PANEL 4: ERISA AND THE FIDUCIARY

MODERATORS:

Dana Muir, Arthur F. Thurnau Professor of Business Law, Stephen M. Ross School of Business, University of Michigan

Robert Eccles, Partner, O'Melveny & Myers

Peter Stris, Partner, Stris & Maher

PANELISTS:

Henry Rose, past General Counsel, Pension Benefit Guaranty Corporation

Frank Cummings, past Chief of Staff to Senator Jacob Javits

Robert Nagle, past Executive Director, Pension Benefit Guaranty Corporation

Dana Muir: I've been asked to start us off with the fiduciary panel. This flows very nicely after David's comments in the last panel about the importance of fiduciaries. I think all of our panelists have been up here before so you're all familiar with who they are. I'm going to turn this over to my colleague Peter Stris to start out with questions on the definition of fiduciary.

Peter Stris: Hi everyone. I've been very amused about all the discussion about age because I was born in 1975, and so. [Laughter]

Dana Muir: You baby.

Peter Stris: I know. What really amused me is as someone who litigates Title I cases, fiduciary cases, including a few before the Supreme Court,[1] when I heard the first panel and I heard Henry talk about how there wasn't much consideration of fiduciary standards in the early bills and I heard—Frank [Cummings], you were talking about how these fiduciary issues were, I think you said, viewed as a diversion intended to kill vesting and funding reforms. This is pretty interesting to me, because in many respects I think of fights over

1. *See, e.g.*, Conkright v. Frommert, 559 U.S. 506 (2010); LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248 (2008); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006).

the definition of fiduciary and what constitutes a fiduciary breach as a centerpiece of litigation today, at least involving defined contribution plans.

I wanted to start by throwing it over to you guys to ask what types of fiduciary misconduct were being targeted, in your opinion, by whoever was putting these terms in the legislation and was it all in the context of asset stewardship? Or was there any thinking at all about duties involving the disclosure to participants, the structuring of plans, etc.?

Frank Cummings: The fact that the handling of the bill was a diversion, politically, doesn't mean that the provision was unimportant. It was critically important. It's just that it was not really controversial. It was very important. But your question is—anyone who had litigated controversies in the pension area before 1974 would have faced all of the questions that came up in the pre-trial conference in the Studebaker case and in many other cases. The people with the say—with the discretion—weren't trustees; and fiduciaries—outside of a few technical areas—fiduciaries were trustees; and what this statute did was to incorporate the equity law of trusts, put it in ERISA, and then redefine whom it applied to—to a fiduciary—and a fiduciary was anyone with discretion to do anything that was really important, that made a difference.

You get into the definition in 3(21)(A) of ERISA[2] and you can see it there. So, yes, it was understood that the plan administrator was a fiduciary, he had all the disclosure duties, and in fact the definition of "party in interest" includes a specific statement that the plan administrator is a fiduciary.[3] Anyone with money management, anyone in charge of plan administration was a fiduciary because before ERISA none of those people could be reached, but you've got to remember that that section was drafted before the issue of preemption was resolved, so it wasn't altogether clear whether benefit claims were really going to arise under federal or state law, and if it was,

2. 29 U.S.C. § 1002(21)(A) (2012) ("Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.").

3. *Id.* at § 1002(14) ("The term 'party in interest' means, as to an employee benefit plan—(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan . . . .").

then you'd take a look at 503 of ERISA,[4] which requires a full and fair review of a claims denial by a named fiduciary of the plan. So a claims decision is a fiduciary function.

None of that was terribly controversial during the development of the statute, or if it was, I didn't know about it, because there were a lot of controversial things like, "Shall this pass?" which was a big one. 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. But the kinds of questions that we now litigate or have litigated, [that] Bob [Eccles] has litigated many years, many of them never occurred to anybody, but I do remember in the Studebaker pre-trial conference, the judge saying, "Who is suing whom for what and what law are we under?" I know that from my perspective this was not a contract claim.

Peter Stris: Bob and Henry, did you have the same perspective as it was going on?

Robert Nagle: Not exactly. [Laughter]

There was a little more disconnect for a while in getting there. The bill that was reported by the Senate Labor Committee and became part of what was passed as H.R. 4200, the bill with the Senate Finance Committee, included a much different definition of fiduciary than we have today.[5] Our version, and having been with the Labor Committee I look back on what we did with a little surprise that we were so narrow, but it only applied essentially to funded plans and to control or management of plan assets.

That's not entirely surprising because after all it was supposed misuses of plan assets which had given rise to most of the concerns that had existed about plan administration in the past. Nonetheless, under principles of trust law, while trustees are primarily responsible for managing the assets that are entrusted to them, they also have other duties to the beneficiaries of their trust. The Senate-

4. 29 U.S.C. § 1133 (2012).

5. *See* H.R. 4200, 93d Cong. § 502(a) (as passed by Senate, Sept. 19 1973) (adding new subsection 3(25) to the WPPDA), *reprinted in* 2 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 2030 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY] (defining "fiduciary" as "any person who exercises any power of control, management, or disposition with respect to any moneys or other property of any employee benefit fund, or has authority or responsibility to do so").

passed bill was very narrow. The House-passed bill—and this is one area where I think the House had the better of us, there are not too many areas I think that, but this one—provided not only that the fiduciary responsibility would extend to control and management of plan assets but also to plan administration and plan management, reaching people who had discretionary authority or control with respect to those matters.[6] That was what the conferees adopted, and it makes a world of difference because I think if the Senate version had prevailed we would not have fiduciary suits involving unfunded welfare plans. We would not have the actions that we now have for fiduciary misrepresentation or failure to adequately disclose. Those are areas, which after all have become a major part of fiduciary litigation.

