Corp., ERISA Litig., 305 F. Supp. 2d 658, 671 (E.D. Tex. 2004). "[A]t this stage of the proceedings the Court will not endeavor to define the duty to monitor's outer edges with no factual record to indicate how far this may or may not push those edges."

In re Sprint Corp., ERISA Litig., 388 F. Supp. 2d 1207, 1228 (D. Kan. 2004). "The court [found] it unnecessary to precisely define the contours of the duty to monitor at this early phase of litigation."

In re ADC Telecomm., Inc., ERISA Litig., No. 03-2989, 2004 WL 1683144, at *7 (D. Minn. July 26, 2004). "Though Plaintiffs make broad allegations under the rubric of the ill-defined and limited duty to monitor, courts have been unwilling to delineate and probe the scope of the defendant's monitoring duties on the motion to dismiss."

But see:

Pedraza v. Coca-Cola Co., 456 F. Supp. 2d 1262, 1278 (N.D. Ga. 2006). "The [c]ourt [did] not need to determine the scope of the monitoring duty or whether such duty includes a duty to inform in order to rule on the motion to dismiss." However, the claim was dismissed because there was no breach of fiduciary duty by the appointed fiduciary.

In cases where the court finds that continued investment in employer stock was prudent, the courts have routinely dismissed claims for breaches of the duty to monitor as well. E.g., Pugh, 521 F.3d at 702; In re Citigroup, 2009 WL 2762708, at *26; In re Dell, 563 F. Supp. 2d at 695; In re Bausch & Lomb, 2008 WL 5234281, at *10.

e. Duty to disclose information and avoid misrepresentations

In addition to claims for breaches of the duty of prudence and to monitor, plaintiffs in stock drop cases will also allege that the company or its officers and directors breached fiduciary duties under ERISA by making inaccurate statements about the financial health of the company or the value of investments in the employer's stock in public filings and press releases. Plaintiffs assert that they were damaged because they relied on these allegedly misleading statements and continued to invest in the employers' stock and that when the "truth" about the employer's financial condition was revealed, the stock's price fell.

Courts have held that fiduciaries have a duty to disclose complete and accurate information to plan beneficiaries, generally as an obligation arising from the general nature of the fiduciary's role. See In re Unisys, 74 F.3d at 441; In re Dell, 563 F. Supp. 2d at 694-95; In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861, 881 (S.D. Tex. 2004); In re Duke Energy, 281 F. Supp. 2d at 791. In addition to specific disclosure requirements under 29 U.S.C. §§ 1021-31; 29 C.F.R. §§ 2520.101-2520.107-1, ERISA prohibits fiduciaries from knowingly providing false information to plan participants regarding the plan and requires that when they speak about the plan they do so truthfully. In re WorldCom, Inc., 263 F. Supp. 2d 745, 766 (S.D.N.Y. 2003). But "[w]hile the duty of loyalty ERISA fiduciaries owe beneficiaries clearly encompasses a duty not to lie, the degree to which that duty imposes an affirmative obligation to disclose material information is unclear." Lingis, 2009 WL 1708097, at *11 (citing Varity Corp., 516 U.S. at 506).

A breach of fiduciary duty claim arises if fiduciaries "mislead plan participants or misrepresent the terms or administration of a plan." Vallone v. CNA Fin. Corp., 375 F.3d 623, 640 (7th Cir. 2004). To show a violation of this duty, courts generally require plaintiffs prove a material misrepresentation or omission, reliance, and causation of damages. In re Dell, 563 F. Supp. 2d at 695.

See:

Edgar v. Avaya, Inc., 503 F.3d 340, 347 n.12 (3d Cir. 2007). *The court held that plan documents warning participants of the risks of investing in the plan and notifying participants that they were responsible for investigating their investment options were sufficient to satisfy the fiduciaries' obligations not to misinform participants. The court also stated that if the fiduciaries had themselves divested the plan of Avaya stock on the basis of non-public information, they potentially could have faced liability under federal securities laws.*

In re Huntington Bancshares Inc. ERISA Litig., 620 F. Supp. 2d 842, 854, 856 (S.D. Ohio 2009). *To establish a failure to disclose claim, a plaintiff must establish "(1) defendant was acting as a fiduciary when it made the challenged statements; (2) the statements constituted material misrepresentations; and (3) plaintiff relied on them to his/her detriment." There, the company's SEC filings disclosed the company's potential exposure. The court held that "Plaintiffs cannot satisfy their pleading burden by ignoring the content of the disclosures and conclusorily asserting that they were incomplete." Moreover, the court held that "Plaintiffs must identify the additional information that they claim was required to be disclosed and provide a basis for that assertion."*

But see:

In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861, 882 (S.D. Tex. 2004). *The court held that plaintiffs had stated a claim for a breach of the duty to investigate where they had alleged that "by virtue of their positions within the company and access to contradictory information" the plan fiduciaries should have known that its summary plan description distributed to participants contained material misrepresentations.*

A key issue in fiduciary breach claims is whether the defendant was acting as a fiduciary when he or she performed the act that the plaintiff is challenging. An ERISA breach of fiduciary duty claim requires that the defendant “was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” Pegram v. Herdrich, 530 U.S. 211, 226 (2000). ERISA allows employers to wear “two hats” and recognizes that an individual or corporation may act in two separate capacities, both as a fiduciary and an employer. See McGath v. Auto-Body N. Shore, Inc., 7 F.3d 665, 670-71 (7th Cir. 1993). Under this doctrine, when a defendant is merely conducting general business activities, ERISA’s fiduciary duties do not apply. As the Supreme court stated in Varity Corp. v. Howe, persons do not act as ERISA fiduciaries “simply because [they make] statements about [the company’s] expected financial condition or because an ordinary business decision turned out to have an adverse impact on the plan.” 516 U.S. 489, 505 (1996) (internal quotation marks omitted). Rather, communications are fiduciary in nature only if the statements are “intentionally connected” to benefits. See id.

Following Varity, courts have dismissed disclosure claims related to employer stock that are based on statements filed with the SEC, annual reports, press releases about an employer’s business, and other communications to shareholders, regulators, investors, and customers because those statements are made in a general corporate capacity and not an ERISA fiduciary capacity. See In re Bausch & Lomb, 2008 WL 5234281, at *7; In re WorldCom, Inc., 263 F. Supp. 2d at 760. “Those who prepare and sign SEC filings do not become ERISA fiduciaries through those acts, and consequently, do not violate ERISA, if the filings contain misrepresentations.” In re WorldCom, Inc., 263 F. Supp. 2d at 760 (ERISA’s “two hats” doctrine precluded plaintiffs from bringing an ERISA claim based on misrepresentations that were purportedly made in SEC filings incorporated into summary plan description). Even if the SEC filings are incorporated into the plan documents, the SEC filings were not prepared pursuant to ERISA and are not “intentionally connected” to providing Plan benefits. In re Bausch & Lomb, 2008 WL 5234281, at *8.

Courts have also rejected attempts by plaintiffs to import a broader duty of disclosure into ERISA, holding that “[w]hen Congress and the Department of Labor have carefully prescribed a detailed list of matters that must be disclosed to plan participants and beneficiaries, it ill-behooves federal judges to add to that list.” Sprague v. Gen. Motors Corp., 133 F.3d 388, 405 n.15 (6th Cir. 1998) (en banc). As the Seventh Circuit has stated, creating new disclosure obligations under ERISA risks “disturbing the carefully delineated corporate disclosure laws.” Baker v. Kingsley, 387 F.3d 649, 662 (7th Cir. 2004). An expansive view of the duty to disclose may expose fiduciaries to other risks. As one court has explained, “requiring disclosure of non-public information to plan beneficiaries when the information has not been provided to the market generally may run afoul of the insider trading laws The statutory text of ERISA itself counsels against a construction that would require fiduciaries to make otherwise impermissible disclosures.” Lingis, 2009 WL 1708097, at *12.

In defining the disclosure obligations of fiduciaries, the Supreme Court has expressly declined to hold that ERISA imposes a duty on fiduciaries to disclose information on their own initiative, or in response to employee inquiries. See Varity Corp., 516 U.S. at 506. The fiduciary is also under no duty to “give investment advice” or “opine on” the stock’s condition.

Edgar, 503 F.3d at 350 (citing Unisys, 74 F.3d at 443). Furthermore, “plan administrators are not required to inform all Plan participants and beneficiaries of every corporate event, especially contingent events, that might impact the value of a company’s common stock.” Sweeney v. Kroger Co., 773 F. Supp. 1266, 1269 (E.D. Mo. 1991); see also In re Citigroup, 2009 WL 2762708, at *21 (holding that “ERISA provided a ‘comprehensive set of reporting and disclosure requirements’” and “plaintiffs can point to no ERISA provision requiring that fiduciaries disclose information bearing on an employer’s financial condition”); Shirk v. Fifth Third Bancorp, No. 05-cv-049, 2009 WL 692124, at *18 (S.D. Ohio Jan. 29, 2009) (holding there is no “general duty of disclosure beyond what is specifically required under ERISA”).

See also:

Herrington v. Household Int’l, Inc., No. 02 C 8257, 2004 WL 719355, at **7-8 (N.D. Ill. Mar. 31, 2004). *The court held that ERISA did not impose a general duty to disclose any non-public information potentially related to the value of an employer’s stock because such a standard “is too broad as it would require defendants to continuously gather and disclose nonpublic information bearing some relation to the plan sponsor’s financial condition” and would “extend[] the statutory language beyond their plain meaning.”*

A more complete discussion of the duty to disclose information and avoid misrepresentations can be found in Section V.B of this Handbook.

f. ERISA § 404(c) defense to stock drop litigation

ERISA § 404(c) provides that:

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control

29 U.S.C. § 1104(c).

Stock drop lawsuits commonly involve individual account plans which allow participants to select their own investment options. Fiduciaries often point to this control and argue that under § 404(c) plaintiffs’ claims should fail because due to the participants’ control over their investments, the fiduciaries cannot be liable for losses that may have resulted from the participants’ decisions to invest in employer stock.

However, several courts have rejected the argument that the § 404(c) defense applies where plaintiffs are challenging the fiduciaries’ decisions as to which investment options, including employer stock, to offer under the plan. These courts have held that the prudence of the fiduciaries’ action is evaluated not based on the full array of plan options provided to

participants. Rather, “the relevant ‘portfolio’ that must be prudent is *each* available Fund considered on its own, including the Company Fund, not the full menu of Plan funds.” DiFelice II, 497 F.3d at 423-24; Brieger v. Tellabs, Inc., 245 F.R.D. 345, 351 (N.D. Ill. 2007); In re Unisys Sav. Plan Litig., 74 F.3d 420, 438-41 (3d Cir. 1996). “[A] fiduciary cannot free himself from his duty to act as a prudent man simply by arguing that other funds, which individuals may *or may not* elect to combine with a company stock fund, could theoretically, in combination, create a prudent portfolio.” DiFelice II, 497 F.3d at 423.

Not all courts accept this view, however. In an opinion on class certification, the Fifth Circuit considered ERISA § 404(c) where the plan permitted participants to choose their own investments. Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 313 (5th Cir. 2007). Contrary to decisions in other jurisdictions, the Fifth Circuit held that § 404(c) applied to the fiduciaries’ selection of investment options. Id. at 313. Langbecker rejected the plaintiffs’ argument that the defense was inapplicable to suits brought on behalf of the plan under § 502(a)(2). Id. at 310. Plaintiffs based their argument largely on a footnote to a DOL regulation which stated that designating investment options is a fiduciary function that is not a result of any participant’s decision. See Final Regulations Regarding Particular Directed Individual Account Plans (ERISA § 404(c) plans), 57 Fed. Reg. 46906, 46924-225, n.27. The majority found that this footnote was an unreasonable interpretation of ERISA § 404(c) because it would render the statute superfluous: “The DOL footnote would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary.” Langbecker, 476 F.3d at 311.

The majority also rejected the dissent’s contention that its holding meant that “no duty of prudence will attach to the selection and monitoring of plan investment choices.” Id. at 312. Rather, the court suggested that fiduciaries may be liable for these choices, but such liability would depend on whether, in fact, a participants’ losses were the result of the choices presented or the participants’ investment decisions. Id. at 312. “Section 404(c) contemplates an individual, transactional defense” when plan fiduciaries have violated their duties in selecting and monitoring plan investments. Id. Thus, Langbecker requires an inquiry into which event — the fiduciary’s breach or the participant’s investment decisions — caused the loss.

After Langbecker, the Seventh Circuit in Hecker v. Deere & Co. considered § 404(c) in a case where the plaintiffs alleged that the fiduciaries allowed the plan and its participants to pay excessive administrative fees based on the investment options that were included in the plan. 556 F.3d 575, 589 (7th Cir. 2009). The court affirmed the dismissal of the case on a motion to dismiss because “[e]ven if [ERISA § 404(c)] does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of [§ 404(c)] and includes a sufficient range of options so that the participants have control over the risk of loss.” Id. (citing Langbecker, 476 F.3d at 310-11 and In re Unisys, 74 F.3d at 445). The court found that the fiduciaries provided plan participants with a sufficient variety of investment options. Id. at 590. In a subsequent opinion, however, the Seventh Circuit clarified that its decision was based solely on the allegations in that case and that it did not necessarily decide that fiduciaries could insulate themselves from liability in all situations merely by providing participants a large number of investment options. Hecker v. Deere & Co., 569 F.3d 708, 711 (7th Cir. 2009).

See also:

In re Washington Mutual, Inc. Sec., Derivative & ERISA Litig., No. C07-1874 MJP, 2009 WL 3246994, *7-*8 (W.D. Wash. Oct. 5, 2009). While noting that the case was similar to Hecker in that plaintiffs included a response to a potential § 404(c) defense in the complaint and that participants had access to a variety of investment options, the court declined to dismiss the case on a motion to dismiss. A critical distinction to the court was that “Plaintiffs here challenge the decision to preserve investment alternatives, not the administrative fees associated with any particular alternative” as in Hecker.

Tullis v. UMB Bank, N.A., 640 F. Supp. 2d 974, 979-80 (N.D. Ohio 2009). The court granted summary judgment for defendants because it found that the safe harbor defense was applicable to the participants’ claims. Plaintiffs sought to recover losses from an investment advisor’s fraudulent activities about which the trustee allegedly knew, but the court found that the participants exercised complete control over their accounts and related assets and they were provided a broad range of investment alternatives.

Lingis v. Motorola, Inc., --- F. Supp. 2d ----, No. 03 C 5044, 2009 WL 1708097, at *7-*14 (N.D. Ill. June 17, 2009). The court granted summary judgment for the defendants and found that the ERISA § 404(c) defense applied. It determined that the participants were given sufficient information about their investment alternatives and that they had independent control over their investment decisions. In addition, the court found that by offering 8 investment options in addition to the employer stock fund, the defendants provided participants with “a broad range of investment alternatives” as required by Hecker.

