

**REFLECTIONS ON ERISA’S FIDUCIARY PROVISIONS:
AN INTEGRAL AND INTEGRATED PART OF THE
STATUTE**

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INTRODUCTION

I have long had a vague understanding that what eventually was enacted as ERISA in 1974 was the product of many years of congressional attention.¹ More recently, two experiences have deeply enriched my understanding of that process. The first was reading Professor James Wooten’s book, *The Employee Retirement Income Security Act of 1974: A Political History*.² The book is an unparalleled examination of the machinations of some, and the deep commitments of others, which culminated in the enactment of the statute.³ The second experience was the privilege of attending the *Drexel Law Review* Symposium, *ERISA at 40: What Were They Thinking?*, held October 25, 2013, and participating as a facilitator on the fiduciary panel. The Symposium was filled with serious discussions of political tensions, years of effort, and ultimately the last-minute rush to put together

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1. See, e.g., Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 4-5 (1995) (referring to “more than a decade of hearings and arguments over ERISA’s complex provisions”).

2. JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004).

3. *Id.*

a statute that President Ford could sign on Labor Day of 1974, thus assuring the country that the political process continued to function on its behalf.⁴ The Symposium transcript also evidences a certain amount of levity, probably attributable in part to the giddiness felt by those of us who self-identify as ERISA geeks and enjoyed the opportunity to spend the day in the company of those whose legislative work has made such a difference for U.S. workers.⁵

My “aha moment” of the Symposium occurred when one of the participants recalled that ERISA’s fiduciary provisions were an afterthought.⁶ After the drafting of what then were thought of as the core provisions, the fiduciary provisions were “stapled on” to an early version of the bill.⁷ I have spent much of my academic career writing and thinking about fiduciary issues and benefit plans,⁸ so I was surprised to learn that what I view as an integral part of the statute’s protective mechanisms initially was not considered critical by those who played a key role in drafting and enacting ERISA.⁹

It is hard to imagine that ERISA could be enacted today. The Symposium participants reminded us that even in the 1960s and early 1970s, no organized constituency supported federal benefits legislation.¹⁰ Instead, the momentum for enacting ERISA came first from hearings held around the country during which workers expressed deep frustration because they could not rely on employer pension promises.¹¹ The media then published articles, often in local newspapers, highlighting the deeply moving stories of workers whose pension expectations had been crushed. The hearings and subsequent media stories captured the attention of voters who then made it clear to their representatives that the unreliability of bene-

4. See Remarks of Russell Mueller, in Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291, 310–11 (2014).

5. See, e.g., Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 267 (2014) (indicating laughter).

6. See Remarks of Frank Cummings, in Panel Discussion, *ERISA and the Fiduciary*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 359, 376 (2014).

7. See Remarks of Frank Cummings, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 282 (2014) (“We were quite prepared to take the administration’s bill or anybody else’s bill on fiduciary standards and just staple it onto ours and say, ‘That’s fine . . .’”).

8. See, e.g., Muir, *supra* note 1, at 14–19.

9. 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, 362 (2014).

10. See Remarks of Norman Stein, in Panel Discussion, *Welcome and Introductory Remarks*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 263, 263 (2014).

11. Cummings, *ERISA and the Fiduciary*, *supra* note 6, at 380–81.

fit “promises” was intolerable. The staffers and legislators developed legislation to address the problems that the hearings had identified, that the media had highlighted, and that deeply concerned the electorate.¹² One of those problems was long vesting periods that prevented an employee (for example, an employee who had to leave employment before age 65) from qualifying for a pension benefit even after many years of service with an employer.¹³ Other pension plans did not have adequate funds to pay promised benefits.¹⁴ If a company declared bankruptcy, a fight ensued among creditors, workers, and retirees over the limited funds, and no one was clear on what the applicable law was.¹⁵ As a result, ERISA contains vesting,¹⁶ accrual,¹⁷ and funding provisions to ensure the pension promises are not illusory.¹⁸ In addition, it incorporates disclosure provisions¹⁹ so workers understand the promises voluntarily made by their employers; multiple kinds of nondiscrimination provisions;²⁰ and remedial provisions to enable workers to vindicate their rights.²¹

Many of these provisions have been amended, often in minor ways,²² in the almost 40 years since ERISA's enactment, but the general framework remains intact.²³ I think that is due, at least in part, to the broad focus and thoughtfulness of ERISA's drafters. The substantive provisions just discussed largely achieved their intended goals. For example, maximum vesting periods generally mean that long-service employees cannot be denied retirement plan benefits if they leave employment prior to the normal retirement age.²⁴ And if a pension plan terminates with insufficient assets to pay promised

12. See generally Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291 (2014) (examining the evolution of relevant pension legislation).

