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# A PRIMER ON THE NEED TO CONTINUE MONITORING CLOSELY THE TRANSFER OF SOCIAL WELFARE RISK AND LIABILITY OF EMPLOYEE BENEFIT PLANS

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## I. INTRODUCTION

Recent federal legislative and judicial actions respond to business decisions and administrative practices transferring investment, financial, health care, and other social welfare risk and liability to employees, retirees, and government under terms, conditions, procedures, and requirements of employee benefit plans. The transfer of risk and liability originates from two kinds of discretion and control over employee benefit plans. The first source is the unilateral exercise of organizational discretion and judgment by business managers to allocate labor, financial, and other resources in the business management of employee benefit plans. The second source is the rational exercise of administrative discretion and control by trustees and administrators to manage plan assets and perform administrative practices in the asset management and plan administration of employee welfare and pension benefit plans. Federal legislative acts and judicial decisions respond to an organization's business decisions and plan's administrative practices in deciding whether these decisions and practices transfer too much social risk and individual liability to employees and retirees for employee welfare and retirement security.

Organizational decisions and plan practices create and follow, respectively, global and domestic business outcomes and social consequences of transferring risk and liability to employees and retirees through plant closings and large layoffs, which cause losses of retirement and welfare benefits. These decisions and practices transfer risk and liability for employee welfare and retirement security to the government by increasing the public cost of and participation in programs that provide medical assistance, supplemental retirement income, food assistance, and other social assistance. Consequently, the federal legislative and judicial branches must scrutinize business decisions and administrative practices that transfer (or always leave) social risk and individual liability to employees and retirees. Federal scrutiny takes place in light of the fact that many American business organizations need broad, flexible organizational discretion and judgment to make American markets, industries, and organizations more competitive in an expanding global economy.

The individual and governmental impact of transferring risk and liability results in increased responsibilities for employees and retirees, as well as more government social costs and programs for health care, retirement, and other needs. If employees and retirees cannot provide their own employee welfare and retirement security (welfare and security) needs, then their failure to provide these needs causes employee and retiree hardships and increases government social costs. These hardships and costs will eventually force Congress to adjust the policy objectives and statutory framework (objectives and framework) of the Employee Retirement Income Security Act of 1974[1] (ERISA). Congress can recoup losses of employee welfare and retirement gains, or it can forego these gains of the last forty years in adjusting ERISA in view of less competitive American industries, markets, and organizations hobbled by much social risk and individual liability. Federal legislative and judicial decisions amend and interpret, respectively, ERISA's objectives and framework. An amendment or interpretation decides whether ERISA should protect welfare and security interests or should forebear by transferring more social risk and personal liability to employees and retirees. Ascertaining when ERISA should protect or forego protecting welfare and security interests is not so straightforward. The Federal Judiciary and Congress must recognize the substantive issues and public policy challenges, respectively, threatening to undermine ERISA's objectives and framework. Specifically, federal judges and policy-makers must *continuously* scrutinize business outcomes and social consequences that underlie disputes and public policy concerns showing the transfer of more social risk and personal liability to employees, retirees, and government. Federal scrutiny reviews both when and how business management and plan administration of American business organizations and employee benefit plans use social risk and liability in responding to unfavorable business outcomes that are reasonably attributable to global business competition.

These august federal institutions determine whether business outcomes and social consequences that follow too closely on the heels of global and domestic conditions and events[2] may cause the transfer of enough risk and liability to undermine

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[1] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C. and I.R.C. (2006 & Supp. II 2009)). The Employee Retirement Income Security Act (ERISA) (codified as amended in 29 U.S.C. §§ 1001-1461 and scattered sections of I.R.C. (2006 & Supp. II 2009)), was amended by the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 29 U.S.C. and I.R.C. (2006 & Supp. II 2009)). For a review of pertinent sections of ERISA and the Pension Protection Act (PPA), see *infra* Parts III and IV, respectively.

[2] *See Evolution of an Economic Crisis?: The Subprime Lending Disaster and the Threat to the Broader Economy*: *Hearing Before the J. Econ. Comm.*, 110th Cong. 1-3 (2008) [hereinafter *Subprime Lending Disaster*] (opening statement of Senator Charles E. Schumer, Chairman, Joint Economic Committee, describing the impact of American business transactions, namely the Subprime Crisis, on domestic and international economic conditions).

ERISA's objectives and framework.[3] In a perplexing triple nexus of ERISA policy, ERISA's framework creates welfare and security rights for employees and retirees (individuals), confers trust or administrative discretion to entities (fiduciaries) managing these rights, and preserves common law organizational discretion of voluntarily subservient employers providing benefits. Federal legislative and judicial decision-makers must consider two issues in managing ERISA's triple nexus. First, they must consider whether ERISA obligations and rights of employees and fiduciaries can continuously further ERISA's objectives and framework to protect employees and retirees of the domestic economy. Second, they must consider whether business organizations retain so much organizational discretion that they are unnecessarily transferring too much risk and liability to employees, retirees, and government in trying to compete and revitalize American standing in the global economy. These issues create challenging public policy and legislative choices between two classic antagonists—government regulation and private business. Now, both must win, or the people will lose!

This Article examines why federal legislative policy-makers and judicial decision-makers should ascertain the impact of the transfer of risk and liability on furthering welfare and security interests and preserving organizational discretion under ERISA and public policy. Part I explains why business organizations or employers transfer risk and liability to employees and retirees. This transfer occurs where global business outcomes cause social consequences that are driven directly by business decisions responding to new global competition and less American economic standing.[4] Part II explains the need to assess the substantive issues and

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[3] *Id.*

[4] *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 175-91 (1st ed. 2005). Mr. Friedman states that "[*i*]*t is this triple convergence—of new players, on a new paying field, developing new processes and habits for horizontal collaboration—that I believe is the most important force shaping global economics and politics in the early twenty-first century*." *Id.* at 181-82.

Commentators have forecasted economic standing and competitiveness of American industries, markets, and organizations in 2025 and thereafter. Their assessments and forecasts should be addressed by Western public policy-makers. *See, e.g.*, Mathew J. Burrows & Jennifer Harris, *Revisiting the Future: Geopolitical Effects of the Financial Crisis*, THE WASH. Q., Apr. 2009, at 27 (relying on the National Intelligence Council's 2025 forecast of the economic order of the world); Roger C. Altman, *The Great Crash, 2008: A Geopolitical Setback for the West*, CURRENT, Mar./Apr. 2009, at 11 (stating that the global financial crisis will force the United States to operate from a smaller platform and will give China an opportunity to rise faster); Moin Siddiqi, *Dawn of a New Economic Order*, AFR. BUS., Apr. 2006, at 48 (relying on the Goldman Sachs' forecast in *Dreaming with BRICs: The Path to 2050*, which suggests that Brazil, Russia, India, and China (referred to as the BRICs) may challenge, if not overtake, the major economic powers of today's global economy).

Other commentators see the economic crisis of 2008 as a threat to globalization. *See* Jean Pisani-Ferry & Indhira Santos, *Reshaping the Global Economy*, FIN. & DEV., Mar. 2009, at 8. Pisani-Ferry and Santos state that:

> Even before this crisis, globalization was already being challenged. Despite exceptionally favorable global economic conditions, not everyone bought into the benefits of global free trade and movement of capital and jobs. Although economists, corporations, and some politicians were supportive, critics argued that globalization favored capital rather than labor and the wealthy rather than the poor.

public policy concerns underlying legislative acts and judicial interpretations limiting or permitting the transfer of risk and liability by employers. Part II also explains the need to consider the impact of the global business environment on domestic business outcomes causing or leading to social consequences, such as less health care or retirement funds, transferring risk and liability to employees, and retirees.[5] Part III discusses ERISA administrative and fiduciary obligations of plan sponsors,[6] plan administrators,[7] and trustees;[8] and it explains the ERISA rights and claims of plan participants[9] and beneficiaries.[10] Part IV examines recent federal legislation

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> Now the crisis and the national responses to it have started to reshape the global economy and shift the balance between the political and economic forces at play in the process of globalization. The drivers of the recent globalization wave—open markets, the global supply chain, globally integrated companies, and private ownership—are being undermined, and the spirit of protectionism has reemerged. And once-footloose global companies are returning to their national roots.

*Id.*

[5] *See generally*, *Subprime Lending Disaster*, *supra* note 2 (recognizing global and domestic impacts and implications of the looming financial crisis).

[6] *See* 29 U.S.C. §§ 1052-1054 and 29 U.S.C. §§ 1081-1082 (repealed 2005) (ERISA §§ 202-204, 301-302) (establishing funding and vesting and other participation requirements); *see infra* Part III.A and accompanying notes. In addition, 29 U.S.C. § 1002(16)(B) (ERISA § 3(16)(B)), states that:

> The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

[7] *See* 29 U.S.C. § 1101-1109 (ERISA §§ 401-409) (establishing and listing fiduciary duties, breaches and liabilities); s*ee infra* Part III.C and accompanying notes. Moreover, 29 U.S.C. § 1002(16)(A) (ERISA § 3(16)(A)) states that:

> The term "administrator" means—
>
> (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
>
> (ii) if an administrator is not so designated, the plan sponsor; or
>
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

[8] *See* 29 U.S.C. § 1103(a) (ERISA § 403(A)) ("Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees."); *see also infra* Part III.C and accompanying notes (discussing the duties and liabilities of the trustee as a fiduciary in asset management of plan assets).

[9] *See* 29 U.S.C. § 1002(7) (ERISA § 3(7)) ("The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization . . . .").

adjusting ERISA's framework by changing substantive requirements and administrative standards for asset management and plan administration of employee benefit plans in furthering security and welfare interests, preserving organizational discretion and enlarging administrative discretionary authority. Part V analyzes a decision of the Supreme Court of the United States to illustrate the substantive impact of ERISA's interpretation on the transfer of risk and liability, namely investment risk and financial liability, by a plan administrator executing an investment decision of a plan beneficiary or participant. Part VI explains the substantive and policy impacts and implications of recent legislative and judicial decisions that permit and limit the transfer of risk and liability by plan sponsors and administrators. Finally, Part VII finds that policy-makers and business decision-makers must come to grips with the fact that new global competition may accelerate the occurrence of unfavorable business outcomes, which, in turn, cause more social welfare consequences including fewer pension and welfare benefits. Therefore, fewer employee benefits create a need for both Congress to scrutinize ERISA and public policy concerns, and for the Federal Judiciary to scrutinize substantive ERISA issues in deciding whether the transfer of risk and liability to employees, retirees, and governments greatly undermines, and therefore, justifies the immediate need to adjust ERISA's objectives and framework in light of domestic and global business and social conditions.

Notwithstanding recent ERISA amendments, it is not too early to consider whether Congress should adjust ERISA's objectives and framework to address the transfer of risk and liability caused by unfavorable outcomes and consequences, such as plant closings and employee benefit plan terminations. Many outcomes and consequences demand the vigilance and prudence of federal policy-makers in making new policy and regulation to further welfare and security interests and preserve organizational discretion and judgment. These outcomes and consequences transfer risk and liability; but the threat to ERISA's objectives and framework now occurs in domestic industries, markets, and organizations that need to respond to global business competition, as well as economic and political events. Moreover, global competition may act as a catalyst that would accelerate the competitive effects of a lethargic mixture of global technology, labor, and talent on domestic industries, markets, or organizations. It would also hasten the decline of support by employers for domestic social policies, such as welfare and security interests. This competition may cause more frequent employee layoffs, plant closings, organizational failures, and other business outcomes, which would create business instability. In fact, new or catalytic competition challenges Western geopolitical dominance and disrupts Western industries and markets, such as textiles and automobiles. Simply, some American business organizations may not be competitive and face an uphill battle to overcome less American economic standing caused by a recent global economic crisis. This lack of competitiveness, and perhaps less standing, cause plant closings, layoffs, and other business outcomes and will eventually lead to unfavorable social consequences. Business organizations or employers respond to these outcomes and

[10] *See* 29 U.S.C. § 1002(8) (ERISA § 3(8)) ("The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.").

create consequences by transferring risk and liability to employees, retirees, and government through the termination or modification of employee benefit plans.

## II. Need, Cause, and Means to Adjust ERISA to a Transfer of Risk

ERISA is exposed to the competition of global business and its impact on the needs of social welfare. This competition is an indifferent economic catalyst that mimics how the addition of a catalytic agent to a chemical mixture increases the speed of a slow or lethargic chemical reaction. Competition creates an active mixture of digital technology, bright global talent, and less costly labor in some foreign countries. It causes an accelerating cascade of declining markets, industries, and business organizations that are unfavorable business outcomes with downward effects on levels of health care, pension, and other benefits.[11] Oddly, ERISA must also preserve the organizational discretion of employers or business organizations that need to meet or exceed this new competition and its business outcomes. Such outcomes now include domestic plant closings, worker layoffs, foreign off-shoring of production facilities, and outsourcing of jobs.[12]

### *A. Continuous Need to Adjust ERISA's Objectives and Framework*

Congress enacted the Pension Protection Act of 2006[13] (PPA) to amend and further ERISA's objectives and framework by addressing the impact of business outcomes and social consequences that had been cumulating for approximately three decades.[14] In fact, ERISA still faces more business outcomes that could eventually lead to social consequences that transfer more risk and liability to employees, retirees, and government for retirement, health care, and other needs. In 2007, the world faced an American-induced economic slowdown that weakened American economic standing in the global economy.[15] This weaker standing coupled with global competition could lead to more unfavorable business outcomes.[16] Consequently, the PPA and a recent Supreme Court decision recognize the widespread use of riskier defined-contribution plans,[17] and show that an ERISA

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[11] *See* Altman, *supra* note 4, at 11; *see* Siddiqi, *supra* note 4, at 48.

[12] *See* Friedman, *supra* note 4, at 103-27.

[13] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 29 U.S.C. & I.R.C. (2006 & Supp. II 2009)).

[14] *Id*.

[15] *See Subprime Lending Disaster*, *supra* note 2, at 1-2.

[16] *See id*. (recognizing the economic impact of the subprime crisis on the domestic and global economy); Burrows & Harris, *supra* note 4, at 27; Altman, *supra* note 4, at 11; Siddiqi, *supra* note 4, at 48; *but see* Pisani-Ferry & Santos, *supra* note 4, at 12.

[17] *See* LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008). In *LaRue*, the Court responds to the transfer of risk and liability plan procedures and requirements. For an explanation of the implications and impact of *LaRue* on adjusting ERISA to address the transfer of risk and liability through administrative procedures and requirements, *see infra* Part VI and accompanying notes.

policy is needed to closely scrutinize the impact and social consequences of these outcomes on the states.[18] These business outcomes and social consequences will be accelerated by global business competition and, perhaps, by less American economic standing.[19] These outcomes eventually lead to the provision of fewer employee plan benefits[20] but are driven by new global competition.[21] The social consequences of plant closings and other outcomes transfer risk and liability to employees, retirees, and government when plan sponsors terminate and modify employee welfare and pension benefit plans.

### *B. Changes to Industries, Markets, and Organizations Causing the Transfer of Risk*

In the past, employers provided a vast number of employee welfare needs and supported many government policies for employee welfare, retirement security, and other social interests.[22] At the beginning of the twenty-first century, as employers

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Equally important, the Court interprets ERISA based on the proliferation of defined-contribution plans and their impact on retirement security when these plans are compared to the purposes and numbers of defined-benefit plans in existence at the enactment of ERISA. *See infra* Part V and accompanying notes.

[18] *See infra* Part VI.C and accompanying notes.

