

## PANEL 6: BENEFIT DISPUTES AND ENFORCEMENT UNDER ERISA

### MODERATORS:

*Scott Macey, President and CEO, ERISA Industry Committee*

*Howard Shapiro, Partner, Proskauer*

*Mary Ellen Signorille, Attorney, AARP Foundation*

### PANELISTS:

*Frank Cummings, past Chief of Staff to Senator Jacob Javits*

*Robert Nagle, past Executive Director, Pension Benefit Guaranty Corporation*

*Karen Ferguson, Director, Pension Rights Center*

**Mary Ellen Signorille:** This is the exciting panel because it's about litigation. My name is Mary Ellen Signorille. I am an attorney with AARP Foundation Litigation and I am the immediate past president of the American College of Employee Benefits Counsel. We have quite a few past presidents here today: Howard Shapiro on the panel, and Phyllis Borzi and Dianne Bennett in the room. I would like to thank Jim and Norm for crediting Karen Ferguson and myself for the idea for this conference, but also of making this come to fruition, because I actually never thought it would happen. I'm very, very excited and I hope some of you academics who are in the room are able to use some of this stuff because I think it's just been fabulous, so thanks everybody for coming. To my immediate left—which is really unusual—Howard Shapiro from Proskauer, one of my good friends. Scott Macey, from ERIC, who's also a good friend. You've met Bob Nagle and Frank Cummings and all the way over to the very end is Karen Ferguson from the Pension Rights Center. So, Karen, why don't you tell us how you got involved in this from the beginning?

**Howard Shapiro:** Karen and I got our spots in the right-left order totally mixed up.

**Karen Ferguson:** I got involved because many years ago I came to Washington—after I had worked for a law firm and the govern-

ment. I wanted to do something different, and I had the opportunity to meet Ralph Nader who invited me to join what was known as the Public Interest Research Group, the very first "PIRG." It was a law firm and I was assigned to be a litigator because I'd had some experience in litigation and I argued a case about misleading advertising—Excedrin is not "twice as effective" as aspirin; it's only twice the size.

But while I was litigating this case, which I ultimately lost—it's a major case, in many casebooks—Ralph dropped on my desk a series of Associated Press articles about the hearings that Bob talked about, the Senate Labor Subcommittee hearings, and all of the horror stories, the terrible things that were being done and he essentially said, "Do something about it."

I was hooked. This area, as all of you know, but students may not know, is a fascinating combination of labor, tax, trust, securities law, everything—it was just so interesting. Ralph and I took a look at what was being proposed by Frank [Cummings] and Bob [Nagle] and Russ [Mueller] and said, "This doesn't do enough."

**Frank Cummings:** There's never enough.

**Karen Ferguson:** It has all these shortcomings. We came up with a new system, which I can talk about later. I came across a letter that I had written to Senator [Harrison] Williams on July 31, 1974, basically saying, "Dear Senator Williams: you've passed this bill in the Senate. I think that in the Conference Committee you should be sure that the Conference Report reflects all the things that the law doesn't do." I have the letter here, it's really interesting. Vesting was too long, survivor's benefits were inadequate—but relevant to this panel, there was an item that said that participants are going to be in no better position after the law is passed in terms of enforcing their benefit claims, their benefit rights, than they are before ERISA, and you should tell everybody this.

And in fact, that was true. There was a provision which Bob will tell you about in the Senate tax bill, which would have authorized the Secretary of Labor to enforce participant rights and there were other things along the way that he can tell you about, but the final law left individual participants to find a lawyer and sue if their benefits were wrongly denied after going through the plan's claims procedure—and we had a whole laundry list of cases where people could not find a lawyer. There were no lawyers to take these cases. David Preminger is here, he was working with legal services at the

time, and he was probably one of five lawyers in the country that would even consider representing a participant in a pension case.

What we're going to be talking about now is the consequence of that. There were no lawyers to take these major cases and my theory, and I think it's justified, is that this is an important part of the reason we have such terrible case law today—terrible Supreme Court law and lower court law in the areas of standard of review, remedies, attorney's fees . . . what am I missing? Standing, and there's a fifth one. That is because the participants did not have legal representation by people who understood what Congress intended in the law. We can go through the specifics later as to why that is the case.

**Mary Ellen Signorille:** There's a lot of stuff obviously that arose from the courts, but let's start with the statute, and we have a claims process that's in there,<sup>1</sup> so my question is: How did that get in there? Why is it in there? And is it doing what you expected it to do? Any one of you.

**Robert Nagle:** Well, I have to say one of the things that I've constantly become more and more aware of as I've thought back upon this whole effort over the years, most of the concerns that Congress addressed were with substantive problems, trying to correct inadequacies that were discussed at great length earlier. Very little attention on the whole was given to remedies. I think obviously now if Congress were revisiting this with a lot of history of how remedies work or don't work, it would be entirely different, but we just didn't have that kind of experience and so the remedy forms that were adopted I would consider—

**Howard Shapiro:** But in fairness, Bob, you were not operating in the kind of litigation world that we operate in. Really, I mean, the civil rights laws were not that old, and you were starting to see employment class actions there. The National Labor Relations Act<sup>2</sup> was ascendant and it's hard to understand in this context now, in this century, how immature in some ways litigation was at the time of the enactment.

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1. 29 U.S.C. § 1133 (2012). ERISA requires employee benefits plans to comply with regulations of the Secretary of Labor in establishing procedures for claims. The substantive regulations are codified at 29 C.F.R. § 2560.503-1 (2013).

2. 29 U.S.C. §§ 151-69 (2012).

**Robert Nagle:** I think that's right. The first stab at providing some remedial procedures beyond just a lawsuit for participants who were denied benefits was one that Karen alluded to and curiously it came from the Senate Finance Committee, a tax committee, and the bill it reported out in August 1973.<sup>3</sup> There was some discussion in their committee report about their concern for participants having an easy remedy to get their benefits when they were wrongly denied, and the Finance Committee's solution was to have the Secretary of Labor decide if they were wrongly denied benefits. A kind of funny provision coming from the Tax Committee, but they were happy to do that for the Labor Department.

