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# THE FEDERAL COMMON LAW OF VICARIOUS FIDUCIARY LIABILITY UNDER ERISA

Colleen E. Medill

*University of Nebraska-Lincoln*, [cmedill2@unl.edu](mailto:cmedill2@unl.edu)

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**ARTICLE:** THE FEDERAL COMMON LAW OF VICARIOUS FIDUCIARY LIABILITY UNDER ERISA

**NAME:** Colleen E. Medill\*

**BIO:** \* Warren R. Wise Professor of Law, University of Nebraska College of Law. The research for this Article was supported by summer research grants in 2008 and 2009 from the University of Nebraska College of Law. The author thanks Joshua Campbell, Heather Quitmeyer, Michelle Sitorius, and Abby Littrell for their invaluable research assistance in the preparation of this Article.

**LEXISNEXIS SUMMARY:**

... Absent a federal common law rule of vicarious fiduciary liability, a corporate employer, in its nonfiduciary capacity as the settlor of its ERISA plan, may design the documents that govern the employer's plan as a shield against fiduciary responsibility for the actions of the employer's own internal fiduciary employees. ... This Article explores the potential for development of another area of federal common law under ERISA - the incorporation of respondeat superior liability principles to impose ERISA fiduciary liability ("vicarious fiduciary liability") upon a corporation for the fiduciary activities of its employees or agents. ... This claims and remedies system requires that vicarious fiduciary liability must be limited so that a nonfiduciary corporate principal is not subject to a damages claim under ERISA if an employee or an agent of the principal acts in a "rogue" manner as a fiduciary with respect to an ERISA plan. ... The question simply was not at the forefront of the immediate problems of trust asset mismanagement in the multiemployer and defined benefit plan context that Congress sought to resolve through ERISA's fiduciary responsibilities provisions. ... ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties - and to damages - under ERISA. ... Similarly, external corporate fiduciaries and external nonfiduciary service providers who assist employers in administering and operating their ERISA plans may increase the fees for their services if the parameters of vicarious fiduciary liability are ill-defined and therefore difficult to monitor and control. ... If imposing vicarious fiduciary liability makes corporate employers the proverbial deep pocket for the misconduct of internal fiduciary employees, then employers are likely to respond by engaging in tactics to protect corporate assets from fiduciary liability. ... To be consistent with ERISA's statutory scheme for claims and remedies under section 502(a), a federal common law rule of vicarious liability must be limited by modifying the common law rule that imposed respondeat superior liability upon a principal who approved or ratified an agent's injurious conduct that occurred outside the scope of employment.

**HIGHLIGHT:** A federal common law rule of vicarious fiduciary liability under ERISA is necessary for two reasons. First, a rule of vicarious fiduciary liability is essential to maintaining and enforcing ERISA's comprehensive system of fiduciary regulation. Second, vicarious fiduciary liability is needed to prevent employer overreaching under the judicially-created settlor function defense to breach of fiduciary duty claims. Absent a federal common law rule of vicarious fiduciary liability, a corporate employer, in its nonfiduciary capacity as the settlor of its ERISA plan, may

design the documents that govern the employer's plan as a shield against fiduciary responsibility for the actions of the employer's own internal fiduciary employees. This misuse of nonfiduciary settlor powers, which is contrary to both the letter and the spirit of ERISA, would be prevented by a federal common law rule of vicarious fiduciary liability.

The Employee Retirement Income Security Act of 1974 ("ERISA"), the federal law that regulates employer-sponsored benefit plans, has a rich history of judicially-created federal common law. This Article explores the theoretical, policy, statutory, and stare decisis grounds for the development of another area of federal common law under ERISA - the incorporation of respondeat superior liability principles to impose ERISA fiduciary liability ("vicarious fiduciary liability") upon a corporation for the fiduciary activities of its employees or agents. The Article proposes that the federal courts should adopt a federal common law rule of vicarious fiduciary liability under ERISA based on the traditional scope of employment approach. Under such a rule, a corporate principal whose own internal employees or agents perform fiduciary functions during the course and within the scope of their employment or agency relationship would be strictly liable under ERISA for any breach of fiduciary duty by the employee or agent. Vicarious fiduciary liability should be limited, however, so that a nonfiduciary corporate principal would not be subject to damages claims under ERISA for the rogue fiduciary activities of its employees or agents, but would be subject to restitution as necessary to prevent unjust enrichment of the principal.

**TEXT:**  
[\*250]

Introduction

The Employee Retirement Income Security Act of 1974 ("ERISA"),<sup>n1</sup> the federal law that regulates employer-sponsored benefit plans, has a rich history of judicially-created federal common law. Examples where the federal courts have incorporated state law principles or doctrines as ERISA federal common law include the contract interpretation doctrine of contra proferentem,<sup>n2</sup> state laws establishing statutes of limitations,<sup>n3</sup> state law principles governing corporations,<sup>n4</sup> common law trust principles,<sup>n5</sup> and common law remedies available in equity.<sup>n6</sup> This Article explores the potential for development of another area of federal common law under ERISA - the incorporation of respondeat superior liability principles to impose ERISA fiduciary liability ("vicarious fiduciary liability") upon a corporation for the fiduciary activities of its employees or agents.<sup>n7</sup>

In enacting ERISA, Congress contemplated 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."<sup>n8</sup> The federal courts have used state law principles and doctrines as "gap-fillers" where the federal statute itself is silent or ambiguous, or where a federal common law rule would promote ERISA's fundamental policies.<sup>n9</sup> But judicial authority to supplement the statutory language of ERISA cannot rewrite the statutory scheme itself. If the role of federal common law is to serve as a statutory gap-filler, then a federal common law rule of vicarious fiduciary liability must be reconcilable with both the policy objectives and the complex statutory provisions of ERISA. This Article contributes to the scholarly literature by providing a comprehensive analysis of the theoretical, policy, statutory, and stare decisis [\*251] grounds for a federal common law rule of vicarious fiduciary liability.<sup>n10</sup>

The Article makes two interrelated claims. The first claim is that the federal common law of ERISA should include a rule of vicarious fiduciary liability. Under such a rule, a corporate principal whose own employees or agents perform fiduciary functions during the course and within the scope of their employment or agency relationship would be strictly liable under ERISA for any breach of fiduciary duty by the employee or agent. In applying a federal common law rule of vicarious fiduciary liability under ERISA, however, the federal courts should be cautious not to misuse the concept and apply it in such a way that it contravenes ERISA's system of claims and remedies under section 502(a).<sup>n11</sup> This claims and remedies system requires that vicarious fiduciary liability must be limited so that a nonfiduciary corporate principal is not subject to a damages claim under ERISA if an employee or an agent of the principal acts in a "rogue" manner as a fiduciary with respect to an ERISA plan. If the nonfiduciary corporate principal learns of the rogue

fiduciary activity, and even knowingly participates in it, section 502(a) of ERISA requires that monetary relief must be limited to restitution as necessary to prevent unjust enrichment of the principal.

The Article's second claim concerns the doctrinal interpretation of the primary fiduciary duty provisions of section 404(a)<sup>n12</sup> and the co-fiduciary duty provisions of section 405<sup>n13</sup> of ERISA. The language of section 405 does not distinguish between external fiduciaries and internal fiduciaries - employees who act as fiduciaries with respect to their employer's plan during the course and within the scope of their employment ("internal fiduciary employees"). Read literally, the co-fiduciary duty provisions of section 405 could be interpreted as permitting an employer to use its nonfiduciary authority as the creator (in ERISA parlance, the "settlor") of the plan to shield itself from responsibility for the actions of its own internal fiduciary employees (the "settlor function defense").

The Article's second claim is that section 405 should not be interpreted so that the corporate employer who sponsors an ERISA plan may design the documents that govern the plan as a shield [\*252] against fiduciary liability for the actions of the employer's own internal fiduciary employees. Just as respondeat superior liability applied to a corporate trustee under the common law, vicarious fiduciary liability should apply under ERISA. Under a rule of vicarious fiduciary liability, the corporate employer would be strictly liable for any breach of a section 404(a) fiduciary duty by an internal fiduciary employee that occurs within the course and scope of employment.

Doctrinally, rejection of the settlor function defense based on a federal common law rule of vicarious fiduciary liability rests on two other statutory provisions of ERISA - section 404(a)(1)(D)<sup>n14</sup> and section 410(a).<sup>n15</sup> Section 404(a)(1)(D), one of ERISA's primary fiduciary duties, establishes an ordering rule that requires a fiduciary to disregard provisions in a plan document that are inconsistent with ERISA's statutory scheme for the regulation of fiduciary conduct. Section 410(a) reinforces this ordering rule by rendering void as a matter of public policy any exculpatory clause in a plan document that purports to relieve a fiduciary of its statutory fiduciary duties. In light of these statutory provisions, section 405 should not be interpreted in such a way as to permit corporate employers to avoid liability for the actions of their own internal fiduciary employees based on provisions that the employer itself has written into the plan's governing documents.

Part I of the Article begins by presenting the theoretical justifications for respondent superior liability and the pre-ERISA liability rules for common law trustees. Part I discusses ERISA's policy goals and compares these goals with the theoretical justifications for respondeat superior liability. Part I ends with a detailed examination of ERISA's statutory provisions that impose fiduciary and co-fiduciary duties and "personal" liability upon breaching fiduciaries. Part I concludes that a federal common law rule of vicarious fiduciary liability is both consistent with ERISA's policy objectives and the technical statutory provisions that regulate fiduciary conduct.

Part II of the Article addresses whether the civil claims and remedies provisions of section 502(a) are consistent with a federal common law rule of vicarious fiduciary liability. Part II finds that vicarious fiduciary liability can be reconciled with the claims and remedies provisions of section 502(a), but that a rule of vicarious fiduciary liability must be limited so as to avoid transforming claims against nonfiduciary external principals into fiduciary claims. Section 410(a) supports this private ordering rule by rendering void, [\*253] as a matter of public policy, exculpatory provisions in a plan document that purport to relieve fiduciaries from their responsibilities under ERISA.

Part III of the Article proposes two general principles to guide the federal courts in developing a federal common law rule of vicarious fiduciary liability under ERISA. Part III presents an analytical model, built upon the two general principles, that emphasizes fiduciary plan structure. Under this model, the federal courts would distinguish between vicarious fiduciary liability claims brought against external corporate principals and claims brought against employers for the fiduciary breaches of their own internal employees with respect to the employer's ERISA plan. The Article concludes with illustrations of how the model may be used to analyze vicarious fiduciary liability claims under ERISA.

#### I. ERISA Fiduciary Regulation and Vicarious Fiduciary Liability

## A. Respondeat Superior Theory and ERISA Policy Goals

### 1. The Theoretical Rationales for Respondeat Superior Liability

The Latin phrase respondeat superior, translated literally, means "let the master answer."<sup>n16</sup> Judge Richard Posner has described the modern doctrine of respondeat superior liability as follows:

The liability of an employer for torts committed by its employees - without any fault on [the employer's] part - when they are acting within the scope of their employment, the liability that the law calls "respondeat superior," is a form of strict liability. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate [itself] by proving [its] freedom from fault.<sup>n17</sup>

Exceptions to an employer's strict liability under the doctrine include torts arising during a "frolic" or "detour" by an employee [\*254] for personal reasons that are outside the scope of employment,<sup>n18</sup> or situations where the employer does not "control" the tortfeasor, as in the case of an independent contractor.<sup>n19</sup> If, however, the employer approves or ratifies an employee's injurious conduct, under the common law respondeat superior liability attaches even though the employee may have been acting outside the scope of employment.<sup>n20</sup>

Respondeat superior liability is closely associated with the rise of the modern corporation and enterprise liability.<sup>n21</sup> Corporations are vicariously liable for the actions of their employees when those employees are acting within the scope of their employment.<sup>n22</sup> Corporate liability is based on the principle that a corporation is charged with knowledge of facts acquired by its officers and agents while these persons act within the course and scope of their employment.<sup>n23</sup> Knowledge of an unauthorized act by the employee, however, is not imputed to the corporation.<sup>n24</sup> Therefore, as in the master-servant context, the corporation is not vicariously liable for conduct by an employee that is outside the scope of employment.<sup>n25</sup>

Legal scholars have long struggled to justify imposing strict respondeat superior liability. Perhaps the most often quoted criticism comes from Justice Oliver Wendell Holmes, who characterized the doctrine of respondeat superior as an anomaly that "must be explained by some cause not manifest to common sense alone."<sup>n26</sup> [\*255] Academic uneasiness with the doctrine exists largely because of "an inability to identify and defend its precise rationale."<sup>n27</sup> Writing in 1916, T. Baty identified no less than nine possible rationales for imposing vicarious liability.<sup>n28</sup> Fifty years later, P.S. Atiyah reviewed Baty's original rationales in light of the complexities of modern society and found that "some element of truth" remained.<sup>n29</sup> Of Baty's nine original rationales for respondeat superior liability, Atiyah concluded that the following rationales remained viable in modern society:

. Control by the employer over the employee encourages accident prevention by imposing liability upon the person who has control over the employee's potentially negligent conduct, particularly if the employer cannot insure against the employee's negligence.<sup>n30</sup>

. Identification of the servant with the master continues in modern society with the fictitious corporate person, who must "act" through its officers and employees.<sup>n31</sup>

. Evidentiary difficulties in identifying and proving that a specific individual is responsible for a tortious act are even more acute in the modern corporate world.<sup>n32</sup>

Atiyah's analysis of the ninth Baty rationale - the satisfaction of damages<sup>n33</sup> - is particularly germane when considered in the modern context of ERISA claims and remedies. Baty's original point was that the master is wealthier than the

servant and therefore is more capable of satisfying a damages award. Atiyah rejected this reasoning as "no justification at all, when taken by itself." <sup>n34</sup> Atiyah then offered a substitute rationale, namely that "where there are other sound reasons for imposing liability, the law should not be stultified by merely creating academic liabilities which can rarely be satisfied in [\*256] practice." <sup>n35</sup> Atiyah's point is noteworthy because it echoes a modern criticism of ERISA's claims and remedies provisions. This criticism - described by the federal judiciary as "betrayal without a remedy" <sup>n36</sup> - arises where, as an academic matter, a valid claim exists under ERISA based on a fiduciary's breach of a statutory duty, but yet ERISA does not provide an adequate remedy. <sup>n37</sup>

Today, the scholarly rationales for respondeat superior liability are rooted primarily in the law-and-economics concepts of loss distribution <sup>n38</sup> and economic efficiency. <sup>n39</sup> Of these two rationales, the economic analysis of Alan Sykes is most instructive for purposes of comparison with the policy objectives of ERISA's statutory system for regulating fiduciary conduct. In *The Economics of Vicarious Liability*, <sup>n40</sup> Sykes examines the circumstances under which a rule imposing vicarious liability upon the principal results in greater economic efficiency than a rule imposing personal liability on the agent alone. Sykes's theoretical approach is highly instructive in the ERISA setting because ERISA expressly imposes personal liability upon a breaching fiduciary, but does not expressly create a rule of vicarious fiduciary liability. <sup>n41</sup>

The starting point for Sykes's analysis is whether or not the principal and agent can contract to allocate the risks associated with the agent's performance. <sup>n42</sup> Under ERISA, persons are statutorily prohibited from contracting to exculpate a fiduciary from liability. <sup>n43</sup> According to Sykes, where liability cannot be allocated by private contract there are two factors that determine whether a rule of vicarious liability promotes greater economic efficiency. These two factors are the risk of insolvency of the agent and the transaction costs to the principal in monitoring the agent's behavior. <sup>n44</sup>

[\*257] Sykes examines how these two factors operate in a variety of scenarios. One scenario - the tort claimant who is an involuntary creditor seeking recovery for an injury caused by the agent - is analogous to the ERISA context of a plan <sup>n45</sup> or a plan participant who suffers a loss due to a fiduciary agent's breach of duty. In analyzing this scenario, Sykes assumes that the principal and the agent are in a multi-period agency relationship (e.g., are employer-employee), and further assumes that the behavior of the agent is only imperfectly observable and therefore costly for the principal to monitor. <sup>n46</sup> These assumptions are consistent with the circumstances of a corporate employer who uses an internal fiduciary employee to administer the employer's ERISA plan.

Given these assumptions, Sykes concludes that imposing a rule of vicarious liability is likely to lead to greater economic efficiency than a rule of personal liability alone. According to Sykes, in situations where the likelihood of agent insolvency is high, the result of imposing vicarious liability on the principal is "an unambiguous welfare gain." <sup>n47</sup> This gain may be offset by the high transaction costs associated with monitoring imperfectly observable agent behavior, but in a multi-period agency relationship "simple and cheaply administered reward and penalty devices, such as promotions, bonuses, [and] threats of discharge" can "induce optimal or near-optimal loss-avoidance efforts" by the agent. <sup>n48</sup>

Applying Sykes's theoretical analysis to the specific context of ERISA, two additional points bear consideration. First, Congress considered the risk of fiduciary agent insolvency to be so high that section 412 of ERISA establishes a bonding requirement to provide a source of funds to replace losses to a plan caused by the fraudulent or dishonest actions of a fiduciary. <sup>n49</sup> The high risk of fiduciary agent insolvency further is confirmed by the very large damage [\*258] awards and settlement amounts for ERISA breach of fiduciary duty claims. <sup>n50</sup>

Second, ERISA imposes upon any person who appoints a plan fiduciary a duty to monitor the conduct of the appointed fiduciary. <sup>n51</sup> Consequently, imposing a rule of vicarious liability under ERISA would be unlikely to result in an increase in the monitoring costs associated with the employer's internal fiduciary employees. ERISA already imposes these monitoring costs upon employers who appoint their own employees as fiduciaries for the employer's plan. Imposing a rule of vicarious fiduciary liability would reinforce the employer's pre-existing fiduciary duty to monitor by

making clear that the employer is strictly liable for the actions of its internal fiduciary employees. <sup>n52</sup>

In summary, Sykes's theoretical analysis indicates that a net welfare gain could result from imposing a rule of vicarious fiduciary liability under ERISA. Of course, economic efficiency is not the sole, or even the primary, factor for the Supreme Court to consider in deciding whether to adopt a rule of vicarious fiduciary liability under a federal statute. <sup>n53</sup> But given the voluntary nature of ERISA plan sponsorship, <sup>n54</sup> and Congress's desire to minimize costs that could discourage employers from sponsoring plans for their workers, <sup>n55</sup> the theoretical economic impact of a rule of vicarious fiduciary liability is at least one factor for judicial consideration in determining whether the federal common law of ERISA should include a rule of vicarious fiduciary liability.