[19] *Protecting the Pensions of Working Americans: Lessons from the Enron Debacle, Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions*, 107th Cong. 26 (2002) [hereinafter *Protecting the Pensions*] (recognizing that Congress enacted ERISA to protect pension plans and pension benefits approximately thirty-four years ago and that today many employers are switching to defined-contribution plans that have less stringent ERISA obligations than defined-benefit plans).

The retirement security of today's employees and retirees may be no better than the wants and hopes of at-will employees prior to the enactment of ERISA. Today's employees cannot fully rely on employers to perform obligations of retirement and welfare benefit plans. *See* Daniel Halperin, *Employer-Based Retirement Income—The Ideal, the Possible, and the Reality*, 11 ELDER L.J. 37, 42-43, 61 (2003) (recognizing that employers may prefer defined-contribution pension or retirement plans that permit them to retain discretion over contributions and transfer more risk and liability to employees). Although ERISA provides retirement security and supports employee welfare, an employer's decision to create employee benefit plans is a unilateral, terminable business decision.

[20] *See Protecting the Pensions*, *supra* note 19, at 3.

[21] *See* FRIEDMAN, *supra* note 4, at 225-36 (finding that American companies are facing stiffer competition in the global economy but must compete by not relying on protectionist ideas and regulation); *id.* at 237-49 (discussing how American companies and individuals can respond to the global economy).

[22] *See* David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1601-02 (1996). The late Professor Charny recognized the transition that America was about to undergo when he stated that:

> Throughout the postwar period, large-firm employers have provided a majority of full-time workers with a fairly comprehensive set of welfare or social insurance entitlements. Employee social insurance has come in two varieties. First, firms have provided certain types of insurance directly, or contracted with private third parties to do so, and have bought or directly administered health insurance, pensions,

face stiffer global competition and uncertain American economic standing, they appear less able to support employee welfare and retirement security needs. Many employers are relying on government health care, retirement assistance, and other social programs to provide assistance or aid to workers and employees.[23] However, some employees are relying on ERISA's objectives and framework to retain meaningful employee welfare and pension benefits.[24] Employees should not expect much.

Federal policy-makers preserve organizational discretion[25] by not mandating these benefits under ERISA's framework.[26] Business organizations can respond unilaterally to business outcomes and ignore the social consequences for employees and retirees.[27] In some instances, business organizations can establish nontraditional or contingent work relationships to increase organizational discretion (actually

> unemployment insurance (in the form of severance pay, and job security and income guarantees), disability insurance, and life insurance.

*Id.* at 1601. However, catalytic global competition threatens to move America quickly beyond the initial transition and force federal policy-makers and private managers to reconsider the relationship between social welfare needs and organizational discretion more often. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 29 U.S.C. and I.R.C.). Perhaps the PPA was only one episode in addressing the eventual transfer of more employee welfare and retirement security needs to the employees and retirees.

[23] *See* Charny, *supra* note 22, at 1601-02.

[24] *See, e.g.*, Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 AKRON L. REV. 9, 12 (2006) (examining the fiduciary duty of plan sponsors of individual account plans where employers can choose investment options for the defined-contribution plans but employees can choose one or more of these options and assume the investment risk for their investment decisions); Kimberly Lynn Weiss, Note, *Directors' Liability for Corporate Mismanagement of 401(K) Plans: Achieving the Goals of ERISA in Effectuating Retirement Security*, 38 IND. L. REV. 817, 818 (2005) (recognizing the liability of directors of corporations where the corporation establishes and manages the assets of the 401(k) plan); John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 163-65 (2004) (recognizing the need to protect and grow plan assets in furthering retirement security).

[25] *See* James E. Holloway, *The Practical Entry and Utility of a Legal-Managerial Framework Without the Economic Analysis of Law*, 24 CAMPBELL L. REV. 131, 151 n.21 (2002) ("Hambrick and Finkelstein define managerial discretion as the 'latitude of managerial action.' '*Managerial action* is domains that executives operate in . . . .' Most importantly, these domains include 'resource allocation and administrative choices (*e.g.*, reward systems and structure) and staffing.'") (alterations in original) (citations omitted) (quoting Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, *in* 9 RES. IN ORG. BEHAV. 369 (L. L. Cummings & Barry M. Straw eds., 1987))).

[26] *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985).

[27] *See, e.g.*, FRIEDMAN, *supra* note 4, at 103-13 (using outsourcing that transfers less essential jobs and positions to foreign countries to compete in the global economy); *id*. at 114-27 (using off-shoring that transfers production and service facilities to foreign countries to gain access to low-cost labor and create new markets to compete in the global economy).

flexibility), which thereafter transfers risk and liability to contract workers and employment organizations for welfare and security interests.[28] ERISA faces both faster occurring domestic business outcomes and mounting social consequences, which are both driven by global economic competition and a weaker American economic standing.[29] More competition and less standing are likely to send more challenging business outcomes rippling through American markets, industries, and organizations.[30] These outcomes lead to the transfer of more risk and liability to employees, retirees, and governments when these organizations curtail employee benefit plans.[31]

[28] *See, e.g.*, Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 251-53 (2006) (examining the impact of atypical employment relationships on retirement security and employee welfare and recognizing the ineffectiveness of federal employment law); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 1 BERKELEY J. EMP. & LAB. L. 153, 154 (2003) (finding contingent work as a means to increase competitiveness in the global marketplace); James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27 (1994) (examining the contingent work relationship as an atypical employment relationship under federal employment law and policy).

[29] *See Subprime Lending Disaster*, *supra* note 2, at 1-2 (opening statement of Senator Charles E. Schumer, Chairman, Joint Economic Committee, illustrating the impact of American business transactions, namely the Subprime Crisis, on domestic and international economic policies). Senator Schumer states that:

> We've seen it most clearly in the financial markets. This summer's credit crunch was in large measure attributable to the collapse of the U.S. subprime market. It shook Wall Street and required the emergency intervention of central banks throughout the world to restore liquidity to international credit markets.
>
> The news outside the financial markets, while not so stark, has been little better. We all saw the anemic August jobs report—for the first time in *four* years, the economy actually lost jobs. Consumer spending—the engine behind much of our recent economic growth—has begun to slow down. Most economists have lowered their already weak expectations about GDP growth even further. For the first time in years, the "R word"—recession—is being discussed far and wide as a real possibility.

*Id.* at 2.

[30] *See Subprime Lending Disaster*, *supra* note 2, at 1-3 (recognizing that the financial crisis may have a national and international economic impact); *see* FRIEDMAN, *supra* note 4, at 225-36 (recognizing that American companies are facing stiffer competition in the global economy).

[31] *Protecting the Pensions*, *supra* note 19, at 2. At a Congressional hearing in 2002, Senator Edward Kennedy, Chairman of the Committee on Health, Education, Labor, and Pensions, explained the social risks and individual liabilities facing American workers who depend on private retirement plans by identifying the "lessons [learned] from the Enron debacle so that we can strengthen America's pension system and protect America's workers." *Id*. at 1. Moreover, Senator Kennedy illustrated the impact of poor business management on retirement security and the need for ERISA in the American retirement system when he stated that:

> Sadly, Enron is not just an isolated tale of corporate greed. Instead, the Enron debacle reveals a crisis of corporate values. In America, people who work hard all

### *C. Case Law and Legislation Illustrating the Impact of Adjusting to New Risks*

ERISA's objectives and framework justify the scrutiny of unilateral and fiduciary plan decisions that transfer social risk and personal liability through managerial and administrative conduct of plan sponsors and administrators, respectively.[32] *LaRue v.*

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> their lives deserve retirement security in their golden years. It is wrong—dead wrong—to expect Americans to face poverty in retirement after decades of working and saving. Enron has shown us that workers today do not have true retirement security.
>
> . . . .
>
> Enron is not an isolated example. The retirement security of workers at many other major corporations has been similarly undermined. . . .
>
> A generation ago, Congress took action to safeguard pensions in response to an Enron-like debacle at Studebaker. These protections for defined benefit plans included diversification requirements and Government insurance. As many companies have abandoned the traditional defined benefit pension plans, 401(k) plans have become the bedrock of America's pension system. Today 401(k)'s [sic] offer few if any of these safeguards for workers' retirement security; 401(k) plans are not professionally managed, they are exempt from diversification standards, and they are not backed by insurance.

*Id*. at 1-2. *See also infra* Part III.A (listing the policy objectives of ERISA set forth by Congress).

[32] *See* ERISA, *The Foundation of Employee Health Coverage: Hearing Before the Subcommittee. on Employer-Employee Relations of the H. Comm. on Educ. and the Workforce*, 107th Cong. 2-3 (2001) [hereinafter *Foundation of Health Care*] (opening statement by Representative Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations). Representative Sam Johnson explained the impact of ERISA on health care in investigating "the role of the Employee Retirement Income Security Act, or ERISA, and how employers voluntarily improve and provide health insurance to millions of the nation's workers under ERISA." *Id.* at 2. Representative Johnson illustrated the impact of ERISA on the American health care coverage when he stated that:

> Thanks to ERISA, the largest number of Americans, 129 million Americans, receives health insurance through their employer. I anticipate additional hearings in the coming months to examine such important topics as: 1) increasing the number of insured, especially employees of small businesses; 2) the effects of claims regulations released by the Department of Labor, as well as other regulatory burdens on employer-provided health plans; 3) ensuring medical privacy; and 4) granting greater protection to workers enrolled in managed care plans.
>
> Over the past 26 years the ERISA preemption of state law has played a key role in providing health insurance to millions of Americans. ERISA covers nearly 80 percent of all workers in this nation. ERISA allows employers and employees alike to agree on a vast array of benefits without significant government interference driving up the cost of health insurance.
>
> Of the estimated 43 million Americans without health insurance, 60 percent are small business owners and their families as well as their employees and their families. Affordable and accessible health insurance for small business enterprises is a priority for this Subcommittee.
>
> When you run a small operation it is absolutely critical that employees and their families are healthy. People perform better when they have peace of mind, knowing their loved ones are healthy, safe and protected.

*Id.* at 2-3.

*DeWolff, Boberg & Associates*,[33] illustrates the need to scrutinize plan administrators' decisions, which are protected by plan discretion, in view of ERISA's framework, which purposely minimizes the transfer of financial risk and liability during the performance of regulated plan administration and asset management.[34] *LaRue* interprets ERISA's fiduciary standards and statutory claims where a plan administrator would have transferred investment risk, market uncertainty, and financial liability by using administrative practices governing the execution of a participant's directed investment decision of an individual account.[35] Next, the PPA illustrates adjustments to ERISA's objectives and framework as a result of new welfare and security needs to maintain the employee retirement and welfare gains of past decades.[36] The loss of these gains would transfer risk and liability and continue the decline of defined-benefit plans, provision of fewer welfare benefits, and use of risk-shifting defined-contribution plans.[37] The PPA is employee-benefit legislation, and it responds, in part, to business outcomes that result partially from global competition.[38] This competition creates the need for American business organizations to be more competitive or more responsive to technology, talent, and

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[33] LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008).

[34] *See LaRue*, 128 S. Ct. at 1025; *see infra* Part V.C and accompanying notes (explaining that Section 502(a)(2) protects plan participants of defined-contribution pension plans containing individual accounts).

[35] *See infra* Part V and accompanying notes (analyzing *LaRue* and its legal impact and policy implications for the adaptability and sustainability of ERISA's policy objectives and statutory framework).

[36] *See infra* Part IV and accompanying notes (discussing how PPA increases access to increase retirement security and employee welfare of employee benefit plans).

[37] *See* 29 U.S.C. § 1001(b)-(c). The pertinent provisions state:

> (b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.
>
> (c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

*Id*.

[38] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended in scattered sections of I.R.C. and 29 U.S.C. (2006 & Supp. II 2009)). The Preamble of the PPA is extremely general but states, "An Act [t]o provide economic security for all Americans, and for other purposes." *Id.*

labor that influences global competitiveness.[39] Consequently, the PPA preserves organizational discretion, which can be used by employers or plan sponsors to manage employee benefit plans and exercise economic power to meet and exceed new competition in the global economy.

*LaRue* and the PPA illustrate how Congress and Federal courts adjust ERISA's framework by responding to a single incident and the mounting effects, respectively, of transferring risk and liability to employees, retirees, and state and federal governments. *LaRue* and the PPA collectively allow ERISA's framework to protect benefits promised to employees, urge employers to sponsor plans, govern fiduciaries conducting plan administration, and regulate trustees performing asset management.[40] *LaRue* and the PPA also allow ERISA's framework to preserve the organizational discretion and judgment that is needed to compete in the global economy that is most unlike the world of 1974.[41] Finally, *LaRue* and the PPA illustrate the potential for great discord among the competing interests and conflicting claims of ERISA's framework.[42]

## III. NATURE OF ERISA OBLIGATIONS, BREACHES, AND LIABILITIES

ERISA's framework mandates employee benefit plans and fiduciary obligations and identifies fiduciary and other liabilities for breaches of duty in creating, administering, and managing employee benefit plans and their assets.[43] This framework also creates plan and statutory duties and rights, and it provides substantive claims and remedies for plan participants and beneficiaries.[44] ERISA grants more protection to pension and retirement benefit plans than welfare benefit plans.[45] For plan sponsors, it preserves much organizational discretion in the business management and plan administration of employee welfare benefits.[46] ERISA grants less protection to retirement benefits of defined-contribution plans by not requiring plan sponsors to fund these plans and allowing plan sponsors to make

[39] *See* FRIEDMAN, *supra* note 4, at 71-80 (discussing the use of digital and other technologies to collaborate and the use of new talent in other parts of the world).

[40] *See infra* Part III and accompanying notes (explaining that ERISA imposes obligations on plan sponsors and fiduciaries as well as providing rights and claims for plan participants and beneficiaries).

[41] *See infra* Part VI.C and accompanying notes.

[42] *See infra* Part VI.B & C and accompanying notes.

[43] *See* ERISA, Pub. L. No. 93-406, § 203, 88 Stat. 829, 854 (1974) (codified as amended at 29 U.S.C. § 1053 (2006 & Supp. II 2009)) (establishing minimum vesting requirements for employee pension plans); *see* ERISA § 302, 88 Stat. at 869 (codified as amended at 29 U.S.C. § 1082 (2006 & Supp. II 2009)) (establishing minimum funding standards for employee pension plans).

[44] *See* ERISA § 502, (codified as amended at 29 U.S.C. § 1132(a)).

[45] *See* ERISA § 301, (codified as amended at 29 U.S.C. § 1081(a)(1)).

[46] *See id.*

discretionary contributions.[47] ERISA preserves some organizational discretion in creating or establishing defined-contribution plans,[48] such as 401(k) plans.[49] ERISA permits the transfer of some investment risk and financial liability to plan participants who accept this risk and liability when they make investment decisions for funds in their individual accounts of defined-contribution plans.[50]

### *A. Fiduciary and Administrative Duties but Preserving Organizational Discretion*

ERISA is a comprehensive statute containing administrative, fiduciary, and enforcement provisions.[51] ERISA does not mandate employee welfare and pension benefits.[52] It exercises no control over the substantive contents of employee benefit plans.[53] It mandates guidelines for the creation and administration of employee benefit plans,[54] such as requiring plans to be in writing.[55] Foremost, ERISA imposes fiduciary obligations on plan administrators, trust managers, and plan sponsors.[56] Section 401[57] contains coverage and exceptions to fiduciary obligations, breaches of these obligations, and liabilities for breaching these obligations.[58] Section 402[59] includes obligations of plan fiduciaries and plan sponsors, such as requiring these plans to be in writing and to list plan fiduciaries.[60] Section 402 imposes obligations on plan sponsors and administrators to govern the operation and administration of employee benefit plans.[61] The Section lists the requisite features of employee benefit plans.[62] Next, Section 402 requires a "procedure for establishing and carrying out a

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[47] *See* Pension Protection Act §§ 101-07, 111-16, 201-06, 211-14, 221, 301-03, 901-06 (codified as amended at 29 U.S.C. § 1081 (a)(7)-(8), (a)(10)) (imposing new vesting, funding and other requirements on defined-benefit and defined-contribution plans).

