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Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction

Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction

by

Dana Muir[*] and Norman Stein[**]

The Employee Retirement Income Security Act of 1974 (ERISA)[1] celebrates its fortieth birthday this year and now totters on the brink of what would be middle-age for a person and what one would hope would be maturity for a statute. But it was during ERISA's adolescence that Professors Daniel Fischel and John Langbein[2] detected a fundamental fissure in its statutory geography: the exclusive benefit rule of Section 404(a).[3] Borrowed from trust law and forming both the centerpiece and core of ERISA's first title, ERISA's exclusive benefit rule unyieldingly commands employee benefit plan fiduciaries to discharge their duties with respect to a plan solely in the interest of the plan's participants and for the exclusive purpose of providing benefits to them and their beneficiaries.[4] Fischel and Langbein told us that these straightforward injunctions deny the essential nature of employee benefit plans, in which the plan sponsors and the plan participants *share* the plan's beneficial interest (*and* also share in the settlement of the

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[1] Employee Retirement Income Security Act (ERISA) of 1974, ERISA §§ 1-4402, 29 U.S.C. §§ 1001-1461 (2006).

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

[3] ERISA § 404(a), 29 U.S.C. § 1104(a) (2006).

[4] Fischel & Langbein, *supra* note 2, at 1107 – 1110.

trust vehicle).[5] Although their article influenced scholarly understanding of an important statutory problem, the problems they raised have not been directly engaged by the federal courts or the federal regulatory agencies that administer ERISA. In legal scholarship, their article is among the most cited of all ERISA articles[6] but it has not once been cited in a judicial opinion.

But this is not to say that the courts and agencies have ignored the tensions that run along this statutory fault line, particularly with respect to the "beneficial" interests of the employer in employee benefit plans. And perhaps the most important of the mediating tools that judges and the agencies have used to recognize the employer's interests is the settlor/fiduciary doctrine.[7] The doctrine delineates plan sponsor decisions into two distinct types: (1) decisions that are made in a fiduciary capacity, and thus are subject to ERISA's fiduciary requirements, including the exclusive benefit rule; and (2) decisions that are made in a business, or "settlor," capacity and are thus unconstrained by the statute's fiduciary paradigm.[8] The metaphor courts have used to describe this distinction is millenary in nature: a plan sponsor might be wearing a fiduciary hat or might be wearing a settlor hat.[9] And as we will show, a fiduciary can, like Dr. Seuss's Bartholomew Cubbins,[10] sometimes wear multiple hats and may have more than two hats in its wardrobe.[11]

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[5] *Id*. at 1118.

[6] A Lexis search of the law review literature finds 116 citations.

[7] *See infra* text accompanying notes 113-27; *see also* Dana M. Muir, *The Plan Amendment Trilogy: Settling the Scope of the Settlor Doctrine*, 15 THE LAB. LAW. 205, 205 (Fall 1999).

[8] *Id.* at 205.

[9] Sonoco Prods. Co. v. Physicians Health Plan, Inc., 338 F.3d 366, 373 (4th Cir. 2003) ("Accordingly, a plan sponsor is entitled to wear different hats: it may perform some functions as a fiduciary to the plan, while it may perform other functions on its own behalf, i.e., in a non-fiduciary capacity."); Hunter v. Caliber Sys., Inc., 220 F.3d 702, 718 (6th Cir. 2000) ("We have recognized that employers who are also plan sponsors wear two hats: one as fiduciary . . . and the other as an employer performing settlor functions . . . ."); Bennett v. Conrail Matched Sav. Plan Admin. Comm., 168 F.3d 671, 679 (3d Cir. 1999) ("ERISA permits employers to "wear 'two hats'," one as plan administrator, the other as plan sponsor.); Akers v. Palmer, 71 F.3d 226, 231 (6th Cir. 1995) ("[it] is therefore perfectly consistent for an employer to wear "two hats" and act both as a fiduciary and as an employer without breaching fiduciary duties.").

[10] DR. SEUSS, THE 500 HATS OF BARTHOLOMEW CUBBINS (1938). In celebration of the seventy-fifth anniversary of the book's publication, Random House and Dr. Seuss Enterprises are sponsoring a traveling exhibition of Dr. Seuss's extensive collection of hats. Leslie Kaufman, *The Author Himself Was a Cat in the Hat*, N.Y. TIMES (Feb. 11, 2013) (book review). "[T]he real Dr. Seuss, Theodor Seuss Geisel, was a hat

As we will explain below, the Supreme Court's "settlor/fiduciary" doctrine relies on an interpretation of the actual statutory language defining fiduciary,[12] while the Department of Labor's (DOL) version of the doctrine relies on the more ethereal notion that the statute must be applied in the context of the voluntariness of the employee benefit plans that the statute regulates.[13] The Supreme Court's arguably outcome-directed reading of the statutory language, which was plausible but not compelled by the statute's actual words, unfortunately leaves courts only marginal flexibility to rein in some of the serious problems that we argue have resulted and will in the future likely result from the application of what is a formalistic and mechanically applied rule. Indeed, the ultimate point of this Article is that while the settlor/fiduciary doctrine has made it relatively easy for courts to decide cases, it has resulted and will continue to result in decisions that are unmoored from the nuanced policy considerations that animated Congress in enacting ERISA[14] and in our view should anchor ERISA jurisprudence.

So what are the problems? In broad terms, there are two, one of which we just suggested: that the settlor/fiduciary doctrine ignores policies and concerns that should be balanced against the interests that the doctrine advances, such as encouraging employers to adopt employee plans in the first place and recognizing the economic interests that employers have in employee benefit plans. Professors Fischel and Langbein, after all, noted that the plan sponsor and plan participant are both, in effect, settlor and beneficiary of an employee benefit plan, and that benefits law should recognize that they share these

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lover himself. He collected hundreds of them, plumed, beribboned and spiked, and kept them in a closet hidden behind a bookcase in his home in the La Jolla section of San Diego. He incorporated them into his personal paintings, his advertising work and his books. He even insisted that guests to his home don the most elaborate ones he could find." *Id.*

[11] *See e.g., infra* text accompanying notes 237-38 (explicitly referring to multiple hats).
[12] *See infra* text accompanying notes 109-10.
[13] *See infra* text accompanying notes 93-95.
[14] *See infra* Part II.C.

functions.[15] The settlor/fiduciary doctrine implicitly recognizes the employer's beneficial interest in plans but ignores the participant's economic interest as the statutorily protected beneficiary of the employer's promise if not as co-settlor.[16]

The second concern is related to the first: that the settlor/fiduciary doctrine can allow employers to design plans to permit fiduciary behavior that would be flatly impermissible if not expressly provided by the plan's terms. An aspect of this concern is that, besides the reputational effects that a plan sponsor might consider in deciding how to act,[17] there are few limitations on the doctrine's scope.[18] Indeed, the only statutory constraints on an employer exercising a settlor function are the minimum standards that ERISA imposes on plan design.[19] And once a plan is adopted, the fiduciary is obligated to follow the plan's terms insofar as the terms of the plan are consistent with the statute.

But as we will show, this statutory brake on plan design—that the plan cannot effectively license a fiduciary to do what the statute prohibits—has not prevented plan sponsors from designing plans to weaken the ERISA fiduciary duties of prudence and loyalty,[20] or to create plan-specific exceptions to some of ERISA's prohibited transaction rules.[21] Moreover, because of ERISA's broad preemptive reach, the employer can design a plan to accomplish harsh outcomes that would otherwise be prohibited by law in virtually all fifty states, were never endorsed by Congress, and arguably are antithetical to

[15] Fischel & Langbein, *supra* note 2, at 1117.
[16] *See, e.g.,* Part III.A.1. discussing how the doctrine is applied to unsettle employee expectations.
[17] Fischel & Langbein, *supra* note 2, at 1132.
[18] *See, e.g.,* Part III.A.2. discussing how the doctrine allows plans to undermine ERISA's protective provisions.
[19] *See* EMPLOYEE BENEFITS LAW 5-1 – 5-115, 6-1 – 6-68 (Jeffrey Lewis et al. eds., 2012) [hereinafter EMPLOYEE BENEFITS LAW]. Many of the minimum requirements are mirrored in the Internal Revenue Code.
[20] *See infra* text accompanying notes Part III.2.
[21] *See infra* text accompanying notes 318-20.

any coherent policy rationale.[22] And as the employee benefits landscape (and the ingenuity of plan designers) continues to evolve, these problems are likely to become more salient, troubling, and intractable.[23]

Consider what happened to James McCutchen after he suffered eggregious injuries in a car accident that was the fault of another driver. His health insurance paid almost $67,000 in medical costs but that did not come close to compensating him for the more than $1 million in lost income and other damages he suffered.[24] Mr. McCutchen sued and eventually recovered $110,000 from his and the other driver's automobile insurance (the policy maximums), leaving Mr. McCutchen with $66,000 after attorney's fees. But after the lawsuit, Mr. McCutchen's health plan demanded to be reimbursed – from the $110,000 settlement– in full for the amount it had paid for his medical costs.[25] This would have left Mr. McCutchen almost 1,000 out-of-pocket ($66,000 - $67,000) simply because he brought the tort suit in an attempt to recover some of his extensive damages. Long standing equitable doctrines in state insurance law safeguard against that outcome, but the U.S. Supreme Court held that employers, while wearing their settlor hat, may negate application of those doctrines by including exclusionary language in the plan.[26]

Mr. McCutchen's case is neither unique nor representative of the broad array problems we address in this Article. The settlor/fiduciary doctrine, or variants on it, is relevant to a surprisingly wide range of employee benefits contexts, including: use of

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[22] *See infra* text accompanying notes 248-57.
[23] *See infra* Part III.A.
[24] US Airways v. McCutchen, 133 S. Ct. 1537, 1543 (2013).
[25] *Id.*
[26] *Id.* at 1551.

defined benefit (DB)[27] plan assets, selection and management of defined contribution (DC)[28] plan investment assets (including stock of the employer), choice of medical providers and access to certain courses of treatment in health care plans, review of claims denials, misleading disclosures to plan participants, subrogation of rights to insurance proceeds in health care plans, plan mergers and spinoffs in corporate reorganizations, and employer interference with a participant's attainment of benefits under a plan.[29] The wide range of topics to which the doctrine has relevance is partly a reflection of how changes in benefits law, benefits delivery, and benefits policy have interacted with ERISA's fiduciary provisions.[30] This process is ongoing and the number of benefit issues—and in some cases non-benefit issues--affected by the doctrine is likely to increase over time.

We have divided the remainder of this Article into four parts. The first Part traces the development of the settlor/fiduciary doctrine, beginning with some discussion about the evolution of employee benefits and its regulation. Part II explores some of the less

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[27] Defined benefit (DB) pension plans promise a lifetime stream of income, or its lump sum equivalent, to retirees. The amount of an employee's benefit frequently is based on years of service and a salary calculation. The employer assumes the investment risk because the employer must fund the plan sufficiently to pay the promised benefits. Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 205-06 (1995).

[28] Defined contribution benefit plans establish an account for each employee who participates in the plan. Employees become entitled to whatever assets are in the account at times established by the plan terms, frequently when they terminate employment or reach a particular age. Employees assume the investment risk in these accounts. *Id.* at 205. 401(k) plans are the most widely used type of DC plan. INV. CO. INST., *Retirement Assets Total $18.9 Trillion in First Quarter-2012,* ICI GLOBAL (June 28, 2012) (reporting 401(k) plans as holding more than $3.4 trillion), http://www.iciglobal.org/portal/site/ICI/menuitem.905dc9f48cce5dfa30fc6010a52001ca/?vgnextoid=56c5056c25f28310VgnVCM1000005a0210acRCRD&vgnextchannel=a04317281ae3f110VgnVCM1000005b0210acRCRD&vgnextfmt=print.

[29] *See infra* Part II.C. discussing these situations.

[30] The settlor/fiduciary doctrine in ERISA can dilute employee rights in areas of law beyond employee benefits. For example, in the second of a quintet of Supreme Court cases on the doctrine, the Court permitted an employer to condition benefits on an employee waiving a variety of rights under federal labor law and state labor and contract law that were unrelated to the benefits in question. *See* Lockheed Corp. v. Spink, 517 U.S. 882 (1996). The doctrine can also affect, for example, the viability of a state-law malpractice claim against a physician, or rights to proceeds from a tortfeasor, in a state court. *See infra* text accompanying notes 234-41 and 248-57.

definitively evolved corners of the settlor/fiduciary doctrine—especially the two questions that the courts have not fully answered. It then continues to reflect on the penumbras of the doctrine while also cataloging the various benefits issues in which the settlor/fiduciary doctrine has relevance. Part III critiques the doctrine in light of the two broad concerns we identified above – that the policies it advances should be balanced with those it negates and that it permits plan sponsors to design plans in ways that undermine ERISA's participant-protective provisions—keeping in mind the unanswered questions explored in Part II. It also explains that the regulatory vacuum created by ERISA's broad preemption provision precludes the problems from being addressed at the state level. The Part IV looks forward and argues that either the courts need to develop limiting principles on the doctrine's scope or Congress needs to consider legislatively taming a doctrine that has the potential to spin out of control. Because we believe congressional action is unlikely, we suggest three limiting principles that courts might use to better assess what hat an employer is wearing when taking action that affects its benefit plan.

I. Development of the Settlor/Fiduciary Doctrine

This Part provides a history of the settlor/fiduciary doctrine as it has developed in the federal courts and the federal agencies charged with enforcement of employee benefits law. The Part begins with what we hope will be some context-creating reflections about the evolution of employee benefits law over the last century or so, with special emphasis on ERISA, its purposes and goals (to the extent there is consensus on these). The Part then turns to ERISA's debt to, and variations on, the common law of trusts. We then provide an account of the administrative and judicial creation of the settlor/fiduciary doctrine.

A. A Brief History of the Regulation of Employee Benefit Plans

Employee benefit plans existed long before ERISA was a sparkle in Congress's eyes. The conventional account of the development of pension plans generally begins in 1875 when The American Express Company adopted a retirement plan for its employees. Pension plans proliferated over the next 50 years, with their growth ultimately truncated by the Great Depression.[31]

There was, of course, no comprehensive federal regulatory scheme regulating pensions or other employee benefit plans during this first half century of employee benefit plans, although the adoption of an income tax in 1916, necessitated the creation of a framework for the taxation of the employer who sponsored an employee benefit plan, the beneficiaries who participated in an employee benefit plan, and the plan itself.[32] But other than the tax laws, regulation of employee benefit plans was at the time left to the states, where applicable legal principles crisscrossed such areas of legal doctrine as trust law, contract law, employment law, and insurance law. It should be said that employers typically included in employee benefit plans "reservation of rights clauses," which described the benefits under the plan as future gifts from, rather than enforceable obligations against, the sponsoring employer.[33] State courts generally respected these

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[31] *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* U.S. SENATE, SPECIAL COMM. ON AGING, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 2 (1984). The account in this subpart relies heavily on Mr. Gordon's chapter, to which he brought his personal in-depth knowledge of the history of ERISA. In 1930, an author of an early text on the actuarial and legal aspects of pensions, found a total of 413 "formal" industrial pension systems, concentrated in firms with large numbers of employees. ARTHUR DAVID CLOUD, PENSIONS IN MODERN INDUSTRY 53-54 (1930). In addition, a number of labor organizations sponsored their own pension plans without direct employer involvement. MURRAY W. LATIMER, TRADE UNION PENSION SYSTEMS 27-29 (1932).

[32] Gordon, *supra* note 31, at 2.

[33] CLOUD, *supra* note 31, at 131-32.

clauses, which were described in one early article on legal aspects of private pension plans as "weasel clauses."[34]

Over the next half century, culminating in 1974 with enactment of ERISA, the law of employee benefits, and particularly the law of private-sector pension plans, became increasingly federalized. The reasons for this were manifold, complex and interrelated, but included the expanding import of the federal income tax and the concomitant value of employee benefit plans in tax planning, the growing economic and social importance of employee benefit plans nationally (especially retirement plans), the significance of employee benefit plans to the federally regulated arena of labor and employment policy, and a developing federal interest in consumer protection.[35] Thus, beginning in the 1930s, the nation saw increasingly detailed and sophisticated tax regulation of employee benefit plans, regulation that had both tax-avoidance and social-welfare policy aspects.[36] And in 1947, concerned about potentially enormous power of union-run pension plans, Congress included in the Labor Management Relations Act (Taft-Hartley Act)[37] provisions curbing union domination of negotiated employee benefit plans and expressly subjected the trustees of such plans to a somewhat primitive federal fiduciary regime.[38]

By the 1950s, Congressional hearings had identified serious shortcomings with employee benefit plans, including mismanagement, theft and other misuses of plan assets; excessive investment in employer stock and debt; inadequate funding; and plan terms and plan administrative practices that were inconsistent with employee benefit

[34] Note, *Legal Status of Private Industrial Pension Plans*, 53 HARV. L. REV. 1375, 1379 (1940).
[35] Gordon, *supra* note 31.
[36] *See* EMPLOYEE BENEFITS LAW, *supra* note 19, at 1-4 – 1-7.
[37] Pub. L. No. 80-101, 61 Stat. 136 (June 23, 1947), *codified at* 29 U.S.C. §§ 141-187.
[38] *See* EMPLOYEE BENEFITS LAW, *supra* note 19, at 1-7 – 1-8.

expectations.[39] In response to these concerns, Congress enacted the Welfare and Pension Plan Disclosure Act (WPPDA) in 1958.[40] The Act, though, reflecting its title, was based on disclosure and did not create substantive rules governing plan administration or investment of plan assets. "The theory of the law was that full disclosure to participants and beneficiaries of the provisions of their plan and its financial operations would deter abuse ('sunlight being the best disinfectant') and would enable them to police the plans themselves without requiring greater Government regulations or interference."[41]

Sunlight did not prove to be an especially effective disinfectant. A 1964 book by Merton Bernstein[42] and a 1965 report[43] issued by a cabinet-level task force created three years earlier by President Kennedy to study private-sector retirement plans, identified serious shortcomings with retirement plans in the private sector most prominently the following: (1) forfeiture of benefits, primarily because some plans had restrictive vesting rules; (2) inadequate funding of DB pension plans; (3) lapses in judgment and in honesty by some of the people investing plan assets; (4) conflicts of interest affecting plan assets; (5) disparate treatment of certain categories of employees in retirement plans; (6) benefit losses when plans terminate with insufficient assets; and 7) tax equity. The Bernstein book and the President's Committee's report made specific recommendations for legislative change or further study in each of these areas.[44]

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[39] Gordon, *supra* note 31, at 6.
[40] Pub. L. No. 85-836, 85th Cong., 2d Sess. (1958).
[41] Gordon, *supra* note 31, at 6.
[42] MERTON C. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS (1964).
[43] PRESIDENT'S COMM. ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PROGRAMS, A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS (Comm. Print 1965) [hereinafter PRESIDENT'S COMM.].
[44] *See* Gordon, *supra* note 31, at 9-10.

On one issue in particular the Committee's report was cautious, however: whether there was a need for new, presumably federal, standards for those who manage plan assets. The Committee's report was equivocal:

> This Committee recognizes the need for additional measures for the protection of the interest of employees, but doubts whether the problem is the lack of appropriate standards of prudence. On the basis of present evidence, the Committee does not propose the substitution of a new set of statutory standards for the recognized standards of fiduciary responsibility, although there appears to be a need for strengthening statutory provisions for assuring compliance with these standards.[45]

The year after the report was issued, however, an investigation by the Senate Committee on Government Operations suggested that the law did not adequately constrain fiduciary misbehavior in pension plans. The investigation focused on a Taft-Hartley plan that paid substantial fees to a consulting company set up by one of its trustees.[46]

A few months after the hearings, the chairman of the Committee, Senator McClellan, introduced legislation that would have amended the WPPDA to create federal fiduciary standards for those who managed private-sector employee benefit plans.[47] In 1967, the Johnson Administration introduced a similar bill, which like the McClellan bill, was confined to fiduciary issues.[48] And later that same year, Senator Jacob Javits introduced the first comprehensive pension reform bill, which included, among other things, federal fiduciary rules, minimum pension standards, minimum pension funding rules, and a federal insurance program.[49] These three bills, and especially the

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[45] PRESIDENT'S COMM., *supra* note 43, at 73.
[46] Gordon, *supra* note 31, at 10-11.
[47] JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 122 (2004).
[48] *Id.* at 126.
[49] *Id.* at 11-12.

comprehensive Javits bill, set the legislative state for pension reform. And seven years later, on Labor Day, President Gerald Ford signed the Employee Retirement Income Security Act of 1974 into law.[50]

ERISA was a lengthy, complex legislative achievement, which federalized employee benefits law and centered its regulation in three federal agencies—agencies whose missions are sometimes in tension but nevertheless were tasked with jointly implementing the new statutory order.[51] Six aspects of ERISA are particularly relevant to the themes we develop in our Article and we note them here:

First, Congress created substantive rules for pension plans, including minimum vesting and accrual rules,[52] spousal protection rules,[53] and funding rules.[54] A plan's favorable tax status is contingent on the plan complying with these rules,[55] but the rules are also generally enforceable by participants under jurisdictional grants provided in the labor section of ERISA.[56]

Second, Congress did not impose parallel substantive standards on health care or other welfare benefit plans (although its fiduciary rules did apply to such plans). Beginning in the mid-1980s, however, Congress began to add some substantive standards for health care plans.[57]

Third, Congress wrote broad, field-occupying preemption language into the statute, which largely precluded states from regulating private-sector employee benefit

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[50] *See id.* at 25.
[51] *See* Dana M. Muir, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits*, 87 MICH. L. REV. 1034, 1036 (1989).
[52] *See* ERISA §§ 203, 204, 29 U.S.C. §§ 1053, 1054 (2006).
[53] *See* ERISA § 205, 29 U.S.C. § 1055 (2006).
[54] *See* ERISA §§ 301-305, 29 U.S.C. §§ 1081-85 (2006).
[55] I.R.C. § 401(a) (2006).
[56] *See* ERISA § 502, 29 U.S.C. § 1132 (2006).

plans.[58] While the preemption rules have had a substantial effect on the applicability of state law in numerous areas, its effect on health-care and other welfare benefit plans has been especially profound because of ERISA's failure to create federal substantive standards for such plans. Thus, the federal government simultaneously barred the states from regulating employer provided welfare benefits while declining to do so itself.[59]

Fourth, Congress included a provision in ERISA that, among other things, made it unlawful to discharge or discriminate against a participant for the purpose of interfering with the attainment of any right to which the participant may become entitled under the plan or statute.[60]

Fifth, the Supreme Court and other federal courts have opined that in enacting ERISA, Congress was attempting to balance competing tensions: "Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ... benefit plans in the first place."[61]

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[57] *See* Colleen E. Medill, *HIPAA and its Related Legislation: A New Role for ERISA in the Regulation of Private Health Care Plans?*, 65 TENN. L. REV. 485, 494 (1998) (discussing legislation requiring health insurance plans to permit the continuation of coverage after the end of employment).

