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Baby Ka-Boom! Coming Developments in ERISA Litigation Due to Social, Demographic, and Financial Pressures From the Baby Boom Generation, 41 J. Marshall L. Rev. 1037 (2008)

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BABY KA-BOOM! COMING DEVELOPMENTS IN ERISA LITIGATION DUE TO SOCIAL, DEMOGRAPHIC, AND FINANCIAL PRESSURES FROM THE BABY BOOM GENERATION

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INTRODUCTION

Legal developments never take place in a vacuum. Rather, they are the natural response to the developments in our daily lives. It generally is only a matter of time before the headlines and trends reported in the newspapers are reflected in plaintiffs' complaints and judges' opinions. Because of this relationship, recognizing current changes today can be an important way to predict future areas of litigation. Few legal areas more clearly reflect the relationship between social trends and the newest forms of litigation than employee benefits. Over recent decades, employee benefits litigation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), has developed in response to several trends that have been at work in the nation's offices and factories. Employees and employers are confronted with social, demographic, and financial pressures that

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have lead to several types of ERISA litigation. This Article explores the impact that social, demographic, and financial trends have had on the development of ERISA litigation, and it examines how that process is continuing today. In particular, it considers the latest pressures employers and employees face related to the impending large-scale retirement of America's Baby Boomers. This Article provides an analysis of these emerging trends and discusses new forms of litigation that are likely to develop in response to them. Part I of this Article discusses some of the major pressures that have affected America's workplaces over recent decades. Part II summarizes specific forms of ERISA litigation that arose in response since the 1980s to today. Part III discusses the current pressures presented by the impending retirement of the Baby Boomers. Finally, Part IV identifies new forms of ERISA litigation that are now developing in response to these latest forces.

I. RECENT SOCIAL, DEMOGRAPHIC, AND FINANCIAL PRESSURES THAT HAVE TRANSFORMED EMPLOYEE BENEFITS

Since ERISA was passed in 1974, the world of employee benefits has been transformed dramatically. This transformation is largely a result of a series of pressures that have affected the types of benefits employers offer, the forms of compensation that employees desire, and the overall economics of employee benefits.

A. Social Pressures

A key social change since 1974 has been the transformation of the American work place from one more heavily focused on manufacturing to one that is more services-oriented. Since the 1960s, the share of the nation's gross domestic product attributable to services has more than doubled, and most of the increase occurred in the 1980s and 1990s.[1] Since 1977 and the end of the 1990s, the average annual real output growth in services was been 7.1% while manufacturing's growth rate was been only 2.7%.[2] The manufacturing sector, which had long provided substantial benefits to its employees and even its retirees, was particularly impacted by this change in the make-up of the

1. Kenneth McLennan, *Worker Representation And Participation in Business Decisions Through Employee Involvement Programs*, 3 U. PA. J. LABOR & EMP. L. 563, 570 (2001) (reporting that the contribution of services share increased from 9.5 percent in 1959 to 20.4 percent in 1997); *see also* Daniel Meckstroth, MANUFACTURERS ALLIANCE/MAPI, EMPLOYMENT AND ECONOMIC GROWTH TRENDS IN THE UNITED STATES, 1998-2008 1, 3 (1999) (reporting largest job growth in 1988 to 1998 was in service sector and that manufacturing accounted for only 13 percent of jobs by 1998).

2. McLennan, *supra* note 1, at 570.

economy.[3] By 2002, manufacturing accounted for only 13.9% of the nation's GDP.[4]

In addition, the changing make-up of the American economy came at the same time as two other important trends: increased incidence of permanent workforce reductions, *i.e.* downsizing, and increased employee turnover.

First, as employers adjusted to the changing make-up of the American economy, significant downsizing occurred in the late 1980s and early 1990s.[5] During that time, many employers were forced to shed large numbers of their workforces.[6] While there were instances of layoffs and plant closures, many employers also offered incentive packages or early retirement programs that gave older employees the option to choose to leave voluntarily.[7]

Second, in response to both the changed economy and downsizing, there has been an increase in turnover among employees. When ERISA was promulgated in the 1970s, workers often stayed at the same employer for decades, but by the 1990s employee turnover was much higher. In 2000, most workers surveyed said that they did not plan to remain with their employer long-term.[8]

Together, the trends of increased downsizing and increased employee turnover have resulted in another social pressure: the increased mobility of workers. While employees used to spend their entire careers with one employer, today's workers are much more likely to change employers or professions multiple times. Statistics reflect that in 1992, eight percent of permanent workers changed employers.[9] By 1994, the number rose to eleven percent and, in 1999, it was fourteen percent.[10] A typical worker will hold

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3. *See* Meckstroth, *supra* note 1, at 3 (reporting negative job growth in mining, manufacturing, and utility sectors during 1988-1998).

4. *See* Josh Bivens, Robert Scott & Christian Wellen, MENDING MANUFACTURING: REVERSING POOR POLICY DECISIONS IS THE ONLY WAY TO END CURRENT CRISIS 1 (2003), *available at* http://epinet.org/briefingpapers/144/bp144.pdf.

5. *See, e.g.*, Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1202-03 (2000) (discussing the movement of jobs away from heavy industry and the growing importance of educated workers).

6. *See, e.g.*, Steve Lohr, *2 Large Companies Make Cuts*, N.Y. TIMES, Nov. 25, 1993, at D1 (reporting 2.2 million permanent layoffs between 1986 and 1993).

7. *See id.* (reporting early retirement offer made to 25,000 employees).

8. Dave Murphy, *Take a Bite Out of Your Job Turnover*, S.F. EXAMINER, Apr. 16, 2000, at J1 (reporting only twenty-five percent of those surveyed considered themselves committed and planning to stay for two more years); *see also* Jacoby, *supra* note 5, at 1204.

9. Edwin R. Render, *How Would Today's Employees Fare in a Recession?*, 4 U. PA. J. LABOR & EMP. L. 37, 49 n. 55 (2001).

10. *Id.*

nearly nine jobs between the ages of eighteen and thirty-four.[11]

The combination of social pressures like the changing American economy and increased mobility has had a significant impact on the benefits that employers offered to employees. The most profound of these has been the change from defined benefit plans to defined contribution plans.