[48] *See id.* (exempting some plans from ERISA's funding requirements). ERISA permits employers to create special or nonqualified plans for executives and exempt these plans from funding requirements. *See* Pension Protection Act § 201(c)(1) (codified as amended at 29 U.S.C. § 1081(a)(3)).

[49] I.R.C. § 401(k) (amending Pension Protection Act § 827).

[50] *See* ERISA § 404(c)(2) (codified as amended at 29 U.S.C. § 1104).

[51] Varity Corp. v. Howe, 516 U.S. 489, 517-16 (1996) (Thomas, J., dissenting) (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993)).

[52] *See* ERISA § 2 (codified as amended at 29 U.S.C. § 1001 (2006 & Supp. II 2009)).

[53] *Metro. Life Ins. Co.*, 471 U.S. at 732.

[54] ERISA § 401 (codified as amended at 29 U.S.C. § 1101).

[55] ERISA § 402(a) (codified as amended at 29 U.S.C. § 1102(a)).

[56] ERISA § 401 (codified as amended at 29 U.S.C. § 1101).

[57] *Id.*

[58] *Id.*

[59] ERISA § 402(a) (codified as amended at 29 U.S.C. § 1102(a)).

[60] *Id.*

[61] *Id.* § 402(b) (codified as amended at 29 U.S.C. § 1102(b)).

[62] *Id.*

funding policy and method consistent with the objectives of the plan . . ."[63] and "procedure under the plan for the allocation of responsibilities for the operation and administration of the plan . . . ."[64] Other features of Section 402 include a "procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ."[65] Section 402 obligates plan sponsors to design and implement employee benefit plans and includes functional features for plan administration and asset management by plan sponsors, administrators, and trustees.[66]

ERISA also regulates asset management and plan administration by imposing fiduciary standards and creating ERISA functions of asset management and plan administration, but permitting plan sponsors to be a plan fiduciary in some capacities.[67] Section 3(21)'s[68] definition of a fiduciary is consistent with ERISA's objectives and framework of not mandating employee benefit plans but regulating plan creation, administration, and asset management. Section 3(21)(A)(i) states that, "a person is a fiduciary with respect to a plan to the extent [that] he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . ."[69] The Supreme Court has concluded that ERISA's definition of fiduciary "str[ikes] a balance that [Congress] believed would protect plan participants without impinging on the ability of employers to make business decisions."[70] "ERISA allows trustee-beneficiary arrangements that the common law of trusts generally forbids . . . ."[71] Consequently, "Congress 'defined "fiduciary" not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan.'"[72] ERISA's definition of fiduciary preserves organizational discretion and furthers retirement security interests by not imposing restrictive mandates on the

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[63] *Id.* § 402(b)(1).

[64] *Id.* § 402(b)(2).

[65] *Id.* § 402(b)(3).

[66] *Id*. § 402(a), (b) (codified as amended at 29 U.S.C. § 1102(a), (b)); *see supra* notes 59-65 and accompanying text.

[67] ERISA § 402(c) (codified as amended at 29 U.S.C. § 1102(c)).

[68] *Id.* § 3(21)(A) (codified as amended at 29 U.S.C. § 1002(21)(A)).

[69] *Id.* § 3(21)(A)(i) (codified as amended at 29 U.S.C. § 1002(21)(A)(i)). A person may also be considered a fiduciary to the extent that:

> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 USCS § 1105(c)(1)(B)].

*Id.* § 3(21)(A)(ii)-(iii) (codified as amended at 29 U.S.C. § 1002(21)(A)(ii), (iii)) (alteration in original).

[70] *Varity*, 516 U.S. at 527.

[71] *Id.*

[72] *Id*. (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993)).

management of business assets, except in the funding of defined-benefit pension plans.

The extent of ERISA's fiduciary duties that are imposed on plan sponsors and fiduciaries in their control and authority over plan administration and asset management was examined in *Varity v. Howe.*[73]

> [A] person "is a fiduciary with respect to a plan" only "to the extent" that "he has any discretionary authority or discretionary responsibility in the administration of such plan."[74] This definition of fiduciary "is designed, in part, so that an employer that administers its own plan is not a fiduciary to the plan for all purposes and at all times . . . ."[75]

Thus, the plan sponsor that is not exercising discretionary authority or control has no fiduciary obligations under Section 404.[76] This limit on the fiduciary obligations of plan sponsors preserves organizational discretion in the management of business assets and other matters.[77]

Section 403(a)[78] mandates that plan assets be held in trust and under the authority of a trustee who has authority to manage plan assets.[79] Section 404[80] lists fiduciary duties of plan administrators and trustees by establishing a "prudent man" standard.[81] Section 404 also includes the exclusive benefit rule by stating that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . ."[82] and manage plan assets solely "(a) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries . . . ."[83] Finally, Section 404 imposes the prudent man standard on plan trustees and asset managers by requiring "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 a like character and with like aims."[84]

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[73] *Varity*, 516 U.S. 489.

[74] *Id*. at 527 (quoting ERISA § 3(21)(A)(iii) (codified as amended at 29 U.S.C. § 1002(21)(A)(iii))).

[75] *Id.* at 527-28.

[76] *Id*. at 528.

[77] *See id.* at 527-28.

[78] ERISA § 403(a) (codified as amended at 29 U.S.C. § 1103(a)) ("Except as provided in subsection (b) [of this section], all assets of an employee benefit plan shall be held in trust by one or more trustees.").

[79] *Id.*

[80] *Id.* § 404(a) (codified as amended at 29 U.S.C. § 1104(a)).

[81] *Id.*

[82] *Id.* § 404(a)(1) (codified as amended at 29 U.S.C. § 1104(a)(1)).

[83] *Id.* § 404(a)(1)(A)(i) (codified as amended at 29 U.S.C. § 1104(a)(1)(A)(i)).

[84] *Id.* § 404(a)(1)(B) (codified as amended at 29 U.S.C. § 1104(a)(1)(B)). Section 404 imposes other prudent person standards by requiring trustees and other fiduciaries to exercise reasonable or prudent care:

*B. Section 502(a) Claims for Breaches of Plan and Administrative Obligations*

ERISA establishes liability for a breach of a fiduciary duty under unique claims and remedies. Section 409[85] lists the liabilities of a fiduciary for a breach of a fiduciary duty.[86] Section 409 states that "[a]ny 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 . . . ."[87] However, Section 409 contains no enforcement actions.[88] ERISA provides statutory claims to challenge and recover for breaches of fiduciary and other duties by plan sponsors, administrators, trustees, and others. ERISA places the enforcement of fiduciary and other duties and recovery for breaches of these duties in Section 502.[89] ERISA establishes unique claims for civil wrongs committed by plan sponsors, administrators, and trustees in the plan administration and asset management of employee benefit plans.[90]

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> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

*Id. § 404(a)(1)(C), (D) (codified as amended at 29 U.S.C. § 1104(a)(1)(C), (D)).*

[85] *Id.* § 409(a) (codified as amended at 29 U.S.C. § 1109(a)).

[86] *Id.*

[87] *Id.* As codified, Section 405, 29 U.S.C. § 1105, lists the liabilities of a co-fiduciary for breaches of fiduciary duties. As codified, Section 405 states:

> (a) Circumstances giving rise to liability. In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he 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, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

*Id.* § 1105(a)(1)-(3).

[88] *See id.* § 409 (codified as amended at 29 U.S.C. § 1109); *but see id.* § 502(a)(2) (codified as amended at 29 U.S.C. § 1132(a)(2)) (providing a civil action for a violation of § 409 (codified as amended at 29 U.S.C. § 1109)).

[89] *Id.* § 502 (codified as amended at 29 U.S.C. § 1132).

[90] *Id.* The pertinent provisions of Section 502 as codified, 29 U.S.C. § 1132, reads as follows:

> (a) Persons empowered to bring a civil action. A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or

ERISA permits plan participants and beneficiaries to file claims to protect their rights and enforce duties under the terms and conditions of employee benefit plans.[91] ERISA grants plan beneficiaries and participants statutory rights and other protection, but these rights and protection were not available prior to ERISA under federal regulation or state common law.[92] ERISA's statutory claims are distinct from common law contract, trust, and other claims.[93] These claims include the failure to report and disclose information,[94] establish terms to modify and terminate employee benefits plans,[95] and conform to fiduciary standards in the administration of employee benefit plans.[96] The federal courts can hear and review ERISA claims by interpreting and applying ERISA and supplementing ERISA with federal common law of trust, contract, employment, and corporations.[97] Section 502(a)(1)(B)[98]

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> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

*Id.* § 1132(a)(1)-(3).

[91] *See id.* § 502 (codified as amended at 29 U.S.C. § 1132).

[92] *Id.* § 2 (codified as amended at 29 U.S.C. § 1001).

[93] *Id.* § 502(a)(1)(B) (codified as amended at 29 U.S.C. § 1132(a)(1)(B)). Federal courts had permitted common law contract claims in construing terms and conditions of employee benefit plans before the enactment of ERISA. *See* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 181 n.20 (1971) (recognizing a contractual claim for unlawful termination of a retirement benefit plan). ERISA, as codified, creates and permits only ERISA claims under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), for unlawful termination and modification of employee benefit plans. *See* DeGeare v. Alpha Portland Indus., 837 F.2d 812 (8th Cir. 1988), *vacated sub nom.* DeGeare v. Slattery Group, Inc., 489 U.S. 1049 (1989).

[94] *Id.* §§ 101-111 (codified as amended at 29 U.S.C. §§ 1021-1031).

[95] *Id.* § 402(b)(3) (codified as amended at 29 U.S.C. § 1102(b)(3)). For a more detailed analysis of the application of Section 402(b)(3) to plan modifications and terminations, see James E. Holloway & Douglas K. Schneider, *ERISA, FASB, and Benefit Plan Amendments: A Section 402(b)(3) Violation as a Loss Contingency for a Plan Amendment*, 46 DRAKE L. REV. 97 (1997); James E. Holloway, *The ERISA Amendment Provision as a Disclosure Function: Including Workable Termination Procedures in the Functional Purpose of Section 402(b)(3)*, 46 DRAKE L. REV. 755 (1998).

[96] *Id.* §§ 401-414 (codified as amended at 29 U.S.C. §§ 1101-1114).

[97] *See id.* § 514(a) (codified as amended at 29 U.S.C. § 1144(a)). As codified, Section 514(a), 29 U.S.C. § 1144(a), is the ERISA preemption provision. The Court has concluded that Section 514(a) requires the federal judiciary to develop a federal common law of trusts, contracts, and other fields to supplement ERISA. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987). The Court has given the ERISA preemption provision a broad interpretation. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). Section 514(a), as

enforces the rights of a plan participant or beneficiary "under the terms of his plan . . . to clarify his rights to future benefits under the terms of the plan."[99] Section 502(a)(1)(B) permits only ERISA plan-based claims to enforce obligations owed by the plan, but it requires the plan participant or beneficiary to comply with the administrative and procedural requirements of the plan.[100] Plan participants and beneficiaries can file claims for an unlawful denial, termination, or modification of plan pension and welfare benefits under Section 502(a)(1)(B)[101] of ERISA.[102]

### *C. Section 502(a) Claims for Breaches of Fiduciary Obligations Under Section 1109*

Sections 502(a)(2) and 502(a)(3)[103] enforce the fiduciary duties of Section 404 and establish liabilities under Section 409 and other ERISA sections that protect employee benefit plans, plan participants, and beneficiaries. Section 502(a)(2) empowers plan participants, beneficiaries, and others to bring claims by stating that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 [Section 409] of this title."[104]

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codified, states that ERISA provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). The Court has concluded that a broad interpretation of Section 514 establishes uniform and consistent federal employee benefit regulation. *See Metro. Life Ins. Co.*, 471 U.S. at 732. Consequently, ERISA preempts state health care, taxation, employment, and other policies, and states can do little to mandate employer-sponsored health care and other benefits. *Id.*

[98] ERISA § 502 (codified as amended at 29 U.S.C. § 1132(a)(1)(B)).

[99] *Id.*

[100] LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1027 (2008) (Roberts, C.J., concurring).

[101] ERISA § 502(a) (codified as amended at 29 U.S.C. § 1132(a)(1)(B)).

[102] *See* DeGreare v. Alpha Portland Indus., Inc., 837 F.2d 812 (8th Cir. 1988), *vacated and remanded*, 489 U.S. 101 (1989).

[103] ERISA § 502(a)(2)-(3) (codified as amended at 29 U.S.C. § 1132(a)(2)-(3)).

[104] *Id*. § 1132(a)(2). The ERISA enforcement scheme permits the Department of Labor to impose civil penalties on fiduciaries. *Id.* § 1132(l). The pertinent provision of Section 502(l), 29 U.S.C. § 1132(l), reads:

> (l) Civil penalties on violations by fiduciaries
>
> (1) In the case of—
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
>
> (B) any knowing participation in such a breach or violation by any other person,
>
> The Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—
>
> (A) pursuant to any settlement agreement with the Secretary, or
>
> (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

In *Massachusetts Mutual Life Insurance Co.* v. *Russell*,[105] the Court concluded that a plan participant in an employee disability plan that paid a fixed level of benefits could not bring a Section 502(a)(2) claim to recover consequential damages caused by a delay in the processing of a disability claim.[106] As discussed below, *LaRue* raised a similar issue: whether Section 502(a)(2) "authorizes a participant in a defined-contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account."[107] Unlike *Russell*, *LaRue* provides a Section 502(a)(2) claim and equitable relief for individual account plans.[108] An individual account plan does not pay a fixed or defined benefit, and the asset management by a plan participant of an individual account is somewhat similar to plan asset management by a trustee of a defined-benefit pension plan.[109] A decade after *Russell* and before *LaRue*, *Varity* concluded that Section 502(a)(2) provided only equitable relief and not compensatory or consequential damages.[110]

Section 502(a)(3) grants plan participants, beneficiaries, and fiduciaries the right to bring claims under ERISA by "enjoin[ing] any act or practice which violates any provision of this subchapter or the terms of the plan or . . . obtain[ing] other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this subchapter or the terms of the plan. . . ."[111] In *Varity*, the Court made findings and conclusions of law on the interpretation and application of ERISA's fiduciary standards.[112] Section 502(a)(3) permits beneficiaries to seek remedial relief.[113] Moreover, Section 409 is not a limitation on Section 502(a)(3), though it operates as a limitation on Section 502(a)(2).[114] Section 502(a)(3) includes

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> (3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—
>
> (A) the fiduciary or other person acted reasonably and in good faith, or
>
> (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.
>
> (4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

*Id.* § 1132(l).

[105] Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985).

[106] *Id.* at 148.

[107] *LaRue*, 128 S. Ct. at 1022.

[108] *Id*.

[109] *Id*. at 1025.

[110] Varity Corp. v. Howe, 516 U.S. 506, 507 (1996).

[111] ERISA § 502(a)(3) (codified as amended at 29 U.S.C. § 1132(a)(3)).

[112] *See Varity*, 516 U.S. at 507.

[113] *See id.* at 515 (relying on ERISA's remedial scheme for providing equitable relief).