13. Cummings, *Setting the Stage*, supra note 7.

14. *Id.* at 266–69.

15. See, e.g., *id.*

16. Employee Retirement Income Security Act of 1974 (ERISA) § 203, 29 U.S.C. § 1053 (2012).

17. *Id.* § 1054.

18. *Id.* §§ 1081–85.

19. *Id.* §§ 1021–25.

20. *Id.* § 1053.

21. Technically these are enforced by the Internal Revenue Service. See generally 26 U.S.C. § 401(a) (2012) (defining requirements for qualified pension, profit-sharing, and stock bonus plans).

22. See EMPLOYEE BENEFITS LAW 1-11-1-23 (Jeffrey Lewis et. al. eds., 3d ed. 2012).

23. Phyllis Borzi, *Introduction to EMPLOYEE BENEFITS LAW* at lxix (Jeffrey Lewis et. al. eds., 3d ed. 2012) (“After more than 35 years, the overall framework of [ERISA] established by its drafters in 1974 seems to have stood the test of time.”).

24. See Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 25–26 (2011).

benefits, in spite of ERISA's funding requirements, the Pension Benefit Guaranty Corporation (PBGC) acts as payer of last resort up to a statutory maximum.²⁵

The statute has also proven doomsayers wrong. Employers have not en masse eliminated all benefit plans.²⁶ Certainly there has been a decline in the percentage of workers covered by traditional pension benefit plans, a trend discussed in far more depth elsewhere.²⁷ But, the percentage of the workforce with some type of employer-based retirement plan remains approximately the same as it was when ERISA was enacted.²⁸ That is not to say that having only about 50% of U.S. workers with an employer-sponsored pension plan is the ideal situation.²⁹ Instead, it shows that the system is compatible with reasonable regulation. In addition, employers sponsor an array of other types of benefit plans, such as health care plans, to which some ERISA provisions apply.³⁰

My takeaway—I hope a fair one—from the Symposium was that ERISA's drafters included the fiduciary provisions primarily as a backstop to the statute's more specific protective requirements. Symposium participants made clear that they did not see the fiduciary provisions as mere surplus.³¹ For example, they spoke about explicitly deciding that the definition of fiduciary should be broadly inclusive.³²

The drafters, however, did not, and could not have, anticipated the eventual importance of the fiduciary standards. Changing workforce demographics, plan typology, and ERISA jurisprudence have all played a role in causing fiduciary principles to become integral

25. See *id.* at 30–32 (explaining the basic coverage of the PBGC insurance program).

26. See, e.g., Alicia H. Munnell & Matthew S. Rutledge, *The Effects of the Great Recession on the Retirement Security of Older Workers*, 650 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 126 (2013) (explaining that today, most workers have a 401(k)).

27. See *id.* (discussing the decline in the percentage of workers covered by defined benefit pension plans).

28. Remarks of Damon Silvers, in Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291, 311–12 (2014).

29. See, e.g., Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 10–11, 49–55 (2013) (explaining that coverage rates overall have not changed dramatically since 1974 and advocating structural reforms to extend coverage to additional employees, particularly those employed by small businesses).

30. See, e.g., ERISA § 101, 29 U.S.C. § 1021(e) (2012).

31. Cummings, *ERISA and the Fiduciary*, *supra* note 6; Rose, *ERISA and the Fiduciary*, *supra* note 9.

32. See, e.g., Remarks of Robert Nagle, in Panel Discussion, *ERISA and the Fiduciary*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 359, 374 (2014) (“After we talked about this endlessly we decided the heck with it, we’ll just cover all bases.”).

to—and integrated in—the larger statutory framework. In the rest of this Reflection, I briefly reflect on three areas where the fiduciary provisions continue to pose interesting questions—particularly on issues of how the provisions integrate with other parts of the statute—for scholars, policy makers, and others involved directly or indirectly with benefit plans. In Part I, I discuss the controversies surrounding the interpretation of the definition of who is an ERISA fiduciary. In Part II, I discuss the continuing debate about the extent to which contract or trust doctrine predominates, particularly in the context of claims for benefits due. Finally, in Part III, I consider the multiple occasions on which the Supreme Court has addressed the scope of equitable relief in cases involving fiduciaries. Together these three areas address critical portions of a fiduciary claim: (1) that the defendant is a fiduciary; (2) that a fiduciary breach occurred; and (3) that a remedy exists.

