THE FEDERAL COMMON LAW OF ERISA

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I. INTRODUCTION

"*Lochner v. New York*." "*Roe v. Wade*." "Substantive due process." Each reminds us of bitter battles over the proper balance of power between the judicial and legislative branches. "ERISA" does not have the same effect. We do not generally look at litigation under the Employee Retirement Income Security Act of 1974 (ERISA)[1] as one of the battlegrounds over the judicial role, yet it is. Quietly and off the front page, a surprisingly large number of ERISA cases address the scope of that role.

1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered section of 5 U.S.C.A., 18 U.S.C.A., 26 U.S.C.A., and 29 U.S.C.A. (1994 & West Supp. 1998).

The area of ERISA litigation that raises this issue more than any other is the power of courts to make "federal common law." It is now accepted doctrine—although it is not expressed in the statute that Congress specifically delegated to federal courts broad power to create federal common-law rights and obligations under employee benefit plans.[2] Courts claim that in creating such rights and obligations they are merely filling gaps in ERISA. Sometimes they are. At other times, however, the only gap is between ERISA as it is written and ERISA as the courts wish it had been written.

One case can serve as an example. In *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*,[3] the Sixth Circuit created a federal common-law remedy of restitution that is not present in ERISA. Whitworth had contributed $11,000 to the Central States pension fund on behalf of two employees, mistakenly believing that they were participants in the fund. When Whitworth learned otherwise, it requested repayment of the contributions. The pension fund refused. Whitworth then filed suit. The district court found that the claim was not authorized under ERISA and dismissed the case for lack of subject-matter jurisdiction.

The Court of Appeals for the Sixth Circuit reversed, ruling that Whitworth could seek recovery of the contributions under a restitution theory.[4] In so doing, the court followed a three-prong

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2. An "employee benefit plan" can consist of an "employee welfare benefit plan," an "employee pension benefit plan," or a combination of the two. *See* 29 U.S.C. § 1002(3) (1994). An "employee welfare benefit plan" is defined as the following:

> [A]ny plan, fund, or program which . . . is . . . 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 . . . .

29 U.S.C. § 1002(1) (1994).

An "employee pension benefit plan" is defined as follows:

> [A]ny plan, fund, or program which . . . is . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . .

29 U.S.C. § 1002(2)(A) (1994).

3. 794 F.2d 221 (6th Cir. 1986).

4. *See id.* at 236.

analysis. First, it conceded that ERISA's text specifically enumerates the remedies available in 29 U.S.C. § 1132(a) and that it does not provide employers with a right of restitution. In fact, at the time, section 1132(a) did not empower employers to bring any causes of action at all.[5] The court further determined that Congress deliberately made this choice.[6] It noted that, in section 1451(a)(1),[7] Congress explicitly gave employers the right to sue. Thus, "[i]t is clear . . . that when Congress intended to provide a civil action for employers with respect to pension plans it knew how to do so."[8] Consequently, the court concluded that "Congress' failure to specifically mention the term 'employer' in [29 U.S.C. § 1132] can, therefore, be construed as meaning that Congress *intended* to exclude employers from the provisions of that section."[9]

In the second prong of its analysis, the court considered whether restitution was an implied right of action under section 1103, the only section dealing with a return of contributions. Section 1103 provides that a fund may, but is not required to, reimburse mistakenly paid contributions.[10] Ultimately, the court found no congressional intent to create an implied right of action through section 1103. Further, the court noted that, in light of the specifically enumerated causes of action in section 1132(a), "it would be inconsistent with ERISA to imply a right of action" stemming from section 1103.[11]

But this finding did not end the court's inquiry; instead, it initiated a third prong of analysis. Remarkably, having

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5. In 1993, Congress amended 29 U.S.C.A. § 1132 (1994 & West Supp. 1998) to allow employers to bring certain claims. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 4301(c)(1), 107 Stat. 312, 376 (codified as amended at 29 U.S.C. § 1132(a)(8) (1994)) (dealing with equitable actions regarding reporting requirements under 29 U.S.C.A. § 1021 (1994 and West Supp. 1998)).

6. *See Whitworth*, 794 F.2d at 228.

7. A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(1) (1994).

8. *Whitworth*, 794 F.2d at 227.

9. *Id.* at 228 (emphasis added).

10. "[I]f such contribution . . . is made by an employer to a plan . . . by mistake . . . paragraph (1) shall not prohibit the return of such contribution to the employer." 29 U.S.C § 1103(c)(2)(A)(ii) (1994).

11. *Whitworth*, 794 F.2d at 233.

determined that Congress *intended* to exclude a restitution remedy, the court found that the judiciary could create the remedy itself as a matter of federal common law. The court broadly construed its power to create federal common law, insisting that Congress intended that courts develop a federal common law regarding pension plans.[12] It found that its power to create federal common law under ERISA was extremely broad and that the creation process included several methods. These methods included looking to the "penumbra" of the statute and otherwise using "judicial inventiveness" to achieve creative solutions to ERISA problems.[13]

Not all courts have been so bold in creating the common-law remedies they find desirable. In fact, courts have chosen not to create federal common law in a number of areas.[14] In other areas, however, they have chosen to do so.[15] And, virtually all courts have accepted the proposition that Congress intentionally delegated broad authority to the judiciary to create common-law rights and obligations.[16]

This Article challenges that proposition. There is a role for federal common law, but it is much more limited than the courts have claimed. Federal common law too often has become a vehicle whereby courts supplement or even revise a statute to accomplish their own will and desires. Although it is appropriate for courts to fill true gaps in the statute—when the creation of a subsidiary or collateral rule is necessary to carry out an explicit congressional directive—federal common law is only legitimate

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12. *See id.* at 234-35.

13. *Id.* at 235.

14. *See, e.g.*, Buckley Dement, Inc. v. Travelers Plan Adm'rs of Ill., Inc., 39 F.3d 784, 790 (7th Cir. 1994) (refusing to fashion a federal common-law remedy allowing a claim against a nonfiduciary); Reich v. Rowe, 20 F.3d 25, 29-30 (1st Cir. 1994) (refusing to create a federal common-law remedy imposing duties on nonfiduciaries to refrain from participating in a fiduciary breach); Olson v. General Dynamics Corp., 960 F.2d 1418, 1423 (9th Cir. 1991) (refusing to allow state fraud claim to fill a "gap" in ERISA and instead ruling that ERISA preempts the fraud claim); McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 823 (11th Cir. 1991) (refusing to allow extracontractual damages).

15. *See, e.g.*, Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957, 966 (1st Cir. 1989) (ruling that federal courts may award restitution to overpaying employers when equitable); Chemung Canal Trust Co. v. Sovran Bank/Md., 939 F.2d 12, 16 (2d Cir. 1991) (finding that ERISA includes the traditional trust-law right to contribution); Miller v. Taylor Insulation Co., 39 F.3d 755, 758-59 (7th Cir. 1994) (finding that promissory estoppel is part of ERISA federal common law).

16. Most commentators addressing the question agree and further conclude that the courts have not gone far enough in exercising common-law powers. *See* text accompanying notes 71-78.

when it is necessary to carry out Congress's will, not when it is used to carry out the will of a particular court.[17]

Part II discusses the appropriate role for federal common law in ERISA cases. Part III evaluates current case law relating to federal common law in light of that role.

II. APPROPRIATE ROLE FOR THE FEDERAL COMMON LAW OF ERISA

A. *ERISA*

Congress enacted ERISA in 1974 after a decade of work on pension and employee benefit issues. Congress's express purpose in creating ERISA was

> [t]o protect... the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.[18]

Congress was unhappy with the existing regulation of pension plans, believing that many workers who had been promised pensions were not receiving them.[19] It also found that plans and their sponsors faced a maze of different and often conflicting state laws and regulations.[20] These laws and regulations resulted

17. This approach is consistent with that taken by the Supreme Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). In *Mertens*, the Court focused on the plain meaning of one of ERISA's remedy provisions and declined to read the provision in light of the Court's own notion of what would be an appropriate remedy. Although the case involved statutory interpretation, the Court properly noted, "The authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Id.* at 259 (citation omitted). For a more detailed discussion of *Mertens*, see *infra* text accompanying notes 134-42.

18. 29 U.S.C. § 1001(b) (1994).

19. *See* 29 U.S.C. § 1001(a) (1994); *see also* 120 CONG. REC. S29950 (daily ed. Aug. 22, 1974) (statement of Sen. Bentsen) ("Government statistics indicate that during 1972 alone more than 15,000 pension plan participants lost retirement benefits because their pension plan terminated with insufficient assets to meet all plan obligations.").

20. *See* H.R. REP. NO. 93-533, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.

in administrative inefficiencies and costs that ultimately may have hurt plan participants.[21]

Congress concluded, therefore, that uniform regulations and standards were necessary.[22] A centerpiece of ERISA is a broad clause that preempts all state laws relating to employee benefit plans, including state-created remedies.[23]

Congress replaced the preempted state laws with a comprehensive and detailed body of federal law. The policy choices Congress made in creating this body of law reflect a complex balancing of competing interests. ERISA took ten years to enact and involved hundreds of compromises to obtain the necessary support for passage.[24] Throughout, Congress strived to balance protection of individual plan participants with the minimization of plan costs and administrative burdens.[25]

ERISA creates a variety of rights, obligations, and remedies. First, it contains detailed reporting and disclosure requirements designed to give plan participants full information regarding their rights.[26] Second, ERISA contains standards governing plan fiduciaries who exercise discretionary authority over plan management or assets.[27] Third, for pension plans, ERISA contains vesting, benefit accrual, and funding standards.[28] Fourth, the statute enumerates a set of exclusively federal

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21. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-39 (1990); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10-11 (1987); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 105 n.25 (1983).

22. *See Shaw*, 463 U.S. at 98-99; 120 CONG. REC. S29933 (daily ed. Aug. 22, 1974) (statement of Sen. Williams); 120 CONG. REC. H29197 (daily ed. Aug. 20, 1974) (statement of Rep. Dent).

23. "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1994). Other provisions exempt certain laws from the application of this general preemption provision. For example, one provision, 29 U.S.C. § 1144(b)(2)(A) (1994), exempts some state laws regulating insurance, banking, or securities. Another, 29 U.S.C. § 1144(b)(4) (1994), exempts generally applicable criminal laws, and yet another, 29 U.S.C. § 1144(b)(7) (1994), exempts qualified domestic-relations orders.

24. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993); 120 CONG. REC. S29933-34 (daily ed. Aug. 22, 1974) (statement of Sen. Javits); 120 CONG. REC. S29961 (daily ed. Aug. 22, 1974) (statement of Sen. Schweiker).

25. *See* S. REP. NO. 93-127, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844; H.R. REP. NO. 93-1280, at 286 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5067; 120 CONG. REC. H29198 (daily ed. Aug. 20, 1974) (statement of Rep. Ullman).

26. *See* 29 U.S.C.A. §§ 1021-31 (1994 & West Supp. 1998).

27. *See* 29 U.S.C.A. §§ 1002(21)(A), 1109 (1994); 29 U.S.C.A. § 1104 (1994 & West Supp. 1998).

28. *See* 29 U.S.C.A. §§ 1051-61, 1081-86 (1994 & West Supp. 1998).

remedies for violations of ERISA. Section 1131 sets forth criminal penalties for anyone who willfully violates any of ERISA's reporting and disclosure requirements.[29] Section 1132(a) identifies several possible civil actions.[30] Although comprehensive and detailed, the remedies set forth do not include every remedy that Congress could have created, nor do they include all those that formerly existed under ERISA-preempted state law.[31]

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29. *See* 29 U.S.C. § 1131 (1994).

30. *See* 29 U.S.C.A. § 1132(a) (1994 & West Supp. 1998). This section provides:

> A civil action may be brought—(1) by a participant or beneficiary—(A) for the relief provided for in subsection (c) of this section, or (B) 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; (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title; (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; (6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (*l*) of this section; (7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); (8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or (9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

Id.

31. For example, the First Circuit in *Reich v. Rowe*, 20 F.3d 25 (1994), recognized that ERISA does not provide a cause of action against a nonfiduciary for participation in or assisting a fiduciary breach. *See id.* at 29-30. The court recognized that ERISA provides "less protection than existed before ERISA was enacted." *Id.* at 32; *see also* Useden v. Acker, 947 F.2d 1563, 1581 (11th Cir. 1991) (stating that a court should only incorporate a trust-law principle if ERISA's text negates the inference that Congress deliberately omitted the trust principle).

Dissatisfaction with this combination—preemption of all state laws and congressionally limited remedies—has given impetus to the creation of a broad federal common law under ERISA.

B. *The Accepted Understanding of the Role of Federal Common Law Under ERISA*

1. *The Supreme Court's Understanding*

The accepted understanding of the federal common law of ERISA is that Congress intentionally delegated to the federal courts broad power to create common-law rights and obligations that are consistent with ERISA's purposes. The Supreme Court developed this understanding in a series of cases decided in the 1980s.

The Court's first, albeit brief, discussion of federal common law under ERISA came in 1983 in *Franchise Tax Board v. Construction Laborers Vacation Trust.*[32] In that case, the Franchise Tax Board sued the Construction Laborers Vacation Trust (CLVT) in California state court, alleging that CLVT violated California state tax law by failing to comply with three tax levies.[33] CLVT was a trust established by construction industry employers and a labor union in order to administer a collectively bargained agreement to provide workers with a yearly paid vacation.[34] As a legal matter, CLVT was an employee benefit plan governed by ERISA.[35] CLVT insisted that ERISA preempted the California law at issue because the California law "related to" an employee benefit plan. Consequently, CLVT sought to remove the case to federal court on the ground that the suit arose under ERISA itself. Because a suit by state tax authorities does not arise under any explicit provision of ERISA, CLVT argued that the suit arose under ERISA as a matter of federal common law.[36] The Supreme Court disagreed and held that the removal was improper.[37]

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32. 463 U.S. 1 (1983).
33. *See id.* at 5.
34. *See id.* at 4.
35. *See id.* at 5.
36. *See id.* at 24.
37. *See Construction Laborers*, 463 U.S. at 28.

Although it rejected CLVT's claim, the Supreme Court noted—in a footnote—that federal courts have the power to develop federal common law under ERISA. The Court based this assertion upon a statement by Senator Javits, one of ERISA's sponsors: "ERISA's legislative history indicates that, in light of the act's virtually unique preemption provision 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.'"[38] The Javits statement has become the single most important, and undoubtedly most cited, source for the asserted authority to create federal common law under ERISA.