[58] *See* ERISA § 514, 29 U.S.C. § 1144 (2006).

[59] *See* Edward Alburo Morrisey, *Deem and Deemer: ERISA Preemption Under the Deemer Clause as Applied to Employer Health Care Plans with Stop-Loss Insurance*, 23 J. LEGIS. 307, 315 (1997). States retain the power to regulate insured health care plans. Typically, however, employer-sponsored plans are self-insured, which places them outside the boundaries of state regulation. Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275, 305 (2013).

[60] ERISA § 510, 29 U.S.C. § 1140 (2006). This provision is discussed *infra* at text accompanying notes 272-76.

[61] Varity Corp. v. Howe, 516 U.S. 489, 497 (1996); *see also, e.g.*, Millsap v. McDonnell Douglas Corp., 268 F.3d 1246, 1250 (10th Cir. 2004); Martinez v. Schlumberger, Ltd., 338 F.3d 407, 414 (5th Cir. 2003); Vartanian v. Monsanto, 131 F.3d 264, 269-70 (1st Cir. 1997).

Sixth, Congress created a federal fiduciary law for employee plans, which we describe below.[62]

B. ERISA Reinvention of Fiduciary Law

Prior to ERISA, the many retirement plans whose assets were held in trust were subject to the fiduciary law of trusts, which was typically found in state law.[63] It is far from clear, however, from the historical record, whether state trust law had much impact on the behavior of the individuals who were responsible for administering a trust or managing its assets. There were, in any event, few reported cases involving retirement plans that turned on principles of trust law. This may be the reason why the President's Committee in its 1965 report found that "there appears to be a need for strengthening statutory provisions for assuring compliance with [existing fiduciary] standards," even though the Committee found "no evidence" that the standards themselves were inadequate.[64]

It is not difficult to speculate on why there were few state-law trust cases involving retirement plans. Some retirement plans were unfunded and those that were funded were not always implemented through trust agreements.[65] Most pre-ERISA pension plans, including trusteed plans, included clauses that disclaimed any employee interest in the trust corpus, which would have created obstacles for any employee to bring a trust-based action against the plan or the plan trustee.[66] Indeed, when employees

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[62] ERISA § 404, 29 U.S.C. § 1104 (2006). This provision is discussed *infra* at text accompanying notes 78-80.
[63] *See* Gordon, *supra* note 31, at 11-12.
[64] PRESIDENT'S COMM., *supra* note 43, at 73.
[65] *See* WOOTEN, *supra* note 47 at 21-22.
[66] *See* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 439 (1987) ("Early private pension plans were usually unfunded. No viable safeguards insured that current employees would ever receive pensions upon retirement, or that retirees would continue to receive their benefits. Employers reinforced paternalism with express exculpatory language, disavowing all liability for pension plan terminations or deficiencies.").

brought pre-ERISA cases in state court, the cases were generally based on contractual rather than trust-based legal theories, and they were generally brought against the employer rather than against a plan trustee.[67] Moreover, the common law of trusts essentially prescribes a series of default rules, which the trust instrument can modify,[68] and we think it reasonable to assume that some pension trusts were drafted to ease or eliminate various trust duties. Each of these reasons alone, and certainly in combination, would explain why so few trust-based civil actions were brought in state court.

The situation was different in the federal courts after Taft-Hartley was enacted. Taft-Hartley required that a plan with a union role in plan management be structured as a trust if it received employer contributions, with a union-designated trustee and a management-designated trustee.[69] The trust had to be established for the exclusive purpose of providing benefits to employees and their beneficiaries.[70] From its passage until the enactment of ERISA, the federal courts were forum to Taft-Hartley pension cases in which participants contended that the plan trustees violated their fiduciary responsibilities, primarily in adopting allegedly arbitrary plan amendments to adjust benefits or misinterpreting a plan's benefit eligibility provisions.[71] This may have suggested to Congress that creating a federal law of trusts for pension plans was familiar if not effectual.

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[67] *See* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083, 1114 (2001) ("[T]he Supreme Court noted that the resulting standard was consistent with the judicial standard pre-ERISA, which applied principles of contract law in lieu of labor law.").
[68] *See* John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U.L. REV. 375, 397 (2010) ("Neither the mandatory rules of the Code, nor the comparable rules of the common law of trusts in non-Code jurisdictions, undermine the default character of the rules of trust administration and trust investment."); *see also* John H. Langbein, *Why did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. (2007).
[69] 29 U.S.C. §186(c)(5).
[70] *Id.*
[71] *See* Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 587-88 (1993). The Supreme Court in 1993 held the Taft-Hartley Act did not create federal jurisdiction for such claims. *Id.*

Building on the three bills introduced between 1965 and 1967,[72] a centerpiece of the legislation that became ERISA was the creation of a federal law of fiduciary behavior. Congress, however, did not willy-nilly incorporate the common law of trusts into the statute; rather, it "in essence, codifie[d] and makes applicable to [employee plan] fiduciaries certain principles developed in the common law of trusts."[73] ERISA's statutory fiduciary regime builds on those principles but departs from that common law in significant ways.

Perhaps the two most significant ways in which this fiduciary law departs from the common law of trusts is in its reach. Trust law regulates the conduct of a trustee of a trust. ERISA, in contrast, regulates a broad class of actors, not just trustees, and it regulates substantially all employee benefit plans regardless of whether the plan is trusteed.[74]

The actors regulated by ERISA's fiduciary provisions are labeled, appropriately enough, "fiduciaries," which is a defined term under the statute. Under the statute,

> 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 . . . with respect to moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary responsibility in the administration of such plan.[75]

An aspect of this definition to which we will return later in the Article is that a person is a fiduciary only to the extent he or she exercises one of the enumerated functions and the statute does permit the scope of responsibility of a particular fiduciary

[72] *See supra* text accompanying notes 47-49.
[73] S. REP. NO 93-127, at 29 (1973).
[74] *See* Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 14-15 (1995) (discussing ERISA's definition of fiduciary and its differences from traditional trust law's definition).
[75] ERISA § 2(21), 29 U.S.C. § 1001 (2006).

to be limited to specific functions.[76] The statute, however, also makes a fiduciary responsible for the breaches of another fiduciary for knowingly participating or concealing the other's breach, for enabling the others' breach through his own breach, or for not making reasonable efforts to correct the other's breach if he has knowledge of it.[77]

ERISA imposes four general requirements on fiduciaries, all of which are framed within an overarching command that the fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries: a duty of prudence, a duty to act for the exclusive purposes of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, a duty to diversify investments to minimize the risk of large losses except to the extent it is clearly prudent not to do so, and a duty to administer the plan in accordance with the plan's instruments "insofar as the documents are consistent with the provisions of this title."[78]

The quoted language is an explicit rejection of that aspect of the common law of trusts that permitted a trust agreement to modify the fiduciary standards that would otherwise apply as default law.[79] ERISA also provides that any plan or separate agreement purporting to relieve a fiduciary of a statutory duty is void as against public policy.[80]

In addition to these general fiduciary standards, ERISA includes a list of absolutely proscribed transactions between an employee benefit plan and parties-in-interest, which are actors with a pre-existing relationship with the plan.[81] Unless a

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[76] *See* Muir, *supra* note 74, at 15.
[77] ERISA § 405(a), 29 U.S.C. § 1105(a).
[78] ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).
[79] *See* Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 CARDOZO L. REV. 2761, 2805 n.30 (2006) (quoting from the RESTATEMENT (THIRD) OF TRUSTS).
[80] ERISA § 410, 29 U.S.C. § 1110.
[81] ERISA § 406, 29 U.S.C. § 1106.

specific exemption applies,[82] a plan fiduciary who knowingly causes a plan to engage in a prohibited transaction is liable for any harm to the plan, regardless of whether the fiduciary's actions were prudent and made solely in the best interests of the participants.[83] The statutory framework appears to assume that such actions are fraught with such potential peril to the plan that liability should attach to the fiduciary, regardless of the circumstances. It is better, Congress implicitly said, to squelch all such interested-party transactions pre-transaction—even those that might have benefited the plan—than try to assess liability post-transaction. And the fiduciary can have liability to the plan even if the plan benefits from the prohibited transaction.[84] In addition, the Internal Revenue Code imposes an excise tax on the interested party regardless of either the fiduciary's or the party's intent.[85]

The prohibited transaction rules would bar many necessary and often routine transactions in a plan's life—for example, the payment of benefits to a participant or payments to service providers. Congress therefore included in the statute a number of exemptions from the prohibited transaction rules and also vested the Department of Labor with authority to grant individual and class exemptions if the Secretary of Labor finds that the exemption request satisfies statutory criteria.[86]

ERISA also includes some exceptions to the general fiduciary rules. The duty to diversify does not apply to DC plans that are designed to invest primarily in employer

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[82] *See* ERISA § 408, 29 U.S.C. § 1108.
[83] *See* Ryan P. Barry, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary,* 31 CONN. L. REV. 735, 748-49 (1999).
[84] *See, e.g.*, Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1418 (9th Cir. 1988) (deciding that even where benefits were paid in full a breaching fiduciary cannot retain ill-gotten profits).
[85] I.R.C. § 4975(a).
[86] *See* ERISA § 408, 29 U.S.C. § 1108 (2006).

stock.[87] The fiduciary rules do not apply to an individual's personal investment decisions in certain "self-directed" DC plans.[88] And ERISA specifically provides that terminating DB plans and welfare benefit plans may distribute assets to the employer notwithstanding ERISA's exclusive benefit rule.[89]

There is one other aspect of ERISA's fiduciary scheme that merits attention here. The common law of trusts imposed a general duty on trustees to furnish beneficiaries with information concerning the administration of the trust and a separate duty to account to beneficiaries for the investment and disbursement of plan assets.[90] ERISA imposes specific disclosure obligations on plan administrators. The courts have at least suggested that the ERISA disclosure obligations defined the only required disclosures, although there is an open question of whether a fiduciary may have additional disclosure obligations in certain circumstances under the general ERISA duties of prudence and loyalty.[91] And the courts have held that a fiduciary that does provide information—even if not required by the statute—may not mislead participants and their beneficiaries.[92]

C. Development of Settlor/Fiduciary Doctrine and the Supreme Court Trilogy

The settlor/fiduciary doctrine is an accretion of guidance from the Department of Labor (DOL or Department) and decisions by the courts. The first explicit iteration of the settlor/fiduciary distinction came in the form of a 1986 DOL information letter in

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[87] *See* ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) (2006).
[88] *See* ERISA § 404(c), 29 U.S.C. § 1104(c) (2006).
[89] *See* ERISA § 4044(d), 29 U.S.C. § 1344(d) (2006).
[90] AUSTIN W., JR. SCOTT ET AL., SCOTT ON TRUSTS §§ 172, 173 (1998).
[91] *See* Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?* 26 HOFSTRA LAB. & EMP. L.J. 497, 510-19 (2009) (discussing ERISA's disclosure obligations).
[92] *See generally*, Dana M. Muir, *Truth or Consequences: Varity v. Howe and Beyond*, 13 THE LAB. LAW. 411, (1998).

response to “questions regarding the extent to which ERISA’s fiduciary duty rules would apply to the decision to terminate a pension plan.”[93] The DOL letter indicated “that in light of the voluntary nature of the private pension system governed by ERISA, the Department has concluded that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called "settlor" functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA.”[94] The letter went on, however, to express the view that “[a]lthough the decision to terminate is generally not subject to the fiduciary responsibility provisions of ERISA, the Department has emphasized that activities undertaken to implement the termination decision are generally fiduciary in nature.”[95]

In an important sense, though, the letter was disingenuous in the way it set up the issue, for there was no genuine disagreement that an employer enjoyed virtually unfettered control over the decision to establish, terminate, or design (subject to ERISA’s substantive requirements) an employee benefit plan, for these were not controversial issues,[96] although perhaps they should have been in certain contexts. Rather, the letter was effectively focused on a narrower issue, which was controversial: did an employer’s decision to terminate an overfunded pension plan for the purpose of capturing its surplus assets implicate fiduciary duties, particularly when the employer had to amend the plan to create an employer right to the surplus assets? Given that the

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[93] John N. Erlenborn, Department of Labor Information Letter 1 (Mar. 13, 1986), *available at* http://www.dol.gov/ebsa/regs/ils/il031386.html. John Erlenborn was a ten-term Congressman from Illinois who helped create a house pension task force and was a key participant in the legislative process that produced ERISA. See, e.g., Nicholas Braude, *John Ernlenborn, Patriarch of Pension Legislation, dead at 78*, PENSION & INVS. (November 14, 2005), http://www.pionline.com/article/20051114/PRINT/511140711/john-erlenborn-patriarch-of-pension-legislation-dead-at-78.
[94] John N. Erlenborn, Department of Labor Information Letter 1, *supra* note 93.
[95] *Id.*

ERISA definition of fiduciary includes a person "to the extent . . . he exercises . . . any authority or control respecting management or disposition of [a plan's] assets,"[97] it was certainly within the parameters of plausible argument that the decision to amend a plan to create an employer right to capture a DB plan's surplus assets was a fiduciary decision and perhaps even that the mere decision to terminate an overfunded plan for the purpose of recovering plan assets was a fiduciary decision. After all, both the decision to terminate the plan and the recapture of the assets involve the exercise of authority or control of the disposition of a plan's assets, even if they involve the exercise of an employer power to do so.[98] The question here would not have been whether there was an employer power, but rather whether the exercise of that power was subject to fiduciary constraints. But the federal courts largely agreed with the Department's position, with the Supreme Court endorsing and demarcating the distinction between settlor and fiduciary functions in a trilogy of cases, with the last of those cases giving the doctrine particularly broad scope.[99]

The Court decided the three trilogy cases in a relatively short period, between 1995 and 1999. The first case, *Curtiss-Wright Corp. v. Schoonejongen,* involved a health care plan that did not include a detailed amendment procedure.[100] For the first time, the Supreme Court decided that employers had a fundamental right to amend or terminate their employee benefit plans even if the plan itself did not explicitly provide for amendments or termination at the

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[96] *See, e.g., In re* Pension Plan for Emps. of Broadway Maint. Corp., 707 F.2d 647, 648 (1983) (outlining the procedures an employer must follow to voluntarily terminate a pension plan).
[97] ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2006).
[98] *See* Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1417 (2d Cir. 1985) (holding, at least arguably, that an employer's decision to capture plan assets could be a fiduciary decision). For a discussion of *Amato* and cases from the period addressing plan terminations that affect early retirement benefits, see Muir, *supra* note 51, at 1051-52. We return to this argument *infra* Part IV.B.
[99] *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).
[100] 514 U.S. 73, 81-83 (1995).

discretion of the employer. The Court did so with little analysis other than a citation to a Sixth Circuit decision.[101]

In the Sixth Circuit case, the employer amended an unwritten severance benefit plan by adopting a written severance plan that denied benefits to employees who remained employed after a sale of the business.[102] The plaintiffs argued that this amendment of the plan constituted a fiduciary breach.[103] In determining that no breach occurred, the Sixth Circuit drew a line between decisions relating to plan assets or plan administration (fiduciary actions) and decisions such as plan adoptions, terminations and amendments, which firms undertake as business decisions (not fiduciary actions).[104]

The very next year the Supreme Court again took up the question of an employer's right to amend its plan in *Lockheed Corp. v. Spink*, a case involving a DB pension plan.[105] The facts of the case were simple: the employer added an early-retirement provision to its plan, a provision that required a participant electing to retire early to release all employment claims against the employer.[106]

In *Spink*, the Court went beyond its cursory determination in *Curtiss-Wright* and considered the question of what employer actions vis-à-vis a plan constitute fiduciary actions.[107] In contrast to the policy-based approach the DOL took in its 1986 letter,[108] the Supreme Court based its decision squarely on an interpretation of ERISA's definition of the term "fiduciary."[109] According to the Court, the statute's activity-based fiduciary definition meant that some

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[101] *Id.* at 78 (citing Adams v. Avondale Indus., 905 F.2d 943, 947 (6th Cir. 1990)).
[102] *Adams*, 905 F.2d at 944.
[103] *Id.* at 947.
[104] *Id.*
[105] 517 U.S. 882 (1996).
[106] *Id.* at 885.
[107] *Id.* at 890-91.
[108] *See supra* text accompanying notes 93-95.
[109] Lockheed Corp. v. Spink, 517 U.S. at 890-91. For the language of the definition, see *supra* text at note 75.

employer actions are fiduciary actions and others are not.[110] Since ERISA's language does not specifically include plan design among the discretionary actions that give rise to fiduciary status, as compared to its inclusion of plan administration, management, and control of plan assets, the Court determined that the act of amending a plan is not a fiduciary act.[111] Its discussion of the distinction between discretionary acts of plan design (not fiduciary acts) and discretionary acts of plan administration and management (fiduciary acts) is where we find the Court's first reference in an ERISA case to "the settlor/fiduciary distinction."[112]

By the third case of the trilogy, the Court became impatient with the limitations being imposed by the lower courts on employer actions and wrote in broad terms. In *Hughes Aircraft Co. v. Jacobson*, a plan sponsor amended a DB plan to require participating employees to make annual contributions.[113] It was this facet of requiring employee contributions that distinguished the *Hughes* plan from the plan that had been at issue in *Spink.* Over time, the *Hughes* plan had become overfunded, which permitted Hughes to cease making any contributions to the plan for a period of eight years, even though employees continued to contribute during this period.[114] Hughes then amended the plan on two occasions; first to use some of the surplus assets to provide enhanced early retirement benefits for selected employees and second, to eliminate the contribution requirement for newly hired employees.[115]

A group of plan participants alleged that Hughes had breached its ERISA fiduciary duties when it amended the plan to use the surplus assets to benefit some contributing employees disproportionately (the first amendment) and when it amended the plan to use the surplus assets to provide benefits for employees who had not contributed to the plan at all (the second

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[110] 517 U.S. at 890-91
[111] *Id.* at 890.
[112] *Id.* at 891.
[113] 525 U.S. 432, 435 (1999).
[114] *Id.* at 436.
[115] *Id.*

amendment).[116] The Ninth Circuit ruled that, to the extent that the surplus assets were attributable to the employee contributions, the participants had stated a cause of action for an ERISA fiduciary breach.[117] One way of understanding the distinction drawn by the Ninth Circuit is that the employees' contributions made them co-settlors of the plan.[118] Thus, Hughes would not have the power to unilaterally amend the terms of the plan, at least in a manner that harmed the participants who had been contributing to the plan.

In a unanimous decision, the Supreme Court reversed the Ninth Circuit,[119] using expansive and unambiguous language that left little room for the lower courts to continue to draw distinctions between various types of benefit plans.[120]

> We made clear in *Spink* that our reasoning applied both to "pension benefit plans" and "welfare benefit plans," since "the definition of fiduciary makes no distinction between persons exercising authority over these different types of plans. Our conclusion applies with equal force to persons exercising authority over a contributory plan, a noncontributory plan, or any other type of plan. Our holding did not turn, as the Court of Appeals below thought, on the type of plan being amended for the simple reason that the plain language of the statute defining fiduciary makes no distinction. Rather, it turned on whether the employer's act of amending its plan constituted an exercise of fiduciary duty. In *Spink*, we concluded it did not.[121]

The *Hughes* Court's approach thus directly links back to its interpretation in *Spink* of ERISA's definition of fiduciary. Again, the Court focused on the difference between design decisions and discretionary plan administration. Even in the context of a plan where employees made contributions and the employer had stopped making

[116] *Id.* at 436-37.
[117] *See* Jacobson v. Hughes Aircraft Co., 105 F.3d 1288, 1297 (1997), *amended by,* 128 F.33d 1305, *rev'd,* 525 U.S. 432 (1999).
[118] *See* 105 F.3d at 1311 (dissenting judge writing: "The majority seems to be saying that employees are co-settlors of contributory plans.").
[119] Hughes Aircraft Co. v. Jacobson, 525 U.S. at 435.
[120] In 1986 Congress amended ERISA to provide for employees sharing in surplus assets on termination, but that would not have applied in the *Hughes* situation because it did not involve a plan termination. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, § 1132(a) (Oct. 22, 1986) (adding ERISA § 4980).

contributions, the decision treats only Hughes as the plan settlor. And, as the settlor, Hughes was free even to design the plan's terms, including who would receive plan benefits. In the words of the Court:

> The same act of amending here also does not constitute the action of a fiduciary, although Hughes' Plan happens to be one to which employees contribute. In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. ERISA's fiduciary duty requirement simply is not implicated where Hughes, acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan *such as who is entitled to receive Plan benefits* and in what amounts, or how such benefits are calculated. A settlor's powers include the ability to add a new benefit structure to an existing plan. Respondents' three fiduciary duty claims are directly foreclosed by *Spink*'s holding that, without exception, "plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."[122]

The *Hughes* decision also quoted language from *Spink*, which listed specific actions that are settlor actions and not subject to ERISA's fiduciary obligations.