I. THE DEFINITION OF FIDUCIARY

The statute provides that a fiduciary includes anyone who falls within the three subparts of its definition. Loosely speaking, a person becomes an ERISA fiduciary by (1) having discretionary authority or control over either plan management, or authority or control over plan assets; (2) providing investment advice for a fee; or (3) having discretionary authority or responsibility in the administration of a plan.³³ This three-pronged definition means that the first question on integration of the definition concerns how the parts work together. One might ask, given the reference to plan management in the first clause and plan administration in the third clause, whether there is any difference between plan management and administration, and if so, what that difference is. When this was posed to Symposium participants, one person responded that they included both words so that the definition would encompass a broad array of discretionary activities vis-à-vis the plan.³⁴

A co-author and I have suggested that one context in which this may become important is in the settlor/fiduciary doctrine. That doctrine, developed by the Supreme Court, generally immunizes from fiduciary responsibility actions taken by a plan sponsor as part of a plan's adoption, amendment, or termination.³⁵ My co-author and I

33. See 29 U.S.C. § 1002(21)(A) (2012).

34. See, e.g., Nagle, *ERISA and the Fiduciary*, *supra* note 32, at 374–75.

35. See Dana M. Muir & Norman P. Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, at 21–28 (working paper on file with authors) (describing the trilogy of Supreme Court cases developing the Settlor/Fiduciary Doctrine); see also

have identified a variety of circumstances in which the doctrine permits plan sponsors to undermine ERISA's protective provisions. We explained that, since the Supreme Court's development of this doctrine occurred in the context of the plan administration prong of the definition, it would be appropriate to narrow the settlor doctrine by ensuring that discretionary acts with respect to plan assets and plan management are also treated as fiduciary functions.³⁶

Next, consider the internal language of the fiduciary definition's first subpart. Someone who has either discretionary authority or control over plan management is a fiduciary. The reference to plan assets, however, omits the word discretionary.³⁷ Does the requirement of discretion over plan management mean something different than the authority or control that counts for plan assets? Or is the difference in language irrelevant? One could speculate that the drafters' efforts to prevent plans from terminating without sufficient assets to pay benefits might have resulted in an especially broad definition of fiduciary for those who deal with plan assets. But does this reasoning make sense given that the concerns about fiduciary behavior and plan assets were primarily directed to misuse of those assets? Misuse, whether by theft or self-interested investments made to benefit the decision-maker, would typically involve discretion. What we know from the Symposium is that the drafters decided to "cover all bases."³⁸

If we look at the fiduciary definition holistically, as opposed to word-by-word, we see a definition that attempts to reach any person or entity with discretion over an ongoing plan or its assets, as well as anyone who is compensated for providing investment advice related to a plan.³⁹ This sensible and holistic reading is consistent with the indications by Symposium participants that they intended to draft a broad definition in an environment that was less focused on technical and industry terms than on prohibiting the shirking of responsibility for benefit plans.⁴⁰

Curtiss-Wright Co. v. Schoonejangen, 514 U.S. 73, 77-80 (1995) (allowing employers to amend or terminate their employee benefit plans); *Lockheed Co. v. Spink*, 517 U.S. 882, 883 (1996) (holding that the act of amending a defined pension plan was not a fiduciary act); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-45 (1999) (holding that amending or terminating a pension plan is not a fiduciary decision).

36. See Muir & Stein, *supra* note 35, at 29.

37. § 1002(21)(A)(ii).

38. Nagle, *ERISA and the Fiduciary*, *supra* note 32.

39. § 1002(21)(A).

