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Darkness at Noon: Judicial Interpretation May Have Made Things Worse for Benefit Plan Participants under ERISA than Had the Statute Never Been Enacted

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DARKNESS AT NOON:
JUDICIAL INTERPRETATION MAY HAVE MADE THINGS WORSE FOR BENEFIT PLAN PARTICIPANTS UNDER ERISA THAN HAD THE STATUTE NEVER BEEN ENACTED

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Is there anything the writer of a rule can do to make sure courts apply the rule as the writer intends? Prominent 20th century American legal theorists took a pessimistic view. One early commentator put it this way: "We are under a Constitution, but the Constitution is what the judges say it is."[1] Another reputedly remarked that a case's outcome is less determined by the text of "the law" than by what the judge had for breakfast.[2] The claims of so-called "Legal Realists" about the weakness of objective words as a constraining force[3] have struck a number of observers as questionably extreme, as overstated.[4] But sometimes it seems there might be something to them.

For anyone who has tried to help a retiree collect a pension or an employee receive a medical reimbursement, the Employee Retirement Income Security Act of 1974, or ERISA,[5] serves as an illustration. Last year marked the 35th anniversary of the effective date of this law, which was adopted to great acclaim by legislators who thought they were striking a blow for the rights of participants in employer-sponsored pension and other benefit plans. We know that is what they thought because they said

1. Charles Evans Hughes, Speech before the Elmira Chamber of Commerce (May 3, 1907), *in* ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916 (1916). Though Hughes himself was not among the group of legal philosophers (mostly members of the Columbia and Yale Law School faculties) who later identified themselves as Legal Realists, his remark is often taken as among the neatest statements of the group's philosophy. *See* WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941 249 (2007). Another iconic quotation is that of fellow Supreme Court Justice-to-be, Benjamin Cardozo, to the effect that "law is not found, but made." BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 115 (Yale University Press 1921).

2. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 129 (2009). Whether Jerome Frank, a leading and self-proclaimed Realist, actually made that statement cannot be definitively established, but the quote has in any case been widely attributed to him and served as a caricature of Legal Realism. *See id.* at 129 n.5. Legal Realism, of course, was a more complex and multi-faceted movement than is conveyed by these quotes. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963) (1930). For more detailed descriptions of the school and its influence on subsequent legal thought, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169–272 (1992). *See also* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); SCHAUER, *supra*, at 124–47.

3. Under the most extreme form of the "indeterminacy" arguments advanced by Critical Legal Studies scholars, successors to the Realists, *no* words can in practice constrain judges from reaching *any* outcome. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

4. *See* SCHAUER, *supra* note 2, at 144–47; Solum, *supra* note 3, *passim*; Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 229 (1972) (questioning whether the Realist tradition's tenets "are, indeed, themselves realistic").

5. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (1974), 88 Stat. 829 (1974) (codified as amended in various sections of 26 and 29 U.S.C.).

so, in the Act itself[6] and in the legislative record.[7] ERISA is an example of a statute having what has been called a "singing reason."[8]

Despite that, the federal courts have felt themselves free in the decades since to resolve a long series of questions under ERISA against plan participants and in favor of employers.[9] The strength of an ERISA plaintiff's legal position has steadily eroded, to the point where today it is routinely the case that a plan participant can prevail only if he is able to persuade a court that ERISA does *not* apply to his case.[10] And for exactly that reason – to make it harder for participants to enforce their rights – companies now go out of their way to make sure that the plans they

6. *See* Congressional Findings and Declaration of Policy, 29 U.S.C. §1001 (2010).

7. *See* H.R. REP. NO. 93-533, pt. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, *available at* 1973 WL 12549. "The primary purpose of [ERISA] is the protection of individual pension rights." *Id.* at 4369, *1; *see also* S. REP. NO. 93-127, pt. B (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, *available at* 1973 WL 12550. "It is intended that the coverage under [ERISA] be construed liberally to provide the maximum degree of protection for working men and women covered by pension retirement programs." S. REP. NO. 93-127 at 4854, *17.

8. *See* SCHAUER, *supra* note 2, at 160–61 ("Sometimes, of course, the statute will *say* what its purpose is, a phenomenon described (and praised) by [Legal Realist] Karl Llewellyn as a *singing reason*, his term for a statute that not only *has* a purpose but also announces it loud and clear.").

9. *See* discussion *infra* Part III.

10. For some sense of the extent to which this has become the common pattern, see, for example, Lockett v. Marsh USA , Inc., 354 Fed. Appx. 984, 989–91 (6th Cir. 2009); Gianetti v. Blue Cross & Blue Shield, 351 Fed. Appx. 520, 522–23 (2d Cir. 2009); Graham v. Metro. Life Ins. Co., 349 Fed. Appx. 957, 959–62 (5th Cir. 2009); Ford v. Unum Life Ins. Co., 351 Fed. Appx. 703, 706–08 (3d Cir. 2009); Menchaca v. CNA Group Life Assur. Co., 331 Fed.. Appx. 298, 302–04 (5th Cir. 2009); Johnson v. Conn. Gen. Life Ins. Co., 324 Fed. Appx. 459, 460–67 (6th Cir. 2009); Lone Star OB/GYN Assoc. v. Aetna Health, Inc., 579 F.3d 525, 529–33 (5th Cir. 2009); McLain v. Andersen Corp., 567 F.3d 956, 963–66 (8th Cir. 2009); Paulsen v. CNF Inc., 559 F.3d 1061, 1072–78, 1087 (9th Cir. 2009); Quality Infusion Care, Inc. v. Humana Health Plan of Tex., 290 Fed. Appx. 671, 676–83 (5th Cir. 2008), Deem v. BB&T Corp., 279 Fed. Appx. 283, 284 (4th Cir. 2008); Fernandez-Vargas v. Pfizer, 522 F.3d 55, 60–62 (1st Cir. 2008); Paneccasio v. Unisource Worldwide, Inc., 532 F.3d 101, 107–11 (2d Cir. 2008); McAteer v. Silverleaf Resorts Inc., 514 F.3d 411, 418–19 (5th Cir. 2008); Brodowy v. Raytheon Co., 257 Fed. Appx. 12, 13–14 (9th Cir. 2007); Nelson v. Unum Life Ins. Co., 232 Fed. Appx. 23, 24–25 (2d Cir. 2007); Early v. United States Life Ins. Co., 222 Fed. Appx. 149, 152–53 (3d Cir. 2007); Kurtek v. Capital Blue Cross, 219 Fed. Appx. 184, 186–87 (3d Cir. 2007); Thurman v. Pfizer, Inc., 484 F.3d 855, 860–64 (6th Cir. 2007). This string of cites is long, but could be a lot longer. It represents a tiny, recent sampling of decisions by Courts of Appeal. A list could be constructed numbering into the thousands of published federal decisions in which it was the plaintiff/plan participant – not the defendant/employer – who had been reduced to arguing, most often in vain, that ERISA should not apply to a particular claim. Already by 1995, 2,800 ERISA preemption cases could be identified by LEXIS search, and in those cases, as noted by a contemporary, "The defendant-fiduciary-administrator-employer-insurer invariably wants ERISA to govern because of ERISA's severely limited or absent remedies for the plaintiff-employee-participant-beneficiary." William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285, 287 (1998).

establish or administer are, in fact, subject to ERISA.[11] This is a remarkable situation. It suggests employees are worse off than they would have been had the statute never been enacted.