The Labor Department very promptly said, "No thanks, we do not want to do that." And, accordingly, when the Labor Committee staff was negotiating with the Tax Committee staff in August 1973, we came up with arbitration as the alternative, so arbitration was what was provided for in the case of benefit denials in the Senate-passed bill.<sup>4</sup>

No one seemed to be very enthusiastic about that. We got nobody to really support arbitration in the conference and the idea was dropped. But in that process this claims procedure that's in the statute—and I think that was developed during the conference period by the staff—and it was just to find some way to give the participants a chance to get a more considered determination by the employer when they were being denied benefits. But that's about the limit of its history.

**Frank Cummings:** From our side, as I said before, this was not our primary focus. Our primary focus was vesting and funding and the structural changes in the plan. In terms of benefit denial, I was a labor relations lawyer and my background was trying grievances and collective bargaining agreement disputes and we were concerned that a particular person—not a class, a person—have at least a way of redressing or starting to redress a claim for wrongfully denied benefits and we were satisfied that the administrative procedure that was in the statute and therefore had to be in the plan—the claims procedure had to be in the plan—could be handled by a per-

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3. S. 1179, 93d Cong. § 602 (as reported by S. Fin. Comm., Aug. 21, 1973), *reprinted in* 1 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 988-90 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY].

4. H.R. 4200, 93d Cong. § 691 (as passed by Senate, Sept. 19 1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, at 2096-98.

son without a lawyer if need be. And it had to have a full and fair review by a named fiduciary.

When we were fighting about preemption, which of course didn't get resolved until the conference committee, I had the suspicion that we might not get it in the final bill. My theory was that if we put a provision in the fiduciary standards in 404(a)(1)(D)<sup>5</sup> we could get backdoor preemption and I didn't want to give any speeches about it but that's what we had in mind, that a fiduciary had a duty to follow the contract insofar as the contract was consistent with the other provisions of the statute, and I had in the back of my mind that if we didn't get full preemption of contract claims we would come at it the other way around and get somebody to litigate a claim as a fiduciary claim for benefits under 404(a)(1)(D). Of course that didn't become necessary because that was a fallback position that we just sort of had in our hip pocket.

But, 404(a)(1)(D) stayed in there as a fiduciary duty to follow the contract. We were also concerned that we were trying to get this bill passed, and we had to convince enough people who were concerned about the impact on management that this was not going to be a burdensome procedure. That there weren't going to be punitive damages, that there weren't going to be consequential damages, there weren't going to be jury trials, that this was going to be like a labor arbitration. You'd get the benefit, the whole benefit, and nothing but the benefit. Attorneys' fees as well, but basically that.

In those days, which was not the current political environment where if you bargain with the other side they take what you offer them and then demand more, in those days you could make bargains across the aisle. This was a bipartisan bill. We had Republican sponsors and Democratic sponsors and all kinds of independent sponsors on the bill, and the bill was deliberately designed on the theory that most managers are decent guys and will follow the law if you just tell them what the hell the law is. I still believe that to be true. The problem is that it doesn't very well vindicate the person who has really been abused by a bad executive just plain violating everything in sight. And now you've got to go to a lawyer and say to the lawyer, "Lawyer, oh lawyer, please represent me on your tab," and you're betting (a) that you're going to win and (b) that you're going to get an attorney's fee—since the attorneys' fees are not mandatory, but discretionary—and it's just not effective in a lot of cases. But only in the abusive cases, but of course that's what litigation is about, the abusive cases, so I'm sorry. *Mea culpa*.

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5. 29 U.S.C. § 1104(a)(1)(D) (2012).

**Karen Ferguson:** But wait a second, but this isn't just abusive cases. There are cases of miscalculation, of misinterpretation of the plan. There are zillions of things that are not abusive in the sense that you're suggesting.

**Frank Cummings:** Well, you know, if it's just a misinterpretation and you go to the manager and you get a full and fair review by a named fiduciary, presumably if this fellow is really doing his job as a fiduciary, he'll listen to reason. And very frequently they do. And of course if you've got a labor union in the act the fiduciary will listen carefully, because it's not worth a labor war.

**Mary Ellen Signorille:** Phyllis, you have a question or comment?

**Phyllis Borzi:** Yes, I'm very confused. I've heard you say several times today that ERISA isn't a contract statute, it's a trust law statute, and I've just heard you articulate a remedy that's a contract remedy. If all you get is your benefit, that's a contract remedy, so why would Congress put a contract remedy on a trust-law based statute?

**Frank Cummings:** Yes, I used the word contract. I was wrong. This is not a contract remedy. These are trust remedies. You don't have to have a contract, you don't have to have an offer, you don't have to have acceptance, you don't have to have mutuality, you don't have to have reliance, you don't have to have change of position—all you have to have is a plan and you enforce the benefit not because you have a contract for it, but because you have a plan for it. And the plan is an entity and you can sue the entity, and you can serve the entity, and the statute tells you how you can do that. You can have a contract if it gives you a warm feeling to say, "I've got a contract."

**Phyllis Borzi:** Why wouldn't you, in the context of a violation of the trust, make the person whole?

**Frank Cummings:** Make the person whole?

**Phyllis Borzi:** As opposed to just give them the benefit? I'm thinking now in the health care cases. In the pension cases, you're talking about cash.

**Frank Cummings:** All I can tell you is that you are enforcing the plan, period. The claims procedure enforces the plan, and the plan doesn't provide to make whole, the plan provides for the benefit. There were state laws hatching right and left—New Jersey and Minnesota and Wisconsin,<sup>6</sup> I forget them all—one more extreme than the next and there was a strong feeling that if we didn't preempt this thing (a) you would have really wild state laws and (b) they would all be in conflict with each other, and if you were running an interstate business, God only knows what law you were under. And that was of course one of the big fights in the Studebaker case. Whose law applies? We were saying to management, "Management, clean up your act and we will give you something," and this was what we were giving them: one stop service and the benefit, the whole benefit and nothing but the benefit. That was deliberate. You can say you don't like it, but that was the intention.

**Phyllis Borzi:** I have no doubt it was deliberate, I'm just asking if it was consistent with the rest of the things you've been saying about the theory behind the structure of ERISA.