3. Adequate consideration must be given when plan acquires employer stock

Aside from stock drop litigation, another important area of litigation related to employer stock involves ERISA’s prohibited transactions provisions, particularly ERISA § 406, 29 U.S.C. § 1106. Section 406(a) prohibits certain types of transactions between a plan and a party in interest, which includes a fiduciary of the plan. Hall Holding, 285 F.3d at 424. One of the prohibited transactions is the acquisition of employer securities by a plan. 29 U.S.C. § 1106(a)(1)(E). However, under ERISA § 406(e), 29 U.S.C. § 1106(e), “§ 406 does not apply to the acquisition or sale by a plan of the employer’s securities as long as the acquisition or sale is for ‘adequate consideration.’” Hall Holding, 285 F.3d at 425 (citing 29 U.S.C. § 1108(e)(1)).

Adequate consideration does not require “a premium above market.” Thompson, 2002 WL 246407, at *3 (rejecting claim “that adequate consideration requires a premium above market”). ERISA provides two definitions for adequate consideration, depending on if the stock is publicly-traded. 29 U.S.C. § 1002(18). ERISA provides that:

“adequate consideration” . . . means

- (A) in the case of a security for which there is a generally recognized market, either
 - (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or
 - (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and
- (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

29 U.S.C. § 1002(18).

For cases involving a publicly-traded stock, the inquiry is rather straightforward. If the plan acquires the stock at a price at or below the publicly-traded price, adequate consideration is provided, and there is no prohibited transaction because the § 408(e) exemption applies. See, e.g., In re Radioshack Corp. ERISA Litig., 547 F. Supp. 2d 606, 617 (N.D. Tex. 2008); In re Coca-Cola Enters. Inc. ERISA Litig., No. 060953, 2007 WL 1810211, at *17 (N.D. Ga. 2007).

To determine whether adequate consideration was provided if the stock is not publicly-traded, courts consider not only the fair market value of the employer securities, but also analyzes “the process that led to the determination of fair market value in light of § 404’s fiduciary duties.” Hall Holding, 285 F.3d at 437. Courts have stated that analyzing the process is necessary because “the definition of ‘adequate consideration’ has two distinct parts. First, there is the ‘fair market value’ part, then there is the ‘as determined in good faith by the trustee’ part.” Id. at 436. In Herman v. Mercantile Bank N.A., the Eighth Circuit held that if a prudent trustee would have purchased the employer stock at the price defendant paid for it, then no ERISA violation occurred “regardless of whether defendant made a good faith effort to determine the fair market value of the stock.” 143 F.3d 419, 421 (8th Cir. 1998). In Hall Holding, the Sixth Circuit expressly rejected Herman. Instead, the court emphasized the importance of both fair market value and good faith of the fiduciary. Hall Holding, 285 F.3d at 436.

The Hall Holding court also distinguished the Sixth Circuit’s decision in Kuper by stating that Kuper “only addressed violations of § 404 [failure to diversify plan assets], not § 406 [prohibited transactions due to lack of adequate consideration].” Id. at 438. Due to this difference, the Hall Holding court found that “the price paid by a hypothetical reasonable fiduciary is irrelevant in determining whether defendants violated § 406(a)(1).” Id. at 437.

Moreover, in Hall Holding the court declined “to read a ‘causation’ element into a violation of § 406,” which would require “a casual link between the failure to investigate and the resultant harm” to the plan. Id. at 438-39; see also Horn, 215 F. Supp. 2d at 876 (stating that “claims under § 406, therefore, operate under a different analytical framework than those under § 404, as § 406 lacks the causation element and places the burden on the defendants to show that adequate consideration was paid”).

In Horn, the plaintiffs alleged that the ESOP trustees caused the ESOP to pay more than adequate consideration for the employer securities. 215 F. Supp. 2d at 873. There, the district court applied the “prudent person” standard of care to the trustees’ actions. Id. The court distinguished the case before it from Moench and Kuper, in which the court adopted the arbitrary and capricious standard of review, by noting that those cases involved allegations of breach of fiduciary duties for failure to diversify ESOP holdings. Id. at 875. The court acknowledged that:

although dicta in these cases supports extending such reasoning to the case of an ESOP fiduciary accused of overpaying for employer securities, Cunningham confronts this issue head on and applies the prudent person standard. Because Cunningham is more factually and legally on point, it is better precedent, and we will follow it by applying the more rigorous standard of review to defendants’ actions in this case.

Id.

Thus, the court held that “a prohibited transaction under § 406 may be found even when, coincidentally, the ESOP paid no more than fair market value for employer securities, if the trustees failed to conduct a prudent investigation into the price of the stock under the circumstances then prevailing.” Id. at 874. The defendant-fiduciary has the burden to demonstrate that it undertook a prudent investigation prior to the ESOP’s stock purchase. Id. at 881.

Furthermore, the court held that “overpayment by the ESOP for employer securities constitutes a loss to the plan, measured by the difference between purchase price paid and the fair market value of the stock at the time of the transaction.” Id. at 874. The Horn court found that even though “defendants were involved in varying degrees in an investigation into the value of the stock,” the trustees were not acting on behalf of the ESOP. Id. at 890 (quoting Reich v. Hall Holding Co., 990 F. Supp. 955, 963 (N.D. Ohio 1998)). In other words, the failure to act “solely in the interest of plan participants and beneficiaries” was “sufficient to show a breach of ERISA § 406 and a prohibited transaction.” Id.; see also Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1097 (9th Cir. 2004) (declining to apply Moench’s standard and questioning whether Moench’s standard requiring potential use of insider information may run afoul of securities laws).

Although the cases discussed above declined to follow Kuper, another case, Landgraff v. Columbia/HCA Healthcare Corp. of Am., No. 3-98-0090, 2000 WL 33726564, at *6 (M.D. Tenn. May 24, 2000), aff’d, 30 Fed. Appx. 366 (6th Cir. 2002), adopted the holding of

Moench and Kuper by extending the presumption of prudence “to the decisions of the defendants to invest the [stock bonus plan] assets in company stock.” As one commentator noted, “it follows the Moench analysis, which gives some effect to the clear intent of Congress to encourage employee investment in employer stock through benefit plan[s]. [Moreover], it adopts the substantial prudence rule [which asks if a fiduciary who conducted a proper investigation would have acted differently].” Robert Gallagher, *ERISA Class Action Fiduciary Litigation after Enron, in Pension Plan Investments 2002: Confronting Today’s Issues*, 576 PLI/TAX 325, 333 (2002).

See also:

Keach v. U.S. Trust Co., 419 F.3d 626, 638-40 (7th Cir. 2005). *The Seventh Circuit affirmed the district court’s entry of judgment in favor of the defendant after a bench trial and held that a transaction was for “adequate consideration” where the defendants secured a fairness opinion within a reasonable time of the transaction approving the price.*

Summers v. State Street Bank and Trust Co., 104 F.3d 105, 106-08 (7th Cir. 1997). *ESOP participants challenged a transaction under ERISA § 406’s prohibition of transactions between a fiduciary and a party-in-interest for a sale of employer securities. Judge Posner held that a “price . . . based on market value” would be considered reasonable even though there was no market in the new preferred stock because there was a market in the employer’s common stock. The bank used the price of the common stock and made an adjustment for the preferred status of the stock that was sold, and the court affirmed dismissal of the prohibited transaction claim.*

E. LITIGATION AFFECTING EMPLOYEE WELFARE BENEFIT PLANS UNDER ERISA

ERISA governs two types of employee benefit plans: employee pension plans and employee welfare benefit plans. See 29 U.S.C. § 1002. A welfare plan requires “(1) a ‘plan, fund, or program’ (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, or prepaid legal services or severance benefits (5) to participants or their beneficiaries.” Donovan v. Dillingham, 688 F.2d 1367, 1370-71 (11th Cir. 1982). A benefit is provided pursuant to a “welfare benefit plan” even if it is within a subsection of a pension plan. McBarron v. S & T Indus., Inc., 771 F.2d 94, 98 (6th Cir. 1985). Health, medical, disability, and life insurance benefits are considered employee welfare benefits. See 29 U.S.C. § 1002(1).

See also:

Neuma, Inc. v. AMP, Inc., 259 F.3d 864, 872 (7th Cir. 2001). *A life insurance program is a welfare benefit plan as defined by ERISA.*

Postma v. Paul Revere Life Ins. Co., 223 F.3d 533, 537-38 (7th Cir. 2000). Disability benefits are welfare benefits.

Owens v. Storehouse, Inc., 984 F.2d 394, 397-98 (11th Cir. 1993). Medical benefits fall within the definition of welfare benefits.

Williams v. Caterpillar, Inc., 944 F.2d 658, 667 (9th Cir. 1991). Health benefits are considered welfare benefits.

But see:

Massachusetts v. Morash, 490 U.S. 107, 116-17 (1989). Although vacation benefits are included in ERISA's list of possible welfare plan benefits, vacation pay which was paid out of the company's general assets did not form an ERISA-covered welfare plan to provide vacation benefits.

Raskin v. Cynet Inc., 131 F. Supp. 2d 906, 908 n.2, 910 (S.D. Tex. 2001). Stock purchase option is not a welfare plan benefit. The test to see whether a plan qualifies as a welfare plan is: whether the plan (1) "exists" (2) falls within a "safe harbor provision" (3) was established by the Department of Labor and (4) meets ERISA requirements of establishment or maintenance by an employer for the purposes of benefiting plan participants.

Further, the employer's purchase of insurance for its employees can establish a welfare plan. See 29 U.S.C. § 1002(1); see also *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444, 447 (4th Cir. 1993).

Once a welfare benefit plan is established, it is subject to ERISA's reporting and disclosure requirements. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82-84 (1995); see 29 U.S.C. §§ 1021-1031. Additionally, ERISA's fiduciary responsibility provisions are applicable to welfare benefit plans. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (holding that ERISA applies to welfare plans), overruled in part on other grounds by Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003); see 29 U.S.C. §§ 1101-1114.

1. Notable differences between welfare benefits and pension benefits

While there are several differences between pension benefits and welfare benefits, without question, the most significant difference between them is that ERISA provides many specific requirements for the substantive content of pension plans but the substantive content of welfare benefit plans is virtually unregulated. This difference is reflected mainly in how ERISA treats the two types of benefits in terms of vesting and minimum funding.

a. Vesting

Under ERISA, participants gain "vested" pension benefits when they gain a right or claim that is unconditional and legally enforceable against the plan. 29 U.S.C. § 1002(19). ERISA contains a significant number of vesting requirements for pension plans. See 29 U.S.C. §§ 1051-61. While ERISA itself does not require welfare plans to vest, employers and employee

may contract for vesting. 29 U.S.C. § 1051; Inter-Modal Rail Employees Ass’n v. Atchison, 520 U.S. 510, 515 (1997).

ERISA contains a number of vesting requirements for ERISA-covered pension plans. See 29 U.S.C. §§ 1051-61. Most critically, an ERISA-covered pension plan must provide that an employee’s pension benefits vest when the employee reaches normal retirement age. 29 U.S.C. § 1053(a)(1). Additionally, an ERISA-covered pension plan must provide that employees have non-forfeitable rights to any benefit that is derived from their own contributions. Moreover, the plan also must provide employees a non-forfeitable right to benefits that are derived from the employer’s contributions after an employee completes certain years of service. For example, a plan satisfies ERISA if an employee who has completed five years of service has a non-forfeitable right to 100% of benefits that are derived from employer contributions. 29 U.S.C. § 1053(a)(2)(A-B). Along with these central requirements, ERISA imposes extensive additional requirements for vesting and accrual which are codified at 29 U.S.C. §§ 1051-61.

In contrast, welfare plans are not covered by ERISA’s vesting requirements. 29 U.S.C. § 1051. Courts have held that though vesting of welfare plans is not required under ERISA, it can be contracted for in welfare plans. See Inter-Modal Rail Employees Ass’n, 520 U.S. at 515. As discussed below, plaintiffs’ attempts to obtain lifetime medical benefits have been a significant source of litigation over recent years. See, e.g., UAW, Local No. 1697 v. Skinner Engine Co., 188 F.3d 130, 139 (3d Cir. 1999).

b. Minimum funding requirements

ERISA-covered pension plans must comply with ERISA’s complex system of minimum funding requirements. 29 U.S.C. §§ 1081-85. For example, ERISA’s minimum funding system requires pension plans to calculate using Department of Treasury rules, the past, current, and projected future assets and liabilities of the pension plans. 29 U.S.C. § 1082. ERISA mandates that pension plans must have a minimum balance between plan assets and liabilities, such that assets cannot be less than liabilities by more than designated amounts at certain periods of time. Id. The requirements vary for different kinds of plans (e.g., single employer plans versus multiple employers plans), but all ERISA-covered pension plans must comply with some minimum funding requirements. Id.

As with the vesting requirements, ERISA does not impose minimum funding requirements on welfare plans. 29 U.S.C. § 1081; Curtiss-Wright Corp., 514 U.S. at 78. As “ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits,” there would be no reason to require employers that do provide welfare benefit plans to fund those plans to ensure that they will continue to provide benefits. See Curtiss-Wright Corp., 514 U.S. at 78. Courts have noted that the lack of minimum funding requirements reflects Congress’s policy decision that administration of welfare benefit plans should remain flexible to encourage employers to provide them.

c. Alienability

Alienability refers to the right of an owner to transfer his property to another. In the context of pension and welfare benefits, alienability refers to the right of an owner to transfer

some or all of those benefits to another, whether voluntarily or involuntarily. See, e.g., Tango Transp. v. Healthcare Fin. Servs. LLC, 322 F.3d 888 (5th Cir. 2003). While benefits that are completely alienable can be bought, sold, and taken by a court to satisfy a judgment, benefits that are inalienable cannot. Id. ERISA treats the alienability of pension and welfare benefits from ERISA-covered plans quite differently. See 29 U.S.C. § 1056.

ERISA tightly restricts the alienation of pension plan benefits before they have been distributed. 29 U.S.C. § 1056(d)(1). ERISA pension benefits are not subject to garnishment or constructive trusts *before* the benefits have been distributed. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 371-72 (1990). However, ERISA pension benefits are subject to garnishment and constructive trusts *after* the benefits have been distributed. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1083 (10th Cir. 1994).

ERISA's anti-alienation provision expressly includes only pension benefits, not welfare benefits. 29 U.S.C. § 1056(d)(1). Although Congress had the choice to prohibit alienation of welfare benefits, it chose not to do so. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) (finding ERISA does not prevent garnishment of welfare benefits). Therefore, welfare benefits are presumably freely alienable. Id. at 838. ERISA also does not prevent the imposition of a constructive trust after the distribution of welfare benefits. Cent. States, S.E. & S.W. Areas Pension Fund v. Howell, 227 F.3d 672 (6th Cir. 2000).

It is unclear if ERISA permits a constructive trust on welfare benefits *before* their distribution, for reasons other than inalienability. The Sixth Circuit has held that a constructive trust before the distribution of welfare benefits is impermissible, reasoning that the plan administrator must distribute the benefits to the named beneficiary. See id. at 679, n.5. Conversely, the Ninth Circuit holds that ERISA permits a constructive trust on welfare benefits after or before their distribution, based on ERISA's express lack of an anti-alienation provision covering welfare plans. See Emard v. Hughes Aircraft Co., 153 F.3d 949, 954 (9th Cir. 1998), overruled in part on other grounds by Egelhoff v. Egelhoff, 532 U.S. 141 (2001). The Supreme Court did not address the portion of Emard concerning the imposition of a constructive trust. Egelhoff, 532 U.S. at 147-48.

