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Editor

James P. Baker
Baker & McKenzie LLP
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
(415) 576-3000
james.baker@bakermckenzie.com
www.bakermckenzie.com

Assistant Editor

Emily L. Garcia-Yow
Baker & McKenzie LLP
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
(415) 576-3000
emily.garcia-yow@bakermckenzie.com
www.bakermckenzie.com

Contributors

M&G Polymers USA, LLC v. Tackett

Douglas Darch
Baker & McKenzie LLP
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601
(312) 861-8000
douglas.darch@bakermckenzie.com
www.bakermckenzie.com

Tibble v. Edison Intl.

Lisa S. Brogan
Baker & McKenzie LLP
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601
(312) 861-8000
lisa.brogan@bakermckenzie.com
www.bakermckenzie.com

New York State Psychiatric Ass'n v. UnitedHealth Group

Jordan A. Faykus
Shaun Cassin
Jake Crumrine
Baker & McKenzie LLP
700 Louisiana, Suite 3000
Houston, Texas 77002
(713) 427-5000
jordan.faykus@bakermckenzie.com
shaun.cassin@bakermckenzie.com
jacob.crumrine@bakermckenzie.com
www.bakermckenzie.com

Okun v. Montefiore Medical Center,

Alexis Hawley
Baker & McKenzie LLP
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601
(312) 861-8000
alexis.hawley@bakermckenzie.com
www.bakermckenzie.com

Ginny M. Aldajani (Paralegal)
Baker & McKenzie LLP
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
(415) 576-3000
ginny.aldajani@bakermckenzie.com
www.bakermckenzie.com

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I. ERISA's Presumption of Vesting for Retiree Medical Plan Benefits Is Dead

Just last term, the Supreme Court "killed off" the judge who created "presumption of prudence" which had tilted the scales of justice in favor of defendants in ERISA class action "stock drop" cases. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. ___ (134 S. Ct. 2459) (2014). This year, the "presumption of vesting" was extinguished. *M&G Polymers USA, LLC v. Tackett,* 574 U.S. ___, 135 S. Ct. 935 (2015). This second "judge created ERISA presumption"favored plaintiffs seeking unchangeable retiree medical benefits. It was developed by the Sixth Circuit in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

ERISA 101 explained that there are two types of employee benefit plans: pension plans and welfare benefit plans. *See* 29 U.S.C. § 1002(1) and § 1002(2). Although pension plans are subject to mandatory vesting rules (*see* 29 U.S.C. § 1053), welfare plans are not (*see* 29 U.S.C. § 1051). An employee's right to ERISA-regulated welfare benefits do not vest unless and until the employer says they do. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, whether an employer has the right to change medical benefits for retired employees turns on what that employer has promised them.

Retiree medical-benefit disputes are complicated because an employer's agreement to provide medical benefits is regulated by ERISA and (in the case of collectively bargained for retiree medical arrangements) by the LMRA, Section 301. All courts agree that under either ERISA or the LMRA, where an employer expressly reserves the right to change or terminate a retiree medical plan, that right will be enforced. Ambiguity about the nature of the retiree medical promise or silence about its duration plays a leading role in generating the conflicts among the circuits. For example, in the Seventh Circuit, "the presumption that health care benefits do not exceed the life of an agreement imposes a high burden of proof upon the retirees." *Cherry v. Auburn Gear, Inc*., 441 F.3d 476, 481 (7th Cir. 2006). As Judge Posner explained in another case:

> If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law (that is, without going beyond the pleadings), unless the plaintiff can show by objective evidence that the agreement is latently ambiguous, that is, that anyone with knowledge about the real-world context of the agreement would realize that it might not mean what it says.

At the other end of the spectrum lies the Sixth Circuit's view that ambiguity in a retiree medical promise is all too common and generally permits plaintiffs to introduce extrinsic evidence. *UAW v. Yardman*, 716 F.3d at 1479 ("The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion."). Thus, even

when the collective bargaining agreement contains no language suggesting that retiree medical benefits are vested and is therefore silent, plaintiffs are allowed to introduce extrinsic evidence to show that retiree medical benefits are vested and unchangeable.

In 2000, M&G Polymers entered into a collective bargaining agreement providing its employees at its plant in Apple Grove, West Virginia, with pension and retiree medical benefits. Employees who retired after a certain date and who were eligible for a pension based on number of years of service would "receive a full Company contribution towards the cost of [health care] benefits" described in the agreement, including hospital, medical, surgical, and prescription drug benefits for retirees and their dependents. Under this agreement, health benefits were provided to qualified retirees and their dependents at no cost. The collective bargaining agreement ("CBA") expired after a three-year term. When the CBA expired in 2006, M&G Polymers informed the retirees that they would be required to contribute toward the cost of their medical plan coverage. The retirees then sued M&G Polymers in federal court. They alleged that the 2000 agreement provided lifetime, contribution-free medical plan benefits to them and their dependents.

The district court dismissed the complaint for failing to state a claim. The Sixth Circuit reversed. It found that language (such as that in the 2000 agreement) vested retiree health benefits for life due to the "inference of vesting" standard set forth in *Yard-Man, Inc.*, 716 F.2d 1479. The presumption of vesting was supported by a number of court-created interpretive rules including these: because the retirees' right to a pension was vested, logically the right to insurance was vested; because some insurance continuation clauses were for less than the term of the agreement, in the absence of a similar clause, the retirees' insurance must extend beyond their agreement's termination; and the general termination clause for the agreement did not apply to retirees' insurance. On remand, the district court ruled for the retirees. The Sixth Circuit then affirmed.

In January 2015, the Supreme Court reversed. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. ___ (2015). The Court was unanimous in finding that the Sixth Circuit's *Yard-Man* inference of vesting was impermissible as it failed to apply ordinary principles of contract interpretation to a contractual dispute.

In *Tackett*, the Supreme Court ruled that it "disagree[d] . . . that the inferences applied in *Yard-Man* and its progeny represented ordinary principles of contract law" and proceeded to delineate several correct contract interpretation rules. 135 S. Ct. at 935. Significantly, the Court faulted *Yard-Man* for ignoring "the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 937. The Court noted that this principle does not preclude vesting in all situations and that vesting may occur if the CBA includes "*explicit* terms that certain benefits continue after the agreement's expiration." *Id.* (emphasis added).

The Supreme Court cited the Sixth Circuit's holding in *Sprague v. General Motors Co.*, 133 F.3d 388, 400 (6th Cir. 1998) for the proposition that "the intent to vest must be found in the plan documents and must be stated in clear and express language" as a measuring stick for ordinary contract interpretation

principles. 135 S. Ct. at 937. According to the Court, the disparate vesting standards applied by the Sixth Circuit to plans negotiated by labor unions in *Yard-Man* versus non-negotiated plans in *Sprague* "only underscore[d] *Yard-Man*'s deviation from ordinary contract law." *Id.* Because the rule articulated in *Sprague* (*i.e.*, that intent "must be stated in clear and express language") was used as the basis on which a departure from ordinary contract law is determined, *Sprague* presumably represents the correct standard under ordinary contract law.

The Court also emphasized the importance of effectuating the terms of a contract as written, especially when that contract creates a plan governed by the Employee Retirement Income Security Act ("ERISA"):

> [T]he rule that contractual provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan. That is because the focus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place.

135 S. Ct. at 933 (internal citations and quotations omitted).

The Court thus underscored ERISA's requirements that plans must be enforced as written and must be interpreted according to their express terms, without resort to extrinsic evidence. *Cf. Musto v. Am. Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988) ("[C]lear terms of a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer."). Finally, the Supreme Court held that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest." 135 S. Ct. at 937. *Tackett* signals that ordinary principles of contract law require a clear and express statement of the intent to vest retiree benefits. It appears that under ordinary contract interpretation rules, retiree healthcare benefits vest only if the parties adopt clear and express language demonstrating their mutual intent that such benefits outlast the expiration of the contract and that such benefits remain fixed and unchangeable. At least one district court has embraced this view. Left unsaid by the Court was the effect to be given to ambiguous language. This omission will likely bedevil courts seeking to find that benefits are vested because ordinary contract principles provide that when language is clear and express, a court must declare the meaning of the language without resort to extrinsic evidence. Williston On Contracts § 30.6 (4th ed. 2012). It follows, therefore, (at least employers will argue) that when the language in a CBA is ambiguous as to whether the parties intended to vest retiree benefits, the court's task is at an end (the benefits are not vested) and resorting to extrinsic evidence is not permitted to aid in declaring the parties' intent.

The clarity of the Court's ruling was muddled by a separate concurring opinion authored by Justice Ginsburg. In her concurrence, she opined that vesting "may arise . . . from . . . implied terms of the expired agreement." 135 S. Ct. at 938 (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991)). The concept of "implied terms" may prove in its application to be inconsistent

with the majority opinion. There are two rubs in the concurring opinion. First, although the Court relied on *Litton* for other rules of law, it deliberately chose not to cite *Litton*'s observation regarding implied contract terms. 135 S. Ct. at 937. Logically, given the Court's holding that "when a contract is silent as to the duration of retiree benefits, a court may not *infer* that the parties intended those benefits to vest" (emphasis supplied), it would be improper to *imply* vesting by judicial fiat. An open issue to be resolved by the courts is whether "implying" an agreement to vest retiree healthcare benefits is simply another way of inferring an intent to vest from contractual silence. Presumably, this result is prohibited by the Court's majority opinion.

Moreover, *Litton* does not expressly explain how courts are to determine the source or scope of an implied term. Ordinary contract law, however, provides an answer: an implied contract term may be supplied by the extant laws or statutes that govern the subject matter of the contract. These implied "default rules" are defeasible, but the contracting parties must affirmatively displace them. *See* Corbin on Contracts, § 26-1 (2014) ("[When] an implied term is . . . imposed directly by law, the parties may eliminate many legally imposed implied terms by an actual agreement displacing the basic rule; . . . these implied terms are defeasible and . . . exist only if not affirmatively displaced by the parties.").

This particular implied term rule is especially appropriate in the context of heavily regulated ERISA employee benefit plans. Thus, where a parties' agreement is silent on the subject of vesting retiree healthcare benefits, two default rules of existing law apply: (1) ERISA's express mandate that welfare benefits are exempt from its vesting requirements and thus can be discontinued and/or modified and (2) that rights and obligations under a CBA ordinarily do not survive contract termination. To the extent a court must "imply" a term as to vesting, both ERISA and traditional contract law principles dictate that the implied term is *"benefits **do not** vest*—unless the parties explicitly agree otherwise." *Cf. USW v. St. Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417, 424-25 (6th Cir. 2007) ("default rule" that arbitrator should decide issues of timeliness applies where CBA is silent); *Wis. Alumni Research Found. v. Xenon Pharms., Inc.*, 591 F.3d 876, 882 (7th Cir. 2010) (default rules under federal patent statutes apply unless agreement states otherwise). How the Sixth Circuit will resolve this issue remains to be seen.

Several principles adopted by the Sixth Circuit appear to have been permanently laid to rest. Most notably, *Yard-Man*'s theory that retiree healthcare benefits are a type of deferred compensation was rejected as "contrary to Congress' determination otherwise" under ERISA. As the Court noted, ERISA expressly and deliberately excludes health and welfare plans from the vesting strictures applicable to pension plans. 135 S. Ct. at 933. This was not a new observation because even before *Tackett*, the Court had held that by exempting health and welfare plans from its vesting rules, ERISA grants plan sponsors the unfettered, statutory right to terminate or modify such plans and to discontinue or decrease any benefits provided thereunder. Indeed, the Court had characterized an employer's ability to terminate or modify welfare benefits plans as a "right"

granted under ERISA. *See, e.g.*, *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997).

Interestingly, the Sixth Circuit in all cases but retiree benefit cases had adopted the ordinary rule of contract interpretation that all benefits under a negotiated agreement expire pursuant to the agreement's general durational clause. *Local 1199 v. Pepsi-Cola Gen. Bottlers, Inc.*, 958 F.3d 1331, 1334 (6th Cir. 1992); *see also Local 18 v. Detroit Newspaper Agency*, 283 F.3d 779, 787 (6th Cir. 2002). Whether the Sixth Circuit will now apply this rule to retiree benefit claims as suggested by *Tackett* will likely be resolved in *Gallo vs. Moen* in which oral argument was heard on October 15, 2015.