[\*259]

## 2. The Origins of ERISA: Corporate Trustees and Respondeat Superior Liability

The historical context in which Congress crafted and enacted ERISA may partially explain why Congress did not expressly incorporate a rule of strict vicarious liability when describing a corporate fiduciary's primary duties. <sup>n56</sup> At the time Congress enacted ERISA, regulation of multiemployer plans maintained pursuant to collective bargaining agreements for unionized employers was the primary focal point for enhanced fiduciary regulation. Congress's immediate concern was with well-publicized instances of corruption in the management of multiemployer plan assets by union officials. <sup>n57</sup> Significantly, the opportunity for corruption arose because administrative expenses of multiemployer plans were paid out of the trust assets. This situation presented opportunities for bribery, graft, kickbacks, and enrichment of persons associated with the administration of the plan and the investment of plan assets. Thus, in facing the problem of asset mismanagement in multiemployer plans, Congress was addressing a situation that was analogous to the external agent of a common law trustee who was being compensated out of trust assets.

Multiemployer plans historically have been defined benefit plans. When Congress enacted ERISA in 1974, defined benefit-style pension plans were the norm. <sup>n58</sup> The administration of a defined benefit pension plan typically requires outside experts, such as actuaries and investment managers or investment advisors, to assist in administering the plan. ERISA recognized this practice and [\*260] expressly permitted outside experts to be paid out of trust assets. <sup>n59</sup> Thus, defined benefit plan administration also paralleled the situation where the external agent of a common law trustee was being compensated out of trust assets.

The decline of the defined benefit plan and the corresponding rise of the individual account (defined contribution) plan <sup>n60</sup> have changed the norms of plan administration. In a defined contribution plan, all of the assets of the plan are allocated to individual plan accounts. Although participant accounts may be charged for administrative expenses, generally the employer who sponsors the plan also pays directly for at least some (if not all) of the plan's administrative expenses. Defined contribution plans are also relatively easier and less costly for the employer who sponsors the plan to administer in comparison with defined benefit plans. The less complex design of defined contribution plans allows corporate employers to rely more heavily on their own internal fiduciary employees to administer the employer's plan.

In designing ERISA's statutory scheme for the regulation of fiduciaries, Congress relied upon the principles of fiduciary conduct for trustees that had evolved under the common law of trusts. <sup>n61</sup> The Supreme Court often turns to these background principles of trust law when interpreting ERISA's provisions. <sup>n62</sup>

The liability rules for trustees under the common law created a sharp distinction between "external" agents who were engaged by the trustee to assist in the administration of the trust and the "internal" officers and employees of a corporate trustee. <sup>n63</sup> The Restatement (Second) of Trusts ("Restatement") describes the general rule as "the trustee is not liable to the [trust] beneficiary for the acts of agents employed by him in the administration of the [\*261] trust." <sup>n64</sup> The Restatement, however, defines the phrase "agents employed by him in the administration of the trust" in a unique way as limited to "only such agents as are employed in connection with the administration of the trust and whose compensation can properly be paid out of the trust property." <sup>n65</sup> This definition excludes from the general rule

situations where the loss to the trust is caused by an internal officer or employee of a corporate trustee. <sup>n66</sup>

Under the general rule described above, state law courts found that a trustee was personally liable to a trust beneficiary for the losses to the trust caused by the acts of an "external" agent only if the trustee was guilty of "supine negligence" <sup>n67</sup> in selecting, directing, monitoring, or supervising the agent. <sup>n68</sup> Thus, the general rule required fault by the trustee before the trustee would be liable to the trust beneficiaries for losses to the trust assets caused by the external agent's intentional or negligent conduct. <sup>n69</sup>

For a corporate trustee, however, the common law of trusts created an important exception to the general rule that a trustee is not liable to the trust beneficiaries for losses to the trust caused by the acts of an agent. Under this exception, a rule of strict liability without fault applied to corporate trustees for the actions of their internal officers or employees that were within the scope of employment. The common law's justification for imposing strict respondeat superior liability upon a corporate trustee was that the corporation necessarily must carry on its trust business through its officers and employees. Therefore, the corporation must assume responsibility for the actions of its employees in administering the trust. <sup>n70</sup>

Modernly, this exception imposing respondeat superior liability for corporate trustees has been recognized and applied by the U.S. [\*262] Supreme Court. In *Mosser v. Darrow*, <sup>n71</sup> the Supreme Court rejected the fault-based "supine negligence" standard under Pennsylvania state law for trustee liability under the general liability rule, and instead imposed a rule of strict vicarious liability for the acts of the corporate trustee's employees because these actions were within the scope of their employment:

It is argued here, and appears to have been the view of the Court of Appeals, that principles of negligence applied and that a trustee could not be surcharged under many decisions unless guilty of "supine negligence." We see no room for the operation of the principles of negligence in a case in which conduct [by employees of the trustee] has been knowingly authorized. This is not the case of a trustee betrayed by those he had grounds to believe were trustworthy, for these employees did exactly what it was agreed by the trustee that they should do. The question whether [the trustee] was negligent in not making detailed inquiries into [the employees'] operations is unimportant, because [the trustee] had given a blanket authority for the operations. <sup>n72</sup>

ERISA closely tracks the fault-based general rule of section 225 of the Restatement when one fiduciary allocates or delegates fiduciary responsibilities to another external fiduciary pursuant to a formal arrangement in the plan document. <sup>n73</sup> But Congress did not explicitly incorporate into ERISA the common law rule of strict vicarious liability when describing a corporate fiduciary's primary duties under section 404(a), <sup>n74</sup> or in describing the "personal" liability imposed on a fiduciary for breach of an ERISA duty under section 409(a). <sup>n75</sup>

Given these historical norms for pension plan design and administration, it is not surprising that Congress failed to address expressly whether ERISA incorporated the corporate trustee-based exception that created a rule of strict vicarious fiduciary liability. The question simply was not at the forefront of the immediate problems of trust asset mismanagement in the multiemployer and defined benefit plan context that Congress sought to resolve through ERISA's fiduciary responsibilities provisions.

[\*263]

### 3. From the Common Law Trustee Model to ERISA

The paradigm Congress used to address problems of fiduciary corruption and asset mismanagement was the common law of trusts, <sup>n76</sup> a structure that was already in use for pre-ERISA employee benefit plans. <sup>n77</sup> Thus, the starting point for ERISA regulation became the requirement that "all assets of an employee benefit plan shall be held in trust by one



or more trustees." <sup>n78</sup> In building upon the pre-existing trust paradigm, Congress purposefully expanded the traditional role of the common law trustee into the concept of an ERISA fiduciary. As the Supreme Court explained in *Mertens v. Hewitt Associates*: <sup>n79</sup>

Under traditional trust law, although a beneficiary could obtain damages from third persons for knowing participation in a trustee's breach of fiduciary duties, only the trustee had fiduciary duties. ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties - and to damages - under [ERISA]. <sup>n80</sup>

The trustee-based model of the common law focused the risk of misappropriation or mismanagement of trust assets on the trustee. ERISA's broader universe of fiduciaries expanded the managerial risks associated with employee benefit plans by granting multiple persons the authority to administer and manage the plan and to control and invest the plan's assets. In moving from a one-dimensional trustee model to a multi-dimensional fiduciary model, Congress did not attempt to anticipate and address all of the potential complications. <sup>n81</sup> One of the omitted details was whether the common law liability rule of respondeat superior liability for corporate [\*264] trustees would become part of ERISA's system for regulating the conduct of corporate fiduciaries.

Given the lack of legislative guidance, three lines of further inquiry seem appropriate. First, is vicarious fiduciary liability consistent with the overarching policy goals of ERISA? This question is addressed in the next section of the Article. Second, is vicarious fiduciary liability consistent with ERISA's technical statutory provisions that regulate fiduciary conduct? Part I.B of the Article examines this second question. Third, is vicarious fiduciary liability consistent with ERISA's statutory scheme authorizing claims and remedies? This third question is addressed in Part II of the Article.

#### 4. Comparing ERISA Policy Goals with the Theoretical Justifications for Respondeat Superior Liability

The Supreme Court has identified both a primary policy objective and a secondary policy objective for ERISA. ERISA's primary policy objective is to protect the rights of plan participants and their promised plan benefits (the "protective policy"). <sup>n82</sup> ERISA's secondary policy objective is to avoid discouraging employers from voluntarily sponsoring benefit plans for their workers by minimizing the administrative burdens and related costs associated with plan sponsorship (the "cost containment policy"). <sup>n83</sup> In crafting ERISA, Congress attempted to strike a balance between these two sometimes-competing policy goals. <sup>n84</sup>

ERISA's protective policy is reflected in the rules governing fiduciary conduct set forth in sections 404 and 405 of ERISA. <sup>n85</sup> Under these rules, a fiduciary is personally responsible for a breach of fiduciary duty and jointly and severally liable for a breach of co-fiduciary duty. <sup>n86</sup> Another set of rules, found in section 406, prohibits [\*265] certain types of transactions involving plan assets that historically presented the opportunity for misuse and self-dealing. <sup>n87</sup> Finally, the bonding requirement of section 412 protects plan participants against losses to the plan assets that secure promised benefits. <sup>n88</sup>

Another important provision that promotes ERISA's protective policy is section 410(a). <sup>n89</sup> Section 410(a) eliminates the common law practice of relieving the trustee from liability by including an exculpatory clause in the trust agreement. <sup>n90</sup> Under section 410(a), "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [4 of title I of ERISA] shall be void as against public policy." <sup>n91</sup> The Department of Labor interprets section 410(a) as further prohibiting the indemnification of a fiduciary using plan assets because "such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations." <sup>n92</sup> The combination of ERISA's prohibition on exculpatory clauses and the restrictions on using plan assets to indemnify fiduciaries addresses

the problem of moral hazard<sup>n93</sup> that arises under ERISA due to the high risk of agent insolvency.<sup>n94</sup>

ERISA's cost containment policy is reflected in ERISA's broad preemption of state laws under section 514(a), the written plan document rule of section 402, and the limitations on the remedies available against nonfiduciary plan service providers under section 502(a). Section 514(a) broadly preempts "any and all State laws [\*266] insofar as they may now or hereafter relate to any employee benefit plan."<sup>n95</sup> Federal preemption relieves plan administrators of the burden of complying with state regulation, particularly for national or regional plans that operate in more than one jurisdiction.<sup>n96</sup> Plan administration also is less burdensome when fiduciaries can rely with certainty on the terms of the written document that establishes the plan and ignore conflicting state laws. In its more recent preemption cases, the Supreme Court has repeatedly emphasized that ERISA preempts state laws that would interfere with the terms of the plan that govern core administrative functions.<sup>n97</sup>

To define these core administrative functions, the Supreme Court has looked to section 402. Section 402 requires that every plan must be established and maintained pursuant to a written instrument, and further describes the mandatory and optional written provisions concerning plan administration that are to be contained in the plan's governing document.<sup>n98</sup> Functions that fall within the mandatory or optional plan provisions described in section 402 are considered by the Supreme Court to be core administrative functions that are not subject to potentially conflicting state laws or regulations.<sup>n99</sup>

Section 402 is particularly important to ERISA's cost containment policy because of the reliance interest that employers and plan administrators have with respect to the design of the governing plan document. Significantly, one core administrative function protected under the umbrella of section 402 concerns plan provisions that allocate fiduciary responsibilities.<sup>n100</sup> These plan-based procedures for allocating fiduciary responsibility for the overall management and operation of the plan form the backbone of modern plan administration.

Even though the written plan document rule of section 402 supports ERISA's cost containment policy, the protective policy nevertheless remains paramount. This ordering rule is reflected in section 404(a)(1)(D). Section 404(a)(1)(D) provides that although [\*267] in general a fiduciary must discharge fiduciary duties in accordance with the terms of the written plan document, a fiduciary is required to disregard any plan document term that is inconsistent with a statutory provision of ERISA.<sup>n101</sup> Thus, for example, a plan fiduciary would have an affirmative duty under section 404(a)(1)(D) to disregard a plan term that directly or indirectly exculpates a fiduciary from ERISA liability in violation of section 410(a).

The third statutory basis for the cost containment policy is found in section 502(a),<sup>n102</sup> which establishes the civil claims and remedies available under ERISA. Section 502(a), which is discussed in detail later in Part II of the Article, is critically important due to ERISA's general preemption of state law claims and remedies that relate to an employee benefit plan. In terms of available remedies, section 502(a) draws a sharp line between defendants who are ERISA fiduciaries and defendants who are not ERISA fiduciaries, such as persons who provide nonfiduciary professional services to a [\*268] plan. Fiduciary defendants are subject to damages claims under section 502(a); nonfiduciary defendants are not.<sup>n103</sup> By eliminating the potential for damages claims against nonfiduciary professional plan service providers, Congress avoided imposing "high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves."<sup>n104</sup>

Viewed from a policy perspective, the theoretical justifications for imposing respondeat superior liability are consistent with the objectives of ERISA's protective policy. The traditional common law justifications for imposing respondeat superior liability all served to make it easier for an individual to recover damages for injuries due to the tort or negligence of an agent who was acting within the scope of employment. In the ERISA context, the claim (breach of a statutory fiduciary duty) may be different, but the underlying evidentiary problems of proving fault, causation of injury, and recouping losses remain the same.

The economic benefits of imposing respondeat superior liability in the ERISA context are not easily quantified due

to a lack of empirical data on utility gains and the transaction costs of monitoring agent conduct. But the two theoretical conditions that would result in a net welfare gain from imposing vicarious liability in the principal-agent setting are at least consistent with the circumstances of ERISA fiduciaries. Internal fiduciary employees are at high risk of insolvency due to potentially very large damages and settlement awards resulting from ERISA breach of fiduciary duty claims, and ERISA requires corporate employers to monitor the conduct of their internal fiduciary employees.

What is less clear is whether the justifications for respondeat superior liability can be reconciled with ERISA's secondary cost containment policy. Given the large dollar amounts at stake in ERISA fiduciary litigation, corporations may be deterred from voluntarily sponsoring ERISA plans without well-defined boundaries and limitations on the scope of an employer's strict liability. Similarly, external corporate fiduciaries and external nonfiduciary service providers who assist employers in administering and operating their ERISA plans may increase the fees for their services if the parameters of vicarious fiduciary liability are ill-defined and therefore difficult to monitor and control.

Closer examination reveals another policy dilemma. If imposing vicarious fiduciary liability makes corporate employers the proverbial deep pocket for the misconduct of internal fiduciary [\*269] employees, then employers are likely to respond by engaging in tactics to protect corporate assets from fiduciary liability. Such tactics, if sanctioned by the federal courts, would undermine ERISA's protective policy because the section 412 bonding requirement alone may be inadequate to restore losses to the plan caused by a fiduciary's breach of duty.<sup>n105</sup> Without the financial backstop provided by the corporate assets of the plan's sponsoring employer, the employer's plan may not be fully compensated for the losses caused by an internal fiduciary employee.

Employers today are, in fact, utilizing such tactics to protect corporate assets.<sup>n106</sup> These tactics are based on the settlor function defense, a doctrine first adopted by the Supreme Court in *Curtiss-Wright v. Schoonejongen*<sup>n107</sup> and further developed in *Lockheed Corp. v. Spink*<sup>n108</sup> and *Hughes Aircraft v. Jacobson*.<sup>n109</sup> Distilled to its essence, the settlor function defense rests on the premise that corporate-level fiduciary liability may be avoided by designing the plan document so that fiduciary responsibilities are allocated to internal employees rather than to the corporate employer who sponsors the plan.<sup>n110</sup> Whether the settlor function defense will be successful in shielding corporate employers from ERISA fiduciary liability is an unresolved question. The answer will depend in large part on whether the federal courts develop a federal common law rule of vicarious fiduciary liability.

## B. Vicarious Fiduciary Liability Claims and the Statutory Regulation of Fiduciaries

Even if a federal common law rule of vicarious fiduciary liability is consistent with ERISA's policy objectives, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration."<sup>n111</sup> This part of the Article examines the statutory language of ERISA that regulates fiduciary conduct.

[\*270]

### 1. Functional Fiduciaries and Named Fiduciaries

In any case involving an alleged breach of fiduciary duty, the threshold issue is whether the defendant was acting in a fiduciary capacity with respect to the plan when the allegedly wrongful actions occurred (or was wearing a "non-fiduciary" hat instead).<sup>n112</sup>

Fiduciary responsibilities are rooted in ERISA's definition of a "fiduciary" and the unique role that the "named fiduciary" plays in the management and administration of an ERISA plan. ERISA's general definition of a fiduciary is noteworthy because the definition expressly limits fiduciary status "to the extent" of the particular fiduciary functions performed.<sup>n113</sup> Consequently, the same person can act as a fiduciary when performing some tasks, and yet not be a

fiduciary when performing other nonfiduciary tasks.<sup>n114</sup> Second, ERISA's definition of a fiduciary focuses on the functions actually performed rather than on the person's official title.<sup>n115</sup> Thus, a person can be a fiduciary under ERISA without even knowing or intending to be a fiduciary.<sup>n116</sup> Third, the word "administration" as used in the definition of an ERISA fiduciary includes not only the exercise of any powers expressly so provided in the plan document, but also broadly includes any "activities that are 'ordinary and natural means' of achieving the 'objective' of the plan."<sup>n117</sup> Thus, activities such as communicating with plan participants about their plan benefits are fiduciary acts of plan administration, even though such activities may not be expressly described or authorized in the plan's governing document.<sup>n118</sup>

Under ERISA's definition of a fiduciary, persons who provide products or professional services [\*271] to assist in plan administration, such as accounting, actuarial, legal, or investment education services ("nonfiduciary plan service providers") normally are not plan fiduciaries.<sup>n119</sup> For example, an insurance company is not a fiduciary with respect to a plan simply because it sells its insurance products, such as group life insurance, group health care insurance, or group long term disability insurance, to provide plan benefits.<sup>n120</sup> Nor is an attorney or an actuary who advises the plan's sponsor concerning legal or actuarial questions a fiduciary with respect to the plan.<sup>n121</sup>

In some instances, however, an individual employee or agent of a nonfiduciary plan service provider may step beyond his or her authorized role of providing products or professional services and instead assume fiduciary responsibilities with respect to a client's ERISA plan.<sup>n122</sup> In these instances of unauthorized or "rogue" fiduciary conduct, the federal courts have been unable to agree whether the insurance company or brokerage firm who is associated with the rogue agent can be sued under ERISA for a breach of fiduciary duty based on a federal common law rule of vicarious fiduciary liability.<sup>n123</sup>

ERISA's definition of a fiduciary uses the generic term "person" to describe the fiduciary actor. ERISA defines a "person" broadly to include both individuals and a variety of legal entities, including corporations, partnerships, and joint ventures.<sup>n124</sup> Thus, the definition of a fiduciary "person" necessarily raises the question of how a corporation "acts" as a fiduciary and the related question of vicarious fiduciary liability based on the actions of a corporation's officers and employees.