Frank Cummings: I retract. He's right.

Henry Rose: The suggestion that the fiduciary provisions didn't constitute or generate much controversy, I didn't mean that it was not important. A lot of people thought it was important, but most of them accepted what was in at least the later versions of the legislation. It's interesting that in the earlier bills it was treated more cavalierly. For example, in the 1967 version of the Javits bill,[7] effectively the fiduciary issues would be treated under state law, not federal law. That was certainly a bigger change later on.

Peter Stris: Were there any stakeholders pushing for a more limited definition or a different definition of fiduciary?

Henry Rose: Well, I can remember representatives of certain interests wanting to tweak the language we were dealing with, but there was not much of that, frankly. I think we just got it pretty right. Frankly, I think that's one of the successes of ERISA, is the way we set it up, the fiduciary provision—and furthermore I think it's one of the successes of ERISA to this day in terms of the litigation. Some of the other parts of ERISA I think have not been very successful.

Frank Cummings: Keep in mind, however, this was done before the discovery of women, and it only applies to reasonably prudent men.

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6. *See* H.R. 2, 93d Cong. § 3(21) (as passed by House, Feb. 28, 1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3910.

7. Pension and Employee Benefits Act of 1967, S. 1103, 90th Cong. § 507 (1967).

Russell Mueller [from the gallery]: Let me add a footnote to what Bob Nagle and everyone has said on this. Frank brought it up, and I remembered that example, by the way, where Frank went down to the courthouse in Studebaker. So in the statute, how are you going to assign at least one person with actual responsibility? So look at the House bill and guess what. There's a named fiduciary.[8] Others can be fiduciaries also, of course, but there has to be a named fiduciary. So the board of trustees sits around and says, "Wow, we don't know what to do about this." But then they make that decision: who's the named fiduciary? Well, there's going to be a named fiduciary because they have to name them—the statute says there has to be one and if they don't name one it is going to be the company.[9] But of course others can tell you who they are today—and also the fiduciaries, too. A person who has so much influence over that plan that they exercise discretionary authority, they're liable, and I think this requirement about needing a fiduciary turned around the asset management of multiemployer plans in particular, but single employer plans as well.

Phyllis Borzi [from the gallery]: Today we hear over and over again the excuse that people use when we go after these other fiduciaries, what they say is, "Yeah, I gave advice, but how could I possibly have known that anybody would rely on it?" Even if they have a contract in which they agree as the investment consultant to act as a fiduciary, "How could anybody possibly have relied on us?" As a matter of fact, there was an anecdote where the chair of a pension committee, who happened to be the CFO of the company, said, "No reasonable person would have paid any attention to what I thought, because what do I know?"

Henry Rose: There's one aspect of the fiduciary law with regard to employee benefit plans that has been overlooked a lot, I think, and that is that there are literally hundreds of cases, maybe thousands, that involved fiduciary issues regarding employee benefit plans, both before ERISA and after ERISA—and these are federal cases I'm referring to—and that was based on Section 302(c)(5) of the Taft-Hartley Act, 1947.[10] It was a strange development and those cases—and you can look at that statute, by the way, what that stat-

8. *See* H.R. 2 § 111(a)(1), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3947–49.
9. *Id.* §§ 3(16)(B), 111(a)(1), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3907–08, 3987–48.
10. Labor Management Relations (Taft-Hartley) Act § 302(c)(5), 29 U.S.C. § 186(c)(5) (2012).

ute says, 302. Section 302 is a criminal statute which says that employers should not give bribes to union representatives, and union representatives shall not take payments from the employer.[11] It is really an anti-bribery statute and there are criminal penalties for violations. There is an exception, though, for payments to "a trust fund established . . . for the sole and exclusive benefit of the employees of [the] employer."[12]

And out of that exception the federal courts applied fiduciary standards to multiemployer plans for decades, even after the enactment of ERISA. They did that until a case that I was involved in, argued in 1993, in the Supreme Court—and that's the *Demisay* case[13]—it came to a stop then. But until then there were a line of cases involving fiduciary issues with regard to employee benefit plans perhaps by the thousands, between 1947 and 1993. They were parallel. You would think that after ERISA they would have stopped, but they didn't. They just kept on being decided, ignoring ERISA for the most part. Not all the federal courts did, but lots of them did.

Dana Muir: I think we're going to switch gears a little bit here and move on. I have to admit that we had a series of topics we wanted to talk about, one of them was prohibited transactions. We fought for who would have to talk about that and luckily Bob Eccles volunteered, so I think he may have some PT [prohibited transactions] questions for you and perhaps it will be a way of following up on some of the discussion we had earlier.

Robert Eccles: So I drew the losing card, but I'll play it anyway. I'll play off of what was said and partially disavowed. There wasn't a lot of internal controversy about fiduciary principles in general, they were established in trust law and that's sort of what ERISA generally incorporated. There was some controversy, though, about prohibited transactions and if one of you would like to carry the story or force me to get it out of you, I'd welcome it.

11. *Id.* at (a)(1)–(2) ("Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations. It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—(1) to any representative of any of his employees who are employed in an industry affecting commerce; or (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . . .").

12. *Id.* at (c)(5).

13. Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993).

Robert Nagle: Ask your question, Bob.

Henry Rose: Yeah.

Robert Eccles: What was going on there?

Phyllis Borzi [from the gallery]: What were you thinking about?