Defined benefit plans are retirement plans that provide a specific benefit at retirement for each eligible employee.[12] Employers fund defined benefit plans on an actuarial basis, which is designed to ensure that the plan will have adequate funds to pay promised benefits to plan participants when they retire. To determine participants' benefits, the pension plan establishes a formula that often considers years of services and compensation. The benefits provided under defined benefit plans for salaried employees often are based on compensation earned near the end of that person's career. Thus, such plans reward long-term employment. Also, because a defined benefit plan "consists of a general pool of assets rather than individual dedicated accounts, the employer typically bears the entire investment risk and must cover any underfunding that may occur from the plan's investments.[13]

In contrast, defined contribution plans establish "an individual account for each participant and for benefits based solely upon the amount contributed to the . . . account."[14] Employees make voluntary contributions to the account, which may be supplemented by periodic employer contributions. The participant's retirement benefit is determined by the account balance, which depends on the contributions plus net investment earnings on the contributions.[15] While they bear an investment risk because the benefit is not a fixed amount, the employees may enjoy higher returns based on the market and their own investment decisions. Because benefits in defined contribution plans are based on contributions and investment earnings over an entire career and not just the last year or last few years of employment, defined contribution plans are generally more portable if the employee leaves the employer and provide the employee greater flexibility.[16]

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11. Katherine E. Ulrich, *You Can't Take It With You: An Examination of Employee Benefit Portability and Its Relationship to Job Lock and the New Psychological Contract*, 19 HOFSTRA LABOR & EMP. L.J. 173, 175 (2001).

12. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) (citing Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 154 (1993)); *see also* LaRue v. DeWolff, Boberg, and Assocs. Inc., 128 S. Ct. 1020, 1022 n.1 (2008).

13. *See, e.g.*, Eaton v. Onan Corp., 117 F. Supp. 2d 812, 816 (S.D. Ind. 2000) (quoting Hughes Aircraft, 525 U.S. at 439).

14. 29 U.S.C. § 1002(34) (2006).

15. *LaRue*, 128 S.Ct. at 1022 n.1.

16. *See Eaton*, 117 F. Supp. 2d at 817 (contrasting a defined benefit and

The social changes to the American workplace have contributed to both a sharp decline in participation in defined benefit plans and a corresponding increase in participation in defined contribution plans.[17] Between 1979 and 2005, the percentage of workers participating in only defined benefit plans decreased from sixty-two percent to around ten percent.[18] In that same period, the percentage of participants in defined contribution plans grew from sixteen percent to over sixty percent.[19] This change naturally follows the increased mobility of today's workforce. As mobility and turnover have increased and workplace longevity has decreased, defined contribution plans better meet the needs of the workplace and participants. Because assets in defined contribution plans can be transported to a new employer when a participant leaves, they are more portable and better suited to today's workers.

In addition, the shift from defined benefit plans to defined contribution plans has itself reflected another important social change. Specifically, it reflects a movement toward private wealth management. Because an increasing number of workers participate in defined contribution plans, they are more likely to be responsible for their own investment decisions. This reflects that today's workers and tomorrow's retirees are literally going to be more personally invested in their retirements and less able to rely on income provided by their employers.

B. Demographic Pressures

One of the most significant demographic pressures many employers have faced has resulted from the Baby Boom. The Baby Boom generation is defined as those born in the post-World War II period of 1946 to 1964.[20] When ERISA was passed in 1974, the age of the first wave of Baby Boomers was twenty-eight. As Baby Boomers finished school, employers had to incorporate them into the workforce.

Throughout the 1980s and 1990s, Baby Boomers continued to rise through the ranks of the workforce. By 1980, the roughly seventy-nine million Americans in the Baby Boom generation

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defined contribution pension plan).

17. *See* Craig C. Martin & Amanda S. Amert, *Cash Balance Plans Reassessed in Light of Discrimination and Funding Litigation*, 59 BUS. LAW. 453, 454 (2004); Ulrich, *supra* note 11, at 193.

18. EMPLOYEE BENEFIT RESEARCH INSTITUTE, U.S. RETIREMENT TRENDS OVER THE PAST QUARTER-CENTURY at 1 (June 21, 2007), *available at* http://www.ebri.org/ pdf/publications/facts/0607fact.pdf.

19. *Id.*

20. Craig C. Martin & Joshua Rafsky, *The Pension Protection Act of 2006: An Overview of Sweeping Changes in the Law Governing Retirement Plans*, 40 J. MARSHALL L. REV. 843, 844 (2007).

accounted for fifty-eight percent of Americans between the ages of eighteen and sixty-five.[21] Employers, who were already facing the social pressures discussed in Part I, found that they needed to also make room for this large number of employees. The benefit incentives some employers offered older employees to leave the companies allowed employers to make room for younger workers in the Baby Boom generation.[22] In the 1990s, studies reflected an overall drop in the average retirement age as additional older workers left the workforce.[23]

C. Financial Pressures

A chief financial pressure employers have faced in recent decades has been the dramatic increase in the cost of employee benefits. In the 1960s, for example, employer-provided health insurance accounted for only 2.7% of the typical private employer's total employee compensation costs.[24] Since the 1980s, however, employers' costs related to employee benefits have skyrocketed. The annual increase of health care costs for private employers in 1980s and 1990s in some years was estimated at twenty percent.[25] By 1995, benefit costs accounted for twenty-eight percent of employees' total compensation.[26]

Today, health care and retirement costs continue to make up a substantial portion of employers' overall costs, especially in older industries where employers continue to provide benefits under defined benefit plans.[27] These established companies are still subject to high employee and benefit costs because those costs are deeply entrenched in the companies' cost structures.

At the same time that employers faced increased financial costs due to higher benefit costs, they also faced increased foreign competition due to globalization. While employers in older, traditional industries remained and continue to be saddled with

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21. STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, U.S. DEP'T OF COMMERCE 12 (2006), *available at* http://www.census.gov/prod/2006pubs/07statab/pop.pdf.

22. *See, e.g.*, Lohr, *supra* note 6.

23. *See* Gina Kolata, *Family Aid to Elderly is Very Strong, Study Shows*, N.Y. TIMES, May 3, 1993, at A16 (reporting only 17 percent of men 65 and older continued to work while in 1950 the percentage was 46 percent).

24. *See* STATISTICAL ABSTRACT OF THE UNITED STATES, CENSUS BUREAU 241-42 (1966), *available at* http://www.census.govprod2/statcomp/documents/1965-03.pdf. At that time, the maximum benefit paid out under nearly 75 percent of collective bargaining contracts was less than $2,000; *see* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 44:6 (5th ed. 1961).

25. *See* Bureau of Nat'l Affairs, *Employer Health Care Costs Rising At 21 Percent Rate, Report Says*, DAILY LABOR REP., Jan. 14, 1991, at A3 (citing increase in costs between 1987 and 1989).

26. Ulrich, *supra* note 11, at 181-82.

27. *See, e.g.*, Josh Bivens, et al., *supra* note 4, at 1.

high benefit costs, newer domestic manufacturers and international competitors have not had to contend with these same cost structures. Pension funding and other benefit costs at these older companies has contributed to the disparate cost structures between older companies in traditional industries like manufacturing and newer domestic and international companies, particularly when the workforce of these newer and foreign companies is primarily non-unionized.