II. The Supreme Court's "Give and Take" on ERISA's Statute of Limitations

The statute of limitations can be a friend if a person is the sponsor of an ERISA-regulated employee benefit plan. Last year the U.S. Supreme Court "reset the game clock" by allowing an ERISA Plan Sponsor to control the time period for filing suit to collect plan benefits. The U.S. Supreme Court ruled that an ERISA plan's own statute of limitations will be enforced unless the time period specified is "'unreasonably short' or '[where] a controlling statute' prevents the limitations provision from taking effect." *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013). The *Heimeshoff* case involved a claim for long-term disability ("LTD") plan benefits. The Court's decision in *Heimeshoff* applies only to claims for plan benefits arising under ERISA Section 502(a)(1)(B).

This year showed that the game clock ticks differently for breaches of fiduciary duty. The two questions presented in this year's case were as follows: (1) does the duty to exercise prudence in selecting investments end once they are selected, and (2) does the fiduciary have a continuing duty to monitor and to remove imprudent plan investments?

A unanimous Supreme Court ruled "no" as to question (1) and "yes" as to question (2). Delivering the Opinion of the Court, and relying on the principles of trust law underlying ERISA, Justice Breyer wrote: "A trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and to remove imprudent trust investments."

The Court stopped short of delineating what form the "monitoring" should take, who should perform the monitoring, or how frequently. The Court remanded the case back to the Ninth Circuit Court of Appeals for an examination of whether the fiduciaries' monitoring fulfilled their duties under ERISA.

II.1 Applying ERISA's Statute of Limitations to Breach of Fiduciary Duty Claims

In *Tibble v. Edison Intl.*, 135 S. Ct. 1823 (2015), the plaintiff, Glenn Tibble, filed a putative class action in 2007 on behalf of beneficiaries in the Edison 401(k) Savings Plan. He asserted several different breaches of fiduciary duty claims alleging that the fiduciaries had improperly selected investments, had failed to prudently monitor the investments, and had neglected their duty to remove imprudent investment options from the Plan.

The Supreme Court opinion described the relevant facts as follows. Three mutual funds were added to the Plan in 1999, and three mutual funds were added to the Plan in 2002. Plaintiffs argued that the fiduciaries acted imprudently by offering six higher-priced "retail-class" mutual funds as Plan investments when materially identical lower-priced "institutional-class" mutual funds were available (the lower price reflects lower administrative costs). "Specifically, [plaintiffs] claimed that a large institutional investor with billions of dollars, like the Plan, can obtain materially identical lower priced institutional-class mutual funds that are not available to a retail investor." Plaintiffs argued that the Plan fiduciaries acted imprudently in the initial selection of, and ongoing investment in, these funds.

Because the decision to invest in the funds chosen in 1999 was made more than six years before the Complaint, the fiduciaries claimed that the suit was time-barred as to those funds. The plaintiffs argued that the fiduciaries had a continuing duty to monitor investments which continued past the limitations period.

The District Court held that the plaintiffs' claims were untimely with respect to the 1999 funds because these funds were included in the Plan more than six years before the Complaint was filed in 2007. The Court found that a six-year statute of limitations applied under ERISA (29 U.S. Code § 1113):

> **Limitation of Actions**
> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
> (1) six years after
> (A) the date of the last action which constituted a part of the breach or violation, or
> (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

The District Court allowed plaintiffs to argue that their Complaint was nevertheless timely because the funds underwent significant changes *within* the six-year statutory period that should have prompted the Plan fiduciaries to undertake a "full due-diligence review" and convert the higher-priced retail-class funds to lower-priced institutional-class mutual funds.

The District Court concluded, however, that the plaintiffs did not meet their burden of showing that a prudent fiduciary would have undertaken a "full due-diligence review" of these funds as a result of the alleged changed circumstances.

On appeal to the Ninth Circuit, the Court held that plaintiffs' claims regarding the 1999 funds were untimely because plaintiffs had not established a change in circumstances that might trigger an obligation to review and to change investments within the six-year statutory period. Nor did the Court of Appeals find any continuing violation of ERISA. The Court's reasoning was that if the continued offering of a plan investment option triggered a new limitations period, it would render the statute of limitations "meaningless."

The Supreme Court accepted the ruling on the 1999 funds for review. In their briefing, the parties and the Solicitor General agreed that the duty of fiduciaries includes a continuing duty to monitor investments and remove imprudent ones. The parties disagreed as to the scope of that duty.

The Supreme Court found that the Ninth Circuit improperly jumped to a conclusion that only a significant change in circumstances could engender a new breach of fiduciary duty. Under trust law, a fiduciary is required to conduct a "regular review of its investment with the nature and timing of the review contingent on the circumstances." *Tibble v. Edison Intl.*, 135 S. Ct. 1823 (2015). The case was remanded for the Ninth Circuit to consider "trust-law principles," at which time "it is possible that it will conclude that the fiduciaries did indeed conduct the sort of review that a reasonable fiduciary would have conducted absent a significant change in circumstances."

As it is apt to do, the Supreme Court decided the case on the narrowest ground possible. It found "a continuing duty of some kind to monitor investments and remove imprudent ones."

It remains to be seen how the Ninth Circuit will decide the issues on remand. District Courts are left to decide on a case-by-case basis what frequency and rigor of review is required by fiduciaries and what level of recordkeeping must be maintained to document that review.

II.2 Practical Implication for Plan Sponsors and Employers

- Periodic review of plan investments is required. Ideally, as a matter of best practices, this review would occur every ninety calendar days and would include monitoring of the reasonableness of fees and the other economic terms of service provider contracts.

- "Materially changed circumstances" appears to trigger a "full due-diligence review," but a periodic review is required even in the absence of changed circumstances.
- The appropriate fiduciaries should review and amend their investment policy statements to provide guidance or benchmarks for a review of each investment alternative on a predetermined schedule.
- Fiduciaries should retain documents showing that they monitored investments and compared the plan's investments to relevant benchmarks, showing that they were otherwise "procedurally prudent" in following the plan's investment policy statements.

III. Back to Basics: ERISA Severance Plans 101

When bad things happen to good companies, one common thread emerges—the implementation of an ERISA-regulated severance pay plan. For example, earlier this year, the energy sector experienced a dramatic downturn. When companies experience hard times, they typically utilize ERISA-regulated severance plans as a means of helping their former employees' transition to new jobs and as a way to protect the company's financial future by obtaining a release of employment-related claims. However, many employers do not understand how ERISA-regulated severance plans can help them get through difficult economic times.

III.1 Legal Snafus in Maintaining Informal Severance Arrangements

In *Okun v. Montefiore Medical Center*, 793 F.3d 277 (2d Cir. July 17, 2015), the Second Circuit addressed whether a hospital's severance policy constituted an "employee welfare benefit plan" under ERISA. The defendant hospital had maintained a severance policy ("the Policy") since as early as 1987. The Policy, which had been in place, without revision, since 1996, provided that all full-time physicians employed before August 1, 1996, who are terminated for reasons other than cause are entitled to either twelve months' notice or six months' severance pay. The Policy further provided that eligible employees with more than fifteen years of service receive automatic review of severance amounts by the hospital's president. It contained an explicit reservations of rights clause, stating that it "may be changed, modified or discontinued at any time by the Medical Center's Senior Vice President of Human Resources, or designee, with or without notice."

In 2011, the hospital terminated for cause a physician who had worked at the hospital for twenty-three years. The physician subsequently filed a complaint, alleging that his termination for cause violated ERISA because it was pretextual

and interfered with his right to severance benefits under the Policy. The Southern District of New York dismissed Plaintiff's complaint for lack of subject matter jurisdiction, finding that the Policy was not a "plan" for purposes of ERISA.

The Second Circuit disagreed and concluded that based on the facts alleged in the complaint, the Policy constituted an ERISA-governed plan. The Court first analyzed ERISA's definition of "employee welfare benefit plan." 29 U.S.C. § 1002(1). The Court reasoned that Congress's use of the phrase "any plan, fund, or program" evinced an intent for this definition to have broad applicability and be "independent of the specific form of plan." The Court further noted that this definition had been found to encompass "most . . . employer undertakings or obligations to pay severance benefits."

Nonetheless, in order to qualify as an ERISA plan, a severance arrangement must involve an "ongoing administrative scheme." To determine the existence of an administrative scheme, the Second Circuit has adopted a non-exclusive, three-factor test: (1) whether the employer's undertaking or obligation requires managerial discretion in its administration, (2) whether a reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits, and (3) whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria.

Applying these factors to the complaint's allegations, the Second Circuit held that the Policy was an ERISA plan. The Policy embodied a "multi-decade commitment to provide severance benefits to a broad class of employees under a wide variety of circumstances and require[d] an individualized review whenever certain covered employees are terminated." Pursuant to the Policy's terms, the hospital must exercise discretion each time it administers benefits under the Policy by making "for cause" determinations and, for those employees with fifteen years or more of seniority, by reviewing and potentially adjusting severance awards. Furthermore, the longstanding duration of the Policy made it reasonable for employees to presume that the hospital had committed to providing severance benefits. The Court found the Policy's reservations of rights clause of no import, noting that most ERISA plans contain such language and that it did not defeat an employee's reasonable perception of an ongoing commitment to provide benefits. As a result, the Second Circuit concluded that by adopting the Policy, the hospital "assumed the 'responsibility to pay benefits on a regular basis, and thus faces . . . periodic demands on its assets' that require long-term coordination and control." Simply stated, the Policy necessitated an ongoing administrative scheme, bringing it within the purview of ERISA.

The *Okun* decision provides a straightforward and practical roadmap for determining whether a severance policy involves an administrative scheme and thereby constitutes an ERISA-governed plan. Employers would be well-served to review their severance policies and practices to assess whether (a) the policy provides for non-discretionary, fixed payments and thus falls outside the reach of ERISA or (b) the policy requires the exercise of managerial discretion via individualized eligibility and/or severance award determinations and, consequently, implicates ERISA.

III.2 The Advantage of Using an ERISA-Regulated Severance Pay Plan

Severance pay plans are a type of ERISA-regulated employee welfare benefit plans. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines the terms *employee welfare benefit plan* and *welfare plan* to include:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,
>
> (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, . . . or
>
> (B) any benefit described in Section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 186(c), cited above, refers to Section 302(c) of the Labor Management Relations Act ("LMRA") which concerns, in part, money paid to trust funds "for the purpose of pooled vacation, holiday, severance or similar benefits . . ." 29 U.S.C. § 186(c)(6). The regulations promulgated by the Department of Labor ("DOL") pursuant to ERISA explain that the effect of citing Section 186(c) in the statutory definition of "employee welfare benefit plan" is "to include within [this] definition . . . those plans which provide holiday and severance benefits, and benefits which are similar. . . ." 29 C.F.R. § 2510.3-1(a)(3). To have the "establishment" of a plan, fund, or program within the meaning of ERISA, "the surrounding circumstances must be such that 'a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.'" *Molyneux v. Arthur Guinness & Sons, P.L.C.*, 616 F. Supp. 240, 243 (S.D.N.Y. 1985) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*)). The lack of a formal written policy is not the sole determining factor in whether an ERISA plan exists. *Id.* at 243; *see also Petrella v. N. Industries, Inc.*, 529 F. Supp. 1357, 1362 (D.N.J. 1982) (employer conduct in administering severance pay plan may entitle employees to benefits).

An employer's unknowing sponsorship of an ERISA-regulated severance plan can be disastrous. For example, in 1975, the Del Monte Corporation decided to either close or sell off Granny Goose Foods, Inc. ("Granny Goose"), the potato chip business. *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1351 (9th Cir. 1984). On December 13, 1980, Granny Goose was bought by private investors. *Id.* at 1351. At the time of the sale, Del Monte maintained a confidential written "separation allowance policy." The confidential policy provided for severance

payments based upon a schedule to employees who lost their employment with Del Monte through no fault of their own. Two years after Granny Goose was bought, a group of former Del Monte employees sued to collect their Del Monte severance benefits. Plaintiffs sued Del Monte in state court, alleging various causes of action including one claim arising under ERISA. *Id.* Defendants removed the case to federal district court which granted summary judgment in favor of Del Monte.

The Ninth Circuit reversed. It found that Del Monte's confidential written "separation allowance policy" (which was only to be reviewed by corporate officers and corporate employee relations staff managers) was an ERISA-regulated severance pay plan. *Id.* at 1352. Because Del Monte "made no attempt to comply with any of the duties that ERISA places upon a benefit plan administrator" it was not entitled to the arbitrary and capricious standard of review in denying severance pay benefits. *Id.* at 1352-53. The Ninth Circuit found that Del Monte had acted in an arbitrary and capricious manner in denying severance benefits because it had acted in complete disregard of ERISA's substantive requirements. *Id.* at 1353.