Frank Cummings: I can give you my memory—

Robert Eccles: I mean, generally there was, I believe the House bill preserved the existing rule for—

Robert Nagle: What the issue was with respect to transactions between a plan and a party in interest was whether those should be permitted or how should they be restricted. The House bill provided that transactions between a plan and a party-in-interest would be alright as long as they were made for adequate consideration.[14] In contrast, the Senate bill prohibited them as a baseline, but there were statutory exemptions provided and then there was a provision for the Secretary of Labor and the IRS to grant exceptions in individual cases where the case could be made that they were reasonable and proper and protective of participants.[15] So this became one of the major points of conflict between the House and the Senate versions when we went to conference. The Senate prevailed. I think there were several factors that led to that. One was that Senators [Harrison] Williams and [Jacob] Javits were adamantly in favor of the Senate version. The administration strongly supported the Senate version,[16] and I think the tax committees did as well. Interestingly, the administration made a couple of points.

One was that it would be very difficult to enforce the House version, because the Labor Department, if it was going to challenge a prohibited transaction, would have the burden of showing that the consideration was not adequate and that wasn't going to be an easy

14. H.R. 2, 93d Cong. § 111(b)(2)(D) & (E) (as passed by House, Feb. 28, 1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3951.

15. H.R. 2, 93d Cong. § 511 (as passed by Senate, Mar. 4, 1974) (adding new § 15(b)(3)–(4), (c) to the Welfare and Pension Plans Disclosure Act), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3775-79.

16. *See* Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform (April 1974), 77–78, *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 5122–23.

thing to do. The other thing they pointed out was that the House version would permit a certain amount of tax sheltering and they spelled out some examples, which I'm not clear on now, of how employers, especially small employers, might transfer property for consideration to the plan and then be able to manage that property in the shelter of the exempt plan.

The administration made a point of that, which I think resonated very well with the tax people. Another factor that's related to the tax side is—you've heard mentioned this morning a person name Larry Woodworth. Larry Woodworth was the Chief of Staff of the Joint Tax Committee, which played a rather unique role in the legislation. The committee serves both the Senate Finance Committee and the House Ways and Means Committee on all Internal Revenue Code matters. The committee worked both sides and it had a very well-regarded staff and Larry Woodworth in particular was perfectly suited, in my view, for the role that he played at the time. He had the trust of members in both houses and members of both parties. Larry himself strongly favored the stronger prohibited transaction rules and I have to think that that held a lot of sway with his members. So, the end result was that the Senate view of the more stringent prohibited transaction rules prevailed.

Henry Rose: And Larry Woodworth had a lot of influence in what was considered in the actual drafting of the language in ERISA. The conference committee lasted for six weeks among the members of the Congress, but they didn't actually draft any language, they just identified the issues that divided the Senate and the House. The actual drafting had to be done afterward. Larry Woodworth was the chairman of the group of twenty of us that basically did the drafting, or giving the instructions to legislative counsel who actually physically did the actual drafting and every night and every morning there was a new draft in front of us. I think Larry also had a very important role in deciding what issues we would discuss in that group and so he played a very important role.

Frank Cummings: Long before those fights took place, the notion of a prohibited transaction in the first place was part of the strategy of putting the whole bill—not part of the bill, the whole bill—in the Internal Revenue Code. The idea was if you were going to have fiduciary behavior standards, how in the devil could you put that in the Internal Revenue Code? As I recall someone had remembered that the private foundation rules, which preceded ERISA by fifteen years—was it five years? Well, it was a while.

But at any rate, that was the model for these prohibited transaction provisions but the provisions were really invented for the purpose of preempting the Labor Committee—so it was really part and parcel of whether the Labor or Tax Committee was going to get control of the legislation, and of course control in the tax-writing committees meant you weren't going to get a bill. So later, after they had developed a lot of this for the Internal Revenue Code, then you had to go back and fit that into Title I, but not all of the tax-prohibited transactions got back into Title I.

Then Russell Long decided he was going to get his pound of flesh, so he put all of his ESOP [Employee Stock Ownership Plan] stuff in there and once you put all the ESOP stuff in there then of course you had to deal with that because it was a flat-out prohibited transaction unless it was exempt, so all of this was like a dog chasing its tail going around and around and around and around, but from our perspective early on we didn't like Title II at all, and we didn't like prohibited transactions, either. We thought prudence was quite sufficient, thank you very much, and we thought by and large it would have worked, but it got more and more complicated and I began to get dizzy so I just turned to other things.

Al Lurie [from the gallery]: I have to tell you. In my attic the choice piece of memorabilia is a blown-up copy of a table of contents, you may have been at that party after they enacted ERISA and in the middle of this blown-up copy of the table of contents there is a circle actually signed by Larry Woodworth—the real target—it was in the form of a dartboard we were throwing at. It's up in my attic, I was hoping to give it to his foundation but they have never come for it, so if anybody would like a piece of memorabilia you can have it.

Henry Rose: The indication of how important the position he held was that when Carter was elected president the appointment of Larry Woodworth as assistant secretary of Treasury was one of the first appointments he ever made.

Robert Eccles: Let me ask you one more prohibited transaction question. An analogous question got asked this morning by Phyllis [Borzi], I think. IRAs. The provisions in the Internal Revenue Code apply to IRAs also, but not those in Title I. Was there any express consideration of how that was going to work out?

Robert Nagle: I don't recall any discussion about IRAs at that time in the context of the prohibited transaction rules. From the Labor [Committee] side, we sort of regarded the IRA issues as a tax thing and we really didn't get ourselves very much involved in it. I understood that the prohibited transaction rules were intended to apply to IRAs, but I don't ever recall very much attention being given at all, at that time to that subject.

Henry Rose: That's my recollection also, that there was considerable discussion about prohibited transactions but not specifically with respect to IRAs.

Phyllis Borzi [from the gallery]: Which is probably why the marketplace acts like the conflicts rules don't apply to them today.

Dana Muir: I'd like to take us on another diversion or a different direction here and ask about 404(c).[17] My question is really for Frank to start us off and tell us a story about 404(c).