[\*272] Although the Supreme Court has never addressed explicitly the question of whether ERISA incorporates common law principles of vicarious liability, the analysis in *Curtiss-Wright Corp. v. Schoonejongen*<sup>n125</sup> provides some indication of how - if faced with the question directly - the Court might resolve it. In *Curtiss-Wright*, the plan document authorized "the Company" to amend the terms of a retiree health care plan, but the plan document did not clearly specify a procedure by which "the Company" could amend the plan. This lack of specificity was problematic because section 402(b)(3) requires that every plan document must provide a procedure for amending the plan.<sup>n126</sup> When the company later amended the plan to terminate the health care benefits for certain retirees, the retirees challenged the termination based on the lack of a proper amendment procedure in the retiree health care plan document. The Supreme Court reasoned that

in order for an amendment procedure that says the plan may be amended by "the Company" to make any sense, there must be some way of determining what it means for "the Company" to make a decision to amend... . After all, only natural persons are capable of making decisions... . Principles of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company. Consider, for example, an ordinary sales contract between "Company X" and a third party. We would not think of regarding the contract as meaningless, and thus unenforceable, simply because it does not specify on its face exactly who within "Company X" has the power to enter into such an agreement or carry out its terms. Rather, we would look to corporate law principles to give "Company X" content. So too here.<sup>n127</sup>

One year after *Curtiss-Wright* was decided, the Supreme Court addressed a breach of fiduciary duty claim brought

against a corporate employer in *Varity Corp. v. Howe*.<sup>n128</sup> The plaintiffs, a class of former employees, claimed that the corporate employer had committed a breach of fiduciary duty based on misleading [\*273] communications concerning the future security of their health care plan benefits made to them by an officer of the corporation.<sup>n129</sup> The corporate employer's defense was that the officer's communications to plan participants were not fiduciary in nature. The Varity Court held that the communications by the corporate officer were a fiduciary act of plan "administration" and, therefore, the corporate employer had engaged in a breach of fiduciary duty by lying to the plan participants.<sup>n130</sup>

The issue in *Varity* of vicarious fiduciary liability on the part of the corporate employer was not raised directly by either the plaintiffs or by the corporate employer defendant. But portions of the Varity Court's reasoning strongly suggest that vicarious fiduciary liability was an underlying assumption in the Court's decision:

We conclude, therefore, that the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so, together provide sufficient support for the District Court's legal conclusion that [the corporation] was acting as a fiduciary.<sup>n131</sup>

In *Varity*, the corporate employer was the plan's named fiduciary, thereby placing the officer of the company in the awkward position of speaking as both on behalf of the corporate employer and as the plan's administrator.<sup>n132</sup> ERISA requires that every plan must have at least one fiduciary (the "named fiduciary") who has overall authority to control and manage the operation and administration of the plan. A named fiduciary is a specialized subset of the broader category of functional ERISA fiduciaries under section 3(21)(A). The purpose of the named fiduciary requirement is to inform the participants in the plan who is responsible for the overall operation and management of the plan and its assets.<sup>n133</sup>

With regard to ERISA fiduciary liability, the role of the named fiduciary is unique. Under ERISA, the default rule is that the plan's named fiduciary is liable for the entire operation and administration [\*274] of the ERISA plan.<sup>n134</sup> In order for a named fiduciary to curtail this unlimited liability for the overall operation and administration of the plan, the plan document formally must set forth a procedure whereby the plan's named fiduciary (or named fiduciaries) allocate or delegate their unlimited fiduciary responsibilities to other fiduciaries.<sup>n135</sup> If a named fiduciary utilizes such a formal allocation or designation procedure, the named fiduciary does not escape fiduciary liability for the allocated or designated fiduciary functions entirely. Rather, the scope of the named fiduciary's potential liability for the allocated or designated functions ranges from unlimited strict liability to a more narrow brand of fault-based co-fiduciary liability under section 405 of ERISA.<sup>n136</sup>

The outcome in *Varity* powerfully illustrated to corporate America the perils of having the corporate employer serve as the named fiduciary for the employer's ERISA plan. Since *Varity*, corporate employers have focused more carefully on their plan documents in an attempt to insulate corporate assets from breach of fiduciary duty claims through utilization of a technique that is based on the Supreme Court's settlor function doctrine. Under the settlor function doctrine, when designing or amending the terms of the plan the corporate employer who sponsors the plan acts in a nonfiduciary "settlor" capacity and not as a fiduciary.<sup>n137</sup> Thus, in designing the terms of the plan the corporate employer does not owe fiduciary duties to the plan's participants, but rather may design the terms of the plan to benefit the corporate employer.

Based on the settlor function doctrine, the corporate employer may design the plan so that a committee composed of individual officers and employees (rather than the corporate employer itself) is designated as the named fiduciary for the employer's ERISA plan.<sup>n138</sup> The purpose of this plan design is to protect the corporate [\*275] employer from ERISA fiduciary liability. If a breach of fiduciary duty is alleged with respect to the employer's plan, the corporate employer's "settlor function" defense is that the committee, not the corporate employer, is liable because the committee is the named fiduciary under the plan document.

In creating the settlor function doctrine, the Supreme Court acknowledged that the doctrine does not provide immunity to the plan's administrator from the primary fiduciary duties of section 404(a) related to the administrator's implementation or enforcement of the terms of the plan.<sup>n139</sup> The primary fiduciary duties of section 404(a), and its potential for a federal common law rule of vicarious fiduciary liability, are explored in the next section of the Article.

## 2. Fiduciary Duties and "Personal" Liability

ERISA's fiduciary duty provisions reflect the statute's protective policy. Section 404(a) of ERISA creates four primary duties that apply to all plan fiduciaries. Section 405 of ERISA imposes additional co-fiduciary duties when a plan has more than one fiduciary. Breach of a fiduciary or a co-fiduciary duty results in "personal" liability for the breaching fiduciary under section 409(a) of ERISA.

Corporate employers always have used the terms of the written plan document in conjunction with the provisions of section 405 to limit the employer's potential co-fiduciary liability for the actions of an external co-fiduciary. More recently, however, employers are seeking to use the plan's design, in conjunction with section 405, to protect corporate assets from the actions of their own internal fiduciary employees. This section examines these developments in plan document design and concludes that a federal common law rule of vicarious fiduciary liability is necessary to prevent abuse of the settlor function doctrine by corporate employers.

### a. Primary Fiduciary Duties Under Section 404(a)

Section 404(a)(1) of ERISA establishes four primary duties that govern the conduct of all fiduciaries. Under section 404(a)(1)(A), a fiduciary generally must discharge his duties with respect to a [\*276] plan solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing plan benefits to them.<sup>n140</sup> Section 404(a)(1)(B) requires the fiduciary to discharge his duties with the "care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims."<sup>n141</sup>

Section 404(a)(1)(C) requires a fiduciary to diversify the investments of the plan prudently under the circumstances so as to minimize the risk of large losses, unless under the circumstances it is clearly imprudent to do so.<sup>n142</sup> The duty of prudent diversification is designed to prevent the fiduciary from concentrating the investment of the plan's assets in a single type of investment, geographic location, or industry.<sup>n143</sup> Significantly, ERISA exempts individual account plans from this duty of prudent diversification with respect to the acquisition or holding of company stock that constitutes qualifying employer securities.<sup>n144</sup> Consequently, participants in pension plans may concentrate their account investments in company stock.

Section 404(a)(1)(D) requires a fiduciary to discharge his fiduciary duties in accordance with the documents governing the plan, but only insofar as such documents are consistent with the other statutory provisions of ERISA.<sup>n145</sup> Section 404(a)(1)(D) is an ordering rule that prevents employer abuse of the nonfiduciary settlor function in designing the terms of the plan. Although the employer acts as a settlor and not as a fiduciary when designing the terms of the plan, the employer acts as a fiduciary when the employer administers the terms of the plan.<sup>n146</sup> Thus, the ordering rule of section 404(a)(1)(D) provides an important check on potential employer overreaching under the settlor function doctrine by requiring that the employer (or the employer-selected plan administrator) must disregard any terms of the plan that would be contrary to the statutory provisions of ERISA.

[\*277] Although Congress generally intended section 404(a) to codify the principles of fiduciary conduct developed under the common law of trusts, certain modifications were necessary for employee benefit plans.<sup>n147</sup> One of these modifications - the ban on exculpatory clauses under section 410(a) - has already been discussed. Two other relevant modifications are the relaxation of the common law's strict duty of loyalty for fiduciary trustees, and the authorization of multiple fiduciaries beyond a trustee for the plan. Both modifications have implications for a federal common law rule of vicarious fiduciary liability.

The common law of trusts imposed a strict undivided duty of loyalty upon the trustee that categorically barred the trustee from self-dealing with trust assets or engaging in transactions involving trust property where the trustee's judgment might be influenced or tainted by a conflict of interest.<sup>n148</sup> ERISA modified this strict common law duty of loyalty. Section 408(c)(3) of ERISA permits an officer or employee of the employer who sponsors the plan simultaneously to serve as a plan fiduciary.<sup>n149</sup> It is this modification to the common law of trusts that makes an internal fiduciary employee possible. By modifying the undivided duty of loyalty imposed by the common law of trusts, Congress permitted fiduciaries who are also officers or employees of the employer that sponsors the plan to operate under a potential conflict of interest. Even though an internal fiduciary employee remains subject to the fiduciary duties of section 404(a),<sup>n150</sup> and when serving in a fiduciary capacity must act with an "eye single" to the interests of the plan's participants and beneficiaries,<sup>n151</sup> the potential for biased judgment in favor of the employer can generate claims of breach of fiduciary duty. Varity illustrates this type of conflict of interest.

The second modification to the common law of trusts relates to ERISA's expanded concept of a fiduciary. Under the common law of trusts, the only fiduciary was the trustee of the trust. Under [\*278] ERISA, at a minimum a plan must have a trustee<sup>n152</sup> and at least one named fiduciary,<sup>n153</sup> but an ERISA plan may (and often does) have multiple fiduciaries.<sup>n154</sup> Any person - whether or not a named fiduciary of the plan - who has the power to appoint or retain a person who will perform fiduciary functions with respect to the plan acts as a fiduciary when exercising these appointment and retention powers.<sup>n155</sup> As part of a fiduciary's general duty of prudence, such an appointing fiduciary has an ongoing fiduciary duty to periodically review the appointed fiduciary's performance for compliance with the terms of the plan and ERISA's statutory requirements and standards. This fiduciary responsibility is known as the "duty to monitor."<sup>n156</sup> The duty to monitor further requires that the appointing fiduciary must exercise due care when delegating fiduciary tasks to other fiduciaries<sup>n157</sup> and when selecting and overseeing persons who provide nonfiduciary services to the plan or its participants.<sup>n158</sup>

Under the duty to monitor, the power of a corporate employer to hire or fire its own internal fiduciary employees is a fiduciary function that makes the corporate employer a fiduciary. Thus, even if the corporate employer who sponsors the plan is not designated in the plan's governing document as a named fiduciary, the corporate employer nevertheless is a fiduciary to the extent of the duty to monitor.

[\*279]

#### b. The Employer's Duty to Monitor and Co-Fiduciary Duties Under Section 405

The corporate employer's duty to monitor raises a difficult characterization issue in the context of a vicarious fiduciary liability claim. This characterization issue is most easily understood by comparing the corporate employer's duty to monitor an external fiduciary with the duty to monitor an internal fiduciary employee.

For the purposes of illustration, assume that the corporate employer who sponsors the plan is also the named fiduciary for the plan. Further assume that the plan document contains a procedure by which the employer may allocate or delegate its responsibility for the plan as the named fiduciary. The corporate employer utilizes the plan's procedure and appoints an external fiduciary to administer the plan. In this situation, the corporate employer and the appointed external fiduciary are separate legal persons. They are co-fiduciaries with respect to each other.

Now assume that instead of appointing an external fiduciary to administer the plan, the corporate employer hires an employee to administer the plan for the employer (the "Plan Administrator"). Should the corporate employer and the Plan Administrator be characterized as separate legal persons, in other words, as co-fiduciaries? Or, should the Plan Administrator be characterized as an employee who acts on behalf of the corporate employer?

The potential legal consequences that flow from this fundamental characterization issue are highly significant. If the corporate employer and the internal fiduciary employee are characterized as co-fiduciaries, then traditional respondeat superior principles do not apply, and the employer is subject to liability for the fiduciary misconduct of the

employee only if the employer is shown to be at fault, either due to a breach of the fiduciary duty to monitor the employee or due to a breach of the co-fiduciary duty provisions of section 405. But if the internal fiduciary employee is characterized as acting on behalf of the corporate employer when engaging in fiduciary misconduct, then under traditional respondeat superior principles the employer would be strictly liable for any breach of a primary section 404(a) fiduciary duty by the employee.

This characterization issue carries with it important implications for ERISA's protective policy. Quite simply, if the federal courts characterize the internal fiduciary employee as a separate fiduciary apart from the employer, then the corporate employer can, by clever plan drafting, circumvent the co-fiduciary duties of **[\*280]** section 405 and thereby limit the employer's potential liability. This result flows from ERISA's intricate rules for allocating fiduciary responsibilities. These rules introduced in section 402 and fully developed in section 405 of ERISA.

Section 402(b)(2) requires that any procedure for allocating or delegating fiduciary responsibilities for the administration of the plan must be specified in the plan document itself, "including any procedures described in section 1105(c)(1) of this title [section 405(c)(1) of ERISA]." <sup>n159</sup> Section 405(c)(1) of ERISA provides:

The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan. <sup>n160</sup>

For the remainder of the Article, when fiduciary responsibilities are allocated among named fiduciaries or designated to be performed on behalf of a named fiduciary by other fiduciaries using a procedure expressly described in the plan document, this procedure is referred to as a "formal 405(c) arrangement."

If a named fiduciary allocates or delegates its fiduciary responsibilities pursuant to a formal 405(c) arrangement, then the co-fiduciary liability of the named fiduciary for the acts or omissions of the persons to whom fiduciary responsibilities have been allocated or delegated is limited to the fault-based circumstances described in section 405(a) and section 405(c)(2)(A). <sup>n161</sup> Absent utilization of a formal 405(c) arrangement, the default liability rule under ERISA is that the plan's named fiduciary is strictly liable for the performance of all fiduciary responsibilities, even those responsibilities that may have been informally allocated or delegated to other persons. <sup>n162</sup> This default liability rule for named fiduciaries provides a very strong incentive for the inclusion of a formal 405(c) arrangement in the plan document. By utilizing a formal 405(c) arrangement, the named fiduciary can replace strict liability with fault-based co-fiduciary liability under the general rules of section 405(a) and the more specialized rules of section 405(c)(2)(A), which apply to named fiduciaries.

**[\*281]** Section 405(a) establishes three general rules for fault-based co-fiduciary liability: (1) if the fiduciary "participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach"; (2) if the fiduciary fails to comply with 404(a)(1) and enables another fiduciary to commit a breach; or (3) if the fiduciary "has knowledge of a breach by such other fiduciary," and makes no reasonable effort to remedy the breach. <sup>n163</sup>

Notably, the second general rule of section 405(a)(2) does not require any knowledge of the fiduciary's breach of duty. <sup>n164</sup> Under section 405(a)(2), a co-fiduciary is jointly and severally liable for another fiduciary's breach if there is a causal connection between the co-fiduciary's own breach of fiduciary duty under section 404(a)(1) "in the administration of his specific responsibilities which give rise to his status as a fiduciary" and the harm or injury caused by the other fiduciary's breach. <sup>n165</sup> Co-fiduciary breaches under section 405(a)(2) typically flow from the fiduciary's own duty of prudence, particularly the duty to monitor appointed fiduciaries, in administering the plan. <sup>n166</sup>



Section 405(a)(2) provides a basis for contrast in interpreting the "knowledge" element of sections 405(a)(1) and 405(a)(3) precisely because section 405(a)(2) contains no knowledge requirement. Under section 405(a)(2), a co-fiduciary who lacks "knowledge" of another fiduciary's breach of duty nevertheless is jointly and severally liable if the co-fiduciary failed to comply with [\*282] his own direct fiduciary duties under section 404(a) and thereby enabled the other fiduciary's breach of duty to occur. If an imputed knowledge based on strict vicarious fiduciary liability were to satisfy the "knowledge" element of sections 405(a)(1) and 405(a)(3), then these provisions would swallow up section 405(a)(2) and render it meaningless. The better reading of section 405(a) is one that gives independent meaning to each of its three subsections. Read together as a whole, the three general rules of co-fiduciary liability under section 405(a) embrace a fault-based liability concept and reject the type of strict liability that would flow from imputing knowledge based on vicarious fiduciary liability.