How this came to be is worth considering. At thirty-six, ERISA's judicial history is significant in its own right – for example, from the standpoint of American retirement and health insurance policy.[12] But this history is also a study in the power that legislative words do not have over judges. It may be a data point partially vindicating Legal Realism.[13]

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11. *See* Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral*, 26 HOFSTRA LAB. & EMP. L. J. 387, 389 n. 14 (2009). During his career in employee benefits practice the author has witnessed many examples of this phenomenon. For example, one internal memorandum written by a disability insurance company stated:

> The advantages of ERISA [to a litigation defendant] are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review. The economic impact . . . from having policies covered by ERISA could be significant. As an example, [we] identified 12 claim situations where we settled for $7.8 million in the aggregate. If these cases had been covered by ERISA, our liability would have been between zero and $0.5 million.

Id. Additional background about the foregoing memorandum can be found in John H. Langbein, *Trust Law as Regulatory Law: The UNUM/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 N.W. U. L. REV. 1315, 1317–20 (2007). The article details how UNUM viewed ERISA as of legal help to it in the company's aggressive "cost-containment measures that pressured claims-processing employees to deny valid claims. Pressures peaked in the last month of each quarter, called the 'scrub months,' when claims managers exhorted staff to deny enough claims to meet or surpass budget goals." *Id.* at 1318.

12. Most Americans covered by health insurance today receive that insurance through an employer-sponsored plan, and the health insurance reform legislation enacted in March 2010 has cemented for the foreseeable future, the central role occupied by employer plans. *See* CONG. BUDGET OFF., REPORT OF THE CONGRESSIONAL BUDGET OFFICE 7, Table 2 (Mar. 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf. As of 2010, 69% of the insured, nonelderly population is covered by employer-provided insurance; and that in 2019, under the new legislation, that percentage will be 61%. CENTER FOR HEALTHCARE RESEARCH & TRANSFORMATION, IMPACT OF HEALTH REFORM COVERAGE IN MICHIGAN ISSUE BRIEF 2–4 (June 2010), *available at* http://www.chrt.org/publications/cover-michigan/issue-brief-2010-06-impact-of-health-reform-on-coverage-in-michigan/. Thus, ERISA looms large in the provision of American health care, as well as other benefits.

13. Ironically, a contemporary legal philosopher recently ruled out ERISA as a statute for which the Realists' claims are likely to be valid, on the ground the statute is too obscure for people to have any preconceived personal ideas about it. *See* SCHAUER, *supra* note 2, at 140 ("Few judges care very much about technical issues in the interpretation of . . . ERISA . . ."). For a more general discussion of the unpredictable consequences of legislative reform, of which ERISA and the phenomena described in this article could be viewed as an example, see ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED 72–90 (2008).

I. OVERVIEW

Courts have constricted the rights of employee benefit plan participants under ERISA in a number of ways, the most prominent of which are catalogued in Part III below. The cumulative effect of these decisions, however, can only be appreciated by taking them together – by considering the overall position of a plan participant under ERISA, as interpreted, relative to the participant's position had ERISA not been enacted. That task is undertaken in Parts IV and later parts of the article.

The review of ERISA case law in this article is intended only as a survey: Much more has been written on the individual issues raised below than is recounted here.[14] References are included to provide the interested reader with an embarkation point for further investigation, but the author's immediate objective is to identify these various judicial trends in one place, to convey how cumulatively devastating to employee benefit plan

14. For reviews of different ways in which ERISA has been deployed as a "shield" by employers rather than a "sword" by participants, see, for example, Joseph F. Cunningham, *ERISA: Some Thoughts on Unfulfilled Promises*, 49 ARK. L. REV. 83 (1996); Maria O'Brien Hylton, *Insecure Retirement Income, Wrongful Plan Administration and Other Employee Benefits Woes – Evaluating ERISA at Age Thirty* (Book Review), 53 BUFF. L. REV. 1193 (2005); Brendan S. Maher, *Creating a Paternalistic Market for Legal Rules Affecting the Benefit Promise*, 2009 WIS. L. REV. 657 (2009); Dana M. Muir, *Fiduciary Status as an Employer's Shield: the Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB.& EMP. L. 391 (2000); Paul O'Neil, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 OHIO ST. L. J. 723 (1994); Andrew L. Oringer, *A Regulatory Vacuum Leaves Gaping Wounds – Can Common Sense Offer a Better Way to Address the Pain of ERISA Preemption?*, 26 HOFSTRA LAB. & EMP. L. J. 409 (2009); Alexa Roberts, *ERISA's Casualties: Former Employees Duped into Early Retirement – With Friends Like ERISA Who Needs Enemies?*, 83 DENV. U. L. REV. 739 (2006); Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 133 (2009) ("[ERISA] has been interpreted by the U.S. Supreme Court over the years to be in essence an Employers' Security Act, with employers using ERISA to shield themselves against employee benefits-related claims"). Commentators have thus far not generally acknowledged, however, the possibility that these problems are so severe that the statute as a whole, with all its protective measures, could nonetheless be assessed on balance as having done more harm to plan participants than good. An exception was a sitting (senior) federal district court judge, whose frustrations in adjudicating ERISA cases led him, in 1998, to assemble portions of his previously published opinions into a remarkable essay in which he concluded that Congress had either been hypocritical or "asleep at the switch" in claiming the statute would benefit plan participants, and that "the real beneficiaries of ERISA, if any, turn out to be the fiduciaries, the administrators, the employers and the insurers." Acker, *supra* note 10, at 287, 295. Judge Acker's article focused on the inability of ERISA plaintiffs to obtain jury trials or extra-contractual damages, and was written even before many of the damaging precedents described in this article were decided. *Id.* at 294–99. Judge Posner has also characterized ERISA as essentially anti-participant. *See* Richard Posner, *How I Approach the Decision of an ERISA Case*, NYU Review of Employee Benefits and Executive Compensation (2002), *summarized in* Jayne E. Zanglein, *Circumnavigating the Serbonian Bog: The Use of ERISA Special Masters to Expedite Employee Benefit Cases*, 35 J. PENSION PLANNING & COMPLIANCE 45, 48 (2009).

participants they have now proved.

II. ERISA

For context we first recall the history of ERISA, and the promise it appeared to hold for plan participants at the time it was enacted. The initial political impetus for ERISA was provided by a single event – the loss of pension benefits by thousands of workers and retirees when Studebaker Corporation closed its remaining automotive operations in South Bend, Indiana, in December, 1963.[15] The incident focused the attention of Congress and the public (aided, eventually, by press coverage that included an NBC prime-time news report)[16] on the role employer-provided plans had come to play in providing pension and health care benefits to ordinary Americans, and the degree to which those plans were then going unregulated. In this way, Studebaker[17] provided political cover for the creation and passage of what became a much broader, far-reaching statute intended to remedy perceived shortcomings in many aspects of employee benefit plan operations[18] (much as a single bankruptcy forty years later, of Enron Corporation, would catalyze a variety of legislative reforms of corporate governance).[19]

In the new statute, Congress attempted to avoid future Studebaker incidents by creating a system of required funding and insurance of traditional, "defined benefit" pension plans.[20] The House and Senate committees also heard testimony about a number of other problems faced by benefit participants – ranging from unrealistically long periods required for new employees in order to participate and "vest" in pension plan benefits, to problems employees encountered simply in discovering from their employer the material terms of a plan, to plan "insiders" diverting

15. *See* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 51–79 (2004). Misuse of pension funds by corrupt union officials (which received significant publicity especially after the 1969 murder of United Mine Workers reformer Joseph ("Jock") Yablonski), also played a role in building political pressure for reform. Richard Ribbons, *1969 Yablonski Murders Spurred Union Reforms*, PITTSBURGH TRIBUNE-REVIEW (Dec. 27, 2009), http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_659597.html.