**Frank Cummings:** Well, I don't know that equitable remedies gives you consequential damages. I think ordinarily equitable remedies just gives you —

**Phyllis Borzi:** Equitable remedies make you whole.

**Frank Cummings:** Whatever turns the judge on.

**Scott Macey:** Well, I didn't think we really know that yet, do we? We don't know if there's these other relief measures.

**Frank Cummings:** No. You have to get the project in *Amara*<sup>7</sup> to find out what it is, but we all had a lot of experience with judges before the merger of law and equity, even after the merger of law and equity you knew when you were trying a case in equity and you got what the judge thought was fair.

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6. For a description of state initiatives underway in 1973, see the prepared statement of Stanley DuRose, Jr., Commissioner of Insurance of Wisconsin, in *Private Pension Plan Reform: Hearings Before the Subcommittee on Private Pension Plans of the Committee on Finance: Part 1*, 93d Cong. (1973), at 531.

7. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

**Scott Macey:** Here's the issue I'm having, and I've had my whole life of ERISA representing and tied to employers—and Karen and I have been on opposite sides of the table sometimes. I was just a young lawyer in an L.A. law firm when ERISA was enacted and my firm assigned it to me to figure out what it meant, and it took me a while. The firm probably figured either ERISA or I were not going to amount to anything, and certainly in retrospect ERISA amounted to something. In any case, that's why they assigned it to a young associate; at the time, a lot of people just didn't realize how important the new law was going to be.

But Karen, I think both you and Phyllis have hit upon something that has troubled me. Number one, it's pretty difficult for an individual participant to pursue an individual claim beyond just the committee claim and review and appeal process, because of the reasons that we've been talking about. And, secondly, what ERISA did was set out a bunch of really detailed standards on retirement plans and it gave some reasonable protections to participants in such plans and a framework of how to structure and administer plans. Not a perfect one, but a pretty reasonable one amended over the years for sponsors.

But on this stuff, on the enforcement stuff, ERISA had a little bit at a very high level of abstraction, but not much more—and some of the enforcement law has evolved through the litigation process over the years and continues to evolve—but the statute did zero on health, it seems to me.

**Phyllis Borzi:** Except preempt state law.

**Scott Macey:** Right, but there is a concern on the health side. If you are, as an individual participant—denied a benefit in a retirement plan and you are ultimately successful of getting it—you'll get the money in your pocket that you otherwise should have gotten under the plan in the first place. Recognize that I'm coming from this representing and being associated with sponsors. But if there's either bad faith or a mistake made or something on the health side, by the time you might get a ruling that you are entitled to it, you might be dead.

**Mary Ellen Signorille:** There's cases like that. The *Bast* case.<sup>8</sup>

**Scott Macey:** Pardon me?

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8. *Bast v. Prudential Ins. Co.*, 150 F.3d 1003 (9th Cir. 1998).



**Mary Ellen Signorille:** There's the *Bast* case out of California.

**Scott Macey:** And then you have an analogous type situation with the *Amschwand* case out of . . . I think it was the Sixth Circuit.<sup>9</sup>

**Mary Ellen Signorille:** Fifth.

**Scott Macey:** Was it the Seventh?

**Mary Ellen Signorille:** Fifth.

**Scott Macey:** Fifth? Okay. [Laughter]

**Scott Macey:** I knew it was one of the circuits, one in the middle there, Fifth, Sixth, Seventh.

**Mary Ellen Signorille:** Chief Judge Jones.

**Scott Macey:** You lead a person to believe for several years that they're a participant in a life-insurance plan, you take their money, and then you find out after they died that it was a mistake, they weren't eligible, and you give them back the premiums when they thought they had a death benefit for their spouse—

**Frank Cummings:**—and the price of the one pill that would have saved his life.

**Scott Macey:** Right. So I'm just saying was there any thinking like that or was it just, given the context, given that you were doing so much—because ERISA did an awful lot, and I think it's been pretty successful in a lot of different ways—was consideration of these non-pension issues and remedies just absent? And I know Karen would feel, and probably Phyllis, at least, that these are pretty big holes in the statute.

**Frank Cummings:** Never thought about that.

**Robert Nagle:** The remedy provisions in ERISA were especially designed for pension plans and those provisions were formulated before the decision was made about complete preemption, so we

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9. *Amschwand v. Spherion Corp.*, 505 F.3d 342 (5th Cir. 2007).

did not really know what ERISA would be doing with respect to health plans. So there was, I would say, zero consideration given to how health claims ought to be handled and what the particular nature of those types of claims should be. It was just not considered.

**Mary Ellen Signorille:** Let me ask two sort of quick questions. One is, when you were coming up with this internal claims process was there any intent to have it apply to fiduciary claims?

**Robert Nagle:** I don't think so.

**Mary Ellen Signorille:** My second question is about Section 510.<sup>10</sup> When you read the Supreme Court decisions and *Amara*<sup>11</sup> talked about the fiduciaries and you can get equitable relief against fiduciaries but an employer isn't a fiduciary. [Section] 510 doesn't fit any of that, because it's a statutory claim, like Section 8(a)(3).<sup>12</sup> And when I read the legislative history it's pretty clear that Congress intended, and you guys intended, for 510 to work like Section 8(a)(3)—whatever you get under the Labor Relations Act when you were discriminated against for union organizing you would get under 510, the same type of remedies.

**Frank Cummings:** There were retaliation statutes everywhere. And even where there weren't, they were implied, so there was nothing novel about 510.<sup>13</sup> Every statute of this kind, protective statute, had an anti-denial remedy and it had an anti-discrimination remedy and it had an anti-retaliation remedy.

**Mary Ellen Signorille:** What were the remedies that you expected people to get?

**Frank Cummings:** [Laughs] I don't know.

**Unidentified Audience Member:** I have a question. You were talking about the remedies for pension plans, did you consider

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10. Section 510 of ERISA forbids employers to retaliate or otherwise discriminate against a participant in an employee benefit plan for exercising any right to which the participant is entitled under the plan. 29 U.S.C. § 1140 (2012).

11. *Amara*, 131 S. Ct. 1866.

12. Section 8(a)(3) of the National Labor Relations Act classifies employer discrimination in hiring or tenure decisions on the basis of union membership as an unfair labor practice. See 29 U.S.C. § 158(a)(3) (2012).