> The undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA. The Separation Allowance Policy was "confidential," *i.e.*, secret, in contravention of ERISA's reporting and disclosure provisions. 29 U.S.C. §§ 1021-1031. The policy was subject to no claims procedure. ERISA mandates a reasonable claims procedure, 29 U.S.C. § 1133 . . . [h]ere, there was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything. Del Monte's claims procedure fails simply because there was none.

Id. The Ninth Circuit concluded:

> Del Monte claims that the secret purpose behind its secret severance benefit policy was to benefit only those employees who were without a job of any kind after termination. We decline to refer to the secret intent behind a secret plan to determine whether the denial of severance benefits in this case was not arbitrary and capricious. Allowing reference to this factor would only encourage violation of ERISA's reporting and disclosure requirements, in the hope of later being able to interpret the policy through cost-benefit analysis of hindsight.

Id. at 1355. In *Blau v. Del Monte Corporation*, the Ninth Circuit made it clear that a plan sponsor's failure to formalize an ongoing separation pay arrangement can be at their own economic peril.

III.3 Formal Severance Plan: Pros and Cons

There are both benefits and disadvantages associated with adopting an ERISA-regulated severance plan.

- One of the most important features in a severance pay plan is a requirement that an employee agree to release all employment-related claims in exchange for severance pay. For a number of years, this practice was a battleground among ERISA lawyers.
- If a severance pay plan is properly structured to comply with ERISA, a plaintiff who brings an ERISA claim will not be allowed a jury trial—a federal judge will decide the merits of the claim. *Thomas v. Oregon Fruit Products Co.*, 228 F.3d 991, 995 (9th Cir. 2000).
- Another benefit of having an ERISA-regulated plan is limitations on claims. The only types of claims permitted are claims for benefits and claims for breach of fiduciary duty. ERISA § 502(a)(1)(b) and 502(a)(2) and (3). This means that no state law claims will be allowed. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Similarly, there are limitations on the types of damages that can be sought. The damages available for a severance benefit claim are the benefits that the plan promised. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Plaintiffs cannot bring claims for extra contractual or punitive damages. *Id.*
- The severance plan sponsor can even select the forum for any federal court disputes. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018, 1023 (C.D. Cal. 2008).
- ERISA plan administrator claims decisions are generally subject to a high level of deference by the courts. In the context of an ERISA plan, disputed denials of claims for benefits must first be presented to the plan administrator for review. 29 U.S.C. § 1133. If the plan administrator's denial of the claim has a rational basis in the facts, a court reviewing the denial will apply an arbitrary and capricious standard of review. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).
- Employers can write into their severance plans a reasonable statute of limitations limiting the time by which an aggrieved plan participant must file a lawsuit challenging the plan administrator's denial of a claim. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, ___ U.S. ___, 134 S. Ct. 604, 610 (2013).
- Because severance plans are not subject to ERISA nondiscrimination rules, the plan sponsor can customize severance pay plans for different groups of employees and even offer the severance pay plan only for a short time period. Because ERISA does not have nondiscrimination rules, ERISA plan sponsors have complete discretion to decide who can and cannot participate in their severance plans. Employers can also establish different benefit formulas for employees in different job classes.

  ERISA is not, however, a utopian protectorate for employers. Without the constraint of a formal plan, an employer can pick and choose who gets severance pay and can choose what they get and how much they get. But

haphazard severance pay agreements can trigger a variety of discrimination lawsuits and even claims that a consistent offering of severance pay created an enforceable severance pay plan under ERISA. Employers *must* be sure that they do not violate other employment discrimination rules that prohibit employment discrimination based upon race, sex, national origin, etc. In light of recent interest in release agreements taken by government agencies such as the U.S. Securities and Exchange Commission and the Equal Employment Opportunity Commission, employers should also make sure that their severance plans do not discourage employees from exercising their rights to access administrative proceedings (brought by themselves or other employees) or to report potential violations of law (including whistleblower claims) to government agencies. The release agreement expressly allows employees to report to/participate in administrative processes without prior consent of the company.

Because employers typically provide severance pay plans to broad classes of employees, formal ERISA plans can act as a shield from employment discrimination claims. On the other hand, individually negotiated severance can expose the company to potential liability for numerous types of employment discrimination claims. For a plan to qualify for treatment as an ERISA-regulated severance plan, plan benefits may not exceed twice the employee's annual compensation in the year before the employee terminates employment and payments under the plan must be completed within 24 months of the date employment ends. 29 C.F.R. § 2510.3-2(b)(1)(ii).

- Plan sponsors can also reduce their exposure to severance pay litigation by imposing mandatory arbitration of all severance pay disputes and by requiring plan participants to waive their right to pursue class action or collective action claims. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S. Ct. 2304 (2013) (ruling that express waiver of class action claims in written arbitration agreements are enforceable under the Federal Arbitration Act).
- If an employer decides to offer severance in compliance with ERISA, it must be careful to adhere to ERISA's fiduciary claims procedure and reporting and disclosure rules. *Blau*, 748 F.2d at 1353. A summary plan description must be prepared and distributed to eligible employees. A severance plan that benefits more than 100 participants is also required to file an annual Form 5500. On the other hand, if the severance plan is unfunded and has fewer than 100 participants at the beginning of the plan year, a Form 5500 need not be filed. 29 C.F.R. § 2520.104-46. Failing to provide documents requested by employees who are eligible for benefits could expose the plan administrator to a civil penalty of up to $110 per day for failing to provide required documents upon request. 29 U.S.C. § 1132(c)(1). Employers who fail to timely file a Form 5500 Annual Report can be subjected to various monetary penalties. 29 U.S.C. § 1132(c)(2) (civil penalties for failure to file complete and timely annual reports), 29 C.F.R. § 2575.502c-2 (same).

III.4 The Supreme Court has Blessed ERISA-Regulated Early Retirement Plans that Require a Release of Claims

In *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), the Supreme Court ruled that Lockheed Corporation did not violate ERISA nor commit a prohibited transaction by amending its pension plan to provide early retirement benefits to employees in exchange for a complete release of any employment-related claims against the company. The court held that the plan sponsors, the employer, and its board of directors did not act as fiduciaries when they amended the plan because when employers adopt, modify, or terminate welfare plans, they do not act as fiduciaries, but are more akin to the settlors of a trust. Under the plan provisions, eligible employees were offered increased pension benefits paid out of surplus plan assets.

Paul Spink, on behalf of a class of retirees of Lockheed Corporation ("Lockheed"), sued Lockheed and several directors and officers of the company. Mr. Spink challenged the early retirement plans, particularly with regard to the feature that benefits were available only to employees who signed a complete release of all employment-related claims. He contended that these acts were breaches of ERISA's requirements that plan assets be used exclusively for the purpose of providing benefits and that defendants' actions violated fiduciary obligations. In particular, Mr. Spink argued that the amendments, which offered increased benefits in exchange for a release of employment, constituted a use of plan assets to "purchase" a significant benefit for Lockheed and was not in the interests of participants and beneficiaries.

The Supreme Court disagreed, ruling that legitimate benefits that a plan sponsor may receive from the operation of a pension plan include attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, decreasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily. The court concluded that obtaining waivers of employment-related claims cannot be distinguished from these legitimate purposes because each involves a *quid pro quo* between the plan sponsor and the participant. In other words, the employer promises to pay increased benefits to employees in exchange for the performance of some condition by the employee. The participants conceded that the employer can ask the employee to continue to work for the employer, to cross a picket line, or to retire early. The Supreme Court ruled that signing a release of claims against the employer is functionally no different; like these other conditions, it is an act that the employee performs for the employer in return for benefits.

III.5 Lying Is a Bad Thing for ERISA Fiduciaries

In the severance context, ERISA's fiduciary rules have special protocols. For example, in *Varity Corporation v. Howe*, 516 U.S. 489, 116 S. Ct. 1065 (1996), the Supreme Court ruled that an employer who is designated as the "plan administrator" may be subject to breach of fiduciary duty claims under ERISA if it makes misleading statements about severance pay and retiree medical benefits. In *Varity*, an employer's approach to downsizing was fraught with misdirection. In other words, the employer pretended to do one thing when it was actually doing something quite different.

In a project called "Project Sunshine," Varity transferred all of its money-losing divisions into a newly formed independent subsidiary ("Newco"). One of the company's primary objectives in forming Newco was to rid itself of costly employee benefit obligations such as retiree medical and severance pay benefits. 116 S. Ct. at 1068. Varity hosted a special meeting to persuade employees to transfer to the new subsidiary. At the meeting, Varity made overly optimistic observations about the new subsidiary's business outlook, its likely financial liability, and the security of the employee benefit program. The nature of Varity's remarks was that the employees' benefits would continue to be secure if they voluntarily transferred to the new subsidiary. Varity made these representations even though it knew that Newco was insolvent from inception and intended to reduce the employee benefits at Newco in the near future. 116 S. Ct. at 1069. Varity also knew that the representations it had made to the employees were untrue at the time they were made. *Id.* at 1071. At the time the new subsidiary was formed, it had a $46 million negative net worth. *Id.* at 1072. At the meeting, about 1,500 employees volunteered to transfer to Newco. The new subsidiary ended its first year of operation with an $88 million loss. It ended its second year of operation in receivership. After Newco failed and went into receivership, its employees stopped receiving certain welfare benefits, including their rights to retiree medical benefits they would have had had they remained employed at Varity. *Id.* at 1069.

The Supreme Court held that *Varity* was acting in its capacity as both an employer and a plan fiduciary when it made intentional misrepresentations to its employees about the security of their employee benefits. *Id.* at 1071-74. The Supreme Court explained, "reasonable employees . . . could have thought that Varity was communicating with them both in its capacity as employer and in its capacity as plan administrator." 116 S. Ct. at 1073.

The Supreme Court's use of the subjective "reasonable belief" standard in evaluating *Varity*'s actions blurs the distinction between when an employer is acting as an employer and when an employer is acting as a plan fiduciary. To avoid any ambiguity as to what "hat" they are wearing, company officers who are also fiduciaries to employee benefit plans should be careful to identify when they are making representations as corporate officers and when they are making representations as plan fiduciaries. Taking *Varity*'s holding to heart requires employers not to name the company as the plan administrator or as a fiduciary of its employee benefit plans to minimize the risk that company

communications about business activities or proposed benefit changes may be characterized as misleading fiduciary communications.

A number of courts of appeals decisions have also placed employers who are considering subcontracting or downsizing in an extremely awkward position. When an employer is acting as a plan fiduciary, he or she must answer a participant's questions truthfully. 29 U.S.C. § 1104; *Berlin v. Michigan Bell*, 858 F.2d 1154, 1163 (6th Cir. 1988).

In *Pocchia v. Nynex Corp.*, 81 F.3d 275 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 302 (1996), the Second Circuit considered the question of whether fiduciaries have a duty to volunteer information about the adoption of a severance pay plan or early retirement incentive plan before the plan is adopted and before a participant has asked a question about them. The Second Circuit explained:

> [A] fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted . . . Until a plan is adopted, there is no plan, simply the possibility of one. Insisting on voluntary disclosure during the formulation of a plan and prior to its adoption would . . . increase the likelihood of confusion on the part of the beneficiaries and, at the same time, unduly burden management, which would be faced with continuing uncertainty as to what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

Id. at 278. *See Stanton v. Gulf Oil Corp*, 792 F.2d 432 (4th Cir. 1986); *see also Bettis v. Thompson*, 932 F. Supp. 173 (S.D. Tex. 1996).

Although the Second Circuit answered this question with a resounding "no," a number of courts of appeal have taken the opposite view. These courts require a plan fiduciary to disclose to a plan's participants plan changes that are under "serious consideration." In *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533 (3d Cir. 1996), employees who retired prior to the company's announcement of an early retirement incentive plan ("Plan") sued to receive the enhanced retirement benefits under the Plan. The Third Circuit opined that: "'Serious consideration' of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."