> "Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. As we said with respect to the amendment of welfare benefit plans, 'employers or other plan sponsors are *generally* free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.' When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust."[123]

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[121] 525 U.S. at 443-44.
[122] *Id.* at 444-45 (emphasis added) (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996), other citations omitted).
[123] *Id.* at 443 (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (other citations omitted)).

This language, with its inclusion of the modifier "generally" arguably left some room for lower courts to maneuver. As a general matter, however, that has not happened.[124]

In *Hughes Aircraft*, the Court ignored rather than engaged the interests of employees. This was not a necessary outcome. The Court could have recognized that, at least because of the direct contributions they made to the pension plan, the employees also held interests in the plan and acted as plan settlors, or at least were entitled to the employer considering their interests in the plan in the amendment process. In our judgment, the broad sweep of the Court's language in *Hughes* regarding the settlor/fiduciary doctrine sometimes (but not always) yields questionable policy outcomes.[125]

II. Doctrinal Boundaries and Application

Despite the rigidity in the settlor/fiduciary doctrine, there are at least two difficult questions that the courts have not yet been able to coherently and fully answer about the doctrine: first, where is the demarcation line between settlor decisions and fiduciary implementation of settlor decisions;[126] and second, to what extent does the doctrine protect plan sponsors when they engage in business or settlor-type activities that do not include adopting, formally amending, or terminating, a plan?[127] The first question is perhaps the more important, for it is one moving part of the settlor/fiduciary doctrine that might be judicially engineered to control some of the doctrine's potential excesses.[128]

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[124] *See generally infra* Part II.C. The Court's use of the term "generally," we note, can be construed to refer to ERISA's substantive limitations on the power to design a plan, but the *Spink* reference to "generally" might also be viewed as a bit of hedging, allowing the development of limiting principles on settlor freedom in subsequent cases.
[125] *See infra* Part III.A.
[126] *See infra* Part II.A.
[127] *See infra* Part II.B.
[128] *See infra* Part IV.A. & B.

After the Supreme Court's *Hughes* decision, the parameters of the settlor/fiduciary doctrine were not clearly defined.[129] More than thirteen years later, some lack of clarity remains but overall the trend has been to find that employers wear their settlor hats when engaging in many plan-related activities. Courts continue to address questions that turn on the distinction between plan design and termination, which are not fiduciary acts, and implementation of those decisions, which are fiduciary acts. The first subsection below analyzes the doctrine in that area, beginning with one of the Supreme Court decisions since the trilogy that directly addressed the settlor/fiduciary distinction. The application of doctrinal boundaries also occurs when plan sponsors engage in business or settlor-type activities but do not formally adopt, amend, or terminate a plan. The second subsection below engages those situations. The third subsection considers the settlor/fiduciary doctrine's boundaries in the context of many of the employee benefits situations to which the settlor/fiduciary doctrine applies.

A. Implementing the Definition of Implementation

In 1999, Professor Muir wrote about the settlor/fiduciary doctrine stating that the "dichotomy between actions taken to amend plans, and actions taken to implement amendments and, by implication, terminations, is likely to continue to create problems."[130] That has proven to be true. On the one hand, the lack of doctrinal clarity surrounding these questions is problematic for all the usual reasons that uncertainty in law is sometimes considered problematic. But, we also see the lack of clarity as offering judges an opportunity to tame some of the more problematic aspects of the settlor/fiduciary doctrine, an issue to which we will return in the last Part of this Article.

[129] Muir, *supra* note 7, at 220.
[130] Muir, *supra* note 7, at 220.

In its 2007 decision in *Beck v. PACE International Union,* the Supreme Court took up the line drawing challenge in a case involving a plan termination.[131] Crown Paper and its parent (Crown) sponsored multiple DB plans at the time Crown declared bankruptcy.[132] Some of the plans, which covered unionized employees, had enjoyed more financial success than Crown and in total were overfunded by approximately $5 million.[133] Crown decided to terminate the plans by purchasing annuities, which is the typical way of terminating a fully or overfunded plan.[134] Through the annuities, the employees and retirees would receive all of their promised pension benefits assuming the continued claims-paying ability of the insurance company. The remaining $5 million of overfunding, which would then remain, would go into the bankruptcy estate to be allocated to Crown's creditors.[135]

The union, PACE International Union (PACE), had other ideas. PACE proposed that Crown transfer all of the liabilities and assets in the relevant plans to a multiemployer pension plan that covered PACE union members. That would have enabled the multiemployer plan to capture the $5 million in excess funding.[136] Crown proceeded with its purchase of annuities without seriously considering PACE's proposition. PACE then alleged that Crown had violated its fiduciary obligation to act for the exclusive purpose of providing plan benefits when it decided to implement the

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[131] 551 U.S. 96 (2007).
[132] *Id.* at 99.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] At the Supreme Court, PACE indicated it would have agreed to a transfer of plan assets to its multi-employer fund even if Crown retained the $5 million surplus. *Id.* at 100 n.2. Multiemployer pension plans provide benefits for the unionized employees of multiple employers. *See, e.g.,* Paul M. Secunda, *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink,* 21 Cornell J. L. & Pub. Pol'y 77, 82-88 (2011) (explaining the basics of multiemployer plans).

plan terminations through annuity purchases in order to recapture assets for Crown's creditors.[137]

The first issue, and the relevant one for this Article, on which the Supreme Court granted certiorari, was whether the decision to purchase annuities was part of the decision to terminate the plan, and thus was not a fiduciary decision, or whether it constituted implementation of the termination decision, and thus was a fiduciary decision.[138] The bankruptcy court, district court, and Ninth Circuit Court of Appeals all found in PACE's favor; Crown's decisions not to consider PACE's plan merger proposal and to purchase the annuities were acts undertaken in the implementation of the termination.[139]

The Supreme Court, in a unanimous decision, disagreed. The Court relied on ERISA's language governing plan terminations and guidance by the applicable regulatory agencies, which both indicated that a plan merger is not a permissible way to achieve a plan termination.[140] PACE had argued that the statutory language clearly permitted merger as an allowable way to implement a plan termination.[141] The Supreme Court, however, agreed with the Pension Benefit Guaranty Corporation's (PBGC) interpretation of the statute to mean that "merger is an *alternative* to (rather than an example of) plan termination."[142] Applying this view of the statute, once Crown decided to terminate the pension plans, which it was entitled to do without fiduciary ramifications under the settlor/fiduciary doctrine, the decision to purchase annuities was subsumed in that termination decision.[143]

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[137] 551 U.S. at 100.
[138] *Id.* at 101.
[139] *Id.*
[140] *Id.* at 102-10.
[141] *Id.* at 105.
[142] *Id.* at 104 (emphasis in original).
[143] *See id.* at 102.

It is worth focusing on precise language in the *Beck* decision and teasing out its implications. The Court set the stage for its analysis by stating that "which hat the employer is proverbially wearing depends upon the *nature of the function performed*."[144] It also noted that this "inquiry . . . is aided by the common law of trusts."[145] This suggests that if the nature of the action is one that historically would have been performed by a trust settlor then the action is not subject to ERISA's fiduciary standards. The *Beck* Court quoted a phrase from the *Hughes*[146] decision that has been cited by a number of lower courts:[147] "'[D]ecision[s] regarding the form or structure' of a plan are generally settlor functions."[148] This language implies that the settlor/fiduciary analysis takes into account the effect of a decision so that even decisions not implemented by plan amendment may be settlor decisions.

Consider the Court's approach to the settlor/fiduciary distinction in *Beck.* The Court appeared willing, if ERISA provided for multiple ways to implement a termination, to treat the selection of a particular implementation method as a fiduciary decision. The Court decided, however, that the condition precedent did not exist; a merger is not a statutorily permitted way to implement a plan termination.[149] Thus, Crown's decision to

[144] *Id.* at 101 (emphasis added).
[145] *Id.*
[146] 525 U.S. 432, 435 (1999).
[147] *See, e.g.,* Bennett v. CONRAIL Matched Sav. Plan Admin. Comm., 168 F.3d 67, 679 (3d Cir. 1999); Coriale v. Xerox Corp., 775 F. Supp. 2d 583, 599 (W.D.N.Y. 2012); *see also* Slusarski v. Life Ins. Co. of N. Am., 632 F. Supp. 2d 159, 167 (D.R.I. 2009) ("ERISA's fiduciary duty requirement simply is not implicated where [the company], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated.").
[148] 551 U.S. at 101-02 (quoting Hughes Aircraft Co., 525 U.S. at 444).
[149] *Id*. at 110.

terminate was a decision on the plan's structure or form,[150] making it a settlor decision and, as a result, Crown had no obligation to consider PACE's merger proposal.[151]

Varity Corp. v. Howe, is the only case in which the Supreme Court applied the settlor/fiduciary doctrine to find that employer acts were fiduciary in nature because they constituted plan administration.[152] The employer and plan sponsor, Varity, had consolidated its financially unsuccessful divisions into a new subsidiary.[153] To encourage active employees in those divisions to transfer voluntarily to the new subsidiary, Varity engaged in an extensive communications program.[154] Although Varity had intentionally structured the new subsidiary to be financially insolvent, the communications program omitted that information.[155] Instead, Varity represented to the employees that they could expect benefits equivalent to those they had enjoyed while employed at Varity.[156] The business results were predictable: the subsidiary failed.[157] The health care plans then terminated, leaving participants without those benefits.[158] The participants sued, alleging that Varity's communications violated ERISA's fiduciary standards.[159] The preliminary question, though, was whether Varity acted as a fiduciary when communicating about the plan with the employees.[160] The Supreme Court held that Varity undertook the

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[150] *Id.* at 101-02.
[151] *See id.* It is not clear, even if termination could have been accomplished by means of a merger, that Crown would have been obligated to merge the plans. The Court found it unnecessary to address the issue of whether a decision on a plan merger "could switch from a settlor to a fiduciary function depending upon the context in which the merger proposal is raised." *Id.* at 102. The Court termed that "an odd" idea. *Id.*
[152] 516 U.S. 489 (1996).
[153] *Id.* at 493.
[154] *See id.* at 493-94.
[155] *See id.* at 494.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *See id.* 492.
[160] *Id.*

communications program as part of its plan administration and, thus, Varity was a fiduciary when communicating with the employees about the plan.[161]

The Court looked to trust law to determine whether Varity was wearing its fiduciary or settlor hat. According to the Court: "The ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents."[162] This includes powers "necessary or appropriate"[163] to carry out the purposes of the trust even when the trust documents do not explicitly grant specific powers. Communicating forward-looking information about the plan to employees asked to make decisions based on that information is an act in furtherance of the trust's purposes.[164] From a contextual perspective, the Court thought that reasonable employees could think that their employer was acting, at least in part, as administrator of the plan when talking about the plan's future.[165]

We can speculate that the Court may have come to a different conclusion if Varity's communications with its employees had not been so transparently dishonest. The lack of a definitive boundary between fiduciary and non-fiduciary acts means that courts have some discretion in characterizing particular actions. Varity was wearing at least two hats and arguably three during this time period. Varity determined the terms of its plans while wearing its settlor hat. Arguably, the decision to create a new subsidiary and to offer employees the opportunity to transfer to that subsidiary was made while

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[161] *Id.* at 505. Varity also transferred approximately four thousand retirees to the benefit plans of the new organization without obtaining the retirees' consent. *Id.* at 494.
[162] *Id.* at 502.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 503.

wearing its business decision-maker hat.[166] And, when Varity communicated with employees about the plan it was wearing its fiduciary hat.

In sum, the courts have confronted questions involving the distinction between plan adoption, amendment, and termination, which are settlor actions, and conduct that occurs while implementing those settlor actions or engaging in plan management, which is subject to fiduciary standards in a wide variety of contexts.[167] For ease of reference, we will refer to this strand of the settlor/fiduciary doctrine as the "plan structure" strand. Before considering the contexts in which those questions arise, the next subsection explains the second strand of the settlor/fiduciary doctrine.

B. Formalism - Beyond Adoption, Amendment, Termination

In each of the trilogy cases, *Spink*,[168] *Curtiss-Wright*,[169] and *Hughes*,[170] the Supreme Court decided that a plan amendment constituted a settlor act, not a fiduciary act. And, in *Varity*,[171] the Court found that communications, which obviously were not plan amendments, were fiduciary acts. The factual differences among those cases, along with the *Beck*[172] and *Varity* Courts' reliance on the common law of trusts, raise the possibility that the distinction between settlor and fiduciary acts is a formalistic one. Indeed, the plan structure strand of the doctrine suggests that acts taken through plan amendments always are settlor acts. In theory, formalism could apply in the opposite

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[166] *See infra* text accompanying notes 203 (discussing some cases characterizing employer actions as business decisions rather than fiduciary acts). This question was not before the Court.
[167] *See infra* text accompanying Part II.C. (discussing cases addressing the boundary between settlor functions and fiduciary functions and categorizing the cases by the type of benefits context in which they arose).
[168] Lockheed Corp. v. Spink, 517 U.S. 882 (1996).
[169] Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995).
[170] Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).
[171] Varity Corp. v. Howe, 516 U.S. 489 (1996).
[172] Beck v. PACE Int'l Union, 551 U.S. 96 (2007).

direction as well. Discretionary acts other than plan adoption, amendment and termination may always be fiduciary acts.

But, even if, under current Supreme Court doctrine, all plan amendments constitute settlor acts, it does not necessarily follow that all plan-related actions not taken through a plan amendment constitute fiduciary acts. The *Hughes Aircraft* Court referred to settlor actions as those that "'adopt, modify, or terminate'"[173] benefit plans. The term "modify" might indicate that settlor actions encompass a broader range of actions than just formal plan amendments.

As a reminder, the Supreme Court's development of the settlor/fiduciary doctrine was premised on its interpretation of the statutory definition of fiduciary.[174] The statute defines fiduciary functions as including discretionary acts of plan management and plan administration.[175] Arguably then the definition encompasses a more limited set of actions than the entire set of discretionary acts that affect benefit plans. Many discretionary business decisions, such as whether to enter a particular market, setting appropriate levels of cash reserves, developing research and development programs, or developing and implementing employment policies, have an indirect, and sometimes even a direct, effect on an employer's benefit plans. The challenge then is to distinguish between instances where an employer is wearing its ERISA fiduciary hat because it is engaging in discretionary plan administration or management, or controlling plan assets, and those circumstances where the employer is wearing its business hat because it is engaged in decision making about its business operations.

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[173] 525 U.S. at 443 (quoting *Curtiss-Wright*, 514 U.S. at 78).
[174] *See supra* text accompanying notes 113-27.
[175] ERISA § 3(21)(A)(i) & (iii), 29 U.S.C. § 1002(21)(A)(i) & (iii) (2006)

The Supreme Court has yet to address the distinction between an employer's fiduciary role in administering a plan and its role in running its business. The Third Circuit, however, confronted such a situation in *Noorily v. Thomas & Betts Corp.*,[176] which it decided shortly after the Court's *Hughes*[177] decision. Thomas & Betts Corporation (T&B) asked certain engineering employees to relocate from New Jersey to Tennessee.[178] T&B's severance plan provided for the payment of benefits to "employees who were 'involuntarily terminated' when 'the terminating manager believes the granting of such pay is appropriate.'"[179] T&B indicated in an initial communication to employees that employees who received but rejected a relocation offer would receive severance benefits. Once T&B realized, however, that substantial numbers of the engineering employers were going to refuse to relocate, it decided to deny them severance benefits in an effort to encourage them to move.[180] The employees alleged that T&B's refusal to pay the severance benefits constituted a violation of T&B's ERISA fiduciary duties.[181]

The Third Circuit held that T&B's decision not to pay severance benefits was an action that T&B undertook while wearing its business hat, not its fiduciary hat. It was irrelevant to the analysis that T&B had not amended the severance plan. Instead of focusing on whether the plan had been amended,[182] which is important to the plan structure strand of the settlor/fiduciary doctrine, the court found it compelling that T&B exercised its "discretion . . . as an employer through its terminating manager rather than

[176] 188 F.3d 153 (3d Cir. 1999).
[177] Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).
[178] *See* 188 F.3d at 156.
[179] *Id.* (quoting plan language).
[180] *Id.*
[181] *See id.* at 158-59 (discussing claim for fiduciary breach).
[182] The Third Circuit might have categorized each of the employment decisions made by a T&B manager as being the equivalent of a plan amendment.

as an administrator through its Corporate Benefits Committee."[183] Under this analysis, the denial of severance benefits to employees was made by T&B in its capacity as an employer because it was in T&B's business interest to encourage the employees to transfer to Tennessee.[184] The decision illustrates an employer's right to make business decisions that affect employee benefit plans without the constraints of ERISA fiduciary obligation. We will refer to this strand of the settlor/fiduciary doctrine as the "business decision" strand.

The Third Circuit's approach in *Noorily* decision provides an interesting counterpart to the Supreme Court's decision in *Varity v. Howe.*[185] As discussed above,[186] Varity arguably was wearing its management hat when it decided to form a new subsidiary. Its discussion with employees on their transfer to the new subsidiary then could have been viewed as also occurring while wearing that management hat.

In sum, the settlor/fiduciary doctrine should be understood as comprising two strands, either of which may result in an employer action being found to be a settlor action and not subject to ERISA's fiduciary constraints. One strand, the plan structure strand, holds definitively that plan sponsors act as settlors and not fiduciaries whenever they adopt, amend, or terminate a benefit plan. The second strand, the business decision strand, is more flexible in its application and permits an employer's actions taken with a business purpose to be recognized as settlor actions even though they are taken through a mechanism other than the adoption, amendment or termination of a benefit plan. The next subsection considers the wide range of employee benefit situations in which the settlor/fiduciary doctrine has application.

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[183] *Id.* at 159.
[184] *Id.*
[185] 516 U.S. 489 (1996). The *Varity* decision is discussed *supra* at text accompanying notes 152-65.

C. The Settlor/Fiduciary Doctrine's Reach Across Employee Benefits.

The breadth of the settlor/fiduciary doctrine's reach through its two strands illustrates what is at stake in the application of the doctrine for both the employers that sponsor plans and the employees who expect to earn benefits from them. As we noted in the introduction, courts have applied the settlor/fiduciary doctrine across many types of employee benefit plans, ranging from traditional pension plans to health care plans, from cases involving one employee to decisions that affect the benefits of all or large sections of an employer's workforce. The settlor/fiduciary doctrine also arises in the context of corporate reorganizations and restructurings and when an employer communicates, directly or indirectly, with its employees. As we analyze the contextual application of the settlor/fiduciary doctrine here, we further consider the application of its plan structure and business decision strands before critiquing the doctrine in the next Part.

1. DB Plan Funding

As referenced above,[187] ERISA contains a series of funding rules intended to ensure that DB plans have sufficient assets to pay the benefits they promise.[188] However, the plan structure strand of the settlor/fiduciary doctrine protects the adoption of plan amendments even if those amendments result in significant plan underfunding. This occurred in one multiemployer DB plan when the employers and union agreed to terminate the employers' contribution obligation.[189] The plan's actuary proposed that the plan trustees adopt a benefit structure consistent with the plan remaining fully funded in

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[186] *See supra* text accompanying note 166.
[187] *Supra* text accompanying note 54.
[188] ERISA §§301-305, 29 U.S.C. §§1081-1085 (2006). Parallel funding requirements are found in the Internal Revenue Code. I.R.C. § 412. The IRS has primary authority in enforcing plan funding obligations. *See* EMPLOYEE BENEFITS LAW, *supra* note 19, at 3-20.
[189] Gard v. Blankenburg, Nos. 00-1234, 00-2224, 2002 U.S. App. LEXIS 2963 (6th Cir. Feb. 21, 2002).

perpetuity.[190] Whether intentionally or because they failed to understand the actuary's proposal, the trustees instead amended the plan to provide a level of benefits that was not sustainable. As a result the plan became severely underfunded.[191]

In addressing allegations that the trustees breached their fiduciary duty by adopting the generous benefit structure,[192] the Sixth Circuit Court of Appeals applied what we have identified as the plan structure strand of the settlor/fiduciary doctrine. Because the trustees took action through a plan amendment, their decision on the benefit structure was not fiduciary in nature. Instead it was a plan design decision, protected by the settlor/fiduciary doctrine.[193] The plan structure strand also protects employer decisions that increase benefits for a subset of employees at some cost, direct or indirect, to other employees.[194]

In an effort to decrease the risk associated with DB benefit promises made to retirees, several companies have shifted the responsibility for the retirees' pension annuities to an insurance company. Verizon caused its pension plan for management employees to purchase annuities from Prudential Insurance Company of America (Prudential) for approximately 41,000 retirees.[195] For the future the annuities will provide the full amount of the benefits owed to those retirees, approximately $7.4 billion at the time of the annuity purchase.[196] The benefits to Verizon of this transaction, one of

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[190] *Id.* at *5.
[191] *Id.* at *6.
[192] *Id.* at *8.
[193] *Id.* at *15; *see also* Hartline v. Sheet Metal Worker's Nat'l Pension Fund, 134 F. Supp. 2d 1 (D.D.C. 2000) (finding that a variety of plan decisions made by multi-employer plan trustees regarding contribution rates were not fiduciary actions because they were plan design decisions), *affd*, 286 F.3d 598 (2002).
[194] *See* Hughes Aircraft Inc. v. Jacobson, 525 U.S. 432, 435 (1999). *See supra* text accompanying notes 113-27 for a discussion of the *Hughes Aircraft* decision.
[195] Lee v. Verizon Commc'ns Inc., No. 3:12-CV-4834-D, 2013 U.S. Dist. LEXIS 87898, at *5 (N.D. Tex. June 24, 2013). General Motors engaged in a similar transaction that reportedly would affect approximately 118,000 retirees and $26 billion in benefits. David Shepardson & Melissa Burden, *GM offers lump-sum buyout of pensions*, DET. NEWS, June 2, 2012, at A1.
[196] *Lee*, 2013 U.S. Dist. LEXIS 87898, at *3.

the types of transactions used as part of a "de-risking" strategy, are numerous and include avoiding future longevity risk, removing the pension liabilities from its balance sheet, and decreasing the potential increase in Verizon's minimum pension contributions as a result of interest rate decreases.[197] Some retirees whose pensions now will be paid by Prudential realize at least one potential benefit as a result of the transaction. If in the future the PBGC assumes responsibility for the Verizon plan at a time when it is underfunded, retiree benefits would be capped according to the statutory cap for benefits paid by the PBGC.[198] Generally, however, the potential implications for the retirees are troubling. Because their benefits are no longer paid from an ERISA plan, the benefits of those retirees may no longer receive Federal protection in the case of personal bankruptcy.[199] And, if in the future, Prudential is unable to pay their benefits, the retirees will not have any guarantee from the PBGC. Instead their protections will be limited to those provided by the relevant state law governing insurance companies.