16. *See Pensions: The Broken Promises* (NBC Reports television broadcast Sept. 12, 1972), *available at* http://www.museum.tv/eotvsection.php?entrycode=nbcreports.

17. *See* WOOTEN, *supra* note 15, at 51–79.

18. *See* FED. CONSUMER INFO. CTR., A PREDICTABLE, SECURE PENSION FOR LIFE: DEFINED BENEFIT PENSIONS (2010), *available at* http://www.pueblo.gsa.gov/cic_text/money/secure-4life/securepension.htm.

19. Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99, 99 (2003).

20. *See* FED. CONSUMER INFO. CTR., *supra* note 18.

plan assets to their own use.[21]

In response to all these issues, ERISA ushered in a far-reaching regulatory regime for employee benefit plans.[22] This included, among other things: 1) an explicit enforcement structure involving the Internal Revenue Service, Department of Labor, and newly created Pension Benefit Guaranty Corporation; 2) requirements that plans be in writing and effectively communicated to employees, and that pension plans not impose unduly long service requirements; and 3) a set of rules governing conduct by a newly defined class of "plan fiduciaries" and other plan "parties in interest."[23] As has (ironically) been recited by courts many times since, ERISA was a "remedial" statute, in the sense that it was intended to fix problems that put plan participants at risk before the statute was created.[24]

Upon the law's enactment – it was signed in September 1974, as one of recently inaugurated President Gerald Ford's first official acts – the bill's principal driver, Senator Jacob Javits of New York, pronounced it "the greatest development in the life of the American worker since social security."[25] Ford himself said that "this Act makes a brighter future for almost all the men and women of our labor force."[26] Senator Robert Dole described the law as an "economic bill of rights" for workers.[27]

Things haven't quite worked out that way. To be sure, a generically apparent Congressional motivation to protect plan participants would be a questionable basis for courts to *create* rights not provided in the text of the

21. *See* H.R. REP. 93-533, *supra* note 7, at 4643–46, *5–7; S. REP. 93-127, *supra* note 7, at 4844–47, *7–10; WOOTEN, *supra* note 15, at 161–64.

22. Significant parts of the new regime, especially those imposing disclosure obligations on plan sponsors, incorporated and built upon an already existing federal law, the Welfare and Pension Plans Disclosure Act of 1958. *See also* FED. CONSUMER INFO. CTR., *supra* note 18, at 1; James A. Wooten, *Legislative and Political History of ERISA Preemption, Part* 3, 15 J. OF PENSION BENEFITS 15, 20 (2008), *available at* http://www.law.buffalo.edu/Faculty_And_Staff/submenu/Wooten/ERISAPreemptionPart3.pdf (explaining that significant parts of the new regime, especially those imposing disclosure obligations on plan sponsors, incorporated and built upon an already existing federal law, the Welfare and Pension Plans Disclosure Act of 1958).

23. *See generally* FED. CONSUMER INFO. CTR., *supra* note 18.

24. *See, e.g.*, Bird v. Shearson Lehman/American Exp., Inc., 871 F.2d 292, 296–97 (2d Cir. 1989).

25. WOOTEN, *supra* note 15, at 1.

26. *Statement by President Gerald R. Ford Upon Signing the Employee Retirement Income Security Act of 1974*, PENSION BENEFIT GUAR. CORP. (Sept. 2, 1974), *available at* http://www.pbgc.gov/about/signing.html.

27. *See* Hilda L. Solis, *Commentary: Anniversary of ERISA is Time to Update "Economic Bill of Rights,"* NEWJERSEYROOM.COM (Sept. 3, 2009), http://www.newjerseynewsroom.com/commentary/anniversary-of-erisa-is-time-to-update-economic-bill-of-rights.

statute. It might have been expected, however, that as to close questions – questions where the text is ambiguous, where more than one interpretation may be equally plausible – courts would have been influenced by the statute's overwhelmingly obvious purpose to be, at minimum, inclined to come down on the side of participants. They have inclined in the opposite direction.

The following Part enumerates some important ways ERISA has been interpreted by courts to restrict participant rights. Those interpretations would not be nearly the problem they are for plan participants, however, had the statute not removed from participants the right to bring any claims *not* arising under ERISA – claims, for example, that might otherwise have been brought under state law. Part III thus begins by discussing ERISA's preemption clause.

III. JUDICIAL RESTRICTION OF PARTICIPANT RIGHTS

A. PREEMPTION.

Before ERISA was enacted, employee benefit arrangements, like pensions or health insurance plans, were just contracts (and sometimes trusts), subject to the rules of state law.[28] State laws obviously differ from each other, which might raise practical problems for large employers with employees in many states. It was, as argued at the time, difficult for such a plan sponsor to predict the enforceable effect of a given plan provision in all the jurisdictions where the sponsor might have operations.[29] Thus, an issue that received specific attention in the run-up to ERISA was the idea of preemption: ERISA should "occupy the field" of employee benefits law, providing sponsors and participants with a uniform set of federal standards for interpreting and applying employee benefit plan provisions. The resulting preemption clause was called by one of ERISA's co-sponsors (at the time of enactment, before all the clause's effects had, perhaps, been fully apprehended) the statute's "crowning achievement."[30]

The ERISA preemption clause, Section 514(a),[31] says that Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The words "*relate*

28. *See Bird*, 871 F.2d at 296.

29. Oringer, *supra* note 14, at 409–10.

30. 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent); *see also* Morstein v. Nat'l Ins. Serv., Inc., 93 F.3d 715, 719 (11th Cir. 1996).

31. Employment Retirement Income Security Act § 514(a), 29 U.S.C. § 1144(a) (2006).

to" are operative. The clause has been described as "the most sweeping federal preemption statute ever enacted by Congress."[32] (The effect is ameliorated, a little, by Section 514(b), which "saves" from preemption particular types of state laws including those which regulate insurance, banking, or securities, and also any "generally applicable criminal law of a State.")[33]

By 1985 commentators had already concluded that "On the basis of the experience in the courts and Congress in the ten years since ERISA's enactment, it is clear that the inclusion of section 514(a) in ERISA was a mistake."[34] Taken on its face, the preemption provision "sweeps as broadly as the English language allows," and leaves essentially no room for judicial balancing of legitimate federal and state interests.[35]

From the standpoint of a plan participant, ERISA's preemption clause has for practical purposes indeed cleared the employee benefits field of state law.[36] Though a neutral concept on its face, the preemption clause in practice almost never comes up in a way that favors participants. Instead preemption inevitably removes the ability of the participant to invoke some remedy or argument that would otherwise have been available under state law but, because of the constricted judicial precedents, is not available under ERISA.[37]

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32. Cal. Hosp. Assn. v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983).

33. ERISA § 514(b), 29 U.S.C. § 1144(b) (2006). It can be difficult to tell, for example, whether a state law is preempted because it relates to employee benefit plans or saved because it regulates insurance.

34. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J. L. REF. 109, 110 (1985).