The Fifth Circuit has held that ERISA welfare benefits are freely assignable. Tango Transp., 322 F.3d at 891-93. By the Fifth Circuit's rule, the right to sue, standing to sue, and the right to receive welfare benefits can all be freely assigned by the named ERISA beneficiary. Id.

2. Suits involving vesting of welfare benefits

ERISA specifically excludes welfare benefits from the minimum participation, vesting and minimum funding requirements applicable to pension benefits. 29 U.S.C. §§ 1051(1), 1053(a), 1081(a)(1); Curtiss-Wright Corp., 514 U.S. at 78. Courts have noted that "[t]o require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." Moore v. Metro. Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988).

Generally, ERISA does not regulate the substantive content of welfare benefit plans. Therefore, unless a plan sponsor contractually cedes its freedom, it is generally free under ERISA to adapt, modify or terminate welfare benefits at any time for any reason. Curtiss-Wright Corp., 514 U.S. at 78; Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771, 774 (7th Cir. 2003). A plan sponsor's promise of vested benefits is enforceable, however. Am. Fed'n of Grain Millers v. Int'l Multifoods Corp., 116 F.3d 976, 980 (2d Cir. 1997); Wheeler v. Dynamic Eng'g, Inc., 62 F.3d 634, 638 (4th Cir. 1995). Vested for the purposes of ERISA means "nonforfeitable," which is further defined as "unconditional." 29 U.S.C. §§ 1002(19), 1002(25). Therefore, courts agree that the plan sponsor and employee may contract to maintain welfare benefits at a certain level that ERISA does not mandate. Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 77 (2d Cir. 1996); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993). Courts disagree, however, over what language is necessary for welfare benefits to vest.

See:

Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 78 (2d Cir. 1996). An agreement to vest welfare benefits need only be as formal as the benefit plan itself.

Bidlack v. Wheelabrator Corp., 993 F.2d 603, 608 (7th Cir. 1993). When the agreement is ambiguous as to when and if the welfare benefits vest, extrinsic evidence may be used to show that the benefits were meant to be perpetual. Therefore, the employer need not state its intent unambiguously.

But see:

Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993). To create a contractual right to vested welfare benefits, the "commitments must be found in the plan documents and must be stated in clear and express language."

United Paperworkers Int'l Union v. Jefferson Smurfit Corp., 961 F.2d 1384, 1386 (8th Cir. 1992). The parties may bargain for welfare benefits to vest, but "the fruits of those bargains must be reduced to writing and incorporated . . . into the formal written ERISA plan provided to employees."

Anderson v. John Morrell & Co., 830 F.2d 872, 877 (8th Cir. 1987). For a contract to validly vest welfare benefits, "there must be a specific, if not written, expression of the employer's intent to be bound."

In determining the scope of vested rights, courts interpret the agreement at issue and apply principles of contract interpretation. Like welfare benefits for active employees, retiree welfare benefits only vest if and when a contract specifies, not upon the attainment of a certain status, such as retirement or disability.

See:

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). Under a retirement health plan, “ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits.”

Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1160 (9th Cir. 2001). Because the disability policy provided that the policy provider could change the policy upon written request without the beneficiaries’ consent, the plan’s provisions were not invoked in perpetuity when the employee was disabled. Rights to the disability benefit do not vest upon the occurrence of the disability but vest only when the contract so provides.

Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 (10th Cir. 1996). The language of the plan did not clearly indicate disability as the vesting trigger. Therefore, although the employee began to collect disability insurance, the employee did not have a vested right to the benefits.

Williams v. Caterpillar, Inc., 944 F.2d 658, 666-67 (9th Cir. 1991). “Retiree medical benefits do not become vested once an employee becomes eligible or retires.”

Moore v. Metro. Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988). For a retirement welfare benefit plan, “[a]utomatic vesting does not occur in the case of welfare plans.”

In re White Farm Equip. Co., 788 F.2d 1186, 1193 (6th Cir. 1986). While a plan provider and an intended beneficiary may contract for vested retiree welfare benefits in the plan documents, retiree welfare benefits are not required to vest at retirement.

But see:

UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983). When considering benefits provided under a collective bargaining agreement “[r]etiree benefits are in a sense ‘status’ benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.”

Because welfare plans do not vest automatically, the plan sponsor is free to amend the plan and apply the amendment retroactively, unless the benefit has contractually vested or has been paid. *Member Servs. Life Ins. Co. v. Am. Nat’l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 954 (10th Cir. 1997) (refusing to allow recoupment of benefits paid before amendment); *Filipowicz v. Am. Stores Benefit Plans Comm.*, 56 F.3d 807, 815 (7th Cir. 1995). Although amendments may apply retroactively if the benefit has not vested, an ERISA welfare plan is not subject to an amendment based on informal communications between the employer and intended beneficiaries. *Confer v. Custom Eng’g Co.*, 952 F.2d 41, 43 (3d Cir. 1991); *Moore*, 856 F.2d at

492. Instead, the plan sponsor must provide, in writing, a procedure for amending the plan and a procedure for identifying the persons who have authority to amend the plan. See 29 U.S.C. §§ 1102(a)(1), (b)(3). Curtiss-Wright Corp., 514 U.S. at 78-79. Because ERISA allows for the termination or modification of welfare plans, an intended beneficiary does not have a claim if a plan is amended but rather when the plan was not amended according to the proper procedure. Id. at 83-84. Further, an employer may be liable if it uses the power to amend the welfare benefit plan to discriminate against an employee or to interfere with that employee's attainment of a right under the plan. See 29 U.S.C. § 1140.

3. Disability benefit exemption

As part of its preemption rules, 29 U.S.C. § 1003(b)(3), exempts from ERISA coverage benefit plans maintained solely for the purpose of complying with applicable disability insurance. See 29 U.S.C. § 1003(b)(3). See Section I of this Handbook for a detailed discussion of ERISA's preemption provisions.

4. The Consolidated Omnibus Budget Reconciliation Act

In some circumstances, employers must provide terminated employees an opportunity to continue to receive group health coverage that would otherwise be terminated. See 29 U.S.C. § 1161. Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), private employers who offer a group health plan must provide for continuation coverage of health benefits for laid-off employees at approximately the group rate. See 29 U.S.C. §§ 1161-1167; see generally MICHAEL J. CANAN & WILLIAM D. MITCHELL, EMPLOYEE FRINGE & WELFARE BENEFIT PLANS § 10.3 (2002 ed.). COBRA requires "an employer who sponsors a group health plan to give the plan's 'qualified beneficiaries' the opportunity to elect 'continuation coverage' under the plan when the beneficiaries might otherwise lose coverage upon the occurrence of certain 'qualifying events.'" Geissal v. Moore Med. Corp., 524 U.S. 74, 80 (1998). A full discussion of COBRA is beyond the scope of this Handbook, but a few topics will be discussed here.

a. COBRA excludes disability benefits

COBRA defines "group health plan" as an employee welfare benefit plan that provides medical care to beneficiaries. See 29 U.S.C. § 1167. Several federal courts have interpreted the term "medical care" to exclude disability benefits.

See:

Austell v. Raymond James & Assocs., Inc., 120 F.3d 32, 33-34 (4th Cir. 1997). *Disability benefits designed to replace lost wages do not fall within COBRA's definition of health benefits because disability insurance is not "an amount paid to modify or alleviate disease, just as it is not an amount paid to diagnose, cure, treat or prevent disease."*

Burgess v. UNUM Life Ins. Co., No. C-95-0229 SI, 1995 WL 581151, at *3 n.3 (N.D. Cal. Sept. 25, 1995). *In dicta*, the court noted that "[l]ong-term disability

coverage is explicitly exempted from COBRA, since it is not considered a 'medical benefit' as defined by COBRA."

b. COBRA excludes life insurance benefits

Similar to excluding disability benefits from its continuation coverage requirement, COBRA excludes life insurance benefits from the benefits provided under a "group health plan."

See:

Mays v. UNUM Life Ins. Co. of Am., No. 95-C-1168, 1995 WL 317102, at *5 n.1 (N.D. Ill. May 23, 1995). *COBRA does not appear to mandate continuation coverage for life insurance.*

Jefferson v. Reliance Standard Life Ins. Co., 818 F. Supp. 1523, 1524-25 (M.D. Fla. 1993), *rev'd on other grounds*, 85 F.3d 642 (11th Cir. 1996). "[Because] [t]he definition of medical care does not include or reference life or accidental death and dismemberment benefits . . . 'group health plan' under the provisions of ERISA and COBRA does not contemplate life or accidental death and dismemberment. Thus a plan sponsor is not required under ERISA and COBRA to offer continuation of coverage for life or accidental death and dismemberment benefits."

c. COBRA provides an extended period of coverage for the disabled

Qualified beneficiaries disabled within sixty days of their termination are eligible for COBRA continuation coverage for twenty-nine months, rather than the normal eighteen months of coverage. See 29 U.S.C. §§ 1162(2)(A)(v). To be eligible for the twenty-nine month coverage period, the individual must be considered disabled under Title II or XVI of the Social Security Act. See 29 U.S.C. § 1162(2)(A)(v).

Similarly, a qualified beneficiary disabled within the first sixty days of termination can qualify for an eleven month extension of coverage. See 29 U.S.C. § 1162(2)(A)(v). To be eligible for the eleven month extension, the qualified beneficiary must have been disabled within the meaning of Title II or XVI of the Social Security Act, within sixty days of his termination. Marsh v. Omaha Printing Co., 218 F.3d 854, 855 (8th Cir. 2000). Additionally, the individual must inform the plan provider of the disability determination within the initial eighteen-month continuation coverage period. Id.; see 29 U.S.C. § 1162(2)(A)(v).

F. 401(K) FEE LITIGATION

Beginning in approximately 2006, plaintiffs began bringing a new form of ERISA litigation alleging breaches of fiduciary duty and prohibited transactions based on the management of 401(k) plan assets and related fees paid to plan service providers. A few cases have been litigated to resolution. See, e.g., Hecker v. Deere, 556 F.3d 575 (7th Cir. 2009), reh'g denied, 569 F.3d 708 (7th Cir. 2009) (affirming dismissal of complaint); Abbott v. Lockheed

Martin Corp., No. 06-cv-0701-MJR, 2009 WL 839099 (S.D. Ill. Mar. 31, 2009) (granting in part defendants' summary judgment motion); Taylor v. United Techs. Corp., No. 3:06cv1494 (WWE), 2009 WL 535779 (D. Conn. Mar. 3, 2009) (granting summary judgment for defendants, in part); Kanawi v. Bechtel Corp., 590 F. Supp. 2d 1213 (N.D. Cal. 2008) (same). But see Braden v. Wal-Mart Stores Inc., 588 F.3d 585, 589 (8th Cir. 2009) (reversing dismissal and remanding). Many of these suits remain pending, so the development of this body of law is unclear. These cases do reflect the increasing importance of defined contribution plans in the landscape of employee retirement plans. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1025, 552 U.S. 248 (2008).

1. Typical parties

a. Plaintiffs

In the typical case, Plaintiffs are current or former individual 401(k) plan participants who seek to bring their claims on a class basis on behalf of all plan participants. An important consideration is whether plaintiffs have standing to bring their claims. See Abbott, 2009 WL 839099, at *8 (holding that investing in one investment option in the plan conferred standing over allegations relating to any plan option).

b. Defendants

In the typical 401(k) fee case, the defendants fall into two broad categories, corporate defendants and service providers.

The typical defendants in 401(k) excessive fee litigation are corporate defendants, and the primary target of this litigation appears to be the Fortune 500 corporate defendants who sponsor large, or "jumbo," 401(k) plans. Board committees and individual officers and directors are also often included in the roster of defendants. See, e.g., Tibble v. Edison Int'l, 639 F. Supp. 2d 1074, 1080 (C.D. Cal. 2009) (naming committee and officer defendants), Taylor v. United Techs. Corp., No. 06-cv-1494 (WWE), 2009 WL 23002284, at *1 (D. Conn. Aug. 9, 2007) (naming committee defendants); Kanawi, 590 F. Supp. 2d at 1219 (same). Important considerations are whether these board and officer defendants are proper defendants under ERISA's enforcement scheme and whether they actually exercise discretion over the challenged conduct. See, e.g., Tibble, 639 F. Supp. 2d at 1112 (dismissing claims against corporate defendants because they failed to connect imprudent conduct to defendants' fiduciary duties).

Some cases also involve service providers who are retained to provide administrative services to the plan. First, a sub-set of cases include bundled service provider entities as defendants. See, e.g., Hecker v. Deere & Co., 496 F. Supp. 2d 967, 967 (W.D. Wis. 2007) (bringing suit against Fidelity); Tussey v. ABB Inc., No. 06-CV-04305, 2007 WL 4289694, at *1 (W.D. Mo. Dec. 3, 2007). These entities often provide record-keeping, trustee, and investment management services for a combination of hard-dollar fees and asset-based fees. In addition, some cases identify investment advisory firms that were previously subsidiaries or otherwise related to the corporate co-defendant as defendants in these lawsuits. Kanawi, 590 F. Supp. 2d at 1219 (naming former in-house investment advisory division of Bechtel as defendant).

See:

Hecker v. Deere & Co., 556 F.3d 575, 583-84 (7th Cir. 2009). Plaintiffs appealed the dismissal of their complaint against a “bundled” service provider defendant, Fidelity. Fidelity argued that it was neither a named nor a “functional” fiduciary because it exercised no authority or control over the management, disposition or administration of plan assets. The court held that limiting the fund options available for selection or “playing a role” or furnishing professional advice is not enough to transform a company into a fiduciary.

But see:

Spano v. Boeing Co., No. 06-cv-743, 2007 WL 1149192, at *3 (S.D. Ill. Apr. 18, 2007). The court denied the motion to dismiss, ruling that Fidelity’s fiduciary status was a question of fact dependent on the amount of discretion exercised over the management of the plan inappropriate for determination at the pleadings stage.