Id. at 1539. Under the Third Circuit's rule, whether or not a plan change is under "serious consideration" is dependent on an analysis of the facts of each situation. Under the Third Circuit's approach, an employer who is downsizing is required to tell the plan's participants of the proposal when it is "sufficiently concrete to support consideration by senior management for the purpose of implementation." 96 F.3d at 1540. The "serious consideration" doctrine has been adopted by a number of other courts of appeal. *See, e.g.*, *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399 (8th Cir. 1995); *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488 (10th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991), *cert.*

denied, 502 U.S. 938 (1991); and *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988).

III.6 Don't Special Rules Apply to Age Discrimination Claims?

The short answer is "yes." The Older Workers Benefit Protection Act ("OWBPA"), amending the ADEA, was passed by Congress in 1990. The OWBPA sets forth seven factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary."

1. A waiver must be written in plain language geared to the level of comprehension and education of the average individual eligible to participate.
2. A waiver must specifically refer to rights or claims arising under the ADEA.
3. A waiver must tell the employee in writing that he or she should consult with an attorney before accepting the agreement.
4. A waiver must provide an individual employee with at least twenty-one days to consider the offer. In the case of "group terminations" (involving two or more individuals), a forty-five day time period is required to be extended to the employees.
5. The waiver must notify the employee that he or she has seven days to revoke his or her signature of the waiver.
6. A waiver cannot release rights and claims that arise after the date on which the waiver is executed.
7. A waiver must be supported by consideration in addition to that to which the employee already is entitled. This "additional consideration" requirement means that the employer cannot require an OWBPA waiver for a benefit that was already promised upon severance without a waiver condition. An OWBPA waiver cannot be purchased with wages or benefits an employee has already earned. For example, an OWBPA waiver cannot be purchased with vacation or with sick pay that is owed to the employee. Severance plans can be written in advance to require the signing of an OWBPA waiver as a condition for receipt of the promised severance benefits.

III.7 Group Layoffs and the OWBPA

To obtain an OWBPA waiver in connection with a group layoff, an employer must provide sufficient information about the factors used in selecting individuals for a group layoff program that will allow terminating employees the ability to determine whether the program discriminated based on age. Under the OWBPA, an employer must provide a written notice to all affected employees of the program that includes the program's particulars. In addition, employees must be given a period of at least forty-five days to consider whether to sign the

OWBPA waiver. EEOC guidance requires an employer to inform employees in writing about the following:

1. Who is included and who is excluded—the employer must describe the class, occupational unit, or group of employees who were chosen for the program as well as employees who were not selected for the program. For example, the unit of employees could be all salaried employees, all hourly employees, or all employees in the accounting department.
2. Eligibility factors must be detailed for the occupational unit affected.
3. The time limits that apply to the program.
4. The job titles and ages of all individuals who are eligible or who were selected for the program and the ages of all individuals in the same job class or organizational unit who are not eligible or who were not selected for the program.

III.8 The WARN Act and Severance Pay

The U.S. Department of Labor provides advice about severance pay and notices under the WARN Act at http://www.dol.gov/elaws/eta/warn/faqs.asp as follows:

> **Can My Employer Provide A Severance Package Instead of Notice?**
> It is possible for an employer to provide a severance package instead of notice in two situations. First, the severance package may be conditioned on waiving any claims under WARN. The conditions for waiver are discussed in the next question. Second, the severance package may offset WARN, thus effectively providing pay in lieu of notice. There are certain circumstances under which WARN allows "voluntary and unconditional" payments that are not required by a legal obligation or collective bargaining agreement to be offset against an employer's back pay obligation. However, payments that are required by a contract, such as an employer's personnel policies (or much less likely, state law), would not offset WARN damages and thus would not serve to reduce the employer's liability.
>
> **Can I Waive My WARN Rights?**
> There are circumstances in which your employer may ask you to waive your rights to WARN notice in return for a severance package. If you agree to such a waiver voluntarily and knowingly, with an opportunity to think about it and consult with a lawyer if you wish to, and if there is consideration (i.e., if you get something of reasonable value in exchange for the waiver), then the waiver will be effective to eliminate your rights under WARN.

Two cases dealing with the question of whether WARN Act payments can be integrated into severance plan payments have reached opposite conclusions. *See Braden v. LSI Logic Corp.*, 340 F. Supp. 2d 1066 (N.D. Cal. 2004) and *Gray v. Walt Disney Co.*, 915 F. Supp. 2d 725 (D. Md. 2013).

III.9 Conclusion

Complying with ERISA presents both a blessing and a burden. Although ERISA imposes a multitude of compliance and reporting requirements on an employer, there are also manifold benefits to maintaining an ERISA-governed plan. For example, ERISA provides the exclusive remedy for employee severance claims, both automatically conferring federal court jurisdiction and preempting any state law claims. Likewise, ERISA allows an employer to implement internal claims procedures to resolve severance disputes and avoid litigation. Finally, so long as the severance plan grants the employer discretion to interpret and administer plan terms, a court—in the event of a lawsuit—will defer to an administrator's decision with regard to eligibility, benefits awards, and other determinations under the plan. Employers, therefore, should weigh the pros and cons of ERISA applicability before rolling out a new severance program or revising its existing policy.

Sponsors of ERISA-regulated Severance Plans are largely the master of their own destiny. Severance plans are in large part creatures of contract. But as we all know, written contracts can be complicated. Employers should exercise great care when making written promises to their employees. One of the benefits of ERISA severance plans is that they can be of a fixed duration, *e.g.*, three months or six months, thus extinguishing the promised benefits as of a certain date. Pitfalls await the hasty or careless drafter. For example, the potential impact of Internal Revenue Code Section 409A or 280G on executives who participate in these severance plans require careful consideration. However, with planning and thoughtful execution, severance pay plans can provide important economic benefits to both employees and employers.

IV. Second Circuit Weighs in on Who Is a Proper Section 502(a)(1)(B) Defendant—*New York State Psychiatric Ass'n v. UnitedHealth Group*

Section 502(a)(1)(B) of ERISA permits a plan beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). But against whom is a beneficiary allowed to bring a civil action? The terms of ERISA do not specify an inclusive list or standard. Without statutory guidance, the United States Courts of Appeals have reached different conclusions as to whether parties other than the plan are proper defendants.

In *New York State Psychiatric Ass'n v. UnitedHealth Group*, No. 14-20-cv, 2015 U.S. App. LEXIS 14641 (2d Cir. Aug. 20, 2015), *petition for cert. filed*, 2015 U.S. S. Ct. Briefs LEXIS 3170 (U.S. Sept. 14, 2015) (No. 15-319), the United States Court of Appeals for the Second Circuit held that a third-party insurance company could be sued under ERISA Section 502(a)(1)(B) in its capacity as a claims administrator because it held "total control" over the relevant plan's claims process. In so holding, the Second Circuit joined several other circuit courts that have similarly held a third-party insurance company is a proper Section 502(a)(1)(B) defendant. Other circuit courts have been more restrictive, holding that only the plan itself and plan administrators are proper Section 502(a)(1)(B) defendants.

Although there is arguably a split among the circuits, there does not appear to be guidance coming in the near future from the United States Supreme Court. On November 16, 2015, the Supreme Court denied UnitedHealth's petition for writ of certiorari, which had asked the Supreme Court to resolve whether a claims administrator of an ERISA plan is a proper defendant in a Section 502(a)(1)(B) action for benefits due under that plan.

IV.1 Case Posture in *New York State Psychiatric Ass'n*

In *New York State Psychiatric Ass'n*, plan participant Jonathan Denbo and the New York State Psychiatric Association ("NYSPA") brought a civil suit under ERISA Sections 502(a)(1)(B) and 502(a)(3) against UnitedHealth Group ("UnitedHealth") seeking monetary damages and injunctive relief. Denbo was an employee at CBS Sports Network and beneficiary under the CBS Medical Plan, a self-funded health benefits plan; the NYSPA was a professional organization of psychiatrists practicing in New York; and UnitedHealth served as claims administrator for the CBS Plan. *Id.* at *4-5. Denbo and the NYSPA claimed that UnitedHealth had violated the terms of the CBS Plan and the Mental Health Parity and Addiction Equity Act ("Parity Act") by using various protocols to assess mental health claims which were more rigorous than those used to assess ordinary medical and surgical claims. *Id.* at *6. Under the Parity Act, a "group health plan" may not impose financial requirements and treatment limitations on mental health benefits which are more restrictive than those imposed on ordinary medical and surgical benefits. 29 U.S.C. § 1185a(a)(3)(A). While the plan at issue in *New York State Psychiatric Ass'n* was a self-funded plan, the Second Circuit held that the Parity Act indirectly imposed a duty on UnitedHealth. *New York State Psychiatric Ass'n*, 2015 U.S. App. LEXIS 14641, at *16.

In its role as claims administrator, UnitedHealth had, under the terms of the plan, "exclusive authority and sole and absolute discretion to interpret and to apply the rules of [the CBS Plan] to determine claims for Plan benefits." *Id.* at *5. UnitedHealth also made "final and binding" decisions on appeals of adverse benefits determinations, but it was not the plan administrator or trustee and it did not actually bear the financial burden of funding the plan. *Id.* at *5

(describing claim denial appeals process), *14 (noting that the CBS Plan was self-funded).

Mr. Denbo attended outpatient psychotherapy sessions with an out-of-plan psychologist to treat his dysthemic disorder and generalized anxiety disorder. UnitedHealth initially granted his claims for this treatment; however, after further review of his claims, UnitedHealth determined that the sessions were not medically necessary and notified Denbo that it would deny any future claims. *Id.* at *6.

After Denbo exhausted the administrative review and appeal process under the plan, Denbo and the NYSPA filed suit in the United States District Court for the Southern District of New York against UnitedHealth, seeking money damages for payment of Denbo's claims under ERISA Section 502(a)(1)(B) and seeking to enjoin future breaches under ERISA Section 502(a)(3). UnitedHealth moved to dismiss, arguing that it could not be sued under Section 502(a)(1)(B) because it was not the plan administrator and did not bear responsibility to pay claims under the CBS Plan. *Id.* at *3-4. UnitedHealth also argued that it would be inappropriate to grant relief under Section 502(a)(3) because Section 502(a)(1)(B) offered an adequate remedy. *Id*. The District Court granted UnitedHealth's motion to dismiss, holding that (1) a claims administrator cannot be sued under Section 502(a)(1)(B) because only a plan and its administrator are proper defendants and (2) equitable relief under Section 502(a)(3) would not be appropriate because the plaintiffs' alleged injuries could be fully remedied under Section 502(a)(1)(B). *Id.* at *4.

The Second Circuit reversed the district court on both grounds for dismissal, and held that (1) a claims administrator is an appropriate defendant if it exercises "total control" over a plan's claims process and (2) the pleadings stage is too early to tell whether Denbo's Section 502(a)(3) claims are duplicative of his Section 502(a)(1)(B) claims. *Id.* *12, *18. The Second Circuit noted that although it had previously stated that "only the plan and the administrators and trustees of the plan in their capacity as such may be held liable" under Section 502(a)(1)(B), it had "never specifically addressed or considered whether a claims administrator that exercises total control may be sued." It explained that Section 502(a)(1)(B) "does not by its terms preclude suits against claims administrators" and concluded that a claims administrator is a "logical defendant" when it "exercises total control over claims for benefits." *Id.* at *12. The court further explained that a claims administrator exercises "total control" where it "has 'sole and absolute discretion' to deny benefits and makes 'final and binding' decisions as to appeals of those denials." *Id.* at *12-13. Notably, the court specifically declined to decide whether a claims administrator that exercises less than total control over the benefits denial process is an appropriate defendant. *Id.* at *13 n.5.