35. *Id.* at 110–11. Professors Irish and Cohen pointed out that key members of Congress themselves had, in 1974, been uncertain about the wisdom of the ERISA preemption clause. Senator Javitz, one of the statute's principal authors, for example, expressed hope that Congress would in the future revisit the preemption issue if necessary. *See id.* at 113. That has proved decidedly unrealistic, as the constituencies whose interests turned out to be served by the provision as it stands (for reasons suggested in this article) have consistently joined forces to block proposed moderation of ERISA's principle of absolute preemption. *See* Jonathan Barry Forman, *Where Are We Going, and Where Should We Be in Ten Years?*, 26 HOFSTRA LAB. & EMP. L. J. 475, 492 (2009); Edward A. Zelinsky, *The Paternalistic Ideology of ERISA and Unforgiving Courts: Restoring Balance though a Grand Bargain*, 26 HOFSTRA LAB. & EMP. L. J. 341, 350 (2009). See WOOTEN, *supra* note 15, at 258–60, 264–70, for a description of the byzantine, last-minute negotiations that led to the preemption clause as finally enacted.

36. *See* Stris, *supra* note 11, at 395; Forman, *supra* note 35, at 485–86.

37. *See, e.g.*, cases cited *supra* note 10. This despite the existence of evidence that Congress specifically intended the preemption provision itself to serve as a protective provision for participants. *See, e.g.*, Helfman v. GE Group Life Assur. Co., 573 F. 3d 383, 391 (6th Cir. 2009); Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1293 (5th Cir. 1989) (quoting Rep. Dent as stating, "With the preemption of the field, *we round out the protection afforded participants* by eliminating the threat of conflicting State and local regulation.") (emphasis added).

An example is the effective substitution of an "arbitrary and capricious" judicial standard for a contractual one in routine disputes over plan benefits, as discussed in the next section. Another is the unavailability to plaintiffs of punitive and other forms of damages that might otherwise be obtainable under state law, as discussed in section c. Preemption has also in some cases prevented states from taking steps on their own to address perceived flaws in the employer-based health insurance system.[38] For example, in *Aetna Health Inc. v. Davila*,[39] Texas legislation to regulate health maintenance organizations ("HMOs") was held to be preempted. That result prompted an express request by two sitting Supreme Court Justices, in a concurring opinion, for Congress to step in and reform the statute.[40]

B. DEFERENTIAL REVIEW OF PLAN ADMINISTRATORS' DECISIONS.

Where a plan sponsor has denied benefits under a plan, the judicial standard of review of that decision, as adopted by the Supreme Court in the landmark ERISA case *Firestone Tire and Rubber Co. v. Bruch*,[41] has in practice made benefits litigation an uphill battle for plan participants. In *Firestone*, the Court relied on traditional trust law principles to conclude that, if the plan document at issue contains a clause granting the plan administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," the plan administrator's interpretation of plan language is entitled to deferential review under an "arbitrary and capricious" or "abuse of discretion" standard.[42]

Since *Firestone* was decided, plan drafters (employers, and their advisors) have, predictably, generally made sure to include in every plan document a clause conferring on the administrator – often the plan sponsor itself – the discretionary authority to interpret plan terms. (It might be malpractice for an employer's lawyer to draft a plan, nowadays, *without* that clause). The Supreme Court ended its *Firestone* opinion by suggesting

38. *See* Zelinsky, *supra* note 35, at 350; Sarah L. Whipple, Note, *Piercing ERISA's Shield of Immunity: The First Step – Saving External Review Laws from ERISA Preemption –* Rush Prudential HMO, Inc. v. Moran *and the Massachusetts Act Relative to Managed Care Practices in the Insurance Industry*, 36 SUFFOLK U. L. REV. 863, 863–65 (2003); Irish & Cohen, *supra* note 34, at 111 (the results of applying the preemption clause make it "embarrassingly clear that Congress enacted ERISA while still oblivious to numerous problems related to benefit plans that the states had already recognized and addressed").

39. 542 U.S. 200, (2004).

40. *See id.* at 222 (Ginsburg, J., concurring).

41. 489 U.S. 101 (1989).

42. *See id.* at 115.

that where an administrator is operating under a conflict of interest, as where the administrator is also the sponsor, that conflict is to be weighed as one "factor" in determining whether the otherwise lenient abuse-of-discretion standard has been met.[43] Post-*Firestone* Courts of Appeals have varied in the extent to which they have allowed that factor to mitigate the burden confronting plan participants;[44] and the Supreme Court more recently failed to do much to clear up the confusion.[45]

The *Firestone* standard is highly questionable. Commentators have noted that the plan "administrator" is likely to be a directly interested economic party to the dispute, not at all like the disinterested third-party trustees who figure in the classic trust authorities relied upon by the Supreme Court.[46] In importing trust law principles into ERISA, it can be argued, Congress was concerned with administration of plan assets, not benefit claim disputes. There is, furthermore, no disincentive for a sponsor to grant itself interpretive discretion when writing the plan; practically all sponsors do take this purely formal step; and the net result has been to impose an "arbitrary and capricious" standard on, effectively, all those who seek to recover ERISA plan benefits. This result was hardly compelled by the words of the statute, and whatever Congress intended in ERISA, it seems likely not to have been this.[47]

The judicial standard applied by a court in reviewing a plan administrator's decision is, not to belabor the obvious, important. If the standard is *de novo*, a court will reverse the administrator's decision if the court disagrees with that decision on the facts. Under the *Firestone* standard, on the other hand, a court may not overturn any decision, even a wrong one, unless the administrator's decision was *so* wrong as to have been "arbitrary and capricious."[48] One commentator collected (nearly ten years ago; many, many more cases like them have been decided in the

43. *See id.*

44. *See* Langbein, *supra* note 11 at 1333–35.

45. *See* Metropolitan Life Ins. Co. v. Glenn, 550 U.S. 105, 114–18 (2008). For a description of *Glenn* and its limitations, see Maher, *supra* note 14, at 678–79.

46. See Langbein, *supra* note 11, at 1323, for an extensive critique of the Supreme Court's "disastrous misstep" in *Firestone*. *See also* Muir, *supra* note 14, at 393–94. Professor Muir marveled at the irony of the Court's having relied on trust law, of all things, effectively to limit participants' recourse; the hallmark of trust law being concern with holding fiduciaries to the highest behavioral standards. *See id.*

47. But for ERISA (as interpreted in *Firestone*), a dispute between a participant and the employer might be subject to a standard weighted *against* the employer, as the drafter of the "contract" (the plan) and hence the party against whom ambiguities must be resolved under common law. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989).

48. *See id.* at 114–15.

interim) a list including the following situations in which the *Firestone* standard has been relied upon by courts to deny participants' claims for benefits:

- "A woman whose employer-sponsored health care plan rejected, as not medically necessary, her physician's recommendation that she be hospitalized during the final phase of her pregnancy. While at home and without nursing care, she lost her unborn child."[49]
- "[R]etiring, long-service employees who were asked to sign waivers indicating that the retirees had reviewed and accepted the applicable benefits and had waived all legal claims concerning the administration of those benefits. Despite the employer's numerous promises, some of them in writing, that the retirees' 'health insurance would be paid by [the employer] for life,' the employer later imposed substantial co-pays and deductibles as part of the retirees' health care programs."[50]
- "[R]etirees whose former employer moved them, but not their peers, from that employer's retirement and health care plans to new plans. The new plans were sponsored by a recently established joint venture and some of the retirees' benefits were decreased." The criterion used by the employer to select which retirees went to the new plans was "[t]he last four digits of the retirees' social security numbers; those whose 'last four' were 4254 or lower were assigned to the new plans while those with higher numbers remained in the long-established plans."[51]

C. LIMITATIONS ON REMEDIES AND CAUSES OF ACTION.

Because ERISA effectively preempts all state claims by participants, participants must rely exclusively upon the remedies provided by ERISA

49. Muir, *supra* note 14, at 392 (citing Corcoran v. United Healthcare Inc., 965 F.2d 1321, 1322–24 (5th Cir. 1992)).

50. *Id.* (citing Sprague v. General Motors Corp., 133 F.3d 388, 394–95 (6th Cir. 1998)).