2. Typical claims

The specific claims alleged in these cases have evolved over time, but some key themes and forms of claim have emerged.

a. Excessive fees

In varying degrees of specificity, 401(k) fee lawsuits allege that employers or plan sponsors improperly allowed plan-service providers to be paid unreasonable and excessive fees, and that such excessive payments violate ERISA § 404’s duty of prudence. These allegations challenge a variety of arrangements, including payments to investment fund managers, investment administrators, record keepers, trustees, and “bundled” service providers which offer some or all of these services. See, e.g., Hecker, 556 F.3d at 578. Some claims allege that fee arrangements with service providers include hidden “revenue-sharing arrangements” in addition to “hard dollar” payments resulting in overall excessive fees. See, e.g., Taylor, 2009 WL 535779, at *11. In evaluating these claims, courts have held that there is no duty to scour the market to find the fund with the lowest imaginable fees and fees set against the backdrop of market competition are reasonable. Hecker, 569 F.3d at 710; Abbott, 2009 WL 839099, at *8-9.

b. Failure to capture revenue streams

Plaintiffs in 401(k) fee litigation have also alleged various theories that defendants failed to capture revenue streams because they failed to monitor or negotiate beneficial fee arrangements with regard to revenue-sharing, securities lending, float, and other practices. See, e.g., Hecker, 556 F.3d at 585 (revenue-sharing); Taylor, 2009 WL 535779, at *15 (float).

c. Imprudent decision-making for 401(k) plans

Alleged ERISA breaches of fiduciary duty in 401(k) fee litigation have also included two categories of allegedly imprudent decision-making: (a) the imprudent selection of fund options, investment styles, or account structures; and (b) the imprudent selection of service providers and negotiation of fee arrangements. In considering these claims, courts have held that a fiduciary need not take a particular investment course to meet the prudent person standard and that 20/20 hindsight opinions that plan fiduciaries should have made different decisions are insufficient to establish a breach of fiduciary duty. Hecker, 556 F.3d at 586 (finding no violation in selection of fund options from one investment company and one investment style); Taylor, 2009 WL 535779, at *10-11 (holding no violation in selection of mutual funds); Kanawi, 590 F. Supp. 2d at 1230 (same); Abbott, 2009 WL 839099, at *6 (finding no violation in failing to secure separate account or for not following a particular investment strategy for fund named “stable value”).

d. Prohibited transactions and breach of the duty of loyalty

Plaintiffs have also attempted to present a variety of claims regarding the management of 401(k) investments by alleging breaches of the duty of loyalty under ERISA § 404, and asserting prohibited transactions under ERISA § 406. Tibble, 639 F. Supp. 2d at 1101 (alleging plan fiduciaries decided to include particular investment options in 401(k) fund line-up influenced by impermissible conflict of interest), modified by 639 F. Supp. 2d 1122 (C.D. Cal. 2009); Kanawi, 590 F. Supp. 2d at 1227-28, 1231 (alleging investment administration company with ties to corporate defendant improperly benefited from certain investment decisions and transactions). A key concept related to these claims is that incidental benefits do not necessarily indicate an ERISA violation. Taylor, 2009 WL 535779, at *13-14 (finding that decision-making process turned on considerations of participants’ best interests rather than any fee incentive).

e. Excessive cash positions in company stock funds

Some early 401(k) fee lawsuits included claims alleging that plan fiduciaries violated ERISA’s fiduciary duties by imprudently retaining excessive amounts of cash in their company stock fund and imprudently selecting a unitized structure for the stock fund. A key consideration in these cases is whether the participants received benefits from the retention of cash and unitization of the stock fund, making the plan fiduciaries’ choices prudent. See Taylor, 2009 WL 535779, at *9 (granting summary judgment for defendants on plaintiffs’ company stock fund claim); Abbott, 2009 WL 839099, at *12 (denying defendants’ summary judgment motion because material fact questions existed as to alleged benefits obtained and whether cash levels exceeded amount disclosed in prospectus).

f. Failure to disclose or misrepresentation

Plaintiffs in 401(k) fee litigation have also often coupled their other breach of fiduciary duty and prohibited transactions claims with a separate breach of fiduciary duty claim asserting that the defendants failed to disclose, or misrepresented, the challenged practice to plan participants. The failure to disclose revenue-sharing fees theory has been addressed -- and rejected -- by numerous courts. See Hecker, 556 F.3d at 586 (holding no duty to disclose

revenue-sharing); Taylor, 2009 WL 23002284, at *4 (dismissing non-disclosure of revenue sharing claim); Abbott, 2009 WL 839099, at *4 (granting summary judgment on non-disclosure of revenue sharing claim). But see Kanawi v. Bechtel Corp., No. C 06-05566 CRB, 2007 WL 5787490, at *2 (N.D. Cal. May 15, 2007) (denying motion to dismiss non-disclosure of revenue-sharing claim due to possibility of intentional misrepresentation theory).

Further, where the underlying practice is not found to violate ERISA, the failure to disclose that practice does not violate the duty to disclose. Taylor, 2009 WL 535779, at *14. A key consideration is whether any purported misrepresentation or omitted information is material. Hecker, 556 F.3d at 586 (finding information sought was not material, and its omission not a breach of fiduciary duty); Taylor, 2009 WL 535779, at *13 (same). For a more detailed analysis of these claims, see Section V.B., supra.

3. Relief plaintiffs seek in fee litigation

Plaintiffs have sought a wide variety of equitable and legal relief in the typical 401(k) fee lawsuit. Monetary relief includes direct losses (i.e. experienced as a direct result of the breach of fiduciary duty) and so-called “investment losses” (i.e. losses allegedly attributable to the ups and downs of the financial market). Equitable relief sought includes disgorgement of fees, removal of fiduciaries and an accounting of plan assets. As these cases are continuing to develop, however, the precise boundaries of available relief remain unclear.

See:

Loomis v. Exelon Corp., No. 06 C 4900, 2007 WL 953827, at *2 (N.D. Ill. Feb. 21, 2007). *The court held that, while loss causation issues are normally inappropriate for resolution on a motion to dismiss, “it should not prove burdensome for a plaintiff who has suffered a [] loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.” Accordingly, the court struck the prayer for investment losses.*

4. Other procedural issues

a. ERISA § 404(c) defense

ERISA § 404(c) provides a fiduciary a “safe harbor” from liability where the plan provides individual accounts and it permits a participant to exercise control over the assets in the account. 29 U.S.C. § 1104(c). Where a fiduciary satisfies the criteria of § 404(c), and includes a sufficient range of options so that the participants have control over the risk of loss, a fiduciary is shielded from liability from an imprudent selection of funds. Hecker, 556 F.3d at 589. For a more detailed discussion of Section 404(c), see Section XV.D.2.f., supra.

b. Statute of limitations

ERISA § 413 governs breach of fiduciary duty claims and provides for a three-year statute of limitations where plaintiffs have actual knowledge, and a six-year statute of limitations in situations of constructive knowledge, of a claim’s underlying facts. The statute of

limitations is addressed in several 401(k) fee cases. See, e.g., Young v. GMIM Corp., 550 F. Supp. 2d 416, 419 (S.D.N.Y. 2008) (applying three-year statute of limitations because information disclosed in plan documents). In considering which limitations period to apply, courts must evaluate whether the doctrine of “fraudulent concealment” applies to the conduct at issue and if plaintiffs are attempting to rely on a “continuing violation” theory. Kanawi, 590 F. Supp. 2d at 1225-26; Abbott, 2009 WL 839099, at *6-*7.

XVI. PLAINTIFFS MAY KNOWINGLY AND VOLUNTARILY RELEASE OR WAIVE ERISA RIGHTS OR CLAIMS

A. EMPLOYERS MAY CONDITION BENEFITS ON A WAIVER OF ERISA RIGHTS AND CLAIMS

Employers may condition the payment of benefits on the execution of a release of employment-related rights and claims. Lockheed Corp. v. Spink, 517 U.S. 882, 894 (1996). Courts generally allow employees to waive rights and claims arising under ERISA in exchange for the payment of benefits if the waiver is knowing and voluntary. See, e.g., Chaplin v. NationsCredit Corp., 307 F.3d 368, 373 (5th Cir. 2002) (explaining that general release discharging all claims against employer is effective to discharge ERISA claims); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181 (1st Cir. 1995) (explaining that participation in employee welfare benefit plan is waivable right); Finz v. Schlesinger, 957 F.2d 78, 82 (2d Cir. 1992) (explaining that individual may waive rights to participate in pension plan). The validity of an individual's waiver of pension benefits or ERISA claims, however, is subject to closer scrutiny than the individual's waiver of general contract terms, however. Finz, 957 F.2d at 81.

See:

Petersen v. E.F. Johnson Co., 366 F.3d 676, 680 (8th Cir. 2004). Holding company was permitted to condition benefits under its new plan on the employees' waiver of rights to claims under the old plan.

Loskill v. Barnett Banks, Inc. Severance Pay Plan, 289 F.3d 734, 737-38 (11th Cir. 2002), *cert. denied*, 537 U.S. 1167 (2003). Plan included a no cut-back provision under which benefits that accrued prior to an amendment of the plan terms could not be reduced or eliminated by that amendment. After employer merged with a larger company, it adopted a release which it required as a condition to payment of severance benefits. Plaintiff refused to sign the release and sued claiming that release violated the no cut-back provision. The court held the release did not violate the no cut-back provision because the release did not alter the amount of benefits to which plaintiff was entitled, but served only as a condition precedent to receipt of benefits.

Krackow v. Jack Kern Profit Sharing Plan, No. 00 CV 2550, 2002 WL 31409362, at *8 (S.D.N.Y. May 29, 2002). The court found that there was no breach of fiduciary duty in the employer's attempt to secure a waiver of pension benefits, because when an employer negotiates waivers of ERISA claims it is not acting as a fiduciary.

But see:

Cirulis v. UNUM Corp., 321 F.3d 1010, 1014 (10th Cir. 2003). Defendant offered plaintiff a severance package conditioned on release of legal claims and a non-solicitation covenant. Plaintiff had only seven days to consider the release and was denied the opportunity to negotiate amendment of the terms, and was

ultimately denied severance benefits for failure to sign. Court held that because Plaintiff did not receive notice that severance benefits would be predicated on assent to the non-solicitation covenant, employer could not condition payment of benefits on assent to this release.

Courts have also considered when a beneficiary may waive his or her spouse's rights to pension death benefits arising under an ERISA plan. A beneficiary may only waive his or her spouse's right to the benefits if: (1) the spouse consents in writing; (2) the spouse consents to the named beneficiary and the named beneficiary (or form of benefits) may not be changed without the spouse's consent; and (3) the spouse's consent is witnessed by a notary public or plan representative. 29 U.S.C. § 1055(c)(2)(A). The requirements of § 1055(c)(2)(A) are strictly enforced. See Hagwood v. Newton, 282 F.3d 285, 289 (4th Cir. 2002) (holding that prenuptial agreement was ineffective to waive rights under ERISA because it did not conform to § 1055(c)(2)(A) requirements and was executed before marriage); Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863, 866 (11th Cir. 1997) (explaining, in holding that prenuptial agreement was ineffective waiver, subjective intent of surviving spouse is irrelevant to whether waiver was effectively made).

The Supreme Court has held that even if a former spouse has purported to waive his or her rights to plan benefits through a common-law waiver that the former spouse signed as part of a divorce decree, however, the plan administrator is obligated to abide by the participants' beneficiary designations under the plan. Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan, --- U.S. ---, 129 S. Ct. 865, 875-76 (2009). In Kennedy, the court held that such a common law waiver was not a "qualified domestic relations order," and it was ineffective if the participant's beneficiary designation pursuant to the plan continued to name the former spouse as a beneficiary. Id. The Court adopted this position to promote a "straightforward rule of hewing to the directives of the plan documents" and ERISA's goal of uniform and standard procedures for benefit administration. Id. at 875.

1. ERISA's anti-alienation provision does not bar waiver of pension benefits

ERISA requires that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Generally, however, courts do not construe the "anti-alienation" provision to bar a knowing and voluntary waiver of pension benefits. Rhoades v. Casey, 196 F.3d 592, 598 (5th Cir. 1999) (holding that anti-alienation provision does not bar knowing and voluntary waiver of retirement benefits as part of settlement agreement).

The Seventh Circuit explained in Licciardi v. Kropp Forge Division Employees' Retirement Plan, 990 F.2d 979, 982 (7th Cir. 1993), that "the anti-alienation provision was not intended to bar the settlement of disputes over pension rights." The Licciardi court distinguished between pension *entitlements*—the rights guaranteed to the employee under the terms of the plan—and *contestable* pension claims. If the release were construed broadly enough actually to eliminate pension *entitlements*, then it would potentially run afoul of the anti-alienation provision. Id. at 982. The provision does not, however, protect "contestable" pension claims. Id.

See:

Lynn v. CSX Transp., Inc., 84 F.3d 970, 975 (7th Cir. 1996). *The anti-alienation provision does not apply to “contested” (i.e., either actually or constructively contested) pension claims. If a claimant does not actually contest a claim, but is aware that a claim exists at the time a release is signed, claimant has constructively contested the claim for purposes of the anti-alienation provision.*

Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 455 (7th Cir. 1991). *Plaintiffs argued that the anti-alienation provision was a total bar to any express or implied waiver of pension benefits. The court disagreed, explaining that a rigid application of the anti-alienation provision would be inconsistent with the policy goal of encouraging settlement of legal disputes.*

2. Employees may not waive prospective ERISA claims

Like many other federal statutory rights, ERISA claims may not be waived prospectively. *Wright v. S.W. Bell Tel. Co.*, 925 F.2d 1288, 1293 (10th Cir. 1991); *Reighard v. Limbach Co.*, 158 F. Supp. 2d 730, 733 (E.D. Va. 2001) (discussing that other federal rights can not be waived prospectively). In *Wright*, the plaintiff sought and was denied long-term disability benefits, and ultimately was terminated from his job. 925 F.2d at 1289. After filing a discrimination charge with the EEOC, the plaintiff raised a grievance through the collective bargaining agreement and received a lump-sum settlement from the defendant. *Id.* at 1290. The check, however, contained a general release of all claims typed on the back of the check just above the endorsement line. *Id.* Plaintiff filed Title VII and ERISA claims against the defendant three years later. *Id.*

While the court held that the release was effective to waive the pending employment discrimination claims, the court held that it was ineffective to waive the ERISA claims because neither the plaintiff nor the defendant could have known about the claim at the time the plaintiff signed the waiver, even though the transaction at issue in the ERISA claim occurred *prior to* the signing of the release. *Id.* at 1293. The *Wright* case suggests that whether a release involves the waiver of prospective rights turns not on whether conduct giving rise to a claim has occurred (as in the statute of limitations), but on whether there is either a claim pending or the plaintiff has notice that a claim may exist at the time the waiver is made. Under *Wright*, if the plaintiff does not know that a claim against her employer may exist, then a general waiver of her rights and claims is ineffective to waive ERISA claims that may arise in the future.

See:

Reighard v. Limbach Co., 158 F. Supp. 2d 730, 733 (E.D. Va. 2001). *Employee signed an agreement at the onset of employment agreeing, inter alia, not to sue employer for any claims arising from involuntary termination. After employee was involuntarily terminated, he raised several ERISA claims in the district court. The district court denied defendant’s motion to dismiss, holding that a release of future ERISA claims is ineffective as inconsistent “with the general rule that waivers of prospective statutory federal rights are void.”*

3. Waivers of welfare benefits might not need to be knowing and voluntary

As discussed in Section XV.E, there are several differences between welfare benefits and pension benefits. The First Circuit has held that a waiver of welfare benefits is not entitled to the same level of heightened scrutiny as the waiver of pension benefits. Rodriguez-Abreu v. Chase Manhattan Bank, 986 F.2d 580, 587 (1st Cir. 1993). Instead, waivers of pension benefits are subject to contract law principles of federal common law. Id.