IV.2 Circuit Split

In addition to the Second Circuit, several other circuit courts have considered what parties can be sued under Section 502(a)(1)(B). The First, Fifth, Sixth,

Ninth, and Eleventh Circuits also permit suit under Section 502(a)(1)(B) against a third-party that exercises control over the plan's administration. *See Gomez-Gonzalez v. Rural Opportunities, Inc*., 626 F.3d 654, 665 (1st Cir. 2010) ("If an entity or person other than the named plan administrator takes on the responsibilities of the administrator, that entity may also be liable for benefits."). *LifeCare Mgmt. Servs., L.L.C. v. Ins. Mgmt. Adm'rs, Inc*., 703 F.3d 835, 845 (5th Cir. 2013) ("Where a [third-party claims administrator] exercises control over a plan's benefits claims process, and exerts that control to deny a claim by incorrectly interpreting a plan in a way that amounts to an abuse of discretion, liability may attach."). *Moore v. Lafayette Life Ins. Co*., 458 F.3d 416, 438 (6th Cir. 2006) (holding that any party responsible for specified tasks under an ERISA-governed plan, such as a third party claims administrator, is necessarily a proper defendant, and the only proper defendant, for claims arising out of the performance of that task). *Spinedex Physical Therapy, U.S.A., Inc. v. UnitedHealthcare of Arizona, Inc*., 770 F.3d 1282, 1297 (9th Cir. 2014), *cert. denied*, 2015 U.S. LEXIS 6538, at *1 (Oct. 13, 2015) ("[P]roper defendants under [§ 502(a)(1)(B)] for improper denial of benefits at least include ERISA plans, formally designated plan administrators, insurers or other entities responsible for payment of benefits, and *de facto* plan administrators that improperly deny or cause improper denial of benefits."). *Oliver v. Coca Cola Co*., 497 F.3d 1181, 1195 (11th Cir. 2006) (acknowledging the Circuit's acceptance of the *de facto* plan administrator doctrine but declining to extend it to third-party claims administrators where the plan sponsor retains the right to review benefits determinations). Circuits also permit suit under Section 502(a)(1)(B) against a third-party that exercises control over the plan's administration. These circuits vary in clarity as to what degree of control a third-party claims administrator must exercise to become a proper defendant. For example, the Sixth Circuit has required exclusive control over the benefits determination process, the Eleventh Circuit requires that the third-party act as a *de facto* administrator, and the Second Circuit has declined to rule whether anything less than total control would be sufficient. *See Moore*, 458 F.3d at 438; *Oliver*, 497 F.3d at 1195; *New York State Psychiatric Ass'n*, 2015 U.S. App. LEXIS 14641, at *13 n.5.

Four circuits, however, have rejected the view that a party may be sued under Section 502(a)(1)(B) based on the control it exercises over benefits determinations. Two of those circuits, the Third and Tenth Circuits, strictly limit the parties that can be sued to the plan itself and the plan administrators and fiduciaries (as defined by statute) in their roles as such. *See Graden v. Conexant Sys., Inc*., 496 F.3d 291, 301 (3d Cir. 2007) ("In a [§ 502(a)(1)(B)] claim, the defendant is the plan itself (or plan administrators in their official capacities only)."). *Geddes v. United Staffing Alliance Emp. Med. Plan*, 469 F.3d 919, 931 (10th Cir. 2006) ("The ERISA statute is clear: ERISA beneficiaries may bring claims against the plan as an entity and plan administrators."). Circuits, strictly limit the parties that can be sued to the plan itself and the plan administrators and fiduciaries (as defined by statute) in their roles as such. The other two circuits, the Seventh and Eighth Circuits, permit claims against

an insurance company that actually bears the financial risk to pay claims, as opposed to those which simply make determinations about whether benefits are owed. *See Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913 (7th Cir. 2013) ("By necessary implication, however, a cause of action for 'benefits due' must be brought against the party having the obligation to pay. In other words, the obligor is the proper defendant on an ERISA claim to recover plan benefits."). *Brown v. J.B. Hunt Transp. Servs., Inc*., 586 F.3d 1079, 1088 (8th Cir. 2009) (dismissing a claim against a plan administrator because the administrator did not have the obligation to pay). Circuits permit claims against an insurance company that actually bears the financial risk to pay claims, as opposed to those which simply make determinations about whether benefits are owed. Under either of these two rules, the degree of control exercised by a third-party claims administrator is irrelevant when it does not also pay or insure the amounts owed under the plan.

IV.3 Petition for Certiorari

On September 14, 2015, UnitedHealth filed a petition for writ of certiorari with the United States Supreme Court, seeking to clarify what it argued was a circuit split. Brief for Petitioner, *UnitedHealth Group v. Denbo*, No. 15-319, 2015 U.S. S. Ct. Briefs LEXIS 3170. In its petition, UnitedHealth presented the following issue: "whether a claims administrator with no obligation to pay benefits under an ERISA plan is a proper defendant in a § 502(a)(1)(B) action for benefits due under that plan." UnitedHealth argued that because an ERISA-governed plan is a contract between specified parties, the only persons that may be sued for benefits under Section 502(a)(1)(B) are the actual parties to the contract who have a contractual obligation to pay; *i.e.*, the plan itself and the plan administrator. *Id.* at *43. To allow recovery from a third party that has no contractual obligation to pay, UnitedHealth argued, would constitute extra-contractual damages and violate the contract law principles which govern ERISA plans. *Id.* UnitedHealth further argued, "ordering a mere claims administrator to pay a participant's benefits is like ordering an accountant to pay his client's taxes. Even if the accountant's error results in underpayment, it is still the taxpayer who must pay the balance due." *Id.* at *47. UnitedHealth requested that the Supreme Court side with the Third, Seventh, Eighth, and Tenth Circuits in holding that "only parties responsible for paying benefits may be sued under Section 502(a) (1)(B)." As discussed above, in *New York State Psychiatric Ass'n*, plaintiffs Denbo and the NYSPA also sought equitable relief under ERISA Section 502(a)(3) to prevent future violations denying Denbo's medical claims. UnitedHealth argued that the Section 502(a)(3) claim was duplicative of plaintiffs' claim for the denial of benefits under Section 502(a)(1)(B) and that equitable relief under Section 502(a)(3) was inappropriate because the plaintiffs' injuries could be fully remedied by monetary damages under Section 502(a)(1)(B). The district court agreed and dismissed the Section 502(a)(3) claim. The Second Circuit reversed, stating that the Supreme Court in *Varity Corp. v. Howe* prohibited duplicative relief rather than duplicative claims and held that the pleadings stage was too

early to tell whether the relief sought under the Section 502(a)(3) claim would be duplicative of the Section 502(a)(1)(B) claim. *New York State Psychiatric Ass'n*, 2015 U.S. App. LEXIS 14641, at *17. While UnitedHealth's petition for certiorari also requested the Supreme Court consider this issue, on November 16, 2015, the Supreme Court denied UnitedHealth's petition. *UnitedHealth Grp., Inc. v. Denbo*, No. 15-319, 2015 U.S. LEXIS 7243 (Nov. 16, 2015). On November 16, 2015, the Supreme Court denied UnitedHealth's petition.

IV.4 Conclusion

With the United States Supreme Court denying review of *New York State Psychiatric Ass'n v. UnitedHealth Group*, it is unlikely that companies will receive guidance in the near future regarding who is a proper defendant in ERISA Section 502(a)(1)(B) suits. Companies therefore must be mindful of the standard that applies in each of the jurisdictions in which they may face a lawsuit. As noted, several circuits employ a bright-line standard that limits Section 502(a)(1)(B) defendants to only the plan, the plan administrator, and plan fiduciaries. However, and as evidenced in the Second Circuit's decision in *New York State Psychiatric Ass'n*, the trend among the Circuit Courts appears to be moving toward a standard that accounts for the responsibilities, actions, and obligations of the various entities.

Companies also must be mindful of the terms of their plans and the powers they retain. If the company retains authority to grant or deny benefits under the plan, the claims administrator may argue it is not a proper defendant because the claims administrator does not retain "total control" over the claims process, similar to the standard employed by the Second Circuit. Thus, a company may find itself without the claims administrator as a co-defendant in a Section 502(a)(1)(B) lawsuit. Depending on the lawsuit, this could present challenges in defending the action.

V. The Final Frontier of ERISA "Plan Assets"

When passing ERISA, a key concern of Congress "was misuse and mismanagement of plan assets by plan administrators." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 at 141, n. 8 (1985). But what exactly are ERISA "plan assets"?

A practical approach to defining "plan assets" has been adopted by the U.S. Department of Labor ("DOL"). DOL regulation § 2510.3-102 states in relevant part: "The assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, were amounts that a participant has withheld from his wages by an employer, for contribution . . . to the plan . . ."

Other than defining plan assets as including employee contributions, the ERISA statute does not explain what exactly qualifies as an asset of an ERISA fund. For example, ERISA does not provide any guidance as to whether yet

unpaid but due and owing employer contributions are "plan assets" before they are turned over to the plan itself. The ERISA statute's definition of "plan assets" states that they are to be "defined by such regulations as the Secretary [of Labor] may prescribe." Those regulations don't add much to what is quoted above, aside from adding: "The assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25% of the total value of each class of equity interest in the entity is held by benefit plan investors."

ERISA § 3(42)(43), 29 U.S.C. § 1002(42)(43). For purposes of retirement plan investment, fund managers and investors in investment funds made available to ERISA entities share a common concern over the "plan assets" status of the fund. Under the DOL regulations, the assets of a privately offered investment fund not registered under the Investment Company Act of 1940 are treated as "plan assets" of ERISA plans if, immediately after the most recent acquisition of an interest in the fund, "benefit plan investors" in the aggregate own 25% or more of the value of any class of equity interest in the fund. A "benefit plan investor" includes ERISA plans as well as individual retirement accounts, governmental plans, church plans, and foreign plans.

The dilemma of how to determine what constitute ERISA "plan assets" is endemic. For example, the Affordable Care Act ("ACA") requires health insurance carriers to spend a certain amount of premiums on medical care and quality improvement activities. The ACA's "Medical Loss Ratios" standards require insurance companies or plans with 100 or more employees to spend at least 85% of premium dollars on medical care and/or quality improvement activities. The Medical Loss Ratios require insurance carriers to spend at least 80% of premium dollars on medical care and quality improvement for group plans with less than 100 employees and individual plans. Carriers that do not satisfy these medical loss ratios must issue a rebate. Issuing a rebate to an employer-sponsored group health plan is complicated on the receiving end. The question arises whether health insurance premium contributions were split between the employer and the employee. If so, then the rebate contains "ERISA plan assets" that must be transferred to the employees. *See* Department of Labor Technical Release 2011-04.

A decade ago, several mutual funds were found to have violated Securities and Exchange Commission ("SEC") rules by allowing "late trading," a term that describes trading in mutual funds after the markets had closed. DOL Field Assistance Bulletin No. 2006-01 provided guidance to 401(k) plan fiduciaries as to allocating settlements containing "plan assets" that had been received from mutual fund late trading or market timing violations.

There are exceptions to ERISA's "plan asset" rule. For example, ERISA provides a statutory exemption from the "plan asset" rules for mutual funds. *See* ERISA §§ 3(21)(B) and 401(b)(1). In enacting these provisions, Congress recognized that mutual fund organizations are already subject to extensive fiduciary regulation under the federal securities laws. These ERISA provisions serve to insulate mutual funds from allegations of self-dealing that other investment media face.

It is common for mutual fund organizations to fund a 401(k) plan for its employees that includes shares of one or more mutual funds within the mutual fund's own complex. One motivation to engage in "in-house" funding is the desire to avoid potential conflicts of interest arising from managing an employee benefit plan for mutual fund organization employees separately from its publicly held mutual funds. The SEC encourages mutual funds to fund "in-house" plans with their own mutual fund shares. 17 C.F.R. § 270.22b-1. DOL-prohibited transaction exemption 77-3 permits the funding of an "in-house" mutual fund with shares of the mutual fund if the plan satisfies four conditions: (1) the plan must not pay a sales commission; (2) the plan must not pay a redemption fee other than to the mutual fund itself; (3) the plan must not pay a separate investment management fee, investment advisory fee, or any similar fees; and (4) the plan's relationship with the mutual fund complex must be on no less favorable terms to the plan than its relationship with other shareholders of the fund.

V.1 Plan Assets and the Duties of ERISA Fiduciaries

Fiduciaries to ERISA-regulated plans have a statutory obligation to act on the up-and-up. The ERISA statute mandates plan fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character." ERISA § 404(a)(1)(b); 29 U.S.C. § 1104(a)(1)(b). An ERISA fiduciary must discharge his or her duties "for the exclusive purpose of providing benefits to participants and their beneficiaries." ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A). ERISA plans are contracts. *Harlick v. Blue Shield of Cal.*, 686 F.3d 699, 708 (9th Cir. 2012) citing *Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1194 (9th Cir. 2007). ERISA further requires that fiduciaries administer ERISA plans "in accordance with the documents and instruments governing the plan to the extent those writings are consistent with the ERISA" statute. ERISA § 404(a)(1)(D); 29 U.S.C. § 1104(a)(1)(D).

Once ERISA "plan assets" are involved, ERISA fiduciary duties and obligations are implicated. A person is a plan fiduciary over plan assets if he exercises any authority or control in the management or disposition of the assets or renders investment advice for a fee with respect to its assets. ERISA § 3(21)(A), 29; U.S.C. § 1002(21)(A).