51. *Id.* at 392–93 (construing Sengpiel v. B.F. Goodrich Co., 156 F.3d 660, 663–64 (6th Cir. 1998)). In the case of group health plans, the health insurance reform legislation of 2010, formally known as the Patient Protection and Affordable Care Act, P. L. 111–148, 124 Stat. 119-1025 (2010) ("PPACA"), contains provisions intended to improve the opportunity of ERISA plan participants to appeal denials of coverage by providing for an independent state-level review procedure, analogous to that already required by many states for insured (non-preempted) plans. The standard of review required to be applied by these external review panels, however, was not made clear by PPACA. *See* ELIZABETH ABBOTT ET AL., PPACA IMPLEMENTATION: CONSUMER RECOMMENDATIONS FOR REGULATORS AND LAWMAKERS (May 2010), *available at* http://www.opic.state.tx.us/docs/652_consumer_recommendations_for_regulators_and_lawmakers.pdf (arguing for implementing regulations specifying that required PPACA external review be de novo). It is certainly not clear as of this writing that Firestone has been legislatively overturned with respect to external review. And, of course, PPACA will not have altered the Firestone standard for review of disability or other types of non-health plans.

itself. These have been severely circumscribed.

Any claim brought under an employee benefit plan that is subject to ERISA now must be brought under Section 502 of the statute itself.[52] Claims for denied benefits constitute the majority of ERISA cases litigated since the statute was enacted in 1974.[53] Prior to ERISA a claim for benefits under a plan itself, as noted above, would have sounded in contract, like a state law claim.

1. Exhaustion of Administrative Remedies.

Most federal circuits require that a participant disputing a benefits denial under a plan must first exhaust all his or her rights of appeal under the plan itself, before seeking redress in the courts.[54] This requirement is inferred from ERISA Section 503, which requires plans to include internal dispute resolution procedures and to provide specific reasons for denying a claim.[55]

2. No consequential damages.

Say an employee's claim for coverage for medical treatment under a plan is denied by the employer, and as a result the employee is forced to forgo treatment, and as a result of that suffers some medical harm. If the plan were a contract subject to state law, the employee might be able to sue for damages for the medical harm in addition to the wrongly withheld benefits. This would be a potential example of "consequential" damages, recoverable at common law if within the contemplation of the parties at the time of the contract. Courts have held that ERISA's remedial provisions do not include a claim for consequential damages.[56]

52. *See* Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132 (2009); *see also* LaRue v. DeWolff, Boberg & Assocs. Inc., 552 U.S. 248, 257–60 (2008) (Roberts, J., concurring).

53. *See* Maher, *supra* note 14, at 661–64, 669.

54. *Id.* at 673–74.

55. *See id.* at 673–76; *see also* Employee Retirement Income Security Act of 1974 § 503, 29 U.S.C. § 1133 (2006).

56. For an earlier survey and criticism of the courts' limitations on remedies under ERISA, see generally Richard Rouco, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631 (1994). *See also* Alexander v. Bosch Auto. Sys. Inc., 232 Fed. Appx. 491, 502 (6th Cir. 2007) (providing examples where plaintiffs were left without any remedy whatsoever, due to ERISA's preemption of state law and lack of an applicable remedy of its own). Courts have also, unnecessarily, interpreted ERISA to preclude plaintiffs from claiming the right to a jury trial. *See* Acker, *supra* note 10, at 295. Perhaps the most notorious recent decision involving judicially limited remedies was Amschwand v. Spherion Corp., 505 F.3d 342 (2007), *cert. denied*, 128 S. Ct. 2995 (2008), in which a widow who lost, due to employer administrative error, all the life

3. No punitive damages.

The deliberate refusal to honor a contract can, in most states, give rise to a claim for intentional infliction of emotional distress or a similar tort, and a related claim for punitive damages. These claims are now preempted for benefit plan disputes, and ERISA contains no provision for punitive damages.[57]

4. Employer allowed to set the statute of limitations.

ERISA does not specify the limitations period during which most statutory claims must be brought. In the absence of other guidance, courts have consulted the most closely analogous state statute of limitations;[58] but they have also been willing to honor limitations periods simply written into plans by employers, so long as the period is "reasonable."[59] In a number of cases, claimants' lawsuits have been dismissed because they were not brought within the two- or three-year limitations period specified under the plan document.[60] If ERISA had not existed, the relevant state's limitation period for breach of contract claims would likely have applied: In most

insurance proceeds that should have been payable upon her husband's death was denied any recovery other than a return of insurance premiums. *See* Oringer, *supra* note 14, at 421–23.

57. *See* Mertens v. Hewitt Assoc., 508 U.S. 248, 261 (1993). In addition to the limitations listed here, the courts have concluded that in general plan participants may not sue for monetary damages for breach of fiduciary duty under ERISA, because monetary damages do not represent "equitable relief" as authorized by the statute. *Id.* As pointed out by a number of courts and writers, part of the statute has thus been rendered toothless, because monetary loss is the usual consequence of a breach of fiduciary duty. The courts have thus (arguably unnecessary) expressly interpreted ERISA to provide a rule without a remedy. *See generally* Secunda, *supra* note 14, at 148–51; Kristina D. Cooksey, Comment, *ERISA – On the Edge of Equity: Can "Appropriate Equitable Relief" be Capped?*, 28 ST. L. U. PUB. L. REV. 527 (2009) (discussing recovery options under the ERISA statute); Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827 (2006). But since that fiduciary rule itself was newly provided by ERISA, this limitation in enforcing the rule cannot fairly be counted, here, among the ways in which the statute has harmed participants relative to its not having been enacted in the first place.

58. *See, e.g.*, Koert v. G.E. Group Life Assur. Co., 231 Fed. Appx. 117, 119 (3d Cir. 2007); Syed v. Hercules Inc., 214 F.3d 155, 159 (3d Cir. 2000); Hall v. National Gypsum Co., 105 F.3d 225, 230 (5th Cir. 1997).

59. *See, e.g.*, Salisbury v. Hartford Life & Acc. Ins. Co., 583 F.3d 1245, 1247 (10th Cir. 2009); Grant-Bergen v. Met. Life Ins. Co., 2009 U.S. Dist. LEXIS 93639, at *20 (D. N.J. 2009).

60. *See, e.g.*, *Salisbury*, 583 F.3d at 1247; *Grant-Bergen*, 2009 U.S. Dist. LEXIS at *20. For an extended (and employer strategy-oriented) discussion of the ability of plan sponsors unilaterally to reduce the statute of limitations for participants, see Jennifer Saba & Russell Greenblatt, *The Potential Advantage of Incorporating a Contractual Limitations Period into Welfare Benefit Plans*, 21 BEN. L. J. 59 (2008). *See generally* George Lee Flint, Jr., *ERISA: Fumbling the Limitations Period*, 84 NEB. L. REV. 313 (2005) (discussing the contractual limitations periods).

cases, these provide for periods of up to six years or even longer.[61]

In the case of an ordinary contract, state contract law also often permits parties to agree to reduce the state-law statutory limitations period, if "reasonable," but in many cases sets limits on this permission.[62] In those cases state legislatures or courts effectively conclude that although the parties may have agreed to a shorter period of limitations, the state's own statutory limitations period reflects a balancing of competing policy interests – including that of protecting claimants' rights – that may not, even by consent, be too severely distorted.[63] The possibility of any such argument is, again in striking irony, foreclosed for ERISA claimants.