In 1985, Justice Brennan discussed federal common law in his concurrence in *Massachusetts Mutual Life Insurance Co. v. Russell.*[39] In *Russell,* the Court found that 29 U.S.C. § 1109(a)—a section of ERISA dealing with the personal liability of plan fiduciaries for breach of fiduciary duty—does not permit a plan participant to recover extra-contractual damages caused by a fiduciary's improper or untimely processing of benefit claims.[40] Although Justice Brennan agreed with the majority that section 1109(a) ultimately did not provide the relief sought by Russell, he criticized the majority's analysis of ERISA's text and legislative history, arguing that the majority's analysis went further than necessary in implying that such extra-contractual relief was not available under *any* statutory section.[41] Justice Brennan stated that such a recovery might indeed constitute "appropriate equitable relief" under one of ERISA's remedial provisions, section 1132(a)(3), if courts properly turned to federal common law.[42]

Justice Brennan relied on two statements from the legislative history to support his theory that courts had the authority to

38. *Id.* at 24 n.26 (quoting 120 CONG. REC. S29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits)). Sen. Javits's full statement was: "It is also intended that a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 CONG. REC. S29942, (daily ed. Aug. 22, 1974) (statement of Sen. Javits).

39. 473 U.S. 134 (1985).

40. *See id.* at 148.

41. *See id.* at 150-51 (Brennan, J., concurring).

42. "The legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning the additional 'appropriate equitable relief.'" *Id.* at 156 (Brennan, J., concurring) (quoting 29 U.S.C.A. § 1132(a) (1994 & West Supp. 1998)).

create federal common law. The first was the statement of Senator Javits discussed above.[43] The second was a statement by Senator Williams, another Senate sponsor of ERISA, in which Williams compared ERISA to the Labor Management Relations Act of 1947[44] (LMRA). As Justice Brennan described it, Williams "emphasized that suits involving beneficiaries' rights 'will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act.'"[45] In a footnote, Justice Brennan also referred to a committee report containing language nearly identical to the Williams statement.[46]

Due to the importance federal courts have now placed on the similarity between ERISA and LMRA, a word regarding the latter is necessary. On its face, section 301 of the LMRA states that federal courts have jurisdiction over suits between unions and employers over collective-bargaining agreements.[47] In *Textile Workers Union v. Lincoln Mills,*[48] the Supreme Court interpreted this section as federalizing the law relating to

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43. *See id.* (Brennan, J., concurring) (citing 120 CONG. REC. 29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits)).

44. 29 U.S.C. §§ 141-97 (1994).

45. *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 156 (1985) (Brennan, J., concurring) (quoting 120 CONG. REC. S29933 (daily ed. Aug. 22, 1974) (statement of Sen. Williams)).

46. *See id.* at 156 n.14 (quoting H.R. REP. NO. 93-1280, at 327 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107). The report states in relevant part:

> The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under title I. However, with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.

H.R. REP. NO. 93-1280, at 327 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107).

47. *See* 29 U.S.C. § 185(a) (1994). Section 301(a) of the LMRA states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

48. 353 U.S. 448 (1957).

collective-bargaining agreements.[49] The Court determined both that section 301 preempts state law and that it directs federal courts to fashion federal common law to replace the state law. Because the statute contains little substantive law for federal courts to use, the Supreme Court determined that Congress broadly authorized courts to create federal common law.[50] In so doing, the Court noted that courts should look to other sections of the LMRA to solve

> problems . . . [that] lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[51]

In *Russell*, Justice Brennan interpreted Williams's statement to mean not only that ERISA and the LMRA are alike in that they both preempt state law but also that both broadly delegate authority to federal courts to create federal common law to take its place.[52] Senator Williams's comparison between ERISA and the LMRA has become one of the most significant sources of support for those who claim Congress intentionally delegated broad common-law powers to the judiciary in employee benefit matters.

The Supreme Court next dealt with ERISA's federal common law in *Pilot Life Insurance Co. v. Dedeaux*.[53] In *Pilot Life*, the Supreme Court found that ERISA preempted a state-law suit for improper claims processing by an employee benefit plan governed by ERISA.[54] In reaching its decision, the Court concluded that Congress had modeled preemption under ERISA after preemption under the LMRA.[55] For support, the Court referred both to the Williams statement and to the committee report cited by Justice Brennan in his *Russell*

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49. *See id.* at 456.

50. *See id.*

51. *Id.* at 457 (citation omitted).

52. *See Massachusetts Mut. Ins. Co. v. Russell*, 473 U.S. 134, 156-57 (1985) (Brennan, J., concurring).

53. 481 U.S. 41 (1987).

54. *See id.* at 57.

55. *See id.* at 54.

concurrence.[56] The Court found the discussion of federal common law to be relevant to the preemption determination. Pointing to the Javits statement, the Court concluded: "The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's section 502(a) to section 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under section 502(a) could be supplemented or supplanted by varying state laws."[57]

In summarizing the Javits statement, the Court subtly changed it in a way that significantly expands the power of courts to create common law. Senator Javits had asserted that courts should develop a body of law "to deal with issues *involving* rights and obligations" under plans.[58] The Court took this to mean that federal courts could *develop* rights and obligations themselves under the federal common law. This seemingly small shift in language has provided a springboard for later courts to use federal common law to add rights, obligations, and remedies in addition to those chosen and created by Congress.

The Court consolidated its new, broader understanding of the breadth of the federal common law in *Firestone Tire & Rubber Co. v. Bruch*.[59] Interestingly, *Bruch* is the only case in the series of four 1980s cases in which the Supreme Court actually created federal common law.[60] To justify its action, the Court simply asserted it had authority to create federal common law by quoting *Pilot Life*: "[W]e have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"[61] For support, the court referred to the Javits

56. *See id.* at 55-56 (citing 120 CONG. REC. S29933 (daily ed. Aug. 22, 1974) (remarks of Sen. Williams); H.R. REP. NO. 93-1280, at 327 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107). Justice Brennan quoted Senator Williams's statement in *Russell*, 473 U.S. at 156 (Brennan, J., concurring) (quoting 120 CONG. REC. S29933 (daily ed. Aug. 22, 1974) (statement of Sen. Williams)).

57. *Pilot Life*, 481 U.S. at 56.

58. 120 CONG. REC. S29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits) (emphasis added).

59. 489 U.S. 101 (1989).

60. *See infra* text accompanying notes 144-50.

61. *Bruch*, 489 U.S. at 110 (quoting *Pilot Life*, 481 U.S. at 56). The Court did not need to make such an expansive statement. *Bruch*'s holding represents a limited use of federal common law.

statement and the fact that "ERISA abounds with the language and terminology of trust law."[62]

In summary, the Supreme Court has declared that Congress intentionally delegated to courts the ability to create federal common-law rights and obligations (not merely law "involving" congressionally created rights and obligations) relating to employee benefits.[63] The primary source of this delegation is asserted to be twofold. First, one of ERISA's Senate sponsors stated that a body of substantive law was to develop. Second, in ERISA's legislative history, Congress compared ERISA's remedies section, 29 U.S.C. § 1132(a), with section 301 of the Labor Management Relations Act, an act which itself has been interpreted to delegate broad common law powers to the federal courts.[64]

2. *The Lower Federal Courts' Understanding*

Lower federal courts do not question that they have been delegated broad authority to create federal common-law rights and obligations. They have not, however, agreed on the precise scope of that authority, nor have they elected to exercise it in all cases. Some, for prudential reasons, have declined to create federal common law in certain areas.[65] Others have created

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62. *Id.*

63. The Court has cautioned that "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." Mertens v. Hewitt Assocs., 508 U.S. 248, 259 (1993) (citation omitted). For a more detailed discussion of *Mertens*, see *infra* text accompanying notes 134-42.

64. One commentator has suggested another way that ERISA's legislative history supports a broad federal common law. Jayne Zanglein argues that a 1989 House Budget Committee report approves the creation of federal common-law remedies not enumerated in ERISA. *See* Jayne E. Zanglein, *Closing the Gap: Safeguarding Participants' Rights By Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 678-79 (1994) (citing H.R. REP. NO. 101-247, at 56 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1948). It has long been recognized, however, that legislative history subsequent to a bill's passage merits little or no weight. *See* Weinberger v. Rossi, 456 U.S. 25, 35 (1982); *see also* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.16 (5th ed. 1994). The intent of one Congress does not represent that of another fifteen years earlier.

65. *See, e.g.*, Buckley Dement v. Travelers Plan Adm'rs, 39 F.3d 784 (7th Cir. 1994). In *Buckley Dement*, the Seventh Circuit refused to create a common-law action for negligence, breach of contract, and breach of fiduciary duty. *See id.* at 790. It stated that federal courts "are charged with the responsibility" to create common law. *Id.* at 789 (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983) (quoting 120 CONG. REC. S29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits))). The court concluded, however, that creating remedies was not an appropriate use of that authority. *See id.* Other cases follow this same approach. *See generally* Reich v. Rowe, 20 F.3d 25, 30 (1st Cir. 1994) (refusing to create a federal common-law claim for non-fiduciary participation in a fiduciary breach); Olson v. General Dynamics Corp., 960

federal common law but in such a way as to enforce congressionally chosen rights, obligations, and remedies rather than to create new rights, obligations, and remedies.[66] Still others have read the authority to create federal common law quite broadly.

An example of this broad reading is the First Circuit's decision in *Kwatcher v. Massachusetts Service Employees Pension Fund.*[67] After reviewing ERISA's preemption clause and the Supreme Court's decision in *Pilot Life*, the court concluded that "Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under section 301 of the LMRA."[68] The First Circuit found both statutes to reflect the "labor-law model," a model which "signals flexibility."[69] The court went on to quote *Lincoln Mills* and assert that under ERISA, as under the LMRA, courts should look to the "penumbra" of the statute and use a "range of judicial inventiveness" to fashion federal common-law solutions to employee benefits problems.[70]

F.2d 1418, 1423 (9th Cir. 1991) (refusing to create a federal common-law fraud claim); McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 823 (11th Cir. 1991) (refusing to create a federal common-law claim for misrepresentation and bad faith).

Courts have set forth a variety of limits as to when federal common law is appropriate. The Fourth Circuit has declared that federal common law is generally inappropriate in three instances: when the use of common law could (1) conflict with the statutory provisions of ERISA; (2) cause a disincentive for employers to create a plan; or (3) threaten to override the explicit terms of an established plan. *See* Singer v. Black & Decker Corp., 964 F.2d 1449, 1452 (4th Cir. 1992). The Eleventh Circuit has said that common law may be created where (1) ERISA does not expressly address the issue before the court; and (2) the state law (to be incorporated as part of federal common law) is consistent with the policies of ERISA. *See* Nachwalter v. Christie, 805 F.2d 956, 959-60 (11th Cir. 1986). The most commonly stated limit is that the federal common law must be consistent with congressional intent. *See, e.g.*, Jamail, Inc. v. Carpenters Dist. Council, 954 F.2d 299, 304 (5th Cir. 1992); Davidowitz v. Delta Dental Plan of California, Inc., 946 F.2d 1476, 1480 (9th Cir. 1991). Other courts state that the common law at least must not be inconsistent with congressional intent. *See, e.g.*, Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1451 (5th Cir. 1995); Thomason v. Aetna Life Ins. Co., 9 F.3d 645, 647 (7th Cir. 1993).

66. *See, e.g.*, Richardson v. Pension Plan of Bethlehem Steel, 67 F.3d 1462, 1465-66 (9th Cir. 1995) (utilizing federal common-law principles of plan interpretation); Hughes v. Boston Mut. Life Ins. Co., 26 F.3d 264, 268 (1st Cir. 1994) (same); Ramsey v. Colonial Life Ins. Co. of America, 12 F.3d 472, 479 (5th Cir. 1994) (same); *see also infra* text accompanying notes 143-81.

67. 879 F.2d 957 (1st Cir. 1989).

68. *Id.* at 966.

69. *Id.*

70. *Id.*

Although lower courts differ on its precise scope, all agree that ERISA delegates broad authority to create common-law rights and obligations. Most cases merely concern whether a particular principle or doctrine should be accepted as part of the federal common law.

3. *The Commentators' Understanding*

Most commentators, too, unquestioningly accept the proposition that Congress delegated broad common-law powers to federal courts to create rights and obligations under ERISA.[71] In fact, the only complaint commentators sometimes make regarding the federal common law of ERISA is that the judiciary has not sufficiently utilized it. Catherine Fisk, for example, has chastised the courts for "not recognizing the large role Congress intended for common law."[72] She argues that courts should be more active in recognizing federal common-law remedies like estoppel and unjust enrichment.[73] William Carr and Robert Liebross criticize courts for having "resisted applying common law principles of equity in deciding cases posing clear questions of right and wrong."[74] Jayne Zanglein similarly complains that "courts have been slow to develop a federal common law of ERISA."[75]

Commentators set forth a rationale beyond those expressed by the Supreme Court to justify the exercise of broad common-law powers: courts must act because Congress has failed to act. According to this rationale, Congress either has not acted or cannot act to correct problems with the statute or to address

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71. See, e.g., William K. Carr & Robert L. Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 1992-93 STAN. L. & POL'Y REV. 221, 222, 224. Carr and Liebross argue that

> Congress delegated to the courts the job of creating a federal common law to fill in the gaps and resolve issues that were not addressed by the Act.... In ERISA, Congress commanded that the equitable character of employee benefit plans be assured and that the courts create a federal common law of rights and obligations under employee benefit plans.

Id.; see also, e.g., Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 FLA. L. REV. 355, 436 (1994) ("It is undisputed that Congress' intention was that the federal courts should develop common law in this area.").

72. Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 154-55 (1995).

73. *See id.* at 233.

74. Carr & Liebross, *supra* note 71, at 224-25.

75. Zanglein, *supra* note 64, at 679.

new issues; therefore, the courts must act. Fisk, for example, argues that when Congress first passed ERISA, it did so knowing that the statutory scheme was provisional and would be amended and revised. Unfortunately, the country's faith in governmental solutions wavered, and Congress never made the additions and revisions:

> [T]he legislative history suggests there was consensus that ERISA's particular provisions were provisional and experimental. By the late 1970s and early 1980s, however, the skeptics came to the fore. As confidence in federal regulation plummeted, the construction of the new welfare state drew to a halt. What had been provisional became permanent. ERISA had swept away existing state common law regulation of benefits and preempted any further state legislative or judicial efforts to regulate in the field, but had put little in the place of what was dismantled.[76]

Fisk proposes that because Congress either cannot or will not act, the courts must complete the project as a matter of common law.[77]

Zanglein similarly argues that "courts must seize the opportunity to fill in ERISA's gaps with federal common law. Absent further congressional enactments, federal courts are the only protectors of participants who have been 'betrayed without remedy.'"[78]

Each of the commentators urging a larger role for federal common law agree that because Congress will not make further policy choices regarding employee benefits, courts have a duty to make their own policy choices as a matter of federal common law.