But see:

Melton v. Melton, 324 F.3d 941, 945-46 (7th Cir. 2003). *In evaluating whether a waiver by a designated beneficiary of an ERISA-regulated life insurance plan was effective, the court observed that it was “more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself.”*

Manning v. Hayes, 212 F.3d 866, 874 (5th Cir. 2000). *An attempted waiver by a designated beneficiary of an ERISA-regulated life insurance plan must be “explicit, voluntary and made in good faith.”*

Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 231 (2d Cir. 1995). *“We see no reason to apply a lower level of scrutiny to waivers of severance claims under ERISA than we do to pension claims. . . . [I]f ERISA applies to the Severance Plan . . . the district court must subject it to the ‘close scrutiny’ called for [by earlier rulings].”*

B. WHETHER A WAIVER IS KNOWING AND VOLUNTARY DEPENDS ON THE TOTALITY OF THE CIRCUMSTANCES

To determine whether a waiver of ERISA rights and claims was knowing and voluntary, some circuits have adopted a six-factor totality of the circumstances test. See Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 12 (1st Cir. 1997); Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1367-68 (2d Cir. 1991). The six factors are not exhaustive, and “no single fact or circumstance is entitled to talismanic significance on the question of waiver.” Smart, 70 F.3d at 181. The factors courts will look to are:

- (1) The plaintiff’s education and business experience;
- (2) The amount of time the plaintiff had possession of or access to the agreement before signing it;
- (3) The role of plaintiff in deciding the terms of the agreement;
- (4) The clarity of the agreement;

- (5) Whether the plaintiff was represented by or consulted with an attorney, as well as whether the employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so; and
- (6) Whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Laniok, 935 F.2d at 1368. A release need not specifically mention ERISA for the claim to be waived effectively; so long as the waiver satisfies the “knowing and voluntary” analysis, it is enough that the release “unambiguously reveal an intent to cover every imaginable cause of action.” Chaplin v. NationsCredit Corp., 307 F.3d 368, 373 (5th Cir. 2002). The party seeking to enforce the waiver has the burden to prove the waiver’s validity. Id. at 372.

If any language on the face of the waiver speaks directly to one of the six factors, a court may bar the parties from seeking to disprove that showing extrinsically. In Morais v. Central Beverage Corp. Union Employees’ Supplemental Retirement Plan, 167 F.3d 709, 713 (1st Cir. 1999), the plaintiff asserted that he was offered the waiver without the opportunity to obtain independent advice. The agreement, which the plaintiff signed, stated that the plaintiff had consulted with attorneys and union officials and signed the agreement after consultation. Id. at 713 n.7. The court, applying basic contract law principles, held that the agreement was conclusive evidence that the plaintiff had received access to adequate independent consultation. Id. at 713-14.

Demonstrating that no single element of the test is dispositive, the Morais court explained that the dramatic discrepancy between the plaintiff’s level of education and sophistication and that of the defendants was offset by the consultation and advice the plaintiff had received—or at least that the agreement stated he had received. Id. at 714. Access to legal counsel, or a legal education and background, can be important evidence in the evaluation of the “education and experience” and the “consultation” prongs of analysis. In Finz v. Schlesinger, 957 F.2d 78, 83 (2d Cir. 1992), the court considered it significant evidence that the plaintiff had been a former New York Supreme Court justice, indicating that it was “clear that Finz, an astute lawyer, knew exactly the bargain he was making.” If the plaintiff had access to any legal advice (or has a legal background), it will be difficult to claim that he did not make a knowing and voluntary waiver.

Despite the general admonition that no single factor is entitled to any greater weight than the others, the consideration factor is crucial, because if a waiver is not supported by consideration, it will probably fail. A waiver will survive if it is supported by consideration which is beyond that to which the plaintiff is already entitled by operation of law or contract and beyond those benefits which the employer has gratuitously conveyed to the plaintiff prior to asking for the release of claims. In Gorman v. Earmark, Inc., 968 F. Supp. 58, 62 (D. Conn. 1997), the defense argued that the release the plaintiff signed was supported by “(1) payment of his salary until the end of the month; (2) payment of his health insurance through the next month; (3) payment for his stock in Earmark and for promissory notes that were not yet due.” The evidence showed that the defendant had already gratuitously offered to extend plaintiff’s salary

and benefits three weeks prior to asking him to sign a release. Id. at 61. In denying summary judgment, the court concluded that a jury could find that the lump sum payment defendant made was compensation for plaintiff's stocks and notes, and therefore, funds to which plaintiff was already entitled by operation of prior contracts. Id. at 63. Moreover, a jury also could have concluded that the extension of salary and benefits was past consideration and therefore could not have supported the release. Id. If it appears that the employer is attempting to support the release of ERISA rights with the discharge of pre-existing legal duties, Gorman indicates that such a release is probably not supported by consideration. Furthermore, if it seems from the circumstances surrounding the signing of the waiver that there was fraudulent inducement, misrepresentation, mutual mistake or duress, then the waiver may justly be set aside. DePace v. Matsushita Elec. Corp. of Am., No. 02 Civ. 4312, 2004 WL 1588312, at *17 (E.D.N.Y. July 16, 2004).

While courts have generally concluded that a knowing and voluntary release of ERISA claims is valid, courts must still interpret the terms of the specific release in question to determine if they cover the claims the plaintiff seeks to assert. E.g., Brieger v. Tellabs, Inc., 473 F. Supp. 2d 878, 885 (N.D. Ill. 2007) (citing Curran v. Kwon, 153 F.3d 481, 488, n. 12 (7th Cir. 1998).) This is an issue of contract law and requires the court to interpret the release.

For example, in Breiger v. Tellabs, Inc., plaintiffs argued that a general release stating that it did not extend to "any vested benefits" did not bar their claims for additional benefits they claimed they would have received but for the fiduciaries' breach. Id. The defendants countered in support of their motion for summary judgment that the release explicitly relinquished claims arising under ERISA and that because the plaintiffs knowingly and voluntarily entered into the release and received adequate consideration in the form of severance packages, they were barred from bringing any claims relating to the plan. Id. The court in Breiger sided with the plaintiffs on defendants' motion for summary judgment because it believed there was a factual issue as to whether the plaintiffs understood a "release that expressly excepted claims for vested benefits [would] bar a claim that the signatory received a lower level of vested benefits as a result of defendants' fiduciary breaches." Id. at 886 (citing Nelson v. Ipalco Enter., Inc., No. IP02477CHK, 2005 WL 1924332, at *5-*6 (S.D. Ind. Aug. 11, 2005).)

C. POSSIBLE TENDER BACK REQUIREMENT MAY BAR CHALLENGES TO ERISA WAIVERS.

Some courts may require plaintiffs who signed waivers but then attempt to bring ERISA claims anyway to offer to tender back the additional consideration they received before they may pursue the ERISA claims or even challenge the validity of the waivers. See Livingston v. Bev-Pak, Inc., 112 F. Supp. 2d 242, 249 (N.D.N.Y. 2000); Bittinger v. Tecumseh Prods. Co., 83 F. Supp. 2d 851, 872 (E.D. Mich. 1998), aff'd, 201 F.3d 440 (6th Cir. 1999); Harless v. Research Inst. of Am., 1 F. Supp. 2d 235, 242-43 (S.D.N.Y. 1998). These courts hold that under the common law, a party who has accepted benefits in exchange for a waiver of claims must tender back that benefit before the party may challenge the release. See, e.g., Livingston, 112 F. Supp. 2d at 249. But see Hogan v. E. Enters./Boston Gas, 165 F. Supp. 2d 55, 65 n.14 (D. Mass. 2001) (stating First Circuit has yet to decide whether tender back requirement is condition precedent to ERISA claim).

In Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998), the Supreme Court rejected such a tender back requirement for plaintiffs bringing age discrimination claims under the Age Discrimination in Employment Act (“ADEA”). Because the Older Workers Benefit Protection Act of 1990 (“OWBPA”) established strict guidelines for the validity of an ADEA waiver, the Court determined that courts could not impose additional requirements such as a tender back requirement. Id. The Fifth Circuit, which was overruled in Oubre, has since held that by its own terms the OWBPA addresses only waivers of age discrimination claims and therefore waivers of ERISA claims remain subject to common law doctrines. See Chaplin, 307 F.3d at 375. Chaplin indicates that the Fifth Circuit would impose a common law tender back requirement on plaintiffs who challenge waivers of ERISA claims.

XVII. SPECIAL CONSIDERATIONS FOR PLAN FIDUCIARIES RELATING TO SECURITIES LITIGATION

Under the Private Securities Litigation Reform Act (PSLRA), institutional investors occupy a uniquely advantageous position. See generally Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Duties of Institutional Investors in Sec. Litig.*, 56 BUS. LAW. 1381 (2001). Not only do institutional investors often wield more influence in directing (or preventing) class actions to which they are parties because of the relative size of their securities holdings, see Joseph A. Grundfest & Michael A. Perina, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litig.*, 38 ARIZ. L. REV. 559, 561 (1996), but they also enjoy statutory advantages in obtaining lead plaintiff status in those actions, see 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(bb); *Switzenbaum v. Orbital Scis. Corp.*, 187 F.R.D. 246, 251 (E.D. Va. 1999). Although the dual roles of litigant and fiduciary have many common goals, institutional investors should be mindful of the limits and requirements of their fiduciary duties when they seek to evaluate, undertake or pursue securities litigation.

See:

In re Cendant Corp. Litig., 182 F.R.D. 144, 146-47 (D.N.J. 1998) (subsequent history omitted). Class of plaintiffs best represented by institutional investors that held large and varied interests in the various securities at issue in the litigation.

In re Cal. Micro Devices Sec. Litig., 965 F. Supp. 1327, 1330 (N.D. Cal. 1997). Actions of institutional investors as lead plaintiffs allayed court's fears about adequacy of settlement, even though settlement was similar to earlier proposal rejected by the court. Settlement included substantial cash payment to plaintiffs.

In re Cal. Micro Devices Sec. Litig., 168 F.R.D. 257, 275 (N.D. Cal. 1996), class cert. and motion granted 965 F. Supp. 1327 (N.D. Cal. 1997). Institutional investors uniquely suited by virtue of sophistication, size of interest, and fiduciary duties to represent class of plaintiffs in action.

A. FIDUCIARY DUTIES IN SECURITIES LITIGATION

“[A]ny institutional investor subject to ERISA must consider how litigating a securities class action case on behalf of plaintiffs that are not beneficiaries of its investment plan comports with its fiduciary responsibilities. In addition, other plaintiffs in securities class actions seeking appointment as lead plaintiff have argued that the fiduciary obligations of institutional investors to their beneficiaries may prevent them from fairly and adequately representing the investor class.” Martin & Metcalf, supra, at 1404.

1. The duty of loyalty

To fulfill his duty of loyalty, an ERISA fiduciary must “discharge his duties with respect to a plan solely in the interest of the participants of the participants and beneficiaries” and for the “exclusive purpose of providing benefits to beneficiaries.” 29 U.S.C. § 1104(a)(1)(A)(i).

Although litigation of the duty of loyalty has arisen most often in the context of self-dealing transactions, such as a fiduciary's use of plan assets to benefit non-fiduciaries, see, e.g., Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983), the duty is also implicated by strategic litigation considerations such as whether to seek lead plaintiff status. See Martin & Metcalf, supra, at 1405-06. See Section V of this handbook for further discussion of the Duty of Loyalty.

See:

Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983). *Fiduciaries violated 29 U.S.C. § 1104(a)(1)(B) when they failed to follow "reasonably acceptable procedures" in making low-interest loan. Specifically, fiduciaries (1) failed to ascertain identity and value of loan security, (2) knew or should have known loan presented an unreasonable risk of not being timely and fully paid without resort to the collateral, (3) granted loan below prevailing interest rates for comparable loans, (4) acted on both sides of loan transaction, and (5) transacted business in a manner calculated to benefit the loan recipient at the expense of plan beneficiaries.*

Donovan v. Bierwith, 680 F.2d 263, 271 (2d Cir. 1982). *The requirements that decisions be made "solely in the interest" and for "the exclusive purpose" of benefiting participants place a "duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan."*

Marshall v. Kelly, 465 F. Supp. 341, 350 (W.D. Okla. 1978). *Plan fiduciary violated duties by making imprudent loans with goal of benefiting loan recipients.*

2. The duty of care

ERISA also imposes on fiduciaries a strict duty of care that requires that a fiduciary act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); see Katsaros v. Cody, 744 F.2d 270, 274 (2d Cir. 1984). The Second Circuit has described the duty as an "unwavering duty . . . to make decisions with a single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would in a similar situation." Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984). See Sections VI-VIII for further discussion of the Duty of Care.

See:

Am. Communications Ass'n v. Ret. Plan for Employees of RCA Corp. & Subsidiary Cos., 488 F. Supp. 479, 483 (S.D.N.Y. 1980), *aff'd*, 646 F.2d 559 (2d Cir. 1980) (*table*). *"A claim of a lower return 'than could have been obtained by the exercise of prudence' does not set forth in what respect the fiduciaries failed in their duty. The mere fact that there may have been a decline in the value of the Plan's portfolio or a diminution of income in a given year does not by itself*

establish imprudent management. . . . The standard to be applied is that of conduct, tested at the time of the investment decision, rather than performance, judged from the vantage point of hindsight.”

Whitfield v. Cohen, 682 F. Supp. 188, 194-95 (S.D.N.Y. 1988). *Trustee who failed to discern whether investment management company or its manager was registered as investment manager with SEC or what fees company would charge for services acted in violation of fiduciary duties.*

But see:

Donovan v. Walton, 609 F. Supp. 1221, 1238 (S.D. Fla. 1985), *aff’d sub nom.*, *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986). *In adopting the “exclusive purpose” standard, Congress did not intend to make illegal the fact of life that most often a transaction benefits both parties involved and therefore trustee’s restructuring of retirement plan and recapture of assets deemed surplus did not violate duties of sole interest and exclusive purpose.*

B. ACTING AS LEAD PLAINTIFF

Congress’s intent in enacting the PSLRA was to prevent “lawyer driven litigation” and “ensure that parties with significant financial interests in the litigation ‘will participate and exercise control over the selection and actions of Plaintiffs[’] counsel.’” *Roszenboom v. Van der Moolen Holding*, No. 03 Civ. 8284, 2004 WL 816440, at *2 (S.D.N.Y. Apr. 14, 2004) (quoting H.R. Rep. No. 104-369 at 731 (1995), reprinted in 1995 U.S.C.C.A.N. 730). Having institutional investors serve as lead plaintiff for the action is the best method for achieving that purpose. Id.

Under the PSLRA, therefore, institutional investors enjoy a statutory advantage in obtaining lead plaintiff status in shareholder class actions. See 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(bb); *Switzenbaum*, 187 F.R.D. at 251. Although the PSLRA imposes no duty on institutional investors to undertake lead plaintiff status, see 15 U.S.C. § 77z-1(a)(2)(A)(iii), such status may prove advantageous.

Although any party wishing to act as lead plaintiff may apply to the court to be so appointed, institutional investors are aided by a statutory scheme that creates a rebuttable presumption that the appropriate lead plaintiff is the one who (i) has either filed the complaint or made a motion to serve as lead plaintiff, (ii) has the largest financial interest in the relief sought by the class, and (iii) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. See 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I). A party that satisfies the three factors is presumed to be the most adequate plaintiff, id., and because the distinguishing factor among competing lead plaintiffs is generally the largest financial interest, institutional investors generally are entitled to the presumption. The presumption can be rebutted only through a showing that the presumptive most adequate plaintiff (i) will not fairly and adequately protect the interests of the class, or (ii) is subject to unique defenses which render it incapable of adequately representing the class. See 15 U.S.C. § 77z-1(a)(3)(B)(iii)(II)(aa)-(bb).