[114] *See id.* at 507.

a limitation that restricts or limits the remedy or recovery for personal and plan financial losses to equitable relief.[115] Moreover, an insurance company cannot recover damages for personal liability requested as a form of restitution where such an equitable remedy was merely a recovery of an earlier payment of money.[116] Likewise, a plan participant has no legal remedy against a nonfiduciary that knowingly participated in a breach of a fiduciary duty that caused the employee benefit plan to suffer financial losses.[117] Thus, Section 502(a)(3) claims are limited to equitable relief for liabilities caused by acts and practices in violation of ERISA or plan terms.

The Court has noted that Section 502(a)(1)(B)[118] claims are for a wrongful denial of employee welfare and pension benefits under plan terms, but these claims may be confused with Section 502(a)(2) claims for practices and acts alleging a breach of a fiduciary duty.[119] In *LaRue*, the petitioner, "LaRue, did not rely on § 502(a)(1)(B) as a source of relief, and the courts below had no occasion to address the argument, raised by an *amicus* in this Court, that the availability of relief under § 502(a)(1)(B) precludes LaRue's fiduciary breach claim."[120] The Court did not address the preclusion of the Section 502(a)(2) claim, but sought to briefly clarify the distinction between claims under Section 502(a) and the consequences of confusing Section 502(a) claims.[121] The Court acknowledged, but left unresolved, the issue regarding the most appropriate claim for a violation of fiduciary duty under Section 502(a) that threatens to undermine employee benefit plans and ERISA procedural safeguards developed under Section 502(a)(1)(B).[122] Thus, procedural safeguards imposed by

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[115] *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (holding that an insurance company could not recover a legal remedy when it attempted to recover restitution for benefits it had conferred on a beneficiary); Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) (holding that a plan participant could not recover money damages against a nonfiduciary where this participant had suffered losses as a result of the nonfiduciary's participation in a breach of a fiduciary duty).

[116] *Great-West*, 534 U.S. at 220-21.

[117] *Mertens*, 508 U.S. at 262-63.

[118] ERISA § 502(a)(1)(b) (codified as amended at 29 U.S.C. § 1132(a)(1)(B)).

[119] *See* LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1026-27 (2008) (Roberts, C.J., concurring).

[120] *Id.* at 1027 (citing Brief of the ERISA Industry Committee as Amicus Curiae Supporting Respondents, LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008), at 13-30).

[121] *Id.* at 1028.

[122] *Id*. at 1027. Chief Justice Roberts stated in a concurring opinion that:

> The significance of the distinction between a § 502(a)(1)(B) claim and one under § 502(a)(2) is not merely a matter of picking the right provision to cite in the complaint. Allowing a § 502(a)(1)(B) action to be recast as one under § 502(a)(2) might permit plaintiffs to circumvent safeguards for plan administrators that have developed under § 502(a)(1)(B). Among these safeguards is the requirement, recognized by almost all the Courts of Appeals, see *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 n.4 (6th Cir. 1998) (citing cases), that a participant exhaust the administrative remedies mandated by ERISA § 503, 29 U.S.C. § 1133, before filing suit under § 502(a)(1)(B). Equally significant, this Court has held that ERISA plans

ERISA and precedents, and those permitted by plans should not be exposed to an unnecessary review but could be exposed where confusion exists in choosing between a Section 502(a)(1)(B) claim or Section 502(a)(2) claim.[123]

The Court noted that such exposure and confusion would undermine the plan authority of the plan administrators, who can invoke procedural safeguards and standards of review under Section 502(a)(1)(B) claims challenging the implementation and interpretation of plan terms and conditions of employee benefit plans.[124] Ultimately, the Court must determine whether administrative acts and practices protected by plan terms or plan discretion permit plan sponsors, administrators, or trustees to transfer too much risk and liability to employees and retirees under ERISA's framework. However, the PPA is Congress's response to business outcomes and social consequences of plan sponsors' decisions and plan administrators' and trustees' practices in the administration and asset management of employee benefit plans.[125] These social consequences of transferred health, financial, and other types of risk and liability to employees and retirees for employee welfare and retirement security needs, such as medical care and retirement planning.[126]

## IV. Pension Protection Act and Its Impact and Implications

Employers exercise organizational discretion to decide the amount and kind of liability and risk to transfer, such as offering fewer welfare benefits and transferring asset management to plan participants.[127] On one hand, employers are establishing

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> may grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of plan terms, decisions that courts may review only for an abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

*Id*.

[123] *Id*.

[124] *Id.*

[125] *See The Retirement Security Crisis: The Administration's Proposal for Pension Reform and Its Implications for Workers and Taxpayers: Hearing before the Comm. on Education and the Workforce, U.S. House of Representatives*, 109th Cong., 1st Sess., 1-2 (Mar. 2, 2005) [hereinafter *Retirement Security Crisis*] (Opening Statement of Honorable John A. Boehner, Chairman, Committee on Education and the Workforce, describing the nature of the retirement security crisis). Representative Boehner recognizes the impact of global competition and domestic business conditions on retirement security by stating that:

> We're entering a new kind of economy, with new kinds of products, services, industries, and business models, and to succeed in this knowledge-and-innovation-driven economy, we need to be able to invest, and we can't do that if outdated pension rules make it impossible for employers to adequately budget for their pension costs from year to year.

*Retirement Security Crisis*, *supra* at 2. Representative Boehner also recognizes that retirement security consists of "Social Security, private pensions, and 401K savings plans," *id.* at 4, and that these public and private retirement plans are under scrutiny by Congress for different reasons. *Id.*

[126] *See Protecting the Pensions*, *supra* note 19, at 3; *see Foundation of Health Care*, *supra* note 32, at 3.

[127] *See supra* Part II.C and accompanying notes.

fewer defined-benefit pension plans[128] and no longer provide guarantees of a specific amount of income at retirement.[129] They are establishing a greater number of defined-contribution pension plans,[130] such as profit-sharing plans,[131] for new and old employees.[132] On the other hand, plan sponsors or employers are granting fewer healthcare, dental, and other welfare benefits[133] of employment and retirement.[134] The PPA is a legislative response to this impact of business outcomes and their

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[128] *See* 29 U.S.C. § 1002(35) ("The term 'defined benefit plan' means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant.").

[129] *See Protecting the Pensions, supra* note 19, at 2. At this congressional hearing, Senator Edward Kennedy, Chairman of the Committee on Health, Education, Labor and Pensions in the United States Senate, stated, "As many companies have abandoned the traditional defined benefit pension plans, 401(k) plans have become the bedrock of America's pension system." *Id*.

[130] *See* 29 U.S.C. § 1002(34) ("The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.").

[131] *See* I.R.C. § 401(k).

[132] *See Protecting the Pensions, supra* note 19, at 3. In the hearing on protecting pension benefits, Senator Kennedy also identified the personal risks accompanying the reliance on 401(k) plans. *Id*. at 2. In fact, he stated that "[t]oday 401(k)'s offer few if any of these safeguards for workers' retirement security; 401(k) plans are not professionally managed, they are exempt from diversification standards, and they are not backed by insurance." *Id*.

[133] *See* 29 U.S.C. § 1002(1). Section 1002(1) states:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . .

*Id.*

[134] *See Foundation of Health Care, supra* note 32, at 2 (opening statement of Representative Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce). At this congressional hearing, Representative Johnson stated:

> I look forward to the witness discussion of the role of ERISA in providing health coverage to our 129 million workers. The Subcommittee must be responsive to shortcomings in the health care system, but we must also insist on workable solutions that do not erode coverage or make cost unaffordable.
>
> We need to expand access to more affordable health insurance and reduce the number of uninsured.

*Id*. at 3.

social consequences on ERISA and its employee welfare and retirement security policy.[135] Thus, a review of the purposes, rights, and duties of a few PPA amendments shows how Congress responds to business outcomes and social consequences threatening to undermine ERISA's objectives and framework.[136]

### *A. Providing Retirement Security, Information, and Financial Advice*

The PPA imposes new disclosure, fiduciary, and administrative obligations on plan administrators, plan sponsors, and asset managers of employee welfare and pension benefit plans.[137] To illustrate, Section 501 amends ERISA and provides more financial security and stability under Section 101(f)[138] of ERISA by adding plan funding requirements to minimize underfunding and plan termination of defined-benefit pension plans.[139] Section 501 also provides notice and disclosure requirements that require plan participants and beneficiaries to receive funding notices and other information from multiemployer plans[140] and single-employer plans.[141] Similarly, Section 502(c)[142] amends Section 204(h)(1)[143] of ERISA by requiring multiemployer plans to notify employers of plan amendments that significantly reduce future benefit accruals.[144] Other disclosure requirements include Section 506,[145] which amends Section 4041[146] of ERISA by establishing disclosure requirements for single-employer plans on the termination of pension plans.[147] Likewise, Section 508[148] amends Section 105(a)[149] by requiring plan administrators of individual account plans and defined-benefit plans to provide pension benefit

[135] *See infra* Part IV and accompanying notes (listing and explaining newly created ERISA rights that were granted to plan participants and beneficiaries to maintain employee gains in employee welfare and retirement security and recognizing that plan sponsors are offering defined-contribution pension plans transferring investment risk and financial liability for retirement planning and health care needs to employees).

[136] *See id.*

[137] Pension Protection Act of 2006, Pub. L. No. 109-280, tit. V, §§ 501-02, 506, 508, 120 Stat. 780, 935-52 (codified as amended in scattered sections of 29 U.S.C. and I.R.C. (2006 & Supp. II 2009)).

[138] *Id.* § 101(f) (codified as amended at 29 U.S.C. § 1021(f)(2)(B)(i)(I)).

[139] *See id.* § 501(a) (codified as amended at 29 U.S.C. § 1021(f)).

[140] *Id.*

[141] *Id*.

[142] *Id.* § 502(c) (codified as amended at 29 U.S.C. § 1021(f)).

[143] ERISA § 4041 (codified as amended at 29 U.S.C § 1054(h)(1)).

[144] Pension Protection Act § 502 (codified as amended at 29 U.S.C. § 1021(f)).

[145] *Id.* § 506 (codified as amended at 29 U.S.C. § 1341(c)(2)).

[146] ERISA § 4041 (codified as amended at 29 U.S.C. § 1341).

[147] Pension Protection Act § 506 (codified as amended at 29 U.S.C. § 1341(c)(2)).

[148] *Id.* § 508 (codified as amended at 29 U.S.C. § 1025(a)).

[149] ERISA § 105 (codified as amended at 29 U.S.C. § 1025).

statements to plan participants or beneficiaries on a regular or specific schedule.[150] The PPA recognizes the uncertainty, risk, and liability of retirement planning when plan participants make financial investment and other decisions with inaccurate, incomplete, or untimely information.[151]

The PPA provides more access to investment advice by plan participants, more discretionary authority to plan administrators, and more organizational discretion to plan sponsors. The PPA amends ERISA's exempted transactions provision that directly affects plan administration and asset management of individual account plans,[152] such as 401(k). ERISA's exempted transactions provision prohibits plan sponsors and administrators from providing investment advice and collecting a fee from plan participants and beneficiaries for such advice.[153] Yet, many plan participants who rely primarily on defined-contribution plans need investment advice and education on consumption, retirement, and estate planning. Thus, Section 601[154] of the PPA amends Section 408[155] of ERISA by adding a statutory exemption to the prohibited transactions provision.[156] Section 601 of the PPA permits fiduciaries to provide investment advice to plan participants and beneficiaries of individual account plans, such as the 401(k) plan, under *eligible investment advice arrangements*.[157] The Section 601 exemption for financial advisers allows

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[150] Pension Protection Act § 508 (codified as amended at 29 U.S.C. § 1025(a)).

[151] *Id*. §§ 501-02, 506, 508 (codified as amended in scattered sections of 29 U.S.C. and I.R.C. (2006 & Supp. II 2009)); *see supra* notes 155-177 and accompanying text (explaining ERISA disclosure, fiduciary, and administrative obligations imposed by the Pension Protection Act).

[152] *Id.* §§ 601, 611-612, 621-625 (codified as amended at I.R.C. § 4975 and 29 U.S.C. §§ 1002, 1104, 1108, 1112, 1141).

[153] *See* ERISA § 408 (codified as amended at 29 U.S.C. § 1108(b)(14)).

[154] Pension Protection Act § 601(a) (codified as amended at 29 U.S.C. § 1108(b)(14)).

[155] ERISA § 408 (codified as amended at 29 U.S.C. § 1108).

[156] Pension Protection Act § 601(a) (codified as amended at 29 U.S.C. § 1108(b)(14)).

[157] *Id.* Section 601 amends 29 U.S.C. § 1108(b), Exempted Transactions, by adding a new exemption that provides retirement planning advice to plan participants but raises some financial service, legal, and public policy concerns. *See* Jon O. Shimabukuro, *Investment Advice and the Pension Protection Act of 2006*, CRS REPORT FOR CONGRESS, Mar. 11, 2008, at CRS-1 (stating that the CRS Report "provides background information on investment advice and fiduciary responsibilities imposed by ERISA" and examines provisions of the Pension Protection Act of 2006 that amend ERISA to establish new rules dealing with the provision of investment advice to plan participants by qualified investment advisers.).

On January 21, 2009, the Department of Labor (DOL) issued final regulations on the implementation of Congress's statutory exemption, 29 U.S.C. § 1108(b)(14), and its class exemption under 29 U.S.C. § 1108(b)(1), at 29 C.F.R. § 2550.408g-1 to g-2 (2009). Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 3822 (Wednesday, Jan. 21, 2009) [hereinafter Investment Advice I] (to be codified at 29 C.F.R. pt. 2550). DOL provides an overview of the comments and its responses to these comments on implementing the final regulations of eligible investment advice arrangement. Investment Advice I, *supra* at 3822-46.

fiduciaries to charge and receive a counseling fee from plan beneficiaries for the receipt of investment advice to aid in the financial management of both participants' and sponsors' contributions to individual account plans.[158] This investment advice must be given by *fiduciary advisers* who are governed by fiduciary obligations and liability of ERISA's framework.[159] Moreover, the PPA contains other exemptions for prohibited transactions involving asset management by plan fiduciaries. Section 611[160] amends Section 408 of ERISA and Section 4975[161] of the Internal Revenue

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On March 20, 2009, the DOL delayed implementation of 29 C.F.R. § 2550.408g-1 to g-2 (2009), until May 22, 2009. Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 11847 (Friday, Mar. 20, 2009) [hereinafter Investment Advice II] (to be codified at 29 C.F.R. pt. 2550). The DOL delayed implementation for sixty days in response to considerations of the Obama Administration and concerns regarding statutory interpretations of some commenters to proposed and final regulations. Investment Advice II, *supra* at 11847-48. On May 22, 2009, the DOL delayed implementation of 29 C.F.R. § 2550.408g-1 to g-2, until November 22, 2009. Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 23952 (Friday, May 22, 2009) [hereinafter Investment Advice III] (to be codified at 29 C.F.R. pt. 2550). DOL states that "[t]he Department believes that the complexity and significance of the issues involved justify delaying the effective and applicability dates of the final rule for an additional 180 days in order to afford the Department time for further review." Investment Advice III, *supra* at 23952.

[158] Pension Protection Act § 601(a) (codified as amended at 29 U.S.C. § 1108(b)(14)); 29 C.F.R § 2550.408g-1.

[159] Pension Protection Act § 601(a) (codified as amended at 29 U.S.C. § 1108(b)(14)); 29 C.F.R § 2550.408g-1; s*ee also infra* Part III.A-B and accompanying notes (discussing the duties and liabilities of fiduciaries, such as plan administrators and trustees, under ERISA's framework).