4. *Critique of the Accepted Understanding*

The accepted understanding—that Congress specifically delegated broad common-law powers to federal courts to create new rights and obligations—is simply not true. To the extent Congress can delegate federal common-law powers to courts, it must clearly intend to do so, and the legislative provision that gives rise to the delegation must frame or limit with reasonable

76. Fisk, *supra* note 72, at 163-64.

77. *See id.* at 167-70.

78. Zanglein, *supra* note 64, at 723 (quoting Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989)).

specificity the scope of the delegated authority.[79] This is certainly not the case here. An analysis of the Javits statement and the LMRA comparison, the primary justifications for delegation, indicates that such authority is not present under ERISA.

First, the Javits statement does not amount to a congressional intent to delegate. Although Javits did sponsor ERISA, he is a single legislator. Courts generally give little weight to statements by individual legislators regarding legislative intent.[80] Courts consider with great caution even the statements of a bill's sponsor.[81] The Supreme Court often has noted that "the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."[82] It is difficult to gauge the intent of an entire body by looking at the words of one speaker, particularly when those words do not find their way into the statute, much less a committee report. Congress did not vote to approve such words, nor has the President signed them. In the course of debate, a speaker may often make gratuitous remarks that reflect solely that speaker's opinion and that Congress does not consider. Likewise, a speaker's "statements may sacrifice complete candor to partisan interest in enactment of the bill."[83]

More importantly, even to the extent a sponsor's statement is considered at all, it ought to be considered in light of the statutory language and other legislative history.[84] Where the statement is isolated and is not supported elsewhere in the text or history, it should be given little or no weight, especially when

79. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 41 (1985); *see generally* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An 'Institutionalist' Perspective*, 83 NW. U. L. REV. 761 (1989) (arguing that the creation of federal common law represents an illegitimate exercise of the policymaking prerogative delegated to Congress); Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573 (1985) (asserting that the judicial lawmaking power is a necessary by-product of deciding cases); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980) (discussing the lessons the *Erie* decision holds for problems concerning other sources of federal jurisdiction).

80. *See* SINGER, *supra* note 64, § 48.16.

81. *See id.*

82. Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); *see also* Brock v. Pierce County, 476 U.S. 253, 263 (1986) (same); Weinberger v. Rossi, 456 U.S. 25, 35 (1982) (same); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (same).

83. SINGER, *supra* note 64, at § 48.16.

84. *See Brock*, 476 U.S. at 263; *Weinberger*, 456 U.S. at 35.

its acceptance as Congress's intent would have a dramatic impact.

An excellent example of this principle is *Weinberger v. Rossi*.[85] In *Rossi*, the Court was asked to interpret part of a statute prohibiting[86] prohibits employment discrimination against U.S. citizens on military bases overseas unless permitted by "treaty." At the time of passage, thirteen executive agreements provided for preferential hiring of local nationals on U.S. military bases overseas. These agreements were not sent to the Senate for advice and consent, as required for "Treaties."[87] Mr. Rossi and others sued, arguing that one of the executive agreements violated the statute.[88]

In resolving the case, the Court had to determine whether "treaty" in the statutory provision referred only to "treaties" as defined in Article II, section 2[89] of the U.S. Constitution or whether the term encompassed the thirteen executive agreements, as well. The Court of Appeals noted a statement by Senator Hughes, a sponsor of the statute during its consideration, complaining that enlisted persons were denied an opportunity to work on overseas bases "by agreement" with the countries involved.[90]

The Court refused to interpret this isolated statement as evidence that Congress intended the provision to cover executive agreements.[91] Rather, the Court found that the statement was not a clear statement of intent. It added that, "it suffices to say that one isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent to abrogate provisions in 13 international agreements."[92]

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85. 456 U.S. 25 (1982).

86. *See* note following 5 U.S.C. § 7201 (1994).

87. "[The President] shall have power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2, cl. 2.

88. *See Weinberger*, 456 U.S. at 28.

89. *See supra* note 87.

90. *See id.* at 34 (citing 117 CONG. REC. S16126 (daily ed. May 20, 1971) (statement of Sen. Hughes).

91. *See id.* at 34-35.

92. *Id.*

The Court in *Pilot Life* should have applied the same reasoning it applied in executive agreement abrogation and refused to give the Javits statement weight. Senator Javits's remark constitutes a single sentence from a short discussion on the breadth of preemption at the end of a lengthy address regarding ERISA.[93] Outside of this statement, Javits neither mentioned the content of this substantive law nor its drafting. Significantly, neither the statute nor any of the many committee reports refer to federal common law. Javits's statement stands alone.

Moreover, Javits's statement, like that in *Rossi*, is not unambiguous. Even if the statement reflects the intent of Congress, it does not circumscribe the alleged delegation of authority. Javits stated that a body of substantive law would develop "to deal with issues involving rights and obligations under private welfare and pension plans."[94] Facially, the statement only refers to law dealing with issues "involving" rights and obligations—most likely those rights and obligations already created by Congress. But the Supreme Court in *Pilot Life* interpreted this statement as meaning that courts can create *new* rights and obligations.[95] The new interpretation has driven a significant increase in judicial power in this area, a dramatic change that should not rest on a single legislator's isolated remark.

In sum, the Javits statement does not support the accepted understanding. Even if it were conclusive evidence of Congress's intent, it does not grant the breadth of authority claimed by federal courts.

Perhaps recognizing this, the Supreme Court has looked to the LMRA analogy to bolster the notion of a broad delegation of common-law authority.[96] Regarding the LMRA, the legislative history is much clearer. Not only did Senator Williams state that there are similarities between ERISA and the LMRA,[97] but the

93. *See* 120 CONG. REC. S29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits).
94. *Id.*
95. *See supra* text accompanying notes 57-58.
96. *See supra* text accompanying notes 55-57.
97. *See* 120 CONG. REC. S29933 (daily ed. Aug. 22, 1974) (statement of Sen. Williams).

courts may also look to a committee report,[98] a more reliable form of legislative history.

The problem, however, is that neither the statement nor the committee report refer to federal common law. The properly recognized similarity between the LMRA and ERISA is the breadth of their preemption of state law. The relevant report reads in context:

> [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.[99]

This passage indicates that ERISA actions for benefits may be brought either in state or federal court, and, in either forum, federal law will govern, as under the LMRA. Under both ERISA and LMRA, all state laws are preempted. The passage does not declare, or even imply, that the federal law in both will originate in the same source. It does not state that the substantive rights, obligations, or remedies will be the same. And it certainly does not state that courts have the same powers to create federal common law under both statutes.

The First Circuit in *Kwatcher* is simply wrong in asserting that, because both statutes deal with labor issues, there is a "labor-law model" that requires federal courts to exercise broad and flexible common-law powers.[100] Although ERISA and the LMRA both involve aspects of labor law and both have broad preemptive effects, they are very different in almost every other way. The key portion of section 301 of the LMRA consists of a single statement.[101] This statement has been interpreted to

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98. *See* H.R. REP. NO. 93-1280, at 327 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107.

99. *Id.*

100. *See* Kwatcher v. Massachusetts Serv. Employee Pension Fund, 879 F.2d 957, 966 (1st Cir. 1989).

101. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1994).

provide that rights and obligations under collective bargaining agreements are a matter of federal law.[102] Indeed, section 301 makes the need for federal common law obvious, because it does not set forth any such rights and obligations or remedies to enforce said rights and obligations.

ERISA, too, preempts state law and reserves issues relating to employee benefit plans to federal law.[103] Unlike the LMRA, in ERISA, Congress replaced the preempted state law with a vast, comprehensive body of law that spells out rights, obligations, and remedies. The Supreme Court has referred to "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'"[104] There is simply not the same necessity, or even room, for courts to create rights and obligations under federal common law. In ERISA, Congress has already done so.

In sum, the evidence of an intentional delegation of broad common-law authority to create rights and obligations is extremely weak. In thousands of pages of legislative history, there is one relevant reference, consisting of one sentence from a single senator. Even if this statement could constitute delegation, the statement does not contain the breadth of delegation claimed.

Like the courts, most commentators wrongly conclude that, in ERISA, Congress delegated broad common-law authority to create rights and obligations under employee benefit plans. These commentators also misunderstand the statute itself. ERISA nowhere expresses the idea that its statutory scheme is incomplete or provisional. Rather, the statute expresses the opposite. ERISA's "Congressional findings and declaration of policy" lists a number of problems that plagued employee benefits law prior to ERISA.[105] The section states that the statute deals with those matters by requiring disclosure and reporting, regulating fiduciary conduct, providing "appropriate" remedies, and imposing on pension plans vesting, funding, and plan

102. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

103. *See* 29 U.S.C. § 1144(a) (1994).

104. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

105. 29 U.S.C. § 1001(a) (1994).

termination insurance requirements.[106] ERISA sets out a detailed and comprehensive body of law in each of these areas.

Certainly some senators and representatives may have wanted ERISA to do more, but compromise is the very nature of the legislative process. Some want more; others want less; and the final product represents only those measures about which a majority could agree. As enacted, ERISA contains only provisions that could receive a majority vote from senators and representatives with differing concerns and interests. ERISA resulted from numerous balances and compromises, and this fact does not render it incomplete or provisional.

Similarly, the proposition that courts must revise ERISA due to Congress's failure to do so lacks basis. Courts are not justified in creating rights, obligations, and remedies found nowhere in the law simply because "something must be done." If something must be done, Congress must do it. Past congressional inaction is not a source of judicial lawmaking power.

C. *A Proper Understanding of the Role for a Federal Common Law Under ERISA*

Neither ERISA nor its legislative history indicate that Congress intentionally delegated authority to create federal common-law rights and obligations to the judiciary. There is, however, still a role for federal common law. In order to understand this role, we must examine two principles that ERISA cases often ignore: (1) the separation of powers; and (2) the strong congressional desire for a uniform body of federal law governing employee benefits.

1. *Separation of Powers*

The separation of powers among the various branches of government was, along with federalism, one of the fundamental achievements of the Constitution. The Framers worried about consolidating too much power in the hands of any governmental body or official.[107] They, therefore, purposely divided that power among the different branches. In Article I, Congress was given

106. *See* 29 U.S.C. § 1001(b), § 1001(c) (1994).

107. *See generally* THE FEDERALIST NO. 51 (James Madison).

the power to legislate[108]—the authority to exercise its will in enacting national policy choices. Federal courts, by contrast, were given the judicial power.[109] Rather than exercising their own will in making policy choices, courts should interpret the law and effectuate the will of the political branches. In *The Federalist Papers*, Alexander Hamilton assuaged this concern that federal courts would "exercise WILL instead of JUDGMENT" or engage in "the substitution of their pleasure to that of the legislative body."[110]

The Supreme Court has long recognized that the formation of national policy belongs to the political branches, not to the courts.[111] "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."[112] In *Tennessee Valley Authority v. Hill*,[113] the Court affirmed an injunction halting construction of the Tellico Dam project in Tennessee because of its impact on the snail darter, an endangered species.[114] The court first concluded that in the Endangered Species Act,[115] Congress chose to protect endangered species despite the possibility of extraordinary costs.[116] It then stated that its own task was to facilitate this choice:

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), it is

108. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

109. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

110. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

111. *See, e.g.*, Bank v. Sherman, 101 U.S. 403, 406 (1879) ("It is our business to execute the law as we find it, and not to make or modify it."); The Apollon, 22 U.S. (9 Wheat.) 362, 366 (1824) ("We cannot enter into political considerations, on points of national policy . . . .").

112. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984).

113. 437 U.S. 153 (1978).

114. *See id.* at 195.

115. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at scattered sections of 7 U.S.C.A. and 16 U.S.C.A. (1994 and West Supp. 1998)).

116. *See Hill*, 437 U.S. at 194.

> equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.[117]

Responding to the notion that the policy choice in the Endangered Species Act was unwise and that the Court should itself devise a reasonable, less expensive solution, the Court noted:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
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> . . . [T]he separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal."[118]

The doctrine of the separation of powers requires that courts must respect the policy choices made by the political branches. "[O]nce Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution."[119]

There are strong prudential principles underlying the separation of powers that mandate that we reserve lawmaking to Congress and require the judiciary to subsume its will to that of Congress in making policy choices. The first is the principle of "electoral accountability: the principle that public policy should be made by officials who are answerable to the people through periodic elections."[120] If legislators make imprudent policy choices, citizens can turn them out of office at the next election.

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117. *Id.*

118. *Id.* at 194-95.

119. Illinois v. Illinois Outboard Marine Corp., 680 F.2d 473, 478 (7th Cir. 1982); *see also* Redish, *supra* note 79, at 764 ("Short of a finding of constitutional invalidity, it is democratically illegitimate for an unrepresentative judiciary to overrule, circumvent, or ignore policy choices made by the majoritarian branches.").

120. Merrill, *supra* note 79, at 24.

But, if federal judges with lifetime appointments make imprudent policy choices, citizens have no recourse outside of impeachment. There exists a problem of legitimacy when politically insulated officials make political choices. Thus, the Supreme Court has properly instructed that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[121]

A second prudential principle underlying the separation of powers relates to judicial competence to make fundamental policy decisions. Congress can conduct investigations and hearings and consider the short- and long-range effects of policy choices on a national scale. It can also balance competing interests through legislative compromise. Courts are not similarly situated. They have before them individual parties to a specific dispute. They cannot realistically assess the effect a decision will have nationwide. They must resolve the conflict between the parties before it. Further, there is no room for compromise; most issues in a lawsuit are winner-take-all. For these reasons, the courts are fundamentally unsuited to making complex national policy choices. The Supreme Court properly has noted that

> [t]he choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.[122]

These concerns have particular relevance to ERISA. ERISA is a complex statute that took ten years to create.[123] It involved numerous hearings and committee sessions and hundreds of

121. Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984).

122. Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980).

123. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) (stating that ERISA is "the product of a decade of congressional study of the Nation's private employee benefit system"); 120 CONG. REC. S29933-34 (daily ed. Aug. 22, 1974) (statement of Sen. Javits).

compromises.[124] It is the product of a complicated balancing of interests. The Supreme Court has rightly stated that ERISA "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs."[125] Congress clearly intended to protect the interest of plan participants in obtaining plan benefits[126] and insisted that the statute minimize plan costs. Thus, Congress acted carefully to insure that administrative burdens and costs imposed on employee benefit plans were not so great as to deter their creation or maintenance.[127]

To accomplish this balance, Congress made very specific policy choices about which rights and obligations it would create. It also chose particular remedies to enforce those rights and obligations. Congress did much more than declare that there should be a federal law regarding employee benefits; it set forth that law in significant detail.

Under a separation-of-powers regime, federal courts must not substitute their will for the will of Congress by adding rights, obligations, or remedies to those chosen by Congress. They must not alter, supplement, or "improve" the balance achieved by Congress. Rather, the courts' role should be to effectuate and enforce that balance.[128]

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124. *See* 120 CONG. REC. S29961 (daily ed. Aug. 22, 1974) (statement of Sen. Schweiker) ("The legislative process has worked; there have been dozens, in fact hundreds, of compromises.").