The retirees whose benefit obligations Verizon transferred to Prudential sued, alleging a variety of claims, including that Verizon breached its fiduciary duty of loyalty to them.[200] The court rejected the retirees' fiduciary claim on the basis of the plan design strand of the settlor doctrine. As the court explained: "Because amending a plan is not a

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[197] *See This Changes Everything,* AICIO, Sept. 1, 2012, at A15 (discussing the effect of interest rate changes on contribution obligations in the context of de-risking).
[198] *See* 2013 U.S. Dist. LEXIS 87898, at *11. The PBGC's current cap on benefits for a retiree who is age 65 at the time plan terminates is $4,789.77 per month. PBGC, *Maximum Monthly Guarantee Tables, available at* http://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.html.
[199] The rights of annuitants against creditors would be decided by state law, as would the ability of the annuitant to assign future benefits. *See, e.g.,* Laura S. McAlister, *Comment, The Inefficiencies of Exclusion: The Importance of Including Insurance Companies in the Bankruptcy Code,* 24 BANK. DEV. J. 129, 130-34 (2008) (discussing the application of state law to insurance company (the typical annuity providers) insolvency).
[200] *Lee*, 2013 U.S. Dist. LEXIS at 87898, at *11.

fiduciary function, Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for participants meeting certain criteria."[201]

Some employers have also amended DB plans to transfer financial risk directly to retirees by giving them a one-time post-retirement election to transform their annuity benefit into a lump sum option.[202] While this is a bonanza for those individuals with known terminal illnesses, for most participants it is a honey-trap, with far less financial value than the continuing annuity that they would be giving up. But employers offer this option not because they want to reward employees with terminal illnesses a financial reward, but because they believe that enough relatively healthy employees will make financially irrational decisions to forego the continuing annuity for the less valuable lump sum to make the lump sum less costly to the employer than retaining the benefit in the plan or paying a premium to transfer it to an insurer. What is more, some retirees will be suffering diminished mental capacity and will not be in a good position to make a reasoned choice. But the decision to offer the lump sum is nevertheless a settlor decision, even if there is clear evidence that the employer is offering it with the expectation that most employees who choose the option will be damaging their financial welfare in retirement.

The business decision strand of the settlor/fiduciary doctrine also may protect employer actions that implicate plan funding. When an employer with limited financial resources decides to pay corporate obligations instead of making contributions to a DB plan, the relationship between the business decision and plan funding is relatively direct. Courts typically categorize those choices as business decisions rather than ERISA

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[201] *Id.* at *16.

fiduciary actions.[203] More indirectly, decisions that affect the business' financial success may implicate the company's ability to make plan contributions.

2. DC Plan Investments

Whatever assets are in a participant's DC plan account at retirement constitute the participant's benefit. Thus, net investment returns are an important factor in a participant's ability to build wealth in those accounts. It is necessary here to take a short detour to explain two prevalent types of DC plans: 401(k) plans and employee stock ownership plans (ESOPs). Although the terms of 401(k) plans vary, the defining characteristic of such a plan is that it must permit employees who are eligible to take part in a 401(k) plan to choose whether to contribute pre-tax earnings to that employee's own plan account.[204] ESOPs differ from 401(k) plans in two ways that are important for this Article. First, ERISA requires ESOPs to invest primarily in employer stock, whereas no such provision exists for standard 401(k) plans.[205] Second, ESOPs typically hold employer stock in a suspense account. Over time, as employees earn plan contributions, the plan transfers stock from the suspense account to participant accounts.[206] Finally, a KSOP is a hybrid of a 401(k) and an ESOP. KSOPs permit employees to make contributions, which are treated as 401(k) contributions, although they are invested in

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[202] *See, e.g.,* Susan Tompor, *Lump-sum pension a tough call for General Motors, Ford retirees,* DETROIT FREE PRESS, , June 14, 2012, at http://www.freep.com/article/20120614/COL07/206140488/Lump-sum-pension-offer-a-tough-call-for-General-Motors-Ford-retirees (June 14, 2012).

[203] *See In re* Brobeck, Phleger & Harrison, LLP, 414 B.R. 627, 637 (N.D. Cal. 2009) ("The clear majority of the few courts dealing with the issue of unpaid employer contributions, regardless of the plan type, hold that choosing not to make employer contributions is a business or corporate function, not a fiduciary function with respect to a plan."); Harpster v. AARQUE Mgmt. Corp., No. 4:03CV1282, 2005 U.S. Dist. LEXIS 30811(N.D. Ohio July 22, 2005) (holding that a decision to pay dividends was a discretionary business decision and not alone a fiduciary breach); *see also* Holdeman v. Devine, 474 F.3d 770, 778 (10th Cir. 2007) (deciding employer not acting as fiduciary in allocating assets to business debts instead of health care plan premiums).

[204] EMPLOYEE BENEFITS LAW, *supra* note 19, at 6-15. Roth 401(k) plans receive contributions from post-tax earnings. *See id.* at 6-20.

[205] ERISA § 407(d)(6)(A), 29 U.S.C. § 1107(d)(6)(A) (2000).

[206] *See* Michael W. Melton, *Demythologizing ESOPs,* 45 TAX L. REV. 363, 364-65 (1990).

employer stock. In addition, the employer may also contribute employer stock, which typically is used to 'match' employee contributions at a specified rate.[207]

a. 401(k) Plans

With that background on plan typology behind us we can return to the plan sponsor's role in selecting investment menus in the typical 401(k) plan and the use of employer stock for matching contributions. Most 401(k) plans are participant-directed plans,[208] which delegate to employees decisions on investment selection. If the plan meets certain regulatory requirements, including diversity in terms of the risk/reward characteristics of the options and sufficient disclosure, then plan sponsors and all fiduciaries, other than plan participant, are insulated from fiduciary liability for the decision to invest account assets in a particular investment product.[209] Plan sponsors play an important role in these plans because they determine which investment vehicles are available to plan participants. Most plans have a limited "menu" of available investments, with the average number of options being eighteen.[210]

In addition to employers' decisions on the composition of the plan's investment menu, employers that contribute to a 401(k) plan may permit employees to invest their contributions in employer stock (turning part of the plan into a KSOP). Or, an employer

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[207] *Employee Stock Ownership After Enron: Proceedings of the 2003 Annual Meeting, Association of American Law Schools Section on Employee Benefits*, 7 EMP. RTS. & EMP. POL'Y J. 213, 236-37 (2003) (remarks of Louis H. Diamond).

[208] *See* Debra A. Davis, *How Much Is Enough? Giving Fiduciaries and Participants Adequate Information About Plan Expenses*, 41 J. MARSHALL L. REV. 1005, 1008 (2008) (explaining that approximately eighty-nince percent of 401(k) plans are participant-directed at least in part).

[209] 29 C.F.R. § 2550.404(c)-1(b); *see also* Dana M. Muir, *The Dichotomy Between Investment Advice and Investment Education: Is No Advice Really the Best Advice?*, 23 BERKELEY J. EMP. & LAB. L. 1, 10 (2002).

[210] DELOITTE & INT'L FOUND., *Annual 401(k) Benchmarking Survey* 20 (2011), *available at* http://www.iscebs.org/Resources/Surveys/Documents/401kSurvey_11.pdf.

may make contributions on behalf of participants in the form of employer stock. Either use of employer stock will affect the investment allocations in employee accounts.[211]

The DOL's long-held position is that a plan sponsor's selection and monitoring of plan investments is a fiduciary function. The preamble to the 1991 final regulation on participant-directed plans stated:

> [T]he act of limiting or designating investment options which are intended to constitute all or part of the investment universe of a [participant-directed 401(k)] plan is a fiduciary function . . . whether achieved through fiduciary designation or express plan language. . . . Thus, . . . the plan fiduciary has a fiduciary obligation to prudently select such [investment options], as well as a residual fiduciary obligation to periodically evaluate the performance of such [investment options].[212]

Generally courts have agreed with the DOL and treated the choice of investments for plan menus and employer matching as fiduciary decisions, although as we will discuss later, this position seems inconsistent with the Supreme Court's holding that plan amendments are always settlor decisions. In analyzing whether employers met their fiduciary duties, particularly with respect to the continuing to allow purchases of employer stock, some courts have found that the employer's decisions are entitled to some level of deference.[213] Some courts, however, limit this presumption to situations where the plan's terms "require or encourage" the availability of company stock as an investment.[214] This term the Supreme Court will decide whether the potential application

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[211] *See* Dana M. Muir, *supra* note 209, at 15 (noting that employees allocate a larger percentage of their voluntary contributions to employer stock where employers make matching contributions using employer stock).

[212] Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans, 57 Fed. Reg. 46,922, 46,924 n.27 (Oct. 13, 1992); *see also* 26 C.F.R. § 2550.404c-5(b)(2) (2012) ("Nothing in this [regulation] shall relieve a fiduciary from his or her duties under . . . ERISA to prudently select and monitor any qualified default investment alternative under the plan or from any liability that results from a failure to satisfy these duties, including liability for any resulting losses.").

[213] *See e.g.*, Quan v. Computer Scis. Corp., 623 F.3d 870, 880-81 (9th Cir. 2010).

[214] Harris v. Amgen, Inc., No. 10-56014, 2013 U.S. App. LEXIS 11223, at *26 (9th Cir. June 4, 2013); *see also* Taveras v. UBS AG, 107 F.3d 436, 445 (2d Cir. 2013) (noting that if a reference to employer stock in plan terms were sufficient to give rise to the presumption of prudence then the presumption would nearly always apply).

of any presumption that might exist should be evaluated at the motion to dismiss stage or as part of the merits.[215] A full discussion of the presumption of prudence and application of ERISA's fiduciary standards to the selection of a plan's investment menu is beyond the scope of this Article.[216]

The Seventh Circuit Court of Appeals, however, has put into question the basic premise of the DOL's position, reserving decision on whether a plan sponsor acts as a fiduciary when selecting investments for its plan menu.[217] In the court's words: "We...question whether [the plan sponsor's] decision to restrict the direct investment choices in its Plans...is even a decision within [the plan sponsor's] fiduciary responsibilities."[218]

The Seventh Circuit's dicta may sweep even more broadly than the usual application of the plan structure strand of the settlor/fiduciary doctrine. The court implied that a decision on the composition of a plan's investment menu may not need to be formalized in the plan documents, as is typical of the plan structure cases, in order to be categorized as a settlor action. The court premised its skepticism about the employer's fiduciary status on its view that the choice of investments for the plan's menu "bears more resemblance to the basic structuring of a plan than to its day-to-day management."[219] This arguably is consistent with the *Hughes* Court's language stating that "'decision[s] regarding the form or structure' of a plan are generally settlor

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[215] Fifth Third Bancorp v. Dudenhoeffer, No. 12-751, 2013 U.S. Lexis 9024 (Dec. 13, 2013) (granting certiorari).

[216] For an introduction to the issues, *see generally*, Jose Martin Jara, *What is the Correct Standard of Prudence in Employer Stock Cases?,* 45 J. MARSHALL L. REV. 541 (2012); Craig C. Martin, et al., *What's Up on Stock-Drops? Moench Revisited,* 39 J. MARSHALL L. REV. 605 (2006).

[217] 556 F.3d 575, 586 (7th 2008), *order denying rehearing en banc,* 569 F.3d 708 (2009).

[218] Hecker v. Deere & Co., 556 F.3d at 586. The plaintiffs had alleged that the employer breached its fiduciary duty by offering investment options with excessive fees. *Id.* Even assuming, though, that the plan sponsor's decisions were fiduciary decisions, the Seventh Circuit found that the employer had not violated its fiduciary obligation because the fees varied across the twenty-six investment options. *Id.* at 586-87.

functions."[220] And the Seventh Circuit's reference to "day-to-day management"[221] of plans links to the DOL's first information letter on the scope of settlor functions,[222] which distinguished as fiduciary activities "the management of plans."[223]

b. ESOPs

Earlier we explained basic differences between 401(k) plans and ESOPs. Beyond the decision to use employer stock, ESOPs give rise to additional categories of settlor/fiduciary doctrine cases. Recall, ESOPs employ a sort of turbo version of the use of employer stock; as a statutory requirement, ESOPs must invest primarily in employer securities. The concentration of their investments in employer stock means that ESOPs are rife with potential conflicts of interest; the creation of an ESOP may benefit the company whose shares were sold to the ESOP, an acquirer of that company who uses an ESOP to fund the acquisition, or a shareholder, such as a company founder, who sells stock to the ESOP. In spite of the inherent dangers of self-interested transactions, courts have consistently applied the plan structure strand of the settlor/fiduciary doctrine to determine that a decision to establish an ESOP is, like the decision to establish any other type of employee benefit plan, not a fiduciary decision.[224] One of the particularly vexing

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[219] *Id.* at 586.
[220] Jacobson v. Hughes Aircraft Co., 525 U.S. 432, 444 (1999).
[221] 556 F.3d at 586.
[222] *See supra* text accompanying notes 93-95 (discussing the DOL information letter).
[223] John N. Erlenborn, Department of Labor Information Letter 1, *supra* note 93.
[224] Neil v. Zell, 677 F. Supp. 2d 1010, 1022 (2010) (finding that board members who decided to establish ESOP did not become fiduciaries as a result of that decision) (subsequent history; not on point). Every ESOP, however, must have a named fiduciary and that fiduciary must ensure that the ESOP acquires employer stock at an appropriate valuation. As one court stated: "Case law imposes on an ESOP fiduciary a still move demanding duty of prudence than a typical ERISA fiduciary because an ESOP holds employer stock only, making diversification impossible." *Id.* at 1019. As discussed above regarding the use of the *Moench* presumption, which was initially developed in the ESOP context, in 401(k) plans, the analysis of whether a named fiduciary has met ERISA's standard of care is a different question from whether there is a fiduciary obligation.

issues from a fiduciary standpoint has been the valuation of stock purchased by an ESOP.[225]

Once an ESOP is established and holds employer stock, a question arises whether company officers who also act as ESOP fiduciaries are wearing their fiduciary or settlor hat when making decisions that may affect the value of that employer. In some instances an ESOP owns one hundred percent, or at least a very high percentage, of the company's issued stock. Business-related decisions have a particularly strong effect on the value of employees' ESOP accounts at such companies.

One court confronted the issue of whether a particular decision was a business decision or fiduciary decision after ESOP participants alleged that the executives who were named fiduciaries of the ESOP violated ERISA's fiduciary standards because they paid themselves excessive compensation.[226] The company's overpayment of compensation allegedly caused dividends paid on the stock held by the ESOP to be lower than they otherwise would have been.[227] Without using the term "settlor," the court, in effect, applied the business decision strand of the settlor/fiduciary doctrine. In rejecting the participants' claim of fiduciary breach it wrote: "Setting compensation levels is a business decision or judgment made in connection with the on-going operation of a business . . . Such a decision may ultimately affect a plan indirectly but it does not implicate fiduciary concerns regarding plan administration or assets. Business decisions

[225] *See, e.g.*, Sam J. Totino, *Note, The Importance of Proper Valuation in Transactions Between an ESOP and the Selling Owner*, 6 ENTREPREN. BUS. L.J. 361, 370-381 (2011) (discussing general and specific issues associated with ESOP valuation).

[226] Eckelkamp v. Beste, 201 F. Supp. 2d 1012, 1013-14 (E.D. Mo. 2002), *aff'd on other grounds,* 315 F.3d 863 (8th Cir.) (upholding the grant of summary judgment on a finding that plaintiffs' expert's testimony was insufficient to establish breach of fiduciary duty).

[227] *Id.* at 1014.

can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits."[228]

The settlor/fiduciary doctrine cannot be stretched so far, however, as to protect a decision by a company's president and board members, who served as ESOP trustees, to buyout the president's deferred compensation agreements for a sum that exceeded a third of the company's value.[229] The Ninth Circuit rejected the trustees' argument that compensation decisions are business, not fiduciary, decisions.[230] According to the court, the distinction between the typical business decision that might implicate stock value, which would be protected by the settlor/fiduciary doctrine, and the instant situation was the direct profit to the company president.[231] In the court's view, application of fiduciary duties in this context "does not risk encompassing within its confines any and all day-to-day corporate decisions shielded by the business judgment rule."[232] This decision raises as many questions as it answers. It is not clear how the court distinguished between 'direct profit' to the company president, which would be evaluated as an ERISA fiduciary decision due to its potential implications for stock value, and "normal" compensation, which presumably would be a business decision. Perhaps, somewhat like the Supreme Court's decision in *Varity,* the distinction turns on whether the action is so egregious that it offends the court.[233]

3. Welfare Benefit Plan Decisions

Health care and other welfare benefit plans, such as disability plans, give rise to sometimes difficult decisions about whether a plan covers specific health treatments or

[228] *Id.* at 1023.
[229] Johnson v. Couturier, 572 F.3d 1067, 1072 (9th Cir. 2009).
[230] *Id.* at 1077.
[231] *Id.*
[232] *Id.*
[233] *See infra* Part IV.C. (discussing Supreme Court decisions that may fit this pattern).

whether a claimant's disability meets the plan's criteria for benefits. In *Pegram v. Herdich*, the question of whether the decision maker acted as a fiduciary intersected with the denial of a participant's entitlement to a particular health care treatment.[234] In *Pegram*, a physician-owned health maintenance organization (HMO) created a conflict of interest, which was reflected in the financial incentives the HMO used to encourage its physicians to ration medical care, with the interests of the patient.[235] After one of the HMO's physicians delayed a patient's treatment, the patient sued on the theory that the HMO's incentives constituted a violation of ERISA's fiduciary standards. [236]

The Court, in effect, addressed the issue of whether the decision to delay treatment was a fiduciary decision or was protected by a version of the business decision strand of the settlor/fiduciary doctrine.[237] The Court explained that "the analogy between ERISA fiduciary and [the] common law trustee becomes problematic . . . because the trustee under ERISA may wear different hats."[238] According to basic settlor/fiduciary doctrine principles, an employer could adopt a health care plan that contained payment incentives equivalent to those established by the HMO.[239] Here, though, it was the HMO making the decision.

In its analysis of what it characterized as the mixed eligibility and treatment decisions made by the HMO through its physicians, the Court looked once again to trust law and determined that the treatment portion of the physician's decisions bore little to no likeness to the typical decisions made by trustees.[240] Thus, the mixed decisions made by

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[234] 530 U.S. 211 (2000).
[235] *Id.* at 215.
[236] *Id.*
[237] *See id.* at 214.
[238] *Id.* at 225.
[239] *Id.* at 226-27.
[240] *Id.* at 231-32.

physicians do not constitute ERISA fiduciary decisions.[241] The Court's deference to the right of physicians to make treatment decisions *qua* physician parallels the right of employers to make business decisions while wearing their business hat even where those decisions have an effect on employee benefits.

As a general matter, in contrast to the situation presented in *Pegram*, discretionary decisions on the payment of health care and other welfare benefit claims are fiduciary decisions.[242] According to well-established doctrine, a plan sponsor may, in the terms of a benefit plan, grant discretion to the plan administrator that makes benefit decisions.[243] Where plans clearly grant discretion, courts review eligibility decisions using an abuse of discretion standard; otherwise they use a de novo standard.[244] As with the ESOP situation, however, conflicts of interest are inherent in situations where the same entity determines whether a participant is eligible for a benefit and bears the financial cost of paying that benefit. As a result, the Supreme Court has determined that the existence of such conflicts is among the factors to be considered in determining whether a fiduciary abused its discretion in denying a claim for benefits.[245]

In some instances benefit plans seek to recover benefits they paid to or on behalf of plan participants. Health care plans typically include provisions permitting the plan to recover the cost of health care benefits provided to a participant who is injured in an accident and subsequently receives an award or settlement from the tortfeasor that caused

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[241] *Id.* at 237.

