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2003

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Recommended Citation

George Lee Flint, Jr. and Philip W. Moore, Jr., ERISA: A Co-Fiduciary Has No Right to Contribution and Indemnity, 48 S.D. L. Rev. 7 (2003).

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ERISA: A CO-FIDUCIARY HAS NO RIGHT TO CONTRIBUTION AND INDEMNITY

GEORGE LEE FLINT, JR.* AND PHILIP W. MOORE, JR.**

The plan administrators of a profit-sharing plan, governed by the Employee Retirement Income Security Act of 1974 (ERISA),[1] decided to invest a portion of the plan assets in a residential real estate project.[2] The plan administrators sought and used the advice of a registered investment advisor in making the investment. For a $100,000 investment the plan received two promissory notes of a limited partnership, the entity owning the residential real estate. As part of the transaction the executed escrow instructions with the escrow holder and the trustee of the profit-sharing plan directed the escrow agent to deliver a recorded deed of trust of the limited partnership to the trustee securing the promissory notes. Neither the escrow agent nor the trustee recorded the deed of trust. Consequently, when the limited partnership filed for reorganization under the bankruptcy laws a few years later, the plan's investment became worthless since the deeds of trust lacked recordation. After an investigation, the Department of Labor determined that the fiduciaries of the plan had violated their duties under ERISA to the plan and demanded that the fiduciaries restore to the plan the money lost, the original investment plus imputed earnings thereon, as a result of the breaches of fiduciary duties. The plan administrators settled with the Department of Labor, and deposited the total money lost into the plan. The plan administrators then brought suit against the other fiduciaries,[3] namely the investment advisor, the escrow agent, and the trustee for contribution and indemnity. The other fiduciaries moved for dismissal of the lawsuit. They had no contractual obligation to provide contribution or indemnity.

A payor can recover reimbursement under a theory of contribution or a theory of indemnity, not both.[4] But since litigants often do not know in advance whether their evidence for one or the other will convince a fact finder, they sue

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1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C. (1999)).

2. *See generally* Call v. Sumitomo Bank of Calif., 881 F.2d 626 (9th Cir. 1989).

3. ERISA contains a broad definition of fiduciary. *See infra* notes 110-122 and accompanying text. Thus, even service providers run the risk of fiduciary status. *See, e.g.*, Chapman v. Klemick, 750 F. Supp. 520, 524 (S.D. Fla. 1990). Here, the court found the beneficiary's attorney to be a plan fiduciary where attorney advised client not to pay insurance recoveries under subrogation agreement with plan since beneficiary was judgment proof and could declare bankruptcy, thus deterring the plan from suing under the subrogation agreement. *Id.* Because of the broad definition, ERISA has no need to permit suits against non-fiduciaries participating in the breach with fiduciaries. *See infra* note 111 and accompanying text.

4. *See infra* notes 19-20 and accompanying text.

for both. For this reason this article refers to the two in the conjunctive, rather than the disjunctive, except where it is obvious which one is meant. Contribution and indemnity may be a contractual obligation or imposed by a court without agreement.[5] This article deals with contribution and indemnity as remedies implied by a court without an agreement. So this article uses the terms "contribution" and "indemnity" to refer to the court imposed remedies rather than a contractual remedy, except in the few instances where it is obvious a contractual remedy is meant by using contractual-related terminology.

Most Americans would not give this lawsuit a second thought. They would allow this lawsuit for contribution and indemnity and so deny the motion for dismissal. Their concept of fairness requires that those that did the dastardly deed should bear the loss.[6] The American system of justice reflects numerous instances where individuals pay the liability of feasors, usually due to some sort of relationship with the feasor, to insure recovery by the victim and then seek reimbursement from the feasor.[7] This means the impact of the insolvency of the feasor falls on the payor, not the victim.[8]

Federal law, however, is not so quick to allow contribution and indemnity when the statute does not contain a provision expressly authorizing such implication.[9] Many believe ERISA does not contain such a provision.[10] Congress may have had some other policy ground for ERISA that overrides our sense that feasors should pay for their deeds. So the issue for the court in the above scenario is whether Congress in passing ERISA intended to provide for the remedy of contribution and indemnity or whether Congress had in mind some overriding policy.