Fiduciaries that mishandle ERISA plan assets put themselves at risk for potential personal liability. ERISA plan fiduciaries who lose plan assets, misinvest them, or otherwise cause an ERISA plan to sustain losses to plan assets can be sued personally to "make whole" the plan for those losses. *See* 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109(a).

In addition to prohibiting plan fiduciaries from being negligent in managing "plan assets," ERISA also prohibits plan fiduciaries from "self-dealing" with ERISA plan assets. *See* 29 U.S.C. § 1106. ERISA contains a *per se* prohibition on using "plan assets" directly or indirectly for the benefit of an ERISA

fiduciary. *Id.* Any ERISA fiduciary who engages in a prohibited transaction not only must disgorge profits but also is subject to additional penalties under ERISA and excise taxes under the Internal Revenue Code.

ERISA imposes strict fiduciary duties on certain persons who control assets of ERISA-regulated plans. Not everyone who has contact with ERISA plan assets is a fiduciary of the plan. As noted above, those who "exercise[] any authority or control respecting management or disposition of [fund] assets" have fiduciary responsibilities toward that ERISA-regulated plan. *Id.* at § 1002(21)(A). An ERISA fiduciary's responsibility has been described as '"the highest known to law."' *Herman v. Nationsbank Trust Co*. (Georgia), 126 F.3d 1354, 1361 (11th Cir. 1997) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)).

V.2 When Does Something Become a Plan Asset?

The Ninth Circuit has ruled that an employer contribution that is yet unpaid is not an ERISA plan asset. *Cline v. Indus. Maint. Eng'g & Contracting Co*., 200 F.3d 1223, 1234 (9th Cir. 2000). In *Cline*, employees of The Industrial Maintenance Engineering & Contracting Co. ("TIMEC") filed an ERISA class action against TIMEC, a union, and the TIMEC IRA plan (the "Plan"). *Id.* at 1228. Plaintiffs alleged that under ERISA, plan participants included employees with only one year of service who had 1,000 hours of service. *Id.* However, the Plan required three years and 1,600 hours of service. *Id.* Because defendants did not consider these one year/1,000 hour employees to be plan participants, no employer contributions had ever been made on their behalf to the Plan. *Id.* Cline, on behalf of the class, alleged that TIMEC had breached its fiduciary duty and had committed a prohibited transaction by failing to make timely contributions on behalf of this alleged class of one year/1,000 hour TIMEC employees. The District Court dismissed Cline's complaint with leave to amend. Cline filed an amended complaint alleging for the first time that the Plan was not a qualified IRA. The District Court granted summary judgment in favor of defendants in part on grounds that plaintiffs could not change horses in midstream and now allege in their "amended complaint" that the Plan was not an IRA. The Ninth Circuit affirmed and opined as to the nature of what constitutes an ERISA plan asset:

> [E]ven assuming that Appellees had failed adequately to contribute to the Plan, Appellants' prohibited transaction argument fails because such funds have not become "plan assets." **Until the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation; this is true even where the employer is also a fiduciary of the plan.** *See Local Union 2134, United Mine Workers* v. *Powhatan Fuel, Inc.*, 828 F.2d 710, 714 (11th Cir. 1987); *Professional Helicopter Pilots Ass'n* v. *Denison*, 804 F. Supp. 1447, 1453-54 (M.D. Ala. 1992). Appellants' allegation that employer contributions were withheld cannot provide

> the. basis for a prohibited transaction claim because no "plan assets" are involved.

Id.

A circuit split has developed on the issue of when employer contributions become "plan assets." The Eleventh and Second Circuits have created a "law of contracts" exception to the "plan asset" rule as it relates to employer contributions. On the other hand, the Tenth and Sixth Circuits do not recognize such an exception. In 2015, the Ninth Circuit ruled that the rule it set forth in 2000 in *Cline* still governs. There is no "law of contracts" exception to the employer contribution/"plan asset" rule.

V.3 The Eleventh and Second Circuits

The Eleventh and Second Circuits have adopted a "law of contracts" exception to ERISA's "plan asset" rule as it relates to employer contributions. The Eleventh Circuit ruled that ERISA plans are contracts in *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1016 (11th Cir. 2003). As a contract, the ERISA-regulated plan can make unpaid employer contributions into plan assets. *Id.* at 1012. In *Hall*, an ERISAregulated union pension fund ("Pension Fund") alleged that Roger and Hope Hall failed to make timely employer pension contributions to the Pension Fund. Mr. and Ms. Hall were the general manager and president, respectively, of a company, H & R Services ("H & R"), that supplies management and labor to operating military base dining facilities. *Id.* In a prior district court action brought by the Pension Fund against H & R, the trial court granted summary judgment in favor of the Pension Fund and assessed over $123,000 in damages against H & R. *Id.* The District Court also issued a permanent injunction requiring H & R to make pension contributions on time. *Id.* H & R did not pay the judgment, nor did it comply with the injunction. The Pension Fund sued Mr. and Ms. Hall personally alleging that they breached their fiduciary duties by failing to pay employer contributions/"plan assets" to the Pension Fund. This time the District Court granted summary judgment in favor of Mr. and Ms. Hall. *Id.* at 1013. It ruled that unpaid employer contributions were not "plan assets," citing ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). On appeal, the Eleventh Circuit reversed:

> **The proper rule, developed by caselaw, is that unpaid employer contributions are not assets of a fund unless the agreement between the fund and the employer specifically and clearly declares otherwise.** Emphasis supplied *See, e.g.; NYSA ILA-Med. & Clinical Servs. Fund V*; *Catucci ex rel. Capo*, 60 F. Supp. 2d 194, 200-01 (S.D.N.Y. 1999) (collecting cases); *Connors v. Paybra Mining Co*., 807 F. Supp. 1242, 1245-46 (S.D.W.V. 1992); *Galgay v. Gangloff*, 677 F. Supp. 295, 301 (M.D. Pa. 1987). The effect of language that makes unpaid contributions assets of the fund is that "when a corporation is delinquent in its contributions, the fund has a sufficient

> priority on the corporation's available resources that individuals controlling corporate resources are controlling fund assets." *Catucci*, 60 F. Supp. 2d at 201. This effect places "heavy responsibilities on employers, but only to the extent that . . . an employer freely accepts those responsibilities in collective bargaining." *Id.*

Id. at 1013-14. In other words, an employer contribution exception to the "plan asset" rule exists where there is clear contractual language that unpaid employer contributions will be treated as "plan assets." *Id.* at 1012. The Eleventh Circuit in *Hall* ultimately decided that the language of the parties' agreement was not clear enough to make unpaid employer contributions into ERISA "plan assets." The case was remanded back to the District Court to determine whether the parties intended unpaid employer contributions to be Pension Fund assets. *Id.*

The Second Circuit has reached a similar conclusion. If unpaid employer contributions are identified as plan assets in pension trust documents, then an employer could be liable for breach of fiduciary duties by failing to make timely pension contributions. *Bricklayers and Allied Craftworkers Local 2, Albany, New York Pension Fund v. Moulton Masonry & Construction, LLC*, 779 F.3d 182, 188-89 (2d Cir. 2015), involved another employer who was not making contributions to a pension fund. Plaintiffs alleged that Moulton Masonry & Construction, LLC ("MM&C"), which had entered into a collective bargaining agreement with a union, failed to timely remit contributions to the union's Pension and other funds (the "Funds"). When MM&C refused to submit to an audit of its books by the Funds' auditor, the Funds sued MM&C and Mr. Moulton. Neither answered the complaint. The clerk entered default. *Id.* at 185. Only after the Funds filed a motion for default judgment several months later did defendants appear in the lawsuit. Defendants opposed the motion and cross moved to vacate entry of default. *Id.* The district court denied defendants' motions. It ruled that defendants were jointly and severally liable for over $650,000 in unpaid employer plan contributions as well as prejudgment interest, liquidated damages, and attorneys' fees and costs.

The Second Circuit affirmed. *Id.* at 189-90. The Second Circuit found that Mr. Moulton was individually liable as an ERISA fiduciary where he "'determined which creditors the [corporate defendant] would pay' and 'exercised control over money due and owing to the Plaintiff Funds' . . . and failed to remit employer contributions under his control'" and where the trust documents expressly designated employer contributions as plan assets. *Id.* at 189.

V.4 The Sixth and Tenth Circuits

The Sixth and Tenth Circuits have taken an alternative approach to what constitutes an ERISA plan asset. In *In re Luna*, 406 F.3d 1192 (10th Cir. 2005), the Eleventh Circuit considered whether an employer who agrees to make regular employer contributions to an ERISA-regulated plan is a fiduciary under ERISA. *Id.* at 1196. Plaintiffs, trustees of a number of ERISA-regulated employee benefit

funds (the "Employee Benefit Funds"), sued Joyce Luna, President, Secretary and record-keeper of Luna Steel Erectors, Inc. ("LSE"), and her son Mark Luna, Vice President of LSE (the "Lunas"). *Id.* The lawsuit alleged that the Lunas had breached their fiduciary duties to the Employee Benefit Funds by failing to timely remit employer contributions mandated by a collective bargaining agreement ("CBA") entered into by LSE. *Id.* at 1197.

LSE was an Oklahoma-based construction company that hired union ironworkers. *Id.* In 1997, LSE, through its owner Mrs. Luna, entered into a CBA. LSE thereby agreed to submit monthly employer contributions to the Employee Benefit Funds on behalf of union ironworkers. In 1999, LSE experienced a financial downturn. In March 1999, LSE stopped contributing to the Employee Benefit Funds, although it was able to keep up with payroll. Forced by LSE's dire financial circumstances to take desperate measures, Mrs. Luna turned over to LSE $43,000 from her personal IRA and $7,000 in personal savings bonds. Her son also took out a personal loan for $30,000 which he deposited into LSE's business account. But their desperate attempts to infuse lifesaving cash into LSE failed to save the company, and in December, LSE's directors voted to dissolve and LSE stopped its operations on December 31, 1999. *Id.* In August 2000, Mr. and Ms. Luna both filed for voluntary Chapter 7 Bankruptcy protection. *Id.* at 1197.

In November 2000, the Trustees of the Employee Benefit Funds sued the Lunas in bankruptcy court. The Trustees alleged that the Lunas were personally liable for unpaid employer contributions totaling $121,000. *Id.* They also alleged that the Lunas's failure to make pension contributions amounted to "fraud or defalcation" while acting as fiduciaries. Because the Lunas' decision to meet payroll rather than pay pension contributions was "fraudulent," the Trustees asserted that the debt could not be discharged in bankruptcy under 11 U.S.C. § 523(a)(4) ("Section 523(a)(4)"). *Id.* The bankruptcy court ruled that although ERISA imposes fiduciary obligations, under Section 523(a)(4), unpaid employer contributions are not "plan assets." The debt, therefore, could be discharged in bankruptcy. The Tenth Circuit affirmed. It analyzed the issue of whether unpaid employer contributions were "plan assets" thereby making the Lunas ERISA fiduciaries:

> The question of whether the Lunas exercised authority or control over the asset at issue almost answers itself: It is the Trustees, not the Lunas, who control the contractual right to collect unpaid contributions from the Lunas. Whether to enforce their contractual rights is entirely up to the Trustees; the Lunas, meanwhile, have no say over whether this right will be enforced or not.
>
> ***
>
> In our view, an employer cannot become an ERISA fiduciary merely because it breaches its contractual obligations to a fund. ERISA's text and purpose, the law of trusts, Department

> of Labor regulatory pronouncements, and case law all lend support to our conclusion.

Id. at 1202-03.

The assets of an ERISA plan "generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law . . ." DOL Advisory Opinion No. 93-14A (May 5, 1993). The Tenth Circuit explained: "Under ordinary notions of property rights, an ERISA plan does not have a present interest in the unpaid contributions until they are actually paid to the plan. In other words, the plan cannot use, devise, assign, transfer, or otherwise act upon contributions that it has not yet received." *Id*. at 1199. The Tenth Circuit concluded that the language of ERISA Section 3(21)(A) which defines an ERISA "fiduciary" does not support a finding that the Lunas acted in a fiduciary capacity:

> The act of failing to make contributions to the Funds cannot reasonably be construed as taking part in the "management" or "disposition" of a plan asset. The asset in question, it must be remembered, is the Trustees' contractual right to collect the unpaid contributions, and the Lunas exercised no control over how the Trustees manage or dispose of that asset.