40. Nagle, *ERISA and the Fiduciary*, *supra* note 32 (discussing the different versions of the fiduciary definition and how the broader definition has provided greater protections); Remarks of Peter Stris & Henry Rose, in Panel Discussion, *ERISA and the Fiduciary*, in Symposi-

Both of the foregoing approaches consider the scope of the fiduciary provisions by integrating the language within the definition. As I will discuss below in the context of remedies, the Supreme Court has in multiple cases interpreted ERISA provisions by integrating them with other provisions in the statute.⁴¹ Elsewhere, a co-author and I explain that the definition of when an employer acts as a fiduciary may appropriately be interpreted with reference to other provisions in the statute so as to avoid undermining basic protections.⁴² Briefly, current doctrine accords plan sponsors broad powers in establishing the terms of the plan.⁴³ The core of that doctrine is correct; employers choose whether to sponsor plans and largely should have control over plan terms. The doctrine, however, has developed into a largely formalistic inquiry, which fails to consider the balance between employer and employee interests.⁴⁴ A more nuanced version of the doctrine would consider plan terms in light of ERISA's substantive fiduciary requirements, its noninterference provision, and its sweeping preemption provision.⁴⁵

II. ERISA AS CONTRACT OR TRUST LAW

ERISA contains fiduciary standards that are derived from trust law.⁴⁶ Therefore, ERISA is a trust law statute. Simple, right? That seemingly simple logic, however, fails to appreciate the complexity of the intersection of the fiduciary provisions with the rest of the statute. After all, the Symposium participants stated that their first focus was not on fiduciary provisions.⁴⁷ Rather, it was to ensure that employers continued to develop voluntary benefit promises for their workers.⁴⁸ From that perspective, the statute begins to sound as though

um, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 359, 362 (2014) (discussing the push for a more limited definition of fiduciary).

41. See *infra* Part III.

42. See Muir & Stein, *supra* note 35, at 3.

43. *Id.* at 4, 52.

44. *Id.* at 3, 53–56.

45. See *id.* at 3–5.

46. *Varity Co. v. Howe*, 516 U.S. 489, 502 (1996).

47. Rose, *ERISA and the Fiduciary*, *supra* note 9 (stating that the “[fiduciary provision] was treated more cavalierly”).

48. Remarks of Daniel Halperin, in Panel Discussion, *Some New Ideas and Some New Bottles: Tax and Minimum Standards in ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 385, 399–400 (2014) (noting that the focus of ERISA was to allow employers discretion in making benefit promises, but to ensure the promises were kept); see also Remarks of Russell Mueller, in Panel Discussion, *Benefit Some New Ideas and Some New Bottles: Tax and Minimum Standards in ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 385, 400 (2014) (discussing ERISA's remedial functions).

it is based in contract law because it sets parameters on the basic terms of the benefits contract and makes those terms enforceable.⁴⁹

The tension between contract law and trust law becomes especially important when it comes to claims for denied benefits. One recent decision should suffice here as an example. In *Killian v. Concert Health Plan*, the Seventh Circuit sat en banc to decide whether Concert Health Plan Insurance Company (Concert), the insurer and claims administrator, was required to pay the cost of out-of-network surgery for Susan Killian, who was on the threshold of dying from brain cancer when she received the surgery.⁵⁰ Mrs. Killian's physician determined in 2006 that she only had a few days to live.⁵¹ The Killians sought a second opinion and found a specialist who could remove the tumor, which extended her life by a few months.⁵² Prior to the surgery, Mr. Killian had at least two conversations with Concert representatives.⁵³ Neither representative advised him that the costs associated with the surgery would not be covered under the plan.⁵⁴ One told him to "go ahead with whatever had to be done."⁵⁵ The other simply said "okay" in response to Mr. Killian's call conveying that his wife was about to be admitted for surgery.⁵⁶

Later, Concert refused to cover approximately \$80,000 in medical fees associated with Mrs. Killian's surgery because the provider was not a member of Concert's network.⁵⁷ The majority of the en banc Seventh Circuit decided that these facts could be the basis for a fiduciary breach claim and, if so, that the statute may provide a remedy.⁵⁸

The majority grounded its finding of potential liability squarely on ERISA's fiduciary provisions, which require fiduciaries to act

[S]olely in the interest of the participants and beneficiaries and . . . 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.⁵⁹

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

50. 742 F.3d 651, 654 (7th Cir. 2013) (en banc).

51. *Id.* at 655.

52. *Id.*

53. *Id.* at 656.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 671.

59. *Id.* at 664 (quoting ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2012)).