[160] Pension Protection Act § 611 (codified as amended at I.R.C. § 4975(d) and 29 U.S.C. §§ 1002(42), 1108(b), 1121(a)). Section 611 creates exemptions from ERISA prohibited transaction rules for financial and other investment transactions that involve service providers, I.R.C. § 4975(f) and 29 U.S.C. § 1108(b), foreign exchange transactions and cross trading, 29 U.S.C. § 1108(b), block trading, 29 U.S.C. § 1112(a), and bond relief and purchase and sale of a security between a plan and party in interest using an electronic communication network, I.R.C. § 4975(d)(19) and 29 U.S.C. § 1108(b). Moreover, Section 611(f) also amends Section 102(42) of ERISA, 29 U.S.C. § 1002(42), by defining plan assets:

> (42) the term "plan assets" means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term "benefit plan investor" means an employee benefit plan subject to part 4, any plan to which *section 4975 of the Internal Revenue Code of 1986* applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity.

Code (IRC) to create exemptions for prohibited financial investment transactions, such as block trading, bonding relief and electronic communication networks.[162] Finally, Section 612[163] amends Section 408 to create an exemption that permits a fiduciary or party-in-interest to correct some otherwise but unknown prohibited transaction if the fiduciary, party-in-interest, or another party corrects the prohibited transaction within fourteen days after having discovered the prohibited transaction, or after one could have reasonably discovered it.[164]

The PPA also grants administrative discretion to fiduciaries performing plan administration and asset management for particular investment decisions and transactions that are likely to expose these fiduciaries and plan sponsors to investment risk and financial liability. The PPA amends ERISA to permit fiduciaries to invest assets in the individual accounts of plan participants who cannot, for one reason or another, manage these assets of their individual accounts.[165] Section 621[166] amends Section 404[167] of ERISA by limiting the fiduciary liability of plan administrators and other fiduciaries when the ability of participants or beneficiaries to direct investments has been suspended.[168] Next, Section 624[169] also amends Section 404 by permitting fiduciaries to give notice to plan participants and then "exercis[e] control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary."[170] Section 624 limits the fiduciary liability of plan administrators by permitting a default investment transaction for plan participants in individual account plans, such as 401(k).[171] Finally, Section 625[172] amends Section 404 of ERISA to permit the annuity contract to be an optional form for the distribution of assets by

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29 U.S.C. § 1002(42) (citation omitted). This definition of plan assets limits the classification of an entity's assets as plan assets if an employee benefit plan does not hold twenty-five percent or more of the value of this entity's equity assets. *See* 29 U.S.C. § 1002(42).

[161] ERISA § 408 (codified as amended at 29 U.S.C. § 1108 and I.R.C. 4975).

[162] Pension Protection Act § 611 (codified as amended at 29 U.S.C. § 1108 and I.R.C. § 4975).

[163] *Id.* § 612 (codified as amended at 29 U.S.C. § 1108(b) and I.R.C. § 4975(d)).

[164] *Id.* § 612(a) (codified as amended at 29 U.S.C. § 1108(b)).

[165] *Id.* § 621 (codified as amended at 29 U.S.C. § 1104(c)); *id.* § 624 (codified as amended at 29 U.S.C. § 1104(c)).

[166] *Id.* § 621 (codified as amended at 29 U.S.C. § 1104(c)).

[167] ERISA § 404 (codified as amended at 29 U.S.C. § 1104).

[168] Pension Protection Act § 621(a) (codified as amended at 29 U.S.C. § 1104(c)).

[169] *Id.* § 624 (codified as amended at 29 U.S.C. § 1104(c)).

[170] *Id.*

[171] *Id*.

[172] *Id.* § 625 (codified as amended at 29 U.S.C. § 1104).

plan beneficiaries of individual account plans.[173] The use of this annuity contract for such a purpose is not subject to the safest available annuity standard,[174] but it is subject to all other fiduciary standards.[175] The PPA expands fiduciary discretion and control by limiting a fiduciary's exposure to investment risk, market uncertainty, and financial liability. This adjustment limits the ability of plan participants and beneficiaries to challenge low investment returns and financial losses of individual account funds of authorized investment or market transactions.[176]

The PPA recognizes the need for individual investment advice for retirement planning. Eventually, the PPA may reduce some investment risk and financial liability of defined-contribution plans, but it permits the transfer of risk and liability to plan participants in what appears to be a zero-sum game. The PPA preserves organizational discretion of plan creation and extends plan discretion of plan administration and asset management by limiting the risk and liability of plan administrators, sponsors, and trustees for some investment transactions and practices.[177]

### *B. Enhancing Employees' Asset Management, Ownership, and Participation*

The PPA expands the regulation of asset management and plan administration of individual account plans to provide investment opportunities for asset managers and plan participants.[178] The PPA also preserves and limits organizational and administrative discretion of some asset management and administrative practices to improve retirement security.[179] First, Section 901 amends Section 401(a)[180] of the IRC. Section 901 increases investment diversification of employers securities held by plan participants in their individual accounts of defined-contribution pension plans.[181] Section 901 mandates that trustees and plan administrators provide plan participants an opportunity to divest employer securities allocated as contributions and an opportunity to reinvest funds of those securities in at least three other investment options that possess materially different risk and return characteristics

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[173] *Id.*

[174] *See* 29 C.F.R § 2509.95-1 (2008). Interpretive Bulletin 95-1 is entitled "Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan." *Id*. The purpose of Interpretive Bulletin 95-1 is to "provide[] guidance concerning certain fiduciary standards . . . applicable to the selection of an annuity provider for the purpose of benefit distributions from a defined benefit pension plan (hereafter 'pension plan') when the pension plan intends to transfer liability for benefits to an annuity provider." *Id*. § 2509.95-1(a).

[175] Pension Protection Act § 625(a)(2) (codified as amended at 29 U.S.C. § 1104).

[176] *See id.* § 621 (codified as amended at 29 U.S.C. § 1104(c)); *id.* § 624 (codified as amended at 29 U.S.C. § 1104(c)).

[177] *See, e.g.*, *id.* § 621 (codified as amended at 29 U.S.C. § 1104(c)); *id.* § 624 (codified as amended at 29 U.S.C. § 1104(c)); *see supra* Part IV.A and accompanying notes.

[178] *See* Pension Protection Act § 901(a)(1) (codified as amended at I.R.C. § 401(a)(35)).

[179] *See id.*

[180] *Id.* § 901(a)(1) (codified as amended at I.R.C. § 401(a)(35)).

[181] Pension Protection Act § 901(a)(1) (codified as amended at I.R.C. § 401(a)(35)).

from employer's securities.[182] Second, Section 902 amends Section 401(k)[183] of the IRC by permitting plan sponsors to create "qualified automatic contribution arrangement[s]" that enroll eligible employees who have not elected to participate in cash or deferred compensation plans when plan sponsors are making qualified contributions until employees decide to elect to participate.[184] Third, Section 903 amends Section 414[185] of the IRC by establishing benefit, contribution, and notice requirements for the administration of eligible combined defined-benefit plans and qualified cash or deferred arrangements by treating each plan as if it were not a part of a combined plan.[186] Obviously, Section 901 limits the transfer of risk and liability by requiring asset diversification; and Section 902 benevolently transfers risk and liability by permitting the enrollment of a plan participant in a defined-contribution plan when this participant would not otherwise receive contributions from his or her employer.

The PPA increases the retirement security of younger employees who are forced to rely solely on defined-contribution plans for retirement savings. Simply, it imposes faster vesting of employers' contributions to employees' individual plan accounts.[187] Foremost, the PPA amends ERISA and IRC to provide faster vesting for defined-contribution plans. Section 904(b)[188] amends Section 203(a)(2)[189] of ERISA, and Section 904(a)[190] amends Section 411(a)(2) of the IRC. ERISA and the Internal Revenue Code contain identical vesting schedules that include faster vesting for employers' contributions to defined-contribution plans.[191] In focusing only on ERISA's vesting schedules, Section 904(b) amends Section 203(a)(2) of ERISA by requiring plan sponsors of defined-benefit plans to provide plan participants with one of two vesting schedules.[192] First, ERISA's five-year *cliff* vesting schedule requires employees to possess "a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions."[193] Second, ERISA's three- to seven-year *graded* vesting schedule requires employees to possess "a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the . . . table" within this section.[194] The PPA

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182 *Id.*

183 *Id.* § 902 (codified as amended at I.R.C. § 401(k)(13)).

184 Pension Protection Act § 902(a) (codified as amended at I.R.C. § 401(k)(13)).

185 *Id.* § 903 (codified as amended at I.R.C. § 414(x)).

186 *Id.* § 903(a) (codified as amended at I.R.C. § 414(x)).

187 *Id.* § 904(b) (codified as amended at 29 U.S.C. § 1053(a)(2)).

188 *Id.* § 904(b) (codified as amended at 29 U.S.C. § 1053(a)(2)).

189 ERISA § 203(a)(2) (codified as amended at 29 U.S.C. § 1053(a)(2)).

190 Pension Protection Act § 904(a) (codified as amended at I.R.C. § 411(a)(2)).

191 *Id.* § 904(a)-(b) (codified as amended at 29 U.S.C. § 1053(a)(2)).

192 *Id.* § 904(b)(2)(A)(i).

193 *Id.* § 904(b)(2)(A)(ii).

194 *Id.* § 904(b)(2)(A)(iii).

accords 20% for the third year and 20% each year thereafter with 100% vesting by the end of the seventh year [195]

Section 904(b) amends Section 203(a)(2) of ERISA by requiring plan sponsors of defined-contribution plans to provide plan participants with one of two vesting schedules.[196] First, ERISA's three-year *cliff* vesting schedule requires an employee to possess a "nonforfeitable right to one hundred percent of the employee's accrued benefit derived from employer contributions."[197] Second, ERISA's two- to three-year *graded* vesting schedule requires an employee to possess "a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the . . . table" within this section.[198] The PPA accords 20% for the second year and 20% each year thereafter with 100% vesting by end of the sixth year.[199]

In a curious twist, the PPA's Section 904(b) *graded* and *cliff* vesting of an employer's or a plan sponsors' contributions to defined-contribution plans is the most liberal vesting or an early transfer of a nonforfeiture right to plan assets.[200] Section 904(b)'s liberal *cliff* and *graded* vesting schedules also transfer investment risk and financial liability for the management of the assets to plan participants and beneficiaries.[201] Moreover, the PPA's liberal *cliff* and *graded* vesting schedules reduce unallocated employer contributions.[202] These schedules eliminate exercises of organizational discretion that would have been used to reallocate the employer's contribution of nonvested assets.[203] Plan participants who may have quit in year two or three before full vesting are now eligible for full or partial vesting in less time.[204] A restricted vesting schedule meant that more unallocated, but unvested, forfeitable contributions would have been retained by plan sponsors and, thereafter, reallocated to other employees as employer contributions or used by the plan sponsor for business needs.[205] Consequently, one must conclude that new competition of the

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[195] *See id.*

[196] *Id.* § 904(b)(2)(B)(i).

[197] *Id.* § 904(b)(2)(B)(ii).

[198] *Id.* § 904(b)(2)(B)(iii).

[199] *See id.*

[200] *See id.* § 904(b)(2)(B)(ii); *id.* § 904(b)(2)(B)(iii).

[201] *See id.* § 904(b)(2)(B)(ii); *id.* § 904(b)(2)(B)(iii).

[202] *See id.* § 904(b)(2)(B)(ii); *id.* § 904(b)(2)(B)(iii).

[203] ERISA § 102(19) (codified as amended at 29 U.S.C. § 1002 (19)). ERISA establishes a claim that plan participants can pursue to recover vested or nonforfeitable benefits. *Id*. ERISA states that:

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. . . .

*Id*.

[204] *See Pension Protection Act* § 904(b)(2)(B)(ii); *id.* § 904(b)(2)(B)(iii).

[205] *See* ERISA § 102(19) (codified as amended at 29 U.S.C. § 1002 (19)).

global economy demanding more organizational discretion would likely favor restricted vesting schedules to acquire more flexibility and control over employers' contributions by making the vesting period much longer.[206]

### *C. Increasing Access to Early Retirement and Availability of Welfare Benefits*

The PPA gives plan sponsors and plan participants an option for providing for employee welfare benefit needs of early retirement and pension benefit needs before full retirement. This option avoids exposing plan participants or early retirees to unnecessary risk and liability by accepting early retirement.[207] Some employees of private organizations may want to retire at age sixty-two and receive Social Security payments, but they may delay retirement if they cannot afford health care insurance on their retirement income.[208] Section 905[209] may be a solution to early retirement for some early retirees. Section 905 permits plan participants to receive a retirement distribution from their pension plan at age sixty-two but continue to work for a few more years. Section 905 amends Section 3(2)[210] of ERISA. Section 3(2) is the definition of an employee pension benefit plan and pension plan.[211] Section 905 permits a distribution of plan assets by an "employee who has attained age 62 and who is not separated from employment at the time of such distribution."[212] Section 905 permits a distribution of plan funds or assets before the termination of covered

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[206] *See also* Halperin, *supra* note 19, at 58-59 (calling for the immediate vesting of the employer's contributions, though the employer wants to use its retirement plan as an incentive in reducing turnover).

[207] *See* Pension Protection Act § 905 (codified as amended at 29 U.S.C. § 1002(2)).

[208] *See Report of the Working Group on Phased Retirement*, November 14, 2000, approved by the Advisory Council on Employee Welfare and Pension Plans (Advisory Council), http://www.dol.gov/ebsa/publications/phasedr1.htm (last visited on Nov. 10, 2009) [hereinafter *Report on Phased Retirement*] (The Advisory Council was to advise the Secretary of Labor in carrying our his or her duties under ERISA). The Report on Phased Retirement states that:

> [P]hased retirement means a gradual change in a person's work arrangements as a transition toward full retirement. This may involve a change of employers (including self-employment), a change of career or a reduction in the number of hours worked. . . .
>
> A study by Joseph Quinn of Boston College indicates that one-third to one-half of American workers will work on a "bridge job" along the way to total retirement.
>
> . . . .
>
> Obstacles to Phased Retirement
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> . . . .
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> Loss of benefits: Health care coverage is another concern for older workers. By moving from full-time employment to part-time employment, an employee may lose access to company-subsidized health care coverage.

*Report on Phased Retirement*, *supra*.

[209] Pension Protection Act § 905 (codified as amended at 29 U.S.C. § 1002(2)).

[210] *Id.*

[211] ERISA § 3(2) (codified as amended at 29 U.S.C. § 1002(2)).

[212] Pension Protection Act § 905 (codified as amended at 29 U.S.C. § 1002(2)).

employment (salary or income used to determine pension contributions and income).[213] There appears to be no ERISA requirement that would require plan sponsors or employers to deny early retirees, who are still active employees, the right to participate in employee health care and other benefit plans.

The PPA creates access to funds for employee and post-retirement health care benefits by giving plan sponsors more organizational discretion in the use of pension plan assets and permitting an income exclusion for plan participants in insurance contracts of welfare benefit plans.[214] Section 841 amends Section 420 of the IRC by permitting plan sponsors of defined-benefit pension plans to transfer excess plan assets to a qualified post-retirement welfare benefit plan that will incur future health care liabilities.[215] Section 842[216] amends Section 420 of the IRC by permitting multiemployer pension plans to transfers excess pension assets to postretirement health benefit accounts.[217] Next, the PPA permits greater use of cash assets to support health care benefit plans under Section 843.[218] It amends Section 419A of the IRC by permitting plan sponsors of bona fide association health care plans to create or maintain a reserve for medical benefits in qualified asset accounts.[219] In addition, Section 844 creates Section 72(e)(11) of the IRC and grants an exclusion from gross income for particular payments to a qualified long-term care insurance contract for any charge against the cash value of an annuity contract or the cash surrender value of a life insurance contract.[220] Section 844 requires that this contract be a part of or a rider on this annuity or life insurance contract, but the investment in the contract is reduced but not below zero.[221] The individual receiving the exclusion must file a return with the Secretary of the Treasury.[222]

The PPA adjusts ERISA's objectives and framework to limit and permit the transfer of risk and liability by preserving organizational discretion, extending administrative authority and discretion, and providing opportunities for more welfare and security gains. Part V below analyzes *LaRue* to illustrate how the Court responds to the plan administration of defined-contribution plans that contain individual account plans that permit directed investment of funds in these accounts by plan participants under Section 404(c)(2) of ERISA.[223] Specifically, the Court must decide what administrative practices can legitimately transfer investment risk and financial liability when plan participants rely on plan administrators to

[213] *Id.*

[214] *Id.* § 841(a) (codified as amended at I.R.C. § 420(f)).