The above results have been described without overstatement as having cumulatively left a "gaping wound" in the legal protection of employee benefit plan participants.[64] And those results were avoidable. Although ERISA's drafters could in many instances have been more specific,[65] the absence of specificity did not have to lead, as a matter of inevitable logic, to judicial destruction of participant rights. Concerning the exhaustion of plan remedies requirement, Brendan Maher has noted that ERISA merely requires plans to provide participants an "opportunity" for review of benefit denials by a plan fiduciary.[66] "Congress had 'good reasons' to mean exactly what it wrote . . . . By its terms, an opportunity is not a requirement."[67] Richard Rouco pointed out in 1994 that the courts could have preserved the availability of consequential and punitive damages under ERISA simply by relying on settled federal common law.[68]

61. *See* Saba & Greenblatt, *supra* note 60, at 60–68.

62. *See* Richard A. Lord, WILLISTON ON CONTRACTS § 79.10 (West, 4th ed. 2004). Some states do not permit the use of privately established limitations periods in insurance contracts, or treat such contractual clauses as disfavored and to be construed against the invoking party, or simply refuse to enforce them at all. *Id.*

63. *See id.* at 328–29, 334–35, 345–46, 365–66; *see also* Saba & Greenblatt, *supra* note 60, at 69, 72–74.

64. *See* Oringer, *supra* note 14, at 412 (quoting Cicio v. Does, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part)).

65. Some observers have put the blame for anti-participant results under ERISA mostly on Congress rather than the courts. *See generally* Acker, *supra* note 10; Irish & Cohen, *supra* note 34, at 163 (mostly blaming the statute itself, and Congress's failure to correct them, for the problems caused by preemption). One response is that there is no way to write a statute in a finite number of words that explicitly answers every possible future question. Interpretive gaps will always be left for courts to fill, and one might have supposed that, where Congress left express instructions as to the principles to be followed in filling the gaps, those instructions would not be ignored.

66. *See* Maher, *supra* note 14, at 674.

67. *Id.* at 674–75.

68. *See* Rouco, *supra* note 56, at 634; *see also* Maher, *supra* note 14, at 672–73; Secunda, *supra* note 14, at 134.

The considerations of policy that so evidently underlie ERISA should also have made courts reluctant, where a choice of several limitations periods might be available, to choose lightly to dismiss plaintiffs' claims on such procedural grounds.[69] Perhaps most damningly, Andrew Oringer has pointed to evidence Congress did, indeed, actually intend for federal judges to be activists in interpreting ERISA, but *in the opposite direction*: to "fill the gaps" left by the statute in ways that furthered the purpose of protecting plan participants.[70]

A rationale repeatedly offered by courts, including the Supreme Court, for their holdings is that to rule otherwise would be to discourage plan formation.[71] Undoubtedly it is true that availability of additional participant rights may make an employer think twice about adopting a plan. But this balance of competing interests – between protecting participant interests, on the one hand, and encouraging plan formation, on the other – is one of public policy, not of statutory interpretation. Congress already balanced those interests, and the result was ERISA. Where an employer *has*, as a matter of fact, adopted a plan, ERISA's drafters were explicit that courts' overriding concern should be with protecting the rights of participants in that plan.[72]

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69. *See* Oringer, *supra* note 14, at 435 (analyzing the courts' authority to fill statutory gaps in the context of ERISA and statute of limitations).

70. *See id.* at 429 (discussing the development of the federal common law under ERISA).

71. *See* Secunda, *supra* note 14, at 2–3 nn.8–9. See also Maher, *supra* note 14, for an extended analysis of this phenomenon, especially cases cited therein at notes 52, 67 and 107. For full-throated, employer-oriented statements of this argument, see Thomas P. Gies & Jane R. Foster, *Leaving Well Enough Alone: Reflections on the Current State of ERISA Remedial Law*, 26 HOFSTRA LAB. & EMP. L. J. 449, 467–68 (2009); Katie Day, *Can Scalia Save Employer-Provided Health Plans? An Analysis of* Metropolitan Life Insurance Co. v. Glenn, 62 TAX LAWYER 915, 932 (2009).

72. *See* Maher, *supra* note 14, at 659. Maher notes that "ERISA's animating policy judgment was that the benefit promise needed specialized protection against breach – protection that would render benefit promises less risky to the employee, but more costly in other ways." *Id.* Maher goes on to argue: "The judicial rejection of those robustness-increasing legal rules is (1) largely unconnected to strictly textual readings of ERISA, (2) in tension with Congress's animating policy assumption in enacting the statute, and (3) indulgent of unreliable judicial policy intuitions about the dangers of increasing promise cost." *Id.* at 671. The Supreme Court has at least on occasion acknowledged the point itself. *See* Metropolitan Life Ins. Co. v. Glenn, 550 U.S. 105, 113–14 (2008) ("[W]e believe [Congress' efforts not to deter employees from setting up benefit plans is] outweighed by 'Congress desire to offer employees enhanced protection for their benefits.'") (quoting Varity Corp. v. Howe, 516 U.S. 489, 497 (2008)). A factor
contributing to the string of anti-participant holdings, difficult to quantify but certainly of some effect, is that major ERISA precedents have been decided during a period in which the federal judiciary has come to be dominated by Republican appointees, who have been more receptive to the arguments of employers and hostile to those of employees.

IV. CUMULATIVE EFFECTS

Imagine a participant whose employer has denied the participant's claim for plan benefits. Together with the *Firestone* decision, the exhaustion of remedies requirement presents the participant with the following prospect if she wants to reverse the denial: First, the participant must appeal the denial to the employer itself or the employer's agent, according to procedures and under a deadline prescribed by the employer itself. The employer, let us remind ourselves, is a party whose economic interest is directly adverse to that of the participant, and who has already ruled against her.[73] If the appeal results in continued denial of the claim, the participant will finally gain access to the courts; but the courts will reverse the employer's denial only if the denial was "arbitrary and capricious." All this inferred by courts from – nowhere expressly provided by – a statute whose motivation was to protect plan participants.

Meanwhile, with no possibility for consequential or punitive damages, the employer will have had very little disincentive to deny benefits in the first place. If the employer decides not to pay, the worst potential consequence (from the employer's perspective) is that a court might later disagree, in which case all the employer will have to do is pay the claimed amount. From the employer's perspective, denying benefits is all potential economic gain with no downside risk.[74] Furthermore the parties' positions are unequal: The employer is likely in a much stronger position to bear the cost of litigation than the employee (and will also likely have more economic incentive to do so, given the possibility of similar claims by other participants).

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73. A 2002 survey concluded, not surprisingly, that in most states health insurers uphold their own initial claim denial a majority of time, at every level of internal appeal. *See* KAREN POLLITZ ET AL., ASSESSING STATE EXTERNAL REVIEW PROGRAMS AND THE EFFECTS OF PENDING FEDERAL PATIENTS' RIGHTS LEGISLATION 5 (2002), *available at* http://www.kff.org/insurance/externalreviewpart2rev.pdf.