One of the most significant unresolved questions is the extent to which ERISA incorporates traditional trust law remedies.[11] The major issue over which parties have litigated this subject involves the right of a breaching ERISA fiduciary to obtain contribution and indemnity from other defendant or potential defendant fiduciaries, as provided by that traditional trust law.[12] Federal courts in the various circuits have split over this issue.[13] So have the commentators.[14]

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5. *See infra* notes 31-36 and accompanying text.

6. *See, e.g.*, Elizabeth A. Di Cola, *Fairness and Efficiency: Allowing Contribution Under ERISA*, 80 CAL. L. REV. 1543, 1562-63 (1992) (explaining the fairness principle as the reason for adopting contribution and indemnity under certain tort-related fields); *see also infra* note 94 and accompanying text.

7. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 341-42 (W. Page Keeton ed., 1984) (noting feasor liability to one vicariously liable for indemnity), § 69, at 499-501 (noting vicarious liability imposed on innocent defendant).

8. The definition of insolvency considers judgment proof individuals as insolvent. *See, e.g.*, 11 U.S.C. § 101(32)(A) (1993) (excluding exempt property from the determination that debts exceed assets for insolvency).

9. *See infra* notes 52-70 and accompanying text.

10. *See infra* note 233 and accompanying text. This article does not agree. ERISA uses other terminology than the words "contribution" and "indemnity," namely "an agreement . . . to relieve a fiduciary from . . . liability." *See infra* notes 146-47 and accompanying text.

11. Robert Eccles, *Fiduciary Litigation under ERISA*, 492 PRACTICING LAW INSTITUTE/TAX 365, 428 (2001).

12. *Id.* at 431.

13. *See infra* notes 234-94 and accompanying text.

14. *See infra* notes 295-343 and accompanying text.

The Supreme Court has yet to consider the issue.

This article resolves the matter. The first section describes the historical development of contribution and indemnity, from a contractual obligation to a court implied obligation followed by an expansion to various federally regulated fields. The second section investigates the ERISA fiduciary sections, their differences with traditional trust law, their legislative history, and the purposes of ERISA. The third section examines the position of the various federal courts on the issue of contribution or indemnity and their rationales, along with that of the commentators. Since ERISA generally does not permit actions against non-fiduciaries,[15] this article excludes those opinions dealing with contribution and indemnity between a fiduciary and a non-fiduciary, most of which appeared prior to the Supreme Court's pronouncement with respect to non-fiduciaries. The fourth section provides the solution pursuant to the Supreme Court's directive for finding contribution and indemnity for a federal statute, finds that the statutory language does not support contribution and indemnity, and shows that the solution of disallowing contribution and indemnity comports with the legislative history and the purposes of ERISA.

I. CONTRIBUTION AND INDEMNITY

Contribution and indemnification as remedies of traditional trust law, and hence equitable remedies, developed in the nineteenth century.[16] Traditional trust law uses joint and several liability to provide a greater chance that the trust will recover the loss without concern about an insolvent breaching trustee.[17] Under federal statutes, the presence of joint and several liability does not necessarily mean that contribution and indemnity serve as remedies.[18] After the trust's recovery from the paying trustee, that traditional trust law uses contribution to apportion the paying trustee's loss amongst all trustees having some degree of culpability with the paying trustee bearing its proportionate share of the loss.[19] Traditional trust law uses indemnification to reimburse the paying trustee for all of its loss where the other trustees' culpability is substantially greater than the paying trustee.[20] The risk of an insolvent trustee merely means the paying trustee does not recover from that trustee.[21]

Roman law recognized contribution and indemnity for surety law. Roman surety law involved a contractual relationship.[22] Since Roman law provided that

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15. *See supra* note 11 and accompanying text.

16. *See infra* notes 34-36 and accompanying text.

17. *See* 3A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 258, at 399 (4th ed. 1988); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 701, at 195 (West Publishing Co., rev. 2d ed. 1995).

18. *See* Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 646 (1981) (noting the anti-trust laws).