This reading of section 405(a) as rejecting a federal common law rule of vicarious liability as between separate persons who are co-fiduciaries is further supported by section 405(c)(2), which applies only to named fiduciaries. The language of section 405(c)(2) closely parallels the language of the Restatement (Second) of Trusts, which describes the general rule of trustee liability under the common law of trusts.<sup>n167</sup> Absent a breach of the common law trustee's own fiduciary duties in selecting, directing, monitoring, or supervising an external agent, the trustee was not personally liable for losses to the trust caused by an external agent who was compensated using trust assets.

But did Congress intend subsection 405(c)(2) to supersede the trust law rule of respondeat superior liability for the internal employees of a corporate fiduciary? And, does section 405(c)(2) negate the possibility of a federal common law rule of vicarious fiduciary liability under section 404(a)?

To answer these questions, there is one final component of ERISA's regulatory scheme that must be reviewed, namely the concept of "personal" liability for a breach of a primary fiduciary duty under section 404(a). In the context of other federal statutes, the Supreme Court has been willing to impose a federal common law rule of vicarious liability upon corporate "persons" based on respondeat superior principles. Although each federal statute is unique, examining other instances where the Supreme Court has recognized a rule of vicarious liability provides insight into whether the federal common law of ERISA includes vicarious fiduciary liability.

[\*283]

c.

#### "Personal" Liability and the Interference of Vicarious Liability When Interpreting Federal Statutes

Section 409(a) imposes liability upon persons who are fiduciaries. ERISA defines a "person" to include both individuals and corporations.<sup>n168</sup> Thus, "personal" liability under section 409(a) could include vicarious liability.<sup>n169</sup>

In *Meyer v. Holley*,<sup>n170</sup> the Supreme Court faced a similar statutory interpretation dilemma in the context of the federal Fair Housing Act. The Supreme Court held that as a matter of federal common law the Fair Housing Act incorporated principles of vicarious liability.<sup>n171</sup> Given the close similarities in the statutory language,<sup>n172</sup> and the relatively close proximity in time between the enactment of the Fair Housing Act and ERISA,<sup>n173</sup> the Supreme Court's reasoning in *Meyer* is instructive.

Unlike the Fair Housing Act, in enacting ERISA Congress legislated against a background of trust law, not tort law. But this background of trust law included the principle that a corporate trustee was subject to respondeat superior liability for damages to the trust that resulted from the misconduct of the corporate [\*284] trustee's own employees. Given this trust law background, it would not be unreasonable to infer, as the Supreme Court did in *Meyer*, that Congress intended to incorporate the concept of vicarious fiduciary liability into ERISA.

d. Vicarious Fiduciary Liability Claims and the Employer Settlor Function Defense

Corporate employers may use the settlor function to form a double layer of protection against fiduciary liability claims. To illustrate this liability avoidance technique, assume that the named fiduciary (whether an individual employee or a committee composed of corporate officers and employees) designates other internal employees to perform the duties of a named fiduciary using a formal 405(c) arrangement, and that these designated internal fiduciary employees perform their fiduciary duties during the course and within the scope of their employment with the employer. This double-layered fiduciary plan structure, which is illustrated in the diagram below, makes the corporate employer two structural steps removed from the internal fiduciary employee who commits a breach of fiduciary duty with respect to the employer's ERISA plan.

Today, this type of double-layered fiduciary plan structure is far from hypothetical. The trend of recent lower federal court decisions reflects this double-layered plan fiduciary structure.<sup>n174</sup> In the wake of the Supreme Court's decision in *Varity*, employers began using the settlor function doctrine in conjunction with this double-layered plan fiduciary structure to avoid corporate-level liability, particularly where the employer's plan holds company stock as a plan asset.

[\*285]

Diagram A  
The Double-Layered Fiduciary Plan Structure

[SEE DIAGRAM A IN ORIGINAL]

The starting point for judicial analysis of the settlor function defense should be the fundamental characterization issue that lies at the heart of the double-layered plan fiduciary structure. The federal courts should begin by recognizing that the traditional corporate law principle of respondeat superior applies as federal common law under ERISA. Under a federal common law rule of vicarious fiduciary liability, the corporate employer is strictly liable under section 404(a) for the fiduciary conduct of its own internal employees who act as fiduciaries with respect to the employer's plan during the course and within the scope of their employment. Recognizing vicarious fiduciary liability as a federal common law rule is consistent with the pre-ERISA background of trust law, which imposed respondeat superior liability upon corporate trustees. Vicarious fiduciary liability is consistent with the statutory definition of a "person" and the imposition of "personal" fiduciary [\*286] liability under section 409(a). In interpreting ERISA in *Curtiss-Wright* and *Varity*, the Supreme Court acknowledged, either expressly or implicitly, that Congress intended ordinary principles of corporate law, including respondeat superior, to apply to the conduct of corporate employers.<sup>n175</sup> Finally, the Supreme Court's interpretation of similar language in the federal Fair Housing Act in *Meyer v. Holley* supports the judicial inference that Congress intended vicarious liability principles to apply under ERISA.<sup>n176</sup>

Imposing vicarious fiduciary liability directly on the corporate employer under section 404(a) further is supported by other statutory provisions of ERISA that are designed to provide an important safeguard against employer misuse of the nonfiduciary settlor power to design the terms of the plan. Under the ordering rule established by section 404(a)(1)(D), the statutory provisions of title I of ERISA supersede any contrary or inconsistent plan terms. In crafting these statutory provisions, Congress made ERISA's protective policy paramount in creating a federal system for the regulation of fiduciary conduct. As part of this system, section 410(a) renders void, as a matter of ERISA's paramount protective policy, any provision in the plan document that would relieve a person from ERISA fiduciary responsibilities. This prohibition against exculpatory clauses in the plan document supports ERISA's protective policy by reducing the problem of moral hazard that arises when the risk of fiduciary insolvency due to ERISA personal liability is high. Permitting employers to use their nonfiduciary settlor powers to design a plan document so as to avoid fiduciary liability for the conduct of their own internal fiduciary employees would violate the spirit, if not the letter, of section 410(a)'s prohibition on exculpatory clauses. Imposing a federal common law rule of vicarious fiduciary liability supports ERISA's paramount protective policy and ensures comprehensive enforcement of the responsibilities imposed on fiduciaries under ERISA.

Recognizing a federal common law rule of vicarious fiduciary liability under section 404(a) places the risk of loss on the corporate employer who sponsors the plan by imposing strict liability for the actions of the employer's internal fiduciary employees. The employer may have acted prudently in its efforts to monitor the fiduciary conduct of its internal fiduciary employees, and yet these monitoring efforts may have failed to prevent a breach of fiduciary duty by an employee, acting as a fiduciary within the scope of employment, [\*287] that resulted in a loss to the plan. As between a "prudent" employer and the innocent plan participants whose benefits are secured by the plan's assets, ERISA's protective policy dictates that the risk of loss should fall on the employer. A federal common law rule of vicarious fiduciary liability appropriately places the risk of loss on the only party (the employer) who is positioned to prevent losses to the plan caused by an internal fiduciary employee.

## II. The Role of Vicarious Fiduciary Liability in ERISA Civil Actions

Part I of the Article demonstrated that a federal common law rule of vicarious fiduciary liability can be reconciled with the provisions of ERISA that regulate fiduciary conduct, and that such a rule would be supportive of ERISA's paramount protective policy. Part II of the Article examines whether a federal common law rule of vicarious fiduciary liability can be implemented in a limited way that is consistent with ERISA's secondary cost containment policy and reconciled with its statutory scheme for civil claims and remedies. Lurking in the background of this discussion is ERISA's sweeping preemption of state law claims and remedies. But preemption of state law claims and remedies under section 514(a) does not preclude the federal courts from adopting vicarious fiduciary liability as a federal common law rule of statutory interpretation under section 404(a) of ERISA.<sup>n177</sup> Nor does section 514(a) preclude the federal courts from recognizing vicarious fiduciary liability claims, based on a breach of a section 404(a) duty by an internal fiduciary employee, under section 502(a) of ERISA.

Section 502(a) has been the subject of numerous Supreme Court interpretations. As a result of these decisions, fiduciary and nonfiduciary defendants fare quite differently in ERISA litigation. Defendants who are fiduciaries are subject to monetary damages; nonfiduciaries are not. It is this absence of monetary damages relief under ERISA against a nonfiduciary corporate principal that leads plaintiffs to bring vicarious fiduciary liability claims based on the fiduciary misconduct of the principal's employee or agent.

[\*288]

### A. Supreme Court Jurisprudence on the Federal Common Law of ERISA Claims and Remedies

The federal courts have voiced different perspectives concerning the development of federal common law under ERISA. One view is that the federal courts may "regularly" incorporate state law contract and trust law principles as federal common law to fill gaps in the statutory scheme caused by ERISA's express preemption of state law.<sup>n178</sup> Another view is that the federal courts should be reluctant to create federal common law in deference to Congress's legislative authority because "federal common law ... does not grant federal courts carte blanche authority ... to re-write a federal statute."<sup>n179</sup> A middle ground in the debate is the view that

federal courts do have a certain latitude to create federal common law under ERISA. This authority, however, is limited to instances in which ERISA is "silent or ambiguous," where there is an "awkward gap in the statutory scheme," or where it may "be said that federal common law is essential to the promotion of fundamental ERISA policies."<sup>n180</sup>

Over the years, the Supreme Court has voiced support for each of these perspectives in interpreting the civil actions authorized by section 502(a) of ERISA.<sup>n181</sup> In its first major decision interpreting section 502(a), the Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell*<sup>n182</sup> rejected the notion that the federal courts may imply a private cause of action under ERISA as part of a federal common law of ERISA claims and remedies. The *Russell* Court reasoned that

the ... carefully integrated civil enforcement provisions ... of [section 502(a)] as finally enacted ... provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially [\*289] suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." ... We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.  
n183

Four years after Russell, the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch* n184 declared that the "courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." n185 Four years after *Firestone*, the Supreme Court in *Mertens v. Hewitt & Associates* n186 cabined its earlier statement in *Firestone* with the caution that "the authority of courts to develop a "federal common law' ... is not the authority to revise the text of the statute." n187

Most recently, the Supreme Court in *LaRue v. DeWolff, Boberg & Associates, Inc.* n188 used its federal common law authority to address legal obsolescence n189 in section 502(a). The Russell Court's interpretation of section 502(a) had been based on the norm of the defined benefit type of pension plan that predominated when Congress enacted ERISA. n190 In *LaRue*, the Court revisited its prior interpretation in *Russell* and altered its interpretation to accommodate the emergence of the defined contribution plan as the new pension plan norm. n191 As a result of *LaRue*'s modified interpretation of section 502(a), participants in 401(k) and other types of individual account plans now may use large class actions to vindicate fiduciary duty violations that result in a loss of plan benefits. n192

[\*290] In short, over the years the Supreme Court has demonstrated a flexible and pragmatic approach to the development of federal common law under section 502(a). Accordingly, the Supreme Court again could employ such an approach to recognize breach of fiduciary duty claims based on vicarious fiduciary liability under section 404(a) as part of the federal common law of ERISA civil actions under section 502(a).

#### B. Fiduciary and Nonfiduciary Claims and Remedies: Russell, Mertens and Harris Trust

Section 502(a) of ERISA describes the civil claims permitted under the statute and the specific remedies available for each particular type of claim. n193 Two types of statutory claims - section 502(a)(2) claims and section 502(a)(3) claims - are relevant when considering the implications of a federal common law rule of vicarious fiduciary liability.

Section 502(a)(2) authorizes a damages claim against a fiduciary who breaches "the responsibilities, obligations, or duties imposed upon fiduciaries" by providing "for appropriate relief under [section 409(a) of ERISA]." n194 In *Russell*, the Supreme Court held that a damages award under Subsection 502(a)(2) may only be awarded to the plan itself. n195 According to *Russell*, an individual cannot obtain a damages remedy by bringing a claim for breach of fiduciary duty under section 502(a)(2). n196 An individual who has been personally injured by a fiduciary's breach of duty may bring a claim under section 502(a)(3), which serves as ERISA's "catchall" claims [\*291] provision. n197 Section 502(a)(3) provides that a civil action may be brought

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. n198

The nature of "appropriate equitable relief" available under section 502(a)(3) is limited to "categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." n199 Relief under section 502(a)(3) thus excludes a monetary damages award, and further excludes subterfuges that would

accomplish the same result as a monetary damages award through the creative use of an injunction or an order of mandamus. <sup>n200</sup>

Given that section 502(a)(2) damages claims expressly are limited to fiduciary defendants, any claim brought against a nonfiduciary defendant must be brought under the catch-all section 502(a)(3), which provides for more limited relief. In *Mertens v. Hewitt Associates*, <sup>n201</sup> the Supreme Court explained why Congress intentionally eliminated damages awards for claims against nonfiduciary defendants under section 502(a)(3):

The text [of section 502(a)(3)] ... is certainly not nonsensical; it allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds. Under traditional trust law, although a beneficiary could obtain damages from third persons for knowing participation in a trustee's breach of fiduciary duties, only the trustee had fiduciary duties. ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties - and to damages - under § 409(a). Professional service providers such as actuaries become liable for damages when they cross the line from adviser to fiduciary ... . All that ERISA has eliminated ... is the common law's joint and [\*292] several liability, for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. <sup>n202</sup>

Mertens suggests that Congress's purposeful elimination of damages awards against nonfiduciary defendants is a point for careful consideration when considering a federal common law rule of vicarious fiduciary liability under ERISA. But the above statement is curiously lacking in guidance. How far does this principle of lesser monetary liability exposure for nonfiduciary defendants extend?

Dicta in the Mertens opinion initially suggested that a claim against a nonfiduciary could not be brought under any circumstances under section 502(a)(3). <sup>n203</sup> In *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, <sup>n204</sup> the Supreme Court held that a claim against a nonfiduciary corporate defendant could be brought under section 502(a)(3) if the nonfiduciary "knowingly participated" in a fiduciary's violation of the fiduciary responsibility provision of ERISA, and the relief sought against the nonfiduciary corporate defendant was equitable in nature. <sup>n205</sup> The centerpiece of the Court's reasoning in *Harris Trust* was the language of yet another statutory provision, section 502(l)(1). <sup>n206</sup> Section 502(l)(1), which Congress added to ERISA in 1989, <sup>n207</sup> states:

In the case of -

(A) any breach of fiduciary responsibility under (or other violation of) part 4 ... by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

[\*293]

the Secretary [of Labor] shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount. <sup>n208</sup>

Section 502(l)(2) defines the "applicable recovery amount" in relevant part as "any amount which is recovered from a

fiduciary or other person with respect to a breach or violation described in paragraph (1) ... ordered by a court ... under subsection [502](a)(2) or [502](a)(5)." n209 The statutory language of section 502(a)(5) permits the Secretary of Labor to seek virtually the same relief that a private plaintiff may seek in a civil action under section 502(a)(3). n210 It was this parallel statutory language that led the Harris Trust Court to conclude that "if the Secretary [of Labor] may bring suit against an 'other person' under subsection [502](a)(5), it follows that a participant, beneficiary, or fiduciary may bring suit against an 'other person' under the similarly worded subsection [502](a)(3)." n211

Harris Trust involved a claim brought under section 502(a)(3) against a corporate nonfiduciary ("Salomon") who was the purchaser of assets from an ERISA plan in a sale that was barred per se by ERISA's prohibited transaction rules. n212 Both the prohibited transaction rules of section 406 and the duties of fiduciaries and co-fiduciaries under sections 404 and 405 are included in part 4 of title I of ERISA. n213 Given the Harris Trust Court's emphasis on the language of section 502(1)(1), legal scholars read Harris Trust as authorizing a claim under section 502(a)(3) against a nonfiduciary who knowingly participates in a fiduciary's breach of fiduciary duty. n214

In reading Harris Trust as authorizing claims against nonfiduciary defendants, it is significant that the Supreme Court maintained a bright line between the plan's fiduciary investment manager, who directed that the plan buy the motel properties, and the corporate nonfiduciary Salomon, who sold the motel properties to the plan. Even though the Supreme Court assumed that the corporate nonfiduciary defendant Salomon "knowingly participated" in the investment manager's breach of fiduciary duty in directing the [\*294] plan to engage in a prohibited transaction, this knowledge did not transform the corporate entity Salomon into a fiduciary. Rather, Salomon remained a nonfiduciary, and therefore remained subject only to the limited forms of "appropriate equitable relief" available against a nonfiduciary under section 502(a)(3).

This point is crucial in fashioning limitations on a federal common law rule of vicarious fiduciary liability in light of ERISA's secondary cost containment policy. The Supreme Court's reasoning in *Mertens* and *Harris Trust* indicates that vicarious fiduciary liability should not be applied to subject an external nonfiduciary corporate principal to damages claims under section 502(a)(2). If the nonfiduciary corporate principal knowingly participates in the fiduciary's breach of duty, a claim for "appropriate equitable relief" under section 502(a)(3) may be brought against the nonfiduciary corporate principal based on section 502(1). Such equitable relief may include monetary restitution, but only to the extent necessary to prevent the unjust enrichment of the nonfiduciary corporate principal. n215

Consequently, *Harris Trust* indicates that the common law rule of respondeat superior liability must be modified to accommodate ERISA's cost containment policy concerning corporate nonfiduciaries. Under the common law, strict liability attached to the corporate employer who approved or ratified conduct by an employee that was outside of the scope of employment. If a nonfiduciary corporate principal "knowingly participated" in the unauthorized fiduciary conduct of an employee or agent, then under this ratification exception the nonfiduciary corporate principal could become strictly liable for any breach of fiduciary duty by the rogue employee or agent. *Harris Trust* suggests that a nonfiduciary corporate principal who "knowingly participates" in a breach of fiduciary duty by a rogue employee or agent is not transformed into a fiduciary and made subject to a damages claim under section 502(a)(2). Rather, the nonfiduciary corporate principal remains a nonfiduciary, with potential monetary liability limited to restitution [\*295] as necessary to prevent the unjust enrichment of the nonfiduciary corporate principal under section 502(a)(3).