If more than one investor is seeking lead plaintiff status, the court can compare its financial interest in the litigation to that of the other lead plaintiff candidates. There has been no test set by the circuit courts or Congress to determine which investor should become the lead plaintiff. Some district courts, however, have adopted a four factor test first adopted by Lax v. First Merchants Acceptance Corp., No. 97 Civ. 2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997).

The four factors are:

1. The number of shares purchased during the class period;
2. The number of net shares purchased during the class period;
3. The total net funds expended during the class period; and
4. The approximate loss suffered.

Pirelli Armstrong Tire Corp. Ret. Med. Benefits Trust v. LaBranche & Co., Inc., No. 03 Civ. 8264, 2004 WL 1179311, at *7 (S.D.N.Y. May 27, 2004); see also In re Initial Public Offering, 214 F.R.D. 117, 121 (S.D.N.Y. 2002) (applying factors to determine which candidate for replacement lead plaintiff had the largest financial interest); In re Crayfish Co. Sec. Litig., No. 00 Civ. 6766, 2002 WL 1268013, at *4 (S.D.N.Y. June 4, 2002) (applying four factors to determine largest financial interest); see also In re Cendant Corp. Litig., 264 F.3d 201, 223 (3d Cir. 2001) (describing District Court's review of total funds lost in determining who had the largest financial stake). But see In re Critical Path, Inc., 156 F. Supp. 2d 1102, 1107-08 (N.D. Cal. 2001) (discussing both four factor test and test which considers potential recovery amount, which looks to the number of shares purchased during the class period as determinative of financial interest, ultimately adopting the recovery test but including consideration of losses incurred selling shares as well); In re Network Assocs., Inc. Sec. Litig., 76 F. Supp. 2d 1017, 1027 (N.D. Cal. 1999) (looking at the net shares purchased during the class period as determinative); In re Ribozyme Pharm. Sec. Litig., 192 F.R.D. 656, 659-660 (D. Colo. 2000) (noting four factor test but adopting retention value test, which compares prices before and after class period).

1. Benefits of lead plaintiff status

In deciding whether to take on lead plaintiff status, institutional investors must consider the potential benefits as well as the increased obligations the status creates. Institutional investors have advantages of both resources and sophistication over smaller investors; as a result, they are in a unique position to negotiate settlements that are beneficial both to litigants and to the company that is the subject of litigation. See In re Cendant Corp. Litig., 182 F.R.D. 144, 149 (D.N.J. 1998); H.R. CONF. REP. NO. 104-369, at 31 (1995), reprinted in 1995 U.S.C.A.N. 697, 730. Not only do institutional investors often have a large and continuing stake in the health of the company, but their significant resources and comparatively large interests in the company may give them a greater ability to resist pressure to agree to a less than optimal settlement in the interests of a quick resolution.

In Cendant, three large pension funds acting as lead plaintiff obtained the largest settlement ever in a shareholder class action. Mitchell Pacelle, *Cendant Agrees in Its Settlement to Change Corporate Governance*, WALL ST. J., Dec. 8, 1999, at A4. The court selected the funds to act as lead plaintiffs over the objection of a number of other applicants, reasoning that the group of funds had sufficient interests in the range of securities involved to ensure adequate representation of the class. Cendant Corp., 182 F.R.D. at 149. The group was able to negotiate not only a substantial monetary settlement, but also a change in Cendant's corporate structure giving shareholders a bigger say in the repricing of stock options and the composition of the board of directors, and in addition was able to minimize attorney fees. Pacelle at A4.

In In re California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996) (Cal. Micro Devices I), class cert. and motion granted 965 F. Supp. 1327 (N.D. Cal. 1997) (Cal. Micro Devices II), the court appointed institutional investors (pension funds) to act as lead plaintiff after refusing to accept a proffered pre-certification settlement because of its serious reservations about the possibility of collusion between the company and proposed lead counsel. The court noted that two pension funds were appropriate lead plaintiffs because, as institutional investors, they (1) had by far the largest financial interests in the class action, (2) were in a superior position to evaluate the company's claims of imminent bankruptcy, and (3) had a fiduciary responsibility to the investors represented by the class action. In re California Micro Devices Sec. Litig., 168 F.R.D. at 275. Subsequently, the court accepted a settlement negotiated by the funds despite its similarities to the earlier proposed settlement, largely because "[t]he presence of interested and able class representatives reduces substantially the agency problems associated with class actions and correspondingly reassures the court about the bona fides of the proposed settlement." Cal. Micro Devices II, 965 F. Supp. at 1330. In addition, the court noted that the settlement was overall better for investors than the first proposed settlement had been. Id. at 1331 (stating "the terms of the present deal offer class members far more cash up front and a greater assurance of ultimately achieving further recoveries").

There is also a cap in the PSLRA that prohibits a person from having lead plaintiff status in more than five securities class actions during any three year period, absent court approval. 15 U.S.C. § 78u-4(a)(3)(B)(vi). If the party seeking lead plaintiff status has already served in that capacity in excess of the cap, there is a presumption against its appointment which it must rebut. In re UNUM Provident Corp. Sec. Litig., No. 03 CV 049, 2003 U.S. Dist. LEXIS 24633, at *19-23 (E.D. Tenn. Nov. 6, 2003) (holding presumption against institutional investor was not overcome as court felt investor was being spread too thin and there was an adequate alternate lead plaintiff with a significant financial interest available).

2. Fiduciary duties and the obligations of lead plaintiffs

Despite the advantages of acting as lead plaintiff, institutional investors must carefully evaluate the intersection between the obligations of a lead plaintiff and their fiduciary obligations under ERISA before petitioning to be appointed lead plaintiffs. Because the PSLRA is a relatively new statute, courts have not yet addressed the intricacies of this area of law; however, ERISA fiduciary duties are interpreted broadly and thus institutional investors should take careful note of the situations in which their conduct as lead plaintiffs could subject them to liability to their beneficiaries under ERISA. Martin & Metcalf, *supra*, at 1405; *see generally* Wesley Kobylak, Annotation, "Dual Loyalty" Considerations in Determining Propriety, Under

Employee Retirement Income Security Act, (29 U.S.C. § 1001 et seq.) of Actions of Officers and Sponsor Corporation Serving as Trustee of Employee Pension Plan, 64 A.L.R. FED. 602 (1983).

Both the duty of loyalty and the duty of care are implicated in the decision to take on lead plaintiff status. The duty of loyalty, for example, precludes ERISA fiduciaries from using plan assets to benefit those who are not plan beneficiaries or from acting other than with the single goal of benefiting plan beneficiaries, see *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (*Bierwirth II*), considerations that could come into conflict with the lead plaintiff's obligation to place foremost the interests of the represented class. On the other hand, courts have indicated in the past that fiduciary obligations to plan beneficiaries are in keeping, rather than at odds, with the obligations of representing the class. See *Cal. Micro Devices I*, 168 F.R.D. at 275. For a fuller discussion of the duty of loyalty, see Section V of this Handbook.

Similarly, the duty of care, with its obligation to invest prudently and investigate fully, requires the institutional investor to procure carefully and to consider fully all available information about the prudence of acting as lead plaintiff. See *Katsaros*, 744 F.2d at 274; Am. Communications Ass'n v. Ret. Plan for Employees of RCA Corp. & Subsidiary Cos., 488 F. Supp. 479, 483 (S.D.N.Y. 1980), aff'd, 646 F.2d 559 (2d Cir. 1980) (table). In short, the duty of care obligates the institutional investor to consider the assumption of lead plaintiff status as it would any other investment of the plan's resources; a failure to do so could result in the fiduciary's being held personally liable for resulting damages. See 29 C.F.R. § 2550.404a-1(b)(i); see also *Whitfield v. Cohen*, 682 F. Supp. 188, 194-95 (S.D.N.Y. 1988). Thus, the institutional investor's wisest course is to employ normal methods of investment investigation, such as hiring expert consultants, etc. See *Donovan v. Walton*, 609 F. Supp. 1221, 1244 (S.D. Fla. 1985), aff'd sub nom., *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986). For a fuller discussion of the duty of care, see Sections VI-VII of this Handbook.

In situations where the institutional investor continues to have a stake in the company in question, or might consider doing so in the future, actions taken in furtherance of litigation should also be evaluated for their effects on the plan's overall investment strategy. For instance, insider information gained during litigation could limit the plan's ability to trade in the company's shares. Continued holding of the shares in question could also create tensions with the plan's lead plaintiff obligations to represent the interests of past shareholders who are also plaintiffs. Id.; Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 29 ARIZ. L. REV. 533, 546 (1997). In addition, plan information divulged in discovery on the lead plaintiff issue could be used to the disadvantage of plan beneficiaries. Id. In some circumstances, however, plan fiduciaries may find themselves compelled by their fiduciary duties to assume lead plaintiff status where it is the only way of securing the optimal result for plan beneficiaries. Id. (citing *Cohen*, 682 F. Supp. at 194). In sum, institutional investors must approach lead plaintiff status with the same careful and impartial investigation that they must apply to any investment opportunity. See *Bierwirth II*, 680 F.2d at 271;

See also:

Gluck v. CellStar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997). *Institutional investor was not inadequate lead plaintiff merely because it continued to hold interests in the disputed securities.*

In re Network Assocs., Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1021-22 (N.D. Cal. 1999). *Widely varied interests among competing applicants for lead plaintiff status in a PSLRA suit called into question the presumption that any single investor or group of investors had sufficiently similar interests to other class members to provide adequate representation.*

3. Competitive bidding for lead plaintiff counsel status

When deciding whether to seek lead plaintiff status, institutional investors should be aware that, should the court decide to utilize a competitive bidding process, the bids submitted would probably be available to the public. See generally *In re Cendant Corp.*, 260 F.3d 183 (3d Cir. 2001). The Third Circuit in *Cendant* vacated sanctions imposed against a losing bidder, reasoning that the district court's order sealing the bids was improper and contrary to the PSLRA. *Id.* at 201; see also *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 433 (D.N.J. 2004) (recognizing *Cendant*, finding as counsel chosen as result of sealed bid was ultimately approved by each lead plaintiff, selection was acceptable to court).

The *Cendant* court reasoned first that “[w]hile not explicitly denominated as such, the bids were essentially submitted in the form of motions to be appointed lead counsel” and were therefore public documents. 260 F.3d at 193. The court further held that making the bid information available to the class members was essential because the “only stage at which class members can exercise effective control is in the selection of class counsel.” *Id.* In addition, the court found that its position was supported by the language and legislative history of the PSLRA. *Id.* at 196. Thus, institutional investors should bear in mind both that their fiduciary obligations are fully in force when they decide to act as lead plaintiffs and that their actions in bidding for that status are open to public scrutiny.

XVIII. SPECIAL PROFESSIONAL RESPONSIBILITY CONSIDERATIONS FOR ATTORNEYS DEALING UNDER ERISA

This section addresses the major ethical concerns ERISA attorneys face. As with most ethical considerations, however, there is seldom a definitive rule that attorneys must follow. To further complicate the issue, no uniform ethical standard applies nationwide. Nonetheless, an ERISA attorney must have a basic idea of the unique ethical concerns that can arise. Therefore, this Handbook will serve to highlight major ethical issues and provide a starting point for more extensive research.

“An employee benefits practitioner is well advised to give careful attention to the ethical complexities of entity representation, multiple representation, and fiduciary representation, which are the hallmarks of employee benefits practice.” Gwen T. Handelman et al., *Standards of Lawyer Conduct in Employee Benefits Practice: Part 1*, 24 J. PENSION PLAN. & COMPL. 10, 10 (Summer 1998).

A. GOVERNING RULES FOR ATTORNEYS DEALING WITH ERISA

No uniform ethical standard applies to all ERISA attorneys. Instead, an attorney may be subject to state or federal ethical standards that vary from court to court. As a general rule, most states (but not all) have adopted some variation of the ABA Model Rules of Professional Conduct. Most federal courts apply ethical rules derived from state law where the federal court sits, but also may look to the ABA and federal common law. As a result, an ERISA attorney should research the ethical standards of the particular court before which he practices. See generally Handelman et al., *supra*; H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (discussing varying applications of ethical standards across country).

See:

In re Am. Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992). Note that motions to disqualify will be addressed by federal law if before a federal court. “[M]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.”

B. ETHICAL CONCERNS WHEN AN ATTORNEY BECOMES A FIDUCIARY

One of the most important ethical considerations under ERISA is that an attorney can become a fiduciary. Fiduciary status can subject an attorney to various forms of liability. If an attorney is directly named as a fiduciary by a plan, or the plan’s documents, it is fairly clear that the lawyer may be a fiduciary. On the other hand, a lawyer may be surprised to know that he can become a fiduciary indirectly simply by performing certain functions as stated in 29 U.S.C. § 1002(21). *Stanton v. Shearson Lehman/Am. Express, Inc.*, 631 F. Supp. 100, 102 (N.D. Ga. 1986).

Therefore, it is important for lawyers to understand what functions can indirectly impose fiduciary status under 29 U.S.C. § 1002(21).

1. Fiduciary liability by exercising discretion over ERISA plan or its assets

ERISA dictates that a person, such as an attorney, may become a fiduciary by exercising discretionary authority or control over an ERISA plan. An attorney will not, however, become a fiduciary simply by performing usual professional functions. See JEFFREY D. MAMORSKY, EMPLOYEE BENEFITS LAW—ERISA AND BEYOND, EMPLOYEE BENEFITS LAW, § 12.03 (2002). The important consideration is whether the attorney exercised discretionary or ministerial (mandatory act without personal discretion) authority or control. If the attorney performs purely ministerial functions, he will not be an ERISA fiduciary. On the other hand, if an attorney exercises discretionary authority or control, it is possible that an attorney will become subject to ERISA fiduciary status.

See:

Custer v. Sweeney, 89 F.3d 1156, 1162 (4th Cir. 1996). “[T]he mere fact that an attorney represents an ERISA plan does not make the attorney an ERISA fiduciary because legal representation of ERISA plans rarely involves the discretionary authority or control required by the statute’s definition of ‘fiduciary.’”

Anoka Orthopaedic Assoc., P.A. v. Mutschler, 709 F. Supp. 1475, 1482 (D. Minn. 1989), *aff’d sub nom., Anoka Orthopaedic Assoc., P.A. v. Lechner*, 910 F.2d 514 (8th Cir. 1990). *Financial reporting and auditing services performed by attorney are ministerial, not discretionary, functions. As a result, an attorney will not become a fiduciary under ERISA for performance of those services.*

But see:

Liss v. Smith, 991 F. Supp. 278, 303 (S.D.N.Y. 1998). *An attorney with large influence over a fund may exercise discretionary control and attorney failed to act as a prudent (or competent) fund counsel when he did not advise the trustees as to their fiduciary duties or his innumerable conflicts of interest.*

2. Fiduciary liability by having discretionary authority or responsibility over an ERISA plan

Here, ERISA does not emphasize an “exercise” of authority. Instead, the requirement is that the attorney simply “has” discretionary authority or responsibility. Nonetheless, cases addressing this requirement, and the first requirement of an “exercise of discretion,” will likely overlap in practice.