125. *Mertens*, 508 U.S. at 262.

126. *See* 29 U.S.C. § 1001(b) (1994).

127. *See* S. REP. NO. 93-127, at 12-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844. In recognition of this history, some courts have described the outcome of the legislative process as the ERISA "bargain." *See* Williams v. Caterpillar, Inc., 720 F. Supp. 148, 152 (N.D. Cal. 1989) ("Congress has decided [employees] are better off for the bargain."); *see also* Memorial Hosp. System v. Northbrook Life Ins., 904 F.2d 236, 249 (5th Cir. 1990) (stating that "health care providers . . . were not a party to this bargain"); Lordmann Enters., Inc. v. Equicor, Inc., 32 F.3d 1529, 1533-34 (11th Cir. 1994) (using the language of *Memorial*); Rehabilitation Inst. v. Group Adm'rs Ltd., 844 F. Supp. 1275, 1281 (N.D. Ill. 1994) (same).

This bargain relates particularly to remedies. Participants received much in ERISA. They received a comprehensive scheme designed to ensure the full and consistent payment of benefits. They also received certain remedies deemed most important to enforce this scheme. Although Congress could have added other remedies, it did not. It was concerned that ERISA not place overwhelming costs and burdens on plans that would hurt existing plans, deter the creation of new plans, and hence, ultimately hurt plan participants. *See* Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty under ERISA*, 41 WAYNE L. REV 1233, 1289-93 (1995).

128. The Supreme Court has appropriately recognized this principle regarding the addition of remedies not enumerated by Congress. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

2. *The Threat of Inconsistent Laws and Regulations*

ERISA's preemption clause provides a second rationale for a less expansive role for federal common law. Congress preempted state law, because it found that benefit plans faced costs and inefficiencies as a result of conflicting laws and regulations. In the place of those laws and regulations, Congress created ERISA—a single, national, uniform law.

Frequent lawmaking by the various courts of appeal and district courts poses a threat to uniformity. Plans will again face different laws and regulations in different jurisdictions. The fact that state law is one of the most common sources to which federal courts look in creating federal common law makes this particularly likely.[129] Judge Wilkinson of the Fourth Circuit noted this problem in his concurrence in *Singer v. Black & Decker Corp.*[130]:

> State rights and remedies that are expressly preempted under ERISA by 29 U.S.C. § 1144 may not be resuscitated as federal common law claims without an exacting examination of whether ERISA permits such a result. ERISA's preemption provision was designed to avoid "conflicting employer obligations and variable standards of recovery" under various states' laws .... While federal law is more of a single corpus than state law, these practical concerns do not magically disappear in the case of federal common law. The prospect of disuniformity remains especially disquieting for businesses with national plans and multi-state operations that can expect to be sued in many different federal forums.[131]

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979); *see also Mertens*, 508 U.S. at 263 (1993) ("We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck."); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985) ("We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA."); Brauch, *supra* note 127, at 1293-95.

129. *See, e.g.*, Babikian v. Paul Revere Life Ins. Co., 63 F.3d 837, 840 (9th Cir. 1995) (adopting the state law *contra proferentem* rule in interpreting plan terms); Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1451-52 (5th Cir. 1995) (same); Nash v. Trustees of Boston Univ., 946 F.2d 960, 967 (1st Cir. 1991) (adopting the Massachusetts defense of fraud in the inducement).

130. 964 F.2d 1449 (4th Cir. 1992), *aff'd mem.*, 447 U.S. 901 (1986).

131. *Id.* at 1453 (Wilkinson, J., concurring) (quoting Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1147 (4th Cir. 1985)).

Because courts have differed on what constitutes federal common law, Wilkinson's "prospect" has become a reality; plans now face different laws in different jurisdictions.[132]

The threat of conflicting laws and regulations does not forbid the use of common law altogether. Indeed, federal courts sometimes differ on questions of statutory interpretation completely apart from the common law. The threat does suggest caution. Courts should reserve federal common law for areas in which it is necessary to fulfill a specific congressional policy choice. It should not be used by courts to make their own choices between competing policies. Here, the danger of disuniformity is greatest. Congress should make any substantive revisions and additions to ERISA's enumerated rights, obligations, and remedies, and the judiciary should apply them uniformly on a national scale.

3. *Conclusion of the Matter*

The federal common law of ERISA has a role, but it is not the broad role claimed by federal courts. Courts wrongly have concluded that Congress intentionally delegated to them broad common-law powers to create substantive rights and obligations regarding employee benefits. Although the courts exercising this purported authority normally claim to be acting in a manner consistent with Congress's intent, they often are effectuating their own policy choices, not those of Congress.

Federal common law is appropriate in limited circumstances when necessary to effectuate congressional policy choices. Despite its comprehensiveness, ERISA does not spell out every detail regarding the enforcement of the rights, obligations, and remedies it sets forth. Because of ERISA's preemption provision, these details cannot be provided by state law. Thus, it is appropriate for courts to create, as a matter of federal common law, collateral or subsidiary rules that are necessary to effectuate the specific directions of Congress to avoid frustrating the statutory scheme.

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132. For example, the law regarding whether participants may bring common-law estoppel actions varies greatly among the different Courts of Appeals. *See infra* text accompanying notes 260-336. Common law also varies regarding whether and when the canon of *contra proferentem* may be used to interpret ambiguous plan terms, *see infra* text accompanying notes 168-80, and whether fiduciaries can bring contribution or indemnity actions against fellow fiduciaries, *see infra* text accompanying notes 227-55.

The appropriate role for the federal common law is that of true interstitial law making. Federal courts often claim they are engaging in interstitial lawmaking, or gap filling, when, in fact, they are making policy choices they wish Congress had made.[133] In such cases, the only gap is that between ERISA as written and ERISA as the courts wish it had been written.

Federal courts instead should respect Congress's policy choices and interpret ERISA to effectuate those choices. Those decisions involve more than the basic notion that federal law should regulate employee benefit plans. Congress explicitly stated which rights, duties, and remedies ERISA contained to both protect participants and minimize plan costs and expenses. Thus, to the extent courts create rights, duties, or remedies that Congress ignored or rejected, courts inappropriately carry out *their* will and policy choices. In contrast, an exercise of proper lawmaking would permit courts to create collateral or subsidiary rules necessary to carry out *Congress's* will and policy choices.

The Supreme Court adopted this approach in *Mertens v. Hewitt Associates*,[134] a case significant for the great respect with which the Court treated ERISA's congressional policy choices. In *Mertens*, the Court held that 29 U.S.C. § 1132(a)(3)—one of ERISA's remedy provisions—did not authorize suits for monetary damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty.[135] Section 1132(a)(3) specifically provides that plaintiffs may obtain "other appropriate equitable relief."[136] The plaintiff argued that "equitable relief" in this context meant any remedy that a court of equity could provide (presumably including compensatory damages in certain cases).[137] Focusing on the words and overall structure of the statute, the Court rejected the plaintiff's argument and found that "equitable relief" means traditional equitable relief such as

133. *See, e.g.*, Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 303-05 (5th Cir. 1992) (purporting to fill "minor gaps in the legislation" by creating "a common law right of restitution under ERISA . . . in accordance with its policy of total federal control of employee pension plans"); Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1057-58 (3d Cir. 1989) ("We believe that creating such a cause of action [employer restitution for mistaken contributions] will fill in the interstices of ERISA and further the purposes of ERISA.").

134. 508 U.S. 248 (1993).

135. *See id.* at 263.

136. 29 U.S.C. § 1132(a)(3) (1994).

137. *See Mertens*, 508 U.S. at 255-56.

injunctions, mandamus, or restitution (but not compensatory damages).[138]

The manner in which the Court approached the interpretation of the statute was perhaps more significant than the specific holding of the case. The plaintiff urged the Court to interpret section 1132(a)(3) expansively to fulfill ERISA's purpose to protect plan participants and beneficiaries.[139] The court refused to invoke its own concept of the statute's purpose to overcome the plain language of the statute.

> [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration .... This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.[140]

The Court recognized that ERISA resulted from legislative compromise and that the Court's role was to enforce Congress's bargain. "We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck."[141]

Although *Mertens* involved statutory interpretation and not federal common law, the Court also issued one important caution regarding the use of federal common law. It warned that, "The authority of courts to develop a 'federal common law' under ERISA... is not the authority to revise the text of the statute."[142]

III. EVALUATION OF THE CURRENT USE OF FEDERAL COMMON LAW UNDER ERISA

This Part reviews the existing body of federal common law created by courts and evaluates it in light of the role for federal common law described in Part II. This Part will focus on the two areas in which courts have created federal common law most frequently: (1) principles for the interpretation of benefit plans;

138. *See id.* at 256-57.
139. *See id.* at 261.
140. *Id.* at 261-62 (citation omitted).
141. *Id.* at 263.
142. *Mertens*, 508 U.S. at 259 (citation omitted).

and (2) claims or remedies not found in ERISA's remedies section, section 1132(a). These areas provide a stark contrast between legitimate and illegitimate common lawmaking.

A. *Legitimate Use of Federal Common Law: Principles Relating to Plan Interpretation in Benefit Claim Actions*

Section 1132(a)(1)(B) sets forth one of the basic remedies provided by Congress. Participants and beneficiaries have the right to recover benefits that they are owed under an employee benefit plan. The section states, "A civil action may be brought—(1) by a participant or beneficiary, . . . (B) to recover benefits due to him under the terms of his plan . . . ."[143] Courts have created a body of federal common law regarding the handling of such claims.

1. *The Standard of Review in Benefit Claim Cases*

Before filing a section 1132(a)(1)(B) suit, a participant or beneficiary must first seek benefits directly from the plan trustee under the claims process set forth in the plan. Only if the trustee denies the claim may the participant or beneficiary go to court.

One major question regarding ERISA litigation was whether district courts should give any deference to a plan trustee's denial when reviewing that decision. ERISA itself is silent on the issue. Federal courts were split until 1989, when the Supreme Court resolved the issue in *Firestone Tire and Rubber Co. v. Bruch*[144] by creating a federal common-law solution. As noted previously, the Court in *Bruch* claimed an extremely broad role for federal common law.[145] Interestingly, the Court's very expansive language contrasts greatly with the Court's narrow application of federal common law.

The Court began its analysis by recognizing that ERISA is a "comprehensive and reticulated statute."[146] Despite this, the Court noted that "ERISA does not set out the appropriate standard of review for actions under section 1132(a)(1)(B)

143. 29 U.S.C. § 1132(a)(1)(B) (1994).

144. 489 U.S. 101 (1989).

145. *See supra* text accompanying notes 59-62.

146. *Bruch*, 489 U.S. at 108 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

challenging benefit eligibility determinations."[147] To fill this gap, the Court looked to the common law of trusts. Following the principles of trust law, the Court concluded that deference should be given to an administrator or fiduciary's decision if the trust document specifically gives such person power to construe disputed or doubtful plan terms.[148] However, if the administrator or fiduciary does not have such discretionary authority, his decision will be reviewed *de novo*.[149]

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[150]

Thus, the current standard of review—*de novo* review unless the document explicitly gives authority to the plan administrator—was imposed through the exercise of federal common law.

2. *Principles of Plan Interpretation*

Once the appropriate standard of review is determined, controversy often remains regarding the meaning of specific plan terms. ERISA does not set forth principles of interpretation. Nonetheless, federal courts have created a body of common-law principles of plan interpretation.

The First Circuit created this type of common law in *Bellino v. Schlumberger Technologies, Inc.*[151] James Bellino and other employees originally worked for a maintenance company, Schlumberger Technologies (Schlumberger). National Semiconductor Corp. (NSC) hired Schlumberger to provide it with maintenance services. Eventually NSC determined that in-house maintenance staff would be cheaper than hiring Schlumberger. NSC and Schlumberger entered into an agreement essentially transferring Schlumberger's employees to

147. *Id.* at 109.
148. *See id.* at 115.
149. *See id.*
150. *Id.*
151. 944 F.2d 26 (1st Cir. 1991).

NSC. Upon their transfer, the employees contended they had been terminated and were thus eligible for severance benefits.[152]

The key question was whether the employees had been "terminated" due to a "reduction in force" within the meaning of those terms in their severance plan. Both the district court and the First Circuit agreed that they had been "terminated" due to a "reduction in force" and thus were entitled to severance benefits.[153] Finding in ERISA no principles governing plan interpretation, the First Circuit turned to federal common law, finding that "courts are to construe ERISA plans by employing accepted principles of contract and trust law."[154] The court then invoked basic principles of contract interpretation to reach its decision. One such principle is that terms are to be given their "natural meaning" and that courts may "not supplant such meaning with rigid definitions or contrary interpretations offered by the parties."[155] Another is that a court should not turn to extrinsic evidence where plan terms are unambiguous.[156] Applying these principles, the court found that the employees were "terminated" as a result of a "reduction in force" under the natural meaning of those terms.[157]

The Ninth Circuit applied similar principles, as a matter of federal common law, in *Babikian v. Paul Revere Life Insurance Co.*[158] Karen Babikian contracted cancer, forcing her to quit working.[159] Her employer-sponsored group health plan, insured by Paul Revere, placed a $1 million lifetime cap on health benefits. Further, the group policy declared that benefits would stop when an employee ceased working.[160] In order to ensure that her insurance coverage would continue after she stopped working, Babikian converted her membership in the group policy into an individual policy.[161] The individual policy, however, had only a $250,000 lifetime cap. Upon learning this,

152. *See id.* at 28.
153. *See id.* at 30-31.
154. *Id.* at 31.
155. *Id.* at 31-32.
156. *See Bellino*, 944 F.2d at 32.
157. *See id.* at 32.
158. 63 F.3d 837 (9th Cir. 1995).
159. *See id.* at 838.
160. *See id.*
161. *See id.*

Babikian sued, seeking a declaration that she was still covered under the original policy with the higher lifetime cap.[162]

The district court granted Babikian summary judgment.[163] The Ninth Circuit reversed and remanded, finding an issue of material fact as to whether Babikian had been informed that the benefits under the converted policy would be reduced.[164] However, the key to this dispute was whether Babikian had a vested right to her medical benefits under the original policy. In construing the plan to determine whether she had such a right, the panel turned to federal common law. The Ninth Circuit looked to generally accepted principles of contract interpretation from state law to create a federal common law of plan interpretation. It concluded, for instance, that plan terms are to be interpreted in an ordinary and popular sense, as a person of average intelligence and experience would interpret those terms.[165] Reading the policy in that way, the court found that the original policy limited coverage to medical expenses incurred while the policy was in force and did not create the vested right claimed by Babikian.[166]

Federal courts have uniformly accepted such basic principles of contract interpretation in determining whether benefits are due in claims under section 1132(a)(1)(B).[167] Slightly more controversial has been the question whether the *contra proferentem* canon of interpretation should be incorporated into the federal common law of ERISA. *Contra proferentem* provides that contract terms are to be construed against the drafter.