Frank Cummings: John Lippman was vice president of an outfit [Certified Plans, Inc.] in Newport Beach, California that was administering self-directed defined contribution plans. John was everywhere, everyone got lobbied by him. I'm sure all of you got hit by John. They had this big company, which ultimately became the pension branch of ADP, or Automatic Data Processing pension services.

And John would run around in California to these dentists and say, "Why don't you set up this profit-sharing plan thing? You can shelter some of your dental income." And they would say, "Yeah, but if it's an employer plan I don't want to tell my partners, much less my nurse, what I'm investing in." So John would insulate the dentist from the other guys in the enterprise and each one would have a separate account and the dentist could direct the trustee on how he wanted it invested specifically.

And it was really quite a booming enterprise and he was advocating the language that ultimately ended up in 404(c).[18] And I thought, "So what? It's alright with me." I never thought that it would be used after DB [defined benefit] plans got slaughtered by DC [defined contribution] plans, that it would become such a big deal in

17. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 404(c), now codified at 29 U.S.C. § 1104(c)(1)(A) (2012).

18. In a telephone interview, John Lippman reported that the language of 404(c) was first written on a cocktail napkin at a lunch with Mike Gordon in 1973 or 1974.

401(k)s because of course there was no 401(k) at the time and most of the plans were DB plans.

But Certified Plans was administering self-directed defined contribution plans and that's where it came from I think. It was John's implacable lobbying which did it. Did you encounter him?

Robert Nagle: No, I think you were taking care of him because that was sort of unsettling for me. [Laughter] At the time there were very few defined contribution plans and what ones there were, were mainly—there were no 401(k)s, as Frank said—what ones there were, were mainly profit-sharing plans and they were not ones where you could self-direct the investments, they were ones where the employer invested the money or had a bank or insurance company do that. So 404(c) was just not something that we ever thought would be very significant, it's certainly not a provision that we ever worried about at all at the time.

Frank Cummings: And look what we have wrought.

Norman Stein [from the gallery]: Is John still alive?

Frank Cummings: Oh yeah, he's out in Newport Beach.

Peter Stris: I'm going to go home back to Southern California and find him. [Laughter]

Dana Muir: Henry, any comments on that, or . . . ?

Henry Rose: No, I have nothing to add. I didn't know him.
Dana Muir: And, Phyllis, any thoughts on 404(c)?

Phyllis Borzi [from the gallery]: You bet. [Laughter]

From time to time reporters ask me particularly in these historic years of—you know, the twenty-fifth anniversary, the thirtieth anniversary, and now we're coming up to the fortieth anniversary of ERISA—because I came to the Hill after ERISA was passed—but if I were around when ERISA passed, is there any one thing that I would have omitted? It's 404(c). If I ruled the world and could make one surgical amendment to ERISA, it would be eliminating 404(c).

The discussion, rather heated, that we had earlier this morning about what the causes of the demise of the DB plan[19] were—there were two significant omissions from the discussion. The more than one nail, but multiple nails, in the coffin, caused by the accounting rules, and 404(c). And now that I know the story of how it got in there, I hate it even more, but there is no one section of ERISA that's caused more problems in terms of shifting the risk and turning what should have been a pension system into whatever we have now because of 404(c)—and the creation of 401(k) plans in 1978 just multiplied those problems. If you think about the logic—and when I was on the Hill lots of times people would come to talk to Russell [Mueller] and me and other people about how important this was and the Department of Labor was busy working on its 404(c) regulations—people say, "Look, these poor small employers, they can't possibly be able to figure out this complicated asset management stuff, so if the entrepreneur who started the business is too stupid to figure this out, let's give it to the workers because they're a heck of a lot smarter." It's just a completely nonsensical provision and I wish that I had the power to excise it.

Frank Cummings: Can I just rise one more time in defense of 404(c). Along about that time, I was off the Hill, I was representing a bank here in Philadelphia, which was once a great, great bank. It's now a hotel. Girard Trust, which was a huge bank here in Philadelphia, is now the Ritz Carlton hotel and there's a restaurant in there called the Vault, which is inside their bank vault. In conversations with Girard and certain other bankers, they said, "Look, let us try to explain to you how our trust department works. We have two fee schedules, one where we think and one where we don't. If we have to think about every investment that you send us, that you can direct us to make in your account, we have to pay people to think and those are our expensive people. If we have to just look at the direction and make sure that it's clear and understandable and at least reasonable on its face, then we have a very low fee schedule because we're not doing any thinking; it's a clerical function, more or less. If you make us second-guess every one of those directions, you're just raising the cost of the plan. We're going to approve 99% of it anyway and in the meantime the plan is going to pay a big expense to have us think 1% of the time."

19. *See* Exchange Between Damon Silvers, Russell Mueller, Jack Sheehan & Robert Nagle *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, 310–17 (2014).

The argument, when first presented, strikes you as very reasonable. There are probably reasons you can think of why it shouldn't be done, why everyone should have to second-guess every instruction that crosses their desk, but there are also pretty damn good reasons not to and it's just as simple as saying, "That's a no-brainer." I'm sure that was on our minds, too.

Dana Muir: Again, we have a good transition because I think we want to talk about plan administration and the duty of prudence. I know it would be much better if it were a prudent woman standard.

Frank Cummings: We hadn't discovered women yet in 1974.

Dana Muir: We may end with that, but first we're going to talk about plan administration, I think, and that's Peter.

Peter Stris: Frank, you touched upon it a little bit before so I kind of just want to throw it back for you to talk a little more about the codification of general fiduciary standards as opposed to—I mean, I understand prohibited transactions being the exception—outside of that world, any insight that you can provide?