Those standards include a duty for the fiduciary to convey information that is material to the situation even if the participant or beneficiary fails to ask exactly the right questions.⁶⁰ This ensures that individuals who are inexperienced with benefits terminology, or are in the midst of dealing with a serious health situation, do not lose benefits because of technical noncompliance.

Judge Posner concurred in the result but not the analysis.⁶¹ He argued that the claim was one for "benefits due . . . under the [plan] terms."⁶² And according to Judge Posner, "such a suit treats the plan as a contract," not as a fiduciary matter.⁶³ In his view, this was an easy case for the application of contract principles.⁶⁴ Concert failed to provide Mr. Killian with appropriate information that he could use to determine whether the surgical costs would be covered.⁶⁵ In fact, when asked, a representative of Concert told Mr. Killian that his wife could go ahead with the treatment.⁶⁶ Concert therefore failed to fulfill its contractual duty of good faith performance.⁶⁷ From a policy perspective, Judge Posner objected to grounding the decision on equitable principles, primarily because he was not persuaded that doing so would reduce uncertainty in benefits claims.⁶⁸

The Symposium proceedings provide insight on the statute's use of contract and trust principles. Participants explained ERISA's fiduciary protections as being additive to the substantive statutory provisions that limit the discretion employers have in establishing benefit plan terms.⁶⁹ This implies that courts should not limit claimants to stating a contract cause of action if a fiduciary claim is also consistent with the statutory terms.

Fiduciary-based concepts in ERISA extend beyond the definition of who is a fiduciary and the fiduciary duties of loyalty, prudence, and diversification. ERISA requires that most plan assets be held in trust.⁷⁰ It makes fiduciaries personally liable for their breaches, and

60. *Id.* at 665.

61. *Id.* at 673 (Posner, J., concurring).

62. *Id.* at 674 (quoting ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2012)).

63. *Id.*

64. *Id.* at 675-77.

65. *Id.* at 676.

66. *Id.*

67. *Id.*

68. *Id.* at 677.

69. See Cummings, *ERISA and the Fiduciary*, *supra* note 6, at 360-61 ("The big fight was over funding and vesting and plan termination insurance and all the definitions and rules and so on. And everybody was copying each other on the fiduciary and enforcement provisions. You got a new idea? Staple it in. It just grew and grew and grew and grew.").

70. ERISA § 403(a), 29 U.S.C. § 1103(a) (2012).

its remedial framework authorizes claims for equitable relief.⁷¹ So, the *Killian* Court got it right. When a plan fiduciary fails to provide information about the plan that the fiduciary knows is necessary to understand the plan's terms, the fiduciary breach claim should go forward. In *Killian*, the plan did not provide for payment of the out-of-network benefits so the claim for benefits due would fail. But from a remedial standpoint, a court can award "appropriate equitable relief"⁷² for the fiduciary breach, which, as discussed below, should allow Mrs. Killian's estate to be made whole.

As the *Killian* case shows, how the contract and trust aspects of ERISA are rationalized is of more than just theoretical interest. It affects the right to jury trial—something long held not to be available in ERISA cases.⁷³ It may be critical to the analysis of claims for benefits. It affects the right of employers to establish plan terms that are inconsistent with broadly applicable equitable principles.⁷⁴ And, it determines the standard—either a contract standard or the more demanding fiduciary standard—to which the plan actor is held.

A complete discussion of ERISA's fiduciary standards is beyond the scope of this Reflection. I cannot resist, however, highlighting one story told by Mr. Cummings about the inclusion of ERISA section 404(c). The current importance of the provision may be best illustrated by realizing that, during the discussion, Assistant Secretary Borzi declared that if there was one provision that she would have omitted from ERISA, it would have been section 404(c).⁷⁵ As a general matter, the provision protects plan sponsors and others associated with defined contribution plans from fiduciary liability for investment decisions made by plan participants or beneficiaries.⁷⁶ In the Assistant Secretary's view, section 404(c) contributed to the "demise of the DB [Defined Benefit] plan"⁷⁷ and shifted investment risk from plan sponsors to employees.⁷⁸

The story behind the provision shows the extent to which no one in 1974 anticipated its eventual importance. According to Mr.

71. ERISA § 409(a), 29 U.S.C. § 1109(a) (2012).

72. ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (2012).

73. Donald T. Bogan, *ERISA: Re-Thinking Firestone in Light of Great-West — Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 639 (2004).