[215] *Id.*

[216] *Id.* § 842(a) (codified as amended at I.R.C. § 420(a) and (e)(5)).

[217] *Id.*

[218] *Id.* § 843(a) (codified as amended at I.R.C. § 419A).

[219] *Id.*

[220] *Id.* § 844(a) (codified as amended at I.R.C. § 72 (e)(11)).

[221] *Id.*

[222] *Id.* § 844(d)(1)(a) (codified as amended at I.R.C. § 6050U).

[223] *See* ERISA § 404(c)(2) (codified as amended at 29 U.S.C § 1104(c)(2)).

implement directed investment decisions with little or no fiduciary liability under Section 404(c)(1)(A)(ii).[224]

## V. *LARUE* AND ERISA CLAIMS, LIABILITIES, AND RELIEF

ERISA can limit the transfer of social risk and liability by adjusting ERISA's objectives and framework regulating administrative practices and actions that were created and used by plan administrators to execute directed investment decisions for individual account assets. *LaRue* dealt directly with this substantive issue and alluded to a public policy concern in ascertaining the fiduciary obligation of a plan administrator, who allegedly breached a fiduciary duty under Section 502(a)(2) by failing to execute the plan beneficiary's directed investment decision for an individual account of a defined-contribution pension plan.[225] In approaching this issue and concern from a different perspective, *LaRue* skirted ERISA's objectives and framework in briefly discussing the plan participant's rights under plan terms and Section 502(a)(1)(B) for a plan administrator's failure to execute this participant's directed investment decision.[226] Obviously, *LaRue*'s impact on Section 502(a) claims must be resolved to address the failure of the plan administrator to execute a plan participant's or beneficiary's directed investment decisions before there can be a full assessment of the transfer of investment risk, market uncertainty, or financial liability under ERISA's trust or contract laws.

### *A. Section 502(a) Issues in the Administration of Individual Accounts*

The Federal Judiciary's interpretation of ERISA may determine how ERISA's objectives and framework limit or permit the transfer of risk and liability by a plan administrator using administrative practices and procedures to implement a directed investment decision of a plan participant who participates in a defined-contribution plan containing individual retirement plans. To illustrate, the petitioner, LaRue, filed an ERISA claim against his former employer and respondent, DeWolff, Boberg & Associates ("DeWolff") and its 401(k) retirement savings plan.[227] The respondent administered its 401(k) retirement saving plan ("DeWolff Plan"), which was an individual account plan. DeWolff permitted the petitioner and other plan participants to direct or make their investments of contributions under the DeWolff Plan's procedures and requirements.[228] In 2001 and 2002, petitioner alleged that he directed the DeWolff Plan to make certain changes to investments in his 401(k) retirement savings account.[229] However, DeWolff never executed his directions.[230]

The petitioner alleged that the DeWolff Plan did not implement his investment decision, which caused him to suffer account losses of $150,000.[231] He claimed that

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[224] *See id*. § 1104(c)(1)(A)(ii).

[225] LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1022,1025 (2008).

[226] *See id.* at 1024 & n.3.

[227] *Id.* at 1022.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.* at 1022-23.

this failure "'depleted' his interest in the plan . . . [and] amounted to a breach of fiduciary duty under [ERISA]."[232] Specifically, petitioner's complaint sought equitable relief under Section § 502(a)(3).[233] The respondent moved for summary judgment, stating that petitioner's claim was for monetary relief and was, therefore, not permitted under Section 502(a)(3).[234] Although petitioner argued that he was seeking only equitable relief, the district court agreed with the respondent and granted summary judgment because the respondent did not possess any contested or disputed funds belonging to petitioner.[235]

The petitioner appealed to the United States Court of Appeals for the Fourth Circuit and argued that his claims under Sections 502(a)(2) and 502(a)(3) requested only equitable relief.[236] The Fourth Circuit found that petitioner's Section 502(a)(2) claim had not been raised in the district court. However, the court still decided the Section 502(a)(2) claim on the merits and concluded that ERISA's framework and *Massachusetts Mutual Life Insurance Co. v. Russell*'s holding[237] would not permit an individual claimant to recover on an individual account within a defined-contribution plan under Section 502(a)(2) for a breach of a fiduciary duty when the petitioner was seeking only personal relief for monies or assets in his individual account and not the entire plan.[238] In relying on *Russell*, the Fourth Circuit concluded that a Section 502(a)(2) claim could only provide a remedy for the entire plan and not for an individual.[239] Likewise, the Fourth Circuit rejected petitioner's Section 502(a)(3)

[232] *Id.* In *LaRue*, the Court does not reach the merit of a breach of fiduciary duty by respondent or the plan administrator and only "assume[s] that respondents breached fiduciary obligations defined in § 409(a), and that those breaches had an adverse impact on the value of the plan assets in petitioner's individual account. Whether petitioner can prove those allegations and whether respondents may have valid defenses to the claim are matters not before us." *Id*. at 1024. Moreover, the Court is most explicit in noting that the economic value of a 401(k) account has no bearing on the determination of the breach of a fiduciary duty under Section 502(a)(2). The Court states that "[a]lthough the record does not reveal the relative size of petitioner's account, the legal issue under § 502(a)(2) is the same whether his account includes 1% or 99% of the total assets in the plan." *Id.* Finally, the Court leaves several unanswered questions regarding the conduct or action of plan participants or the petitioner under the terms and conditions of the plans. The Court does not "decide whether petitioner made the alleged investment directions in accordance with the requirements specified by the Plan, whether he was required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to § 502(a)(2), or whether he asserted his rights in a timely fashion." *Id*. at 1024 n.3.

[233] *Id*. at 1023 (citing Civil Action No. 2:04-1747-18 (D.S.C.), p. 4, 2 Record, Doc. 1).

[234] *Id.*

[235] *Id.*

[236] LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008).

[237] *Id*. at 1023.

[238] *Id.*

[239] *Id.* The Court notes that "[r]elying on our decision in *Russell*, the Court of Appeals for the Fourth Circuit held that § 502(a)(2) 'provides remedies only for entire plans, not for individuals. . . . Recovery under this subsection must "inure[ ] to the benefit of the plan *as a whole*," not to particular persons with rights under the plan.'" *Id*. at 1022 (citing LaRue v. DeWolff, Boberg & Assocs., Inc., 450 F.3d 570, 572-73 (4th Cir. 2006)).

claim because he was not seeking equitable relief but, rather, a recovery of personal losses from only his account.[240] The Fourth Circuit found that the individual account plan contained no plan assets and that the plan administrator executed the directed investment decision of the plan participant on behalf of the plan, and it concluded that this participant could not recover for losses from his individual account.[241]

The Fourth Circuit would severely limit the fiduciary obligation of and impose little or no liability on plan administrators for administrative procedures and requirements that are likely to enlarge a prior transfer risk and liability to a plan participant who makes directed investment decisions that automatically transfer this risk and liability to plan participants.[242] The Fourth Circuit's conclusion would expand plan administrator's discretion and control over defined-contribution plans containing individual accounts.[243] Moreover, the Fourth Circuit's conclusion would always leave transferring risk and liability with plan participants until the plan administrator chose to execute directed investment decisions under market uncertainty and investment risk.

### *B. Section 502(a)(2) Issue under* Russell *and Defined-Contribution Plans*

The petitioner did not share the Fourth Circuit's conclusions on ERISA's framework regarding who should bear the investment risk, financial liability, and market uncertainty for a plan administrator's failure to timely implement a directed investment decision of a plan participant or beneficiary. Consequently, the petitioner requested and received a writ of certiorari from the Supreme Court.[244] The Court agreed to decide whether Section 502(a)(2) and *Russell* would "authorize[] a participant in a defined-contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account."[245] The Fourth Circuit misread *Russell* and "[w]hile language in our *Russell* opinion is consistent with that [Court of Appeals'] conclusion, the rationale for *Russell*'s holding supports the opposite result in . . . [*LaRue*]."[246] "In *Russell*[, the Court] held that a participant in a disability plan that paid a fixed level of benefits could not bring suit under § 502(a)(2) of [ERISA] . . . to recover consequential damages arising from delay in the processing of her claim."[247] The Court had to consider whether its past precedent, ERISA's present framework, and today's use of defined-contribution plans justify allowing the plan participant to sue a fiduciary that

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[240] *Id*. at 1023.

[241] *Id.* (citing *LaRue*, 450 F.3d at 572-73).

[242] *See supra* Part V.A and accompanying notes (discussing fiduciary duties, breaches and liability, and enforcement of fiduciary liability under ERISA's framework).

[243] *See LaRue*, 450 F.3d at 572-73.

[244] LaRue v. DeWolff, Boberg & Assocs., Inc., 551 U.S. 1130 (2007).

[245] LaRue v. DeWolff, Boberg & Assocs. Inc., 128 S. Ct. 1020, 1022 (2008).

[246] *Id*.

[247] *Id.*

had caused this plan participant to suffer a financial loss from a specific, identifiable individual account.[248]

The petitioner's claim arose under Section 502(a)(2),[249] which "authorizes the Secretary of Labor as well as plan participants, beneficiaries, and fiduciaries, to bring actions on behalf of a plan to recover for violations of the obligations defined in § 409(a)."[250] "The principal statutory duties imposed on fiduciaries by . . . [S]ection [502(a)(2)] 'relate to the proper management, administration, and investment of fund assets' . . . ."[251] Section 502(a)'s purpose was to "ensur[e] that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries."[252] The misconduct of a plan administrator in failing to perform the instructions of the plan participant "falls squarely within" Section 502(a)(2).[253] Effectively, the Court

[248] *Id*. For analysis of the merits of using Section 502(a)(2) to permit individual recovery of legal and equitable remedies, see Regina L. Readling, *Rethinking "The Plan": Why ERISA Section 502(a)(2) Should Allow Recovery to Individual Defined Contribution Pension Plan Accounts*, 56 BUFF. L. REV. 315 (2008). Ms. Readling states that:

> In order to fully explain why ERISA has proven inadequate in providing remedies to defined contribution plan participants harmed by fiduciary breach, an examination of the Supreme Court's interpretation of ERISA's civil enforcement provisions is required. In sum, the net effect of the *Russell*, *Mertens*, and *Great-West* decisions took away a substantial amount of protection and barred a number of potential remedies that should have been afforded to defined contribution plan participants aggrieved by a breach of fiduciary duty. As will be discussed in detail below, application of the Russell precedent was used to bar recovery for breach of fiduciary duty under section 502(a)(2) if the remedy inured to an individual, or an individual account. Further, *Mertens* and *Great-West* drastically limited even the type of equitable relief an aggrieved participant could seek under section 502(a)(3).

Readling, *supra*, at 333-34.

[249] *LaRue*, 128 S. Ct. at 1024.

[250] *Id.*

[251] *Id.*

[252] *Id*. (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985)); *see also* Varity Corp. v. Howe, 516 U.S. 506, 511-12 (1996) (noting that § 409's fiduciary obligations "relat[e] to the plan's financial integrity" and "reflec[t] a special congressional concern about plan asset management").

[253] *Id.* Although the record before the Court did not show any lost profits suffered by the petitioner, the Court concluded that Section 502(a)(2) was still the appropriate claim in the management of trust assets. *Id.* at 1024 n.4. The Court stated that:

> The record does not reveal whether the alleged $150,000 injury represents a decline in the value of assets that DeWolff should have sold or an increase in the value of assets that DeWolff should have purchased. Contrary to respondents' argument, however, § 502(a)(2) encompasses appropriate claims for "lost profits." Under the common law of trusts, which informs our interpretation of ERISA's fiduciary duties, trustees are "chargeable with . . . any profit which would have accrued to the trust estate if there had been no breach of trust," including profits forgone because the trustee "fails to purchase specific property which it is his duty to purchase."

*Id.* (citations omitted).

In one of the concurring opinions, Chief Justice Roberts, joined by Justice Kennedy, did not agree that petitioner, LaRue, had raised a Section 502(a)(2) claim in challenging the created fiduciary parity under ERISA's framework. The administrative practices that support investment decisions made by participants of defined-contribution pension plans will be given the same fiduciary protections as those given to asset management practices that support investment decisions made by trustees or other fiduciaries of defined-benefit plans.[254] This fiduciary parity does not allow plan administrators who exercise ineffective administrative procedures and impose requirements that implement directed investment decisions of individual accounts to transfer all risk and liability to plan participants and beneficiaries.[255]

### *C. Section 502(a)(2) to Recover for Individual Account Impairment*

ERISA does not permit the transfer of risk and liability by denying plan participants the benefits promised by their employee benefit plans, nor does it permit plan administrators to deny benefits that are granted by these plans.[256] In *LaRue*, the Court stated that a fiduciary's misconduct "in *Russell* . . . fell outside this category" in that "[t]he plaintiff in *Russell* received all of the benefits to which she was contractually entitled, but sought consequential damages arising from a delay in the processing of her claim."[257] *Russell* stressed that the fiduciary relationship of Section 409(a) was with the plan, and the plan itself was the victim of the breach and entitled to recovery for such fiduciary breach.[258] Next, the circumstances behind the enactment of ERISA by Congress were the '"misuse and mismanagement of plan

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omission of the fiduciary. *Id.* at 1026 (Roberts, C.J., concurring). Chief Justice Roberts, however, agreed with the Court's conclusion that ERISA permits recovery for the breach of a fiduciary duty for failing to perform an investment transaction in a defined-contribution plan that consists of individual account plans and permitting directed investment by a plan participant. *Id.* Chief Justice Roberts stated that:

> LaRue's right to direct the investment of his contributions was a right granted and governed by the plan. In this action, he seeks the benefits that would otherwise be due him if, as alleged, the plan carried out his investment instruction. LaRue's claim, therefore, is a claim for benefits that turns on the application and interpretation of the plan terms, specifically those governing investment options and how to exercise them.

*Id.* It is at least arguable that a claim of this nature properly lies only under § 502(a)(1)(B) of ERISA. That provision allows a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). It is difficult to imagine a more accurate description of LaRue's claim. And, in fact, claimants have filed suit under § 502(a)(1)(B) alleging similar benefit denials in violation of plan terms. *Id.* (citing Hess v. Reg-Ellen Machine Tool Corp., 423 F.3d 653, 657 (7th Cir. 2005) (discussing an "allegation made under § 502(a)(1)(B) that a plan administrator wrongfully denied instruction to move retirement funds from employer's stock to a diversified investment account"); *LaRue*, 128 S. Ct. at 1026 (Roberts, C.J., concurring) (other citations omitted).

[254] *See LaRue*, 128 S. Ct. at 1024 (recognizing that particular asset management or administrative duties are enforceable under Section 502(a)(2)).

[255] *See id.*

[256] *See* ERISA § 502(a)(2) (codified as amended at 29 U.S.C. § 1132(a)(2)).

[257] *LaRue*, 128 S. Ct. at 1024 (citing *Russell*, 473 U.S. at 136-37).