Frank Cummings: Yes. The trouble with the way courts—even today—approach a benefit claim is they pretend that this is a contract claim (and that the plaintiff, a poor slob who was entitled to a benefit under the plan, which the poor slob didn't even know about, didn't know there was a plan, has never read the plan, but the plan says what it says) is that if you approach it as a contract claim with all the elements of a cause of action under state law for contract—or for acceptance, consideration, reliance, all that rigmarole—you come out not with a plan but with five thousand different contracts, all of which are roughly the same but not exactly.

Whereas if you approach it as, "This is a claim not under a contract, but under a plan." Why? Because it is a plan and you're enforcing the plan and you're making the fiduciary follow the plan because he has a duty to, a fiduciary duty to, not because you have a cause of action under contract law. Once you go down the contract road, you get estoppel, you have to have reliance, then—

Peter Stris: Let me ask you a related question, all three of you, about the balance that was struck. So we have this prohibition on exculpatory agreements, we basically have the legislation structured so that you have to be a fiduciary essentially if you meet certain criteria, and at the same time there's an allowance for, essentially, a conflict. People who are sponsoring plans also administer them.

Frank Cummings: Yes.

Peter Stris: And when you layer on top of that the fiduciary liability that you're talking about—

Frank Cummings: The statute not only allows you to have a conflict of interest, it compels you to have conflict of interest. Everyone has a conflict of interest. The default plan administrator is the company—the employer—who is both a disqualified person and a party-in-interest. The default named fiduciary is usually the employer. The definition of fiduciary includes the employer. There's no question. The question is not whether you have a conflict of interest; the question is whether you are able to act on it.

Peter Stris: How did the stakeholders as part of this debate at the time feel about this?

Frank Cummings: There's one case in the Third Circuit called *Cutaiar v. Marshall*,[20] which identified, I think, probably the only case I know of where you are totally disqualified because you have conflict of interest. The same guy was a trustee of two plans and one plan needed a loan and the other plan was loaded with assets. So he was going to lend some money from one of his plans to the other of his plans, and he was going to bargain with himself about the loan terms. [Laughter]

It struck the Third Circuit as utterly absurd and you're just plain disqualified. That's the conflict of interest you cannot escape. But most conflicts of interest are those where you are the employer, you are administering the plan. Yes, it's true if you pay this benefit you will have less funds in the plan, and so in more than just a sense, it's coming out of your pocket and you feel very strongly that you hate to spend money but you also feel very strongly that this guy is entitled to the benefit. And the assumption is—and Congress is saying to you—take off your employer hat, put on your fiduciary hat, and act solely in the interest of the employees and if you can't do that, then go get somebody else who can. And, of course, Bob [Eccles] was involved with the most famous of those cases, *Donovan v. Bier-*

20. 590 F.2d 523 (3d Cir. 1979).

wirth.[21] He didn't like the result, but he liked the precedent. Have I said it fairly, Bob?

Robert Eccles: That'll do. [Laughter]

Peter Stris: And this was not controversial? Choosing this sort of structure and laying civil remedies, among other things, on top of it, there was not a discussion as part of the legislative—

Frank Cummings: Remedies is a different question.

Peter Stris: But you layer it on top of this, no?

Frank Cummings: There was a long ten-year or fifteen-year fight over what the words "equitable remedies" meant.[22] Although I never thought it was even obscure. But an awful lot of people did, and I think [Justice] Scalia and others like him muddied the waters for a long, long time; but [Justice] Breyer straightened it all out a few years ago.[23] I think people pretty much know . . . . People who are entering the field today never practiced law before the merger of law and equity. I did. And not only that, but everyone who was practicing law around Washington in 1970, say, did, because Maryland, which is where most of us lived, had not merged law and equity. So we tried cases in equity all the time and we knew damn well you could get money in equity and anybody who's never seen a divorce—there are no such people—and if you think you can't get money in equity go look at a divorce case sometime and you'll discover that's what it's all about. There's been a lot of turmoil, but it's artificial turmoil. That statute was pretty damn clear.

Dana Muir: I just want to not tread on the last panel that's going to talk about enforcement. I think and probably that could become

21. 680 F.2d 263 (2d Cir. 1982).

22. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012) ("A civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to obtain *other appropriate equitable relief*.") (emphasis added).

23. *Compare* CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1880 (2011) (writing for the majority, J. Breyer held that an injunction requiring a plan trustee to pay monies owed under a judicially-reformed ERISA plan was "other appropriate equitable relief" under ERISA), *with* Mertens v. Hewitt Assocs., 508 U.S. 248, 255–56 (1993) (writing for the majority, J. Scalia interpreted "equitable relief" under ERISA as not including compensatory damages but instead being limited to classic equitable remedies such as injunction, mandamus, or restitution), *and* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217–18 (2002) (writing for the majority, J. Scalia interpreted "equitable relief" under ERISA to exclude legal, or compensatory, remedies).

an issue, but if you have more comments on this question of administration and exculpatory issues.

Robert Nagle: I do not think there was ever really an issue that the prohibition on exculpatory clauses should be included. Those clauses were commonplace in small trust law but clearly had no place in benefit plan administration. I don't recall any conflict whatsoever about including that prohibition. The idea of providing ascertainable structure for the plan and the trust so you would know who was responsible for what, I think the wisdom of that was rather readily accepted. And I think the idea of making aspects of discretionary judgments of management and administration subject to fiduciary requirements—I think that was readily accepted.