These prior Supreme Court decisions establish key fundamental principles of statutory interpretation for ERISA claims and remedies under section 502(a). Fiduciary and nonfiduciary defendants fare quite differently in ERISA fiduciary litigation. Fiduciary defendants are subject to monetary damages under section 502(a)(2) for losses to the plan caused by a breach of fiduciary duty. Nonfiduciary defendants are not subject to damages awards, but may be subject to equitable restitution as necessary to prevent unjust enrichment under section 502(a)(3). This lack of availability of monetary damages likely motivates plaintiffs to assert theories of vicarious fiduciary liability, thereby making a damages remedy possible under section 502(a)(2).

To date, the Supreme Court has not addressed the viability of a civil action against a corporate defendant that rests

on vicarious fiduciary liability under section 404(a) as the basis for a plaintiff's damages claim under section 502(a)(2). Part III of the Article presents an analytical model for resolving such a claim.

### III. The Federal Common Law of Vicarious Fiduciary Liability Under ERISA

#### A. Distinguishing Between External Corporate Principals and the Internal Fiduciary Employees of Corporate Plan Sponsors

A review of lower court cases indicates that vicarious fiduciary liability claims arise in two distinct situations. One situation involves corporate employers who sponsor ERISA plans as defendants.<sup>n216</sup> In this group of cases, the corporate [\*296] employer claims that it is not liable as a fiduciary for the actions of its own internal fiduciary employees. The other situation involves external corporate principals as defendants.<sup>n217</sup> In this group of cases, the external corporate principal may be a fiduciary with respect to an employer's ERISA plan. Or, the external corporate principal may be engaged to provide nonfiduciary services or financial products to an ERISA plan, but a rogue employee or agent of the principal performs fiduciary functions with respect to the plan that are outside the scope of the employment or agency relationship with the nonfiduciary principal.

When analyzing damages claims against a corporate principal based on vicarious fiduciary liability, the federal courts should distinguish between corporate defendants who sponsor ERISA plans and external corporate defendants who are engaged as fiduciaries or nonfiduciary service providers to an ERISA plan. There are strong policy reasons for drawing this distinction. Under ERISA's primary policy objective of protecting the benefits promised to plan participants, a corporate employer who sponsors an ERISA plan should bear responsibility for the conduct of an internal fiduciary employee who acts as a fiduciary within the course and scope of employment. Under ERISA's secondary cost containment policy, external corporate principals who have been engaged to perform nonfiduciary plan services should not be transformed into fiduciaries and subjected to damages claims under ERISA. Distinguishing between the two types of corporate defendants based on ERISA's policy objectives is the first step toward bringing logical consistency to what is currently a disorderly area of ERISA fiduciary law.

To leap directly, however, from ERISA's primary and secondary policy objectives into the labyrinth of the statute's technical provision is perilous. To bring coherence to this important area of federal law, there must be judicial consensus on how principles of ERISA fiduciary law apply in the context of vicarious fiduciary liability claims.

[\*297]

#### B. Two General Principles to Guide Vicarious Fiduciary Liability Under ERISA

The federal courts should embrace two general principles in developing a federal common law of vicarious fiduciary liability under ERISA. The first general principle is that, under section 404(a), vicarious fiduciary liability applies to a corporate principal whose own employees or agents perform fiduciary functions during the course and scope of their employment or agency relationship. This first general principle applies to both external corporate fiduciaries and to employers who designate their own internal officers or employees to serve as fiduciaries for the employer's plan.

The first general principle is supported by the pre-ERISA history of the common law of trusts and trustees, which imposed respondeat superior liability on a corporate trustee for the acts of its own employees. The first general principle further is consistent with ERISA's definition of "personal" liability under section 409(a), and supported by the Meyer v. Holley inference that federal statutes generally incorporate principles of vicarious liability.<sup>n218</sup> Finally, the Supreme Court's reasoning in Curtiss-Wright and Varsity supports incorporating vicarious fiduciary liability principles under section 404(a).<sup>n219</sup>

In recognizing vicarious fiduciary liability as federal common law under ERISA, the federal courts should be cautious not to misuse the concept and impose vicarious fiduciary liability in such a way that it contravenes ERISA's

system for claims and remedies under section 502(a). Specifically, the federal courts should limit vicarious fiduciary liability so that an external nonfiduciary corporate principal is not transformed into an ERISA fiduciary simply because an employee or an agent of the principal acts in a rogue manner as a fiduciary outside the course and scope of employment or the agency relationship with the principal. If the fiduciary conduct of the employee or agent is outside the scope of employment or the agency relationship, then the corporate employer should not be subject to damages under section 502(a)(2) for the fiduciary's misconduct. ERISA's secondary cost containment policy requires this limitation. An unlimited rule of vicarious fiduciary liability would impose prohibitive monitoring costs on [\*298] nonfiduciary plan service providers. Without such a limitation, nonfiduciary plan service providers are likely to pass these monitoring costs on to employers in the form of higher fees for their services, and thereby deter employers from voluntarily sponsoring ERISA plans.

The more difficult case is the situation where a nonfiduciary corporate principal may have acquired knowledge of rogue fiduciary activities by an employee or agent. Under the traditional common law rule of respondeat superior liability, strict liability attached to the corporate employer who approved or ratified conduct by an employee that was outside of the scope of employment. Here, ERISA modifies the traditional common law rule of respondeat superior liability. Under the reasoning of *Harris Trust*, a claim may be brought against the external principal as a nonfiduciary under section 502(a)(3) if the principal "knowingly participated" in the fiduciary breach by the unauthorized employee or agent.<sup>n220</sup> Under *Mertens*, however, the nonfiduciary principal who "knowingly participates" in a fiduciary's breach of duty is liable only for equitable relief, not money damages, for the actions of its rogue employee or agent. In terms of a monetary award, equitable relief under section 502(a)(3) includes restitution, but only to the extent necessary to prevent the unjust enrichment of the nonfiduciary principal. This modification to the traditional common law rule of respondeat superior liability is necessary to appropriately balance ERISA's primary and secondary policy objectives. Rather than making the external nonfiduciary principal the plan's guarantor, monetary liability rests on the named fiduciary of the plan, who ultimately is responsible for the overall operation and management of the plan.

The second general principle concerns how the federal courts should interpret sections 404 and 405 of ERISA in light of a federal common law rule of vicarious fiduciary liability. In defining a fiduciary much more broadly than a common law trustee, ERISA recognized that the modern administration of employee benefit plans often required the corporate employer who sponsored the plan to engage outside fiduciary expertise to administer the plan. Section 405(c) provides a formal mechanism for a named fiduciary to designate external fiduciaries to assist the named fiduciary in the management and administration of the plan.

The language of section 405 does not, however, distinguish between external fiduciaries and internal fiduciary employees of the corporate employer who perform fiduciary functions with respect to the employer's plan within the course and scope of their employment. Read literally, section 405 could be interpreted by the federal courts as permitting corporate employers to design their [\*299] plan documents as a shield to avoid liability for the actions of their own internal fiduciary employees.

The second general principle is that section 405 should not be read in a literal manner when applied to internal fiduciary employees of the employer who sponsors the plan. Rather, section 405 should be interpreted in light of the overall context of ERISA's system for the regulation of fiduciary conduct and the paramount protective policy that this system promotes. Specifically, the federal courts should not read section 405 so that the plan document may be used to shield employers from fiduciary liability for the actions of their own employees who perform fiduciary functions with respect to the employer's own plan within the scope of their employment. Just as the doctrine of respondeat superior applied to a corporate trustee, the federal courts should infer that ERISA incorporates the doctrine of respondeat superior and creates a federal common law rule of vicarious fiduciary liability. Under the second principle, the corporate employer is not characterized as a co-fiduciary of its own internal fiduciary employee under section 405. When an internal fiduciary employee engages in fiduciary conduct within the scope of employment, such conduct is performed on behalf of the corporate employer, and the corporate employer is strictly liable for any breach of fiduciary duty under section 404(a).



Grounding a federal common law rule of vicarious fiduciary liability in section 404(a) and not in section 405 is essential to maintaining ERISA's system for the regulation of fiduciary conduct and the protective policy that this system is designed to promote. Section 404(a)(1)(D) requires a fiduciary to disregard provisions in a plan document that are inconsistent with ERISA's statutory scheme for the regulation of fiduciary conduct. Moreover, section 410(a) renders void as a matter of public policy any exculpatory clause in a plan document that purports to relieve a fiduciary of its statutory fiduciary duties, including the fiduciary duty to disregard plan document terms that violate the statute. In light of these statutory provisions, the federal courts should not read section 405 literally so that the plan document may be used to shield employers from fiduciary liability for the actions of their own internal employees who perform fiduciary functions with respect to the employer's plan within the scope of their employment. Rather, the federal courts should read the primary fiduciary duties of section 404(a) as incorporating the concept of vicarious fiduciary liability as part of the federal common law of ERISA.

By applying these two general principles, the federal courts can resolve multiple scenarios involving damages claims based on [\*300] vicarious fiduciary liability in a consistent and predictable manner. Various scenarios are modeled in the two diagrams below and explained in the remainder of Part III of the Article. The first diagram involves a defendant who is an external corporate principal. The second diagram involves a defendant who is a corporate employer that sponsors an ERISA plan.

#### Chart 1

Analytical Model of Vicarious Fiduciary Liability for External Corporate Principals

[SEE CHART 1 IN ORIGINAL]

#### Chart 2

Analytical Model of Vicarious Fiduciary Liability for Employers Who Sponsor Plans

[SEE CHART 2 IN ORIGINAL]

[\*301] From a policy perspective, the two general principles appropriately balance ERISA's primary protective policy and the secondary cost containment policy. External fiduciary principals should be expected to supervise and control the fiduciary activities of their own employees or agents that are within the scope of employment or an agency relationship with the principal. If the activities of an employee or an agent are fiduciary in nature and are within the course and scope of employment, then imposing strict liability in the form of vicarious fiduciary liability upon the corporate principal is both appropriate and necessary to support ERISA's protective policy. Conversely, external nonfiduciary principals should not be expected to monitor against the rogue fiduciary activities of their employees or agents. Even if a nonfiduciary external principal knowingly participates in the rogue fiduciary conduct of its employee or agent, *Mertens and Harris Trust* dictate that only limited equitable relief as necessary to prevent the unjust enrichment of the nonfiduciary external principal is available under section 502(a)(3). To use vicarious fiduciary liability to transform an external nonfiduciary principal into a fiduciary subject to damages under ERISA for losses to a plan would violate the policy balance that Congress struck in designing the claims and remedies system of section 502(a).

With regard to corporate employers who sponsor ERISA plans for their own employees, the two general principles reflect a tilting toward ERISA's primary policy objective of protecting the benefits promised to plan participants and beneficiaries. A federal common law rule of vicarious fiduciary liability under section 404(a) is necessary to protect plan participants and their benefits. Such a rule is supported by ERISA's trust law background and by the inference that vicarious liability generally applies under federal statutes. The alternative - to sanction the settlor function defense and permit corporate employers to evade responsibility for the conduct of their internal fiduciary employees - would expand the judicially-created settlor function doctrine in a way that is contrary to both the letter and the spirit of ERISA's comprehensive system for fiduciary regulation.

[\*302]

### C. Illustrations of the Two General Principles

The real problem in vicarious liability, in fact, is not so much the rectitude of its basal principles, as the degree in which they are to be applied. <sup>n221</sup>

Part III.C of the Article provides illustrations and explanations of how the federal courts should apply the two general principles to analyze and resolve different types of cases involving assertions of vicarious fiduciary liability. Consistent with the two diagrams presented above, the illustrations are organized by two main categories of defendants: (1) claims against external corporate principals; and (2) claims against a corporate employer who sponsors an ERISA plan for its own employees.

#### 1. Claims Involving External Corporate Principals

The named fiduciary for an ERISA plan may hire external corporate fiduciaries to assist in the named fiduciary's administration and management of the plan. A named fiduciary also may hire external corporate principals to provide services for the plan that are not fiduciary in nature. Four scenarios illustrating possible cases involving both fiduciary and nonfiduciary external corporate principals are discussed below. For each case, the federal courts must determine whether a claim based on vicarious fiduciary liability may be brought under ERISA against the external corporate principal.

##### a. Named Fiduciary Has Informal Arrangement with an External Fiduciary (Case #1)

A named fiduciary may hire an external corporate fiduciary to assist in the administration and management of the plan. In Case #1, the named fiduciary's delegation of its fiduciary responsibilities to an external corporate fiduciary is established through an informal arrangement and not pursuant to a formal 405(c) arrangement specified in the plan document.

In Case #1, the external corporate fiduciary is subject to vicarious fiduciary liability under ERISA for the fiduciary actions of its own employees. The external corporate fiduciary may be sued under [\*303] section 502(a)(2) for damages recoverable by the plan resulting from a breach of fiduciary duty under section 404(a) by one of its employees. Or, the external corporate fiduciary may be sued under section 502(a)(3) for equitable relief if individual relief is sought by the plaintiff.

The named fiduciary in Case #1 is strictly liable for any breach of fiduciary duty by the external corporate fiduciary due to the named fiduciary's utilization of an informal arrangement in structuring the relationship with the external corporate fiduciary. <sup>n222</sup> This strict liability eliminates the need for the federal court to engage in an analysis of the named fiduciary's co-fiduciary duties under section 405(a) or the named fiduciary's duty to monitor the external corporate fiduciary under section 405(c). The named fiduciary may be sued for damages payable to the plan under section 502(a)(2) for any breach of fiduciary duty by the external corporate fiduciary, or for equitable relief under section 502(a)(3) if individual relief is sought by the plaintiff.

##### b. Named Fiduciary Has Formal Section 405(c) Arrangement with an External Fiduciary (Case #2)

In Case #2, the named fiduciary designates an external corporate fiduciary to perform all or part of its fiduciary responsibilities pursuant to a formal 405(c) arrangement. For example, if the plan is an insured health care or disability plan, the named fiduciary may formally designate the insurance company that provides the group insurance policy for the plan to administer claims under the plan. Or, if the plan is a self-insured health care plan, the named fiduciary may formally delegate claims administration to an external corporate fiduciary with expertise in processing health care claims.

In Case #2, the same general principle of vicarious fiduciary liability applies to the external corporate principal as in Case #1. The external corporate principal is subject to vicarious fiduciary liability under ERISA for the fiduciary actions of its own employees. The external corporate principal may be sued for damages recoverable by the plan resulting from the breach of fiduciary duty under [\*304] section 502(a)(2), or for equitable relief under section 502(a)(3) if individual relief is sought by the plaintiff.

Case #1 differs from Case #2 with respect to the potential fiduciary liability of the named fiduciary for the actions of the external fiduciary. By utilizing a formal 405(c) arrangement to designate the external corporate fiduciary to perform part of the named fiduciary's responsibilities (e.g., claims administration), the named fiduciary is no longer strictly liable for the fiduciary conduct of the external corporate fiduciary.<sup>n223</sup> The named fiduciary's liability is reduced to co-fiduciary liability under the factual circumstances described in section 405(a), or based on a failure to monitor under section 405(c)(2). The details of the analysis of the named fiduciary's co-fiduciary liability under section 405 are discussed in Case #7.

c. Ignorant External Nonfiduciary Principal with a Rogue Fiduciary Employee or Agent (Case #3)

Case #3 arises when the named fiduciary hires an external corporate principal to perform services related to the plan that are not fiduciary in nature. For example, the named fiduciary may hire a law firm, accounting firm, or actuarial firm to provide professional services to the plan. Or, an insurance company or a broker-dealer may sell its insurance or investment products to the plan. In Case #3, a "rogue" employee or agent of the nonfiduciary principal acts in an unauthorized manner outside of the scope of employment or the agency relationship with the nonfiduciary principal and, unknown to the nonfiduciary principal, serves as a fiduciary with respect to an ERISA plan.

The rogue employee or agent is, of course, always personally liable under section 409(a) for the individual's own misconduct as a fiduciary with respect to the plan.<sup>n224</sup> As a functional fiduciary, the rogue employee or agent may be sued for damages recoverable by the plan resulting from a breach of fiduciary duty under section 502(a)(2), or for equitable relief under section 502(a)(3) if individual relief is sought by the plaintiff. But if the rogue employee or agent is insolvent, then the plaintiff may attempt to look to the external nonfiduciary principal to satisfy the liability.

In Case #3, *Mertens and Harris Trust* dictate that no claim may be brought under ERISA against the ignorant nonfiduciary principal. [\*305] Assuming that original relationship between the plan and the external principal was nonfiduciary in nature, then the federal courts should not impose vicarious fiduciary liability upon the external principal for fiduciary conduct by a rogue employee or agent that is outside of the scope of employment or the agency relationship with the principal.

d. External Nonfiduciary Principal Who "Knows" of the Rogue Fiduciary Activities of an Employee or Agent (Case #4)

Case #4 presents the situation where an external principal originally is hired as a nonfiduciary to provide professional services or products to a plan. The plaintiff alleges that the external nonfiduciary principal had "knowledge" of the fiduciary conduct of a rogue employee or agent that was outside of the authorized scope of employment, or even that the principal "participated" in the rogue fiduciary conduct.

To resolve Case #4, the federal courts must extend the reasoning of the Supreme Court's precedents in *Mertens and Harris Trust* to a new factual situation. In both *Mertens and Harris Trust*, the Supreme Court assumed that the employees of the external nonfiduciary principal acted within the scope of employment. Case #4 is distinctly different. In Case #4 the fiduciary conduct of the employee or agent is outside the scope of employment or the agency relationship with the nonfiduciary principal, but the principal allegedly had "knowledge" of or even "participated" in the rogue fiduciary conduct.