See:

Hibernia Bank v. Int’l Bhd. of Teamsters, 411 F. Supp. 478, 490 (N.D. Cal. 1976). *Bank argued that it had discretionary control over plan assets and therefore, the bank was a fiduciary under ERISA. Although the bank arguably had some control, or responsibility, over the disposition of the plan assets, the court held that the bank was not a fiduciary since the plan had veto power to all of the bank’s dispositions of money.*

3. Fiduciary liability for rendering paid investment advice

To avoid attaining fiduciary status, an attorney should be wary of advising on fund investments. Under 29 U.S.C. § 1002(21)(A), one who renders investment advice (or has a responsibility to do so) regarding an ERISA plan's assets, and receives a fee, can become a fiduciary. Some courts addressing this issue, however, have referred to the Labor and Treasury Departments' definition of investment advice. See 26 C.F.R. § 54.4975-9 (providing regulations from Department of Treasury); 29 C.F.R. § 2510.3-21 (providing regulations from Department of Labor). This definition adds the requirements that the investment advisor either have some discretionary control or that the advisor give investment advice on a regular basis.

See:

Yeseta v. Baima, 837 F.2d 380, 385 (9th Cir. 1988). *Holding that attorney was not a fiduciary because he did not have discretionary control or render investment advice for a fee.*

Eaves v. Penn, 587 F.2d 453, 458 (10th Cir. 1978). *In dicta, court noted that fiduciary status may exist where "attorneys . . . counsel the employer, investment committee, or trustee with regard to an appropriate portfolio mix or with regard to specific investments, and receive a fee for these services"*

N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno (DePerno I), 816 F. Supp. 138, 148 (N.D.N.Y. 1993), *aff'd and remanded in N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno (DePerno II)*, 18 F.3d 179 (2d Cir. 1994). *Court held that defendant was not a fiduciary because while he "acted as attorney for the Fund, . . . [h]e did not run the Fund on a day-to-day basis . . . [or] . . . render investment advice."*

Anoka Orthopaedic Assoc., P.A. v. Mutschler, 709 F. Supp. 1475, 1483 (D. Minn. 1989), *aff'd sub nom., Anoka Orthopaedic Assoc., P.A. v. Lechner*, 910 F.2d 514 (8th Cir. 1990). *Relying on the Department of Labor regulations, the court recognized that the defendant could not be a fiduciary even if he did render investment advice because attorney neither had discretionary authority over plan assets nor rendered advice on a regular basis.*

C. ETHICAL CONCERNS WHEN AN ATTORNEY IS NOT A FIDUCIARY

Even if an attorney is not a fiduciary under the previous analysis, he still may be subject to ERISA liability. In particular, a non-fiduciary attorney may be liable as a party in interest according to 29 U.S.C. § 1002 (14)(B) if he participates in "prohibited transactions" under ERISA § 406(a)(1)(C) and (D), 29 U.S.C. § 1106(a)(1)(C)-(D). The United States Supreme Court held in *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241 (2000), that a non-fiduciary party in interest can be held liable for transactions that are prohibited by § 406(a). Court decisions have subjected attorneys who participate in prohibited transactions to equitable liability under § 502(a)(3) and (5), civil penalties under § 502(i) and (l), and excise taxes under I.R.C. § 4975. See *Handelman et al.*, *supra*, at 18.

See also:

Mertens v. Hewitt Assocs., 508 U.S. 248, 252-54 (1993). *ERISA does not expressly authorize suits against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty, and, because the parties did not dispute the issue, the Court left undecided the question of whether a non-fiduciary violated ERISA by participating in a fiduciary's breach. Subsequent cases have established that equitable relief is appropriate for those non-fiduciaries that conduct prohibited transactions.*

Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 353-54 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2412 (2004). *The court found that the Supreme Court's Harris Bank holding permitted it to find that a non-fiduciary non-party-in-interest attorney who holds "disputed settlement funds for a plan participant client" is subject to a cause of action under 502(a)(3).*

Reich v. Stangl, 73 F.3d 1027, 1034 (10th Cir. 1996). *The court recognized equitable actions based on ERISA and parallel IRS codes by stating that "the language of sections 406(a) and 502(a)(5) of ERISA, the legislative history of ERISA, the decisions of other circuits, the Supreme Court's decision in Mertens, the policies underlying ERISA, and 26 U.S.C. § 4975(h) [of the IRC] establish that the Secretary may bring a civil action for equitable relief under section 502(a)(5) against a party in interest who has engaged in a prohibited transaction."*

Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988). *While the attorney was not a fiduciary, the court held that liability could still attach because the attorney "does have a status defined by the Act: Because he provides services to the Funds, he is a 'party in interest' under ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B)."*

1. Collecting attorney fees from ERISA plan assets may constitute a "prohibited transaction" that subjects an attorney to liability

"Two problems often arise under prohibited transactions rules in connection to collection of attorneys fees supplied from plan assets. First, the payment of more than 'reasonable' fees from plan assets may constitute a prohibited transaction. Second, the payment of attorney fees from plan assets for [certain] services . . . may constitute a prohibited transaction . . ." *Handelman et al.*, *supra*, at 19-20. In particular, attorneys who represent plan fiduciaries may encounter situations where an ERISA plan provides for the payment of attorneys' fees. When an ERISA plan provides fees, however, the attorney must remain wary of potential ethical issues.

a. Fees collected from an ERISA plan must be reasonable

An attorney must receive reasonable fees from an ERISA plan. 29 U.S.C. § 1108(b)(2) exempts from the definition of "prohibited transactions" reasonable arrangements with a party in interest for legal services that are necessary for the establishment or

operation of an ERISA plan. If an attorney receives more than reasonable fees, however, this transaction will not be exempt under § 408 and the attorney may be liable as a party to a prohibited transaction.

See:

Rutledge v. AFL Hotel & Rest. Workers' Health and Welfare Fund, 201 F.3d 1212, 1220-22 (9th Cir. 2000). *An allegation of excessive attorney's fees charged to the plan is an allegation of a prohibited transaction and any state claim related to the excessive fees is preempted by ERISA.*

Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988). *"Some of the allegations in the complaint, if true, establish that [the attorney] participated in such 'prohibited transactions' with the Funds by receiving excessive compensation for legal services"*

See also:

26 C.F.R. § 1.162-7(b)(3). *IRS defines unreasonable compensation by stating that "[i]n any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned."*

b. An attorney may still be liable even if fees are reasonable if the services were not "performed on the plan's behalf"

Attorneys must remain aware that even reasonable fees may constitute "prohibited transactions." Handelman et al, supra, at 20. ERISA dictates that a plan's payment of attorney's fees must be for services "necessary for the establishment or operation of the plan."

29 U.S.C. § 1108(b)(2). If an attorney receives payment for services that were not necessary, payment may constitute a prohibited transaction and subject the attorney to liability as a party in interest. As a result, lawyers should remain wary of circumstances where there is doubt as to whether an ERISA plan should be paying the attorneys' fees.

In particular, when an attorney represents a plan fiduciary, it may be unclear whether attorneys' fees are necessary for the establishment or operation of the plan. Accordingly, attorneys who represent plan fiduciaries should remain cautious about accepting payment from the assets of an ERISA plan.

See:

Jordan v. Mich. Conference of Teamsters Welfare Fund, 207 F.3d 854, 861-62 (6th Cir. 2000). *A party-in-interest may receive attorneys' fees it previously advanced to fund the litigation without being a prohibited transaction.*

FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 913 (8th Cir. 1994). An attorney may receive payment for reasonable fees where the plan documents provide for reimbursement of reasonably incurred fees.

But see:

Martin v. Walton, 773 F. Supp. 1524, 1527 (S.D. Fla. 1991). If an attorney represents a fiduciary who breached his fiduciary duty, acceptance of fees from an ERISA plan may constitute a prohibited transaction. “Under ERISA, however, legal fees are not permitted to a breaching fiduciary, even if the action constituting the violation were undertaken by the fiduciary in good faith and did not result in a loss to the plan.”

If a court finds that a fiduciary did not breach his fiduciary duty, it is fairly settled that a lawyer can accept reasonable payment from an ERISA plan for the fiduciary’s defense. 29 U.S.C. § 1108(c)(2); see *FirsTier Bank*, 16 F.3d at 913. If the fiduciary is found to have breached his fiduciary duty, however, a lawyer generally cannot accept payment from the plan for the fiduciary’s defense. *Martin*, 773 F. Supp. at 1527. The unanswered question is whether an attorney may receive fees during the litigation that determines whether a plan fiduciary breached a fiduciary duty.

See:

Moore v. Williams, 902 F. Supp. 957, 966-67 (N.D. Iowa 1995). Plan fiduciary incurred legal expenses in defense of an alleged fiduciary breach. Because the plan had an indemnity agreement that provided for the payment of legal fees until a final adjudication on whether there was a breach of fiduciary duty, payment of attorney fees from plan assets was proper, at least until a final adjudication.

D. OTHER ISSUES ERISA ATTORNEYS SHOULD CONSIDER

Aside from the ERISA-specific issues addressed in the previous sections, an ERISA attorney should consider several other ethical issues. As a result, this Handbook will briefly highlight some areas that an attorney should consider while handling ERISA matters.

1. Entity representation

An ERISA attorney should be aware of the complexities that arise from representing entities such as corporate and union sponsors and jointly administered pension and welfare funds. An attorney should conduct specific research if they represent an entity in an ERISA action. *Handelman et al.*, *supra*, at 23-24.

See:

Toussaint v. James, No. 01 Civ. 10048, 2003 WL 21738974, at *8 (S.D.N.Y. July 25, 2003). Counsel for pension plan does not become counsel for trustees automatically because pension plans are “distinct legal entit[ies].”

Amatuzio v. Gandalf Sys. Corp., 932 F. Supp. 113, 118 (D.N.J. 1996). Court held that communications between a corporation's attorney and an employee of the corporation, who later becomes an adverse party, are not protected communications under certain circumstances.

Niagara-Genesee & Vicinity Carpenters Local 280 v. United Bhd. of Carpenters & Joiners, 859 F. Supp. 65, 69 (W.D.N.Y. 1994). Motion to disqualify defendant's counsel due to conflicts resulting from entity representation was granted.

2. Multiple representation

An ERISA attorney may represent multiple parties either intentionally or unintentionally. Regardless, the attorney must remain aware that divided loyalty and conflict of interest issues may force the attorney to withdraw from the representation.

See:

Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995) (quoting *Sullivan v. Chase Inv. Servs. of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978)). Upholding an order that a class action attorney withdraw, the court stated “[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.”

See also:

In re Regents of the Univ. of Cal., 101 F.3d 1386, 1389 (Fed. Cir. 1996). “When the same attorney represents the interests of two or more entities on the same matter, those represented are viewed as joint clients for purposes of privilege.”

3. Privilege and confidentiality

Generally, a plan fiduciary may rely on the attorney-client privilege to protect from involuntary disclosure confidential privileged communications that the fiduciary has with an attorney for the purposes of obtaining legal advice. See, e.g., United States v. Mett, 178 F.3d 1058, 1064 (9th Cir. 1999). However, when the attorney-client privilege may be asserted and against whom it may be asserted depend upon the precise circumstances of the communication. Therefore, an attorney must research the particular ethical standards of his or her jurisdiction in evaluating the applicability of the privilege.

For example, in the ERISA context, a key consideration for the applicability of the attorney-client privilege is the so-called “fiduciary exception” to the attorney client privilege. Under this exception, “a fiduciary of an ERISA plan ‘must make available to the beneficiary, upon request, any communications that are intended to assist in the administration of the plan.’” *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779, 787 (7th Cir. 2005) (quoting *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997)). This exception is premised on the theory that when the fiduciary receives legal advice concerning the administration of the plan, the plan’s

participants are the “real” or “ultimate” clients and “the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty.” *Id.*; *In re Occidental Petro. Corp.*, 217 F.3d 293, 296-97 (5th Cir. 2000) (allowing plan participants to gain access to documents through fiduciary exception since plan participants were beneficiaries of ESOP plan which held stock of corporation); see also *Wachtel v. Health Net Inc.*, 482 F.3d 225, 233 (3d Cir. 2007); *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 83-87 (N.D.N.Y. 2003). Courts have found that the participants’ right to access these materials is grounded in the “mutuality of interest” shared by the trustee and beneficiaries as a result of the fiduciary obligations the trustee. See *Martin v. Valley Nat’l Bank of Arizona*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991); see generally, Craig C. Martin and Matthew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS. L.J. (1999).

See:

Wash.-Baltimore Newspaper Guild Local 35 v. Wash. Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982). “When an attorney advises a fiduciary about a matter dealing with the administration of an employees’ benefit plan, the attorney’s client is not the fiduciary personally but, rather, the trust’s beneficiaries.” Therefore, to maintain attorney-client privilege, fiduciaries would need separate counsel from the ERISA plan. Otherwise, there could be no privilege for communications with fiduciaries regarding the plan since they are represented by the same attorney.

Cobell v. Norton, 212 F.R.D. 24, 27-28 (D.D.C. 2002). The court held that if a trustee claims a litigation privilege, it is the trustee’s obligation to show that the communication is not required to be disclosed under the fiduciary exception.

Donovan v. Fitzsimmons, 90 F.R.D. 583, 586 (N.D. Ill. 1981). Court recognized that in suit between stockholders and a corporation (similar to fiduciary versus plan beneficiaries), attorney-client privilege can be broken, subject to good cause exception.

In considering whether the fiduciary exception applies, the Third Circuit has noted that ERISA fiduciaries “come in many shapes and sizes” and that the logic underlying the fiduciary exception does not apply equally to all fiduciaries. *Wachtel*, 482 F.3d at 234. In *Wachtel*, the court considered whether the fiduciary exception would require an insurer that provided benefits to the plan to disclose its privileged communications to plan participants. The court stated that the insurer was a fiduciary under ERISA but that the insurer was significantly different from other plan fiduciaries to whom the exception has been applied. The court considered several factors, including the fact that the insurer did not pay for the advice from plan assets and that it had conflicting interests with the participants, to conclude that the insurer did not have a sufficient identity of interests with the participants for the exception to apply. *Id.* at 234-36.

The fiduciary exception does not render all communications between a fiduciary and counsel available to plan participants. First, the exception does not apply to communications related to “settler” functions, such as the formation, termination, or amendment of the plan. Because such conduct is not a “fiduciary” activity and does not relate to plan administration, the

exception does not apply. Wachtel, 482 F.3d at 233. Similarly, advice concerning a top-hat plan has been found to be not subject to the fiduciary exception because ERISA's fiduciary rules do not apply to such plans. Marsh v. Marsh Supermarkets, Inc., No. 1:06-cv-1395, 2007 WL 1021410, at *2 (S.D. Ind. Mar. 29, 2007).