Id. at 1204. The Tenth Circuit then concluded that "a delinquent employer-contributor is merely a debtor, not a fiduciary." *Id.* at 1206.

The Sixth Circuit reached the same conclusion with respect to who is a fiduciary of ERISA plan assets. *See Bucci v. Bd. of Trustees*, 493 F.3d 635 (6th Cir. 2007). In February 2003, Charles Bucci, president and sole shareholder of Floors by Bucci, Inc. ("Floors by Bucci"), entered into a CBA that obligated Floors by Bucci to make monthly employer contributions to pension and fringe benefit funds (the "Funds"). *Id.* at 638. Two years later, he filed for Chapter 7 bankruptcy protection. The trustees of the Funds sought a declaration from the bankruptcy court that the employer contribution payments Mr. Bucci owed to the Funds could not be discharged in bankruptcy because these debts, like the debts in *Luna*, under Bankruptcy Code Section 523(a)(4), were debts arising from defalcation and/or embezzlement. *Id.* The bankruptcy court ruled that "defalcation is limited to situations where the parties to a creditor-debtor relationship intend for the debtor to act as a trustee of the monies owed." *Id.* at 638. The trustees appealed to the district court claiming that the bankruptcy court should have found that Bucci could not discharge its debts under Section 523(a)(4) because he was an ERISA fiduciary. But the district court affirmed the bankruptcy court. The Sixth Circuit subsequently affirmed. In doing so, the Sixth Circuit noted that the definition of fiduciary in Section 523(a)(4) is much narrower than the definition of fiduciary set forth in ERISA. *Id.* at 641. "[F]or a trust relationship to satisfy [Section] 523(a)(4), the alleged fiduciary must have duties that preexist the act creating the debt." *Id.* at 643 (citations omitted). It then found that "if an employer failing to pay contributions becomes an ERISA fiduciary only after the contributions are due, then the trust relationship springs from the act in which the debt arose. Such a trust relationship does not

create an express or technical trust for purposes of [Section] 523(a)(4)." *Id.* The Bucci court concluded:

> The key point for bankruptcy purposes, however, is that Bucci had only a contractual obligation to pay the employer contributions. This is not enough, for "the debtor must hold funds in trust for a third party to satisfy the fiduciary relationship element of the defalcation provision of Section 523(a)(4)." *In Re Garver*, 116 F.3d at 179. As the bankruptcy and district courts below correctly found, there is no evidence on the record establishing that Bucci was the trustee of the employer contributions.

Id. at 643.

V.5 There Is No Exception to the "Plan Asset" Rule in the Ninth Circuit

The Ninth Circuit continues to follow the employer contribution/"plan asset" rule it set forth fifteen years ago in *Cline*. In 2015, the Ninth Circuit considered whether an owner's contractual agreement to make employer contributions to an ERISA fund makes it a fiduciary of yet unpaid contributions. *Bos v. Bd. of Trs.*, 795 F.3d 1006, 2015 U.S. App. LEXIS 13272 (9th Cir. 2015). In 2007, Gregory Bos, president and owner of Bos Enterprises, Inc. ("BEI"), entered into the Carpenters' Master Agreement ("Agreement"). By doing so, BEI agreed to make monthly contributions to several trust funds for the purpose of providing employee benefits (the "Trust Funds"). In August 2008, Mr. Bos stopped making his monthly contributions to the Trust Funds. To make matters worse, Mr. Bos signed a promissory note in March 2009 personally guaranteeing that he would pay all delinquencies between August 2008 and January 2009. However, he also failed to meet that obligation. The Board of Trustees for the Fund ("Board") filed a grievance against Mr. Bos and BEI to recover the outstanding monies and was awarded $504,282.59. In 2011, Mr. Bos filed for Chapter 7 bankruptcy. The Board filed a complaint claiming that the $504,282.59 awarded by the arbitrator was not dischargeable debt because Mr. Bos had committed defalcation while acting as a Fund fiduciary. The bankruptcy court agreed, and the district court then affirmed. *Id.* at *4. However, the Ninth Circuit reversed. The Ninth Court pointed to the general rule in *Cline* that unpaid employer contributions are not plan assets and concluded "consistent with our general rule that unpaid contributions to employee benefit funds are not plan assets . . . . Bos did not engage in defalcation for purposes of [Section] 523(a)(4)."

Although we know that employee contributions are "plan assets," we don't really have a set rule for employer contributions. But as this final plan asset

frontier evolves, the "if, when, and whether" employer contributions become ERISA-regulated plan assets remains largely uncharted.

VI. Proceed with Caution! Fiduciaries Who Provide ERISA-Regulated Benefits to Undocumented Workers Expose Themselves to Certain Risks

The question of whether undocumented workers are entitled to receive payment of ERISA-regulated benefits gives ERISA plan administrators the willies. They have good reason to be cautious. It is a crime to obtain employment under false pretenses. *See* 8 U.S.C. § 1324(a). The Immigration Reform and Control Act of 1986 ("IRCA") is "a comprehensive [law] prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). Under IRCA, it is a crime for an unauthorized alien to subvert the employer verification system by knowingly submitting fraudulent documents. *Id.* citing 8 U.S.C. § 1324c(A). A violation of IRCA by using or attempting to use fraudulent documents is punishable by civil fines, and offenders may be subject to criminal prosecution. *Hoffman Plastic*, 535 U.S. at 148 (citations omitted) citing 8 U.S.C. § 1324a(e)(4)(A).

In *Hoffman*, the United States Supreme Court concluded that allowing the National Labor Relations Board (the "Board") to provide back pay to illegal aliens contradicted the policies underlying IRCA. The Supreme Court opined:

> We therefore conclude that **allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.** However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

535 U.S. at 151-52. In no uncertain terms, the Supreme Court explained that awarding back pay was incompatible with policies underlying IRCA because it was for "years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." *Id.* at 149. The Supreme Court left no room for ambiguity in *Hoffman* that, while undocumented workers may be "employees" under the NLRA, they are not entitled to the remedies of reinstatement or back pay. "Aliens who use or attempt to use such [false] documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b)." *Hoffman*, 535 U.S. at 148. The Supreme Court went

so far as to observe that awarding back pay to undocumented workers, "not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 150.

The *Hoffman* back pay analysis may apply to potential ERISA-regulated pension benefits claimed by undocumented workers. This has been found true for front pay. In *Renteria v. Italia Foods, Inc.*, No. 02-c-495, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. Aug. 21, 2003), José Renteria along with eight workers sued Italia Foods, Inc. ("Italia Foods"), their employer, a manufacturer of frozen food products. Plaintiffs alleged that Italia Foods had failed to pay them overtime under the Fair Labor Standards Act. Some of the workers also claimed that they had been retaliated against by Italia Foods for making overtime claims. Italia Foods claimed that certain workers were not entitled to recovery because it had discovered that they were undocumented while they worked for the company. The District Court concluded that workers who gained employment under false pretenses were not entitled to the remedies of back pay or front pay after *Hoffman*. *Renteria v. Italia Foods, Inc*., 2003 U.S. Dist. LEXIS 14698, at *18 (N.D. Ill. Aug. 25, 2003).

The Supreme Court's *Hoffman* policy analysis also makes sense in the ERISA context. Paying ERISA pension benefits to undocumented workers arguably condones past violations of federal immigration laws by awarding pension benefits for work that was only obtained through criminal fraud. Pension payments to undocumented workers also arguably condones future immigration violations by encouraging others who are undocumented to obtain employment and accrue (and ultimately be paid out) pension benefits with no negative consequences for their fraudulent actions. It may also encourage future violations of the Internal Revenue Code because paying pension benefits to those who are fraudulently using a Social Security number that does not match their identity means that those individuals are unlikely to pay income taxes on pension distributions they receive.

VI.1 The Risk Is Real: One District Court Has Found *Hoffman* "Analogous" in the ERISA Context

In *Garcia v. Am. United Life Ins. Co.*, No. 07-cv-63, 2009 U.S. Dist. LEXIS 126391 (E.D. Tex. Dec. 9, 2009), a federal District Court refused to provide ERISA-regulated life insurance benefits to the beneficiary of an undocumented worker. The *Garcia* court found *Hoffman* "analogous" and the Supreme Court's analysis "instructive" in its own analysis of an ERISA life insurance dispute. *Id.* at **48, 51. Having been applied in one ERISA context, it is not unreasonable to think that Courts may apply the *Hoffman* court's with equal force to an ERISA-regulated pension plan.

In *Garcia*, the American United Life Insurance Company ("American") issued a life insurance policy to Tatum Excavating Company, Inc. ("Tatum") effective July 1, 2005 ("Policy"). *Id.* at **7-8. Two months later, Salvador

Garcia ("Mr. Garcia"), signed an enrollment form. *Id.* at *7. The enrollment form included a representation of his date of birth and Social Security number. *Id.* at *7. About five months later, Mr. Garcia passed away. *Id.* at *8. As his designated beneficiary, his wife applied for benefits under the Policy. *Id.* It subsequently came to light that the Social Security number Mr. Garcia had provided on his enrollment form did not belong to him. *Id.* at **14-16. American denied the claim for benefits and voided the policy. American explained that:

> [i]nformation provided . . . indicates the decedent provided invalid information and could not have been legally employed or living in the United States. Because the decedent was not eligible for employment with [Tatum], he was not eligible to apply for coverage under its ERISA governed group life insurance policy. No information has been provided showing he was legally employed or living in the United States.

Id. at *10.

Only employees of Tatum were eligible to be Plan participants. The Plan's definition of employee was silent as to immigration status. It stated:

> EMPLOYEE means an individual:
> (1) whose employment with the Group Policyholder constitutes his principal occupation; and
> (2) who regularly works at that occupation at the Group Policyholder's regular place of business a minimum number of hours per week . . . ; and
> (3) who is not temporarily or seasonably employed by the Group Policyholder
>
> TO REMAIN ELIGIBLE FOR PERSONAL INSURANCE AND DEPENDENT INSURANCE, IF ANY, PERSONS MUST CONTINUOUSLY MEET THE ABOVE REQUIREMENTS.

Id. at **25-26. Mrs. Garcia argued that American was attempting to read an immigration status requirement into Plan eligibility that simply was not there. *Id.* at *27. She further argued that it was Mr. Garcia's employer that had committed an illegal act by hiring Salvador. *Id.* at *28. The Magistrate agreed with American and found that Salvador "cannot meet the policy requirement of 'employment with the Group Policyholder' in a lawful manner." *Id.* at *29. The Magistrate went on to state:

> After a detailed investigation, American determined that Salvador was not eligible for employment in the United States. Despite having had the opportunity, Plaintiff failed to provide information establishing or indicating that Salvador was a legal resident or authorized to work in this country. **Unable to confirm Salvador's identity and United States citizenship, American correctly determined that Salvador was not eligible for employment with Tatum and thus not lawfully**

> **employed by Tatum, requiring denial of benefits to Plaintiff as beneficiary.** Given the facts presented, the Administrative Record establishes that American's decision was consistent with a "fair reading of the plan."

Id. at **29-30 (internal citations omitted). The Magistrate also concluded that "American applied a legally sound interpretation of the Plan." *Id.* at *32. Mrs. Garcia objected to the Magistrate's Report and Recommendation. *Garcia v. Am. United Life Ins. Co.*, No. 07-cv-63, 2010 U.S. Dist. LEXIS 31809 **2-3 (E.D. Tex. Mar. 31, 2010).

However, the District Court adopted the Magistrate's Report as the findings and conclusions of the Court. *Id.* at 14. The District Court analyzed whether Mr. Garcia had made a material misrepresentation, opining:

> Plaintiff would have this Court overlook the fact that Mr. Garcia submitted a false SSN, ostensibly in order to become employed by Tatum, so that she may benefit from a policy for which Mr. Garcia would not otherwise have been eligible. *Cf*. *Hoffman*, 535 U.S. at 148-49 ("The Board asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."). As the Magistrate Judge found, an "applicant's SSN is a vital piece of information pertinent to the insurer's accurate identification of the person seeking to be insured." Dkt. No. 57 at 34. Indeed, it is required by law. *See* 8 U.S.C. § 1324(a)(1). Simply, as the Magistrate Judge found, "American actually issued coverage to an individual who only secured employment (upon which eligibility was based) by means of tendering fraudulent identification to the employer" and "had Tatum known of [Mr. Garcia's] illegal status, it would not have offered him employment just as American would not have issued coverage had it known of same." Dkt. No. 57 at 36.