In Case #4, section 502(l) modifies the traditional common law rule of *respondeat superior* that an employer may

ratify, and thereby become strictly liable for, the unauthorized activities of an employee or agent. Even if the nonfiduciary principal "knowingly participates" in the rogue fiduciary's conduct (within the meaning of section 502(1)), the nonfiduciary principal is not transformed into a fiduciary. Case #4 requires the federal courts to indulge in a case-by-case, facts and circumstances determination of "knowing participation" within the meaning of section 502(1). Under the reasoning of Harris Trust, "knowing participation" in the fiduciary breach of duty by the rogue employee or agent under section 502(1) is a prerequisite to bringing a claim against the nonfiduciary corporate principal under section 502(a)(3). If the nonfiduciary principal has "knowingly participated" in the breach of fiduciary duty by of its employee or agent, and has accepted a monetary benefit, then the federal courts may award restitution [\*306] under section 502(a)(3) as necessary to prevent the unjust enrichment of the nonfiduciary principal. In no instance, however, should the federal court make "knowing participation" by the nonfiduciary principal the basis for a section 502(a)(2) claim for damages, which is the remedy available against a breaching fiduciary. To do so would substantially undermine ERISA's cost containment policy and upset the balance that Congress struck in carefully crafting the claims and remedies provisions of section 502(a).

## 2. Claims Involving Corporate Employers Who Sponsor ERISA Plans and Their Internal Fiduciary Employees

Claims against corporate employers who sponsor ERISA plans for their own employees are the most challenging for the federal courts to analyze because of the multiple roles the employer may play in relation to the company's plan. Under the judicially-created settlor function doctrine, the employer acts in its settlor capacity and not as a fiduciary when designing the terms of the plan document. When designing the plan document, the corporate employer may decide to make the company the plan's named fiduciary. Alternatively, the employer may identify an individual officer or employee, or a committee composed of officers and employees, as the named fiduciary for the plan. The corporate employer also may include in the plan document a formal 405(c) arrangement by which the named fiduciary may designate other persons to perform the named fiduciary's responsibilities in operating and managing the plan. Six scenarios illustrating possible variations on these themes are presented and analyzed below.

### a. Employer as Named Fiduciary: Informal Arrangement with an Internal Fiduciary Employee (Case #5)

In Case #5, the plan document identifies the corporate employer as the named fiduciary for the plan. The employer's fiduciary duty to manage and administer the plan as the named fiduciary is delegated to one or more of the employer's own internal employees under an informal arrangement.

The corporate employer in Case #5 is responsible as the named fiduciary for the plan for the entire management and operation of the plan by its fiduciary internal employees, whether or not those employees act as fiduciaries with respect to the plan within the [\*307] scope of their employment. This result occurs because, absent use of a formal 405(c) arrangement to delegate its fiduciary responsibilities, as the named fiduciary for the plan the corporate employer is liable for the entire operation, management, and administration of the plan. Thus, in Case #5 the federal courts should not apply a federal common law rule of vicarious fiduciary liability to the corporate employer and entertain arguments concerning whether an internal employee acted within the scope of employment in committing a breach of fiduciary duty with respect to the plan. Section 402 and implementing Department of Labor regulations specify that, as the named fiduciary for the plan who did not use a formal 405(c) arrangement to delegate its fiduciary responsibilities, the corporate employer is strictly liable for the entire management and operation of the plan.<sup>n225</sup>

### b. Employer as Named Fiduciary: Formal Section 405(c) Arrangement with an Internal Fiduciary Employee (Case #6)

Case #6 is similar to Case #5 in that the plan document identifies the corporate employer as the named fiduciary. Case #6 differs from Case #5 in that the corporate employer utilizes a formal 405(c) arrangement to allocate or delegate all or part of the employer's fiduciary responsibility to manage and administer the plan to an internal fiduciary employee (or, to a committee of employees).

In Case #6, unlike Case #5, at the outset of the analysis the federal court should determine if the internal fiduciary employee's breach of fiduciary duty under section 404(a) occurred while acting within the scope of employment. If so, vicarious fiduciary liability should apply, and the breaching fiduciary employee should be characterized as acting on behalf of the corporate employer under section 404(a), not as a separate co-fiduciary with respect to the corporate employer under section 405. The conduct of the employee that resulted in a breach of a fiduciary duty under section 404(a) is imputed to the corporate employer under a rule of vicarious fiduciary liability, thereby making the employer strictly liable under section 409(a) for the employee's fiduciary misconduct. In Case #6, the federal courts should not entertain a claim against the corporate employer for a breach of a co-fiduciary duty under section 405(a).

[\*308] For Case #6, the extent of the corporate employer's vicarious fiduciary liability turns on the scope of employment of the breaching fiduciary employee. The entire scope of employment for the employee may consist of fiduciary functions. For example, the delegated employee may have been hired solely to serve as the internal administrator for the employer's plan. Alternatively, the employee's scope of employment may include both fiduciary and nonfiduciary tasks. To illustrate, assume that pursuant to a formal 405(c) procedure the corporate employer has designated an administrative committee composed of officers and employees to administer the employer's plan. One of the members of the administrative committee also may be the chief financial officer of the company, who is responsible for the nonfiduciary task of preparing and signing the company's financial statements. In situations where the scope of employment includes both fiduciary and nonfiduciary tasks, the federal court must engage in a case-by-case, facts and circumstances analysis of fiduciary tasks performed by the officer or employee, which are subject to the fiduciary duties of section 404(a), and nonfiduciary tasks performed by the employee, to which ERISA fiduciary duties (and vicarious fiduciary liability) do not apply.

c. Employer as Named Fiduciary: Formal Section 405(c) Arrangement with an External Fiduciary (Case #7)

Case #7 is factually the same as Case #2, but analyzed from the perspective of the corporate employer's potential co-fiduciary liability. In Case #7, the plan document identifies the corporate employer as the named fiduciary for the plan. As the named fiduciary, the corporate employer utilizes a formal 405(c) arrangement to designate an external fiduciary to perform all or part of the fiduciary tasks associated with operating and managing the plan. For example, the fiduciary responsibility for claims administration for the employer's plan may be delegated to an external fiduciary who has the power to approve or deny claims for benefits under the plan. Or, the employer's fiduciary duty to communicate with participants and beneficiaries concerning their benefits under the plan may be delegated to an external fiduciary.

In Case #7, the corporate [\*309] employer as the named fiduciary for the plan and the external fiduciary are co-fiduciaries with respect to each other and the employer's plan. Because the corporate employer as the plan's named fiduciary used a formal 405(c) arrangement to designate the external fiduciary, the corporate employer potentially is liable for a fiduciary breach by the external fiduciary as a co-fiduciary under section 405. Vicarious fiduciary liability does not apply under Case #7. Rather, the corporate employer is jointly and severally liable for any breach of fiduciary duty by the external fiduciary only if the corporate employer had actual or constructive knowledge of a breach by the external fiduciary under section 405(a)(1) or section 405(a)(3), if the corporate employer failed to monitor the external fiduciary under section 405(c)(2), or if the corporate employer's own fiduciary breach enabled the external fiduciary's breach under section 405(a)(2).

d. Committee as Named Fiduciary: Informal Arrangement with an Internal Fiduciary Employee (Case #8)

Case #8 is different from Cases #5 through #7 in that the corporate employer, in its settlor capacity, has designed the plan document to designate a committee composed of internal officers and employees as the named fiduciary for the plan.<sup>n226</sup> The committee informally designates other internal fiduciary employees to perform the committee's fiduciary responsibilities with respect to the plan.

Case #8 presents the settlor function defense, where the corporate employer has attempted to avoid fiduciary liability altogether by designing the plan so that a committee composed of internal officers or employees is the named

fiduciary for the plan. Under a federal common law rule of vicarious liability, the corporate employer cannot use the plan document as a shield in Case #8 to achieve a different result than in Case #5. In Case #8, the fiduciary actions of the members of the committee are within the scope of their employment. Therefore, the corporate employer is vicariously liable for the fiduciary actions of the committee members under section 404(a).

e. Committee as Named Fiduciary: Formal Section 405(c) Arrangement with an Internal Fiduciary Employee (Case #9)

In Case #9, as in Case #8, the corporate employer in its settlor capacity has designed the plan document so that a committee composed of internal officers and employees is the named fiduciary for [\*310] the plan. Unlike Case #8, in Case #9 the committee in turn has used a formal 405(c) arrangement to designate other internal employees of the corporate employer to perform the committee's fiduciary responsibilities with respect to the plan. Under this double-layered plan fiduciary structure, the corporate employer potentially is two steps removed from the internal fiduciary employee who breaches a primary fiduciary duty under section 404(a).

Case #9 again presents the settlor function defense, where the corporate employer has attempted to avoid fiduciary liability altogether by designing the plan as a shield against potential liability for the conduct of its own internal fiduciary employees. Under a federal common law rule of vicarious fiduciary liability, the corporate employer cannot use the plan document as a shield in Case #9 to achieve a different result than in Case #6. In Case #9, the fiduciary actions of the members of the committee and other internal employees are within the scope of their employment. Therefore, the corporate employer is vicariously liable under section 404(a) for the fiduciary actions of the committee members or other internal fiduciary employees that occur during the course and within the scope of their employment.

f. Committee as Named Fiduciary: Formal Section 405(c) Arrangement with an External Fiduciary (Case #10)

Case #10 is similar to Cases #8 and #9 in that the corporate employer has designed the plan document so that a committee composed of internal officers and employees is the named fiduciary for the plan. Case #10 is different in that instead of using a formal 405(c) arrangement to designate other internal employees to perform the committee's fiduciary responsibilities, the committee uses a formal 405(c) arrangement to designate external fiduciaries to perform all or part of the committee's fiduciary responsibilities as the named fiduciary for the plan.<sup>n227</sup>

Vis-a-vis the relationship between the corporate employer and the committee members, Case #10 presents the settlor function defense. The corporate employer has attempted to avoid fiduciary liability by designing the plan so that a committee composed of internal officers and employees is the named fiduciary for the plan. [\*311] Under a federal common law rule of vicarious liability, the corporate employer cannot use the plan document as a shield against the fiduciary actions of the committee members. In Case #10, the actions of the members of the committee are within the scope of their employment. Therefore, the corporate employer is vicariously liable for the fiduciary actions of the committee members under section 404(a).

Vis-a-vis the relationship between the committee and the external fiduciary, the committee as the named fiduciary and the external fiduciary are co-fiduciaries with respect to each other and the employer's plan. Because the committee used a formal section 405(a) procedure to designate the external fiduciary, the corporate employer (based on vicarious liability) and committee members are potentially liable for a fiduciary breach by the external fiduciary as a co-fiduciary under section 405. The corporate employer (based on vicarious liability) and the committee members are jointly and severally liable for any breach of fiduciary duty by the external fiduciary under section 405(a)(1) or section 405(a)(3), a failure to monitor the external fiduciary under section 405(c)(2), or a breach by the committee members of a primary duty under section 404(a) that enables the external fiduciary's breach under section 405(a)(2).

#### Conclusion

In enacting ERISA, Congress gave to the federal courts the authority to develop federal common law as needed to

buttress the rights and remedies created by the statute. This Article claims that the federal courts should develop a federal common law rule of vicarious fiduciary liability under ERISA based on the traditional scope of employment approach. In applying such a rule, the federal courts should be guided by two general principles. The first principle is that vicarious fiduciary liability should apply to a corporate principal whose own employees or agents perform fiduciary functions during the course and within the scope of their employment or agency relationship. This first principle is supported by a number of factors. First, the theoretical justifications for respondeat superior liability are consistent with the policy objectives of ERISA. Second, the common law of trusts, which formed the template for ERISA's fiduciary responsibility provisions, imposed respondeat superior liability upon a corporate trustee for the actions of its own internal employees. Third, ERISA's statutory language regulating fiduciary conduct, particularly the definition of a "person" and [\*312] "personal" liability under section 409(a), are consistent with a federal common law rule of vicarious fiduciary liability. Fourth, prior Supreme Court decisions support the development of a federal common law rule of vicarious fiduciary liability. In *Curtiss-Wright*, the Supreme Court expressly acknowledged that ERISA incorporates general principles of corporate law. In *Varity*, the Supreme Court implicitly acknowledged that ERISA incorporates vicarious fiduciary liability. Finally, under the precedent established in *Meyer v. Holley*, the federal courts may infer that ERISA incorporates vicarious liability principles.

To be consistent with ERISA's statutory scheme for claims and remedies under section 502(a), a federal common law rule of vicarious liability must be limited by modifying the common law rule that imposed respondeat superior liability upon a principal who approved or ratified an agent's injurious conduct that occurred outside the scope of employment. This limitation applies in the context of external nonfiduciary corporate principals. The Supreme Court's reasoning in *Mertens* and *Harris Trust* indicates that the federal courts should not use vicarious fiduciary liability to subject a nonfiduciary corporate principal to damages claims as a fiduciary under section 502(a)(2). Even if the nonfiduciary corporate principal knowingly participated in the rogue fiduciary activities of its employee or agent, monetary relief against the nonfiduciary corporate principal should be limited under section 502(a)(3) to restitution as necessary to prevent unjust enrichment of the nonfiduciary corporate principal. This limitation is based upon the statutory language of section 502(1), which as interpreted by *Harris Trust* forms the basis for bringing a claim against a nonfiduciary defendant under section 502(a)(3). According to *Mertens*, such a limitation on the monetary liability of a nonfiduciary is necessary to preserve the balance crafted by Congress between ERISA's primary protective policy and its secondary cost containment policy.

Doctrinally, the federal courts should ground a federal common law rule of vicarious fiduciary liability in the primary fiduciary duties of section 404(a) and not the co-fiduciary duties of section 405. When an internal employee of a corporate principal acts during the course and within the scope of employment as a fiduciary, the federal courts should characterize the employee as acting on behalf of the corporate principal. Under a rule of vicarious fiduciary liability, the corporate principal would be strictly liable for any breach by the internal fiduciary employee of the primary fiduciary duties contained in section 404(a).

[\*313] Finally, a federal common law rule of vicarious fiduciary liability is necessary to prevent employer overreaching under the settlor function defense. Absent a federal common law rule of vicarious fiduciary liability, an employer who sponsors an ERISA plan may abuse its settlor function powers and design the plan document as a shield against fiduciary responsibility for the actions of the employer's own internal fiduciary employees. This misuse of the nonfiduciary settlor power, which is contrary to both the letter and the spirit of ERISA's statutory provisions that regulate fiduciary conduct, would be prevented by a federal common law rule of vicarious fiduciary liability.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 GovernmentsFiduciary ResponsibilitiesPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General OverviewTortsVicarious LiabilityEmployersGeneral Overview

### **FOOTNOTES:**

n1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 & 29 U.S.C.).

n2. See, e.g., *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257-58 (3d Cir. 1993).

n3. See, e.g., *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981-82 (4th Cir. 1987).

n4. See *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 80-81 (1995).

n5. See *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 110-11 (2008); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-13 (1989).

n6. See *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363-65 (2006) (equitable lien); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (injunction, mandamus, restitution).

n7. To simplify the presentation, the Article uses a single-employer plan as governing paradigm for discussion purposes.

n8. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) (quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)).

n9. See *infra* text accompanying notes 178 & 180.



n10. The one scholarly work to date attempting to analyze vicarious fiduciary liability claims under ERISA is a student piece. See Bradley P. Humphries, Comment, *Assessing the Viability and Virtues of Respondeat Superior for Nonfiduciary Responsibility in ERISA Actions*, 75 U. Chi. L. Rev. 1683 (2008).

n11. 29 U.S.C. § 1132(a) (2006).

n12. *Id.* § 1104(a).

n13. *Id.* § 1105.

n14. *Id.* § 1104(a)(1)(D).

n15. *Id.* § 1110.

n16. *Hamilton v. Neff*, 371 P.2d 157, 159 (Kan. 1962). The origins of the doctrine are rooted in feudal times. The master of the household was responsible for the actions of servants who were attached to his household, just as the master was held responsible for the acts of his own family members. See John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 330-36 (1894).

n17. *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990) (Posner, J.).

n18. See, e.g., *Riley v. Standard Oil Co.*, 132 N.E. 97 (N.Y. 1921). See generally Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444 (1923).

n19. See Restatement (Third) of Agency § 2.04 (2006).

n20. See Restatement (Second) of Agency § 218 (1958).

n21. See Harold J. Laski, *The Basis of Vicarious Liability*, 26 *Yale L.J.* 105, 132-33 (1916) ("Nor ought the corporation to avoid responsibility on the ground that it is mindless. Such a view has long been regarded as untenable... . It would be intolerable if corporate enterprise did not imply corporate responsibility.").

n22. See 10 *Fletcher Cyc. Corp.* § 4877 ("A corporation is liable ... whenever a tortious act is committed by an agent within the scope of the agent's authority and in the course of the agent's employment.").

n23. 3 *id.* § 790; see also 19 *C.J.S. Corporations* § 727 (2007) (stating that knowledge or notice to an agent acquired in the ordinary discharge of duties for the corporation is imputed to the corporation).

n24. See 10 *Fletcher Cyc. Corp.* § 4877; 19 *C.J.S. Corporations* § 727 (2007).

n25. See *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 773 (4th Cir. 1995) ("When the agent is acting outside the scope of the agency relationship, the legal fiction that the agent and the principal share an identity of interest is destroyed."); 3 *Fletcher Cyc. Corp.* § 820. See generally Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 *Harv. L. Rev.* 562 (1988).

n26. Oliver Wendell Holmes, Jr., *Agency*, 4 *Harv. L. Rev.* 345, 345 (1891). Fundamentally, Holmes objected on personal responsibility grounds based on the argument that "common-sense is opposed to making one man pay for another man's wrong, unless he has actually brought the wrong to pass." Oliver Wendell Holmes, Jr., *Agency*, II, 5 *Harv. L. Rev.* 1, 14 (1891). The cynical view justifying respondeat superior liability is that the employer has the proverbial "deep pocket." See Richard A. Epstein, *Cases and Materials on Torts* 379 (8th ed. 2004).

n27. Epstein, *supra* note 26, at 378.

n28. See T. Baty, *Vicarious Liability* 148 (1916); see also Young B. Smith, *Frolic and Detour*, 23 *Colum. L. Rev.* 444, 454-56 (1923) (discussing Baty). Baty's original nine rationales for imposing vicarious liability were: control; profit; revenge; carefulness and choice; identification; evidence; indulgence; danger; and satisfaction. Baty, *supra*, at 148.