[242] Aetna Health Inc. v. Davila, 542 U.S. 200, 219-20 (2004) (limiting *Pegram*'s application to situations where physicians or the HMO make both a treatment and eligibility decision).

[243] Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

[244] *See, e.g.*, Cosey v. Prudential Ins. Co. of Am., 735 F.3d 161, 2013 U.S. App. LEXIS 22833, at *8-*9 (4th Cir. 2013) ("In the ERISA context, courts conduct de novo review of an administrator's denial of benefits unless the plan grants the administrator discretion to determine a claimant's eligibility for benefits, in which case the administrator's decision is reviewed for abuse of discretion.").

the accident or the tortfeasor's insurance company. Three Supreme Court decisions have addressed whether ERISA's remedial provisions permit the health plan's recovery, with the application of the remedial provisions being highly fact dependent.[246] ERISA's remedial provisions are complex and a number of scholars have penned thoughtful critiques of them.[247]

For purposes of this Article, rather than delve into the vagaries of the remedial doctrine, it is sufficient to consider the most recent Supreme Court decision on ERISA remedies, *US Airways v. McCutchen.*[248] The Court took up the issue of whether plan participants are able to rely on the equitable "double recovery" and "common fund" doctrines, which are equitable doctrines developed in state insurance law, to defeat health insurance plan terms intended to permit recoveries of benefits paid to participants.[249] The background story was sad and simple -- it is the scenario in the opening section of this

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[245] Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); *see also* Conkright v. Frommert, 130 S. Ct. 1640, 1649 (2010) (holding that a plan administrator's second interpretation was entitled to deference where it had made an honest mistake in its first interpretation).

[246] CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011); Sereboff v. Mid-Atlantic Med. Servs., Inc., 547 U.S. 356, 368 (2006) (finding that recovery was possible against a separate trust established pending resolution of the health care plan's claim); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 221 (2002) (holding that health care plan could not recover from a special needs trust established in an insurance settlement on behalf of the participant).

[247] *See, e.g.*, Roger M. Baron & Anthony P. Lamb, *The Revictimization of Personal Injury Victims by ERISA Subrogation Claims,* 45 CREIGHTON L. REV. 325 (2012); Susan Harthill, *A Square Peg in a Round Hole: Whether Traditional Trust Law "Make-Whole" Relief is Available under ERISA Section 502(a)(3),* 61 OKLA. L. REV. 721 (2008); John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317 (2003); Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3),* J. MARSHALL L. REV. 827 (2006); Muir, *supra* note 74; Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA,* 61 HASTINGS L.J. 131 (2009).

[248] 133 S. Ct. 1537 (2013).

[249] *See id.* at 1542-43. The issue had split the circuits. *Compare* Zurich Am. Life Ins. Co. v. O'Hara, 604 F.3d 1232, 1237 (11th Cir. 2010) (holding that equitable defenses are not available), *and* Admin. Comm. of Wal-mart Stores, Inc. Assoc. Health & Welfare Plan v. Shank, 500 F.3d 834, 838-39 (8th Cir. 2007) (same), *and* Admin. Comm. of the Wal-Mart Stores, Inc. Assoc.'s Health & Welfare Plan v. Varco, 338 F.3d 680, 690 (7th Cir. 2003) (same), *and* Bombardier Aerospace Emp. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 361 (5th Cir. 2003) (same), *with* CGI Tech. & Solutions Inc. v. Rose., 683 F.3d 1113, 1124-25 (9th Cir. 2012) (holding that plan participants may defend using either the common fund or make whole doctrine), *and* U.S. Airways, Inc. v. McCutchen, 663 F.3d 671, 673 (3d Cir. 2011) (same), *vacated and remanded,* 133 S. Ct. 1537 (2013).

Article.[250] Mr. McCutchen's health insurance covered substantial medical costs that resulted when he was profoundly injured in an automobile accident.[251] The plan demanded a reimbursement from Mr. McCutchen that exceeded the amount he received after attorney's fees in a tort suit.[252] He argued that (1) he should be able to raise equitable principles to limit the plan's recovery; and (2) in any event, the plan should not be able to recover in excess of the participant's recovery net of attorney's fees.

Mr. McCutchen cited two equitable doctrines. The common fund doctrine provides that if an attorney recovers monies on behalf of third parties then the attorney's fees should be paid from the recovery.[253] The double recovery doctrine permits insurers to recover expenses only from any excess that the insured obtains through a private claim over the insured's total loss.[254] The US Airways health care plan required participants "to reimburse [US Airways] for amounts paid for claims *out of any monies recovered* from [the] third party . . .'"[255] Based on this language, U.S. Airways sought to recover the entire amount of a participant's tort settlement even though the participant still had not been made whole and the participant would have to pay out of pocket the attorney's fees associated with the settlement.

The Supreme Court used a contract analysis to find that the plan's language precluded application of the double recovery doctrine and remanded for a determination of whether the language also negated the common fund doctrine.[256] According to the Court: "Courts construe ERISA plans, as they do other contracts, by 'looking to the terms

[250] *See supra* text accompanying notes 24-26.
[251] US Airways v. McCutchen, 133 S. Ct. at 1543.
[252] *Id.*
[253] *See id.* at 1545.
[254] *Id.*
[255] *Id.* at 1543 (emphasis added) (internal quotation marks omitted).
[256] *Id.* at 1551.

of the plan' as well as to 'other manifestations of the parties' intent.'"[257] The *US Airways* decision has important implications for plan terms in addition to those that permit plans to recover medical benefits. As we will explain in the next section, the Supreme Court's decision implies that a plan may enforce any written terms that are not directly inconsistent with ERISA's requirements, suggesting few legal limits on onerous plan terms.

4. Benefit Structures – Different Benefits for Different Participants

Since at least 1964, the U.S. has expanded federal statutory prohibitions against workplace discrimination.[258] ERISA, however, continues to permit employers to engage in arbitrary line-drawing among employees with respect to their benefit eligibility. The plan structure strand of the settlor/fiduciary doctrine typically protects an employer's right to distinguish among employees so long as the line-drawing is not in direct conflict with ERISA or IRC requirements,[259] or federal nondiscrimination provisions such as that of Title VII of the Civil Rights Act of 1964.[260]

Not surprisingly then, participants have been unsuccessful with allegations that employers breached their fiduciary duty by adopting plan amendments that draw distinctions perceived as unfair by some participants. One employer adopted a plan amendment that granted early retirement benefits to a handful of recently laid-off

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[257] *Id.* at 1549. Professor Langbein has explained that trusts have a contractarian aspect. John H. Langbein, *The Contractarian Basis of the Law of Trusts,* 105 Yale L.J. 625, 650-52 (1995). ERISA's dual nature, which incorporates both trust and contract law, poses a variety of challenges for the courts. *See, e.g.,* Killian v. Concert Health Plan, No. 11-1112, 2013 U.S. App. LEXIS 22657, at *34, *59 (7th Cir. 2013) (en banc) (finding that claim was fiduciary in nature as compared to Judge Posner's view that it was a contract-type of claim). This issue is beyond the scope of this Article.

[258] *See, e.g.,* Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections,* 18 Mich. J. Gender & L. 25) (2011) (discussing the development of federal discrimination law, particularly Title VII). The statement that protections have expanded since 1964 is not to imply that the authors believe discrimination protections are sufficient. *See, e.g., id.* at 50-73 (discussing issues with relying on categories to define those entitled to protections).

[259] 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, 41-42 (2011).

employees.[261] The employer did not extend those benefits to other similarly, but not equivalently, situated laid-off employees.[262] Because the employer amended the plan to provide the benefits to the subgroup of former employees, the benefit change was a settlor decision and not subject to fiduciary challenge.[263] This is the type of plan amendment that T&B arguably could have adopted in *Noorily v. Thomas & Betts Corp.*,[264] where it denied severance benefits to certain employees who refused to relocate. If T&B had taken the approach of formally amending its plan, the plan structure strand of the settlor/fiduciary doctrine would have applied. The outcome of the case would have been unchanged – T&B's actions would have been valid settlor actions. Another court confirmed that an employer's amendment of its severance pay plan to eliminate benefits for employees who refused to join a successor employer was a settlor act even though it was taken in conjunction with the employer's sale of a business unit to that successor employer.[265] Consider the selling employer's two-fold conflict of interest. First, the amendment decreased the amount of severance benefits that employer owed. Second, that employer could demand a higher price for the business unit because of the increased likelihood that the successor employer would be able to retain the unit's workforce. Yet the employer's conflict of interest played no role in assessing the employer's obligation; the employer acted as a settlor when it amended the plan.[266] *Spink* and *Hughes* are variations on this theme, with the employers using the plan amendment to facilitate downsizing.

[260] 42 U.S.C. §2000e-2 (2006).
[261] Schultz v. Windstream Commn's., 600 F.3d 948, 950 (8th Cir. 2010).
[262] *Id.* at 950.
[263] *Id.* at 952.
[264] 188 F.3d 153 (3d Cir. 1999). *Noorily* is discussed *supra* at text accompanying notes 176-84.
[265] Campbell v. BankBoston, 327 F.3d 1, 6-8 (1st Cir. 2003).
[266] *See id.*

Broader scale changes to benefit plans also may affect various employee cohorts in different ways. For example, a significant number of plan sponsors with DB plans have converted those plans to cash balance plans.[267] An understanding of the technicalities of those conversions is not necessary here.[268] The point for this Article is that the conversions tend to defeat the benefit expectations of long and middle-term service employees, leaving them disproportionately worse off than shorter service employees.[269] Because the plan conversions are accomplished through the mechanism of a plan amendment the plan structure strand of the settlor/fiduciary doctrine protects them from fiduciary challenge.[270]

ERISA and the IRC provide some limitations on employers' ability to favor some employees over others in benefit plans. The IRS requirements limit the amount of benefits that can go to highly compensated employees as compared to nonhighly compensated employees.[271] ERISA's nondiscrimination provision, Section 510, prohibits anyone, including an employer, from taking specified actions, such as termination of employment, against benefit plan participants in retaliation for exercising benefit rights, or in order to prevent them from becoming entitled to benefits.[272] As a result, it is a

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[267] KRAVITZ, 2012 NATIONAL CASH BALANCE RESEARCH REPORT 4 (2012) ("Many larger corporations converted existing defined benefit plans to Cash Balance . . .), *available at* http://www.businesswire.com/news/home/20120719006342/en/Cash-Balance-Retirement-Plans-Double-Projected-Growth.

[268] For an explanation of cash balance plans, *see* EMPLOYEE BENEFITS LAW, *supra* note 19, at 2-8.

[269] Joshua Rauh, Irina Stefanescu, & Stephen Zeldes, *Cost Shifting and the Freezing of Corporate Pension Plans,* FEDS Working Paper No. 2013-82 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357987.

[270] Campbell v. BankBoston, 327 F.3d 1 (1st Cir. 2003) (applying explicitly the settlor/fiduciary doctrine to amendment of a separation pay plan but implicitly also applying it to permit conversion of a traditional pension plan to a cash balance plan), *see also* Muir, *supra* note 7, at 214-16.

[271] 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, 41-42 (2011).

[272] ERISA § 510, 29 U.S.C. § 1140 (2006).

violation of ERISA to fire an individual employee[273] or the workforce at an entire plant[274] in order to avoid the payment of benefits.

Although Section 510 operates as a constraint on an employer's ability to make business decisions, namely to make employment decisions based on benefit plan costs, the settlor/fiduciary doctrine provides employers with another option – amend the plan to achieve the same result. For example, an employer reduced the lifetime cap in its health insurance plan from $1 million to $5,000 for expenses related to AIDS shortly after learning that one of its employees had contracted AIDS.[275] Because the reduction applied to all employees who might file AIDS-related claims, the Fifth Circuit Court of Appeals accepted the employer's explanation that its motivation was to reduce the costs of its health care plan and that it was not impermissibly targeting the specific employee.[276] This was almost certainly not entirely true, for other medical conditions could impose similarly devastating costs on the plan, yet the plan's narrowly carved out expenses related to AIDS. The case might also be read to hold that a decision to amend the plan, no matter what the effect or intent, is simply not an action covered by Section 510.

5. Fundamental Corporate Changes

When companies engage in fundamental corporate changes, such as mergers, acquisitions, or dispositions, those changes may result in modifications to benefit plans that affect an entire workforce or a subset of employees. The doctrinal results are similar to those discussed in the prior subsection. Courts uphold an employer's right, relying on the plan structure strand of the settlor/fiduciary doctrine, to amend plans in the context of

[273] Fitzgerald v. Codex Corp., 882 F.2d 586, 489 (1st Cir. 1989) (allowing claim for retaliation by discharged employee).
[274] Pickering v. USX Corp., 809 F. Supp. 1501, 1570 (D. Utah 1992) (finding that USX violated ERISA Sec. 510 when it closed two facilities in order to avoid its pension costs).
[275] McGann v. H & H Music Co., 946 F.2d 401, 403 (5th Cir. 1991).
[276] *Id.* at 405-08.

fundamental corporate changes, even when a plan amendment makes arbitrary distinctions among employees or groups of employees. In other cases, courts categorize the employer's decision as a business decision, and thus free of ERISA fiduciary constraints, even though that business decision may have significant effects on employee benefit plans.

In a case, *Sengpiel v. B.F. Goodrich Co.*, that pre-dated the Court's *Hughes Aircraft* decision, the Sixth Circuit decided that the plan sponsor did not act as a fiduciary when it drew arbitrary distinctions among retirees as part of a spin-off.[277] When B.F. Goodrich (Goodrich) spun off its tire operations, the new entity assumed the pension and welfare benefit obligations for the active and retired employees of those operations.[278] Goodrich transferred approximately 42 percent of its headquarters retirees to the new pension and welfare benefit plans since the tire operations had constituted that percentage of Goodrich's total operations[279]. The company determined which retirees would be transferred by looking to the last four digits of their social security numbers.[280] Those retirees with numbers ending in 4254 or lower were transferred, while those with higher numbers remained in the Goodrich plan.[281]

Nine years later the company that had assumed the welfare benefit obligations of the retirees assigned to the spin-off reduced those retirees' health and life insurance benefits.[282] The retirees alleged, among other things, that Goodrich had violated its ERISA fiduciary obligations when it arbitrarily assigned retirees to the new entity.[283] The Sixth Circuit rejected the retirees' *Varity*-based argument that assigning retirees to

[277] 156 F.3d 660 (6th Cir. 1998).
[278] *Id.* at 663.
[279] *Id.*
[280] *See id.*
[281] *Id.* at 663-64.
[282] *Id.* at 664.

the transferred plans was a discretionary act of plan management or administration, and, thus a fiduciary act. According to the court, "the exercise of discretion alone"[284] does not cause an act to be a fiduciary act. Instead, the plan sponsor's acts must involve carrying out the plan purposes or discretion with respect to plan administration or management.[285] The Sixth Circuit then opined that "the actions undertaken by [Goodrich] to implement its business decision were simply not the kind of plan management or administration that trigger ERISA's fiduciary duties."[286]

More recent decisions have consistently upheld the right of employers to make decisions in the context of fundamental corporate changes free of ERISA's fiduciary constraints even where the decisions affect benefit plans. For example, when General Electric Company (GE) sold a defense division to Martin Marietta Corp., GE transferred pension assets from its overfunded DB plan to Martin Marietta's DB plan to offset benefit promises Martin Marietta would make to the former GE employees it hired.[287] Former GE employees brought a variety of fiduciary challenges related to GE's transfer of those assets.[288] One of those claims alleged that GE violated its fiduciary duty of loyalty to pension plan participants by transferring more pension assets than liabilities to Martin Marietta and, in return, getting a higher sale price for the division.[289] According to the court, however, "GE's decision to spin-off the division along with its pension plan was, at its core, a corporate business decision, and not one of a plan administrator,

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[283] *See id* at 664-65.
[284] *Id.* at 666.
[285] *Id.*
[286] *Id.*
[287] Flanigan v. Gen. Elec. Co., 242 F.3d 78, 82 (2d Cir. 2001).
[288] *Id.*
[289] *Id.* at 87.

[therefore] GE was acting as a settlor, not a fiduciary, when it transferred the surplus to [Martin Marietta]."[290]

6. Inadequate or Misleading Disclosures to Plan Participants,

As explained above,[291] the Supreme Court held in *Varity v. Howe* that the employer acted as a fiduciary and not a plan sponsor when communicating with employees about the benefits they could expect if they voluntarily transferred to a new subsidiary.[292] In subsequent cases challenging the accuracy of communications, the courts typically follow *Varity* in holding that the communicator is a fiduciary so long as the communications are intentionally or closely connected to employee benefits. Where, however, the communications are more attenuated from employee benefit plans, courts may apply the business decision strand of the settlor/fiduciary doctrine to determine that communications are not subject to ERISA's fiduciary obligations.

For example, participants in one 401(k) plan alleged that public statements made by the company via a variety of fora such as Securities and Exchange Commission (SEC) filings and press releases were misleading and in violation of fiduciary obligations owed by various individuals who were fiduciaries of the company's 401(k) plan.[293] The court decided, in what it believed to be the then-current trend, that SEC filings are made in a corporate capacity, not an ERISA fiduciary capacity, even though the plan incorporated the filings by reference.[294] Similarly, the court rejected the claims based on some of the

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[290] *Id.* at 88; *see also* Hunter v. Caliber Sys., 220 F.3d 702, 719 (6th Cir. 2000) (finding decisions on staffing level needed to transfer plan assets, transferring plan assets as company stock to be business decisions).
[291] *See supra* text accompanying notes 152-65.
[292] 516 U.S. 489, 505-06 (1996).
[293] *In re* General Growth Props., 2010 U.S. Dist. LEXIS 44234, at *8-9 (N.D. Ill. 2010).
[294] *Id.* at *16; *see also In re* Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 U.S. Dist. LEXIS 78055, *72-73 (S.D.N.Y. Aug. 31, 2009) ("emerging case law makes clear that those 'who prepare SEC filings do not

defendants' public statements on the grounds that those statements also were made in a corporate capacity. According to the court: "Communications are fiduciary in nature only if statements are 'intentionally connected' to benefits."[295]

The court also determined that employees who held company stock in the 401(k) plan did not have any right to disclosures about the company's allegedly "precarious financial condition and the real risk that it might collapse under the weight of its reckless business practices."[296] The court noted that the defendants' nondisclosure was a "byproduct of keeping such information from creditors and competitors."[297] And, requiring such disclosures to plan participants could "'distur[b] the carefully delineated corporate disclosure laws.'"[298]

7. Claims Processing and Claims Review

While ERISA does require that a plan have a full and fair review process,[299] the statute itself does not specify the requirements for such a review process. In addition, ERISA does not include a statute of limitations for benefit claims. The DOL has partly filled the first gap by promulgating regulations on the meaning of full and fair review[300] and the courts have filled in the second gap by holding that comparable state limitations

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become ERISA fiduciaries through those acts'"), *aff'd,* 662 F.3d 128 (2d Cir. 2011). *But see* Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 423 (6th Cir. 2012).

[295] 2010 U.S. Dist. LEXIS 44234, at *17. *But see In re* Sprint Corp. ERISA Litig., 388 F. Supp. 2d 1207, 1227 (D. Kan. 2004) (denying motion to dismiss on basis that statements of CEO & board chair & president & COO made in company newsletter to employees could be made in fiduciary capacity); Stein v. Smith, 270 F. Supp. 2d 157, 173 (D. Mass. 2003) (holding that employees may be able to show that six communications by CEO to employees explaining the company's general economic position were made wearing a fiduciary hat).

[296] *Id.* at *29.

[297] *Id.* at *32.

[298] *Id.*

[299] *See* ERISA § 503, 29 U.S.C. § 1133 (2006).

[300] 29 C.F.R. § 2560.503-1(a), (b). The Affordable Care Act (if first reference, define & cite PPACA] contains new claims and review requirements for certain group health care plans. [cite; also regs?].

periods and federal tolling principles control.[301] Some plans, however, have sought to vary the limitations period and to augment the regulations with specific plan provisions. In 2013 the Supreme Court considered the issue where an employer's disability plan required that a claimant file a disability proof of claim within three years of "'the time written proof of loss is required to be furnished according to the terms of the policy.'"[302] But for the plan provision, the statute of limitations would not have been triggered until the plan denied the claim.[303] The Court unanimously held that the terms of the plan were enforceable.[304]

III. Critique of the Settlor/Fiduciary Doctrine.

The settlor/fiduciary doctrine draws a formal distinction between business and fiduciary conduct. ERISA applies to the latter conduct but not the former, which because of ERISA preemption is ordinarily subject only to specific ERISA constraints on plan design in areas such as vesting and benefit accrual. Business conduct affecting employee benefit plans can be separated into two strands: (1) conduct involving the design and termination of plans (traditional settlor functions), and (2) traditional business decisions.