Id. at **12-13.

Mr. Garcia's wife appealed the District Court's order. She argued that the District Court had applied the wrong standard of review and had erred in finding that Mr. Garcia had made a "material" misrepresentation about who he was, thus allowing American to deny the claim. The Fifth Circuit affirmed. *Garcia v. Am. United Life Ins. Co.*, 422 Fed. Appx. 306 (5th Cir. 2011). It explained that:

> [Mr. Garcia's] misrepresentations were clearly material and of the type that would have prevented [American] from issuing the policy. A SSN is an integral part of the process by which a party's identity can be verified. *See generally Sherman v. U.S. Dept. of the Army*, 244 F.3d 357, 364-66 (5th Cir. 2001) (discussing the significant privacy interest an individual has

> in her SSN because it could be used to uncover her financial information, as well as other identity-related information). Because Salvador provided a false SSN and inhibited [American's] ability to verify his identity, he not only placed [American] at risk of severe penalties, but also inhibited [American's] ability to assess the underwriting risk involved in issuing him the policy.

Id. at 312. The Fifth Circuit thus ruled that Mr. Garcia never became a Plan participant because he used a false Social Security number. It further ruled that had American known of his Social Security number misrepresentation, it would not have issued a policy to Salvador which made American vulnerable to civil and criminal penalties. *Id.* at 312-13. This line of *Garcia* cases demonstrate that known material misrepresentations about Social Security numbers may expose pension plan fiduciaries to civil and criminal penalties.

VI.2 ERISA's Duty to Investigate Applies to Pension Plan Trustees

An ERISA fiduciary is tasked with discharging his or her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B); 29 U.S.C. § 1104(a)(1)(B). ERISA fiduciaries must also discharge their duties with respect to ERISA-regulated plans "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . ." ERISA § 404(a)(1)(A)(i); 29 U.S.C. § 1104(a)(1)(A)(i).

The Ninth Circuit has held that a retirement plan fiduciary breached his fiduciary duties by failing to investigate and by failing to inform plan participants of his suspicions with respect to mismanagement of plan funds. *Barker v. Am. Mobil Power Corp*., 64 F.3d 1397, 1404 (9th Cir. 1995). In *Barker*, American Mobil retiree plaintiffs sued after they discovered that their retirement plan was out of money to pay their retirement benefits. *Id.* at 1400. These retirees alleged the plan fiduciary breached his fiduciary duties by mismanaging plan funds. *Id.* The District Court found that the fiduciary, defendant John Ayres, a member of the Administrative Committee of the Plan, suspected individual accounts had not been established for plan participants and suspected plan benefits were not paid out of the plan's assets. *Id.* at 1402-03. Mr. Ayres signed yearly profit sharing certificates that indicated that plan funds were being held on plaintiffs' behalf and were accruing interest. *Id.* at 1403. Despite his suspicions, Ayres did not investigate. *Id.* Nor did he inform plan participants about his suspicions. *Id.* The District Court ruled that Mr. Ayres' conduct was not a breach of fiduciary duty. *Id.* The Ninth Circuit reversed. *Id.* at 1405. The Ninth Circuit ruled that Mr. Ayres had a duty to investigate and "had a duty to inform the participants

of any and all circumstances that threatened the funding of their pensions." *Id.* at 1403.

The Ninth Circuit opined:

> Ayres suspected that there were problems with the maintenance of the Plan. Any prudent individual who had a retirement account and who possessed the same suspicions that his own account was not being properly maintained would make inquiries to ascertain with certainty that the account was being properly funded. **A fiduciary has a duty to act in the best interests of the plan participants and beneficiaries. Not to investigate suspicions that one has with respect to the funding and maintenance of the plan constitutes a breach of that duty.** *See Fink v. National Sav. & Trust Co.*, 249 U.S. App. D.C. 33, 772 F.2d 951, 955 (D.C. Cir. 1985) (discussing general standards for fiduciaries).

Id. The Ninth Circuit explained as follows:

> Moreover, fiduciaries breach their duties if they mislead plan participants or misrepresent the terms or administration of a plan. *See Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) (as amended). **An "ERISA fiduciary has an affirmative duty to inform beneficiaries of circumstances that threaten the funding of benefits."** ***Acosta v. Pacific Enters*****., 950 F.2d 611, 619 (9th Cir. 1991) (as amended). A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information.** *See Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993).

Id. Pension plan trustees are obligated by their fiduciary responsibilities to take action to prevent the diversion of plan monies to improper uses. *Id.* Fiduciaries who fail to investigate whether "participants" are illegal aliens and/or fail to notify Trust Fund participants that the Trustees are on notice that some "participants" may be illegal aliens expose themselves to potential fiduciary breach claims. In a seminal case involving fiduciary malfeasance, the Second Circuit noted that "[l]uck or good fortune is no substitute for a trustee's duty of inquiry." *Donovan v. Bierwirth*, 680 F.2d 263, 274 (2d Cir. 1982).

Pension plan fiduciaries have a duty to guard pension plan and trust assets by ensuring that benefits are only disbursed to eligible plan participants. ERISA mandates that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." ERISA § 403(c)(1); 29 U.S.C. § 1103(c)(1). In *Ellenburg v. Brockway, Inc.*, 763 F. 2d 1091, 1093 (9th Cir. 1985), Leroy Ellenburg sued to recover early retirement benefits under ERISA. To be eligible for early

retirement benefits, Mr. Ellenburg had to have worked for the company from 1964 until the time of his retirement, must have completed at least ten years of continuous service to both his current employer and its predecessor and must be at least 55 years old. *Id.* at 1094. On his early retirement application forms dated June 27, 1979, and on later forms filed along with his application, Mr. Ellenburg listed his birthdate as December 26, 1923. *Id.* That would make him 55 and a half years old at the time of his application. However, on previous employment documents, Mr. Ellenburg used a birthdate three years later—December 26, 1926. *Id.* A computer printout of retirement benefits calculations listed 1926 as his year of birth, and Mr. Ellenburg's employer informed him that he was not eligible to retire. *Id.* Mr. Ellenburg then informed his employer that he had recently obtained a Delayed Birth Certificate indicating that his birthdate was December 26, 1923. He gave a copy of this document to his employer. *Id.* Mr. Ellenburg had obtained the Delayed Birth Certificate with the help of his sister and by having a family friend, who was also a notary public, certify that she had examined a family Bible and life insurance policy which contained Mr. Ellenburg's age. The State of Georgia then issued a Delayed Birth Certificate based entirely on the notary friend's certification. *Id.* After hearing a rumor among employees that Mr. Ellenburg had provided an incorrect birthdate on his application, the Manager of Employee Benefits ("Manager") investigated. *Id.* He discovered that none of the records that supposedly supported the Delayed Birth Certificate did not list Mr. Ellenburg's birth year as 1923. *Id.* The Manager then wrote to Mr. Ellenburg and told him that the year 1923 might not be correct. *Id.* He informed Mr. Ellenburg that until the discrepancy in dates was resolved, his benefit payments were suspended. *Id.* His letter requested additional documents to verify Mr. Ellenburg's birthdate, including a copy of the life insurance policy, the name and address of the hospital where Mr. Ellenburg was born, and a copy of his military discharge papers. *Id.* Mr. Ellenburg claimed that the family Bible and the insurance policy had disappeared. *Id.* After the Manager received copies of school records and an application for the life insurance policy listing Mr. Ellenburg's birth year as 1926, the employer denied Mr. Ellenburg's benefits. *Id.* at 1094-95. Mr. Ellenburg sued. The Ninth Circuit opined:

> Brockway's and Cunningham's consideration of evidence of Ellenburg's age, obtained after Ellenburg retired, in determining eligibility was not arbitrary and capricious. The discrepancy in Ellenburg's date of birth was apparent prior to his retirement, and such discrepancy was sufficient to cause Brockway and Cunningham suspicion as to Ellenburg's eligibility. As fiduciaries, Brockway and Cunningham were under a duty to protect the pension plan and trust assets by assuring that only eligible employees received benefits. The decision to resolve the discrepancy in Ellenburg's date of birth prior to payment of benefits was reasonable and prudent, rather than arbitrary and capricious.

Id. at 1096-97. Pension plans generally require participants seeking payment disbursements to provide a Social Security number for tax reporting purposes. Fiduciaries who fail to require participants to provide correct Social Security numbers open themselves up to a potential fiduciary breach lawsuit if plan benefits are paid out to individuals who are ineligible to be plan participants.

VI.3 Willfully Aiding or Assisting an Illegal Alien in Submitting a Fraudulent or False Tax Document Is a Crime Under the IRC

It a crime to willfully aid or assist an individual in submitting a tax document "which is fraudulent or false as to any material matter." *See* 26 U.S.C. § 7206(2); *see also* 26 U.S.C. § 7206(1). Trustees who make pension payments to individuals who have used a fraudulent Social Security number risk violating this provision. Pension payments are generally distributed as taxable income. Pension plans' identification and disbursement procedures often rely upon the matching of an SSN to a participant. Fiduciaries who are on notice that a "participant" has used a false Social Security number risk condoning or even committing a criminal violation of the IRC when they make a taxable distribution to individuals whose identity and Social Security number do not match.

VI.4 The DOL Has Never Opined That It Will Enforce ERISA Irrespective of Undocumented Status

The DOL has taken the position that illegal immigrants are "employees" under the Fair Labor Standards Act ("FLSA") and Migrant Seasonal Agricultural Worker Protection Act ("MSPA"). However, the DOL has remained silent on this issue in the ERISA context. Fact Sheet #48, issued by the DOL to distinguish two areas within its enforcement from the holding of *Hoffman*, does not mention ERISA at all. However, it does discuss the FLSA and the MSPA. Fact Sheet #48, last revised in July 2008, states, in part:

> The Supreme Court's decision does not mean that undocumented workers do not have rights under other U.S. labor laws. In *Hoffman Plastics*, the Supreme Court interpreted only one law, the NLRA. The Department of Labor does not enforce that law. The Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers. The FLSA requires employers to pay covered employees a minimum wage and, in general, time and a half an employee's regular rate of pay for overtime hours. The MSPA requires employers and farm labor contractors

> to pay the wages owed to migrant or seasonal agricultural workers when the payments are due. The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA. . . . The Department of Labor is still considering the effect of *Hoffman Plastics* on other labor laws it enforces, including those laws prohibiting retaliation for engaging in protected conduct.

Even though *Hoffman* was decided thirteen years ago in 2002, the DOL has never issued a similar Fact Sheet opining on ERISA and undocumented workers.

This makes sense. Paying pension benefits to undocumented workers arguably violates the policies underlying immigration laws in a way that payment of minimum wage does not. *See Hoffman Plastic*, 535 U.S. at 149. Pension plan contributions are made above and beyond, and in no way subtract from, a worker's wages. An illegal alien who is entitled to wages for hours worked is not automatically entitled to additional benefits. For example, illegal aliens are not eligible to receive federal public benefits. *See* 8 U.S.C. § 1611(c). "Federal public benefits" include:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1)(A), (B). The Federal Government has taken the position that Social Security benefits earned under false pretenses will not be paid. The *New York Times* reported that President Obama's 2015 budget proposed to save at least $67 million over five years by "involuntarily disenroll[ing]" illegal aliens from Medicare.

Indeed, even the DOL has recognized that ERISA is different from minimum wage laws.

> ERISA does not require any employer to establish a retirement plan. It only requires that those who establish plans must meet certain minimum standards.

(DOL website, "FAQs About Retirement Plans and ERISA", *accessed at* http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html) So, too, the Supreme

Court has found that "employee" means different things in the FLSA and ERISA contexts:

> The definition of "employee" in the FLSA evidently derives from the child labor statutes [] and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an "employee" to include "any individual employed by an employer," it defines the verb "employ" expansively to mean "suffer or permit to work." 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g). This latter definition, whose striking breadth we have previously noted, *Rutherford Food*, *supra*, at 728, stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of "employee."

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (adopting common-law test for determining who qualifies as an "employee" under ERISA). In short, the DOL's position with respect to undocumented workers in the ERISA context is still unknown.

VI.5 What Is a Fiduciary to Do?

ERISA fiduciaries must take precautions to protect an ERISA plan's interests if they discover that eligible "participants" have obtained employment and/or are seeking benefits under false pretenses.