n29. See P. S. Atiyah, *Vicarious Liability in the Law of Torts* 15 (1967).

n30. See *id.* at 15-18.

n31. See *id.* at 19-20.

n32. See *id.* at 20-21.

n33. See *id.* at 22.

n34. *Id.*

n35. *Id.* (emphasis added). Atiyah identified the principle of loss-distribution as the "other sound reason" for imposing vicarious liability. See *id.*

n36. *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544, 553 (6th Cir. 1998).

n37. See Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(A)(3), 39 J. Marshall L. Rev. 827, 848-50 (2006).

n38. See generally Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (1970); Richard Posner, *Economic Analysis of Law* (7th ed. 2007); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961); C. Robert Morris, Jr., *Enterprise Liability and the Actuarial Process*, 70 Yale L.J. 554 (1961).

n39. See generally Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984).

n40. *Id.*

n41. See 29 U.S.C. § 1109(a) (2006).

n42. See Sykes, *supra* note 39, at 1235-36.

n43. See 29 U.S.C. § 1110(a) (prohibiting exculpatory clauses as against public policy).

n44. See Sykes, *supra* note 39, at 1234, 1241-43.

n45. Under ERISA, the plan itself is considered an entity that may sue or be sued. See 29 U.S.C. § 1132(d)(1).

n46. Sykes, *supra* note 39, at 1253-56.

n47. *Id.* at 1255.

n48. *Id.* at 1256. Due to the difficulty in estimating the offsetting transaction costs of monitoring imperfectly observable agent behavior against the "unambiguous welfare gains" from imposing vicarious liability, Sykes ultimately concludes that this scenario presents "an intermediate case" where a rule of vicarious liability may increase economic efficiency. *Id.* In other words, empirical evidence of the magnitude of utility gains and transaction costs is necessary to quantify the extent of the welfare gain.

n49. See 29 U.S.C. § 1112. The amount of the bond must be at least 10 percent of the plan funds handled by the person or persons covered by the bond during the prior plan year. The bond amount must be not less than \$ 1,000 or more than \$ 500,000 if the plan does not hold employer securities as a plan asset. If the plan holds employer securities as a plan asset, the maximum amount of the bond is increased from \$ 500,000 to \$ 1 million. *Id.*

n50. See, e.g., *Cavalieri v. Gen. Elec. Co.*, No. 06cv315 (GLS/DRH), 2009 WL 2426001 (N.D.N.Y. Aug. 6, 2009) (approving settlement of \$ 40.15 million in damages and \$ 10 million in attorneys' fees); *In re Delphi Corp. Sec., Deriv. and ERISA Litig.*, 248 F.R.D. 483, 491 (E.D. Mich. 2008) (approving settlement for \$ 47 million in damages); *In re Healthsouth Corp. ERISA Litig.*, No. CV-03-BE-1700-S, 2006 WL 2109484 (N.D. Ala. June 28, 2006) (approving settlement of \$ 28.85 million in damages). For examples of private settlement amounts, see the data compilation by Nell Hennessey at <http://www.erisasettlements.com>.

n51. See discussion *infra* notes 155-158 and accompanying text.

n52. See Richard A. Epstein & Alan O. Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 *J. Legal Stud.* 625, 636 (2001) (stating that vicarious liability places the employer's assets at risk and thereby gives employers an incentive to use their control over employees to induce them to behave more carefully).

n53. Cf. *Meyer v. Holley*, 537 U.S. 280 (2003) (analyzing vicarious employer liability under the federal Fair Housing Act); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (analyzing vicarious employer liability under Title VII).

n54. See H.R. Rep. No. 93-533, at 1 (1973), reprinted in 2 Subcomm. on Labor of the S. Comm. on Labor and Public Welfare, 94th Cong.,

Legislative History of the Employee Retirement Income Security Act of 1974, at 2348 (1976) [hereinafter *Legis. Hist.*].

n55. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985).

n56. See S. Rep. No. 93-127, at 3-7, 11 (1973), reprinted in 1 *Legis. Hist.* at 587, 589-93, 597; H.R. Rep. No. 93-533, at 2-4, 7-8 (1973), reprinted in 2 *Legis. Hist.* at 2349-51, 2354-55; Steven A. Sass, *The Promise of Private Pensions* (1997); James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* (2004); Michael S. Gordon, Introduction: The Social Policy Origins of ERISA, in *Employee Benefits Law*, at 1xxix (2d ed. 2000); Michael S. Gordon, Overview: Why Was ERISA Enacted?, in Senate Special Comm. on Aging, 98th Cong., *The Employee Retirement Income Security Act of 1974: The First Decade* (1984).

n57. See *Mass. Mut. Life Ins.*, 473 U.S. at 140 n.8; *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045 Before the Gen. Subcomm. on Labor of the H. Subcommittee on Education and Labor, 91st Cong. 470-72 (1970)* (statement of Sec'y of Labor); 120 Cong. Rec. 4279-80 (1974) (statement of Rep. Brademas); *id.* at 4277-78 (statement of Rep. Perkins); 119 Cong. Rec. 30,003 (1973) (statement of Sen. Williams); President's Comm. on Corporate Pension Funds & Other Private Ret. & Welfare Programs, *Public Policy and Private Pension Programs* (1965); R.C. James, *Manipulation of a Joint Pension Board for Power Purposes: The Teamsters Experience*, 20 N.Y.U. Conf. on Labor 381 (1968); F.M. Kleiler, *The Law, The Pension Fund, and the Trustee*, 20 N.Y.U. Conf. on Labor 395 (1968).

n58. See *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008) (quoting J. Langbein, S. Stabile & B. Wolk, *Pension and Employee Benefit Law* 58 (4th ed. 2006)).

n59. See generally 29 U.S.C. § 1108(b)(2) (2006) (providing for exemptions to prohibited transaction rules).

n60. See Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 *Emory L.J.* 1, 5-9 (2000); Edward Zelinsky, *The Defined Contribution Paradigm*, 114 *Yale L.J.* 451, 471 (2004).

n61. See *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 110-11 (2009); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989); H.R. Rep. No. 93-1280, at 298-301 (1974) (Conf. Rep.), reprinted in 3 *Legis. Hist.* at 2565-68; H.R. Rep. No. 93-533, at 11-13 (1973), reprinted in 2 *Legis. Hist.* at 2358-60; S. Rep. No. 93-127, at 28-29, 33-34 (1973), reprinted in 1 *Legis. Hist.* at 614-15, 619-20. See generally John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 *Colum. L. Rev.* 1317 (2003). For a discussion of those instances where ERISA omitted areas of trust law that were inapplicable or inappropriate for the modern employee benefit plan, see *id.* at 1327-28.

n62. See Glenn, 554 U.S. at 110-11; Varsity, 516 U.S. at 497; Firestone, 489 U.S. at 110-11.

n63. See Restatement (Second) of Trusts § 225 (1959); Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 225, at 414-16 (4th ed. 1988).

n64. Restatement (Second) of Trusts § 225; see also Scott & Fratcher, *supra* note 63.

n65. Restatement (Second) of Trusts § 225 cmt. b (emphasis added); see also Scott & Fratcher, *supra* note 63, § 225.2, at 418-19.

n66. See Restatement (Second) of Trusts § 225 cmt. b.

n67. E.g., *In re Marcus*, 2 F. Supp. 524, 525 (W.D. Pa. 1932); *In re Estate of Lohm*, 269 A.2d 451, 455 (Pa. 1970).

n68. E.g., *In re Will of Hartzell*, 192 N.E.2d 697, 705-07 (Ill. App. Ct. 1963); *In re Estate of Mild*, 136 A.2d 875, 883 (N.J. 1957).

n69. See Restatement (Second) of Trusts § 225 cmt. a (stating that a trustee is not liable for losses to the trust resulting for the improper conduct of the agent unless the trustee himself is guilty of a breach of trust).

n70. See *Kenny v. Citizens Nat'l Trust & Savings Bank*, 269 P.2d 641, 652 (Cal. Ct. App. 1954); *New England Trust Co. v. Paine*, 59 N.E.2d 263, 272-73 (Mass. 1945); see also *Browning v. Fid. Trust Co.*, 250 F. 321, 324-25 (3d Cir. 1918) (holding that a corporation is liable for the acts of its employee/agents, even if one department has no knowledge of what has happened in another department because the corporation cannot divide itself into parts).

n71. 341 U.S. 267 (1951).

n72. *Id.* at 272.

n73. Compare Restatement (Second) of Trusts § 225(2) (1959), with 29 U.S.C. § 1105(c)(2) (2006).

n74. See 29 U.S.C. § 1104.

n75. See *id.* § 1109(a).

n76. See *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989).

n77. See Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 *U. Chi. L. Rev.* 1105, 1107-08 (1988).

n78. 29 U.S.C. § 1103(a); see Fischel & Langbein, *supra* note 77, at 1107 (describing section 403 as a rule of mandatory trusteeship). ERISA section 403(b), codified as amended at 29 U.S.C. § 1103(b) (2006), lists various limited exceptions to the norm that plan assets must be held in a trust.

n79. 508 U.S. 248 (1993).



n80. *Id.* at 262 (citations omitted).

n81. See Fischel & Langbein, *supra* note 77, at 1126-27 (criticizing ERISA's trust-law based exclusive benefit/duty of loyalty rule as inconsistent with the use of internal officers and employers in modern plan administration).

n82. *Mertens*, 508 U.S. at 263.

n83. *Id.* at 262-63 (quoting *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504, 515 (1981)); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985).

n84. See H.R. Rep. No. 93-533, at 1-2 (1973) ("The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized.").

n85. See 29 U.S.C. §§1104-1105 (2006).

n86. 29 U.S.C. § 1105 (providing that a fiduciary may be liable for a breach of fiduciary duty by a co-fiduciary). Courts have found co-fiduciaries to be jointly and severally liable for each other's breaches. See, e.g., *Lowen v. Tower Asset Mgmt.*, 829 F.2d 1209, 1221 (2d Cir. 1987); *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1982); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 644 (W.D. Wis. 1979).

n87. See 29 U.S.C. § 1106.

n88. See *id.* § 1112.

n89. See id. § 1110(a).

n90. Compare id. § 1110(a), with Restatement (Second) of Trusts § 222(1) (1959). Under the common law of trusts, an exculpatory clause was effective to relieve the trustee for liability for breach of trust so long as the trustee did not act in bad faith, intentionally, or with reckless indifference. See Restatement (Second) of Trusts § 222(2).

n91. 29 U.S.C. § 1110(a).

n92. 29 C.F.R. § 2509.75-4 (2005); see also *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (prohibiting company that was 100% owned by an ESOP from indemnifying officers against ERISA fiduciary liability or paying defense costs).

n93. Y. Kotowitz, Moral Hazard, in *Allocation, Information, and Markets: The New Palgrave* 207, 207 (John Eatwell et al. eds., 1989) ("Moral hazard may be defined as actions of economic agents in maximizing their own utility to the detriment of others, in situations where they do not bear the full consequences or, equivalently, do not enjoy the full benefits of their actions due to uncertainty and incomplete or restricted contracts which prevent the assignment of full damages (benefits) to the agent responsible.").

n94. See *supra* note 50.

n95. 29 U.S.C. § 1144(a).

n96. See S. Rep. No. 93-127, at 35 (1973), reprinted in 1 *Legis. Hist.* at 621 ("State law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.").

n97. See *Kennedy v. DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 874-77 (2009) (stating that a valid disclaimer under state law of plan benefits is not binding on plan administrator if it conflicts with written terms of the plan); *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001) (finding state law that interfered with plan provision governing distributions preempted).

n98. 29 U.S.C. § 1102(a)(1).

n99. See Kennedy, 129 S. Ct. at 874-75; Egelhoff, 532 U.S. at 147-48.

n100. 29 U.S.C. § 1102(b)(2), (c)(2), (c)(3).

n101. See *id.* § 1104(a)(1)(D); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) ("Trust documents cannot excuse trustees from their duties under ERISA ..."); see also *Pegram v. Herdrich*, 530 U.S. 211, 227 n.7 (2000) (noting that although plan design is a nonfiduciary settlor function, it may be difficult for a fiduciary in administering the plan's terms to do so in compliance with ERISA's fiduciary standards). Section 404(a)(1)(D)'s requirement that the fiduciary's duties of prudence and loyalty take precedence over plan language has arisen where the plan document requires that plan assets be invested in employer securities. See *Laborer's Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999) (noting that an investment manager must disregard plan if investing plan assets as required by plan would violate its duty of prudence); *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995); *Moench v. Robertson*, 62 F.3d 553, 569 (3d Cir. 1995); see also *Dep't of Labor Op. Letter No. 90-05A*, 1990 WL 172964, at 3 (Mar. 29, 1990) (stating that despite plan provisions to the contrary, it is responsibility of fiduciaries to determine, based on all the relevant facts and circumstances, the prudence of investing large percentage of plan assets in qualifying employer securities); *Dep't of Labor Op. Letter No. 83-6A*, 1983 WL 22495, at 1-2 (Jan. 24, 1983) (same). The Department of Labor has long taken the position that fiduciaries must act prudently and solely in the interest of participants and beneficiaries in deciding whether to purchase or retain employer securities despite plan language requiring the plan to purchase employer securities. See *Brief for Sec'y of Labor as Amicus Curiae Supporting Plaintiffs at 9-10, Agway Inc. Emps.' 401(k) Thrift Inv. Plan v. Magnuson*, No. 5:03-CV-1060 (N.D.N.Y. June 18, 2004); *Brief for Sec'y of Labor as Amicus Curiae Supporting Appellant at 13-17, Tatum v. R. J. Reynolds Tobacco Co.*, No. 04-1082 (4th Cir. May 7, 2004); cf. *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997) (holding in suit brought by the Department of Labor that an ESOP trustee's decision not to tender shares of company stock held as plan assets had to be evaluated in light of ERISA's duties of prudence and loyalty; trustee could not blindly follow the plan's "mirror voting" provision). For additional cases recognizing the general principle that section 404(a)(1)(D) requires fidelity to ERISA's requirements over conflicting plan language, see *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 764 (S.D.N.Y. 2003); *In re Williams Co. ERISA Litig.*, 271 F. Supp. 2d 1328, 1343 (N.D. Okla. 2003); *Rankin v. Rots*, 278 F. Supp. 2d 853, 857 (E.D. Mich. 2003); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 549 n.51, 656 (S.D. Tex. 2003).

n102. 29 U.S.C. § 1132(a).

n103. See discussion *infra* Part II.B.

n104. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

n105. Compare 29 U.S.C. § 1112(a) (bond amounts), with sources cited *supra* note 50 (damages and settlement awards).

n106. See discussion *infra* Part I.B.2.d.

n107. 514 U.S. 73, 78 (1995).

n108. 517 U.S. 882, 890 (1996).

n109. 525 U.S. 432, 444-45 (1999).

n110. See *infra* Part I.B.2.d.

n111. *Mertens v. Herwitt Assocs.*, 508 U.S. 248, 261 (1993).

n112. *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (emphasis added).

n113. 29 U.S.C. § 1002(21)(A) (2006); 29 C.F.R. § 2509.75-8, FR-16 (2005); see *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan Enters., Inc.* 793 F.2d 1456, 1459-60 (5th Cir. 1986) (“[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control.”).

n114. See *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998); *Maniace v. Commerce Bank of Kansas City, N.A.*, 40 F.3d 264, 267 (8th Cir. 1994).

n115. 29 C.F.R. § 2509.75-8, D-3 to D-5; see *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984).

n116. See *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979) ("It is apparent from the evidence that many of these persons were confused about the nature of their fiduciary duties and indeed unsure whether they were fiduciaries with respect to the Plan... . Their state of mind, however, does not determine their fiduciary status under ERISA.").

n117. *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996).

n118. See *id.*

n119. See 29 C.F.R. § 2509.75-5, D-1.

n120. E.g., *Am. Fed. Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 664 (5th Cir. 1988) (noting that merely "urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products"). Plan assets held in an insurance company's general account may, however, render the insurance company a fiduciary by virtue of control over the management of those assets. See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993); 29 C.F.R. § 2550.401c-1 (2007).

n121. See 29 C.F.R. § 2509.75-5, D-1.

n122. See, e.g., *Coldesina Emp. Profit Sharing Plan & Trust v. Estate of Simper*, 407 F.3d 1126 (10th Cir. 2005) (theft of plan assets by insurance agent); *Cont'l Assurance Co. v. Cedar Rapids Pediatric Clinic Emps. Pension Plan & Trust*, 957 F.2d 588 (8th Cir. 1992)

(embezzlement of plan funds by insurance agent); Nat'l Football Scouting, Inc. v. Cont'l Assurance Co., 931 F.2d 646 (10th Cir. 1991) (embezzlement of plan funds by insurance agent); Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544 (D. Md. 2003) (mismanagement of plan investments by insurance agent); Nat'l Mgmt. Assoc. v. Transamerica Fin. Res., Inc., 197 F. Supp. 2d 1016 (S.D. Ohio 2002) (embezzlement of plan funds by brokerage firm agent); Miller v. Lay Trucking Co., Inc., 606 F. Supp. 1326 (N.D. Ind. 1985) (misrepresentation of plan benefits by agent, inducing employer and employees to switch insurance plans).

n123. See cases cited supra note 122.

n124. See 29 U.S.C. § 1002(9) (2006).

n125. 514 U.S. 73 (1995).

n126. 29 U.S.C. § 1102(b)(3).

n127. Curtiss-Wright, 514 U.S. at 80-81 (citations omitted) (citing 2 W. Fletcher, Cyclopedic of Law of Private Corporations § 466, at 505 (rev. ed. 1990) ("[A] corporation is bound by contracts entered into by its officers and agents acting on behalf of the corporation and for its benefit, provided they act within the scope of their express or implied powers.")).

n128. 516 U.S. 489 (1996).

n129. *Id.* at 489, 494.

n130. *Id.* at 506-07.

n131. *Id.* at 503 (emphasis added).