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162. *See id.*

163. *See Babikian*, 63 F.3d at 838.

164. *See id.* at 844.

165. *See id.* at 840.

166. *See id.* at 842.

167. *See, e.g.*, Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1376 (6th Cir. 1994) (authorizing use of traditional methods of contract interpretation to resolve ambiguity); Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 585 (1st Cir. 1993) (using canons of contract interpretation to decipher an ERISA benefit plan); Glocker v. W. R. Grace & Co., 974 F.2d 540, 544 (4th Cir. 1992) (requiring the district court to interpret a plan in accordance with principles of contract law); Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1084 (1st Cir. 1990) (stating that federal common law must embody canons of contract interpretation). The Third Circuit also applied these principles in an estoppel action in *Smith v. Hartford Ins. Group*, 6 F.3d 131, 138-39 (3rd Cir. 1993).

Almost all federal courts now apply this rule as a matter of federal common law, but at least one does not.[168]

This principle played a role in *Todd v. AIG Life Insurance Co.*,[169] a case that should end forever the myth that all ERISA cases are boring. In *Todd*, the Fifth Circuit affirmed a grant of summary judgment requiring plan payment to a widow seeking benefits from her husband's employer-sponsored accidental death and dismemberment plan.[170] Her husband died by autoerotic asphyxiation, the practice of limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure. Mr. Todd had suffocated while constricting a dog collar around his neck.[171]

The key issue in the case concerned whether this death met the policy's definition of "accident." In ruling for Mrs. Todd, the court turned to federal common law. It justified this move by stating that "Congress, in adopting ERISA, expected that 'a federal common law of rights and obligations under ERISA-regulated plans would develop.'"[172] In determining the scope of that federal common law, the court concluded that it could draw guidance from analogous state law so long as the state law was not "'inconsistent with congressional policy concerns.'"[173] The Fifth Circuit incorporated the contract law canon of *contra proferentem* into the federal common law of ERISA.

Reviewing *de novo* and construing the plan in favor of Mrs. Todd, the court agreed with the district court that "accident" should mean that: (1) the deceased had a subjective expectation of survival while engaged in the activity; and (2) this expectation was objectively reasonable, because death was not "substantially certain" to follow from the activity.[174] The court concluded that this death was an "accident" and awarded benefits to Mrs. Todd.[175]

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168. *See* Blair v. Metropolitan Life Ins. Co., 974 F.2d 1219, 1222 (10th Cir. 1992) (refusing to apply the canon of *contra proferentem* in this case but without resolving whether this rule should be applied to contracts governed by ERISA).

169. 47 F.3d 1448 (5th Cir. 1995).

170. *See id.* at 1459.

171. *See id.* at 1450.

172. *Id.* at 1451 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)).

173. *Id.* (quoting Thomason v. Aetna Life Ins. Co., 9 F.3d 645, 647 (7th Cir. 1993)).

174. *See Todd*, 47 F.3d at 1456.

175. *See id.* at 1459.

Although most circuits have now adopted *contra proferentem* as a matter of federal common law,[176] in *Blair v. Metropolitan Life Insurance Co.*,[177] the Tenth Circuit did not apply *contra proferentem* to an ambiguous plan term.[178] It reached the same result—construing the ambiguous term in favor of the plan beneficiary—by using principles of trust law.[179] Two other circuits have adopted *contra proferentem* as a matter of federal common law, but in a limited fashion. The Third and Eighth Circuits both have determined that the principle can be applied only after all other principles of contract interpretation have failed to resolve the dispute, including a resort to extrinsic evidence.[180]

3. *Appropriateness of Federal Common Law Relating to Plan Interpretation*

Creating federal common-law principles regarding plan interpretation is appropriate. The principles aim to carry out the will of Congress. In its remedies section, Congress has provided that a participant or beneficiary may sue for benefits due under a plan. As part of such a suit, courts need to determine how to review claim denials by trustees of plans and also how to interpret disputed plan terms. State contract and trust law contained principles regarding those issues, but ERISA preempted them. Therefore, to carry out Congress's specific intent that a participant or beneficiary be able to sue to recover benefits, courts must fill the gap with federal common law.

This is true gap-filling. Standards of review and principles of contract interpretation are subsidiary and collateral rules. These rules are necessary in order to effectuate a specific congressional policy choice—ensuring that participants and beneficiaries have this remedy.[181] This use of federal common law is fully consistent

176. *See, e.g.*, Lee v. Blue Cross/Blue Shield, 10 F.3d 1547, 1551 (11th Cir. 1994); Doe v. Group Hospitalization & Med. Serv., 3 F.3d 80, 88-89 (4th Cir. 1993); McNeilly v. Bankers Life Assurance Co., 999 F.2d 1199, 1201 (7th Cir. 1993); Masella v. Blue Cross & Shield of Conn., Inc., 936 F.2d 98, 107 (2d Cir. 1991); Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 538-39 (9th Cir. 1990).

177. 974 F.2d 1219 (10th Cir. 1992)

178. *See id.* at 1222.

179. *See id.*

180. *See* Smith v. Hartford Ins. Group, 6 F.3d 131, 140 n.9 (3d Cir. 1993); Delk v. Durham Life Ins. Co., 959 F.2d 104, 106 (8th Cir. 1992).

181. Another example of a subsidiary and collateral rule being necessary in benefit claim actions occurs in the area of privilege. In *Patterson v. Caterpillar, Inc.*, 70 F.3d 503 (7th Cir. 1995), the court had to determine, in deciding a benefit claim, whether an

with the separation of powers. Further, because it is limited and does not impose new substantive rights, obligations, and remedies, it does not subject benefit plans to vastly inconsistent laws and regulations.

B. *Illegitimate Use of Federal Common Law: Claims in Addition to Those Specified by Congress*

Using federal common law, courts have created several new claims under ERISA plans, none of which is provided for in the statute. This Part will discuss claims by employers for restitution, fiduciaries for contribution, and participants for estoppel. Each is the product of illegitimate common lawmaking.

1. *Restitution*

The courts of appeal accept, as a matter of federal common law, restitution claims by employers against plans. In these cases, employers seek the return of excess contributions made to the plan on behalf of employees. The ERISA provision most relevant to such claims is 29 U.S.C. § 1103. Known as the anti-inurement rule, section 1103(c)(1) forbids the use of plan assets for the benefit of employers, stating 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."[182] This rule, however, contains an

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employee was "totally disabled" within the meaning of his benefit plan. Patterson's treating physician testified that he was not "totally disabled." Patterson sought to have the testimony barred on the ground of physician-patient privilege. The court determined that such a privilege is not part of the federal common law of ERISA. *See id.* at 506. Again, although ERISA declares that benefit claim actions may be brought, it does not specify all the collateral subsidiary rules necessary to bring such claims. The Seventh Circuit had to determine, as a matter of common law, whether the privilege should apply. This is an appropriate use of the federal common law.

Also appropriate is the creation of federal common-law defenses to enumerated causes of action. ERISA's remedies section, section 1132(a), spells out what actions may be brought, who may bring them, and what remedies are available. Section 1132(a) does not address whether ERISA recognizes any defenses to these causes of action. Courts have therefore turned to federal common law to determine what, if any, defenses are appropriate. They have recognized the following defenses as a matter of federal common law: fraud in the inducement, *see* Nash v. Trustees of Boston Univ., 946 F.2d 960, 967 (1st Cir. 1991); waiver, *see* Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 588 (1st Cir. 1993); District 29, United Mineworkers v. New River Co., 842 F.2d 734, 736 (4th Cir. 1988); conflict of interest, *see* Board of Trustees v. California Co-op Creamery, 877 F.2d 1415, 1425 (9th Cir. 1989); and estoppel, laches, and unclean hands, *see* Holt v. Winpisinger, 811 F.2d 1532, 1541-42 (D.C. Cir. 1987).

182. 29 U.S.C.A. § 1103(c)(1) (1994 & West Supp. 1998).

exception allowing pension plans to reimburse employers when an excess contribution results from a "mistake of fact or law."[183] The exception states that the anti-inurement principle "shall not prohibit the return of such contribution or payment to the employer within six months after the plan administrator determines that the contribution was made by such mistake."[184] Although this exception allows a pension plan to reimburse an employer, it does not require it.

Also relevant to the issue is section 1132(a), the remedies provision of ERISA. Significantly, section 1132(a) does not confer on employers the right to recover excess contributions. It is against this statutory background that courts have considered whether to recognize employer claims seeking restitution of excess contributions.

a. *Courts Allowing a Restitution Claim*

Despite the lack of statutory authority, most courts addressing the issue have permitted employers to bring federal common-law restitution claims against pension plans for mistakenly paid contributions. This Article's Introduction discussed one such case: *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund.*[185] As the Introduction noted, although the Sixth Circuit recognized that Congress had not provided for a restitution remedy either explicitly or implicitly—and in fact had intended to exclude the remedy—the court created that remedy as a matter of federal common law.[186] It created the remedy, therefore, as a matter of its own policy choice.

The Sixth Circuit's analysis is far from uncommon; indeed, it is representative. The First Circuit reached the same result in *Kwatcher v. Massachusetts Service Employees Pension Fund.*[187] This Article has already noted *Kwatcher's* discussion of the basis for and breadth of federal common law.[188] This Part will examine

183. 29 U.S.C. § 1103(c)(2)(A)(ii) (1994).
184. *Id.*
185. 794 F.2d 221 (6th Cir. 1986). *See supra* text accompanying notes 3-13.
186. *See supra* text accompanying notes 3-13.
187. 879 F.2d 957 (1st Cir. 1989).
188. *See supra* text accompanying notes 67-70.

the court's rationale for allowing employers to bring a restitution action as a matter of federal common law.

Kwatcher used a three-step analysis. First, it reviewed ERISA's text to determine whether ERISA explicitly provides a restitution claim and concluded that it did not. The court noted that employers were, at the time, conspicuously absent from the list of potential plaintiffs in ERISA's remedies section, section 1132(a).[189]

Second, the court queried whether ERISA contains an implied right of action for restitution. Again, the court concluded that it does not.[190] The court noted that the key question in the inquiry whether an implied right of action exists is whether Congress intended that there be such a right of action. "If neither the text nor the legislative history of a statute reveals a congressional intent to create a new class of private plaintiffs, a court's inquiry should proceed no further."[191] The court gave several reasons why it found no such congressional intent with regard to the employer claim. First, Congress "carefully catalogued a selected list of persons eligible to sue under ERISA," and employers are not on the list.[192] Second, the language of the anti-inurement rule specifically says that plans *may* reimburse employers; it does not state that they *must*.[193] Third, the court noted that courts should be careful in adding remedies to those carefully chosen by Congress in section 1132(a).[194] The court concluded that "[f]or these reasons, we are convinced that a cause of action in favor of an employee for recovery of overpayments cannot be implied."[195]

Despite finding no express or implied cause of action to recover excess contributions, the court initiated a third prong of analysis. It asked whether "inequity" would result from

189. *See Kwatcher*, 879 F.2d at 964.

190. *See id.* at 965.

191. *Id.*

192. *Id.*

193. *See id.*

194. *See* 29 U.S.C.A. § 1132(a) (1994 & West Supp. 1998). The full text of this section can be found *supra* note 30.

195. Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957, 965 (1st Cir. 1989). The Ninth Circuit, by contrast, has concluded that there is an implied right under section 1103 for employers to recover overcontributions. *See* Award Serv., Inc. v. Northern Cal. Retail Clerks Union & Food Employers Joint Pension Trust Fund, 763 F.2d 1066, 1068 (9th Cir. 1985).

inaction.[196] The First Circuit concluded that the answer was yes and that it could therefore give employers a restitution claim under the federal common law.[197] Without pointing to any specific provision in the statute granting this power, the court justified its action as follows: "[w]hereas ERISA grants no self-executing rights of action in favor of an employer who mistakenly overcontributes, the statute does give the federal courts power to prevent this sort of inequity."[198] The court explained that such a claim was necessary to make a level playing field for employers and employees and found that it was consistent with ERISA's underlying policies.[199]

A similar reliance upon congressional intent is found in the Third Circuit's decision in *Plucinski v. I.A.M. National Pension Fund.*[200] In *Plucinski,* the Third Circuit agreed that the federal common law provides a restitution claim but sent the case back for further fact-finding.[201] The court justified granting the possibility of restitution recovery through the same three-prong analysis used in *Kwatcher.* First, it conceded that ERISA's text, although specifically enumerating the remedies available under the statute, does not provide employers with a remedy of restitution. Second, the court concluded that section 1103 ("Establishment of Trust") does not create an implied right of action for employers to recover mistakenly paid contributions and acknowledged that no evidence of congressional intent to create the remedy exists.[202] The court went so far as to state: "Indeed there is no indication in the statute or in the legislative history that Congress intended to give employers any causes of action at all under ERISA."[203]

But, as in *Kwatcher,* this finding did not end the court's inquiry. Although it conceded that Congress did not intend, explicitly or implicitly, to provide employers with that or any other remedy, the court created the remedy itself. The court's reasoning is illuminating. It began by arguing that, although

196. *See Kwatcher,* 879 F.2d at 966.
197. *See id.*
198. *Id.*
199. *See id.* at 967.
200. 875 F.2d 1052 (3rd Cir. 1989).
201. *See id.* at 1058.
202. *See id.* at 1056.
203. *Id.*

Congress did not intend to create a restitution remedy, Congress did not intend to *forbid* it.[204] This new way of looking at the problem gave the court expansive powers to create federal common law. Rather than seeking to effectuate Congress's will by following the policy choices Congress had made, the court felt that it was free to make its own policy choice so long as the choice had not been expressly forbidden by Congress. It explained that "[s]ince Congress both authorized and expected that the courts will create a common law under ERISA, we need not look for a specific congressional intent to create the remedy at issue."[205] Having thus characterized the issue and finding that a restitution remedy would be consistent with ERISA's broad purposes, the court created one.[206] Remarkably, the court concluded that its action merely filled a "gap" in the statute.[207]

Another restitution case shows that, despite the breadth of common-law authority assumed by federal courts in these cases, courts still consider their actions "interstitial" lawmaking. In *Jamail, Inc. v. Carpenters District Council*,[208] the Fifth Circuit affirmed a restitution recovery granted to an employer by the trial court.[209] The Fifth Circuit followed the familiar three-part analysis used by the cases above and found no express or implied right to recover the contributions.[210] Yet, as in the other cases, the Fifth Circuit affirmed the judgment as a matter of federal common law.[211]

In so doing, the court—somewhat defensively—denied that it was engaged in judicial lawmaking. The court first argued that "[t]he application of federal common law to a statute is not an example of the judiciary rewriting legislation. 'To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.'"[212] The court then characterized the lack of an employer-restitution remedy as a "minor gap," stating that,

204. *See id.*
205. *Plucinski*, 875 F.2d at 1056.
206. *See id.* at 1057-58.
207. *See id.* at 1056.
208. 954 F.2d 299 (5th Cir. 1992).
209. *See id.* at 306.
210. *See id.* at 302.
211. *See id.* at 304-05, 306.
212. *Id.* at 303 (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 594 (1973)).