74. See *US Airways v. McCutchen*, 133 S. Ct. 1537, 1544–48 (2013) (finding that clear plan terms may preclude application of both the double-recovery rule and the common-fund doctrine).

75. Remarks of Phyllis Borzi in Panel Discussion, *ERISA and the Fiduciary*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 359, 370 (2014).

76. See ERISA § 404(c), 29 U.S.C. § 1104(c) (2012).

77. Borzi, *ERISA and the Fiduciary*, *supra* note 75, at 370.

78. See *id.*

Cummings, Mr. John Lippman— who was affiliated with an entity in Newport Beach, California that ran self-directed defined contribution plans—sought to have the section included in the bill.⁷⁹ The plans typically were sponsored by small professional businesses, such as doctors' and dentists' offices.⁸⁰ The individual professionals were happy to shelter their income from taxation, but wanted to make their own investment decisions without disclosing the actual investments to other members of the profit-sharing plan.⁸¹ Mr. Lippman lobbied for what became section 404(c) to ensure that those profit-sharing plans could retain their structure.⁸² He also lobbied for the individual's ability to keep investments confidential without fiduciary liability for the plan sponsor or participants.⁸³

III. REMEDIES FOR FIDUCIARY BREACH

Appropriate remedies are the third item required for a fully functioning fiduciary scheme. In Part I, I reflected on ERISA's definition of a fiduciary. In Part II, I considered the controversy over whether trust or contract principles govern claims. A definition of appropriate breadth and the application of fiduciary standards are necessary for a functioning fiduciary framework. However, fiduciary protections are illusory if no remedy is available for breach. As in the discussions above, here the integration of the statutory provisions plays a role in interpreting these integral provisions to fiduciary claims.

The Supreme Court first referred to ERISA as a "comprehensive and reticulated statute"⁸⁴ in 1980 when deciding whether particular pension plan benefits were forfeitable. Since then, the Court has used that phrase in five cases involving the scope of relief available to ERISA plaintiffs.⁸⁵

79. Cummings, *ERISA and the Fiduciary*, *supra* note 6, at 368–69.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

84. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

85. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 258 (2008) (holding that ERISA § 502(a)(2) authorizes a remedy for fiduciary breaches in individual account plans); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (rejecting claim by insurance company for money damages under ERISA § 1132(a)(3)); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000) (holding that ERISA § 1132(a)(3) provides the basis for a claim against non-fiduciaries involved in a prohibited transaction); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (denying a claim for monetary damages brought under ERISA § 1132(a)(3) against a non-fiduciary); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (rejecting a claim under ERISA § 1132(a)(2) for extracontractual damages).

The statute's remedial framework is detailed. Section 502 lists ten categories of claims for which civil actions may be brought.⁸⁶ Many of those categories have subsections.⁸⁷ Instead of integrating the remedial text with the principles motivating the statute, the Court has compared the wording at issue with other subsections of section 502, other sections of ERISA, and even other statutes. For example, in *Mertens v. Hewitt Association*, the Supreme Court considered section 502(a)(3)(B)'s authorization of "appropriate equitable relief."⁸⁸ The Court contrasted that wording with text found elsewhere in the statute that provides for "other equitable or remedial relief."⁸⁹ In an opinion authored by Justice Scalia, the Court declared that the reference only to equitable relief in section 502(a)(3) must reflect an intent to provide something less than the full extent of relief that the common law provided for in trust cases.⁹⁰ The Court held that the section provides only for traditional equitable relief, which the Court distinguished from all equitable relief.⁹¹

I have been among the many commentators who have criticized this interpretation.⁹² While he could not have been the only person responsible, I commend Mr. Robert Nagle for admitting that he "feel[s] a certain mea culpa in all this because [he] would say drafting carelessness gave Scalia the opening to do what he did."⁹³ Mr. Nagle recalled that ERISA section 502(a)(3) "was clearly intended to be a total catchall provision and to provide any sort of appropriate relief."⁹⁴ I doubt anyone in the crowd was surprised that the drafters did not break out treatises on the scope of remedies back before the merger of law and equity when engaging in the final push to get President Ford to sign the legislation. And I was among those feeling vindicated by Mr. Nagle's perspective when he said,

I keep thinking this [referring to the distinction drawn by the *Mertens* Court between equitable relief and traditional equitable relief] is ridiculous. If only we had thought to put

86. ERISA § 502(a), 29 U.S.C. § 1132(a) (2012). Section 501 provides for criminal penalties. ERISA § 501(a), 29 U.S.C. § 1131(a).