These financial pressures also contributed to the shift from defined benefit plans to defined contribution plans discussed above. Because they are primarily funded by the employer and employers bear the investment risk, defined benefit plans are riskier for employers to maintain than defined contribution plans.[28] Accordingly, employers moved away from traditional defined benefit plans because such plans are costly and place them at a financial disadvantage against competitors who offer less costly 401(k) and other defined contribution programs. In recent years, several large and well-known companies including Verizon, IBM, Lockheed Martin, Alcoa, Sears, Hewlett Packard, and Delta Airlines have sought to freeze or cut their future defined benefit accruals.[29]

II. RECENT ERISA LITIGATION RESULTING FROM THESE PRESSURES

The combination of the social, demographic, and financial pressures outlined in Part I led to a variety of recent forms of ERISA litigation. As employers adjusted to these pressures by modifying the benefits they offered, many participants—with help from the plaintiffs' bar—took action to secure the benefits they believe they were owed.

A. Material Misrepresentation Litigation in the Late 1980s-1990s

Facing social pressures due to the changing face of the American economy and increased financial pressures due to costs and competition, many employers in the late 1980s and 1990s downsized their workforces.[30] Employers faced demographic pressures as well because, around that time, the first wave of Baby Boomers was entering or on the verge of entering their 40s. In reducing their payrolls by downsizing and in accommodating the

28. Amy B. Monahan, *Addressing the Problem of Impatients, Impulsives and other Imperfect Actors in 401(k) Plans*, 23 VA. TAX REV. 471, 477-78 (2004).

29. *See* 152 Cong. Rec. S38 (2006), *available at* http://www.govtrack.us/congress/record.xpd?id=109-h20060308-38&person=400267 (statement of Rep. George Miller [D-CA]) (discussing various retirement and pension issues).

30. *See supra* notes 2-9 and accompanying text (describing the downward shift in labor in response to financial constraints).

large number of Baby Boomers who were coming up in the ranks, many employers offered enhanced retirement packages to employees to give employees an incentive to leave the company. While these enhanced offers provided benefits to many workers, employers soon found themselves in litigation. Generally, participants who took the offers alleged that shortly after they accepted the employer's offer, the employer modified the plans to provide better benefits, and that the participants were entitled to those enhanced benefits.[31] Plaintiffs alleged that they acted in reliance on alleged misrepresentations by employer and made benefit and employment decisions based on these misrepresentations.[32]

Under ERISA, fiduciaries must discharge their duties "solely in the interest of the participants and beneficiaries." [33] For example, they have the duty to not mislead plan participants regarding material information about participants' benefits.[34] Participants may bring claims for breaches of fiduciary duty if a fiduciary breaches its duty by making misrepresentations to the employees.[35] To prevail, the plaintiff must show that the fiduciary breached its fiduciary duties by misleading plan participants or misrepresenting the terms or administration of a plan.[36]

For example, in *Varity Corp. v. Howe*, an employer represented to its employees that an impending corporate restructuring would not adversely affect their benefits.[37] Plaintiffs claimed that the corporation knew this was false.[38] The Supreme Court found that while the misrepresentations related to the financial health of the company, the employer was acting in its fiduciary capacity, not as an employer making business decisions.[39] The Supreme Court held that the employer breached its fiduciary duty by intentionally misleading employees about the new subsidiary's chances for financial success and security of benefits to persuade the employees to transfer to the subsidiary.[40] The Court reasoned that the employer's goal in its misrepresentations was to terminate the employees' benefits and

31. *See, e.g.*, Vartanian v. Monsanto Co., 14 F.3d 697, 699 (1st Cir. 1994); Fischer v. Phila. Elec. Co., 994 F.2d 130, 132 (3d Cir. 1993); Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1158 (6th Cir. 1988).

32. *See, e.g.*, Danis v. Cultor Food Sci., Inc., 154 F. Supp. 2d 247, 258-59 (D. Conn. 2001).

33. 29 U.S.C. § 1104(a)(1) (2006).

34. *See, e.g.*, Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 644 (8th Cir. 2007).

35. 29 U.S.C. § 1132(a)(3) (2006).

36. *See, e.g.*, Vallone v. CNA Fin. Corp., 375 F.3d 623, 640 (7th Cir. 2004).

37. 516 U.S. 489, 498 (1996).

38. *Id.* at 494, 505.

39. *Id.* at 505.

40. *Id.* at 506-07.

reduce its costs.[41]

Varity implicitly affirmed a pre-existing line of cases which required employers to reveal information to plan participants when they were seriously considering plan changes.[42] Subsequent to *Varity*, most circuit courts have found a fiduciary must provide information that it knows or should know would be harmful to withhold based on the fiduciary's knowledge of the specific participant's situation because that information is likely to be material to the participant.[43] Accordingly, federal courts often hold that a fiduciary has a duty to inform beneficiaries of possible changes to a plan or a new plan when such changes are under "serious consideration." These courts have held that a duty of accurate disclosure begins "when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."[44]

Other courts, however, decided that courts should look to a number of factors to determine whether a statement about a future plan provision is material.[45] These factors include:

> (1) "how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes," (2) "the special relationship of trust and confidence between the plan fiduciary and beneficiary," (3) "whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee and

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41. *Id.* at 506.

42. *See, e.g.*, Wilson v. Southwestern Bell Tel. Co., 55 F. 3d 399, 404 (8th Cir. 1995); Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 751 (D.C. Cir. 1990); *Berlin*, 858 F. 2d at 1164.

43. *See, e.g.*, Gregg v. Transp. Workers of Am. Int'l, 343 F.3d 833, 847-48 (6th Cir. 2003); Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450, 461-62 (3d Cir. 2003); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 380 (4th Cir. 2001); Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590-91 (7th Cir. 2000); Shea v. Esensten, 107 F.3d 625, 628 (8th Cir. 1997).

44. *See, e.g.*, Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996); *see also* Winkel v. Kennecott Holdings Corp., 3 Fed. Appx. 697, 703 (10th Cir. 2001); Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1049 (9th Cir. 2000) (adopting serious consideration test but stating factors should not be applied too rigidly); McAuley v. IBM Corp., 165 F.3d 1038, 1043 (6th Cir. 1999) (adopting serious consideration test); Vartanian v. Monsanto Co., 131 F.3d 264, 270 n.6 (1st Cir. 1997) (plaintiff "must show that a specific proposal under serious consideration *would have affected him*")(emphasis added); *but see* Beach v. Commonwealth Edison Co., 382 F.3d 656, 659-61 (7th Cir. 2004) (noting majority rule but leaving Seventh Circuit standard undecided); Mathews v. Chevron Corp., 362 F.3d 1172, 1180-182 (9th Cir. 2004) (duty not to actively misinform applies even before serious consideration begins).