"[w]henever Congress enacts complex and comprehensive legislation, such as ERISA, minor gaps in the legislation are unavoidable. Congress cannot be expected to perceive in advance all the ramifications of its legislation. It is the judiciary's role, therefore, to fill in these gaps."[213]

Perhaps to disguise the breadth of its holding, the court concluded by cautioning that the power to create federal common law is not a "carte blanche power to rewrite the legislation to satisfy our proclivities."[214] Instead, courts "must be careful to remain faithful to ERISA's policies."[215]

b. *The Eleventh Circuit's Rejection of a Restitution Action by Employers*

Only one circuit out of those that have so far addressed the question has refused to recognize a federal common-law claim for restitution of excess contributions—the Eleventh Circuit in *Dime Coal Co. v. Combs*.[216] As in the cases discussed in Part III(B)(1)(a), the court found neither an express statutory right to bring the restitution claim under section 1132(a) nor an implied right under section 1103. Concluding that congressional intent was paramount, the court found that Congress's deliberate exclusion of a restitution remedy from its carefully integrated enforcement provisions constituted strong evidence that Congress did not intend to provide that remedy.[217]

Although the federal common-law issue had not been raised fully by the parties in the case, the Eleventh Circuit considered, in a footnote, whether to create a restitution claim under federal common law. It decided not to, stating:

> [W]e hold that no federal common law right to recovery of the disputed contributions at issue in this case exists. As the Supreme Court recently cautioned, "the presumption that a

213. *Jamail*, 954 F.2d at 303.

214. *Id.* at 304. One is reminded of the *Lopez* dissenters who argued, in essence, that although the challenged no-guns-near-schools statute was perfectly constitutional, the commerce power did not give carte-blanche authority to Congress. *See* United States v. Lopez, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting).

215. *Jamail*, 954 F.2d at 304. The Seventh and Eighth Circuits also have approved a federal common-law restitution claim. *See* Young Am., Inc. v. Union Cent. Life Ins. Co., 101 F.3d 546 (8th Cir. 1996); UIU Severance Pay Trust Fund v. Local 18-U, 998 F.2d 509 (7th Cir. 1993).

216. 796 F.2d 394 (11th Cir. 1986).

217. *See id.* at 398.

> remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[218]

The court thus deferred to Congress's deliberate omission of the restitution claim.

c. *Appropriateness of Creating a Federal Common-Law Restitution Claim*

Courts creating restitution claims through federal common law have insisted that they are simply effectuating Congress's policies and filling "minor gaps" in ERISA. But they are betrayed by their own analysis. By creating restitution remedies, these courts are instituting into law their own choices about which policy is appropriate. In examining whether an express or implied remedy existed, each of the courts found that Congress did not intend to permit such a remedy. Indeed in *Whitworth*,[219] the court found that Congress intended that there *not* be a remedy for employers seeking restitution.[220]

Compelling evidence indicates that this finding is correct. Section 1132(a) is a carefully drawn set of remedies. When Congress first passed ERISA, it enumerated four classes of plaintiffs who could bring suit under that section: participants, beneficiaries, fiduciaries, and the Secretary of Labor. Congress left out employers.[221] It is extremely unlikely that this omission was accidental. As *Whitworth* pointed out,[222] other provisions of ERISA did provide employers with certain remedies.[223] It is clear that Congress considered suits by employers; it did not ignore them. It also considered the issue of overpayment of contributions, as is evident by the permissive wording of the exception to the anti-inurement clause. However, these facts tell us that Congress deliberately chose to make the return of overcontributions voluntary, not mandatory.

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218. *Id.* at 399 n.7 (quoting Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97 (1981)).

219. Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir. 1986).

220. *See supra* note 6 and accompanying text.

221. *See supra* note 6.

222. *See Whitworth*, 794 F.2d at 227.

223. *See* 29 U.S.C. § 1451(a)(1) (1994).

By creating a restitution claim despite this evidence, courts are redrawing the carefully achieved balance as they wish it had been drawn. Although *Jamail* describes this as "minor" gap filling,[224] the gap is not found in the statute itself. The gap is both created and filled by the courts. This practice violates the separation of powers and is illegitimate lawmaking.

Courts creating this cause of action might take issue with this analysis, insisting that they are trying to be consistent with congressional purposes. But their actions belie this argument. In *Plucinski*, the Third Circuit stated that it could create federal common law in an area unless doing so was expressly *forbidden* by Congress.[225] In *Whitworth*, the Sixth Circuit created a cause of action for restitution despite its finding that Congress intended *not* to create one.[226]

Further, consistency with broad notions of congressional purpose sets a very weak limit on court lawmaking power. Read at a broad enough level of generality, the "purpose" of ERISA could support nearly any sort of federal common law. Furthermore, there is no single purpose underlying ERISA. As noted above, ERISA involves a balance of numerous competing interests. When courts ignore this and proceed to use the common law to create actions that Congress chose deliberately not to create, their actions are inconsistent with congressional intent, no matter how many protestations they make to the contrary.

2. *Right of Contribution Among Joint Tortfeasors*

ERISA provides that plan fiduciaries are personally liable for breaches of fiduciary duty:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject

224. *See* Jamail, Inc. v. Carpenters Dist. Council, 954 F.2d 299, 303 (5th Cir. 1992).

225. *See supra* text accompanying notes 200-207.

226. *See supra* text accompanying notes 9-13.

> to other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[227]

In light of the substantial personal liability that can result from a breach of fiduciary duty, fiduciaries have sought ways to share this liability with other fiduciaries who share responsibility for the breach. In particular, fiduciaries facing liability have sought to join the other fiduciaries as third parties in contribution or indemnity actions. Two courts of appeal have addressed this issue. The two courts agreed that contribution and indemnity actions are not provided for in ERISA, but they disagreed on whether contribution or indemnity actions are appropriate under the federal common law of ERISA.[228]

a. *Approval of Contribution Claims*

The Second Circuit approved a contribution action, as a matter of federal common law, in *Chemung Canal Trust Co. v. Sovran Bank/Maryland.*[229] *Chemung* involved a pension plan established by Fairway Spring Company ("Fairway"). The first trustee of the plan, Glenn Dawson, made imprudent investments and engaged in transactions prohibited by ERISA's fiduciary standards.[230] Fairway removed Mr. Dawson as trustee and appointed Sovran Bank ("Sovran") as his successor.[231] Sovran acted as trustee for four years, until it was replaced by Chemung Canal Trust Co. ("Chemung").[232] Upon taking over, Chemung sued Sovran for breach of fiduciary duty to the plan.[233] Sovran brought a third party contribution claim against Fairway, claiming that Fairway had breached its fiduciary duties by failing to monitor the activities of Mr. Dawson, the first trustee, and that its failure contributed to the losses that were the subject of

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227. 29 U.S.C. § 1109(a) (1994). Section 1132(a)(2) provides the corresponding cause of action: "A civil action may be brought—... (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title." 29 U.S.C. § 1132(a)(2) (1994).

228. The Seventh Circuit in *Free v. Briody*, 732 F.2d 1331, 1337 (7th Cir. 1984), determined that a contribution action by a fiduciary is appropriate, but, as a matter of statute, not federal common law. The court determined that a contribution action was permitted under the express language of section 1109. *See id.* The argument is weak and constitutes federal common lawmaking through the back door.

229. 939 F.2d 12 (2d Cir. 1991).

230. *See id.* at 13.

231. *See id.*

232. *See id.*

233. *See id.* at 13-14.

Chemung's suit against Sovran.[234] The district court dismissed the third party claim against Fairway, finding that ERISA does not allow claims for contribution or indemnity.[235]

The Second Circuit reversed the district court's holding that there is no cause of action for contribution or indemnity under ERISA.[236] First addressing its authority to create federal common law, the court relied on the Supreme Court's decisions in *Bruch* and *Pilot Life* in concluding that "[t]he Supreme Court has left no doubt" that courts are to develop a federal common law of rights and obligations and that, in so doing, they are to be guided by principles of traditional trust law.[237] The court next noted that traditional trust law provides for a right of contribution among joint tortfeasor fiduciaries.[238] After these two steps, the court concluded that "the traditional trust law right to contribution must also be recognized as a part of ERISA."[239]

The court did respond to the concern that it was effecting its own policy choice rather than Congress's. It argued that it was "not creating a right from whole cloth. We are simply following the legislative directive to fashion, where Congress has not spoken, a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence."[240] As for the notion that Congress deliberately left out of the statute a remedy for contribution, the court concluded that the omission "does not necessarily mean that Congress intended to preclude such remedies."[241] The court found it more likely that Congress simply had not focused on whether a contribution action was proper and that this lack of attention to the issue had left a gap in the statute.[242]

Judge Altimari dissented from the court's conclusion that a contribution action should be permitted as a matter of federal common law.[243] He noted that he was personally sympathetic to

234. *See Chemung*, 939 F.2d at 14.

235. *See id.*

236. *See id.* at 18. The Second Circuit affirmed the district court's holding that a former fiduciary does not have standing to sue on behalf of the plan. *See id.*

237. *Id.* at 16.

238. *See id.*

239. *Chemung*, 939 F.2d at 16.

240. *Id.*

241. *Id.* at 18.

242. *See id.*

243. *See id.* at 18 (Altimari, J., concurring and dissenting).

allowing such actions,[244] but he was concerned that the court had chosen to add the claim itself simply because adding the claim seemed like a good idea. He stated, "[w]hile the majority's decision makes good sense, such good sense does not always find its way into legislation enacted by Congress, as the statute at issue demonstrates."[245] Judge Altimari rejected the notion that Congress had simply forgotten to address the issue of contribution actions. He noted that a separate section of ERISA, section 1105 (dealing with co-fiduciary liability), "delineates the circumstances in which a co-fiduciary may be liable for another fiduciary's breach of fiduciary responsibility."[246] Judge Altimari concluded:

> Essentially, Congress' omission of all references to the allocation of costs among fiduciaries for joint liabilities demonstrates its rejection of the scheme of contribution and indemnification adopted by the majority. Simply stated, if Congress had intended to include a right of action for contribution and indemnification, it would have done so.[247]

b. *Rejection of Contribution Claims*

The Ninth Circuit refused to recognize a claim for contribution in *Kim v. Fujikawa.*[248] In this case, Fujikawa, one fiduciary of a multi-employer plan, was found to have engaged in

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244. *See Chemung*, 939 F.2d at 16.

245. *Id.*

246. *Id.* at 19.

247. *Id.* District courts in the First and Third Circuits have followed *Chemung's* lead. In *Duncan v. Santianiello*, 900 F. Supp. 547 (D. Mass. 1995), the District Court for the District of Massachusetts concluded that fiduciaries have the standing and right to pursue contribution and indemnity from other fiduciaries if they are found jointly liable for harming an ERISA plan. *See id.* at 551. The court noted that, "the First Circuit has held that federal courts have the power to fashion similar ERISA federal common law rights and obligations." *Id.* (citing Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957, 965-66 (1st Cir. 1991)). It found that contribution and indemnity actions are appropriate because they "do not conflict with ERISA's enforcement scheme; instead, they "promote enforcement of strict fiduciary standards of care," and they "promote the participants' and beneficiaries' best interests." *Id.*

In *Cohen v. Baker*, 845 F. Supp. 289 (E.D. Pa. 1994), the District Court for the Eastern District of Pennsylvania similarly allowed one fiduciary to bring a contribution action against another. It followed the *Chemung* analysis very closely. It agreed that courts are to be guided by the principles of traditional trust law. *See id.* at 291. "Consequently, because ERISA does not preclude contribution, and traditional trust law does include it, the court concludes that a right to contribution exists under ERISA's federal common law." *Id.* at 291. The District Court for the District of New Jersey has reached the same conclusion. *See* Green v. William Mason & Co., 976 F.Supp. 298, 301 (D.N.J. 1997).

248. 871 F.2d 1427 (9th Cir. 1989).

a prohibited transaction under ERISA and was required to pay damages to the fund. Fujikawa then brought a contribution action against other trustees, claiming that they had ratified the prohibited transaction and thus should likewise be liable for damages.[249]

The district court refused to allow the claim, and the Ninth Circuit affirmed.[250] In rejecting the claim, the court did not mention the federal common law of ERISA; consequently, it is not clear if the court rejected the contribution action as a matter of federal common law or as a matter of an implied right under the statute. The court's rationale could apply to either.

The court justified its decision in several ways. First, it noted that section 1109, which addresses remedies for breach of fiduciary duty, provides a remedy only to plans and not to breaching tortfeasors.[251] Second, following the Supreme Court in *Russell,* the court declared that ERISA's remedial scheme was comprehensive, indicating that Congress did not intend to authorize other remedies that it simply did not place in the statute expressly.[252] The court expressed grave doubts as to whether courts should simply add to the statute remedies that seemed appropriate. The court cited *Russell*'s statement that, "'[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.'"[253] The court noted that it was possible that Congress had deliberately rejected a contribution remedy because it did not want to soften the blow on wrongdoers by letting them share some of their responsibility with others.[254] In sum, the court did not believe it appropriate to make a policy choice that Congress had declined to make.[255]

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249. *See id.* at 1431.

250. *See id.* at 1436.

251. *See id.* at 1432.

252. *See id.*

253. *Kim,* 871 F.2d at 1432-33 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985) (quoting California v. Sierra Club, 451 U.S. 287, 297 (1981))).

254. *See id.* at 1433.