There are people who ask, "Regarding that business in the bill about discretionary control or authority over administration and then also over management, and what is the difference?" I remember we had a lot of conversations at the staff level about what the difference was, and I remember doing some research at the time, and there are recognized distinctions between the terms "management" and "administration" but the relative roles are different depending on what organizational context you're looking at. In some contexts, it is regarded that administration is the top level and that's where policy is made, while management is where policy is carried out, but in other organizational structures, it's regarded as almost the opposite. After we talked about this endlessly, we decided the heck with it, we'll just cover all bases.

The other element that was in the fiduciary definition, which Phyllis [Borzi] has alluded to,[24] was the provision of investment advice for a fee, that one who provided investment advice for a fee is a fiduciary. That was in the House bill,[25] not in the Senate bill. We got a lot of questions about just who that meant and what it meant and why it was there, and I think the answer we got from the House staff was: "Well, if"—which is probably the right answer—"if somebody is getting paid to give investment advice, very likely their advice is going to be followed and effectively they are going to be the decision maker," so we all said we might as well include them. Now, had we known all those years ago what headaches this would be giving Phyllis today, I'm sure we would have tried to do better.

24. *See* discussion *infra* p. 363.

25. H.R. 2, 93d Cong. § 3(21)(A)(ii) (as passed by House, Feb. 28, 1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, at 3910.

Frank Cummings: Do you want to talk a little bit about the co-fiduciary rule?[26]

Dana Muir: Sure.

Frank Cummings: Is that on your turf? Is that on your inventory?

Dana Muir: I'd be happy to talk about that.

Robert Eccles: It is now. [Laughter]

Frank Cummings: The thing's often referred to as vicarious liability, which it is not. If you read the three subsections—I think there are three subsections—of that section on co-fiduciary liability, it is never liability without fault.[27] One section is for enabling another person to commit a breach, knowing participation in a breach, or knowing cover-up once you've discovered the previous breach.[28] It's always a knowledgeable breach, a real independent breach of fiduciary duty. It's never: "You're liable because the guy was your employee and so it's just vicarious liability." That's not the way it comes out, although there's a lot of misunderstanding about it. At least in my experience, that's the way it's been interpreted, and I think that was the way it was intended, but I wasn't the draftsman on the section.

Judy Mazo [from the gallery]: You all have said that, essentially, the fiduciary provisions were not controversial generally, so did they just evolve as the staff thought of new things to address, or was it people coming in with specific issues, or what? If it wasn't engaging the stakeholders, then where did it all come from?

Dana Muir: Let me try to repeat her question just for the video. Briefly, it was, if the fiduciary provisions weren't controversial, how did they evolve? Was it people coming in with new ideas, et cetera?

Frank Cummings: If somebody says as a diversion, "I want you to have fiduciary standards; that's all I want you to have," and you don't want to make a big fight over it, you just incorporate it into

26. *See* ERISA § 405, 29 U.S.C § 1105 (2012).
27. *Id.* § 405(a)(1)–(3).
28. *Id.*

your bill and go on with what you're really interested in. If someone else wants to oppose it, let them go play with it—

Phyllis Borzi [from the gallery]: So, they came with an actual outline of what the standards should be?

Frank Cummings: Oh, sure. The fiduciaries came with the fiduciary protection in order to prevent others—not the fiduciaries. They—the employer side, or the Chamber of Commerce, that kind of thing—and then some administration people—came with these bills. They said: "If you do these fiduciary standards, that will fix all the problems. You don't have to worry about funding, vesting, plan termination insurance"—and all the good things that keep people from starving to death—"all you gotta do is catch the crooks and thieves." And you figure, well, you know, if it's a good idea, and if you want to write it up and give it to me, then I'll staple it into the bill, and someone may want, you know, to come with a sharp pencil and fix it, but it wasn't controversial.

Karin Feldman [from the gallery]: If the fiduciary provisions, as Judy was asking, those that weren't that controversial, as the bills were winding their way through Congress, I mean, once ERISA becomes law everybody's like neurotic about being—"Don't sue me. I'm a fiduciary." I mean, I've heard stories.

Frank Cummings: I've been making a good living out of that section of the statute for quite a long time.

Karin Feldman [from the gallery]: I mean, there were stories about bumper stickers in Southern California saying "Hit me, I'm a fiduciary," and things like that. So, people were worried once it became law, and a whole business grew about educating fiduciaries, right?

Robert Nagle: The Senate bill provision—which I described earlier, the one that applied just to management and control of plan assets[29]—that was pretty old hat. I mean, that had been around. I think the House provisions—and maybe Russ [Mueller] can tell us where they came from—sweeping in discretionary decisions with respect to administration and management, that to my mind was new to the

29. *See infra* p. 361–62.

mix and that's probably what has ended up surprising a lot of people who are wondering "Why am I a fiduciary?"

Dana Muir: Jack, I think I saw a question.

Jack Sheehan [from the gallery]: Given this detailed conversation here about fiduciaries, I was just wondering, did the previous McClellan hearings on labor influence the fact that this shows up in this legislation? Did these practices show up in those hearings, in labor history, what was going on?

Dana Muir: If I can summarize, and maybe folks can help me. If you didn't have the McClellan Labor Hearings as the background, would that have affected what happened on fiduciary?

Frank Cummings: Oh, sure. Actually, the Attorney General Criminal Division testified in the McClellan hearings[30] that—which he later changed his mind about—but he testified and said that, legally, they didn't do anything wrong. In case you haven't followed those hearings, George Barasch set up two welfare funds, he got all—there were no participants after a while, no one was vested, everyone left, and he had this little pot of riches. He transferred the assets of one fund to a charitable foundation in Liberia and the assets of the other to a charitable foundation in Puerto Rico.[31] Nobody lost anything because nobody had anything.