45. *See, e.g.*, Ballone v. Eastman Kodak Co., 109 F.3d 117, 125 (2d Cir. 1997); *see also* Martinez v. Schlumberger Ltd., 338 F.3d 407, 428 (5th Cir. 2003).

the employee's reliance on the plan administrator for truthful information," and (4) "the specificity of the assurance."[46]

These courts, however, state that while an "employer has no affirmative duty to disclose the status of its internal deliberations on future plan changes even if it is seriously considering such changes . . . if it chooses . . . to speak it must do so truthfully . . . ."[47]

Because of cases like *Varity* and the material misrepresentation cases, employers must be careful in how information is conveyed when they offer benefits to their employees. As enhanced benefits were being offered to encourage workers to leave, many employers were caught in this "trap for the unwary."

B. Retiree Medical Benefits Litigation in the 1990s to the Early 2000s

At the same time that employers were facing tough times and attempted to reduce their benefit cost by restructuring their work forces, some employers also were squeezed by increased benefit costs, particularly retiree medical benefits.[48] In response, employers either increased the premiums that recipients had to pay for the benefits, reduced the benefits they provided, or eliminated them altogether.[49] Throughout the 1990s and the turn of the century, participants and retirees brought litigation to restore their benefits or reduce their increased premiums.

ERISA generally does not regulate the substantive content of welfare benefit plans and it specifically excludes welfare benefits such as medical benefits from the minimum participation, vesting and minimum funding requirements applicable to pension benefits.[50] Therefore, unless a plan sponsor contractually cedes its

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46. *Ballone*, 109 F.3d at 125; *see also Martinez*, 338 F.3d at 428 (courts must ask "whether there is a substantial likelihood that a reasonable person in the plaintiffs' position would have considered the information an employer-administrator allegedly misrepresented important in making a decision to retire.").

47. *Martinez*, 338 F.3d at 430.

48. In addition, rules related to how many employers accounted for these benefits and their costs changed in the early 1990s. Since 1993, publicly-traded employers have been required under Statement of Financial Accounting Standard No. 106 ("FAS 106") to recognize as a current expense the cost of these anticipated benefits. *E.g.*, Larry Grudzien, *The Great Vanishing Benefit, Employer Provided Retiree Medical Benefits: The Problem and Possible Solutions*, 39 J. MARSHALL L. REV. 785, 786 (2006). After FAS 106, there was a substantial decline in the percentage of employers providing retiree medical benefits. *Id.* at 787.

49. *See, e.g.*, UAW v. Skinner Engine Co., 188 F.3d 130, 136 (3d Cir. 1999); UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983).

50. 29 U.S.C. §§ 1051(1), 1053(a), 1081(a)(1) (2006); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). Courts have noted that "[t]o require

freedom to unilaterally modify the plan, it is generally free under ERISA to adapt, modify, or terminate welfare benefits at any time for any reason.[51] However, if a plan sponsor promised vested benefits, that promise can be enforced.[52] Therefore, courts have held that the plan sponsor and employee may contract to maintain welfare benefits at a certain level that ERISA does not mandate.[53]

To determine whether participants' obtained vested rights, courts typically interpreted the agreement at issue and applied principles of contract interpretation. Most courts concluded that, like other forms of welfare benefits, retiree medical benefits only vested if and when a contract specifies, not upon the attainment of a certain status, such as retirement or disability.[54] As the Supreme Court has stated, "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits."[55] The Sixth Circuit, which covers states like Michigan and Ohio that were hit hard by the social and financial changes in the 1980s and 1990s, was one of the few courts to suggest that when considering benefits provided under a collective bargaining agreement:

> retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.[56]

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the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." Moore v. Metro. Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988).

51. *See Curtiss-Wright Corp.*, 514 U.S. at 78; Hackett v. Xerox Corp. Long Term Disability Benefits Plan, 315 F.3d 771, 774 (7th Cir. 2003).

52. Am. Fed'n of Grain Millers v. Int'l Multifoods Corp., 116 F.3d 976, 980 (2d Cir. 1997); Wheeler v. Dynamic Eng'g, Inc., 62 F.3d 634, 638 (4th Cir. 1995). Vested for the purposes of ERISA means "nonforfeitable," which is further defined as "unconditional." 29 U.S.C. §§ 1002(19), 1002(25).

53. Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 77 (2d Cir. 1996); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993).

54. *See, e.g.*, Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1160 (9th Cir. 2001) (holding that benefit rights did not vest on the occurrence of the disability but vested only when the contract so provided); Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 (10th Cir. 1996) (finding that because plan's language did not clearly indicate disability triggered vesting, plaintiff's receipt of disability insurance did not entitle employee to vested right); Williams v. Caterpillar, Inc., 944 F.2d 658, 666-67 (9th Cir. 1991) ("Retiree medical benefits do not become vested once an employee becomes eligible or retires."); *Moore,* 856 F.2d at 491 ("[a]utomatic vesting does not occur in the case of welfare plans").

55. *Curtiss-Wright Corp.*, 514 U.S. at 78.

56. *Yard-Man, Inc.*, 716 F.2d at 1482. However, in later opinions, the Sixth Circuit was clear that it was not creating a presumption that such benefits

While courts often recognized that employees could obtain vested medical benefits, much of the retiree medical benefit litigation focused on what language was necessary for welfare benefits to vest. Generally, courts found that the level of formality needed to vest benefits needed to match the formality of the plan.[57] In addition, courts decided that if the agreement is ambiguous as to when and if the welfare benefits vest, extrinsic evidence could be used to show that the benefits were meant to be vested.[58] However, courts were frequently reluctant to provide plaintiffs with vested benefits absent "clear and express language" to that effect.[59]

The retiree medical benefits litigation cases clearly reflect the impact that the financial pressures had on employers and participants, but also a social change where it could no longer be assumed that retirees could rely on their former employers to provide medical coverage in the future. The employers faced significant increases in costs for benefits that they argued they never agreed to provide forever and without change. Participants responded that they had anticipated that these benefits would be available, and employers were taking them away after participants had provided their services to those employers. Ultimately, the courts were required to step in and resolve the difficult question of what the parties intended years after the agreements were drafted. In the end, however, many retirees could not present the level of proof that courts required to establish that the benefits were to be vested.

C. Cash Balance Litigation from the 1980s to the Pension Protection Act of 2006

As discussed above, the traditional defined benefit plan became increasingly ill-suited to today's workplace. In response, some employers shifted to a hybrid of defined benefit and defined contribution plans called the cash balance plan. Cash balance plans were one of employers' first attempts at controlling their defined benefit liabilities.

While cash balance plans have generally been governed by

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vested and that courts must still interpret the terms of the applicable contract. *See, e.g.*, Maurer v. Joy Techs., Inc., 212 F.3d 907, 917 (6th Cir. 2000); In re White Farm Equip. Co., 788 F.2d 1186, 1193 (6th Cir. 1986) (holding that plan provider and intended beneficiary may contract for vested retiree welfare benefits, but retiree welfare benefits are not required to vest at retirement).