255. District courts within the Sixth and District of Columbia Circuits have agreed with this decision. In *Daniels v. National Employee Benefits Servs., Inc.,* 877 F. Supp. 1067 (N.D. Ohio 1995), the District Court for the Northern District of Ohio rejected a right of contribution. The court stated that there were two instances where a federal court appropriately could create common law: (1) where it is necessary to protect a uniquely federal interest; and (2) where Congress has given the court power to develop substantive law. *See id.* at 1074. It found neither present in this case. *See id.* The court then

c. *Appropriateness of Contribution Actions as a Matter of Federal Common Law*

Judge Altimari's analysis in *Chemung* is correct. Permitting a contribution action may seem to be a perfectly appropriate remedy. But to say it seems appropriate does not answer the question whether a court should be permitted to create the cause of action when Congress did not. Despite its protestations in *Chemung*, the panel majority in that case created the contribution action out of whole cloth. The action is thus the result of a policy choice they, not Congress, made. The court's own words make this clear. It stated that it was free to create the remedy as a matter of common law as long as Congress had not "intended to preclude such remedies."[256]

Much more than the lack of an outright prohibition should be required before a court itself may create a remedy that Congress did not create. The majority decision in *Kim* and Judge Altimari's opinion in *Chemung* correctly note that congressional silence has meaning. Had Congress wanted to allow a fiduciary to seek contributions from another fiduciary, it would have done so. The existence of section 1105 demonstrates that Congress thought about when fiduciaries should be liable to one another. That Congress did not elect to place similar co-fiduciary liability in section 1109 or section 1132(a) indicates, not that it forgot to do so, but that it intended not to do so. As the Supreme Court stated in *Russell*: "[t]he six carefully integrated civil enforcement provisions found in [section 1132(a)] of the statute as finally enacted, however, provide strong evidence that Congress did *not*

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turned to Judge Altimari's opinion in *Chemung* and agreed that a statutory omission of a remedy was an indication that Congress had intended to exclude such a remedy, rather than an indication that Congress had ignored the issue. *See id.*

The District Court for the District of Columbia likewise rejected a federal common-law right of indemnity or contribution among fiduciaries in *International Bhd. of Painters & Allied Trades Union & Industry Pension Plan v. Duval*, No. Civ.A.92-1099, 1994 WL 903314, at *3 (D.D.C. Apr. 14, 1994). The court did not find *Chemung* persuasive.

> Clearly, Congress was aware that the issue of indemnification and contribution among fiduciaries would arise under ERISA, and that principles of trust law allow a breaching fiduciary to recover for indemnification and contribution from other wrongdoers. Nonetheless, despite the comprehensive nature of ERISA, Congress could have included provisions for indemnification or contribution among fiduciaries, but did not.

Id. at *3 (citation omitted).

256. Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 18 (2d Cir. 1991).

intend to authorize other remedies that it simply forgot to incorporate expressly."[257]

Like actions for restitution of excess contributions, actions for contribution do not fit within the appropriate role for federal common law. Recognizing such actions is not necessary to carry out Congress's will. It is not a collateral or subsidiary rule. It is a conscious policy choice made by federal courts in the face of knowledge that Congress itself chose not to allow fiduciaries to share some of their liability. Like recognizing restitution actions, recognizing contribution actions violates the separation of powers.

Chemung's argument to the contrary is flawed in that it proves too much. The Second Circuit reasoned that, in developing federal common-law remedies, it was to be guided by traditional trust law.[258] If this were true, there would have been no need for Congress to lay out a remedial scheme in ERISA. Congress could have provided no remedies at all, or it could have stated that any remedies previously available at common law were also available under ERISA. Instead, Congress explicitly preempted state common law, including common-law remedies, and replaced those remedies with the limited options set out in section 1132(a). The legislative history indicates that, in creating ERISA, Congress incorporated some of the principles of trust law, but not all of them.[259]

In enacting ERISA and in incorporating certain principles of trust law but rejecting others, Congress made deliberate policy choices designed, in part, to balance competing interests. The

257. *Russell*, 473 U.S. at 146.

258. *See Chemung*, 939 F.2d at 16.

259. For example, Senate and House committee reports make it clear that the fiduciary responsibility section "codifies and makes applicable to these fiduciaries *certain* principles developed in the evolution of the law of trusts." S. REP. NO. 93-127, at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (emphasis added); *see also* H.R. REP. NO. 93-533, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649-51. Although ERISA incorporated certain fiduciary principles, it did so "with modifications appropriate for employee benefit plans." S. REP. NO. 93-127, at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865. The Eleventh Circuit has described Congress's use of trust law as follows:

> [W]e interpret ERISA to embody a tailored law of trusts—a legal fabric which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, *and* exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law.... Thus, while it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts.

Useden v. Acker, 947 F.2d 1563, 1581 (11th Cir. 1991).

Chemung court, despite its protestations to the contrary, made different policy choices that redraw that balance. It effectuates its own will, not that of Congress.

3. *Estoppel Claims by Participants*

As a final example of federal court overreaching in the area of ERISA, this Part discusses one of the most persistent problems in ERISA litigation: what to do with a promise of benefits that is inconsistent with the terms of a written benefits plan. ERISA itself provides no real remedy.[260] Section 1132(a)(1)(B) permits participants to sue for benefits, but only those promised in the plan itself.

Participants have consequently argued that federal courts should recognize a federal common-law remedy of estoppel in such situations. They have urged courts to award the benefits *promised*, not those provided by the written plan, by holding that the employer is estopped to deny the promised benefits. Different circuits have taken a variety of approaches to such claims.[261] This Part will provide an overview of some of those approaches.

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260. The Supreme Court recently ruled that section 1132(a)(3) may provide a remedy in some cases of this nature. *See* Varity Corp. v. Howe, 516 U.S. 489, 515 (1996). There, the Court upheld a claim for individual relief arising out of a breach of fiduciary duty. If a promise of benefits inconsistent with the terms of a plan breaches a fiduciary duty, participants may have an action under section 1132(a)(3) under the Court's rationale. The Court's ruling, however, rests on an improper reading of both ERISA's text and legislative history. *See generally* Brauch, note 124. The individual claim for breach of fiduciary duty is also limited in that it may be brought only against a fiduciary and only for equitable relief (thus excluding a recovery of compensatory damages).

261. Some circuits have handled estoppel claims as a matter of statutory interpretation as well as federal common law. For example, the Third Circuit upheld an equitable estoppel claim in *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 239 (3d Cir. 1994). Rather than explicitly relying on federal common law, the court stated that equitable estoppel claims are "authorized under ERISA pursuant to § 1132(a)(3)(B)." *Id.* at 235. The court set forth a three-prong test for determining when estoppel is appropriate. "To succeed under this theory of relief, an ERISA plaintiff must establish (1) a material representation, (2) reasonable and detrimental reliance upon the representation, and (3) extraordinary circumstances." *Id.; see also* Smith v. Hartford Ins. Group, 6 F.3d 131, 137 (3d Cir. 1993) (permitting an equitable estoppel claim to proceed under section 1132(a)(3)).

The First and Second Circuits have stated that they, too, would uphold an estoppel claim as a matter of statutory interpretation if the facts warranted it. In *Law v. Ernst & Young*, 956 F.2d 364, 370 (1st Cir. 1992), the First Circuit ruled that the district court erred in finding an estoppel claim actionable under 29 U.S.C. § 1132(a)(3) (1994). Following the Eleventh Circuit's analysis in *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir. 1990), the First Circuit rejected the claim because it amounted to a modification of the plan, not an interpretation of an ambiguous term. Similarly, in *Lee v. Burkhart*, 991 F.2d 1004, 1010 (2d Cir. 1993), the Second Circuit affirmed a lower court's dismissal of

a. *Courts Recognizing Common-Law Estoppel Claims*

1. *Eleventh Circuit Approach*

The Eleventh Circuit has concluded that estoppel actions are appropriate as long as the representation enforced is the interpretation of an ambiguous plan term, not a modification of the plan itself. Two cases set forth the boundaries of this rule.

The first is *Nachwalter v. Christie.*[262] *Nachwalter* involved a suit brought against Mrs. Christie to determine the extent of the plan's liability. Nachwalter sued Mrs. Christie, individually and as the personal representative of the estate of her deceased husband, Irwin Christie, who had been a participant in Nachwalter's two employee benefit plans.[263] The key dispute concerned which date was the valuation date for determining Irwin Christie's share of assets in the plans.[264] Under the clear written terms of the plan, the valuation date was the date Irwin became a "Withdrawn Participant," which was June 30, 1982.[265] Mrs. Christie alleged, however, that the plan trustees and Irwin had informally agreed that he could withdraw his assets on June 30, 1981 and that this date should be the valuation date.[266] The significance of the dates was that, between June 1981 and June 1982, the value of Christie's assets in the plans had fallen from over $196,000 to approximately $83,000.[267] Mrs. Christie sought to enforce the alleged oral agreement by estoppel.[268] The district court rejected the claim and entered a declaratory judgment in favor of the plan trustees.[269]

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an estoppel claim, finding that "these facts are insufficient to support a claim for equitable estoppel." However, the court made it clear that it would recognize such claims in "extraordinary circumstances" when the facts demonstrated (1) a material misrepresentation; (2) reliance; and (3) damage. *See id.* at 1009. Interestingly, although most courts tying estoppel claims to the text of section 1132 have relied upon 29 U.S.C. § 1132(a)(3) (1994), which broadly provides for "other appropriate equitable relief," this court viewed the estoppel claim as arising under 29 U.S.C. § 1132(a)(1)(B) (1994), which specifically provides a participant only with benefits "under the terms of his plan." *See Lee,* 991 F.2d at 1009.

Despite these attempts to tie the estoppel claims to ERISA's text, the courts are simply making common law and calling it by a different name.

262. 805 F.2d 956 (11th Cir. 1986).

263. *See id.* at 958.

264. *See id.*

265. *See id.*

266. *See id.*

267. *See Nachwalter,* 805 F.2d at 958.

268. *See id.*

269. *See id.* at 958-59.

The Eleventh Circuit affirmed.[270] The court accepted the proposition that Congress had intended federal courts to create a body of federal common law, but it noted that this was not "*carte blanche* authority to apply any prevailing state common-law doctrine it chooses to ERISA cases."[271] The court found two limits upon the creation of federal common law with regard to ERISA. First, courts may create federal common law only if ERISA does not expressly address the issue before the court.[272] Second, courts may incorporate a doctrine into the federal common law of ERISA only if that doctrine is consistent with ERISA's policies.[273] The court specifically cautioned that "federal courts may not use state common law to rewrite a federal statute."[274]

Applying these limits to the case before it, the court rejected the federal common-law estoppel claim. First, the court found that Congress had expressly addressed the issue in 29 U.S.C. § 1102(a)(1), which requires that ERISA plans be "'established and maintained pursuant to a written instrument.'"[275] The court reasoned that, because ERISA requires plans to be maintained in writing, that same provision prohibits informal agreements to modify such plans. Second, the court concluded that allowing some participants to recover under a common-law estoppel claim ultimately might hurt other participants and beneficiaries and thus would not be consistent with congressional intent. In particular, the court feared that enforcing promises to some participants for benefits greater than those provided under the terms of the plan would leave fewer plan assets for others. As the court put it, "employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements."[276]

In 1990, however, the Eleventh Circuit made it clear that it does not reject all estoppel claims. In *Kane v. Aetna Life*

270. *See id.* at 962.
271. *Id.* at 959.
272. *See Nachwalter*, 805 F.2d. at 959.
273. *See id.* at 959-60.
274. *Id.* at 960.
275. *Id.* (quoting 29 U.S.C. § 1102(a)(1)) (1994).
276. *Id.* at 960.

Insurance,[277] the court allowed an estoppel claim as a matter of federal common law after it determined that the representation at issue merely interpreted an ambiguous plan term and did not modify the terms of a written plan.[278] Kenneth and Kathy Kane had adopted a child who had been born prematurely and who faced serious medical problems.[279] Before finalizing the adoption, they contacted their health insurer to determine whether Mr. Kane's employer-provided group health coverage would pay for the child's medical expenses.[280] Twice Aetna stated that the expenses would be covered.[281] The first time, Aetna told the Kanes that the child would be covered from the date of commencement of formal legal adoption proceedings.[282] The second time, Aetna informed the hospital that coverage would begin on June 1, 1984.[283] The child remained in the hospital until July 5, 1984, "amassing substantial medical expenses."[284]

When the Kanes submitted a claim to Aetna for the medical expenses, Aetna denied coverage. Aetna claimed that its plan stated that medical expenses for a hospital visit are not covered when the hospitalization began prior to the "effective date of coverage."[285] In this case, the hospital visit began with the child's birth on May 19, 1984, before formal adoption proceedings had begun. A dispute then arose regarding the "effective date of coverage."[286] Mr. Kane sued individually and as guardian for the child, seeking to enforce the earlier representations through estoppel. The district court granted summary judgment to Aetna.[287]

The Eleventh Circuit reversed.[288] The court reaffirmed *Nachwalter's* holding that oral representations cannot be used to modify the terms of an ERISA plan. In this case, however, the court found that the oral representations were not plan

277. 893 F.2d 1283 (11th Cir. 1990).
278. *See id.* at 1286.
279. *See id.* at 1284.
280. *See id.*
281. *See id.* at 1284-85.
282. *See Kane*, 893 F.2d at 1284.
283. *See id.* at 1285.
284. *Id.*
285. *Id.*
286. *See id.*
287. *See Kane*, 893 F.2d at 1285.
288. *See id.* at 1286.

modifications but were merely interpretations of the phrase "effective date of coverage," a phrase it found to be ambiguous.[289] One possible interpretation was that "effective date of coverage" referred to the date of coverage of the person who was hospitalized, including a dependent. Under that interpretation, the child was hospitalized before the effective date of coverage began, and the expenses would not be covered. An alternative reading was that "effective date of coverage" referred only to the employee and that the dependent was covered if the employee was eligible for benefits before the hospitalization began. The court stated that "[g]iven this ambiguity, we are of the opinion that these events involved an oral interpretation of the Plan, not an amendment or modification."[290] The court therefore held that the Kanes could bring their federal common-law action to estop Aetna from denying coverage.

2. *Sixth Circuit Approach*

The Sixth Circuit has also accepted estoppel claims as a matter of federal common law, but only in cases in which the representation at issue relates to a "welfare" plan, rather than a pension plan. The court set forth this principle in *Armistead v. Vernitron Corp.*[291] The plaintiffs in *Armistead* were former employees of Vernitron Corporation ("Vernitron") who had retired based on alleged oral representations that, by taking an early retirement offer, they would be given lifetime health and life insurance benefits.[292] In fact, the terms of the early retirement agreement provided that such benefits could be terminated, and this case arose after just such an occurrence.[293] The plaintiffs claimed that if they had known they might not receive lifetime health and life insurance benefits, they would not have retired.[294] They brought an equitable estoppel claim

289. *Id.*

290. *Id.* The Eighth Circuit has hinted that it would adopt the same position regarding creation of a federal common-law estoppel remedy in an appropriate case. *See* Slice v. Sons of Norway, 34 F.3d 630, 635 (8th Cir. 1994) (affirming dismissal of a common-law estoppel claim where the representation amounted to a modification of the plan, not an interpretation of an ambiguous term).

291. 944 F.2d 1287 (6th Cir. 1991).

292. *See id.* at 1292.

293. *See id.* at 1292-93.