But that's not really germane to the fiduciary standards of ERISA. What we know about those was that anyone who had gone through a trial of a fiduciary type of dispute, such as loss of money, loss of investment, or this that and the other thing, would go in there and the judge would look around as they did with the Studebaker case and say, "Who is here?" And one guy says, "I'm an investment manager—I'm not a trustee, I'm an investment manager. I only came because nobody invests anything unless I tell them to, but I'm not a trustee. And by the way, I don't do business in your district. And I've got a contract right here and it says it's governed by the law of New Jersey." And then the bank says, "Well, I'm the trustee, and I do the investing but I don't think about it. I have no discretion,

30. *Diversion of Union Welfare-Pension Funds of Allied Trades Council and Teamsters Local 815: Hearings Before the Committee on Government Operations*, 89th Cong. (1965).

31. *See Diversion of Union Welfare-Pension Funds of Allied Trades Council and Teamsters Local 815: Report of the Committee on Government Operations, United States Senate*, 89th Cong. (1966), Rpt. No. 1348, at 7–13.

I'm a directed trustee, and, by the way, I don't do business here and you can't serve me and my trust agreement says it's governed by the laws of the State of New York."

And you go around the table, and of course, the actuary is there and he says, as he did in the Studebaker case, "I'm the actuary, I'm the only one here who knows what's going on, and I thought I would come to tell you." Which is the way actuaries do this kind of thing.

Henry Rose: With regard to the McClellan bill,[32] my recollection is that it did not have a great influence on the development of fiduciary provisions at all. It relied heavily on criminal penalties and that was, in my opinion, and most of my colleagues, that was not appropriate for ERISA. In fact, if you look in Title I of ERISA you will find some criminal penalties,[33] but virtually all of them were carryovers from the Welfare and Pension Plans Disclosure Act. And so that you have criminal penalties with regard to some disclosure provisions, but not fiduciary provisions.

Frank Cummings: You don't want the witnesses taking the Fifth Amendment. And they'll all take it, if you make it criminal.

Dana Muir: Russ, you had a comment.

Russell Mueller [from the gallery]: Yes. Bob had asked,[34] "How did those provisions get into the House bill?" I can provide for the record a reference at Georgetown University Law School where I donated sixty indexed boxes of the entire detailed legislative history of ERISA and the subsequent amendments as well. Jim Wooten's book is very, very good, but you could write another book filling in the entire record, because what that Georgetown archive has is a record of draft by draft by draft from what's in the green book to the next item, and maybe more important what Georgetown has are the letters from constituents and interest groups saying, "Yes, we would like 404(c) or whatever it happens to be." So that whole record can be filled in with, shall we say, with judicious research.

Israel Goldowitz [from the gallery]: Could I try a non-fiduciary question, which is the relationship of ERISA to other federal laws?

32. S. 2627, 89th Cong. (1965).
33. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 501.
34. *See infra* p. 377.

There was a long tradition of doing judicial plan design under the Taft-Hartley Act. At a point in my career I was Deputy General Counsel at the UMWA Funds, which were governed by Taft-Hartley and ERISA. With PBGC [Pension Benefit Guaranty Corporation], I am heavily involved with bankruptcy law. So what did Congress have in mind in 514(d) that ERISA would not supersede any laws of the United States?

Dana Muir: It's a bit of side stream for our panel, but just a quick reaction, and the question was**:** What was intended by ERISA's provision that it didn't essentially preempt other federal laws?

Henry Rose: I don't think it had any affect with regard to 302(c)(5) in Taft-Hartley, which as I noted earlier had been misinterpreted for decades. I mean, it was a criminal provision and it had nothing to do with fiduciary law, so ERISA certainly did not mean to repeal it. There was nothing to repeal. That's what the U.S. Supreme Court held in the *Demisay* case in 1993.[35]

Phyllis Borzi [from the gallery]: What federal laws were they thinking about?

Henry Rose: What were they thinking of then? I can't testify to that.

Robert Nagle: I can't recall that we ever catalogued in our minds what might be the other federal law, it just seems like it was kind of a boilerplate provision. I'm sure you will not find any legislative history as to just what we had in mind.

Dana Muir: As time runs short, I see that Karen has had a question for a while and then I know Bob Eccles has a final question I think to wrap up the panel. We'll see. But Karen.

Karen Ferguson [from the gallery]: I think this may be an easy one. I remember hearing long ago that the reason the prudent person standard—the prudent man standard—in ERISA is not the typical trust standard is because the American Bankers Association wanted it to be an institutional standard—actions should be measured by those of a prudent man acting in "a like capacity and with like aims . . . ."[36]

35. Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993).
36. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2012).

Dana Muir: So the question is: Why ERISA's prudence standard is written as prudent person, I think, as opposed to prudent expert.

Karen Ferguson [from the gallery]: No—"acting in a like capacity"[37]

Phyllis Borzi [from the gallery]: It is a prudent expert standard.

Dana Muir: Okay, prudent expert as opposed to prudent person.

Frank Cummings: Not a prudent expert.

Robert Eccles: "acting in a like capacity . . . in the conduct of an enterprise."[38]

Karen Ferguson [from the gallery]: Thank you. Bob [Eccles] has it . . . .

Dana Muir: This is Bob's question anyway, I think, in the end.

Robert Eccles: I've got a slightly different one. [Laughter]
Robert Eccles: But why don't you answer that as part of answering mine.

Frank Cummings: The prudent expert notion was suggested by none other than me in *Donovan v. Cunningham*,[39] and I was duly slapped down in a footnote by the judge in that case, who said, "It's not a prudent expert." But then he explained what it was and the way he explained it, it struck me that he was talking about a prudent expert, because you have to be familiar with such matters in the conduct of a like enterprise with like aims and familiar with such matters as a reasonably prudent person. I called it a prudent expert, the judge said I was wrong, it's not a prudent expert, and then he said what it was and it sure sounded like a prudent expert to me.