57. *See, e.g.*, *Schonholz*, 87 F.3d at 78.

58. Bidlack v. Wheelabrator Corp., 993 F.2d 603, 608 (7th Cir. 1993).

59. *Wise*, 986 F.2d at 937; *see also Skinner Engine*, 188 F.3d at 141-42; United Paperworkers Int'l Union v. Jefferson Smurfit Corp., 961 F.2d 1384, 1386 (8th Cir. 1992).

the ERISA rules that govern traditional defined benefit plans,[60] they are intended to look like defined contribution plans because workers are provided with hypothetical individual accounts.[61] In cash balance plans, a participant's hypothetical account receives a semi-annual or annual credit comprised of a percentage of the participant's compensation and an interest credit that is set by the plan.[62] The employees' personal accounts are not separately funded by the employer, however.[63] By legal definition, a cash balance pension plan is a defined benefit plan because the individual accounts cash balance plans establish are merely fictional and do not actually exist.[64] From an economic standpoint, however, a cash balance pension plan resembles a hybrid arrangement where a defined benefit plan functions as a defined contribution plan.[65]

Because cash balance plans provide that an individual's account will receive interest credits that are outside the control of the employer, the employer bears the risk that the plan's investment return may fall below the interest credit rate guaranteed by the plan.[66] However, the employer benefits if the plan's net investment return is above the rate guaranteed by the plan.[67] Because the employer bears the risk with these investments, cash balance plans, like defined benefit plans, have been subject to a number of statutory requirements that do not apply to defined contribution plans. Despite these statutory requirements, cash balance plans are attractive to employers because they typically are less costly to maintain than traditional defined benefit plans and there tends to be less volatility in the employer's funding obligations.[68] Younger workers also typically prefer the cash balance plans because they provide a more even benefit to workers regardless of the time spent working for their employer.[69]

Because until recently most of the ERISA provisions that govern cash balance plans predated those plans,[70] litigation

60. Martin & Amert, *supra* note 17, at 455 (citing EMPLOYMENT BENEFIT RESEARCH INSTITUTE, *New EBRI Backgrounder Cash Balance Pros and Cons Outlined*, PR NEWSWIRE, June 24, 1999, *available at* LEXIS, U.S. News Library).

61. *Id.*

62. Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 637 (7th Cir. 2006).

63. *Id.*

64. *See* Esden v. Bank of Boston, 229 F.3d 154, 158-59 (2d Cir. 2000).

65. *See Eaton*, 117 F. Supp. 2d at 817.

66. *Id.*

67. *Id.*

68. Martin & Amert, *supra* note 17, at 458; CCH, LEGISLATION 2006, PENSION PROTECTION ACT OF 2006: LAW, EXPLANATION AND ANALYSIS 334 (2006).

69. Martin & Amert, *supra* note 17, at 455-56.

70. West v. AK Steel, 484 F.3d 395, 410 (6th Cir. 2007); *Esden*, 229 F.3d at

resulted as employers and employees tried to apply ERISA's provisions for defined benefit plans to cash balance plans.[71] While there have been several vexing issues related to cash balance plans, two stood out as being particularly common in litigation. The first was litigation related to the so-called "whipsaw effect."

The whipsaw effect is a complicated issue, but, in essence, it arises from the fact that ERISA and Internal Revenue Service rules governing distributions from defined benefit plans mainly contemplate the "normal retirement benefit"—typically, a single-life annuity payable at normal retirement age.[72] Any optional distribution, such as a lump sum payment, must be no less than the "actuarial equivalent" of the normal retirement benefit.[73] To make this calculation for a cash balance plan, the employer must project the participant's current cash balance forward to the normal retirement age and then discount that balance back to present value.[74] The rate used to project the balance may be defined by the plan, but the discount rate has been prescribed under the Internal Revenue Code.[75] If the plan's projection rate is higher than the statutory discount rate, the present value of the participant's benefit will exceed the participant's account balance.[76] The IRS has taken the view that if the employer did not pay out the higher figure, an impermissible forfeiture occurred in violation of ERISA § 203(a) and I.R.C. § 411(a)(2).[77]

Accordingly, employers who did not pay the higher amount found themselves in litigation brought by participants who alleged they were owed additional benefits. Since 2000, four circuits have considered the whipsaw issue, and each concluded that the employers had failed to pay the benefits that ERISA and the Treasury regulations required.[78] Relying on the statutory text and

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159 (noting that defined benefit rules "do not always fit in a clear fashion with cash balance plans").

71. *See, e.g.*, Gary I. Boren and Norman P. Stein, QUALIFIED DEFERRED COMPENSATION PLANS, §1.8 (2007); *see also Esden*, 229 F.3d at 159; *Eaton*, 117 F. Supp. 2d at 817-18.

72. *Esden*, 229 F.3d at 159.

73. *Id.*

74. *Id.*

75. *Id.* The "applicable interest statutory rate" was the interest rate on 30-year treasury obligations and found at I.R.C. § 417(e) (2006); Boren & Stein, *supra* note 71, § 1.8.

76. *Esden,* 229 F.3d at 159. As the Eleventh Circuit noted, the dispute only arises if the projection rate and the discount rate are different. Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan, 221 F.3d 1235, 1241 (11th Cir. 2000). "If the plan had pegged the interest [projection] rate to the prescribed maximum discount rate, there would have been no difference . . . and no dispute." *Id.*

77. *Esden*, 229 F.3d at 159.

78. *West*, 484 F.3d at 410; Berger v. Xerox Corp. Ret. Income Guar. Plan, 338 F.3d 755, 763 (7th Cir. 2003); *Esden*, 229 F.3d at 159; *Lyons*, 221 F.3d at

deferring to IRS, the courts determined that under ERISA and applicable regulations, benefits paid at any other time or in another form "must be worth at least as much as [the normal retirement benefit]."[79]

A second common type of litigation related to cash balance plans has been that some plaintiffs sued claiming that cash balance plans discriminated against them based on their age. For example, in *Cooper v. IBM Personal Pension Plan*, the plaintiffs alleged that the IBM cash balance plan discriminated against them under ERISA because "younger employees receive interest credits for more years."[80] The Seventh Circuit held that IBM's cash balance plan was legal, stating that because the plan was age-neutral, it was not age discriminatory.[81] According to Judge Easterbrook, when Congress enacted ERISA's age discrimination provisions, it did not "set out to legislate against the fact that younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings."[82] Not all courts agreed with the Seventh Circuit, however, and continued to hold that cash balance plans were age discriminatory.[83]

Fortunately, Congress has recently acted to remove—prospectively, at least—the uncertainty regarding cash balance and other hybrid pension plans. In 2006, Congress passed the Pension Protection Act of 2006 ("PPA").[84] It clarifies going forward that a defined benefit plan is not considered age discriminatory "if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant."[85] Under the PPA, cash balance plans do not violate the prohibition against ceasing or reducing the rate of an

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1252.