74. See O'Neil, *supra* note 14, at 780, for a similar argument. ERISA does allow the possibility of an award to the plaintiff of attorney's fees, the risk of which could theoretically constrain the employer. *See* ERISA § 502(g), 29 U.S.C. § 1132(g) (2006). But fees may be recovered only for representation during litigation – not, for example, during the plan's administrative process – and to be eligible the plaintiff must not only to achieve "some degree of success on the merits" in the litigation but also, generally satisfy a multi-factor test that includes, for example, an assessment of the plan sponsor's "culpability or bad faith." Hardt v. Reliance Std. Life Ins., 130 S. Ct. 2149, 2158 (2010). In any event, the possibility of such an award would often have been available under ordinary principles of state common law, so can't be viewed as an additional protection provided by ERISA. The employer could also theoretically be assessed criminal penalties for refusal to pay; but those consequences are even rarer, and require scienter: Even a plausible argument that benefits are not due will likely be enough to defeat them. *See* ERISA § 501, 29 U.S.C. § 1131 (2006).

In sum, the employer's calculus in deciding whether to pay benefits under an ERISA plan is now roughly the following: On the one hand, pay the benefits. On the other hand, don't, with as consequence only the remote chance the participant will decide to incur the time, cost and effort[75] to exhaust his administrative appeals to the employer itself or its agent, and then take the case to court; and that the denial will be eventually judicially reversed as "arbitrary and capricious" – in which case the employer will merely have to pay what it would have owed in any event.

What's striking is not just that this can hardly be viewed as a regime "protective of plan participants." What's striking is that this regime is distinctly less protective than would have been the case under ordinary principles of common law, and that it was established by judges in the name of a law expressly intended to expand participant protection beyond those available under common law.

V. CAVEATS

While the individual critiques collected above are shared by many observers, the overall proposition that "ERISA actually made things worse for employees overall than had the statute never been enacted, which would have shocked ERISA's drafters" is not, really. Various objections to that proposition can be raised (and have been, by people who have discussed the subject with the author). In this section I collect some possible objections into two general groups, state them as fairly as I am able, and provide responses.

A. ERISA'S BENEFITS.

1. The Objection.

ERISA improved the position of plan participants in many ways. If an employer maintains a benefit plan, that plan must generally be reduced to writing and the resulting document made available to plan participants.[76] Historically, employees often had difficulty identifying the governing plan provisions, or even proving that a plan existed.[77] The plan sponsor is

75. Indeed, evidence suggests that participants are often too discouraged to exhaust their appeal rights after an initial adverse decision, even under circumstances where the review will be "external" and hence arguably neutral. POLLITZ ET AL., *supra* note 73.

76. *See* ERISA §§ 104(a), 402(a), 29 U.S.C. §§ 1024(a), 1102(a) (2006).

77. *See* S. REP. NO. 93-127, *supra* note 7, at 4847, 4863; *see also* H.R. REP. NO. 93-533, *supra* note 7, at 4646, 4649.

required to provide participants with simple explanations of the plan's terms, and to file regular reports with the Department of Labor.[78] Employees may not be forced to wait too long before being allowed to participate in a pension plan or "vest" in their rights to pension benefits.[79] ERISA also imposed standards on those who invest plan assets, and penalized trustees and other plan "parties in interest" who divert plan funds for their own use.[80] And, of course, the Act addressed the Studebaker problem, by providing that defined benefit pension plan sponsors must irrevocably set aside in trust amounts adequate to pay for the promised benefits, and by establishing a new federal scheme to insure those benefits.[81]

2. Response.

It must be conceded, first of all, that the argument that the statute made things worse rather than better for participants is much stronger in the case of health and welfare benefits than it is in the case of pension benefits. The position of pension claimants was not strong before ERISA; now we have federally mandated minimum vesting, accrual, etc. rules. The creation of these minimum safety nets is a benefit to participants, which in the case of pension plans at least in part – maybe in whole – offsets the detrimental consequences of the statute described above. (In the case of health and other welfare plans, on the other hand, there is no such offsetting benefit: ERISA stripped participants of state-law rights without providing meaningful substantive federal rights to replace them.)

But the magnitude of the actual benefit for plan participants of even some of the reforms listed above can be questioned. In evaluating the fiduciary provisions, for example, it has to be noted that embezzlement of plan funds was already illegal under state and previously existing federal law: The principal problem that Congress perceived, and which led to a new regime under ERISA of "prohibited transactions" and related fiduciary requirements, seems largely to have been one of uneven enforcement.[82]

78. *See* ERISA §§ 102, 103, 29 U.S.C. §§ 1022, 1023 (2006).

79. *See* ERISA §§ 202, 203, 29 U.S.C. §§ 1052, 1053 (2006).

80. *See* ERISA §§ 404–412, 29 U.S.C. §§ 1104–1112 (2006).

81. *See* ERISA §§ 4001–4402, 29 U.S.C. §§ 1301–1461 (2006).

82. *See* S. REP. NO. 93-127, *supra* note 7, at 4840–41, 4865, 4871; *see also* H.R. REP. NO. 93-533, *supra* note 7, at 4650. The legislative history of ERISA's predecessor statute, the Welfare and Pension Plans Disclosure Act of 1958, also sheds light on the availability of pre-ERISA remedies for fiscal wrongdoing, and the nature of Congress' concern with those remedies. U.S. Dept. of Labor, Legislative History of the Welfare and Pension Plans Disclosure Act of 1958, as amended by Pub. L. 87-420 of 1962, 132–38 (1962).

Although misuse of plan funds unquestionably took place before (and, in fact, after) 1975, it seems unlikely that unaddressed criminal behavior was so widespread as to produce losses to employees on the same scale as that which anti-participant federal judicial precedent is now producing under ERISA.[83]

The effect of the defined benefit plan reforms is also complicated. To be sure, ERISA precludes the possibility of recurrence of a *Studebaker*-type plan failure. Yet it has been argued that (there being no requirement that employers adopt plans in the first place) the statute's imposition of new funding, actuarial, and insurance premium costs has had the effect of inhibiting defined benefit plan formation, resulting in a net reduction in the number of retirees receiving benefits under such plans.[84] It is in any case indisputable that, for whatever reason, the number of defined benefit plans has dramatically fallen since the statute's enactment,[85] and it is not obvious that underfunding – of the much-reduced group of defined benefit plans that remains – would present as great an overall problem to employees as the judicial precedent described above.

83. ERISA's per se prohibited transaction rules – as opposed to the general fiduciary standards that would have already applied to any trustee under state law – were new. *See* ERISA § 406, 29 U.S.C. § 1106 (2006). It has been suggested, however, that those rules, by going too far and by being too categorical, have inhibited plan transactions that would have been benign and even beneficial. *See* Donald S. Grubbs, Jr., Continuing Policy Issues, in STAFF OF S. SPEC. COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE (S. Print 98–221, 1984) 156–57. Certainly the prohibited transaction regime has introduced significant administrative complexity, cost, and delay to the employee benefit system (as reflected in part, for example, by the many prohibited transaction exemptions the Department of Labor has been called upon to consider), all of which must be taken into account in assessing the overall value of that regime, whatever its success in reducing self-dealing. *But see* David A. Pratt, *Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans*, 49 BUFF. L. REV. 741, 813 (2001). And it is not hard to find cases where the prohibited transaction rules themselves don't appear to be serving any meaningful participant-protection purpose. *See, e.g.*, Zabolotny v. Comm'r, 7 F.3d 774, 775 (8th Cir. 1993).