Both the Supreme Court and the DOL have identified three areas of conduct that are conclusively settlor functions: adopting a plan, amending a plan, and terminating a plan.[305] We can simplify these three by noting that in a system of voluntary benefit plan sponsorship, adoption of a plan is by definition a voluntary, unreviewable action and that is obvious and noncontroversial. But the act of adopting a plan and the act of amending

[301] *See, e.g.,* Veltri v. Bldg. Serv. 32B-J Pension Fund, 393 F.3d 318, 323 (2d Cir. 2004) (applying federal tolling principles).
[302] Heimeshoff v. Hartford Life & Accident Ins. Co., No. 12-651-cv, 2013 U.S. LEXIS 9026, at *9 (2013) (quoting plan terms).
[303] *See id.* at *12-*13.
[304] *Id.* at *30.
[305] *See, e.g.,* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443 (1999); John N. Erlenborn, Department of Labor Information Letter 1, *supra* note 93.

a plan and the act of terminating a plan share functional DNA, for each is a formal mechanism by which an employer implements or alters or ends a plan's *written* design, which includes the definition of plan benefits, the conditions for benefit eligibility, and the prerogatives and responsibilities of the plan sponsor and the plan's participants. One can say, then, that settlor functions are in essence actions that implement two sets of choices: first, the binary choice of having a plan or not having a plan (which is effected through plan adoption and through plan termination); and second, the almost infinite number of choices that shape a plan's design (which is effected through both plan adoption and through plan amendment). Under the plan structure strand of the settlor/fiduciary doctrine, these choices belong to the employer and are neither constrained by, nor subject to review under, ERISA's fiduciary rules.

Committing these functions to the business rather than fiduciary judgment of the plan sponsor has considerable surface appeal. On an abstract level, it reflects the business autonomy of the employer in a system that makes entry into the system voluntary. It allows the employer to consider business purposes and business goals in its plan-related decisions. And on a practical level, it often if not generally provides an easy, mechanical test to demarcate conduct subject to ERISA's fiduciary rules. Moreover, for the overwhelming number of events in the life of a plan, the settlor/fiduciary distinction produces outcomes that are unequivocally correct, events that neither cause controversy nor produce litigation.

In this section of the Article we review some problems with the doctrine, problems that we foreshadowed in the Article's earlier sections. These problems are significant enough to suggest that the settlor/fiduciary doctrine has not served the statute well, in large measure because it obscures difficult policy judgments, creates structural problems in the statutory architecture, and has unintended consequences in a surprising array of situations. Moreover, as we have already discussed, the scope of the doctrine is blurry at its edges, undermining one of the appealing aspects of the doctrine, its ease of application.

The fact that a doctrine produces problems, even serious problems, is not, of course, a condemnation of the courts and agencies that developed it if the doctrine were compelled, or at least strongly implied, by the statute's language and structure. Thus, in this section, we also critique the statutory basis for the doctrine. Our conclusion is that while the statute did imply a version of the settlor/fiduciary doctrine, the Supreme Court's expansive and rigid iteration of the doctrine was inconsistent with the statute's structure and not compelled by the statute's language.

A. Problems with the Settlor/Fiduciary Doctrine

We have already suggested through specific contexts that the settlor/fiduciary distinction, at least as interpreted by the Federal courts, is not entirely free of problems. In this section, we attempt to identify the central concerns that we have with the doctrine, essentially moving from the specific to the general. We have grouped our concerns into three categories: (1) concerns related to employee expectations; (2) concerns related to undermining ERISA protections; and (3) concerns related to the creation of regulatory voids, particularly in welfare plans.

We want to make three initial points, however, one touching on the employee as co-settlor and one touching on some of the difficulties in applying the doctrine, both of which we reject for purposes of this article as legitimate concerns.

As we have observed, the Supreme Court has rejected the idea of employee as co-settlor of an employee benefit plan, even when the plan itself was funded primarily (and we assume even if were funded exclusively) by voluntary employee contributions. To us, the result in a case such as *Jacobson v. Hughes* seems unjust, but this is our subjective sense of fair play speaking. The Supreme Court's position, that a plan participant is, in essence, contracting for a specific benefit and not for a right to the underlying plan assets, is a plausible overlay to the statute, particularly in the type of plan in which the ultimate risk of underfunding falls, at least nominally, on the employer. Besides, a workable contrary rule—that the fiduciary must consider and balance the competing interests of employer and employee would be difficult to fashion and difficult for both fiduciaries and courts to apply. Thus, for purposes of this section, we do not list failure to consider the employee as co-settlor as a concern (although this is an issue that in an ideal world Congress might want to consider).

This does not mean, however, that we reject the interests of plan participants as a concern, particularly in three contexts. First, one of ERISA's central themes is that the employee should be able to rely (or at least reasonably rely) upon the promises contained in an employee benefit plan and that the plan should provide sufficient information for the employee to understand what is promised and what is not promised. The settlor/fiduciary doctrine sometimes allows the employer to change or abandon promises mid-stream and this, in our view, can be problematic in some situations—for example, when employees had a reasonable reliance interest on the promise. Second, ERISA is intended to protect employee interests through its fiduciary rules, through its enforcement provisions, and through its substantive standards. The settlor/fiduciary doctrine is problematic to the extent that it allows the employer to reduce these intended statutory protections for participants in employee benefit plans. Third, the settlor function should not shield the employer from misleading the employees. While the Supreme Court in

Varity held that the employer could not deliberately mislead employees, the settlor/fiduciary function would allow the employer to amend the plan and not inform employees of the potentially adverse impact of the amendments on them. We return to this third problem in the concluding section of the paper.

Our second preliminary point relates to the lack of clarity in parts of the settlor/fiduciary doctrine and the difficulty this poses for courts. Although the settlor/fiduciary doctrine is often easy to apply, we have noted two areas in which courts have experienced difficulty and in which they will likely continue to have difficulty: first, in distinguishing settlor decisions from implementation decisions, and second, in determining when the employer is acting in a non-fiduciary capacity outside orthodox settlor functions (adopting, amending, or terminating a plan). This includes situations in which the plan sponsor takes actions equivalent to a plan amendment and situations in which the sponsor acts in its business rather than settlor capacity.[306]

These parts of the settlor/fiduciary doctrine may pose difficulties for courts and plan administrators, but any limitations on the scope of the settlor/fiduciary doctrine will pose difficulties, so this does not seem grounds to object to the doctrine itself. Indeed, in the final section of this article, in which we suggest judicial strategies to limit some of the problems of the settlor/fiduciary doctrine, we focus on how these judicial limitations might be usefully adapted to address concerns about the doctrine's problems.

1. Formalism, Contracts of Adhesion, and Employee Expectations

The difference between pension as contract and pension as gratuity has been a theme of employee benefits law for more than a century and ERISA is sometimes reckoned to be the culmination of an evolutionary move from employee benefit plan as

[306] In some instances the plan sponsor may be doing both.

gratuity to employee benefit plan as contract.[307] There are, of course, some conceptual problems with the contract paradigm because employee benefit plans are typically not the bilateral product of active bargaining by the parties, but rather are drafted by the employer without direct and certainly not individual negotiation with the employees. But the resulting issues are not unique to employee benefit plans, but to all contracts of adhesion. And by the time ERISA had evolved, concerns about contracts of adhesion were addressed judicially by a common-law approach favoring the consumer over the drafter in matters of interpretation, and legislatively by the adoption of particular statutory measures to counter unambiguous contractual provisions that violated public policy.

ERISA did include minimum standards for pension plans, which can be likened to the legislative approach to limiting contracts of adhesion, but federal courts have been resistant to adopting modes of contractual interpretation to ERISA plans that construed plan provisions in favor of the plan participants—i.e., the consumer.

Employee benefit plans generally include two types of clauses that exploit this judicial reluctance to construe pension plans as contracts of adhesion: reservation of rights clauses and clauses providing plan administrators with discretionary interpretative authority over the contract, shielding an administrator's contractual interpretations from the de novo judicial review that is accorded to most contracts that arise from bilateral bargaining.

In effect, these clauses, which are design clauses that appear in the plan document either at initial adoption or plan amendment, turn the normal judicial approach to interpreting unilateral contracts on its head. The plan sponsor is bound by nothing that is

[307] For a brief description of this history, see Moore, *supra* note 271, at 25-26.

not mandated by ERISA's minimum standards; a reservation of rights clause allows an employer to make virtually any changes to a plan that are not expressly prohibited by the statute's minimum standards. If the employer neglects to reserve its rights in the initial plan document, it may subsequently amend the plan to do so under the Supreme Court's *Curtis-Wright* decision. Thus, courts have permitted an employer to amend a plan that had provided for employees to receive any surplus assets on plan termination to provide that the surplus assets would go to the employer,[308] to amend a retiree-health-care plan that provided lifetime health benefits to a plan that did not,[309] or to amend a health care plan to eliminate AIDS benefits to an employee who while covered contracted AIDS.[310] In contracts of adhesion outside the judicial arena for employee benefits, courts typically would have used an interpretative framework far less tolerant of the reserved rights of the contract's drafter to upset the contract's original provisions or ignore the probable understanding of the contract's terms to the non-drafting party.

Indeed, an employer's broad "settlor" privileges arguably prevent the employer and employee from contractually agreeing to any benefits that are not expressly identified and protected by a specific provision in the statute, because the employer would always retain the right to amend the plan. This would be a peculiar result in a statute that requires a written contract and elaborate disclosure to ensure the satisfaction of a plan's contractual obligations to its participants.

Clauses that give the plan administrator, who is generally an alter-ego of the employer, authority to interpret plan language, are also treated differently from the way

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[308] *See, e.g.*, *In re* C. D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1132 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir.1978).
[309] *See generally*, Janilyn S. Brouwer, *Retiree Health Benefits: The Promise of a Lifetime?*, 51 OHIO ST. L.J. 985 (1990) (discussing the legal theories on which various cases have been litigated).
[310] McGann v. H & H Music Co., 946 F.2d 401, 403 (5th Cir. 1991).

similar clauses in contracts of adhesion are typically handled by state courts: some courts will simply ignore such language and others will limit its reach to interpretations that do not favor the contract's drafter.[311] Increasingly, states are incorporating bans on discretionary clauses in state insurance law.[312] As noted above,[313] this approach has limited effect because most employees with ERISA-governed health care plans are in self-insured plans that are exempt from state law.

Courts[314] and commentators[315] may justify broad "settlor" powers to override employee expectations because of Congress's concern about employer's willingness to offer employee benefit plans if the law narrowed those powers. But this is a variation of an argument that can be made against almost any type of consumer protection, whether legislatively or judicially crafted: such protections will increase costs or decrease choices to the consumer. The overarching theme of ERISA was to protect reasonable employee benefit expectations and Congress implicitly recognized that this would at the margins increase employer cost and willingness to sponsor plans. Allowing the employer, the drafter of the contract, unchecked and unreviewable power of contract modification and broad discretion to interpret contested contractual terms or facts relating to eligibility

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[311] *See* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U.L. REV. 1315, 1323-24 (2007); Dahlia Schwartz, *Breathing Lessons for the ERISA Vacuum: Toward a Reconciliation of ERISA's Competing Objectives in the Health Benefits Arena*, 79 B.U.L. REV. 631, 658 (1999).
[312] Radha A. Pathak, *Discretionary Clause Bans & ERISA Preemption,* 56 S.D. L. REV. 500, 504-06 (2011).
[313] *See supra* note 59.
[314] *See, e.g.,* Tittle v. Enron Corp., 284 F. Supp. 2d 511, 676 (2003) ("The settlor function protection was created to encourage employers to establish plans.").
[315] *See, e.g.,* Kathryn J. Kennedy, *The Perilous and Ever-Changing Procedural Rules of Pursuing an ERISA Claims Case,* 70 UMKC L. REV. 329, 331-32 (2001) ("As these employee benefit plans are **voluntary** in nature, the courts have been cognizant of the plan sponsor's **settlor** rights in the drafting, amending, and termination of such plans."); Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3),* 39 J. MARSHALL L. REV. 827, 919-20 (2006) ("The policy purpose behind the settlor function doctrine is to encourage employers voluntarily to sponsor benefit plans by preserving the autonomy of the employer to make decisions concerning the benefits offered to employees based upon the nature of the employer's business, budget, and workforce.").

contract, seem to us inconsistent with the statutory framework that Congress adopted in ERISA.[316]

2. Settlor Override of Statutory Provisions.

ERISA sets minimum standards for pension plans (and Federal law sets some standards for health care plans), imposes strict duties on those who are fiduciaries under the statute, provides an enforcement scheme that is intended to provide "ready access to the Federal courts,"[317] and prohibits any person from interfering with the attainment of benefits under a plan. Yet in numerous cases the courts have allowed plan sponsors to use the settlor/fiduciary doctrine to dilute or negate statutory requirements. In our view, this is problematic: there would have been little reason for Congress to create requirements if the plan sponsor could choose to ignore them in certain situations.

We offer a partial catalog of some of the ways in which the settlor/fiduciary doctrine has trumped statutory requirements:

(i) Use of plan assets for the benefit of the plan sponsor. ERISA's exclusive benefit rule and its prohibited transaction rules bar the employer from using plan assets for its own account. Thus, a plan sponsor could not, for example, use plan assets to settle a Title VII or torts claim brought by an employee. Moreover, it seems plain that a fiduciary could not condition payment of promised benefits on an employee releasing the plan sponsor from such claims. Yet in the second leg of the Supreme Court trilogy, Lockheed Corporation had conditioned an early retirement benefit on an employee's waiver of all employment-based claims against the employer.[318] The

[316] This is not to say that the employer should be locked into a non-amendable framework; employers require flexibility to change plan terms and benefits. Thus, we are not critical of an employer's ability to change plan terms, only that the power to amend is unchecked by fiduciary restraints in all situations.
[317] ERISA § 2(b), 29 U.S.C. § 1001(b) (2006).
[318] Lockheed Corp. v. Spink, 517 U.S. 882, 888 (1996).

employee argued that this violated both ERISA's prohibited transaction rules and its duty of care rule.[319] The Court, held, however, that the provision was one of plan design and thus not subject to the restraints on fiduciary behavior.[320]

In principle, there does not seem to be a limit on the types of claims that the employee could be required to sign away. There also, in principle, does not seem to be any reason that the employer could not require the employee to waive future claims or, for that matter, to tattoo the corporate logo onto the employee's forehead. Thus, the employer is able, in effect, to use plan assets for, in the words of the statute, its own account.

In *Lockheed*, the Court's decision was sensitive to this point, to a point. The Court noted that the plaintiff had conceded that an employer could receive legitimate benefits from adopting a plan, including "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages,"[321] and inducing employees to decide to retire. The Court then wrote that "we do not see how obtaining waivers of employment-related claims can meaningfully be distinguished from these [other] admittedly permissible objectives."[322] But there is, of course, a difference: the other objectives come about by sponsoring an employee benefit plan and the benefits the employer receives are incidental to the sponsorship of a benefits plan. Requiring the employee to waive claims against the employer is not merely incidental to the sponsorship of a plan. And we note that in *Spink*, the benefits were offered to a class of individuals. There is, however, no overriding limiting principle in ERISA that would prevent an employer from negotiating

[319] *Id.* at 886.
[320] *Id.* at 891.
[321] *Id.* at 893.

special benefits to induce a particular employee to settle a lawsuit or barter away other rights.[323]

(ii) Selection of investment options in self-directed defined contribution plan. When a fiduciary selects investment options for the menu of a defined contribution plan, the choices are subject to ERISA's fiduciary standards. If the plan specifies the investments, however, the investment menu would be a settlor decision under Supreme Court precedent, although DOL has signaled that it believes the development of an investment menu is a fiduciary function even if effected through a plan amendment.[324] In any event, as we will explain in the concluding section, the fiduciary would still be under an obligation to monitor the investment options and presumably to stop offering them if they were imprudent.

But as we have noted, the Seventh Circuit effectively held that a decision to offer a large array of funds was a settlor decision and that such a choice was inherently prudent. The irony here is that the Seventh Circuit decision will provide incentives to plan designers, at least in the Seventh Circuit, to choose a wide variety of funds to insulate plan officials from fiduciary liability, even though many commentators argue that a wide array of funds is not in the best interests of employees who do not have substantial experience in managing investments.

A similar dynamic comes into play when a plan selects a brokerage window. Arguably, a fiduciary that makes a decision to provide a brokerage window has an

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[322] *Id.* at 894.
[323] There may be other constraints: for example, the non-discrimination rules of the Internal Revenue Code would presumably make problematic a special benefit for a highly-compensated employee if some non-highly compensated employees did not also obtain the benefit. *See, e.g.*, 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, 41-42 (2011). And, Title VII of the Civil Rights Act of 1964 might in some situations make it unlawful to direct benefit improvements to a particular class of individuals.
[324] *See supra* text accompanying note 212.

obligation to consider its value and cost to the plan population before selecting a window.[325] But if the window is written into the terms of the plan, the decision to include it would be a settlor decision, even if the fiduciary believed it would be an attractive nuisance to many or even most employees.

(iii) Discrimination by plan amendment. Section 510 of ERISA makes it unlawful for any person to interfere "with the attainment of any right to which a participant may become entitled under the plan"[326] or under ERISA. Thus, an employer would violate Section 510 if it fired an employee with an expensive medical condition to prevent them from obtaining benefits from an employer health plan. But the employer's amendment of the plan to eliminate payment for the particular medical condition afflicting the employee, or to amend the plan to eliminate coverage of the employee, is arguably a settlor decision and not actionable under ERISA.[327]

(iv) Impeding access to the Federal courts. ERISA was intended to provide participants with ready access to the Federal courts. The statute imposes no amount-in-controversy thresholds and provides nationwide service of process and generous venue provisions. While ERISA does not provide a statute of limitations for benefit claims, courts have incorporated state-law limitations periods, although claims accrual is determined under Federal law.

Some plan sponsors have used their settlor role to constrict access to the federal courts by drafting plans to reduce the time in which participants can bring a civil action

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[325] *See* DOL Field Assistance Bulletin 2012-02R A-39 (July 30, 2012) ("[F]iduciaries of . . . plans with platforms or brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries and beneficiaries . . .").

[326] ERISA § 510, 29 U.S.C. 1140 (2006).

challenging a benefit denial. Plans, particularly in the disability and health-benefit areas, may include a plan-specific limitations period, which can be substantially shorter than applicable state limitations periods, and which also can trigger the running of the limitations clock earlier than would be the case under federal claims accrual case law, and which can result in claims accrual before the plan has formally and finally denied the claim. The Supreme Court recently upheld such a limitation.[328]

The use of the settlor function to set accelerated limitations periods undercuts the Congressional goal of providing ready access to the Federal courts. We note here that the Supreme Court has indicated that any plan-defined limitations period must be reasonable.[329] It appears, however, that substantially accelerated limitations periods meet that requirement.[330]

(v) Allowing a fiduciary to interpret legal requirements. In *Firestone Tire & Rubber Co. v. Bruch*, the Supreme Court indicated that a plan could include a provision giving a fiduciary discretion to interpret plan terms, which limits the scope of subsequent judicial review to an arbitrary-and-capricious standard. In some cases, courts have held that this deferential standard of review can apply to a fiduciary's interpretation of plan provisions incorporating legal requirements of the Internal Revenue Code.

For example, consider a Sixth Circuit Court of Appeal's decision.[331] The plan, as required by the Internal Revenue Code, included language providing for vesting on a

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[327] There is an oddity to this result, because here a pure business decision to, for example, terminate the employee to prevent attainment of a benefit would violate ERISA § 510, but an amendment of a plan would not.
[328] Heimeshoff v. Hartford Life & Accident Ins. Co., No. 12-651-cv, 2013 U.S. LEXIS 9026, at *9 (2013).
[329] *Id.* at *13.
[330] *Id.* at *19 (noting that the claimant had about one-year of the three-year limitation period after administrative resolution).
[331] Admin, Comm. of the Sea Ray Emps.' Stock Ownership and Profit Sharing Plan v. Robinson, 164 F.3d 981 (6th Cir. 1999); *see also* McDaniel v. Chevron Corp, 22 Employee Benefits Cases (BNA), 1449 (N.D. Cal. 1998), *aff'd*, 203 F.2d 1099 (9th Cir. 2000); Monks v. Keystone Powdered Metal Co. 78 F. Supp. 2d.

partial termination of the plan.[332] The plan administrator determined that there had been no plan termination when substantial percentages of the plan's participants left service in each of two successive years.[333] A class of participants brought a civil action, contesting the administrator's decision that there had not been a partial termination.[334] Rather than decide whether there had been a partial termination under the applicable provisions of the Internal Revenue Code, the panel limited its review to whether the plan administrator's determination had been arbitrary and capricious and determined that it was not.[335] It is certainly questionable whether a plan provision should be able to substitute a plan administrator's legal interpretation of a statutory requirement for a court's interpretation.

(vi) Bypassing ERISA's writing requirement. ERISA straightforwardly requires employee benefit plans to be written.[336] Courts and commentators have explained this requirement as necessary so that participants will understand the terms of the plan, their rights and their responsibilities.[337] In addition, Treasury regulations predating ERISA require that DB pension plans provide definitely determinable benefits

647 (E.D. Mich. 2000), *aff'd,* 10 Fed. Appx. 273 (6th Cir. 2001). In many other circumstances courts do not give deference to a plan administrator's interpretation of legal requirements. *See, e.g.,* Penn v. Howe-Baker Eng'rs, Inc., 898 F.2d 1096, 1100 (1990).

[332] *Admin. Comm. of the Sea Ray Emps.' Stock Ownership and Profit Sharing Plan,* 164 F.3d at 984.

[333] *See id.* at 988.

[334] *See id.* at 983.

[335] *Id.* at 989.

[336] ERISA § 402(a)(1), 29 U.S.C. §1102(a)(1) (2006).