79. *See, e.g.*, *West*, 484 F.3d at 409 (quoting *Esden*, 229 F.3d. at 163).

80. 457 F.3d at 638.

81. *Id.* at 642.

82. *Id.* at 639.

83. *See, e.g.*, In re Citigroup Pension Plan ERISA Litig., 470 F. Supp. 2d 323, 342-43 (S.D.N.Y. 2006) (following *Cooper* "would ignore the plain language of the statute as well as the critical distinctions between the types of plans outlined by the Second Circuit," and citing *Esden*, 229 F.3d at 158-63).

84. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) [hereinafter PPA].

85. PPA § 701 (amending 29 U.S.C. § 1054, I.R.C. § 411 and 29 U.S.C. § 623).); *see also* Jenner & Block Client Alert, Pension Protection Act of 2006 (2006), *available at* http://www.jenner.com/files/tbl_s20Publications%5CrelatedDocumentsPDFs1252%5C1376%5CPension_Protection_Act_Advisory_of_2006.pdf. "[A] participant is similarly situated to any other such individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age." *Id.*

employee's benefit accrual because of age[86] if participants' accrued benefits meet this similarly-situated standard.[87] The PPA also ends going forward any potential illegality with respect to the whipsaw effect by amending the Internal Revenue Code (and related provisions in ERISA and the ADEA) to state that cash balance plans do not violate Section 417(e) and the general vesting rules if the plan treats the accrued benefit's present value as the participant's account balance.[88] The cash balance plan qualifies for this provision if the participant's benefit vests after no more than three years of service.[89]

Hopefully, the PPA will eliminate the challenges faced by employers who have adopted cash balance plans going forward. Because they feature some of the qualities of defined contribution plans, cash balance plans now will likely be strengthened as a viable option for employers who are seeking to avoid many of the problems they face with their existing defined benefit plans.

D. Stock Drop Litigation In Recent Years

In recent years following fluctuations in the stock market, numerous ERISA suits have been filed, typically as class actions, in which plaintiffs allege that they were harmed due to a decline in the value of their employers' stock.[90] In the typical stock-drop scenario, beneficiary-plaintiffs who invested in their employer's stock as an investment option provided as part of a defined contribution plan file suit after the publicly-traded stock suffers a significant drop in its price.[91] The plaintiffs allege that the plan's fiduciaries imprudently invested in, continued to invest in, or continued to offer as an investment option the employer's stock and thereby violated their ERISA fiduciary duties and that the plaintiffs were damaged by the decline in their account balances under the plan.[92]

Although the cases raising these issues have been numerous, the legal outcomes of these ERISA "stock drop" cases are only now becoming clearer as they work their way through the courts. For

86. 29 U.S.C. § 1054(b)(1)(H) (2006); I.R.C. § 411(b)(1)(H) (2006).

87. PPA § 701(d) (amending ERISA § 204, I.R.C. § 411 and ADEA § 4); Jenner & Block Client Alert, *supra* note 85.

88. Boren and Stein, *supra* note 71, §1.8 (citing I.R.C. § 411(a)(13)(A)).

89. *Id.* (citing I.R.C. § 411(a)(13)(B)).

90. *See, e.g.*, In re Sprint Corp. ERISA Litig., 388 F. Supp. 2d 1207, 1219 (D. Kan. 2004); In re Sears, Roebuck & Co. ERISA Litig., No. 02 C 8324, 2004 WL 407007, at *3 (N.D. Ill. Mar. 3, 2004); In re WorldCom Inc., 263 F. Supp. 2d. 745, 764-65 (S.D.N.Y. 2003).

91. *See, e.g.*, Kuper v. Iovenko, 66 F.3d 1447, 1451 (6th Cir. 1995) (plaintiffs brought suit where share price dropped 80 percent in roughly 18 months); In re Duke Energy ERISA Litig., 281 F. Supp. 2d, 786, 790 (W.D.N.C. 2003) (plaintiffs sued after price dropped 42 percent in a few months).

92. Edgar v. Avaya, 506 F.3d 340, 344 (3d Cir. 2007).

example, it is increasingly clear that courts will hold that a "fiduciary who invest the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision."[93] Accordingly, courts have dismissed plaintiffs' claims where plaintiffs' allegations fail to overcome the presumption of prudence ERISA provides to the fiduciaries of an employee stock ownership plan.[94]

The stock drop litigation is another example of ERISA litigation that grew out of the social, demographic, and financial pressures that came before it. As employers faced the pressures discussed in Part I that caused them to shift away from defined benefit plans, funds were increasingly moved into defined contribution plans. Defined contribution plans offered employees the choice of investment options, and many participants thought that investing in their employer's stock was a sound financial decision. Also, some employers made their financial matches to the participant's selection through the employer stock investment option. The end result was that a substantial portion of some plans became devoted to company stock. As the stock market bubble of the late 1990s and early 2000s burst, the stock decline affected the balances of 401(k) participants. However, ERISA allowed fiduciaries to invest funds in employer stock and participants themselves often were the ones who selected the employer stock as the investment option. These stock drop cases reflect that many fiduciaries found themselves in a difficult position because, due to the fact that substantial portions of the participants' accounts were invested in employer stock, they were vulnerable to large swings in the plan's value if the employer's stock declined.

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93. *Id.* at 347; *e.g.*, Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995); *see also* Pugh v. Tribune Co., 521 F.3d 686, 701 (7th Cir. 2008); *Edgar*, 506 F.3d at 347; Steinman v. Hicks, 252 F. Supp. 2d 746, 758-59 (C.D. Ill. 2003) (dismissing claim upon plaintiff's failure to overcome the presumption of reasonableness), *aff'd* 352 F.3d 1101 (7th Cir. 2003); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d at 794.

94. *See, e.g.*, *Edgar*, 506 F.3d at 347-49 (holding the *Moench* presumption applies equally to EIAPs as well as ESOPs); *Pugh*, 521 F.3d at 701 (holding plaintiff must demonstrate the ERISA fiduciary unreasonably complied with the plan's directions to invest solely in the employer's securities amidst a circulation scandal); *Kuper*, 66 F.3d at 1459; *Steinman*, 252 F. Supp. 2d at 758-59 (dismissing claim upon plaintiff's failure to overcome the presumption of reasonableness); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d at 794-95 (holding that plaintiff's claim failed to overcome the presumption of reasonableness); *see also* In re Calpine Corp. ERISA Litig., 2005 WL 1431506, at *5-6 (N.D. Cal. Mar. 31, 2005).