294. *See id.* at 1293.

seeking lifetime benefits.[295] The district court entered judgment for the plaintiffs, holding Vernitron equitably estopped from withholding retirement insurance benefits from the plaintiffs.[296]

The Sixth Circuit affirmed.[297] It began its analysis by noting that it had authority under both the LMRA and ERISA to create an estoppel right under federal common law.[298] It further noted that estoppel had been recognized as an appropriate remedy in the common law of the LMRA.[299]

The court next considered the type of plan involved. Vernitron had relied upon *Nachwalter* in arguing that ERISA's written plan requirement prohibited the common-law creation of an estoppel remedy in this situation. The Sixth Circuit concluded that the real basis for *Nachwalter* was that the plan at issue there was a pension plan—a plan to which employees contribute and from which benefits are paid out based upon actuarial assumptions. To permit an oral modification of a pension plan could undermine the security of pension rights, and this was the main reason why the written plan requirement existed.[300]

The court found that welfare plans are different because welfare plans do not have vesting and funding requirements. Thus, a plan's actuarial soundness is not threatened if one participant recovers plan assets through estoppel.

> The actuarial soundness of a fund, which might be depleted if strict vesting and accrual requirements were not observed, is not an issue where a plan of this description is involved. We conclude therefore that in such a case, the purpose of Congress in enacting 29 U.S.C. § 1102(a) would not be frustrated by recourse to estoppel principles which are generally applicable to all legal actions.[301]

In this case, however, the court approved the use of estoppel for a suit involving a welfare plan. It did not speculate as to whether estoppel could ever be appropriate in a case involving a pension plan.

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295. *See id.*
296. *See Armistead*, 944 F.2d at 1290.
297. *See id.* at 1305.
298. *See id.* at 1298.
299. *See id.*
300. *See id.* at 1299.
301. *Armistead*, 944 F.2d at 1300.

3. *Seventh Circuit Approach*

Like the Sixth Circuit, in addressing estoppel claims the Seventh Circuit has focused, in part, on whether the plan at issue is a pension or a welfare plan. The Seventh Circuit also has focused on whether the alleged promise is oral or written and whether the plan is single-employer or multi-employer. The court specifically has approved the use of estoppel where there has been a written misrepresentation regarding an unfunded, single-employer welfare plan. It has also raised the possibility that estoppel could be used to enforce oral representations in an appropriate case.

The Seventh Circuit first approved an estoppel claim as a matter of federal common law in *Black v. TIC Investment Corp.*[302] The court in this case used an analysis much like that in *Armistead,*[303] drawing a distinction between welfare and pension plans.[304] The action was brought by Paul Black, who claimed that he had relied to his detriment on his employer's alleged oral promise to pay severance benefits despite prior written notice that the severance plan had been terminated.[305] He filed suit in federal district court, arguing that his employer, White Farm Equipment Company ("White"), and its parent, TIC, should be estopped from denying the validity of his severance claim.[306]

The district court ruled that White had properly terminated its severance plan and that Black was ineligible to recover benefits, despite the alleged promise.[307] The Seventh Circuit reversed, ruling that the doctrine of estoppel could be used to enforce the promise.[308]

Although the court never mentioned the federal common law of ERISA, its analysis makes clear that federal common law was the source of the cause of action it permitted. The court did not discuss any statutory section of ERISA. Instead, the court stated: "In this case the statute is silent. This is not so much a question of statutory interpretation as a question of public policy. Is it

302. 900 F.2d 112 (7th Cir. 1990).

303. In fact, the Sixth Circuit in *Armistead* relied in part on *Black* in reaching its result. *See Armistead,* 944 F.2d at 1300.

304. *See Black,* 900 F.2d at 115.

305. *See id.* at 113.

306. *See id.*

307. *See id.* at 113-14.

308. *See id* at 116.

better to allow estoppel in employee benefit cases or to bar them?"[309] To answer this question, the court addressed two concerns that other courts had raised about permitting estoppel actions.

First, the court addressed the concern that allowing the action might affect the plan's actuarial soundness. The court highlighted the distinction between a pension plan and a welfare plan—the funding requirement—and noted that concern over pension plan actuarial soundness was the most common reason courts were reluctant to allow estoppel actions.[310] It agreed with *Vernitron* that this concern was not relevant to welfare plans because "[i]n the case of an unfunded welfare plan, there is no particular fund which is depleted by paying benefits. Thus there is no need for concern about the plan's actuarial soundness."[311]

Second, the court addressed a concern related to multi-employer plans. Some courts had expressed concern that one employer contributing to a multi-employer plan could hurt other contributing employers by making misrepresentations regarding plan benefits. The court found that this concern also did not apply, as Black's claim involved a single-employer welfare plan.[312] Finding these two concerns about the recognition of estoppel claims to be inapplicable, the court held that "estoppel principles are applicable to claims for benefits under unfunded single employer welfare benefit plans under ERISA."[313]

The Seventh Circuit reaffirmed its decision four years later, in *Miller v. Taylor Insulation Co.*[314] *Miller* permitted a claim of promissory estoppel, as a matter of federal common law, to enforce a written representation regarding a single-employer welfare plan. As the facts of the case were very similar to those in *Black*, the court devoted most of its decision to speculation about whether an oral representation could ever support an estoppel claim.

309. *Black*, 900 F.2d. at 114.
310. *See id.* at 115.
311. *Id.*
312. *See id.*
313. *Id.*
314. 39 F.3d 755 (7th Cir. 1994).

The dispute arose when Miller, upon retiring from Taylor Insulation Co. ("Taylor"), entered into a contract with Taylor providing that he could participate in Taylor's group health insurance plan.[315] His claims were paid for eight years.[316] When a new company took over as the insurer for the Taylor group, however, it determined that Miller was not covered, because he was not a full-time employee, and that the policy provided that coverage was limited to full-time employees.[317]

Miller filed against Taylor both a breach of contract claim and a promissory estoppel claim under ERISA. The district court found that the breach of contract claim was preempted by ERISA, and it granted summary judgment to Taylor on the estoppel claim.[318]

The Seventh Circuit reversed the summary judgment on the promissory estoppel claim, approving the use of promissory estoppel in general, but remanding the case to the district court for fact-finding to see whether the facts supported such a claim.[319] The court explained its holding by stating that "promissory estoppel is, in the view of this circuit at any rate, a part of the common law we have been told . . . to create in order to plug gaps in ERISA."[320] The court acknowledged that there might be limits on the breadth of an ERISA promissory estoppel claim, particularly given ERISA's requirement that employee benefit plans be in writing. In particular, it noted that "[c]onceivably the policy against oral modifications of ERISA plans . . . may bar using the concept of estoppel to modify the terms of a written plan on the basis of an oral promise."[321] Whether this policy in fact did bar estoppel claims based on oral remains an open question within the circuit. The court's main concern about such oral promises was that "they would enable the plan's integrity, and possibly its actuarial soundness, to be eroded by relatively low-level employees who in response to inquiries about the scope of coverage advise participants that a

315. *See id.* at 757.
316. *See id.*
317. *See id.*
318. *See id.*
319. *See Miller*, 39 F.3d at 761.
320. *Id.* at 758 (citation omitted).
321. *Id.* at 759.

particular medical procedure is covered, even though the plan is explicit that it is not covered."[322]

The court stated that the likelihood of a low-level employee being able to jeopardize a plan in this manner might differ depending whether the promise was that an employee was a participant in a plan itself, or that a particular medical procedure was covered. The court stated that it would be unlikely that a low-level employee would make the former promise and, thus, that the likelihood of jeopardization was smaller in the first scenario.[323]

In the end, the court admitted that all of its discussion was speculative because the representation at issue in the case was written, not oral. Therefore, the court concluded that enforcing the written representation given to Miller "would not collide with a policy against allowing oral modifications of ERISA plans."[324]

After *Miller*, then, federal common-law estoppel claims may be brought in the Seventh Circuit to enforce written representations regarding single-employer welfare plans. The question is still open whether oral modifications of a plan may be allowed. *Miller* hints that such modifications are more likely to be approved when the modifications concern participation in a plan in general, rather than specific, procedures, in order to avoid the danger that low-level employees might bind the insurer or fiduciary.[325]

b. *Tenth Circuit Rejection of Common-Law Estoppel Claims*

In *Miller v. Coastal Corporation*,[326] the Tenth Circuit refused to allow a plaintiff to bring an equitable estoppel claim to enforce representations regarding a pension plan. The plaintiff in this

322. *Id.*

323. *See id.*

324. *Miller*, 39 F.3d at 759.

325. It is also an open question whether the Seventh Circuit, if it recognized estoppel claims to enforce an oral promise, would adopt the Eleventh Circuit's distinction between oral interpretations and oral modifications. In *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 650 (7th Cir. 1993), after refusing to allow a waiver claim as a matter of federal common law, the court noted that estoppel claims were proper and raised the possibility that the Seventh Circuit might follow the Eleventh Circuit's lead in distinguishing between promises that modify the plan and those that merely interpret ambiguous plan terms.

326. 978 F.2d 622 (10th Cir. 1992).

case, Fred Miller, had been employed by Derby Refinery from 1950 to 1973 as a union hourly employee.[327] In 1973, Coastal Corporation ("Coastal") purchased Derby Refinery. A year later, Coastal promoted Miller to a salaried non-union position.[328] Miller was no longer eligible to participate in the union pension plan and began participating in the pension plan for salaried employees.[329] He claimed that when he was promoted to the salaried position, he was told that his service in the hourly position would be treated, for pension purposes, as if he had been a salaried employee.[330] When Miller retired, however, Coastal Pension Plan did not calculate his pension as if he had always been a salaried employee of Coastal, and he received a much lower pension than he had been expecting.[331]

Miller brought an action to recover additional pension benefits under section 1132(a)(1)(B). The district court found that the plan did not entitle Miller to additional benefits.[332] On appeal, Miller urged the court to enforce the alleged representation regarding how his benefits would be calculated by recognizing a common-law estoppel claim under ERISA. The appeals court declined,[333] specifically rejecting Miller's claim that estoppel was appropriate because the misrepresentation was made in writing, not orally. In clearly rejecting estoppel claims in both situations, it noted: "An employee benefit plan cannot be modified . . . by informal communications . . . regardless of whether those communications are oral or written."[334] To the court, the issue was not whether representations were oral or written but whether *any* informal representations could be used to modify a formal written plan.[335] Actuarial soundness concerns constituted the primary motivation for the court's rejection of informal modification. The court noted that some employees would be unable to rely on their plans if expected retirement benefits could be radically affected by greater distributions to

327. *See id.* at 623.
328. *See id.*
329. *See id.*
330. *See id.*
331. *See Coastal*, 978 F.2d at 623.
332. *See id.* at 624.
333. *See id.* at 624-25.
334. *Id.* at 624 (citation omitted).
335. *See id.*

other employees pursuant to informal arrangements.[336] The court therefore concluded that its decision protected all participants' interests in such plans.

c. *Appropriateness of Recognizing Estoppel Actions as a Matter of Federal Common Law*

Although the facts in several of the cases described above are sympathetic, it is as improper for federal courts to create estoppel claims as a matter of federal common law as it is for them to create restitution or contribution claims. In creating such claims, courts are replacing Congress's policy decision with their own. The Seventh Circuit decisions are particularly noteworthy. *Black* makes clear that a decision whether to create a federal common-law estoppel claim under ERISA is a matter of pure judicial policy. There, the court quite frankly conceded that, because the statute was silent, "[t]his is not so much a question of statutory interpretation as a question of public policy."[337]

The Seventh Circuit's actions in *Black* and *Miller*, however, are in conflict with its dicta in *Pohl v. National Benefits Consultants, Inc.*[338] In *Pohl*, the court, facing facts very similar to those in *Black*, albeit with an oral rather than a written promise, found a state law claim for misrepresentation of benefits under an ERISA welfare plan to be preempted by ERISA and refused to provide a federal claim in its place.[339] When the plaintiff objected, the court properly pointed out that the lack of a particular remedy is not a gap in the statute, stating that "[t]he fact that ERISA does not provide a substitute remedy reflects not a senseless gap in the statute but a determination to carry through the policy we have described by confining participants to the entitlements spelled out in writing."[340] Despite this apparent understanding, the Seventh Circuit continues to characterize its creation of new remedies as mere gap-filling.[341] Yet, as explained above, these

336. *See Coastal*, 978 F.2d at 625 (quoting Straub v. Western Union Tel. Co., 851 F.2d 1262, 1265 (10th Cir. 1988)).

337. Black v. TIC Inv. Corp., 900 F.2d 112, 114 (7th Cir. 1990).

338. 956 F.2d 126 (7th Cir. 1992).

339. *See id.* at 127 ("ERISA 'shall supersede any and all State laws.'" (quoting 29 U.S.C. § 1144(a) (1994))).

340. *Id.* at 128.

341. *See, e.g.*, Miller v. Taylor Insulation Co., 39 F.3d 755, 758 (7th Cir. 1994).

gaps are gaps of the courts' own creation. Just like restitution claims by employers and contribution claims by fiduciaries, estoppel claims by participants have been created solely by judicial, not congressional, will. Recognition of a remedy is not necessary to effectuate congressional intent. By overriding Congress's rejection of such a remedy, the court is contradicting Congress's will and violating the separation of powers.

Second, one of the prime motivating factors in ERISA's passage was that benefit plans faced a maze of different and inconsistent laws and regulations that created inefficiencies and raised costs. Congress desired a federal law of uniform and consistent rights and obligations. Such a uniform law no longer exists in the area of estoppel. If a plan has nationwide operations, it faces different rules regarding estoppel in different circuits. If it operates in the Eleventh Circuit, participants may be able to use estoppel to enforce inconsistent representations, so long as those representations interpret the plan rather than modify it. In both the Sixth and Seventh Circuits, whether a representation is enforced will depend on whether it involves a pension plan or a welfare plan. In the Seventh Circuit, another significant factor will be whether the representation was oral or written and, if it was oral, whether the representation was made regarding coverage in general or coverage for a specific procedure. In the Tenth Circuit, representations regarding pension plans are not enforceable even if they are made in writing. As is obvious, just as there were once varying state laws, there is now varying federal common law among the different circuits. Although on a smaller scale, there is now inconsistency and disuniformity, just as there was before ERISA's passage.

IV. CONCLUSION

Who should make fundamental national policy choices regarding rights, obligations, and remedies under employee benefit plans? The Constitution assigns that task to Congress. Congress fulfilled its mission in the detailed provisions of ERISA, which reflect hundreds of policy choices and achieve a difficult balance among competing interests. When courts create federal common law interpreting plan terms and creating defenses to congressionally specified remedies, they are effectuating Congress's choices. But when courts create new federal

common-law claims or remedies omitted from ERISA by Congress, they are effectuating their own choices. Courts may be unhappy with the choices Congress made, but courts should not substitute their own will for that of Congress.

Federal common law should not be created merely because a case is sympathetic or the doctrine considered seems good. Congress, not the federal courts, is in the better position to make these policy choices. Congress, not the federal courts, is directly accountable to the people.