[258] *Id.* (citing *Russell*, 473 U.S. at 140).

assets by plan administrators'" [259] and that the sum of the purpose of Section 502(a)(2) and Section 409 is to "protect the 'financial integrity of the plan . . . .'"[260] In *LaRue*, ERISA's framework takes ineffective administrative practices that transfer investment risk and financial liability to plan participants and beneficiaries of defined-contribution pension plans that contain individual accounts managed by these participants and beneficiaries and exposes those practices to fiduciary liability.[261]

The history and nature of the defined-contribution pension plan justify a Section 502(a)(2) claim to protect individual accounts from a breach of a fiduciary duty.[262] Foremost, the Court concluded that the dominant use of defined-contribution plans would not support "*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct . . . ."[263] Defined-contribution pension plans are preferred by employers in the retirement plan market.[264] "In contrast, when ERISA was enacted, and when *Russell* was decided, 'the [defined-benefit] plan was the norm of American pension practice.'"[265] Next, the defined *welfare* benefit plan in *Russell*[266] is unlike the defined-contribution *pension* plan in *LaRue*. Russell's disability plan did not contain employees' individual plan accounts, but rather, it paid a disability benefit based on a

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[259] *Id.* (quoting *Russell*, 473 U.S. at 141 n.8).

[260] *Id.* (quoting *Russell*, 473 U.S. at 142 n.9).

[261] *Id*. at 1024.

[262] *See id.* at 1025.

[263] *Id*. In another concurring opinion, Justice Thomas, joined by Justice Scalia, did not agree that the proliferation of defined contribution plans in the private sector justifies moving away from *Russell*'s protection of the entire plan. *Id.* at 1028 (Thomas, J., concurring). Justices Thomas and Scalia, however, still agreed with the Court's conclusion that Section 502(a)(2) applies to individual accounts of defined contribution plans. *Id.* Justice Thomas also stated, "Although I agree with the majority's holding, I write separately because my reading of §§ 409 and 502(a)(2) is not contingent on trends in the pension plan market. Nor does it depend on the ostensible 'concerns' of ERISA's drafters." *Id.*

[264] *See LaRue*, 128 S. Ct. at 1025 (citing David Rajnes, *An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans* (Employee Benefit Research Institute) Sept. 2002, *available at* http://www.ebri.org/pdf/briefspdf/0902ib.pdf (last visited Oct. 27, 2009); *Facts from EBRI: Retirement Trends in the United States Over the Past Quarter-Century* (Employee Benefit Research Institute) June 2007, *available at* http://www.ebri.org/pdf/publications/facts/0607fact.pdf (last visited Oct. 27, 2009)).

[265] *Id.* (citing JOHN H. LANGBEIN, SUSAN J. STABILE, & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 58 (4th ed. 2006); *see also* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 471 (2004) (discussing the "significant reversal of historic patterns under which the traditional defined benefit plan was the dominant paradigm for the provision of retirement income").

[266] *Russell*, 473 U.S. at 136 ("Respondent Doris Russell, a claims examiner for petitioner Massachusetts Mutual Life Insurance Company . . . is a beneficiary under two employee benefit plans administered by petitioner for eligible employees. Both plans are funded from the general assets of petitioner and both are governed by ERISA.").

formula that used the employee or plan participants' compensation."[267] *Russell* focused on those plans that pay a defined benefit or fixed amount and found that misconduct by fiduciaries of these plans does not affect individual accounts that actually do not exist.[268] The characteristics of defined-benefit plans prompted Congress to reduce the risk of default by imposing funding requirements and requiring insurance with the Pension Benefit Guaranty Corporation (PBGC) to protect against unfunded or underfunded plan termination.[269] Consequently, "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409."[270] *Russell*'s concerns with the entire plan, "which accurately reflect the operation of § 409 in the defined-benefit context, are beside the point in the defined-contribution context."[271] Finally, other provisions of ERISA are consistent with the Court's conclusion on asset management of individual accounts when fiduciaries are "exempt[ed] . . . from liability for losses caused by participants' exercise of control over assets in their individual accounts."[272]

In *LaRue*, the Court held "that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."[273] One concurring opinion agreed with Court's holding but based the Court's interpretation of Section 502(a)(2) solely on the text of ERISA and not the dominance of defined-contribution plans.[274] The other concurring opinion of *LaRue* also considered allowing LaRue, a plan participant, to file a Section 502(a)(1)(B) claim because his allegations may be no more than a denial of benefits under the terms and conditions of the defined-contribution plan.[275]

*LaRue* can limit the transfer of risk and liability to plan participants and beneficiaries when plan administrators used or relied on ineffective administrative acts and practices to execute or implement directed investment decisions of individual account plans. This limit places the risk and liability for losses of account funds on plan administrators who create and fail to execute administrative acts and

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[267] *LaRue*, 128 S. Ct. at 1025 (citing Russell v. Mass. Mut. Life Ins. Co., 722 F.2d 482, 486 (9th Cir. 1983)).

[268] *Id.*

[269] *Id.* (citing Zelinsky, *supra* note 265, at 475-78).

[270] *Id.*

[271] *Id.*

[272] *Id.* (citing 29 C.F.R. § 2550.404c-1 (2007)).

[273] *Id.* at 1026.

[274] *Id.* at 1028 (Thomas, J., concurring). Justices Scalia and Thomas did not agree that the increased use of defined-contribution plans should be considered in the interpretation of Section 502(a)(2). *Id.*

[275] *Id.* at 1026 (Roberts, C.J., concurring). Chief Justice Roberts and Justice Kennedy did not agree that LaRue had raised a Section 502(a)(2) claim in challenging the omissions of the fiduciary. *Id.*

practices. Section 502(a)(2) permits a plan participant of a defined-contribution plan that contains individual accounts to file an ERISA claim for breach of a fiduciary duty by the plan administrator for failing to execute a directed investment decision.[276]

## VI. Implications of *LaRue* and the Pension Protection Act

The implications and impact of the PPA and *LaRue* on maintaining employee welfare and retirement security gains must be assessed in view of the need of plan sponsors, plan administrators, and asset managers to transfer social risk and financial liability in business management, plan administration, and asset management of employee benefit plans. This transfer of risk and liability also includes considering the implications and impact of PPA and *LaRue* on the need to maintain organizational discretion and administrative control of plan sponsors and plan administrators, respectively. *LaRue* signals that the use of administrative procedures and practices can transfer risk and liability in a slightly different manner than employment contracts and trust arrangements of the common law; but they do so with similar retirement social welfare consequences, namely the loss of retirement savings.[277] Although the PPA addressed and imposed limits on the transfer of risk and liability to employees and retirees, the PPA still permits fiduciaries to transfer risk and liability by exercising administrative discretion; and it allows employers to transfer risk and liability by exercising organizational discretion. Therefore, Congress must come to grips with the fact that the impact of more foreign competition and less American economic standing and competitiveness could mean more unfavorable business outcomes and social consequences, which includes the transfer of more risk and liability to employees, retirees, and government.

### *A.* LaRue *and Fiduciary Liability, Breaches, and Remedies*

*LaRue* is consistent with ERISA's objectives and framework, even though *LaRue* creates a Section 502(a)(2) breach of fiduciary duty claim for impairment of individual accounts by a plan administrator.[278] *LaRue* does not restrict plan sponsors who want to provide fewer employee welfare and retirement benefits.[279] Plan sponsors can continue to make discretionary contributions to defined-contribution pension and welfare benefit plans.[280] *LaRue* does not greatly interfere with the administrative discretion and control of plan administrators over defined-contribution pension plans permitting directed investment decisions.[281]

*LaRue* recognizes a fundamental change in employers' creation of pension benefit plans, reaffirms the nature of different kinds of employee benefit plans, and

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[276] *See LaRue*, 128 S. Ct. at 1026.

[277] *See Protecting the Pensions*, *supra* note 19, at 2. "A generation ago, Congress took action to safeguard pensions in response to an Enron-like debacle at Studebaker. These protections for defined benefit plans included diversification requirements and Government insurance." *Id.* (statement of Senator Kennedy).

[278] *See LaRue*, 128 S. Ct. at 1025-26; *see supra* Part V. C and accompanying notes.

[279] *See LaRue*, 128 S. Ct. at 1025.

[280] *See id.*

[281] *See id.* at 1025-26.

continues to deny recovery for personal injuries under ERISA's framework.[282] Foremost, a substantial change in granting pension benefits has taken place since Congress enacted ERISA in 1974.[283] "In contrast, when ERISA was enacted, and when *Russell* was decided, 'the [defined-benefit] plan was the norm of American pension practice.'"[284] Moreover, the Court distinguished the defined-benefit welfare (disability benefit) plan in *Russell*[285] from the defined-contribution pension (retirement account) plan in *LaRue*.[286] "[T]he disability plan at issue in *Russell* did not have individual accounts; it paid a fixed benefit based on a percentage of the employee's salary."[287] Finally, the Court was consistent in its refusal to award compensatory damages under ERISA's objectives and framework for the enforcement of rights of plan participants and beneficiaries under plan terms and ERISA fiduciary obligations. *LaRue* is consistent with *Mertens v. Hewitt Associates*[288] and *Great-West Life & Annuity Insurance Co. v. Knudson*[289] on the kind of remedy that plan participants and beneficiaries can recover under ERISA.[290] *LaRue* permits only equitable relief.[291] Although the plan participant can recover losses of profits from individual accounts, the only recovery under Sections 502(a)(2) and 502(a)(3) is equitable relief. *LaRue* permits recovery only for lost profits under trust law and does not permit recovery for personal injuries under a common law remedy.[292]

The impact of *LaRue* on the fiduciary obligations and liability of plan administrators and plan sponsors is quite manageable under administrative procedures and ERISA procedural safeguards.[293] Plan sponsors and administrators need only address the administrative procedures and requirements that are likely to contain or cause disputed administrative acts and practices that would breach a

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[282] *See id.*

[283] *See id.* at 1025.

[284] *LaRue*, 128 S. Ct. at 1025 (citing LANGBEIN, *supra* note 265, at 471 (discussing the "significant reversal of historic patterns under which the traditional defined benefit plan was the dominant paradigm for the provision of retirement income").

[285] *Russell*, 473 U.S. at 136.

[286] *LaRue*, 128 S. Ct. at 1025.

[287] *Id.* (citing *Russell*, 722 F.2d at 486).

[288] Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) (holding that plan participant could not recover money damages against a nonfiduciary where the participant alleged he had suffered losses as a result of the nonfiduciary's participation in a breach of a fiduciary duty).

[289] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (holding that insurance company could not recover under a legal or at-law remedy when it attempted to recover under restitution for benefits it had conferred on a beneficiary).

[290] *See LaRue*, 128 S. Ct. at 1025.

[291] *See id.* at 1026.

[292] *See id.*

[293] *See LaRue*, 128 S. Ct. at 1025; *see supra* Part V.C and accompanying notes.

fiduciary duty and result in liability.[294] Plan participants may not use Section 502(a)(1)(B) to challenge plan procedures or ERISA procedural safeguards because Section 502(a)(1)(B) claims are normally about the denial of benefits and other claims under the plan terms and conditions.[295] These participants will not be permitted under ERISA to challenge the exercise of authority and discretion by plan administrators and trustees.[296]

### *B. Limits of* LaRue *in Pursuing Section 502(a) Claims*

*LaRue*'s impact on the transfer of risk and liability is not fully known or understood under Section 502(a) because the Court relied on factual assumptions and left unresolved issues to address the Section 502(a)(2) claim.[297] Specifically, *LaRue* relies on the assumption of a breach of fiduciary duty, gives little or no weight to the economic value of individual accounts in challenging administrative practices, and places great weight on resolving disputes under Section 502(a)(2) claims that are likely to avoid ERISA procedural safeguards.[298] Foremost, the Court did not reach the merits of the claim of a breach of a fiduciary duty by respondents as plan administrators, but it "assume[d] that respondents breached fiduciary obligations defined in § 409(a), and that those breaches had an adverse impact on the value of the plan assets in petitioner's individual account."[299] On this issue, the Court stated, "Whether petitioner can prove those allegations and whether respondents may have valid defenses to the claim are matters not before us."[300] Next, the Court was most explicit in noting that the economic value of the 401(k) individual account has no bearing on the issue of the determination of the breach of a fiduciary duty under Section 502(a)(2).[301] The Court stated that "[a]lthough the record does not reveal the relative size of petitioner's account, the legal issue under *§ 502(a)(2)* is the same whether his account includes 1% or 99% of the total assets in the plan."[302] What remains is that the Federal Judiciary must scrutinize substantive issues to determine if the transfer of risk and liability to plan participants under ERISA's objectives and framework is reasonable when plan sponsors and administrators who permit directed investment decisions are allowed to transfer the investment risk and financial

[294] *See LaRue*, 128 S. Ct. at 1025.

[295] *See* LaRue, 128 S. Ct. at 1025, 1027 (Roberts, C.J., concurring). *LaRue*'s majority and concurring opinions agree on the need to protect plan procedures and ERISA safeguards not subject to scrutiny under Section 502(a)(1)(B) claims that are based primarily on plan terms. *See generally id.*

[296] *See supra* Part III.B; *see also LaRue*, 128 S. Ct. at 1025, 1027 (Roberts, C.J., concurring).

[297] *LaRue*, 128 S. Ct. at 1024.

[298] *Id*.

[299] *Id.*

[300] *Id.*

[301] *Id*.

[302] *Id*.

liability to plan participants and beneficiaries for these administrators' untimely performance of the investment transactions.[303]

In *LaRue*, the Court also leaves unsettled questions regarding the distinction between Section 502(a)(2) and Section 502(a)(1)(B) claims.[304] It firmly recognizes the need to preserve ERISA procedural safeguards and the standard of review for plan administrators' decisions that are challenged by plan participants and beneficiaries under Section 502(a)(1)(B).[305] Chief Justice Roberts stated, "I do not mean to suggest that these are settled questions. They are not. Nor are we in a position to answer them."[306] Since the petitioner LaRue had raised only a Section 502(a)(2) claim, the Court would not decide whether a Section 502(a)(1)(B) claim was appropriate on the facts.[307] In a concurring opinion, Chief Justice Roberts points out the danger of not addressing this question, when he stated that "[a]llowing a *§ 502(a)(1)(B)* action to be recast as one under *§ 502(a)(2)* might permit plaintiffs to circumvent safeguards for plan administrators that have developed under *§ 502(a)(1)(B)*."[308] Thus, a substantial fiduciary need exists to preserve and protect ERISA and plan procedural safeguards that are relied on or used by plan administrators to deny benefits, reimburse benefit claims, and other actions of plan administration and asset management.

The federal courts must not review numerous Section 502(a)(2) claims for a breach of fiduciary duties when these claims do not follow ERISA safeguards and plan procedures as required by Section 502(a)(1)(B).[309] Section 502(a)(2) should not be a bypass around Section 502(a)(1)(B) via a trip to federal courts. Equally important, these denials of federal review protect the deferential standard of review applied by federal courts to scrutinize plan administrator and trustee's decisions that interpret plan terms.[310] These denials prevent Section 502(a)(2) claims from placing artificial substantive restrictions on the administrative authority or discretion of plan administrators responding to requests for benefits and other actions.[311] This discretion is granted to plan administrators so that they may "determin[e] benefit eligibility and the meaning of plan terms, decisions that courts may review only for an abuse of discretion."[312]

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[303] *See id*. at 1024-25.

[304] *Id.* at 1027 (Roberts, C.J., concurring).

[305] *Id*.