III. NEW PRESSURES ARISING FROM THE IMPENDING RETIREMENT OF BABY BOOMERS

It has been widely-recognized that the impending retirement of Baby Boomers on a large scale will present new pressures on employers. Just as employers had to adapt to accommodate the large-scale entry of Baby Boomers into the workforce, they must now react to their impending departure. In July 2005, there were nearly eighty million Baby Boomers.[95] That was about twenty-five percent of the population of the United States and nearly half of all Americans ages eighteen to sixty-five.[96] In 2006, the first wave of Baby Boomers, about 2.9 million people, turned sixty, and, today, Baby Boomers range in age from forty-four to sixty-two. As this group retires over the next twenty years, issues related to their benefits and income they will receive from their investments will become increasingly important.

An interesting demographic pressure that employers will now face is the opposite issue they faced when Baby Boomers were moving up in their ranks. As discussed in Part I, some employers found that they had to make room for Baby Boomers in their organizations by offering employees early retirement incentives to exit early. Now, faced with the prospect that a large portion of their work force may leave, many employers are seeking to avoid a "brain drain."[97] To encourage Baby Boomers to stay employed while younger employees are brought up to speed, some employers are offering older employees the chance to access their retirement benefits while remaining with the company.[98] However, the opportunities for employers to do so are limited by applicable tax rules.

One of the financial pressures employers will now face with the impending retirement of the Baby Boom generation is that existing benefit obligations they have to employees and retirees, also known as "legacy costs," threaten to place a major strain on their financial and competitive positions.[99] Employers will likely continue to investigate cost-efficient alternatives to traditional defined benefit pensions.

Impending retirement of the Baby Boomers on a large scale will pose a serious challenge to the government's ability to sufficiently provide for the financial needs of these retirees. [100] For

95. STATISTICAL ABSTRACT 2007, *supra* note 21, at 12.

96. *Id.*

97. Claudia H. Deutsch, *A Longer Goodbye*, N.Y. TIMES, Apr. 21, 2008, at H1.

98. *Id.*; *see also* John Leland, *Retirees Return to the Grind, But This Time It's On Their Own Terms*, N.Y. TIMES, Dec. 8, 2004, at A-18.

99. *See, e.g.*, Angela Boothe Noel, *The Future of Cash Balance Plans: Inherently Illegal or a Viable Pension Option?*, 56 ALA. L. REV. 899, 900 (2005).

100. *See* CONG. BUDGET OFFICE, THE RETIREMENT PROSPECTS OF THE BABY

example, because of the large number of expected retirees, existing Social Security and Medicare programs may be unable to provide benefits for retirees in the future.[101]

Because of the strain that the Baby Boomers' retirement is likely to place on the ability of the government to provide assistance, the benefits retirees receive from their personal retirement plans and accounts will take on even greater importance. Moreover, the increased use of defined contribution plans has placed the risk of lower returns on participants. As a result, retirees will pay even greater attention to the value of their accounts, the benefits they obtain, and how their funds are managed. As Baby Boomers approach retirement, they are more likely to scrutinize the performance of their investments, especially if they are receiving reduced returns. To the extent that returns do not match expectations, participants will likely be looking for someone to take responsibility.

Finally, for years, fund assets have been building up as Baby Boomers socked away money for retirement. Going forward, funds will now need to consider that as Baby Boomers retire, there will be a drawdown and removal of those assets and a resulting effect on financial markets.

IV. THE FUTURE OF ERISA LITIGATION DUE TO THESE NEW PRESSURES

As Baby Boomers begin to or will soon retire, new forms of ERISA litigation are already developing. The direction of these new avenues of litigation is not fully clear at this point. However, as in the past, it is clear that the current social, demographic, and financial pressures discussed in Part III at work today will ultimately impact the development of ERISA case law in several ways.

BOOMERS 1 (2004) (estimating that roughly twenty-five percent of baby boomer households have not accumulated sufficient retirement savings and that these households may need to rely on government assistance and benefit programs); *see also* EMPLOYEE BENEFIT RESEARCH INSTITUTE, HOW MUCH HAVE WORKERS SAVED FOR RETIREMENT? at 12 (Apr. 17, 2008) (reporting 49 percent of workers surveyed had saved less than $25,000 excluding homes and defined benefit plans).

101. *See* THE RETIREMENT PROSPECTS OF THE BABY BOOMERS, *supra* note 100, at 1 ("[T]he population of retirees will grow much more quickly than the taxpaying workforce, at a time when average benefits per retiree are expected to continue rising. Those developments will place severe and mounting budgetary pressures on the federal government.").

A. The Supreme Court's Decision in LaRue v. DeWolff, Boberg & Associates, Inc.

In 2008, in *LaRue v. DeWolff, Boberg & Associates, Inc.*, the Supreme Court unanimously ruled that although ERISA does not provide a remedy for individual injuries that are distinct from plan injuries, it does authorize plaintiffs to recover for fiduciary breaches that impair the value of plan assets in a participant's individual account.[102]

In *LaRue*, the plaintiff participated in a 401(k) plan, which is a defined contribution plan that permitted him to direct the investment of his account balance. The plaintiff alleged that the plan administrator breached its fiduciary duty by failing to carry out his investment instructions and that if his instruction had been followed, he would not have incurred an alleged loss of $150,000 in his plan account.[103] The Fourth Circuit dismissed the suit by holding that ERISA Section 502(a)(2) provides remedies only for entire plans and does not allow for recovery of losses to individual accounts.[104]

The Supreme Court reversed and remanded, however, holding that Section 502(a)(2) does not provide a remedy for individual injuries that are distinct from plan injuries, but it does allow a plaintiff to recover for "fiduciary breaches that impair the value of plan assets in a participant's individual account."[105] The decision recognized a difference between the defined contribution plan at issue and defined benefit plans because an individual's fixed retirement payment under a defined benefit plan is not affected by misconduct unless it impacts the potential for default of the entire plan.[106] For a defined contribution plan, however, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount participants would otherwise receive."[107] Because the Court found that such misconduct falls within the duties imposed on plan administrators by ERISA,[108] under *LaRue*, a participant in a defined contribution pension plan may sue a fiduciary whose alleged misconduct impaired the value of "plan assets" in the participant's individual account under Section 502(a)(2).[109]

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102. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S.Ct. 1020, 1026 (2008).
103. *Id.* at 1022.
104. LaRue v. DeWolff, Boberg & Assocs. Inc., 450 F.3d 570, 574 (4th Cir. 2006) (citing 29 U.S.C. § 1132(a)(2)).
105. *LaRue*, 128 S.Ct. at 1026.
106. *Id.* at 1025.
107. *Id.*
108. *See* 29 U.S.C. § 1109 (2006).
109. In a concurrence that Justice Kennedy joined, Chief Justice Roberts

LaRue may ultimately raise several concerns for plan administrators, and the potential effect of the Court's decision is uncertain. At a minimum, however, it is likely to encourage plaintiffs to try to sue under Section 502(a)(2) to recover for alleged breaches of fiduciary duties due to a variety of alleged administrative errors by the fiduciaries or those they appoint. In addition, the decision could increase litigation exposure for plan administrators, such as the plan sponsor, or plan recordkeepers, who might be contractually liable for errors they commit.