[337] *See e.g.* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 ("In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan.'") (quoting H. R. Rep. No. 93-1280, p. 297 (1974)) (emphasis added by Supreme Court); James E. Holloway, *The ERISA Amendment Provision as a Disclosure Function: Including Workable Termination Procedures in the Functional Purpose of Section 401(b)(3),* 46 DRAKE L. REV. 755, 762 (1998) ("ERISA consists of an elaborate informational scheme that is created by disclosure and reporting requirements to apprise plan participants and beneficiaries of their rights and obligations under benefit plans."); Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3),* 39 J. Marshall L. Rev. 827, 895 (2006) ("The purpose of the written plan document rule is to provide assurance to participants that they may examine the plan document and know with certainty their rights under the plan and who is responsible for operating the plan."); Frank P. VanderPloeg, *Role-Playing Under ERISA: The Company as "Employer" and "Fiduciary",* 9 DEPAUL BUS. L.J. 259, 286 (1997).

at retirement—that is, benefits that can be determined under a plan formula.[338] A plan would fail both the writing requirement and, if it is a pension plan, the definitely determinable requirement, if it provided that benefit eligibility were contingent on the discretion of the employer to grant the benefit. But courts have approved clauses in plans that give the employer the ability to designate who is entitled to a benefit. In the T&B case, for example, the plan provided that severance benefits would be paid only if "the terminating manager believes the granting of such pay is appropriate."[339] The eligibility terms for the benefit, then, were committed to the determination that they were "appropriate" in the subjective judgment of the terminating manager. The eligibility terms thus did not, in substance, appear in the plan. And as we noted earlier, the court held that the manager's decision as to whether it was "appropriate" to pay benefits was made in a business rather than fiduciary capacity.[340]

(vii) The decision to invest in employer stock. A retirement plan invested in employer stock is rife with problems: it can leave employees with a risky, undiversified portfolio and it creates myriad conflicts of interest. Thus, ERISA limits a DB plan's investment in employer stock to 10% of its assets.[341] However, a plan sponsor may design a plan to invest primarily in employer stock or sponsor a 401(k) plan. Some of the diversification rules are waived in each of those types of plans.[342]

Thus, a settlor decision to design a plan primarily to invest in employer stock is, in essence, a decision to opt out of much of ERISA's fiduciary rules. But unlike other

[338] Treas. Reg. § 1.401-1(b)(i).
[339] Noorily v. Thomas & Betts Corp., 188 F.3d 153, 156 (3d Cir. 1999).
[340] *Id.* at 162.
[341] ERISA § 407(a), 29 U.S.C. § 1107(a) (2006).
[342] Sean M. Anderson, *Risky Retirement Business: How ESOPs Harm the Workers They Are Supposed to Help,* 41 LOY. U. CHI. L.J. 1, 11-12 (2009) (comparing the diversification rights of 401(k) plan and ESOP participants).

problems identified in this section, Congress expressly authorized the plan sponsor to design a plan to be an ESOP and thus subject to a weaker fiduciary regime.

3. Settlor Decisions Exploiting Regulatory Vacuums

ERISA includes a field-occupying preemption provision, preempting, with only limited exceptions, any state law that relates to an employee benefit plan.[343] Thus, ERISA ousts states from regulating even those aspects of employee benefit plans that ERISA itself does not regulate. There is an exception to ERISA preemption for state insurance laws, but the exception does not apply to plans that self-insure and applies only to laws that relate to insured plans, which do not, for example, include separate state regulation of claims procedures.[344]

ERISA, from its 1974 origins, imposed various consumer-protection standards on the design of retirement plans, primarily in the areas of vesting and benefit accrual. And the statute did of course create fiduciary rules that applied to all benefit plans. But ERISA did not initially impose consumer protections on welfare benefit plans, although some protections were later added to Federal law, most recently by the Patient Protection and Affordable Care Act.[345] But there remain large swathes of benefit topics that are not regulated by ERISA and cannot, because of ERISA's sweeping preemptive reach, be regulated by the states.

[343] ERISA § 514, 29 U.S.C. §1144; *see* Andrew Stumpff, *Darkness at Noon: Judicial Interpretation May Have Made Things Worse for Benefit Plan Participants Under ERISA than had the Statute Never been Enacted*, 23 ST. THOMAS L. REV. 221, 229 (2011) ("From the standpoint of a plan participant, ERISA's preemption clause has for practical purposes indeed cleared the employee benefits field of state law.").
[344] *See supra* note 59 (discussing application of the insurance law exception).
[345] Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010). Shortly after passage of the Patient Protection and Affordable Care Act, Congress enacted numerous amendments in the Health Care and Education Reconciliation Act of 2010. Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

This creates fertile ground for various problematic plan design features to take root, features that may violate state-Federal consensus on legal behavior outside the arena of employee benefit plans. As discussed above, the Supreme Court recently had an opportunity to explore this issue in *US Airways v. McCutchen*, in which a plan participant challenged the validity and reach of a health care's subrogation provision.[346] The provision required the participant to reimburse the plan for medical expenses from any tort recovery.[347]

Notwithstanding the fact that some states would not have enforced any subrogation clause under a medical insurance policy[348] and states consistently have refused to enforce a subrogation clause against a recovery without prior deduction for attorney's fees;[349] and notwithstanding that the subrogation rights claimed by the US Airways plan exceeded the subrogation rights of the Federal government for its payment of medical expenses under Medicare, Medicaid, and the Federal Employee's Health Benefits Act,[350] the Supreme Court ruled that nothing in ERISA prohibited or in any way limited a plan's subrogation clause, which the court equated to a contractual provision.[351] The majority, however, found that the subrogation clause in question was not sufficiently clear on whether attorney's fees should first be deducted and was unwilling to interpret the clause in such an "unnatural" way in the absence of clearer language.[352]

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346 133 S. Ct. 1537 (2013). For more detailed discussion of the case, *see supra* text accompanying notes 248-57.
347 133 S.Ct at 1543.
348 *See* Brief for Respondent at 52, U.S. Airways, Inc. v. McCutchen, 2011 U.S. Briefs 1285 (2012) (explaining that categorical bans of reimbursement has not caused insurers to refuse to issue coverage in states with those bans).
349 *See* Brief for Appellee-Respondent at 26-27, U.S. Airways, Inc. v. McCutchen, 2011 U.S. Briefs 1285 (2012).
350 *See* Brief for Appellee-Respondent at 53-54, U.S. Airways, Inc. v. McCutchen, 2011 U.S. Briefs 1285 (2012).
351 133 S. Ct. at 1548.
352 *Id.*

Thus, the Supreme Court has provided that an ERISA plan can include and enforce a subrogation clause that neither the Federal government nor any state would enforce as written. It is difficult to articulate a persuasive argument why employer-sponsored health care plans should be the only species of health care plan unaffected by a Federal and state consensus that subrogation clauses in health care plans should be limited.

Settlor choices on plan design can also shield, or at least partly shield, medical professionals from state malpractice claims. In the case of *Pegram v. Herdrich*, the Supreme Court ruled that a doctor for a health maintenance organization was not acting as a fiduciary when it made a mixed treatment/eligibility decision and thus a participant denied needed medical care had no action against the HMO,[353] but the decision was widely understood to mean that the participant could bring a state law civil action for malpractice against the doctor and in some states perhaps against the HMO itself.[354] Plan sponsors, however, were able to find a plan design solution that protected both the physician and the HMO from liability by vesting the eligibility question to a plan official other than the treating physician; the plan official's decision would be a plan benefit determination, subject to deferential review, and malpractice actions against the plan would be barred.[355] The treating physician would be protected from medical malpractice since the decision to withhold or choose a less expensive method of treatment was made by the plan official rather than the treating physician. Thus, through the settlor function,

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[353] 530 U.S. 211, 237 (2000). For additional discussion of *Pegram*, see *supra* text accompanying notes 234-41.

[354] *See* Thomas Jost, Pegram v. Herdrich: *The Supreme Court Confronts Managed Care,* 1 YALE J. OF HEALTH POL'Y, L. & ETHICS, Article 11 (2001).

[355] *See* Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) (holding that ERISA preempts malpractice claims against HMOs when a non-treating physician makes a benefit eligibility decision).

HMOs are able to insulate themselves and their physicians from certain types of malpractice claims.[356]

In principle, we see no reason why HMOs, insurance companies, and self-insured plans could not further insulate physicians from malpractice claims by including clauses in the plan that participants agree not to bring a malpractice action against a physician for ordinary negligence, or not to seek punitive damages, or to forego judicial resolution of malpractice claims in favor of binding arbitration. Such plan provisions would pose challenging preemption questions if a state found them against public policy, for such provisions would certainly reduce plan costs and state failures to respect them thus would seemingly be related to an employee benefit plan. While we are not aware of such clauses today, we would be mildly surprised not to see them in the future.

B. The Statutory Basis for the Settlor/Fiduciary Doctrine

In this subsection we consider a question of textual analysis: whether ERISA's language and structure compel the expansive scope that the Supreme Court gave to the settlor/fiduciary doctrine? This question has implications beyond its inherent academic interest, because the answer bears at least somewhat on the ability of the courts to rein in the doctrine without legislative modification of the statutory language.

As we earlier observed, the first reference to the settlor/fiduciary distinction occurred in a 1986 DOL letter to a prominent private attorney concerning whether a decision to terminate an overfunded DB plan (which enabled the employer to recover plan's assets in excess of plan liabilities) was subject to ERISA's fiduciary regime. If it

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[356] The *Davila* Court's holding distinguished *Pegram*, noting that the treating physician's mixed eligibility/treatment decision is not a fiduciary decision and could be subject to a state malpractice action. 542 U.S. at 218. We note that it is possible to read *Davila* to allow a physician to make an eligibility determination as a plan fiduciary rather than as a physician (such as whether a treatment is experimental), but this is not clear.

were, the employer's decision to terminate the plan—at least a termination with an asset reversion to the employer—almost certainly would have violated the statute, since it would be difficult to argue that the decision to recover surplus assets was made in the exclusive interest of the plan's participants. The Department held that it was not, "in light of the voluntary nature of the private pension system governed by ERISA."[357] The Department wrote that it has "concluded that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called "settlor" functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA."[358] The Department, then, did not base its rationale solely and seemingly not even primarily on the statutory language defining fiduciary, but rather based the decision on the foundational structure of employer benefits regulation under the statute: the decision to adopt, amend, or terminate a plan is a voluntary employer decision and must be so in a system where plan sponsorship is voluntary.[359]

The letter, perhaps significantly, also left room to pull back at least somewhat from the idea that every decision made in a settlor capacity is exempt from ERISA's fiduciary regime. The DOL letter stated that the "decision to terminate is *generally* not subject to the fiduciary responsibility provisions of ERISA" (emphasis added), which suggests that that the Department was reserving flexibility to subject some plan termination decisions (and other settlor decisions) to the statute's fiduciary regulation if policy or other prudential concerns arose in the future that warranted it.[360]

[357] John N. Erlenborn, Department of Labor Information Letter 1, *supra* note 93.
[358] *Id.*
[359] The statute expressly provides for reversions and gives employer the authority to terminate a sufficiently-funded plan. ERISA § 4041, 29 U.S.C. § 1341 (2006).
[360] Of course, it is possible that this possible limitation on the Department's view of the doctrine's contours resulting from less than fully attentive drafting, but the letter on the whole appear to be carefully composed.

In contrast to the DOL, the Supreme Court has "rooted" its version of the distinction "in the text of ERISA's definition of fiduciary,"[361] which provides that "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary responsibility in the administration of such plan."[362] In its *Spink* decision, the Court held that the act of amending a plan is not a discretionary administrative or managerial act and thus that ERISA fiduciary standards do not apply to plan amendments.[363]

The statutory language, however, did not mandate this result and could have been interpreted in less absolutist terms. We do not attempt here to develop the "correct" interpretation of the statutory definition of fiduciary, because the words of the definition, and how the definition is situated within the structure of the statute, do not lead inexorably to a single correct interpretation. The correct interpretation, in such circumstances, is of course the interpretation that the Supreme Court crafts. In this section, we suggest only that the Supreme Court's categorical determination that a person who designs a plan can never be a fiduciary was not inevitable and that the statute was susceptible to interpretations that would have permitted some judicial flexibility to treat plan amendments as fiduciary actions. These interpretations include the following:

(1) Management and administrative decisions through plan design. In its *Spink* decision, the Supreme Court held that "amending or terminating a plan . . . cannot be an

[361] Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996).
[362] ERISA § 3, 29 U.S.C. § 1002 (2006).
[363] 517 U.S. at 890-91.

act of plan ‘management” or ’administration.’”[364] The Court observed that the plan was like a trust and a fiduciary akin to a trustee, who was to administer the plan in accordance with the plan documents, just as a trustee was to administer a trust in accordance with trust documents.[365] But the statute does not require that reading. The statutory definition of fiduciary provides four circumstances in which a person is a fiduciary—one of which is exercising discretionary control or authority respecting the management of the plan, and a second is having discretionary control or authority in the administration of the plan. The statute, then, recognizes a difference between plan management and plan administration, but the Court’s opinion does not explore the statutory distinction or whether an amendment can ever be an act of plan management even if not an act of plan administration.

(2) Management or Disposition of Plan Assets. The definition of fiduciary also provides that a person is a fiduciary to the extent that he exercises any authority or control over the management or disposition of plan assets. In a funded plan, an amendment or plan design feature will often affect the disposition or investment of plan assets.[366] And in an unfunded plan, certain plan amendments—such as the selection of a named plan fiduciary or the selection of a closed panel HMO—will affect the disposition of plan assets and seem literally to be covered by the ERISA definition of fiduciary.

(3) Investment Direction through Plan Amendment. A person who provides investment advice to a plan is a fiduciary under the statute’s definition.[367] But under the

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[364] Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (quoting Varity Corp. v. Howe, 516 U.S. 489, 505 (1996)).
[365] *See* 517 U.S. at 890.
[366] The Court focused on the difference between welfare and retirement plans although its intent seemed to be to distinguish between funded and non-funded plans.
[367] Long-standing DOL regulations narrowly define when an investment adviser acts as an ERISA fiduciary. *See* 29 C.F.R. § 2510.3-21(c). The Department has appropriately recommended a more inclusive definition given change in nature of retirement plans. Definition of the Term ’Fiduciary‘, 75 Fed.

Supreme Court's doctrine, if the investment advice is given to the plan designer and incorporated in the plan design, the person who gives investment advice presumably would not be a fiduciary, for the investment advice would not be given to the plan but rather to the plan designer. There is little reason, though, to differentiate between investment advice given to a plan designer, which would then become part of the plan document, and investment advice given to a fiduciary, which would implement the plan's investment function. If functionally the advice to shape an investment menu is the same whether given to the designer of a plan document or to the plan fiduciary, they should presumably treated the same under ERISA's fiduciary regulation. And if investment advice to the plan designer should make the advisor a fiduciary, then the plan designer who receives the advice and adopts a particular investment structure should presumably also be a fiduciary, in the same way that a plan official implementing investment advice would be a fiduciary.

We reiterate that we are not contending that the Supreme Court's take on the scope of fiduciary activity is implausible or that a more expansive interpretation of fiduciary activity is more closely aligned with the statutory language. We are contending only that a more expansive interpretation was also plausible.[368] Nor are we suggesting that a more expansive interpretation would have been easier for courts to apply. Indeed, as we noted at the start of this paper, one of the virtues of the Supreme Court trilogy is that it is an easy doctrine for courts to apply. It has the simplicity and predictability of a simple chemical reaction.

Reg. 65,263 (proposed Oct. 22, 2010). The DOL subsequently withdrew the proposed regulation and indicated it will redraft and re-propose it. U.S. Department of Labor, *US Labor Department's EBSA to repropose rule on definition of a fiduciary*, 11-1382-NAT (Sept. 19, 2011), *available at* http://www.dol.gov/ebsa/newsroom/2011/11-1382-NAT.html.

[368] Some lower courts—including in *Hughes* and *Spinks*—did have a more expansive view of fiduciary action.

A more expansive doctrine would have produced more hard cases, cases whose resolution would have required nuanced doctrine and judicial judgment. In their 1988 article, Professors Fischel and Langbein nominated the trust principle of impartiality as a "likely doctrinal rubric"[369] for resolving questions involving competition among classes of participants, or among participants and plan sponsors, for finite trust resources. Courts also could have developed doctrine that applies fiduciary analysis to plan design decisions that are functionally equivalent to management or administrative activities (for example, the selection of a menu of investments or the appointment of a named fiduciary seem clear examples of plan management decisions, whether made in designing a plan or in implementing a plan provision giving a fiduciary the responsibility to make those decisions). And courts could have focused on the statute itself, cordoning off from fiduciary analysis aspects of plan design that the statute expressly places in the ambit of employer discretion—for example, establishing a plan designed to invest in employer stock or a pension plan that provides that an employer can recover surplus plan assets on termination of the plan.

Decisions in individual cases would have been tougher under a less rigid settlor/fiduciary distinction, but the decision-making would have focused on statutorily relevant substance rather than on a purely formalistic inquiry. And the concerns we have about future developments in plan design and employee benefits law would have been more modest if the Supreme Court had constructed a less rigid divide between settlor and fiduciary functions.

IV. Pruning Back the Doctrine

[369] Fischel & Langbein, *supra* note 2, at 1107.

The settlor/fiduciary doctrine operates mechanically and largely lacks nuance. It has no obvious brake or governor on its excesses and accommodates if not invites sharp practices. It privileges formalism over substance, prevents certain types of contractual understandings, upsets Congressional policy judgments, effectuates conflicts of interest, ignores an important part of the economics of employee benefits, and undermines national consensus on some legal issues. To us, the problems with the doctrine have become more apparent with time and we have little confidence that the doctrine will not result in the growth of new problematic issues unless it is trimmed back, either through judicially developed limitations on the doctrine's scope (perhaps with a hand from the DOL) or through legislative modification of the statute itself.

The prospects for either approach may not be promising. Given that there are no interest groups currently lobbying for legislative redesign of the settlor/fiduciary doctrine, and that if such a group improbably appeared it would almost certainly be met by a resolute and well-heeled pension industry that has a strongly focused interest in retaining the doctrine in its broadest form, amendment of the statute to reshape the settlor/fiduciary doctrine seems unlikely, particularly in an era marked by legislative gridlock. If legislative change comes, it is likely to come in the shape of targeted provisions to address specific issues, as occurred, for example, in the late 1980s, when Congress created limitations on the ability of employers to access surplus assets on the termination of a DB plan[370] or in 2006 when Congress added some legislative protections for participants during a conversion of a traditional DB plan to a cash balance plan.[371] It would not surprise us, then, to see, for example, some additional protections for

[370] *See, e.g.,* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (Nov. 11, 1988).
[371] Pension Protection Act of 2006, Pub. L. No. 109-280, 128 Stat. 780 (Aug. 17, 2006).

participants affected by de-risking transactions, possibly in the form of additional disclosures.[372]

Judicial revision of the doctrine may seem even more improbable than legislative modification, given the Supreme Court's multiple pronouncements on the doctrine, which situate a mechanical and expansive version of the doctrine squarely in the statutory definition of fiduciary. Initially, then, there thus does not appear much room for doctrinal give, but we do have some reason for optimism. First, the doctrine could be limited collaterally, outside the language and structure of the ERISA fiduciary definition, by focusing on the statutory prohibition on enforcing a plan term that is inconsistent with the provisions of the statute, implementation of plan amendments and plan terminations, and on limits to ERISA's preemptive reach. Second, some of the doctrine's rigidity might be attributed to dicta in the *Spink* decision that did not distinguish between plan administration and plan management. Giving content to the plan management component of ERISA's fiduciary definition would provide room for some adjustment at the margins. Third, the Supreme Court has developed rigid doctrine on ERISA preemption and remedies only to retreat when the statute began producing outcomes divorced from the policies and concerns that seemingly undergird the statute and, arguably, from common sense. The Court has signaled its willingness to follow a similar path with the settlor/fiduciary doctrine.

As we discuss, in turn, each of these potential judicial approaches to achieving a more nuanced interpretation of the settlor/fiduciary doctrine, we link the approaches back to the three categories of concern we identified above in Part III.[373] Those categories are: (1) concerns related to employee expectations; (2) concerns related to undermining

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[372] *See supra* text accompanying notes 195-202 (discussing de-risking transactions).

ERISA protections; and (3) concerns related to the creation of regulatory voids, particularly in welfare plans.

A. Collateral Modification of the Settlor/Fiduciary Doctrine

We begin with the possibility of judicial modification of the doctrine itself albeit through a collateral approach that would leave intact the Court's grounding of the doctrine in ERISA's statutory definition of fiduciary. Available in a variety of situations, the common thread of the collateral approach is that it would involve application of substantive ERISA provisions to set boundaries on the settlor/fiduciary doctrine. Its grounding in ERISA's requirements means the approach could prevent the doctrine from being used to undermine ERISA's substantive protections. Because of the range of ERISA's substantive protections, the collateral approach may be the most useful of the three opportunities the courts have to reshape the boundaries of the settlor/fiduciary doctrine.

1. Prohibition on Enforcing a Plan Term Inconsistent with Statutory Provisions

It is the duty of a fiduciary to follow the terms of a plan document "insofar" as the document is "consistent with the statute."[374] This language "consistent with the statute" could be restrictively read, as it generally seems to have been in settlor/fiduciary cases to date, to prohibit a fiduciary from enforcing a plan provision only if the term unequivocally violates another ERISA rule—for example, a vesting or accrual rule.[375] Under this approach, a fiduciary may enforce a plan term if it arguably violates an ERISA

[373] *See supra* Part III.A.
[374] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (2006).
[375] *See, e.g.*, *supra* text accompanying note 52 (referring to ERISA's vesting and accrual rules).

general standard, such as the general fiduciary prudence standard,[376] or if it violates "the full and fair review" requirement regarding participant claims,[377] or the written plan requirement.[378] Taking such an approach certainly has the virtue of allowing a fiduciary to follow plan terms without having to make difficult judgment calls on whether the plan conflicts with either ERISA's fiduciary or non-fiduciary standards of behavior.