[306] *Id.*

[307] *Id*. ("LaRue did not rely on *§ 502(a)(1)(B)* as a source of relief, and the courts below had no occasion to address the argument, raised by an *amicus* in this Court, that the availability of relief under *§ 502(a)(1)(B)* precludes LaRue's fiduciary breach claim." (citing Brief for ERISA Indus. Comm. as Amicus Curiae Supporting Respondents, 2007 WL 2679382, *13-30 (2007))).

[308] *Id.*

[309] *See id.*

[310] *Id*. (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).

[311] *See id.* at 1027 (Roberts, C.J., concurring).

[312] *Id*. (citing *Firestone*, 489 U.S. at 115).

In the aftermath of *LaRue*, some confusion and uncertainty remain in the Federal Judiciary's review of Section 502(a)(2) claims that respond to a breach of fiduciary duty for the administration of individual accounts of defined-contribution pension plans.[313] The nature and cause of fiduciary liability are not entirely clear because the merits of the fiduciary breach of duty were never addressed by the Court. Next, an issue regarding the selection of a Section 502(a)(2) or 502(a)(1)(B) claim to resolve benefit claim disputes was not fully resolved by the Court in *LaRue*.[314] Protecting ERISA procedural safeguards and requirements play a paramount role in selecting a Section 502(a)(2) or Section 502(a)(1)(B) claim for a breach of a fiduciary duty in the administration of individual accounts.[315] A Section 502(a) claim is less likely to disturb the authority granted to plan administrators under ERISA procedural safeguards, and the deferential standard of review granted to plan administrators under employee benefit plan fits best with ERISA's objectives and framework.[316]

*LaRue* permits a broad exercise of organizational discretion and administrative authority by protecting the use of ERISA procedural safeguards and plan procedures.[317] This broad exercise permits the transfer of risk and liability by permitting plan administrators to interpret plan terms, deny benefit claims or make other plan decisions where ERISA and plan procedures and requirements must be followed to file a claim under ERISA's enforcement provisions.

### *C. Implications of* LaRue *and PPA for ERISA's Enforcement*

*LaRue*'s interpretation of Sections 502(a)(2) and 502(a)(1)(B) fits well with the context of ERISA's objectives and framework.[318] Yet, the PPA takes plan participants and beneficiaries who acquire investment advice from fiduciary advisers to manage individual account assets and exposes them to new investment risk, more market uncertainty and greater financial liability; and the PPA will raise new disputes under Section 502(a) regarding the integrity of some financial advice.[319] The PPA protects defined-benefit pension plans, increases the stability of defined-

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[313] *Id*. at 1024 & n.3.

[314] *Id*. at 1027 (Roberts, C.J., concurring).

[315] *Id*.

[316] *See id.*

[317] *See id*. at 1024.

[318] *See LaRue*, 128 S. Ct. at 1025-26; *supra* Part VI.A and accompanying notes. The Court states that "[m]ost significant is § 404(c), which exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts. *See also* 29 C.F.R.§ 2550.404c-1 (2007). This provision would serve no real purpose if, as respondents argue, fiduciaries never had any liability for losses in an individual account." *See LaRue*, 128 S. Ct. at 1025-26.

[319] Pension Protection Act of 2006, Pub. L. No. 109-280, § 601(a)(1), 120 Stat. 780, 952-53 (2006) (codified as amended at 29 U.S.C. § 1108(b)(14) (2006 & Supp. II 2009)). Section 406(b) prohibits financial and other transactions between the plan fiduciary and plan participants under ERISA's framework. ERISA, Pub. L. No. 93-406, § 406(b), 88 Stat. 829, 879 (1974) (codified as amended at 29 U.S.C. § 1106(b) (2006 & Supp. II 2009)).

contribution pension plans,[320] and increases the opportunity for funding of some health care benefits.[321] At most, *LaRue* protects individual accounts of defined-contribution pension plans from a breach of fiduciary duty by a plan administrator who used an inadequate administrative practice to execute a directed investment decision.[322]

The PPA may increase the exposure of individual account assets to investment risk, financial liability, and market uncertainty. This exposure may lead to more Section 502(a) claims. Section 601[323] of the PPA amends Section 408—Exempted Transactions[324] —of ERISA to permit fiduciary advisers to offer investment advice to plan participants and beneficiaries of defined-contribution pension plans that contain individual accounts.[325] Section 408 creates an eligible investment arrangement that permits a fiduciary adviser to provide investment advice to plan participants and beneficiaries, but ERISA's framework for fiduciary duties and liability governs the decisions and practices of fiduciary advisers.[326] Eventually, plan participants and beneficiaries will use financial advice and education, but they will suffer substantial losses of assets or funds from their individual accounts due to unforeseen or unexpected market risk and uncertainty. Some plan participants and

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[320] *See supra* Part IV.B (discussing PPA provisions that provide access to financial advising for plan participants in individual account plans, faster vesting, and permit distribution for retirement while the participant is still working).

[321] *See supra* Part IV.C (discussing PPA provisions that permit employers or plan sponsors to transfer excess pension funds to health care plans and exclude from gross income to pay for long-term care insurance).

[322] *See LaRue*, 128 S. Ct. at 1025-26.

[323] *See infra* note 330 and accompanying text.

[324] ERISA § 408(a) (codified as amended at 29 U.S.C. § 1108(a)).

[325] *See infra* note 330 and accompanying text.

[326] Pension Protection Act § 601(a)(1) (codified as amended at 29 U.S.C. § 1108(b)(14)); *see also supra* notes 153-60 and accompanying text (discussing the eligible investment arrangement of the PPA and its implementation by the Department of Labor). Congress and the Department of Labor (DOL) do not want American workers managing their retirement accounts with little or no financial investment advice and education for consumption, retirement, and estate planning. *See* Investment Advice I, *supra* note 157, at 3822. Moreover, the DOL must never allow fiduciary advisers who give investment and planning advice to transfer risk and liability by financial, professional, and administrative procedures and requirements. The hundreds of billions of dollars in defined-contribution plans and individual retirement accounts (IRA) must lead the DOL to consider the impact of eligible investment advice arrangements on financial markets and institutions. DOL should talk to the Department of Treasury, Department of Commerce, and Board of Governors of the Federal Reserve to understand the impact of these arrangements on the American and Global financial systems. These agencies need to examine how institutional practices, ERISA fiduciary standards, and professional certifications could eventually impact the redistribution or reallocation of market uncertainty, financial liability, and investment risk under an eligible investment advice arrangement. Curiously, the DOL has found it extremely difficult to implement eligible investment arrangements that would provide investment advice and education to plan participants and beneficiaries under ERISA's newly created statutory exemption from prohibited transactions. *See supra* notes 153-60 and accompanying text.

beneficiaries may make allegations of inadequate or improper financial advice. We cannot predict the future, but it should not be surprising if, after *LaRue*, a few plan participants and beneficiaries file Section 502(a) claims and pursue litigation when they do not receive satisfactory answers or responses for losses from individual accounts.[327] *LaRue* indicates that newly created fiduciary advisers should avoid using loosely structured financial counseling practices that are not responsive to the investment needs of plan participants and beneficiaries making directed investment decisions for individual accounts.[328] ERISA claims may arise when these practices do not provide timely information or permit timely use of advice and provide an investment option unfamiliar to plan participants.[329]

Section 502(a) claims play a role in deciding whether federal courts will permit or limit the transfer of risk and liability to employees and retirees in interpreting statutory provisions or sections of ERISA's framework in response to business outcomes and social consequences, such as permanent layoffs and pension plan

[327] *See also LaRue*, 128 S. Ct. at 1025-26. The Court recognizes that a fiduciary cannot be exempted from all liability for directed investment decisions by plan participants. *See id.*

[328] *See id.* 1024-25 ("Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409. . . .").

[329] *See supra* notes 153-60 and accompanying text. Individual accounts of defined-contribution welfare benefit plans may be implicated by *LaRue*, but complete analysis is beyond the scope of this article. *LaRue* points out that *Russell*'s defined-benefit plan actually includes payment for a welfare benefit plan, which was a disability benefit. Conceivably, *LaRue* could extend to health care, educational, and other individual benefit accounts of defined-contribution welfare benefit plans. *LaRue*'s Section 502(a)(2), codified as amended at 29 U.S.C. § 1132(a)(2) (2006 & Supp. II 2009), would be a claim preferred by plan participants who would allege a breach of a fiduciary duty for an inept administrative practice that denies timely services and accurate responses to benefit claims. They would allege that ineffective administrative practices do not permit timely actions and decisions by plan administrators. Yet, Section 502(a)(1)(B), codified as amended at 29 U.S.C. § 1132(a)(1)(b) (2006 & Supp. II 2009), may present a hurdle where the Court insists on protecting ERISA. plan procedures, and plan requirements so that plan administrators can exercise discretion in interpreting plan terms and responding to requests for benefits. However, *LaRue* is a Section 502(a)(2) claim, codified as amended at 29 U.S.C. § 1132(a)(2), brought by a plan participant on behalf of his own individual account and may not extend beyond its original facts and circumstances. One must ask whether *LaRue*'s Section 502(a)(2) claim would apply to other defined-contribution benefits that use individual accounts administered by plan administrators solely on behalf of plan participants of defined-contribution plans. *LaRue* finds the type and nature of the employee benefit plan relevant in determining whether Section 502(a)(2) applies to a breach of a fiduciary duty for individual accounts. *LaRue* requires only that the benefit plan cannot pay a fixed amount and must consist of individual accounts. Again, the presence of confusion and uncertainty in distinguishing between Section 502(a)(1)(B) and 502(a)(2) claims may present a hurdle when plan participants are trying to avoid following plan and ERISA procedural safeguards to challenge an administrator's decision. This confusion leaves the nature of a Section 502(a)(2) claim for the impairment of individual accounts providing only welfare benefits difficult to resolve under Section 502(a)(2). In *LaRue,* the Court assumed the breach of a fiduciary duty and focused on protecting ERISA procedural safeguards. *LaRue,* 128 S. Ct. at 1025. Section 502(a)(2) claims seem most uncertain when the dispute is decided on the merits and includes compliance with ERISA procedures and requirements.

modifications.[330] The widespread use of individual accounts and their protection from incomplete and untimely administrative practices creates the need to consider the nature and utility of Section 502(a) claims.[331] In particular, these claims protect the application or request for pension and welfare benefits by plan participants and beneficiaries under the plan's terms and ERISA procedural safeguards.[332] These claims also guarantee the execution of investment decisions and integrity of investment advice by plan administrators under fiduciary obligations.[333] The Court and Congress must eventually decide when a Section 502(a) claim should restrict the discretion and control of plan administrators and when it should limit organizational discretion and flexibility of plan sponsors, who allocate and reallocate risk and liability of employee benefit plans.

The enforcement issues of Section 502(a) are important in determining whether plan sponsors and administrators are transferring too much risk and liability under ERISA's objectives and framework. Several regulatory concerns and business risks and opportunities make the transfer of risk and liability most inviting to plan sponsors and administrators, who must manage business risk and liability in response to domestic business and social needs of a global economy. These concerns include the receipt of only equitable relief,[334] judicial focus on protecting ERISA and plan procedures,[335] fiduciary standards and deference to protecting administrative discretion,[336] contract terms preserving organizational discretion,[337] and a slow legislative response to an erosion of retirement security.[338] These concerns coexist with business opportunities that demand the management and reallocation of social risk and personal liability to employees and retirees under ERISA's objectives and framework.[339] Once business organizations transfer too much risk and liability to the

[330] *See LaRue*, 128 S. Ct. at 1024-25. The Court recognizes that Section 502(a) protects the financial integrity of the plan and claims for benefits under the plan. *See id.*

[331] *See id.* at 1026-27 (Roberts, C.J., concurring).

[332] *Id.* (Roberts, C.J., concurring).

[333] *Id.* at 1024-25.

[334] *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248 (1993).

[335] *See LaRue*, 128 S. Ct. at 1026-27 (Roberts, C.J., concurring). "Equally significant, this Court has held that ERISA plans may grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of plan terms, decisions that courts may review only for an abuse of discretion. Firestone Tire & Rubber Co. v. Burch, 489 U.S. 101, 155 (1989)." *Id*. at 1027.

[336] *See id.* (Roberts, C.J., concurring).

[337] *See id.* at 1026-27 (Roberts, C.J., concurring).

[338] *See, e.g.*, *Protecting the Pension*, *supra* note 19, at 1; *Foundation of Health Care*, *supra* note 32, at 1. Congress conducted legislative hearings to investigate public policy concerns regarding retirement security and employee welfare two to three years before the enactment of the Pension Protection Act.

[339] *Retirement Security Crisis*, *supra* note 125, at 2 (recognizing that American businesses are entering the knowledge and innovation economy).

public, this transfer becomes no more than a redistribution or externalization of social liability and costs to government social programs.

## VII. CONCLUSION

ERISA eventually may need to adjust to the transfer of social welfare risk and liability to further its policy objectives and statutory framework. *LaRue* and the PPA signal that ERISA's framework and objectives can be adjusted to maintain employee welfare and retirement security gains that are comparable with those of the last quarter of the twentieth century.[340] However, it remains to be seen whether ERISA can continue to adjust to the transfer of risk and liability occurring more frequently in a more competitive and dominating global economy. If American employers do not broadly meet global competition or improve economic standing, they will face new business outcomes, creating undesirable social consequence.[341] Thereafter, they will transfer more risk and liability to employees, retirees, and government.

Business decision-makers and public policy-makers must come to grips with the fact that catalytic competition can transform foreign labor, technology, and talent into a more competitive mixture in the presence of global capital. In addition, less American economic standing may create another hurdle for business markets, industries, and organizations.[342] This competition and standing may cause more unfavorable business outcomes and social consequences that are capable of eroding the protection gained by employees and retirees under ERISA's objectives and framework. This erosion of employee welfare and retirement security gains may take place even faster when stiffer competition and poor standing increase the frequency and kinds of unfavorable business outcomes.[343] Corporate policy-makers and business decision-makers must respond to global competition and may need to overcome a lower economic standing to avoid or minimize unfavorable business outcomes and social consequences, thus minimizing the transfer of risk and liability.[344]

If American markets, industries, and organizations cannot meet this competition and improve their standing in the global economy, Congress and the Federal Judiciary will be faced with the task of reexamining ERISA's objectives and framework. Congress can choose to do nothing, or it can provide more employee welfare and retirement security in response to a transfer of too much risk and liability. In accomplishing the latter, Congress would need to adjust ERISA's framework to increase access to employee welfare and retirement benefits. Congress has several legislative options. It can provide tax incentives and financial subsidies to encourage employers to provide more employment, postemployment, and postretirement benefits. Congress can also assist in rebuilding or retooling American

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[340] *See supra* Part VI and accompanying notes (discussing the impact and implications of *LaRue* and the PPA on transferring social risk and liability).

[341] *See id.*

[342] *See* Altman, *supra* note 4, at 11 (stating that the global financial crisis will force the United States to operate from a smaller platform); Siddiqi, *supra* note 4, at 48 (forecasting stiffer business competition for the U.S. and other western nations in the global economy).

[343] *Retirement Security Crisis*, *supra* note 125, at 2.

[344] *Id.*

industries, finding new markets, and improving business management to increase competitiveness and economic standing. While Congress is considering what to do, the Federal Judiciary will eventually be asked to decide when retirees, employees, and the government must accept the denial, termination, or modification of health care, retirement, and other benefit plans under ERISA's framework. Eventually, federal policy-makers must decide who will bear the burden of unfavorable business outcomes and social consequences, such as plant closings and plan terminations, which cause the reallocation of social welfare risk and liability in view of more foreign (catalytic) competition and less American economic standing of the global economy.[345]

[345] *See Retirement Security Crisis, supra* note 125, at 2.