As second type of communications that the fiduciary exception does not affect are communications related to the potential liability of the fiduciary. Wachtel, 482 F.3d at 233; Mett, 178 F.3d at 1064. A fiduciary that seeks legal advice for its own personal defense in contemplation of an adversarial proceeding against the beneficiaries retains the attorney-client privilege. This exception to the fiduciary exception is premised on the idea that the communications were not made for the participants' benefit and that there was not a mutuality of interests between the fiduciary and the participants. Mett, 178 F.3d at 1064. Courts applying this concept "limit[] the scope of advice that relates to 'plan administration' by excluding from it any advice whose goal is to advise the trustee about the legal implications of actions and decisions undertaken while performing its fiduciary obligations." Fischel v. Equitable Life Assurance, 191 F.R.D. 606, 609 (N.D. Cal. 2000).

See:

United States v. Mett, 178 F.3d 1058, 1064 (9th Cir. 1999). "On the one hand, where an ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries. On the other hand, where a plan fiduciary retains counsel in order to defend herself against the plan beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact."

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APPENDIX A

A PRACTICAL GUIDE TO THE ERISA BENEFITS CLAIMS PROCEDURE

This Appendix illustrates the process of an application for and denial of benefits under ERISA. To provide tangible guidance, this Appendix provides sample letters between a plan participant requesting benefits and a plan administrator. Because of the diverse nature of potential benefit disputes, these letters are not forms and merely serve to represent one manner by which the minimum requirements of the ERISA regulations for claim requests and reviews may be satisfied. Practitioners also should be aware that this Appendix relates only to pension plans, and that different regulations apply to health and disability plans. Before presenting the letters, a review of the legal framework guiding the drafting of these letters is in order.

To make a claim for benefits, a plan participant must request a “plan benefit or benefits . . . in accordance with a plan’s reasonable procedure for filing benefit claims.” ERISA Claims Procedure, 29 C.F.R. § 2560.503-1 (e). It is reasonable for a benefits plan to require that a plan participant submit a claim for benefits in writing, and employee benefit plans in fact often have such a requirement. *See, e.g., Andrews-Clarke v. Lucent Techs., Inc.*, 157 F. Supp. 2d 93 (D. Mass. 2001) (denying relief to plan participant who failed to submit written claim and therefore did not comply with benefit plan’s reasonable procedure). If the plan administrator grants the plan participant’s request for benefits, then no review procedure is required and the following sections are inapplicable. See page A-3 for a written request for benefits.

A plan administrator has 90 days to notify the plan participant of a benefit denial, and if notice is sent within the initial 90 days, may take an additional 90 days if “special circumstances require an extension of time for processing the claim.” 29 C.F.R. § 2560.503-1 (f)(1). A plan administrator generally must provide written notice of an adverse decision of any benefit claim “in a manner calculated to be understood” by the plan participant. 29 U.S.C. § 1133(1); 29 C.F.R. § 2560.503-1 (g)(1). The notification must set forth the specific reason for the denial and must make reference to the specific plan provision upon which the decision to deny the benefits is based. 29 C.F.R. § 2560.503-1 (g)(1)(i-ii). The denial also must include a description of any material or information that the plan participant could provide to perfect the claim and explain why this information is necessary. 29 C.F.R. § 2560.503-1 (g)(1)(iii). Finally, the notification must describe the review procedures available to the plan participant, and must inform the plan participant of his or her right to bring a civil action if the plan’s review procedure also produces an adverse determination. 29 C.F.R. § 2560.503-1 (g)(1)(iv). See page A-4 for an example of a denial letter that includes references to these relevant regulations. Citations are not required under ERISA’s regulations, and are not usually found in such correspondence.

As discussed in Sections XII.A and XII.B, the benefit plan must afford participants a reasonable opportunity for a full and fair review of the adverse benefit determination. 29 C.F.R. § 2560.503-1 (h)(1). At a minimum, a full and fair review procedure provides (1) at least 60 days to appeal the adverse determination, (2) an opportunity to submit information relating to the claim, (3) a process that considers this additional information, and (4) free-of-charge access to applicable documents relied upon or generated by the plan administrator in reviewing the claim. 29 C.F.R. § 2560.503-1 (h)(i-iv), (m)(8). A plan

participant may request a review of the adverse determination and page A-6 provides an example of such a letter.

If the claim is again denied, a written notification of the decision is required within 60 days, but if notice is sent within the initial 60 days, an additional 60 days may be taken if more time is required to process the claim. 29 C.F.R. § 2560.503-1 (j); 29 C.F.R. § 2560.503-1(i)(1)(i). The review denial notification's requirements generally track those of the initial denial, and must set forth specifically the grounds for the denial and relevant plan sections upon which the denial was based. 29 C.F.R. § 2560.503-1 (j)(1-2). It must also state that the plan participant is entitled to all applicable documents free of charge, describe any voluntary appeal procedures offered by the plan, include a statement regarding the plan participant's right to receive information about the appeal procedures sufficient to make an informed judgment whether to appeal, and inform the plan participant of his or her right to bring a civil action under ERISA. 29 C.F.R. § 2560.503-1 (j)(3-4). Page A-7 provides an example of such a denial letter.

Although not considered in the sample letters provided in this Appendix, ERISA provides enhanced procedural safeguards for benefits claims when processing claims under group health and disability plans. In addition to heightened procedural standards for decision making and appeal that serve to better protect plan participants, the rules also provide additional guidelines for notifying plan participants of an adverse decision of a benefit determination on review. 29 C.F.R. § 2560.503-1 (j)(5). In addition to the general requirements for adverse benefit determinations on review, 29 C.F.R. § 2560.503-1 (j)(1-4), the plan must indicate whether any "internal rule, guideline, protocol, or other similar criterion" was used in the decision making process. 29 C.F.R. § 2560.503-1 (j)(5)(i). Furthermore, if the benefit denial was predicated on an exclusion or limitation such as "medical necessity or experimental treatment," the notification must include an explanation of the "scientific or clinical judgment for the determination." 29 C.F.R. § 2560.503-1 (j)(5)(ii). Finally, the statement must include the following statement: "You and your plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact your local U.S. Department of Labor Office and your State insurance regulatory agency." 29 C.F.R. § 2560.503-1 (j)(5)(iii).

In contrast to group health and disability benefit plans, employee benefit plans established pursuant to collective bargaining need not comply with certain procedural requirements provided that the plan provides for filing and initial disposition and/or a grievance and arbitration procedure. See 29 C.F.R. § 2560.503-1 (b)(6)(i-ii).

April 1, 2009

John Sheridan
EHRP Plan Administrator
Neptune Motor Company, Inc.
10 Ridgeway Dr.
Indianapolis, IN 46225

Mr. Sheridan:

I was employed in the Indianapolis factory of Neptune Motor Company as a maintenance engineer from the 1970s until my retirement this February 1, 2009. Under the collectively bargained Employee Health and Retirement Plan (EHRP), I am entitled to a pension.

When I received my first pension payment, I was shocked to find that it was nearly one-third less than I anticipated. I telephoned to inquire as to why I was not receiving my full payment, and it turns out there is a discrepancy in the number of years of my employment that are included in calculating my pension. Your records start the time period of my employment on March 1, 1988, when in fact I began work on February 1, 1979.

I am requesting that my benefits be calculated using 30 years of employment rather than the 20 years that you are currently using.

Sincerely,

/S/Steven Roberts

NEPTUNE MOTOR COMPANY, INC.

[See generally 29 C.F.R. § 2560.503-1 (g)(1)]

May 1, 2009 **[29 C.F.R. § 2560.503-1 (f)(1)]**

Mr. Steven Roberts
555 Meridian St.
Indianapolis, IN 46220

Dear Mr. Roberts:

We are writing in response to your April 1, 2009 claim for additional pension benefits under the Neptune Motor Company Employee Health and Retirement Plan (EHRP). As we understand your situation, you do not agree with the years of plan membership figure used to calculate your pension benefit payments. Our records indicate that under the terms of the EHRP you have 20 years of plan membership time, and that this is what is currently being used to calculate your benefits. Your April 1, 2009 claim states that your February 1, 1979 initial employment date warrants that we calculate your years of plan membership as 30 years. However, the EHRP calculates the years of plan membership based on the later of a participant's initial employment date or the last non-qualified leave of absence resumption date. Because your last non-qualified leave of absence resumption date is March 1, 1988, the proper calculation of your years of plan membership is 20 years, and we are denying your claim.

Discussion

Under section 4.4 of the EHRP, the years of plan membership figure is based on the "later of either the participant's initial employment date or non-qualified leave of absence resumption date." Under section 1.18 of the EHRP, a non-qualified leave of absence resumption date is defined as the "first day of paid employment following a non-qualified leave of absence," and under section 1.17 of the EHRP, a non-qualified leave of absence is defined as "10 or more working days of absence not covered by the participant's allotted unpaid sick days and allotted paid vacation days, but not including leave for military service or leave approved by the participant's supervisor." **[29 C.F.R. § 2560.503-1 (g)(1)(ii)]**.

Our records indicate that from January 15 to March 1, 1988, you were on an extended leave of absence for 31 working days. This absence consumed your yearly 10 paid vacation days and 10 unpaid sick leave days. After that point, you were gone an additional 11 days. This 11 day absence falls under the definition for an unqualified leave of absence, and thus your return on March 1, 1988, is properly classified as an unqualified leave of absence resumption date.

There is no record of either supervisor approval or military service during that time period in your file, and thus the period during which your years of plan membership are calculated is based on the period from March 1, 1988 (a non-qualified leave resumption date) to February 1, 2009 (your retirement date).

Because your years of plan membership are correct due to your non-qualified leave in 1988, your pension benefits are calculated properly, and therefore your claim to adjust these benefits is denied. [29 C.F.R. § 2560.503-1 (g)(1)(i)].

Decision

For these reasons, your request is denied. This is not the final administrative process. You or your authorized representative may appeal the denial of your request and receive a full and fair review of such request by the EHRP Plan Administrator. If you receive an adverse decision on review, you have a right to bring an action under section 502(a) of the Employee Retirement Income Security Act. [29 C.F.R. § 2560.503-1 (g)(1)(iv)].

If you wish to appeal the decision, the EHRP review procedure requires that you file a written appeal within ninety (90) days. You or your authorized representative also have the right to review any pertinent plan documents. You will receive a written decision on your appeal within sixty (60) days. If special circumstances such as a hearing or an extension of time are necessary, you will be notified within the initial sixty (60) day period, and you will receive a decision within one hundred and twenty days (120). [29 C.F.R. § 2560.503-1 (i)(1)(i)].

Should you decide to appeal this decision, you may want to submit additional evidence such as information that indicates that our records were not correct and you were not absent from work during the time period at issue. This would demonstrate that there was no unqualified leave during your employment, and therefore your initial employment date would govern the determination of your years of plan membership. Alternatively, you might submit additional evidence indicating that your absence was approved by your supervisor or that your absence was for military service. This would demonstrate that your non-qualified leave met the requirements for the exceptions under section 1.17 of the EHRP. [29 C.F.R. § 2560.503-1 (g)(1)(iii)].

Please understand that your failure to appeal this claim and/or to provide additional evidence or facts to support this claim may preclude you from filing suit or from providing any new facts later to support your position.

Sincerely,

John Sheridan
EHRP Plan Administrator
Neptune Motor Company, Inc.

JS:rhc

June 1, 2009

John Sheridan
EHRP Plan Administrator
Neptune Motor Company. Inc.
10 Ridgeway Dr.
Indianapolis, IN 46225

Mr. Sheridan:

In response to your letter of May 1, 2009, I would like request a review of the denial of my benefits. My leave of absence was to care for my wife who had been injured in an automobile accident. Under the Neptune Motor Company Employee Rules and Guidelines, in effect before 1988, an employee may be granted approved leave to, among other things, "assist an immediate family member who requires intensive short term medical care." I believe that I qualify for this provision and thus my absence was for an approved reason, and therefore I should be entitled to my full pension benefits.

I have attached an affidavit from my wife's physician at the time of the accident verifying that she was indeed in a serious automobile accident and required at-home care after release from the hospital. I have also attached copies of her hospital bills from that time period. Finally, you will find attached a photocopy of the relevant Neptune Employee Rules and Guidelines manual.

Sincerely,

/S/Steven Roberts

NEPTUNE MOTOR COMPANY, INC.

[See generally 29 C.F.R. § 2560.503-1 (j)]

July 1, 2009 **[29 C.F.R. § 2560.503-1 (i)(1)(i)]**

Mr. Steven Roberts
555 Meridian St.
Indianapolis, IN 46220

Dear Mr. Roberts:

We write to respond to your letter of June 1, 2009, concerning your benefits under the Neptune Motor Company Employee Health and Retirement Plan (EHRP). In your letter you stated that your absence should be considered a “qualified leave of absence” under the EHRP because it was appropriate for your supervisor to have given approval for the leave of absence under the rules set forth in the Neptune Employee Rules and Guidelines manual.

Because the EHRP requires that a supervisor actually approve the leave of absence, we are affirming the denial of your request to have your pension calculated using your initial employment date rather than the non-qualified leave of absence resumption date that is currently being used in the calculation.

Discussion

Under section 1.17, an employee’s leave of absence will not be considered non-qualified leave if it is “approved by the participant’s supervisor.” **[29 C.F.R. § 2560.503-1 (j)(2)]**. While you have submitted evidence that it would have in fact been proper for your supervisor to have approved your leave of absence, you have failed to submit proof that your supervisor actually did approve the leave of absence, and as stated in our May 1, 2009 letter, your records do not indicate supervisor approval. Therefore, your leave of absence is considered non-qualified.

The calculation of your pension benefits using the non-qualified leave of absence resumption date is proper, and your request to alter the years of plan membership figure used in calculating your benefits is denied. **[29 C.F.R. § 2560.503-1 (j)(1)]**.

Decision

For the above stated reasons, the current calculation of your pension benefits is correct, and the denial of your claim will not be reversed.

There are no more voluntary appeals provided for by the EHRP. **[29 C.F.R. § 2560.503-1 (j)(4)]**. If you do not agree with the results of this appeal, you have the right to file a lawsuit in federal court under section 502(a) of the Employee Retirement Income Security Act. **[29 C.F.R. § 2560.503-1 (j)(4)]**.

Upon request, you are entitled to receive, free of charge, reasonable access to and copies of all documents, records, and other information relevant to your claim for pension benefits. **[29 C.F.R. § 2560.503-1 (j)(3)].**

Sincerely,

/S/John Sheridan
EHRP Plan Administrator
Neptune Motor Company, Inc.

JS:rhc

APPENDIX B

COMMONLY CITED ERISA SECTIONS AND THEIR CODIFICATIONS IN THE UNITED STATES CODE

ERISA §§ 404-06 (Fiduciary Duties)	29 U.S.C. §§ 1104-06
ERISA § 409 (Liability for Breach of Fiduciary Duties).	29 U.S.C. § 1109
ERISA § 502 (Civil Enforcement Provision)	29 U.S.C. § 1132
ERISA § 503(a) (Claims Procedure)	29 U.S.C. § 1133
ERISA § 510 (Interference with Rights)	29 U.S.C. § 1140
ERISA § 514(a) (Preemption)	29 U.S.C. § 1144(a)
ERISA § 514(b)(2)(A) (Saving Clause)	29 U.S.C. § 1144(b)(2)(A)
ERISA § 514(b)(2)(B) (Deemer Clause)	29 U.S.C. § 1144(b)(2)(B)

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