19. SCOTT & FRATCHER, *supra* note 17, § 258, at 399-401; BOGERT & BOGERT, *supra* note 17, § 701, at 195-96.

20. SCOTT & FRATCHER, *supra* note 17, § 258, at 401-03; BOGERT & BOGERT, *supra* note 17, § 701, at 197.

21. SCOTT & FRATCHER, *supra* note 17, § 258.1, at 401.

22. *See* 10 SAMUEL P. SCOTT, THE CIVIL LAW (Central Trust Co., reprinted 1973), 145 (Justinian's Digest Bk. 45, Tit. 2, Law 19), 155 (Justinian's Digest Bk. 46, Tit. 1, Law 1), 170

a lawsuit by a creditor extinguished the debt, substituting the judgment, risk of insolvency lay with the creditor and his choice of proceeding against the debtor or one of the sureties.[23] If the creditor sued the surety, that surety had to satisfy the debt without having any recourse against the co-sureties or the original debtor.[24] To mitigate this result Hadrian allowed sureties to plead the benefit of division and thereby limit their liability to their "pro rata share, determined by the number of solvent sureties at the time of the peremptory plea."[25] The risk of an insolvent surety after the plea still lay with the creditor but the creditor could go against each one individually for their share.[26]

A. THE ENGLISH DEVELOPMENT OF CONTRIBUTION AND INDEMNITY

In adopting the Roman concept of contribution and indemnity, Anglo-American jurisprudence developed two strands since England had more than one set of courts. One strand appeared in the Chancery and so provides an equitable remedy. The other appeared in the Kings Bench and Common Pleas Courts, the common law courts, and so provides a legal remedy. These two strands have differing rules concerning how they apply these two remedies. The most notable difference is the absence of a right to a jury trial in equity[27] and the refusal to enforce penalties in equity.[28] A court could view shifting the loss to a defalcating fiduciary under ERISA through contribution as a penalty for improper behavior and so deny this equitable remedy.

Traditional trust law, and hence ERISA, is an equitable field and uses equitable principles rather than legal principles. However, for ERISA most of the American courts and commentators ignore the distinction between equitable and legal contribution and indemnity, and hence differing rules, probably because they focused on whether such remedies are available under ERISA, rather than applying the remedy to a particular ERISA fiduciary.[29]

English courts enforced contribution and indemnity agreements, both by

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(Justinian's Digest Bk. 46, Tit. 1, Law 60); *see generally* Philip K. Jones, Jr., *Roman Law Bases of Suretyship in Some Modern Civil Codes*, 52 TULANE L. REV. 129, 130 (1977).

23. *See* Jones, *supra* note 22, at 133.

24. *See Id.*

25. *See* SCOTT, *supra* note 22, at 162 (Justinian's Digest Bk. 46, Tit. 1, Law 26), 168 (Justinian's Digest Bk. 46, Tit. 1, Law 51); Jones, *supra* note 22, at 133-34.

26. *See* SCOTT, *supra* note 22, at 134 (Bk. 46, Tit. 1, Law 51(4)); Jones, *supra* note 22, at 134.

27. *See, e.g.*, 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA (Bancroft-Whitney Co., 5th ed. 1941), § 358a (stating that at law uses jury, equity uses judge). *Compare* Brock v. Group Legal Adm'rs, Inc., 702 F. Supp. 475, 476 (S.D.N.Y. 1989) (holding no jury trial for contribution and indemnity for ERISA trust), *with* Nat'l Farmers Union Prop. & Cas. Co. v. Nelson, 147 N.W.2d 839, 844-45 (Iowa 1967) (noting that for third-party claim for contribution and indemnity for auto collision it is the duty of the jury to find facts and of the court to determine right of contribution or indemnity as a matter of law).

28. *See, e.g.*, Pomeroy, *supra* note 27, § 72 (explaining doctrine that equity abhors enforcement of penalties). *See also* Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 639 (1981) (giving the penalty aspect as the reason for the refusal to extend contribution and indemnity to violations under the federal anti-trust laws).