B. Possible ERISA Litigation Due to Subprime Mortgages

One of the biggest financial, social, and political issues in 2007 and 2008 has been the fallout from defaults on subprime mortgages and the ensuing turmoil in the global financial markets. In essence, the issues began to arise when high-risk borrowers, who had obtained "subprime" mortgages because of their lower incomes or poorer credit histories, started to default on those subprime loans.[110] Many of the mortgages had been bundled together into investments called mortgage-backed securities through which investors could obtain returns as the mortgages were paid but also took on the risk that borrowers would default.[111] Financial-services firms and others who had invested in the mortgage-backed securities began to face large losses because the value of the underlying mortgage assets declined as more and more borrowers went into default.[114]

While the story of the subprime lending debacle is still being written, it appears that it may prove to become the next form of ERISA litigation. The subprime crisis has negatively affected a number of pension funds.[115] Some pension funds have become the

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agreed that the Fourth Circuit's analysis was flawed but he expressed concern over the majority's conclusion that Section 502(a)(2) authorizes recovery in such cases without analyzing whether such a claim is more appropriately brought as a claim for benefits under Section 502(a)(1)(B) and whether the decision would allow plaintiffs to circumvent important procedural components of Section 502(a)(1)(B), such as the requirement to exhaust administrative remedies and judicial deference to a fiduciary's use of permitted discretion. *LaRue*, 128 S. Ct. at 1026-27. These also may prove to be important issues for future courts that interpret the issues raised by *LaRue*.

110. Robert Weisman, *Questions that Plague Investors - and Wall Street*, THE BOSTON GLOBE, Mar. 21, 2008, at C-1.

111. *Id.*

114. *See, e.g.*, *A Subprime Beat-down*, CHI. TRIB., Jan. 12, 2008, at C1.

115. Craig C. Martin & William L. Scogland, *The Subprime Crisis*, 33 EMP. REL. L. J. 105, 105 (Spring 2008). For example, the Ohio Public Employees Retirement System has invested approximately $530 million, or about 1 percent of its total investments, in subprime mortgages and the California Public Employees' Retirement System has invested close to $2.5 billion in subprime mortgages out of $250 billion total invested. *Id.*

lead plaintiffs in securities actions against subprime lenders they invested in and have alleged that the lenders made false and misleading statements that inflated the value of their stock.[116] Lawsuits in which plan participants sue pension funds or pension fund managers as defendants alleging that they made a poor investment decision by investing in mortgage-backed securities have not begun in earnest—yet.[117]

However, an action filed in October 2007 suggests a possible wave of new ERISA litigation. In *Unisystems Inc. Employees Profit Sharing Plan v. State Street Bank, et al.*, the plaintiff filed a class action complaint in the Southern District of New York asserting breach of fiduciary duty under ERISA.[118] Plaintiffs alleged that "State Street breached its fiduciary duties under ERISA . . . by causing State Street's purportedly conservative bond funds . . . to invest in high-risk and highly leveraged financial instruments tied to, among other things, mortgage backed securities."[119] The complaint further alleges that the "recent collapse of the subprime mortgage industry exposed the aggressive gamble State Street took with the retirement assets invested by ERISA plans . . . ."[120] The plaintiff claims its losses are in the hundreds of millions of dollars.[121] It may be only a matter of time before additional similar ERISA suits are filed.

The exact path that ERISA litigation related to the subprime

116. *See, e.g.*, Gold v. New Century Fin. Corp., 07-cv-00931 (C.D. Cal., consolidated complaint filed Sept. 14, 2007) (reflecting New York State Teachers' Retirement System as lead plaintiff); Atlas v. Accredited Home Lenders Holding Co., 3:07-cv-00488, 2008 WL 80949, at *1 (S.D. Cal., Jan. 4, 2008) (reflecting Arkansas Teacher Retirement System as lead plaintiff).

117. There have been several stock-drop suits filed in which plaintiffs alleged that it was imprudent for the company to have continued to offer the employer's stock as an investment option in light of the company's investments in the subprime market. *See, e.g.*, Alvidres v. Countrywide Fin. Corp., No. CV 07-5810-RGK (CTx), 2008 WL 1700312, at *1 (C.D. Cal. Apr. 9, 2008); In re Washington Mut., Inc., Sec., Derivative & ERISA Litig., 536 F. Supp. 2d 1377, 1378 (J.P.M.L. 2008); Pisano v. Bear Stearns Cos., 08-3006 (S.D.N.Y. complaint filed Mar. 28, 2008).

118. Unisystems Inc. Employees Profit Sharing Plan v. State Street Bank & Trust Co., No. 07 CIV 9319, 2007 WL 4189444 (S.D.N.Y. Oct. 17, 2007);); *see also* In re State Street Bank & Trust Co. ERISA Litig., --- F. Supp. 2d ----, No. 07 CIV. 8499 (RJH), 2008 WL 4414662, at *1 (S.D.N.Y. Sept 30, 2008) (reporting that complaint in related action alleged that plans "lost roughly $80 million in the summer of 2007 due to State Street's overly risky investment strategies, including 'undisclosed, highly leveraged positions in mortgage-based financial derivatives'").

119. *Id.* at *1.

120. *Id.* at *4.

121. *Id.* at *5. The cases against State Street are still on-going. In a recent decision in one of the related actions State Street, however, the court dismissed plaintiff's claims for monetary relief in the form of "restitution and disgorgement" the extent those claims were brought pursuant under Section 502(a)(3) of ERISA, finding that the claims were legal, not equitable. *Id.* at *6.

mess will follow remains to be seen. Based on the claims asserted against State Street, however, it appears that this new area of litigation may focus on traditional questions related to fiduciary duties that other pension fund and ERISA litigation have already addressed. That said, these cases will continue to present challenges to fiduciaries and could expose them to significant and costly litigation based on their investment decisions.

V. CONCLUSION

Like other forms of litigation, litigation under ERISA is a natural result of the events and trends in the world outside the courtroom. In the past, social, demographic, and financial pressures transformed the employee benefits area in numerous ways, perhaps most importantly by leading to the shift from defined benefit plans to defined contribution plans. These trends resulted in several kinds of litigation that plan participants and legal practitioners continue to face.

The new challenges that the retirement of Baby Boomers presents to employers and participants have already given rise to new forms of litigation. The precise path of this new litigation is not entirely clear. However, because these new and eventual retirees are likely to closely scrutinize their benefits and the conduct of those who manage their investments, it is very likely that these new forms of litigation put pressure on fiduciaries to closely monitor how they operate, what investments they select, and how they communicate with participants.