13. 29 U.S.C. § 1140.

when you provided for participants to sue for breach of fiduciary duty, how that would apply in a defined benefit plan?

**Frank Cummings:** We snuck it in there. You mean 404(a)(1)(D)<sup>14</sup> where you were in breach of fiduciary duty if you didn't follow the plan documents? No, because when we put it in there we were going to sneak it past somebody, nobody really realized why we were putting it in here. I wanted it because I wanted to preempt the law of benefit claims. We were going to argue that later, but it didn't work.

**Scott Macey:** So was preemption designed to preempt state laws regarding the design and administration of plans as opposed to the remedies regarding the plans?

**Frank Cummings:** Both.

**Robert Nagle:** But the main thought was with the first.

**Scott Macey:** Pardon me?

**Robert Nagle:** The main focus was really, and the main concern was really, on the—

**Mary Ellen Signorille:** Funding and design?

**Robert Nagle:** On the substantive provisions. As I said all along, we did not give enough thought to remedies. It was the substantive provisions that seemed to be the focus of everything.

**Al Lurie [from the gallery]:** I want to go back to your comment, Phyllis, about whether or not you've got an equitable claim. The remedy section of ERISA, Title I, Section 502(a)(3), whatever it is . . . has equitable remedies, and the courts have expanded that. I've forgotten the leading Supreme Court case, Breyer went back to the chancery courts, I mean he goes back 200–300 years.<sup>15</sup>

**Phyllis Borzi:** I wouldn't call what the Supreme Court has done for remedies expanding. [Laughter]

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14. 29 U.S.C. § 1104(a)(1)(D) (2012).

15. *Amara*, 131 S. Ct. at 1879.

**Mary Ellen Signorille:** Yes, I would agree with Phyllis that they actually haven't expanded. I think maybe *Amara* actually sort of made it more—

**Phyllis Borzi:** *Amara*, maybe—

**Mary Ellen Signorille:** Yeah, it did, I think, sort of put it back more towards where people thought it was originally.

**Scott Macey:** I mean, what do we know with the equitable remedies in those type of cases between *Varsity*<sup>16</sup> and *CIGNA v. Amara*<sup>17</sup>—

**Mary Ellen Signorille:** We don't know much—

**Scott Macey:** We know that if the court concludes you lied to your employees, that you committed fraud, that they will find an equitable remedy that somehow fits. Do we know anything about that?

**Mary Ellen Signorille:** It's still on appeal. *Amara* is still on appeal in the Second Circuit.<sup>18</sup>

**Scott Macey:** I know.

**Phyllis Borzi:** One thing that we know—and anybody in this room who has ever worked for Congress knows—is that there isn't a member in 1974 who would articulate as Justice Scalia did that Congress intended to go back to the state of the law before the divided bench—

**Frank Cummings:** He wanted to go back to before the dawn of Western Civilization.

**Phyllis Borzi:** —let alone imputing to Congress some arcane—I was going to say crazy, but arcane is a better word—intent or understanding or a ratification of the division between law and equity—certainly nobody serving in the sixteen years that I was on the congressional staff, if I offered them a million dollars to tell the dif-

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16. *Varsity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996).

17. 131 S. Ct. 1866.

18. *Id.*; see also *Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242 (D. Conn. 2012) (addressing the decision in 131 S. Ct. 1866 on remand); *Amara v. CIGNA Corp.*, No. 13-447 (2d Cir. Feb. 7, 2013) (appealing the district court's decision in 925 F. Supp. 2d 242).

ference or to even know what I was even talking about, well I'd still have my million dollars —

**Mary Ellen Signorille:** Phyllis Borzi just said that in the *Mertens* case, that Justice Scalia's interpretation of equitable relief going back to the days of the separation of law and equity courts<sup>19</sup> —

**Phyllis Borzi:** Justice Scalia said this was what Congress intended<sup>20</sup> —

**Mary Ellen Signorille:** That Congress intended it and her point is that no one in 1974 probably even thought about it.

**Robert Nagle:** Let me make a comment about that. We are talking about Section 502(a)(3),<sup>21</sup> which was clearly intended to be a total catchall provision and to provide any sort of appropriate relief.

**Frank Cummings:** Equitable relief.

**Robert Nagle:** Wait, wait, wait.

**Frank Cummings:** It says equitable.

**Robert Nagle:** This is the problem, and I feel a certain *mea culpa* about all this because I would say drafting carelessness gave Scalia the opening to do what he did.

**Phyllis Borzi:** But I was questioning his basic theory, that Congress intended this —

**Robert Nagle:** Well, obviously Congress didn't —

**Phyllis Borzi:** Because they were busy contemplating what the law was days before —

**Robert Nagle:** Well, yeah, well, this is where it all gets silly. [Section] 502(a)(3) refers specifically to equitable relief. Scalia, in trying to determine for us what equitable relief is, saying, "Well, in other sections there are references to 'legal or equitable' relief, and Congress didn't put the term 'legal' in 502(a)(3)." This is the *mea culpa* part. And therefore Congress must have intended in 502(a)(3) to

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19. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256–59 (1993).

20. *Id.* at 258–59.

21. 29 U.S.C. § 1132(a)(3) (2012).

provide only those forms of equitable relief which were typically available in courts of equity, notwithstanding that courts of equity would also award legal relief. And he said, "So consequently Congress must not have intended to allow that type of relief in 502(a)(3)," and then I think he went on to imagine plausible reasons why Congress may have reached that conclusion. And I keep thinking, this is ridiculous. If only we had thought to put "legal" in there, this whole issue would have been avoided. [Laughter]

**Scott Macey:** And Bob, do you think he's right or wrong? Was it just an inadvertent mistake that it wasn't in there, or was it intended not to be in there?

**Robert Nagle:** Oh, it was an inadvertent mistake. If anybody had said in our drafting group, "wait a minute, we've got legal and equitable everywhere else, let's put . . ." we would have said, "of course." I mean there was no intention whatsoever to restrict the sort of relief.

**Israel Goldowitz:** One of the many things that Congress and ERISA's drafters probably could not have anticipated was the Scalia revolution on how you read a statute.