N132. See *id.* at 498.

n133. See H.R. Rep. No. 93-1280, at 297 (1974) (Conf. Rep.), reprinted in 3 Legis. Hist. at 4564.

n134. See 29 C.F.R. § 2509.75-8, FR-13 & FR-14 (2005).

n135. See *id.*

n136. See 29 U.S.C. § 1105 (a)(1)-(3), (c)(2) (2006); 29 C.F.R. § 2509.75-8, FR-13 & FR-14. The fault-based co-fiduciary liability provisions of Section 405 are discussed *infra* Part I.B.2.b.

n137. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444-45 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

n138. E.g., *Harris v. Koenig*, 602 F. Supp. 2d 39 (D.D.C. 2009); *In re Bausch & Lomb, Inc. ERISA Litig.*, No. 06-CV-6297, 2008 WL 5234281 (W.D.N.Y. Dec. 12, 2008); *Cannon v. MBNA Corp.*, Civ. No. 05-429 GMS, 2007 WL 2009672 (D. Del. July 6, 2007); *In re Coca Cola Enters. Inc. ERISA Litig.*, No. 1:06-CV-0953 (TWT), 2007 WL 1810211 (N.D. Ga. June 20, 2007); *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206 (D. Conn. 2007); *In re Cardinal Health Inc. ERISA Litig.*, 424 F. Supp. 2d 1002 (S.D. Ohio 2006); *In re Westar Energy, Inc., ERISA Litig.*, No. 03-4032-JAR, 2005 WL 2403832 (D. Kan. Sept. 29, 2005); *Woods v. Southern Co.*, 396 F. Supp. 2d 1351 (N.D. Ga. 2005); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 8853(SWK), 2005 WL 563166 (S.D.N.Y. Mar. 10, 2005); *Kling v. Fid. Mgmt. Trust Co.*, 323 F. Supp. 2d 132 (D. Mass. 2004); *Howell v. Motorola, Inc.*, 337 F. Supp. 2d 1079 (N.D. Ill. 2004); *In re Tyco Int'l Multidistrict Litig.*, No. MDL 02-1335-PB, 2004 WL 2903889 (D.N.H. Dec. 2, 2004); *In re Reliant Energy ERISA Litig.*, 336 F. Supp. 2d 646 (S.D. Tex. 2004); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328 (N.D. Okla. 2003); *Crowley ex rel. Corning, Inc. Inv. Plan v. Corning, Inc.*, 234 F. Supp. 2d 222 (W.D.N.Y. 2002).

n139. See *infra* note 146 and accompanying text.

n140. 29 U.S.C. § 1104(a)(1)(A).

n141. *Id.* § 1104(a)(1)(B).

n142. *Id.* § 1104(a)(1)(C); see *Brock v. Citizens Bank of Clovis*, 841 F.2d 344, 346 (10th Cir. 1988); *Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 383 (D. Haw. 1980).

n143. H.R. Rep. No. 93-1280, at 304 (1974) (Conf. Rep.), reprinted in 3 *Legis. Hist.* at 4571.

n144. See 29 U.S.C. §§1104(a)(2), 1107(d)(5). Similarly, individual account plans are exempt from ERISA's prohibited transaction rule that limits an investment in employer securities to no more than ten percent of the plan's assets. See *id.* § 1107(b)(1).

n145. *Id.* § 1104(a)(1)(D).

n146. See *id.* § 1002(21)(A); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444-45 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

n147. See *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996); *Leigh v. Engle*, 727 F.2d 113, 122-23 n.19 (7th Cir. 1984); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 n.15 (5th Cir. 1983).

n148. See *Restatement (Second) of Trusts* § 170 (1959).



n149. See 29 U.S.C. § 1108(c)(3); *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1344 (7th Cir. 1995) ("[Section 408(c)(3)] provides specifically that employers may appoint their own officers to administer ERISA plans even if the company is a "party in interest."); *Donovan v. Bierwirth*, 538 F. Supp. 463, 468 (E.D.N.Y. 1981), *aff'd as modified*, 680 F.2d 263 (2d Cir. 1982) ("Section 408(c)(3) expressly contemplates fiduciaries with dual loyalties," an arrangement that is "an unorthodox departure from the common law rule against dual loyalties.").

n150. See *Cuningham*, 716 F.2d at 1467.

n151. *Bierwirth*, 680 F.2d at 271.

n152. See 29 U.S.C. § 1103(a).

n153. See *id.* § 1102(a).

n154. See *id.* § 1002(21)(A); *id.* § 1102(a)(1) (stating that a plan may have more than one named fiduciary); *Mertens v. Hewitt & Assocs.*, 508 U.S. 248, 262 (1993) ("Under traditional trust law, although a beneficiary could obtain damages from third persons for knowing participation in a trustee's breach of fiduciary duties, only the trustee had fiduciary duties. ERISA, however, defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan, see 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties - and to damages - under § 409(a).").

n155. See 29 C.F.R. § 2509.75-8, D-4 (2005); see also, *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996); *Kling v. Fid. Mgmt. Trust*, 323 F. Supp. 2d 132, 142 (D. Mass. 2004).

n156. See 29 C.F.R. § 2509.75-8, FR-17; see also, *Coyne & Delany Co.*, 98 F.3d at 1465-66; *Martin v. Feilen*, 965 F.2d 660, 669-70 (8th Cir. 1992); *Leigh v. Engle*, 727 F.2d 113, 134-35 (7th Cir. 1984); *Kling*, 323 F. Supp. 2d at 142; *In re Enron Corp. Sec., Derivative, and "ERISA" Litig.*, 284 F. Supp. 2d 511, 553 n.59 (S.D. Tex. 2003).

n157. See 29 C.F.R. § 2509.75-8, FR-13.

n158. See *id.* at FR-14.

n159. 29 U.S.C. § 1102(b)(2).

n160. *Id.* § 1105(c)(1).

n161. See 29 C.F.R. § 2509.75-8, FR-14 & FR-13.

n162. *Id.*

n163. 29 U.S.C. § 1105(a).

n164. See *Free v. Briody*, 732 F.2d 1331, 1335 (7th Cir. 1984); *PBGC v. Ross*, 781 F. Supp. 415, 419-20 (M.D.N.C. 1991); *Freund v. Marshall & ILLSLEY Bank*, 485 F. Supp. 629, 640 (W.D. Wis. 1970). Although the statutory language seems clear that a fiduciary's actual knowledge of the cofiduciary's breach is not a prerequisite to imposing joint and several liability on the fiduciary under section 405(a)(2), some federal courts have been reluctant to do so. In *Davidson v. Cook*, for example, the federal district court rejected the plaintiff's claim of co-fiduciary liability because

absent ... established knowledge, the defendants cannot be liable. The Court is loath to encourage ignorance, and the Court feels strongly that in many instances at least some of the fiduciaries should have known of the breaches and taken steps to remedy them. The evidence before the Court, however, does not adequately establish the required knowledge.

567 F. Supp. 225, 237 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4th Cir. 1984). Compare 29 U.S.C. § 1105(a)(2), with *id.* § 1105(a)(1), (a)(3).

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n165. 29 U.S.C. § 1105(a)(2); see, e.g., *Silverman v. Mut. Benefit Life Ins. Co.*, 941 F. Supp. 1327, 1336 (E.D.N.Y. 1996); *Brandt v. Grounds*, 502 F. Supp. 598, 599 (N.D. Ill. 1980), *aff'd*, 687 F.2d 895 (7th Cir. 1982).

n166. See *Kling v. Fid. Mgmt. Trust Co.*, 323 F. Supp. 2d 132, 144-45 (D. Mass. 2004); *Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1141 (D. Mass. 1996); *Mazur v. Gaudet*, 826 F. Supp. 188, 189-93 (E.D. La. 1992).

n167. Compare 29 U.S.C. § 1105(c)(2), with Restatement (Second) of Trusts § 225(2) (1959).

n168. 29 U.S.C. § 1002(9).

n169. *Id.* § 1109(a) ("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 subchapter 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 the use of assets of the plan by the fiduciary ... ." (emphasis added)).

n170. 537 U.S. 280 (2003).

n171. See *id.* at 285-87. The Supreme Court in *Meyer* reasoned:

The Fair Housing Act itself focuses on prohibited acts. In relevant part the Act forbids "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate," for example, because of "race." It adds that "person includes, for example, individuals, corporations, partnerships, associations, labor unions, and other organizations." It says nothing about vicarious liability.

Nonetheless, it is well established that the Act provides for vicarious liability. This Court has noted that an action brought for compensation by a victim of housing discrimination is, in effect, a tort action. And the Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.

It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.

Id. at 285-86 (internal citations omitted).

n172. Compare 29 U.S.C. § 1002(9) (definition of "person" under ERISA), with 42 U.S.C. § 3602(d) (2006) (definition of "person" under Fair Housing Act).

n173. Congress enacted the Fair Housing Act in 1968. ERISA was enacted in 1974.

n174. See cases cited supra note 138.

n175. See *Varity Corp. v. Howe*, 516 U.S. 489, 503 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 80-81 (1995).

n176. See *Meyer v. Holley*, 537 U.S. 280, 285-87 (2003).

n177. 29 U.S.C. § 1144(a). Section 514(a) of ERISA broadly preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan." Thus, ERISA preemption under section 514(a) includes preemption of state law respondeat superior liability principles. Id.

n178. *Beach v. Commonwealth Edison Co.*, 382 F.3d 656, 659 (7th Cir. 2004) (observing that state courts "regularly create federal common law to fill the gap"). For examples of where federal courts have incorporated state contract law and trust law principles as federal common law gap-fillers, see cases cited supra notes 2 and 5.

n179. *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58 (4th Cir. 1992) (internal quotation marks omitted).

n180. *Int'l Union of Paper Workers v. Nat'l Indus. Grp. Pension Plan*, 342 F.3d 606, 609 (6th Cir. 2002) (citations omitted).

n181. 29 U.S.C. § 1132(a).

n182. 473 U.S. 134 (1985).

n183. *Id.* at 146-47 (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)).

n184. 489 U.S. 101 (1989).

n185. *Id.* at 110 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). The Firestone Court incorporated common law trust principles into the standard of judicial review for denial of benefits claims brought under ERISA. See *id.* at 111-15; see also *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) ("[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." (quoting 120 Cong. Rec. 29942 (1974) (statement of Sen. Javits))).

n186. 508 U.S. 248 (1993).

n187. *Id.* at 259 (citing *Firestone*, 489 U.S. at 110).

n188. 552 U.S. 248 (2008).

n189. In the statutory context, the problem of legal obsolescence arises where a statute no longer fits the current legal landscape or could no longer be enacted today. See Guido Calabresi, *A Common Law for the Age of Statutes* 2 (1982). Where a federal statute has become

obsolete, the federal courts traditionally have addressed the problem through a variety of statutory interpretation approaches and techniques. See *id.* at 31-43.

n190. *LaRue*, 552 U.S. at 253-54.

n191. *Id.*

n192. The *Russell* Court previously had determined that subsection 502(a)(2) of ERISA authorized a claim and a damages remedy for breach of fiduciary duty only if the relief was awarded to the "entire" plan. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). The *LaRue* plaintiff, who was a participant in a 401(k) plan, argued that his damages claim for breach of fiduciary duty could be brought under subsection 502(a)(2) even though only his personal account under the 401(k) plan, not all participant accounts in the plan, would receive the damages award. See 552 U.S. at 250-52. The *LaRue* Court acknowledged that its prior interpretation was based on the now-outdated norm of the defined benefit pension plan. *Id.* at 253-56. Recognizing that this norm had since changed to the individual account plan, the *LaRue* Court held that subsection 502(a)(2) authorized a claim and relief for a fiduciary breach that impaired the value of a participant's individual account. *Id.* at 255-56. In so doing, the *LaRue* Court made it possible for 401(k) plan participants to assert breach of fiduciary duty claims under Section 409(a) as class actions under section 502(a)(2) rather than as individual claims under section 502(a)(3).

n193. See 29 U.S.C. § 1132(a) (2006).

n194. *Id.* § 1132(a)(2). Section 409(a) requires the breaching fiduciary to "make good" any "losses" to the plan and to restore to the plan any profits made through the fiduciary's use of plan assets. See *id.* § 1109(a). "Losses" to the plan include lost investment opportunity. See *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

n195. See *Russell*, 473 U.S. at 140-43.

n196. See *id.* at 144.

n197. See *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).

n198. 29 U.S.C. § 1132(a)(3).

n199. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

n200. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002).

n201. 508 U.S. 248 (1993).

n202. *Id.* at 262 (citations omitted).

n203. *Id.* at 253-55 (stating that no provision of ERISA explicitly imposes a duty on a nonfiduciary to avoid participating in a fiduciary's breach of duty, and expressing skepticism as to whether ERISA authorizes claims against nonfiduciaries).

n204. 530 U.S. 238 (2000).

n205. See *id.* at 249. The plaintiffs in *Harris Trust* sought rescission, restitution, and disgorgement of profits made by the nonfiduciary corporate defendant involving a purchase and sale of plan assets. See *id.* at 243.

n206. 29 U.S.C. § 1132(l) (2006).

n207. Congress added section 502(l), 29 U.S.C. § 1132(l), to ERISA in 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2101, 103 Stat. 2106, 2123 (1990).

n208. 29 U.S.C. § 1132(l)(1) (emphasis added).

n209. *Id.* § 1132(l)(2).

n210. Compare *id.* § 1132(a)(5), with *id.* § 1132(a)(3).

n211. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000).

n212. See *id.* at 242-43.

n213. See 29 U.S.C. §§1104-1106.

n214. See *Medill*, *supra* note 37, at 908-09; Susan J. Stabile, *Breach of ERISA Fiduciary Responsibilities: Who's Liable Anyway?*, 5 *Emp. Rts. & Emp. Pol'y J.* 135, 153-56 (2001).

n215. See *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 360-65 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14 (2002); *Harris Trust*, 530 U.S. at 243. Professor John H. Langbein has argued that restitution under subsection 502(a)(3) should include monetary "make-whole" relief to an individual who has been injured by a fiduciary's breach of duty because such relief was available in courts of equity against a trustee who breached a fiduciary duty and thereby injured a trust beneficiary. See generally Langbein, *supra* note 61. For a nonfiduciary defendant under ERISA, however, the trust law analogy for awarding make-whole monetary relief becomes less compelling. Limiting monetary relief to restitution as necessary to prevent unjust enrichment is necessary to maintain the congressional balance between ERISA's primary protective policy and the secondary cost containment policy. See *Medill*, *supra* note 37, at 927-28.



n216. E.g., *Bannistor v. Ullman*, 287 F.3d 394 (5th Cir. 2002); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985); *In re Bausch & Lomb, Inc. ERISA Litig.*, No. 06-CV-6297, 2008 WL 5234281 (W.D.N.Y. Dec. 12, 2008); *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206 (D. Conn. 2007); *In re Coca-Cola Enterprises, Inc. ERISA Litig.*, No. 1:06-CV-0953 (TWT), 2007 WL 1810211 (N.D. Ga. June 20, 2007); *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002 (S.D. Ohio 2006); *Rogers v. Baxter*, 417 F. Supp. 2d 974 (N.D. Ill. 2006); *In re Mut. Funds Inv. Litig.*, 403 F. Supp. 2d 434 (D. Md. 2005); *Pietrangelo v. NUI Corp.*, No. Civ. 04-3223(GEB), 2005 WL 1703200 (D.N.J. July 20, 2005); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 8853(SWK), 2005 WL 563166 (S.D.N.Y. Mar. 10, 2005); *Howell v. Motorola, Inc.*, 337 F. Supp. 2d 1079 (N.D. Ill. 2004); *In re Reliant Energy ERISA Litig.*, 336 F. Supp. 2d 646 (S.D. Tex. 2004); *Kling v. Fid. Mgmt. Trust Co.*, 323 F. Supp. 2d 132 (D. Mass. 2004); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328 (N.D. Okla. 2003).

n217. E.g., *Coldesina Emp. Profit Sharing Plan & Trust v. Estate of Simper*, 407 F.3d 1126 (10th Cir. 2005); *Hamilton v. Carell*, 243 F.3d 992 (6th Cir. 2001); *Kral, Inc. v. Sw. Life Ins. Co.*, 999 F.2d 101 (5th Cir. 1993); *Cont'l Assurance Co. v. Cedar Rapids Pediatric Clinic*, 957 F.2d 588 (8th Cir. 1991); *Wasley Prod., Inc. v. Bulakites*, Nos. 3:03cv383(MRK)(WIG), 3:03CV1790(MRK)(WIG), 2006 WL 3834240 (D. Conn. May 31, 2006); *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544 (D. Md. 2003); *Nat'l Mgmt. Ass'n, Inc. v. Transamerica Fin. Res., Inc.*, 197 F. Supp. 2d 1016 (S.D. Ohio 2002); *Tool v. Nat'l Emp. Benefit Serv., Inc.*, 957 F. Supp. 1114, 1120-21 (N.D. Cal. 1996).

n218. See 29 U.S.C. § 1109(a); *Meyer v. Holley*, 537 U.S. 280, 285-87 (2003).

n219. See *Varity Corp. v. Howe*, 516 U.S. 489, 503 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 80-81 (1995).

n220. *Harris Trust*, 530 U.S. at 249.

n221. *Laski*, *supra* note 21, at 114 (emphasis added).

n222. See 29 C.F.R. § 2509.75-8, FR-14 (2005) (stating that if the instrument under which the plan is maintained does not provide for a procedure for designating persons who are not named fiduciaries to carry out fiduciary responsibilities, than any such designation which the named fiduciaries may make will not relieve the named fiduciaries from responsibility or liability for the acts and omission of the persons so designated).

n223. See 29 U.S.C. § 1105(c)(2); 29 C.F.R. § 2509.75-8, FR-13 & FR-14.

n224. See 29 U.S.C. § 1109(a).

n225. See id. § 1102(a); 29 C.F.R. § 2509.75-8, FR-13 & FR-14.

n226. The analysis would be identical if the corporate employer named only one individual employee or officer as the plan's named fiduciary.

n227. If the committee informally designated an external fiduciary to perform the committee's fiduciary responsibilities, then the corporate employer would be strictly liable for both the fiduciary actions of the committee members and the fiduciary conduct of the external fiduciary, as in Case #1.