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Foreword, 40 J. Marshall L. Rev. xix (2007)

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FOREWORD

The Fifth Annual Employee Benefits Symposium was held on April 25, 2007. The symposium addressed a wide variety of employee benefits issues ranging from the practical implications of the sweeping changes wrought by the Pension Protection Act of 2006 to the more esoteric question of the social costs of misrepresentation in summary plan descriptions. The panelists included leading employee benefits practitioners and academics. The program was well attended with students, professors, practicing attorneys, and at least one actuary in the audience. This exciting mix of academics and practitioners led to a very stimulating discussion of current and important issues in employee benefits law today.

Alison Sulentic started the program with a discussion of *Secrets, Lies & ERISA: The Social Costs of Misrepresentation in Summary Plan Descriptions*. Her article begins by describing ERISA's disclosure requirements and the inherent limitations of summary plan descriptions. She then turns to social ethics and its teachings regarding the role of disclosure. Drawing from this social ethics scholarship, Professor Sulentic recommends that standardized terms in summary plan descriptions be adopted to promote "trust in the workplace by providing transparent and understandable explanations of employee benefit plans."

Albert Feuer then addressed the question of *Who is Entitled to Survivor Benefits from ERISA Plans?* In this lengthy article, Mr. Feuer contends that ERISA clearly mandates that plan beneficiary designations determine who should get and keep ERISA plan benefits, and plan designations should not be superseded by either equitable or common law principles. He asserts that the only agreements to make beneficiary designations that should be given effect are QDROs; other agreements, whether or not part of state court orders, do not give individuals who are not designated beneficiaries under the terms of the plan the right to obtain plan benefits directly from the plan or from the plan designee. In addition, he argues that spousal "waivers," which are part of marital dissolution agreements, should not be given effect. Finally, he argues that designated beneficiaries who "slay" ERISA participants should still be entitled to receive benefits unless the specific terms of the plan or a generally applicable criminal law provides for a forfeiture of benefits under such circumstances.

After Mr. Feuer's talk, Mark DeBofsky turned to the question of *What Process is Due in the Adjudication of ERISA Claims?*

Illustrating the beauty of the marriage between practice and academia, Mr. DeBofsky said that the topic for this very interesting paper arose from a question he was asked as an adjunct professor in the John Marshall Law School's Employee Benefit Graduate Program. His eloquent answer was informed by his extensive employee benefits law practice. In his article, Mr. DeBofsky describes the limited procedural due process rights that litigants have been afforded since the Supreme Court's landmark decision in *Firestone Tire & Rubber Co. v. Bruch*.¹ Although *Firestone* focused solely on the standard of review applicable to ERISA claims, Mr. DeBofsky shows that many courts have used the case to preclude claimants from conducting discovery or presenting any evidentiary challenge to the "administrative record" assembled by claim administrators. Mr. DeBofsky argues that this application of an administrative law paradigm to the adjudication of ERISA claims violates claimants' due process rights. He offers two possible methods of remedying the problem: (1) Congress could expressly guarantee a trial *de novo* in ERISA claims; or (2) the Supreme Court could make it clear that it never intended to limit the scope of evidence or procedures available in reviewing claim determinations under ERISA.

The fourth talk, titled *The Pension Protection Act of 2006: An Overview of Sweeping Changes in the Law Governing Retirement Plans*, was written by Craig Martin and Joshua Rafsky and presented by Matt Renaud and Joshua Rafsky. The authors begin their article by providing an overview of the American retirement system and the declining role of defined benefit plans. They then provide an overview of the Pension Protection Act of 2006, the most comprehensive reform of the nation's pension laws since the enactment of ERISA in 1974. Their overview includes a discussion of the new funding rules applicable to defined benefit plans, the new defined benefit plan disclosure statements, the new method for calculating PBGC under-funded plan variable rate premiums, the new provisions applicable to defined contribution plans, and the Act's legitimization of cash balance and hybrid pension plans. The authors point out that, while the changes effected by the Pension Protection Act should shore up the current crisis in funding defined benefit plans, it is likely to accelerate the current trend away from defined benefit plans and toward defined contribution and hybrid plans.

In the final talk, Barry Kozak and Joshua Waldbeser discussed cash balance plans, now known as "applicable defined benefit plans" or "statutory hybrid plans," in more detail. Their article, *Much Ado About the Meaning of "Benefit Accrual": The Issue of Age Discrimination in Hybrid Cash Balance Plan*

1. 489 U.S. 101 (1989).

Qualification Is Dying but Not Yet Dead, began as a critique of the Seventh Circuit's decision, *Cooper v. IBM Personal Pension Plan*,² which endorsed cash balance plans. The authors expanded the scope of their article when Congress prospectively authorized "applicable defined benefit plans" in the Pension Protection Act. Although the article focuses on the age discrimination issue raised by these plans, the article also discusses the whipshaw issue of non-age discrimination; as of yet unresolved and being litigated for older cash balance plans. The article concludes by summarizing the advantages and disadvantages of the cash balance plan design after the Pension Protection Act.

This symposium issue also contains two papers that were not presented at the program on April 25. The first, *The Past, Present, and Future of Health Care Reform: Can It Happen?* was written by David Pratt. This article tackles the perennial problem of health care in the United States. Although the United States spends more on health care than any other nation, its health care system is in "bad shape." Costs are rising rapidly while coverage is declining. Professor Pratt's article offers a sobering account of past and present efforts to reform the health care system and their limitations. Although many, including Professor Pratt, argue that the current system is in need of substantial reform, Professor Pratt is pessimistic about the likelihood of comprehensive reform being enacted any time soon.

The final symposium paper consists of a *Book Review* of Nancy Altman's recent book, *The Battle for Social Security: From FDR's Vision to Bush's Gamble*. The book review, written by Kathryn Moore, brings attention to Ms. Altman's valuable addition to the debate on Social Security reform. The book begins with an illuminating history of Social Security. It then provides a pointed critique of President Bush's proposal to fundamentally restructure the current Social Security system by introducing personal retirement accounts. Finally, the book ends with a three part reform plan which would address Social Security's long-term deficit without fundamentally restructuring the system.

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2. 457 F.3d 636 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1143 (2007).