**Frank Cummings:** That revolution is really over. *Amara* really has circumvented Scalia completely.

**Mary Ellen Signorille:** Yeah, Izzy's comment was just—

**Frank Cummings:** We're whistling Dixie here.

**Mary Ellen Signorille:** —that Congress could have not foreseen Scalia and his group, the way they read statutes in terms of statutory interpretation. Is there any more on remedies? We could probably go on all afternoon on remedies, but I want to hit preemption in more depth, so—

**Russell Mueller [from the gallery]:** One sentence.

**Mary Ellen Signorille:** One sentence, yes.

**Russell Mueller [from the gallery]:** Congress did attempt to try to put additional remedies in specifically for health plans in HIPAA.

**Mary Ellen Signorille:** Oh, in HIPAA they tried to put in additional health remedies for plans.

**Russell Mueller [from the gallery]:** Attempted.

**Mary Ellen Signorille:** Attempted. Okay.

**Russ Mueller [from the gallery]:** Scott could tell you why.

**Al Lurie [from the gallery]:** Scalia is not only resigned to the fact that he is the Supreme Court justice with the most opinions in the minority, but he's bragging about it. He is fast approaching the point when he will become the Supreme Court justice with the most dissents.

**Frank Cummings:** He has been wrong more than anyone else.

**Phyllis Borzi:** If we look at the narrow category of ERISA cases, he would win that without anyone close with the exception of a person I have tremendous respect for, which is Sandra Day O'Connor. She has also written some odd ERISA opinions.

**Frank Cummings:** So you want to turn to preemption?

**Mary Ellen Signorille:** There's one additional question I want to ask about benefit claims. First, the deferential standard of review. One of the things that you've said is that you can have a contract and the contract according to the case in *Firestone v. Bruch* says if the plan writes that they have the discretion to decide the case that means that the courts have to defer to their decision.<sup>22</sup> Was that contemplated? Was that discussed? Was that intended?

**Robert Nagle:** I think the critical question is: what is the standard of review, and what are the sources of that standard? I believe to the extent we thought about it we simply thought there should be a de novo standard of review of a denial of benefit claims. The whole subject gets interestingly explored by Justice O'Connor in *Firestone v. Bruch*, who pointed out that, pre-ERISA, the courts—which had addressed benefit claims as contract claims—had provided a de novo standard of review.

Subsequent to ERISA, a number of courts, because of some peculiar history related to 302(c)(5) cases under the Taft-Hartley Act,

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22. 489 U.S. 101, 111 (1989).

which Henry talked about this morning,<sup>23</sup> concluded that since it was now clear that the denial of benefits was a fiduciary decision, they should apply a deferential standard of review, even if the plan did not provide for a deferential standard of review, and Justice O'Connor, I think very rightly, said, "That's wrong. To do that would leave employees worse off than they were pre-ERISA when they were getting a de novo standard of review." Now the problem that has really emerged are those plans that specifically provide for discretion on the part of the fiduciaries who are making the benefits decision. Since *Firestone* illuminated the issue, a lot of plans have been amended to provide for such discretion, which the *Firestone* case said would lead to deferential review. It's been a particularly difficult area in health cases and certainly in disability cases, as I understand. I have to say that that part of the problem is not something we anticipated at the time of adopting the remedies in ERISA.

**Scott Macey:** But even that's still being evaluated and litigated in the *Frommert*<sup>24</sup> case in the Second Circuit on remand from the Supreme Court, although the Supreme Court did talk about deference—

**Mary Ellen Signorille:** No, the *Frommert*—

**Scott Macey:** What does deference mean if they overrule what effectively the Supreme Court said in the *Frommert* case?

**Peter Stris [from the gallery]:** We're arguing notice on remand. There are two questions in the case. We know we lost the deference issue before the Supreme Court. Now the issue that's pending before the Second Circuit is just the notice question. They are two separate questions.

**Mary Ellen Signorille:** Whether or not the participants had notice of the deference?

**Peter Stris [from the gallery]:** No, had notice of the underlying issue.

**Mary Ellen Signorille:** Okay. Notice of the issue.

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23. See Remarks of Henry Rose, in Panel Discussion, *ERISA and the Fiduciary*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 359, 363–64 (2014).

24. *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008), *rev'd*, 559 U.S. 506 (2010).



**Peter Stris [from the gallery]:** We had a benefits claim and a 502(a)(3) claim. Deference applies to the benefits claim. We still have a pending (a)(3) claim.

**Mary Ellen Signorille:** The question that I have with discretion is sort of what Frank said. People are now left worse off and now what's happened is, going back to Karen's first comment about lawyers, you have lawyers who, even if they're willing to take ERISA cases, won't take an ERISA case unless they get involved from the very beginning because of the deference issue. And so you have people who potentially could have good claims, but they don't know they need an independent medical review or something like that; and so it really has stacked the whole system and made it more necessary to bring lawyers in at the very beginning of a claims dispute, which I think was not the intention from what you gentlemen have said.

**Frank Cummings:** No.

**Mary Ellen Signorille:** So I think that has sort of gotten very screwed up.

**Frank Cummings:** The whole handling of medical claims has always been a mess and it's going to be a worse mess under the Affordable Care Act [ACA] because you have the anomaly of an ERISA statute, which preempts all state law; then you have the ACA<sup>25</sup> which expressly does not preempt state law and that it amends ERISA, which does preempt. So you have a non-preemptive statute amending a preemptive statute un-preemptively, and then you have it administered, depending on the state you're in, under a state exchange, which is set up by state law, which isn't preempted by ERISA but is probably established pursuant to ERISA, and God knows whether that preempts anything, and you're going to be litigating this. We're all going to get rich. [Laughter] We'll spend the rest of our lives litigating whose law applies.

**Mary Ellen Signorille:** I think because of the external review process, I think that will probably take care of a lot of that. But since we're talking about preemption, let's go back to preemption because

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25. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 28, 29, 35 and 42 U.S.C.).

I know Scott had some questions, so why don't you ask your question, Mr. Macey.