87. ERISA § 502(a), 29 U.S.C. § 1132(a).

88. *Mertens*, 508 U.S. at 253.

89. *Id.* at 252-53 (citing ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2012)).

90. *Id.* at 257-58.

91. *Id.* at 260-61 (citing ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012)).

92. See Muir, *supra* note 1.

93. See Panel Remarks of Robert Nagle, in Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 421 (2014).

94. *Id.*

legal in there, this whole thing would have been avoided [I]f anybody had said in our drafting [round], "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.⁹⁵

I took two things away from Mr. Nagle's words. First, I would like to write a law review article that engages in the following thought experiment: How would U.S. employer-sponsored benefit plans be different if the drafters had included the words "legal" and "equitable" instead of just "equitable" in ERISA section 502(a)(3)?⁹⁶ My second thought is that, given the way the issue discussed in Part I has developed, we might still be left with confusion about when claims should be categorized as equitable or legal.⁹⁷

CONCLUSION

In 1974, Congress came together to pass ERISA in time for President Ford to sign it on Labor Day.⁹⁸ Its enactment signaled to a wary country, in the wake of the Watergate scandal and the subsequent resignation of President Nixon, that the political process still functioned. Almost forty years later, ERISA still functions well, but I have grave concerns that the same can be said of the current political process. Despite its imperfections, ERISA continues to protect U.S. workers against the kind of benefit losses that enraged the country and focused Congress on the problem.⁹⁹ In my view, ERISA's success in significant measure rests on its fiduciary provisions, which are integral to keeping fiduciaries focused on the basics: loyalty and prudence.

However, integrating the statute's fiduciary provisions with the rest of ERISA's "comprehensive and reticulated" framework has been a challenge for the courts.¹⁰⁰ One lesson learned from the

95. *Id.* at 422.

96. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012).

97. In addressing claims for benefit eligibility, Mr. Frank Cummings indicated that
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 . . . 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.

Remarks of Frank Cummings, in Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 414 (2014).

98. See WOOTEN, *supra* note 2, at 1.

99. *Id.* at 51–79.

100. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

“ERISA at 40” Symposium is that those involved in the statute’s enactment saw their work in human terms. Mr. Jack Sheehan told us that

What drove this thing finally is that then the individual worker became aware of the vulnerability of the plan and that it meant something to him particularly. . . . [T]he drive for pension reform did not come from the specialists, did not come from the labor institution, but came from the people working in these plants.¹⁰¹

Others similarly reminded us of the very real cost to individuals when benefit promises are not kept:

I kept seeing the same thing, which was that you could have a worker work a very long time expecting to get a pension—not just expecting, reasonably expecting to get a pension and he would end up not getting it and there were about a half a dozen ways that . . . could work. You could have a disappointed, reasonable expectation after working a long time.¹⁰²

[The] hearings [about pre-ERISA pensions] were held in Democratic districts, Republican districts, the issues were the same. I mean, I had to excuse myself from a number of them, I just have such a soft heart. Listening to people have their entire future taken away from them, there was a need and there was a recognized need. [T]he hearings got the attention of the politicians.¹⁰³

“[W]hy don’t we do pension reform” because these people are really getting screwed.¹⁰⁴

The courts would do well to consider these perspectives. Far from being “incredibly boring stuff that no one can love, and only a lawyer can understand,”¹⁰⁵ ERISA plays an integral role in protecting the reasonable benefits expectations of U.S. workers. Those who participated in ERISA’s enactment thought in terms of the toll that ben-

101. Mueller, *Making Sausage*, *supra* note 4, at 310.

102. *Id.*

103. *Id.* at 306.

104. Remarks of William Kilberg, in Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291, 307–08 (2014).

105. David Lat, *Quote of the Day: The New Republic Isn’t That Glossy*, ABOVE THE LAW (Sept. 18, 2012, 5:55 PM), <http://abovethelaw.com/2012/09/quote-of-the-day-the-new-republic-isnt-that-glossy/>.

efit instability imposed on the workers of the time. Today's workers deserve no less consideration.