But this approach raises fundamental issues, for it permits a fiduciary to take actions pursuant to a specific plan provision even though the fiduciary's actions might be imprudent or otherwise in violation of the statute if exercised pursuant to the fiduciary's discretion or a less-specific grant of authority. For example, we have already noted the tension that exists[379] between the Department's1991 position that a person acts in a fiduciary capacity when it selects investments, "whether achieved through fiduciary designation or express plan language,"[380] and the Supreme Court's 1999 *Hughes* opinion, which held that plan amendments are always settlor actions and outside the ambit of fiduciary regulation.[381] There are at least two ways to bridge the tension, one using the collateral limitation approach, which we discuss here, and a second that we will discuss in the next subsection. The former approach would rely on the duty of a fiduciary to discharge his duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the statute."[382] If a plan document specifies investment options that are imprudent or that become imprudent over time, then a fiduciary implementing the plan directions could not follow them

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[376] *See* ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2006).
[377] *See* ERISA § 503(2), 29 U.S.C. § 1133(2) (2006).
[378] *See* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (2006).
[379] *See supra* text accompanying notes 212-23.
[380] Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans, 57 Fed. Reg. 46,922, 46,924 n.27 (Sept. 16, 1991).
[381] Lockheed v. Spink, 517 U.S. 882, 890 (1996).
[382] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (2006).

without violating the fiduciary duties of prudence and fealty to the exclusive interests of the participant and beneficiaries of the plan. A problem remains, however, in applying this concept to participant-directed 401(k) and KSOP plans. Frequently, in those plans the only relevant fiduciary for investment-related transactions is the entity that implements participants' investment directions. Those trustees are known as directed trustees and they only have obligations to evaluate the prudence of investment options if they have nonpublic information or in very limited circumstances involving employer stock.[383] Thus, typically even if a plan's investment menu becomes imprudent the directed trustee would not have any obligation, or even any ability, to take action to remove the imprudent investment as a plan option. As a result, in many plans relying on a fiduciary that implements plan directions to identify and eliminate imprudent investments is not a viable option.

This understanding of ERISA's prudence requirement and the potential lack of any fiduciary to serve in that role provides a basis for courts to consider imposing a collateral limitation on the settlor/fiduciary doctrine in light of the prudence provision. Even conceding for purposes of argument that the initial selection constitutes a settlor decision when the investment menu is included in the plan terms, that only requires that the original choice of investments be outside the scope of fiduciary obligation. It need not undermine the ongoing fiduciary monitoring obligation inherent in the concept of prudence. Instead courts could treat the plan sponsor as a fiduciary for the plan investment menu in all respects, including monitoring, other than the initial decision to include the menu in the plan terms.

[383] FAB 2004-03 (Dec. 17, 2004), *available at* http://www.dol.gov/ebsa/regs/fab_2004-3.html.

We acknowledge that monitoring and determining the prudence of plan investment options will require difficult judgments by fiduciaries and courts. But, the courts are well-equipped to develop appropriate standards consistent with the statute and trust law underpinnings of ERISA's fiduciary obligations. And, in fact, these determinations will not be entirely new for either courts or fiduciaries. For example, courts have struggled to fashion appropriate standards to test when a fiduciary's purchase of employer stock pursuant to plan terms is imprudent (or violates the exclusive benefit rule). In developing standards for these cases, courts have worked to reconcile the competing dictates of prudence with the express statutory authorization of a plan designed to invest primarily in employer stock. They have held that a fiduciary is subject to a less probing ERISA prudence analysis when purchasing employer stock pursuant to a plan provision directing the fiduciary to do so.[384] An alternative and more generally applicable approach may be to query whether the action would be permissible for a fiduciary granted maximum discretion under the plan. We note that such a test could be implemented through a mirror image in the fiduciary/settlor doctrine itself, in which a plan design feature would be a fiduciary act if it required a plan official to act in a way that would be impermissible if the plan official had merely been given broad discretionary authority.

In some circumstances, particularly those related to employee expectations, courts may look to the statute's exclusive purpose obligation, which is often discussed in terms of the trust law concept of loyalty, to limit the settlor/fiduciary doctrine. In their seminal article, Professors Fischel and Langbein observed that loyalty in trust law typically

[384] *See, e.g.*, Harris v. Amgen, Inc., No. 10-56014, 2013 U.S. App. Lexis 11223, at *26 (9th Cir. June 4, 2013); *see also* Taveras v. UBS AG, 107 F.3d 436, 445 (2d Cir. 2013) (noting that if a reference to

requires a trustee to use the principle of impartiality to resolve opposing interests between trust beneficiaries.[385] That approach could have significant power in resolving a variety of problems we observed earlier in this Article. For example, courts typically have applied the settlor doctrine to permit a plan sponsor to amend a health care plan, as happened in *McGann,*[386] to eliminate a benefit of importance to one or a few employees. Instead a court could collaterally constrain the doctrine in light of both Section 510's prohibition on accomplishing the same outcome by firing the affected employees and the principle of neutrality embedded in Section 510.[387] Similarly, courts have permitted plan sponsors to convert DB plans to cash balance plans and include plan terms that impose wearaways with particularly harsh effects on the benefits of older and/or longer service employees. Here again, the obligation of loyalty, and through it impartiality, could require a more equitable distribution of the economic effects of the plan change on participants.

So far we have been discussing ways in which ERISA's fiduciary standards might be interpreted to limit the scope of the settlor/fiduciary doctrine; other ERISA provisions might also be inconsistent with unquestioned adherence to terms of a plan. Cases such as *Heimeshoff*[388] could be resolved by determining when a plan provision violates the ERISA requirement that plans offer a full and fair review process for benefit denials.[389] Plan provisions requiring a fiduciary to apply discretion (or to defer to the discretion of a

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employer stock in plan terms were sufficient to give rise to the presumption of prudence then the presumption would nearly always apply).

385 Fischel & Langbein, *supra* note 2, at 1121.

386 McGann v. H & H Music Co., 946 F.2d 401, 403 (5th Cir. 1991).

387 ERISA § 510, 29 U.S.C. § 1140.

388 Heimeshoff v. Hartford Life & Accident Ins. Co., No. 12-651-cv, 2012 U.S. App. LEXIS 191269 (2nd Cir. Sept. 13, 2012), *cert. granted*, 133 S. Ct. 1802 (2013).

389 This may not be a problematic issue for the fiduciary, though, for presumably the fiduciary's compliance with the plan terms, while perhaps challengeable in court, would presumably not result in fiduciary financial responsibility for a breach.

non-fiduciary, as in the *Noorily*[390] case) in determining eligibility for a benefit could be held to be in conflict with the requirement that a plan, and presumably its terms, be in a written document. Decisions on DB plan benefit structures and funding also could be reviewed in the context of ERISA's requirements. For example, recall that the Six Circuit Court of Appeals decided that adoption of a benefit structure that was so generous it caused the plan to become severely underfunded was a settlor action because the trustees amended the plan to specify the level of benefits.[391] If the court had considered the collateral effects of either the fiduciary obligation of prudence or plan funding rules, the court may have drawn the settlor definition more narrowly.

A slightly different approach from relying on ERISA's substantive provisions to cabin the settlor/fiduciary doctrine, would be for courts to limit settlor functions to those that relate to benefits, benefit eligibility, and internal plan administration, but not matters that relate to judicial or executive branch oversight of plans. Under this view of the doctrine, for example, a plan provision could not reduce the time a participant would have to bring a civil action against a plan for benefits. Including such a provision in the plan document would not transform the decision into a fiduciary decision, but rather would result in an unenforceable plan term.

This principle would also mean that plan terms could not be used to limit participants' remedies under ERISA, nor to expand settlor remedies beyond those clearly enunciated in the statute. Determination of remedies, after all, is a prerogative of the judiciary and in some instances the administrative branch. Recall, the recent Supreme

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[390] Noorily v. Thomas & Betts Corp., 188 F.3d 153 (3d Cir. 1999).

[391] Gard v. Blankenburg, Nos. 00-1234, 00-2224, 2002 U.S. App. LEXIS 2963 (6th Cir. Feb. 21, 2002). The case is discussed *supra* at text accompany notes 189-93.

Court decision in *US Airways v. McCutchen*,[392] where the court addressed the question of whether a plan could preclude participants' reliance on traditional equitable defenses to limit remedies sought by the plan. The essence of the Court's decision was that since ERISA does not prohibit plans from barring application of those equitable defenses, clear plan provisions excluding them would be enforceable. However, the effect is to permit plan sponsors to rewrite ERISA remedies in their favor; a result surely not contemplated in the statute's enactment.

2. Distinguishing Implementation From Design

The courts have already expressly identified one collateral limitation on settlor actions: the implementation of plan design features. The "implementation" idea, though, is not so much a limitation on the settlor/fiduciary doctrine as it is a restatement of it: discretionary actions implementing plan provisions are fiduciary actions. The difficulty with this approach is twofold: first, in close cases, how do we demarcate where the plan design decision ends and implementation begins; and second, what does implementation entail?

We have already discussed the former in the context of the Supreme Court's *Beck* decision,[393] in which the Court held that under Title IV of ERISA the plan sponsor's decision to terminate a plan was a plan design decision that required the purchase of annuities. Ultimately, *Beck* teaches us that courts will need to make case-by-case determinations between plan design decisions and implementation decisions in close cases, although since *Beck* no close case has emerged.[394]

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[392] 133 S. Ct. 1537 (2013).
[393] Beck v. PACE Int'l Union, 551 U.S. 96 (2007).
[394] In *Varity*, the Court found, or at least arguably found, that misrepresentations in a plan restructuring was part of the implementation of the plan restructuring. *See supra* text accompanying notes at 152-65 (discussing the *Varity* decision).

The latter—what does implementation entail—also will require case-by-case determinations that intersect with the settlor/fiduciary doctrine in cases where conflicts of interest are particularly intractable. The application of ERISA's fiduciary standards in these contexts is beyond the scope of this article, however, it is useful briefly to illustrate the basic problem using de-risking transactions. One approach to de-risking, recall,[395] occurs when a plan sponsor amends a plan to transfer benefit liabilities to an insurance company, which distributes irrevocable annuity contracts to participants. Another involves a plan sponsor's amendment of a plan to allow a class of participants—generally among those participants who have already retired but sometimes also including former employees who have vested benefits to elect a lump sum payment in lieu of lifetime stream of income from the plan.[396] Both of these situations pose challenging implementation questions for a fiduciary, particularly since the plan sponsor's settlor decisions in a de-risking are largely antithetical to the interests of the employees. How the courts and the DOL responds to these issues can either accentuate or minimize the harms that flow from the settlor decision to de-risk. Similarly, difficult considerations in application of fiduciary decision-making arise in the context of ESOPs. For example, courts have struggled to define when payments in the nature of dividends or compensation rise to the level that they constitute a fiduciary breach.[397] This article leaves those questions for another day.

3. Limiting ERISA's Preemptive Reach

[395] *See supra* text accompany notes 195-201.

[396] Any plan action to reduce its risk is a 'de-risking' action. In addition to the two techniques discussed in the text, plan sponsors may take actions such as changing a plan's investment strategy, their contribution patterns, etc. *See* David Buck & Jason Flynn, *CFO Insights De-Risking pensions: Can it be done?*, DELOITTE (2013), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/CFO_Center_FT/us_cfo_CFO-Insights_De-risking-pensions_01172013.pdf.

[397] *See, e.g. supra* text accompany notes 226-33.

Finally, returning to the core principle that courts might constrain the settlor/fiduciary doctrine by considering the doctrine together with collateral statutory provisions, preemption may play an important role. This is especially true in the category of concerns we identified above related to the creation of regulatory voids, particularly in welfare plans. Again, though, there is a slight twist. Rather than a substantive ERISA provision limiting the doctrine, ERISA's preemption provision would permit the application of state law. This could be most applicable in areas that are core areas of traditional state regulation, such as the regulation of medical providers.

In sum, if courts use collateral limitations based in ERISA's substantive requirements to refine the scope of the settlor/fiduciary distinction, they will need to develop the case law on those requirements. And again, the task would not necessarily be an easy one. It would, however, help prevent plans from undermining ERISA protections that Congress included in the statute. In fact, statutory provisions are relevant to all three categories of concerns we identified above in Part III: (1) concerns related to employee expectations; (2) concerns related to undermining ERISA protections; and (3) concerns related to the creation of regulatory voids, particularly in welfare plans.

B. Treating Plan Management Decisions as Fiduciary Decisions

Rather than focus on collateral limitations to cabin the settlor/fiduciary doctrine, an alternative approach would be for courts to acknowledge that some plan design decisions are, in fact, fiduciary decisions, pulling back from the rhetoric in *Spink*. As we have already noted, the *Spink*[398] decision held that plan amendments (and that presumably extends to plan design decisions in the initial plan document) are never plan administrative or management decisions and thus not fiduciary activities. But the decision conflates administrative and management decisions, which are referred to in separate clauses of the statutory definition of fiduciary and were almost certainly intended by Congress to have different meanings.

Doctrine holding that plan amendments are not fiduciary in nature because they do not fit within the statutory definition of fiduciary administrative decisions does not necessarily mean that the amendments can never constitute fiduciary plan management decisions. Early in the last subsection we described how collateral limitation could support the Department's position that the selection of plan investments is always a fiduciary function—regardless of whether the investment options are included in the plan's terms. Acknowledgement that there is a difference between administrative and management decisions involving the plan could support the Department's view that both investment selection and monitoring are always fiduciary decisions. At one level, the Department's position seems inconsistent with the Supreme Court's holding in *Hughes*[399] that the act of plan amendment is always a settlor function. But the identification of a person as a named fiduciary in a plan document, or the selection of an investment menu for a participant defined contribution plan, are arguably plan management decisions even if implemented through a plan amendment.[400]

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[398] Lockheed Corp. v. Spink, 517 U.S. 882 (1996). For a discussion of the case, see *supra* text accompanying notes 105-12.

[399] Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999). For a discussing of the case, see *supra* text accompanying notes 113-27.

[400] There are at least two other arguments in favor of the department's position. Perhaps a plan sponsor who amends a plan to set the investment menu is a fiduciary because he "renders investment advice" to the plan, although the statutory framework making an investment adviser a fiduciary requires that the advice be rendered "for a fee or other compensation, direct or indirect," ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii) (2006), and it is not clear that a plan sponsor receives any sort of compensation for selecting the plan's investments. Or, perhaps the Department's position can be seen as an exception—perhaps a singular exception—to the expansive definitional scope that the Supreme Court has given settlor (and thus non-fiduciary) functions.

Moreover, the statute provides that exercise of authority or control over management of plan assets is a fiduciary action and a plan provision creating a menu of investment options for a self-directed plan certainly is the exercise of authority over management of plan assets. There is, then, a basis for pulling back from the broad statement in *Spink*, which was not necessary to the Spinks decision and might be considered dicta rather than the case's holding.[401]

Consider other situations in which a court might find that a plan sponsor engages in the exercise of authority or control over management of plan assets. In de-risking transactions, the plan sponsor uses its discretion to decide to transfer plan assets to an annuity provider without terminating the plan.[402] When determining what percentage of a plan's assets to transfer as part of a corporate reorganization or sale of the unit, the plan sponsor likewise makes a discretionary decision on transferring assets out of the plan. These discretionary transfers of plan assets in a context when the plan continues in existence may have a significant effect on the rights of participants and the ability of the surviving plan to pay benefits. As such, these discretionary decisions logically fit within Congress' goal of ensuring that control over plan assets is subject to ERISA's fiduciary protections.

Using this approach, courts could reject the *Spink*[403] dicta and recognize that plan management and control and management of plan assets are fiduciary acts as defined by the statute. In terms of the concerns we identified above in Part III, the primary effect would be to prevent the undermining of ERISA protections in such varied applications as

[401] The DOL's existing guidance is consistent with this and it could reiterate that guidance, which should receive deference from the courts as long standing and consistent guidance.
[402] The ongoing nature of the plan distinguishes this decision from situations in which plans are voluntarily or involuntarily terminated. Supreme Court decisions, correctly in our view, confirm that those plan terminations are settlor decisions. *See*, *e.g.* Beck v. PACE Int'l Union, 551 U.S. 96 (2007).
[403] Lockheed Corp. v. Spink, 517 U.S. 882 (1996).

ensuring the prudence of plan investment menus, preventing the substitution of non-ERISA annuities for retiree DB plan benefits, and precluding employers from indirectly capturing the value of plan assets by inflating the sale price of a unit. In situations such as de-risking transactions, recognizing the fiduciary nature of the decision also will protect retirees' expectation that their benefits would be paid from the plan so long as the plan remains in existence.

C. Outcome-Oriented Decision Making

This brings us to a final point: in cases in which the facts are particularly troubling the Supreme Court sometimes seems to blunt the harshest edges of the broad ERISA doctrines it has created. For example, in its initial interpretations, the Supreme Court used sweeping language when applying ERISA's preemption provision.[404] When considering ERISA remedies, the Supreme Court first appeared to dramatically limit remedies.[405] In more recent cases the Court has distinguished those early decisions and permitted remedies that the lower courts had presumed were foreclosed by the Court's broad language.[406]

Of course development over time of increasingly nuanced doctrine is not usual in the common law. So, it should not be surprising either that other areas of ERISA jurisprudence have developed in this way or that the same effect can be seen in the settlor/fiduciary cases, especially when application of broadly-written language would result in particularly harsh outcomes. Thus, the Court's holding in *Varity*[407]—that the

[404] *See, e.g.* Margaret G. Farrell, *ERISA Preemption and Regulation of Managed Health Care: The Case for Managed Federalism*, 23 AM. J. L. & MED. 251, 261-62 (1997).
[405] *See, e.g.* Langbein, *supra* note 247.
[406] CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1876, 1879 (2011).
[407] Varity Corp. v. Howe, 516 U.S. 489 (1996).

employer's misrepresentations to employees were made while wearing both an employer hat and a fiduciary hat—might be explained as the Court's implicit unwillingness to license to sanction abhorrent business behavior. And similarly, the Court's holding in *McCutchen*[408]—that the court would not interpret plan subrogation language to require a participant to pay the plan medical expenses gross of lawyers' fees in the absence of unambiguous plan language so providing—may have reflected the Court's unease at endorsing an unusually harsh result. In other words, we might take from *Varity* and *McCutchen* a lesson that the Court will create ways to bend the business/fiduciary distinction to avoid egregious outcomes.

In our view, it would be preferable for the Court to begin refurbishing the settlor/fiduciary doctrine so that the Court does not have to engage in ad-hoc creativity to avoid such outcomes and can fashion results in other cases that better accommodate and balance ERISA's sometimes contradictory themes and reflect the underlying economics of employee benefit plans. In the prior two subparts we have offered approaches that courts might use to build a more nuanced doctrine. The first approach would limit the doctrine collaterally, relying on substantive ERISA provisions. The second would recognize that in *Spink* the Supreme Court was opining only on the "administration" prong of ERISA's fiduciary definition. That leaves courts free to recognize that decisions on plan management or the control or management of plan assets are, as defined in the statute, fiduciary in nature.

Conclusion

Perhaps in a jurisprudence with a greater tilt toward legislative intent than our own (and an affinity for both whimsy and *deus ex machina*), every statute would have an

[408] U.S. Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

expiration date (say 40 years) that coincides with a reunion of the legislators who enacted it and the staff who wrote it, who would then have a free hand to address the statute's unintended consequences and to correct judicial and administrative distortions of what they had in mind (or what they would have had in mind had they been able to chart future events with unerring accuracy). ERISA is certainly a statute that has been victimized both by unintended consequence and by judicial and administrative distortion of legislative intent and statutory purpose and meaning (assuming, of course, that the legislators had a uniform understanding of what they were attempting to achieve, a fiction in which lawyers reflexively engage). Nowhere has this victimization been more dramatic than with the fiduciary/settlor doctrine.

We have shown in this article instances where the settlor-fiduciary doctrine has produced troubling outcomes and have predicted that the broad berth the courts have given the doctrine, if left unchecked, will lead to even more disturbing outcomes in the future. Indeed, in the course of working on this article, we have twice had to move a discussion of predicted outcomes to a discussion of settled Supreme Court jurisprudence.

Why did the doctrine develop as it did? Here our story is, of course, a bit speculative. When first formulated, the doctrine provided a sensible approach to recognizing the plan sponsor's economic interest in the plan, something that a literal application of the statute's fiduciary standards might have prevented. But the doctrine was not well theorized and the Supreme Court's decision to locate its core in explicit statutory language rather than in a Federal common law created doctrinal rigidity where doctrinal flexibility might have been preferable. The Court, deciding one case at a time and relying on the ease with which the doctrine leads to outcome, and without ever fully reflecting on how the doctrine might affect future application of the statute, seeded the doctrine into ERISA’s statutory language and we now seem stuck with what the Court has sown.

Or are we? We have suggested ways that the Supreme Court might retreat a bit from the doctrine, but we also recognize that rote judicial adherence to the doctrine over time has made retreat more difficult. Perhaps we will have to rely on Congress to legislate limits on the doctrine. But perhaps more judicial focus on and discussion of contexts broader than particular cases is yet possible. Indeed, we wrote this article to help stimulate such a discussion, for hope springs eternal, even among those of us who write and think about ERISA.