Karen Ferguson [from the gallery]: It's the emphasis on the enterprise—

37. *Id.*
38. *Id.*
39. 716 F.2d 1455, 1467 n.26 (5th Cir. 1983).

Robert Nagle: Karen, I think again this was a provision that I don't believe a lot of heavy thinking went into. I think it was a sign of recognition that we realized investment of pension plan assets was a different enterprise than the kind of investments that a lot of traditional trust law addressed like some family trusts.

Karen Ferguson [from the gallery]: What it leads to is "if every other institution is doing it, I'm home free."

Frank Cummings: Well, you're saying that the conventional wisdom without more is prudent. And the statute doesn't say that. It refers to a reasonably prudent person familiar with such matters.[40] So you have to be cognizant not only of the conventional wisdom, but this conventional wisdom has to be prudent, and in theory everyone could be doing it, yet they all could be wrong. I haven't found that case yet.

Henry Rose: It's pretty clear that Congress didn't have in mind to limit fiduciary restrictions to experts, because they clearly were aiming for boards of trustees, for example, who clearly were not experts.

Robert Eccles: Let me pick one of the questions I had and go with it, the one that's closest to what you just said. One of the early prudence issues after ERISA was passed was dealt with by a Department of Labor regulation in 1979, which there was a lot of criticism that fear of ERISA was restricting investments, ruining the capital markets. You could only invest in the Nifty Fifty or Blue Chip stocks of some sort and the Department adopted a portfolio approach and an investment course of action had to be looked at, and its prudence determined in light of the overall portfolio and the aims.[41] The question is: was that an issue that had come before you and your principals in any way or an anticipated issue, an issue discussed?

Robert Nagle: I don't ever recall the phrase "modern portfolio theory"[42] being used at the time we were working on ERISA.

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

41. Preamble to Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence Rule," 44 Fed. Reg. 37, 221–25 (June 26, 1979).

42. Modern portfolio theory is a theory of finance in which a portfolio aims to decrease the risks of investments and increase financial returns by diversifying among various investments. *See, e.g.*, Edwin J. Elton & Martin J. Gruber, *Modern Portfolio Theory, 1950 to Date*, 21 J. BANKING & FIN., 1743, 1744–48 (1997).

Robert Eccles: Try "legal theories."

Robert Nagle: But I have no problem with it. I think it was consistent with what we would have had in mind, and again, this gets to the language Karen quoted about recognizing the nature of this enterprise, and if modern portfolio theory is appropriately applied in pension plans, I don't think that we would have had any problem with that.

Dana Muir: Did we miss anything that we should have asked, Phyllis?

Phyllis Borzi [from the gallery]: Why didn't you have the kind of Jean Dixon clairvoyance? What do you think, looking back on the situation now in terms of what the current fiduciary issues are, were they things that just were never on the radar screen, or did you have any inkling that some of the issues, such as the valuation issues in ESOPs [Employee Stock Ownership Plans], this business about conflicts of interest in the advice marketplace, or generally the idea that people don't want to be fiduciaries, even though I thought David's story about his wife was perfectly on point.[43] Are there things now that you either didn't understand then or weren't even on the radar screen that are now much more significant?

Frank Cummings: This is a law that the courts interpret, and there have always been fiduciary standards applicable to trustees. They've been there since the Fourteenth Century, or something like that. We didn't really feel that we were doing anything particularly exotic, but when it came to prohibited transactions—if that's what you're asking about—in my own view, which nobody agreed with, the whole thing was absurd, and they shouldn't have had any prohibited transactions. I didn't prevail and I lost interest in what—

Phyllis Borzi [from the gallery]: So, you would have had a flat conflict of interest prohibition?

Frank Cummings: Conflict of interest violates the basic fiduciary standard.

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43. *See* Remarks of David Cay Johnston, *in* Panel Discussion, *Keynote: Other Perspectives*, *in* Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 341, 355–57 (2014).

Phyllis Borzi [from the gallery]: You would have just allowed conflicts of interest?

Frank Cummings: No. [Laughter]

Phyllis Borzi [from the gallery]: Okay, then I don't understand.

Robert Nagle: There could be no more than adequate consideration[44]—

Phyllis Borzi [from the gallery]: Yeah, the unenforceable adequate consideration rule.

Frank Cummings: I would leave it to 404(a)(1) and let that be enough. Let the courts and the Labor Department decide who they're going to chase, and then if you get really bad prohibited transactions, every one of which would violate Title I general fiduciary standards under Section 404, almost by definition, then you have them.[45] I would have relied on Title I. But that's just one guy, one voice banging in the wilderness, I didn't prevail and the tax writing committees pushed this stuff, and the House pushed this stuff, and we just went along with it. You know, if it's important to you, then . . . .

I didn't really feel that was going to be big trouble. What I didn't anticipate was that the exemption process under 408(a) would take decades,[46] or at least years. There are no transactions in the world that can await an individual exemption from—you should pardon the expression—Ivan Strasfeld.

Phyllis Borzi [from the gallery]: So, he's regulating from another position now outside of the department?

Frank Cummings: Pardon? [Laughter]

Phyllis Borzi [from the gallery]: You think I have a ghost employee with Ivan?

Henry Rose: I think you do.

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44. *See infra* p. 365–66 (statement by Robert Nagle) (discussing Nixon Administration's objections to House prohibited transaction rules).

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

46. ERISA § 408(a), 29 U.S.C. § 1108(a) (2012).

Frank Cummings: It wasn't my turf.

Dana Muir: Thank you everyone. I think we need to move forward today, but I very much appreciate everyone's help.