**Scott Macey:** The preemption provision<sup>26</sup> is a very broad provision and "relate to," whatever it means—the Supreme Court has changed its meaning from time to time as this evolved in the cases over the years—it seems like the preemption provision may be the most litigated single provision of ERISA. I don't know that for a fact empirically, but it just seems like it comes up more than—

**Howard Shapiro:** The most Supreme Court cases.

**Scott Macey:** Right, that's what it seems like.

**Mary Ellen Signorille:** No, it is, with Supreme Court cases.

**Scott Macey:** So, we know that it talks about "relate to," and we know that there's this line of cases over the last thirty years, let's say, starting with *Shaw*<sup>27</sup> and moving through the *New York Blue Cross* case<sup>28</sup> and the *Travelers* case<sup>29</sup> and others over the years; did you have an idea—presumably you thought it would be litigated from time to time just because of how broadly, in general, it applies—did you have any concept that the Supreme Court would evaluate it, or courts in general, the way that they have? Or is this all something that really wasn't thought about because preemption was put in near the end of the legislative process? I think it was either [John] Erlenborn or [Jacob] Javits said it was the crowning achievement.

**Robert Nagle:** It was John Dent.<sup>30</sup> One of the more foolish comments ever made.

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26. 29 U.S.C. § 1144(a) (2012) ("Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.").

27. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

28. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 662-64 (1995).

29. *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 719-21 (2d Cir. 1993), *rev'd sub nom.* *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

30. See 3 ERISA LEGISLATIVE HISTORY, at 4670 ("Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans.").

**Scott Macey:** And I know the company that I was with for many, many years, AT&T, felt it was a very important provision because they had plans in every state. Has it surprised you how it's gone over the last thirty-five or so years?

**Robert Nagle:** My answer is yes. It has surprised me. Both the House and Senate bills had preemption provisions,<sup>31</sup> and to oversimplify a little, each of them, in different words, preempted only that which was being regulated. And the conferees, in a meeting in mid-June, tentatively approved a preemption provision which amalgamated some parts of the House and Senate provisions. But what we had when that tentative agreement was reached was essentially—and again, I'm probably over-simplifying a little—a provision that would preempt only that which was being regulated.

The change, the drastic change, from “relate to subject matters regulated in this bill” to “relate to all benefit plans subject to Title I of the Act,”<sup>32</sup> was approved by the conferees at their final meeting on July 30. And this was a drastic, drastic change that, had consequences which we never had time to think about. Now, what brought that about? Well, even though, notwithstanding the more limited provisions of the House and Senate bills, there were still many business interests and labor interests who were not satisfied with the scope of that preemption. And there were things going on, I think Frank alluded to some in state legislatures. One was a bill in the California State Legislature to require pension plans to give cost of living increases to retirees. Arguably, that was not something we regulated, so that's something they could do. Well, that got a lot of people alarmed. And there were other kinds of state legislation being proposed or acted on and all of this made business and labor interests very, very nervous.

**Russell Mueller:** Including health. Meaning national health.

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31. H.R. 2, 93d Cong. § 514 (as passed by House, Feb. 28, 1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 4057-59; H.R. 2, 93d Cong. § 699(a) (as passed by Senate, Mar. 4, 1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3820.

32. See H.R. REP. No. 93-1280, at 128 (1974), *reprinted in* 1974 U.S.C.A.N. 5038, 5083 (“Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce.”).

**Robert Nagle:** That's the other thing; the fact that many states were considering more active legislation regulating the content of health plans.

**Karen Ferguson:** And legal services, wasn't that a major factor?

**Frank Cummings:** That's what got [John] Dent. That got Dent.

**Robert Nagle:** The legal services issue, that got at least one union exercised, that didn't do it by itself, but some —

**Frank Cummings:** Are you going to tell them what got your boss? The one in New Jersey on Ballantine Brewery.

**Robert Nagle:** Oh, they would have had to pay their unfunded benefits if they were leaving the state.

**Frank Cummings:** Yeah, Ballantine wanted to move his brewery and you couldn't leave New Jersey unless you were fully funded.

**Robert Nagle:** There was a lot of dissatisfaction within the business and labor communities with the tentative resolution of the preemption issue. I cannot remember exactly how it was communicated, but finally all this unhappiness from the labor and business communities got communicated to the leadership and we were given marching orders to broaden the preemption provision. Now, one of the things that you have to bear in mind to get some sense of the atmosphere (and this has been alluded to earlier), we were still at that point facing the potential of impeachment proceedings against Richard Nixon.

We had fully understood that once impeachment proceedings got to the Senate, that would probably be the end of any legislation for the rest of that Congress, so ERISA would be dead unless we completed all action on it and got it in shape for a Senate vote before Nixon impeachment hearings started. This put incredible time pressure on everybody involved and so this last-minute rumbling about preemption was enough to make everybody say, "Oh my God, this could derail the whole thing. Give them what they wanted." And that's basically how it came out. So we ended up with a preemption provision that nobody had really thought about. We had no time to really consider its consequences or what other adjustments might be made in the statute had we known that such a preemption provision was going to be there.

**Frank Cummings:** But whereas we weren't aware of how it would play out as written, everyone who had anything to do with this thing historically knew that both the National Labor Relations Act [NLRA]<sup>33</sup> and the Labor Management Relations Act [LMRA],<sup>34</sup> without benefit of any preemption clause, had been held by the Supreme Court to be almost—not quite—but 100% preemptive and that was what we were looking for.<sup>35</sup> And since this thing was rather broadly written, my assumption, and I think a lot of people's assumption was, what we got was the equivalent of the LMRA preemption. NLR[A] being the behavior standards, and LMRA being the enforcement of the document standards, and they were both almost completely preemptive and that's what we had in mind, so how they wrote it, who knows, but we would have been quite surprised if we didn't get as much preemption here as the labor movement got, and management got, really, under the labor statutes.

**Scott Macey:** But it wasn't until the end that you got this occupy-the-field type of preemption subject to a few savings clauses.

**Frank Cummings:** It's what we were hoping for.

**Scott Macey:** Pardon me?

**Frank Cummings:** This was what we were hoping for, God knows whether we were going to get it.

**Howard Shapiro:** So there was no specific connection between broad preemption and remedies.

**Robert Nagle:** No.

**Howard Shapiro:** Which of course would have made more sense, a broad preemption carve-out with appropriate remedies so that you never had state law issues, jury trial issues, common law issues, and yet the remedies could exist under ERISA.

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33. National Labor Relations Act of 1935, 29 U.S.C. § 151 (2012).