84. See text accompanying notes 49–50, for a discussion of the illegitimacy of such reasoning as a rationale for judicial holdings. It is not, however, an illegitimate basis for evaluating the effect of the statute itself. For discussions of ERISA's role in the demise of defined benefit plans, see Hylton, *supra* note 14, at 1202. *See also* David A. Pratt, *Pension Simplification*, 35 J. MARSHALL L. REV. 565, 620–21 (2002). For quantification of the drastic reduction in the number and coverage of U.S. defined benefit plans, see James Poterba, Steven Venti, & David Wise, *The Decline of Defined Benefit Retirement Plans and Asset Flows, in* SOCIAL SECURITY POLICY IN A CHANGING ENVIRONMENT (NBER 2008). *See also* Chantel Sheaks & Michael Lawson, *Defined Contribution Plans: What does "Reform" Mean to Employers?*, BUCK CONSULTANTS REPORT, Chart 1 (2009), http://www.buckconsultants.com/buckconsultants/Portals/0/Documents/PUBLICATIONS/white_papers/WP_Retirement/wp_insight_DC_Plan_Reforms.pdf.

85. *See* Hylton, *supra* note 14, at 1202 (reviewing James A. Wooten's views as to the decline of qualified defined-benefit plans).

Even without Title IV or the rest of ERISA, pension promises would represent contractually enforceable obligations of the plan sponsor. Moreover accounting considerations might have been expected, wholly apart from legal considerations, to exert at least some pressure on employers to set aside adequate funds to pay plan benefits.[86] Furthermore, some have argued that without ERISA market constraints could have served to at least some extent to achieve a workable balance between participant vesting and funding security, on the one hand, and employer flexibility on the other.[87]

And while written plan documents are nice to have, many plaintiffs would probably accept the prospect of having to prove the contents of unwritten plan terms in return for removal of insurmountable legal obstacles to collecting on those terms.[88]

These objections are raised not to suggest that the funding, fiduciary, and disclosure reforms of ERISA were entirely ineffective, or were a bad idea. They are raised to suggest that, while it is surely true that some participants and beneficiaries have been helped by the statute, it is also plausible that more have been hurt, and that this latter effect may be larger. The statute's net effect, as interpreted, on U.S. employee benefit plan participants may be negative. It is worth marveling (and the limited aim of this article is to suggest) that this claim is even plausible. Definitive mathematical calculation of ERISA's "net effect," or even of whether the net effect's sign is positive or negative, will never be possible.[89] To do so would require quantifying things that can't be quantified, including the

86. The case of retiree medical obligations is instructive. Unlike pensions, retiree medical benefits are not subject to any legal requirement of pre-funding under ERISA. *See* David A. Pratt, *The Past, Present and Future of Retiree Health Benefits*, 3 J. HEALTH & BIOMED. L. 103, 121–34 (2007). Nonetheless generally accepted accounting principles have evolved to require employers either to set funds aside to pay such benefits or to reflect an appropriate liability on their books, a requirement that has led to increased funding of retiree medical benefits. *Id.*

87. *See generally* John H. Langbein, Susan J. Stabile & Bruce A. Wolk, PENSION AND EMPLOYEE BENEFIT LAW 75–76 (4th ed. 2006).

88. In any event the written plan requirement has, like so much of the rest of the statute, also been stood on its head by courts as an anti-participant provision, in this case to justify refusing to permit participants to enforce oral modifications of plan terms, even where those modifications can be proven. *See generally* Jeffrey A. Brauch, *ERISA at 25 – and Its Most Persistent Problem*, 48 KAN. L. REV. 285 (2000). The significance of ERISA's disclosure requirements as a participant protection mechanism is even further reduced by the fact that federal plan disclosure requirements already existed, before ERISA. *See* Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997.

89. Nevertheless, the facts that (1) so many employees must convince courts that ERISA does *not* apply to their cases, in order to win, and (2) employers go out of their way to make sure ERISA does apply for just this reason, as noted above, suggest to this author that the overall sign is in fact negative. *See supra* notes 10–11 and accompanying text.

unknown course jurisprudence would have followed in the statute's absence, as well as, as noted above, whether increased protections for pension benefits outweigh lost protections for health and other benefits, which necessitates the application of subjective value judgments.

B. ERISA'S DRAFTERS WOULDN'T HAVE BEEN SO SURPRISED BY THE RESULTS REACHED BY THE COURTS.

1. The Objection.

ERISA did not represent an unalloyed attempt by Congress to benefit employees and other plan participants. If it had, the statute could never have been enacted, politically. Features such as the preemption clause, in particular, were deliberately included in the statute to win the necessary support of business-friendly constituencies.[90] Congress was at pains throughout the development of ERISA not to discourage voluntary plan formation by employers. As a result it's not correct to characterize the results reached by the judiciary as out of step with Congress's intent. The drafters would not have been surprised by, and may have actively intended, many of these results.

2. Response.

It is true that divining "a" "legislative intent" from the complicated, collective process of a statute's enactment is always difficult.[91] Some of the members of Congress who ultimately voted for ERISA would have been less sympathetic to the position of employees, and more sympathetic to that of employers, than other members. Still it seems beyond doubt that everyone involved at the time – those who supported the statute wholeheartedly, those who opposed it, and those in the middle – thought that what they were being asked to vote on was generally characterizable as benefit plan "reform," in the sense of being, on balance, participant-protective. The statute *said,* explicitly, that its purpose was participant protection.[92] This renders, I think, the subsequent judicial approach to the statute, taken as a whole, astonishing.

90. *See* James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 3*, 15 J. PENSION BEN. 15, at 19, 21 (2008).

91. *See generally* Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

92. *See supra* notes 6–7 and accompanying text.

VI. THE UPSHOT: AN ACCOUNTING

Here is an illustrative overview of some facets of benefit plan participant protection, constructed in such a way that "Yes" means a participant's rights are stronger:

A. EFFECTS OF ERISA

	With ERISA	Without ERISA
Plan generally required to be written and made available to participants, who must also be furnished summary plan description.	Yes	No
Plan required to name the administrator and provide right of appeal.	Yes	No
Plan sponsor required to file an annual report with the Department of Labor.	Yes	No
Pension plans required to satisfy minimum vesting and participation (service) requirements.	Yes	No
Pension plans must be funded according to minimum specifications.	Yes	No
Fiduciaries of funded plans must satisfy strict anti-self-dealing rules.	Yes	No
Plan fiduciaries may not embezzle plan assets	Yes	Yes
Participant has right to sue for unpaid benefits.	Yes	Yes
Participant's failure to appeal under the employer's appeal process need not be fatal to the participant's claim.	No	Yes
Participant can sue for consequential damages.	No	Yes
Participant can sue for punitive damages.	No	Yes
State courts can review employer-established limitations period for reasonableness.	No	Yes
Participant has right to have claim tried before a jury.	No	Yes (sometimes)
Claim denial subject to judicial review under a legal standard that is at least neutral, and possibly favorable to participant.	No	Yes

Whether or not you're better off under ERISA depends, obviously, on who you are. But despite what Congress thought it was doing in 1974, it's not hard to imagine that there are plenty of plan participants for whom the "Yes's" in the right-hand column of the above chart outweigh – far outweigh – those in the left.