34. Labor Management Relations Act of 1947, 29 U.S.C. § 141 (2012).

35. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (NLRA preemption); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957) (LMRA preemption).

**Frank Cummings:** We had in the National Labor Relations Act and the Labor Management Relations Act, we had preemption both of the substance and the remedies. You didn't get a jury trial, not for breach of collective bargaining agreements, you took it to arbitration and then you appealed and you got a presumption of correctness on the arbitrator's remedy. You didn't get a jury trial before the National Labor Relations Board, you went up to the Court of Appeals. You had limited scope of review, abuse of discretion, and so on, except on questions of law and that was certainly what I had in mind, I thought if you got preemption on the NLRA-LMRA model you would end up with something like that, and we did.

**Karen Ferguson:** But Frank, obviously that was your thinking but, in point of fact, with the National Labor Relations Act, you have the National Labor Relations Board acting for workers. They go to bat for a worker who has filed a charge and there's a very elaborate governmental procedures all the way up and so I don't—I mean, I understand your thinking at the time—but it doesn't really—

**Frank Cummings:** If you ever tried a labor arbitration under 301(a) of the Taft-Hartley Act—

**Karen Ferguson:** I'm not talking about 301(a), I'm talking about the NLRA.

**Frank Cummings:** — the only way you could reverse it is you had to prove either that the arbitrator was asleep at the time of the hearing or that he was drunk or that he was lying about something terribly important.

**Karen Ferguson:** But Frank, I'm just talking from a benefit claims perspective. There you have the union advocating for the member, and that it was understood as two equal parties and therefore it was appropriate since they would both be back before the arbitrator.

**Frank Cummings:** I didn't say we were right, I said that's what we were thinking.

**Howard Shapiro:** You saw that all the time, Karen, because there were plenty of unfair labor practice charges where the union is targeted and this was especially true as the unions were dealing with the advent of the Civil Rights Act and the attacks on seniority systems, so again, we're back in a—it's very difficult to remember the

scenarios back there and really not as prevalent a litigation world as we live in now, but it was a very different kind of system.

**Russell Mueller:** The last minute introduction of this and then the rather interesting change of language on the Senate floor where Bob Connerton brought some additional language that clarified the broad preemption with regard to legal plans, but it did raise some questions in some people's minds and I recall conversations with Mike Gordon, and that's one of the reasons why there was a joint pension task force among the four committees put in the statute to study issues, among them portability, which was dropped, and, specifically, preemption. So it was contemplated that there may need to be some adjustments, that all the things that were happening that we didn't know about, that we would study them and maybe there might have to be some changes. We knew that. It just never happened because, of course, the tax writing committees didn't want to do it. Mike Gordon tried to do it himself but it didn't last too long.

**Mary Ellen Signorille:** Russ's point was that ERISA provided for a joint committee—

**Russell Mueller:** Joint Pension Task Force.<sup>36</sup>

**Mary Ellen Signorille:** Joint Pension Task Force to study outstanding issues after the passage, just want to get that on the record. I think Karen's point though was that it's very different when you have an individual trying to try these cases versus either a labor union or the National Labor Relations Board. It's just an unequal system when you're looking at the benefit claims. Was that your point?

**Karen Ferguson:** Exactly.

**Norman Stein:** It is my recollection that Mike Gordon said Javits was angry at the inclusion of broad, field preemption by the Conference and that he hoped the Joint Pension Task Force would recommend, as Scott said, that Congress would pull back from it a bit.

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36. See ERISA § 3021, 29 U.S.C. § 1221 (2012) (creating a Joint Pension, Profit-Sharing, and Employee Stock Ownership Plan Task Force comprised of "[t]he staffs of the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives, the Joint Committee on Internal Revenue Taxation, and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate" to study ERISA's effects for two years after it was enacted).

**Mary Ellen Signorille:** Okay. Norm Stein said that Mike Gordon had said that Senator Javits was angry about total preemption and had hoped that it would be pulled back. I don't know if that's true.

**Frank Cummings:** I wasn't there. Maybe he changed his mind.

**Robert Nagle:** I'm guessing it was true.

**Frank Cummings:** Huh?

**Robert Nagle:** I would imagine it was true. I don't think Javits favored that.

**Henry Rose:** He certainly didn't favor it in the earlier bills.

**Mary Ellen Signorille:** Yeah, that he didn't favor it in the earlier bills. Karen, did you have another issue you wanted to raise, or did we cover it?

**Karen Ferguson:** Do you want to talk about the statute of limitations?

**Mary Ellen Signorille:** Yeah, let's talk about the statute of limitations, since we just had the oral argument on it. So the question as we all know is that ERISA provides a statute of limitations for fiduciary claims but it is silent for benefit claims, and so the question is, Why, gentlemen? Why is there silence?

**Robert Nagle:** Easy answer.

**Mary Ellen Signorille:** I like easy answers.

**Robert Nagle:** Again, *mea culpa*.

**Mary Ellen Signorille:** Another *mea culpa*, boy. [Laughter]

**Robert Nagle:** This is a question I'm asked most frequently: "Why isn't there a statute of limitations for benefit claims – although there is one for fiduciary liability claims?" – and my answer is just for some weird reason nobody ever noticed. There is no deliberate reason why there was not a statute of limitations. It's hard to imagine. The bill that the Senate passed, H.R. 4200, does not directly, but if you were straining to find a statute of limitations for benefit claims you could perhaps make the argument that benefit claims would be



subject to the five-year statute of limitations that was provided for other violations. You have to strain to make that connection, but if you really wanted to you possibly could, but once provisions got jumbled after we merged the respective House and Senate bills, even that remote connection was lost, so there was really –

**Mary Ellen Signorille:** Well, it's more than just, there's no statute of limitations, unlike the fiduciary section, where it says – it basically accrues from when you know or should have known.

**Robert Nagle:** Yes.

**Mary Ellen Signorille:** In a perfect world, if you could redo it, when would you have the claims start? After the exhaustion, before the exhaustion; does it matter?

**Robert Nagle:** I think I would have provided after exhaustion.

**Mary Ellen Signorille:** We're going to put you on the Court. [Laughter] Yes, Karin.

**Karin Feldman [from the gallery]:** Right, but there's some benefit claim cases that aren't covered by the claims and appeals procedure – termination of retiree health. The employer has a collectively bargained plan and they terminate it. You don't go through the claims and appeals procedure yet it's a benefit claim, so when do you start that one?

**Scott Macey:** But wouldn't that run from the date they terminate or notify participants they terminated?

**Karin Feldman [from the gallery]:** Absolutely. I'm not arguing that it wouldn't, but you get different results in different circuits.

**Mary Ellen Signorille:** Right. Karin was just saying if you have a termination of health coverage that you don't go through the claims process and therefore this idea of it's a benefit claim, but you wouldn't have to go exhaust, basically, so this –

**Karin Feldman [from the gallery]:** There are also Section 510 claims – what is the statute of limitations in those claims?

**Mary Ellen Signorille:** Nobody brings those claims because there's no remedy for them. [Laughter]

**Mary Ellen Signorille:** Anything else that we haven't covered that someone—

**Karen Ferguson:** Attorneys' fees.

**Mary Ellen Signorille:** Before we do that, does anybody else have something—David, did we cover what you wanted to cover?

**David Cay Johnston:** What was the thought on whether participants had to use the claims procedure in order to get into court?

**Mary Ellen Signorille:** So David's question is, did they contemplate that the claims procedure had to be used, had to be exhausted?

**Robert Nagle:** I don't believe we specifically provided that. I think that everyone would have agreed that there should be exhaustion of the procedure.

**Frank Cummings:** And it should have been provided, but it wasn't.

**Karen Ferguson:** Related to that, let me ask a question related to the claims and appeals procedure. Was there any consideration of whether the same person who decides the initial claim—a fiduciary—should also be the same person who decides the appeal? I just wonder if that was ever an issue at all.

**Robert Nagle:** I don't know if it was an issue. I think if the initial decision is made at the highest level, then where else is there to go, but to have the same person—

**Karen Ferguson:** But you also have a two-stage—

**Robert Nagle:** Well, I understand that, but I'm on a couple of boards of trustees of multiemployer plans. We make all the benefit decisions. When we deny a benefit initially, we give the participant a chance to challenge our reasons but we're, again, the ones who are making that decision. There's nowhere else for it to go.

**Mary Ellen Signorille:** Okay, Karen wanted to talk about attorneys' fees. You want to ask the question?

**Karen Ferguson:** Again, those of you who are in this know that this is another area where the courts went wrong as far as we're concerned. Many courts—not all, but many courts—say that ERISA has a provision that says that attorneys' fees can be awarded at the discretion of the court, which we always assumed meant if a participant won the case the court had the discretion to award attorneys' fees to the participant. This makes sense since otherwise they can't get a lawyer to represent them.

But in several circuits, again, thanks to one bad case that then led to all the other bad cases, you have to have five factors, including whether it affects lots of people, whether there is bad faith, et cetera, et cetera. The original case, and Howard certainly knows this, *Eaves v. Penn*<sup>37</sup> was a case where the issue was: *who* should pay the attorneys' fees, not *whether* attorneys' fees should be awarded. It made sense to have those factors in that context, which was 'should the plan pay or should the trustees pay?' But then the courts in those circuits just blindly applied those factors in almost every other case. So the issue is, was any thought given to what was meant by giving the courts discretion to award attorneys' fees, or not. Does that make sense?

**Robert Nagle:** It makes sense, yes, I don't believe a lot of thought was given to it at all, and I think the provision—we probably plugged a provision from some other statute, I don't know if it was what's in Title VII or—

**Howard Shapiro:** Well, it's interesting because it's a different language formulation than Title VII.

**Robert Nagle:** Is it?

**Howard Shapiro:** Title VII is a prevailing party standard and ERISA, of course, is discretionary, and, of course, Title VII had been eleven years, ten years prior.

**Robert Nagle:** So we should have done better, you're saying.

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37. 587 F.2d 453 (10th Cir. 1978).

**Mary Ellen Signorille:** And I guess the other piece of it is whether it was contemplated that you could not get attorneys' fees in the benefits claims process at the plan level, or was that never even thought about?

**Robert Nagle:** As far as I'm aware that was not even thought about.

**Howard Shapiro:** You have to keep harkening back to the procedure of filing a grievance at an arbitration, and nobody would have thought when you filed a grievance in arbitration in the work force under a collective bargaining agreement, nobody thought about attorneys' fees, nobody thought, Karen, about the two-tier level of review. And again, that seems to me always, when I think back on it, that is the analog and that's the blackboard that was being written on—the experience under the traditional labor laws.

**Karen Ferguson:** Which does not really apply to most participant claims, and I think you're right, that that is the problem.

**Norman Stein:** There was another difference in the attorneys' fee statute in ERISA and that in Title VII, which was that a court could award attorneys' fees to either party, not only to the prevailing party. I've wondered whether that was because in some cases it might be justified to give the participant attorneys' fees even if they didn't win their case, perhaps because they settled the case or won on some issues but not all issues. I've wondered about that, why the statute says the court can award fees to either party rather than limit it to the prevailing party.

**Phyllis Borzi [from the gallery]:** And actually Norman, that goes to a point that I was going to make. Not only did ERISA's attorneys' fees not mirror any of the civil rights laws, it didn't mirror any of the labor laws. So it was created, in essence, from whole cloth. And I, myself, have always wondered why people—I mean, maybe I'm just the master of shortcuts but I try not to reinvent the wheel when there's something that I know that has a history to it. So why was it that you wrote something new, you didn't use the labor law or a civil rights law for attorneys' fees?

**Robert Nagle:** I don't know. All I can say is the Labor Department and Henry [Rose] should have been giving us better guidance. [Laughter]

**Frank Cummings:** But Phyllis, that's not as funny as it sounds, because the fact was that this whole enforcement scheme was developed downtown and was picked up by the sponsors of a bill that (a) wasn't supposed to pass and (b) if it would pass it would pass in lieu of everything else, not in addition to everything else. So it wasn't taken seriously, the way a serious bill would be taken, because it wasn't supposed to pass.

**Mary Ellen Signorille:** Okay, with that, I want to thank the panel for their time. And Norm and Jim, you want to close?