29. *See, e.g.*, Paul James Hunt, Note, *Bucking the Trend: An Argument in Favor of a Fiduciary's Implied Right to Contribution Under ERISA*, 76 VA. L. REV. 1377, 1396 (1990) (describing contribution as equitable, but citing tort cases) *id.* at 1397 n.127 (again describing contribution as equitable, but citing a tort article that refers to jury trial and punishing feasors, both not tolerated in a court of equity).

contract and implied contracts, by the seventeenth century, both for surety law in the Chancery equitably[30] and for tort law in the common law courts at law.[31] Extending contribution and indemnity to situations without the agreement did not occur early. English surety law in the Chancery recognized contribution without the agreement by 1787.[32] But the effort to extend contribution to torts without the agreement in the common law courts failed in 1799.[33] In the early nineteenth century, the Chancery based on its surety law precedence, extended contribution to traditional trust law.[34] By mid-nineteenth century, the Chancery also recognized indemnity without an agreement for the inactive trustee.[35] Courts in the United States followed these three developments of denying both remedies for torts and allowing both for trusts.[36] So contribution and indemnity without an agreement developed first as an equitable remedy.

Since equity had exclusive jurisdiction over traditional trust law,[37] after the recognition of contribution and indemnification for a jointly and severally liable fiduciary, the Chancery began to develop rules for the remedy.[38] Equity distinguished between unintentional and intentional wrongs. So liability for an innocent breach of trust created the right to contribution, while liability for an intentional or fraudulent breach of trust, an equitable wrong in the nature of a tort to which the tort rule of no contribution analogously applied, did not.[39] For

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30. *See, e.g.,* Hale v. Harrison, 22 Eng. Rep. 783 (1675); Swain v. Wall, 21 Eng. Rep. 534 (1642); Morgan v. Seymour, 21 Eng. Rep. 525 (1638); Peter v. Rich, 21 Eng. Rep. 499 (1630); Fleetwood v. Charnock, 21 Eng. Rep. 117 (Ch. 1629).

31. *See* Battersey's Case, Winch. 48, 124 Eng. Rep. 41, *s.c. sub. nom.* Fletcher v. Harcot, Hutton 55, 123 Eng. Rep. 1097 (C.P. 1622) (implied); Martyn v. Blythman, Yelv. 197, 80 Eng. Rep. 130 (K.B. 1611) (actual); *see generally* Note, *Contribution – Right of Recovery Inter Sese Between Wrongdoers*, 21 VA. L. REV. 551 (1935); W. Page Keeton, *supra* note 7, at 341.

32. *See* Dering v. Earl of Winchelsea, 29 Eng. Rep. 1184, 1185 (1787) (contribution even without knowledge of the co-surety's contract); *see also* Craythorne v. Swinburne, 33 Eng. Rep. 482 (Ch. 1807) (right to contribution either on a principle of equity or contract).

33. *See* Merrywether v. Nixon, 101 Eng. Rep. 1337 (K.B. 1799); *see also* Philips v. Biggs, 145 Eng. Rep. 433 (Exch. 1659) (court doubted one could obtain contribution for a tort judgment); W. Page Keeton, *supra* note 7, at 336.

34. *See* Lingard v. Bromley, 35 Eng. Rep. 45 (Ch. 1812) (bill for contribution); *see also* Perry v. Knott, 49 Eng. Rep. 307 (Ch. 1841); *see generally* Note, *Right of Contribution Among Co-Trustees*, 22 VA. L. REV. 804 (1936) (noting that surety law provided the source of the rule). *See Lingard,* 35 Eng. Rep. at 46 (citing only surety cases for the proposition); Robinson v. Harkin, [1896] 2 Ch. 415 (applied to sureties, then to co-trustees).

35. *See* Lincoln v. Wright, 49 Eng. Rep. 404 (Ch. 1841); *see also* Thompson v. Finch, 44 Eng. Rep. 506, *s.c.* 52 Eng. Rep. 1130 (Ch. 1856) (allowing indemnity when the indemnitor also served as the trust's solicitor); Lockhart v. Reilly, 44 Eng. Rep. 803 (Ch. 1857) (allowing indemnity when the indemnitor also served as the trust's solicitor); *see also* Bakin v. Hughes, [1895] 31 Ch. 390, 395 (identifying the first two indemnity cases as *Thompson* and *Lockhart*).

36. *See* W. Page Keeton, *supra* note 7, at 557 n.35. For contribution under trust law, *see* BOGERT & BOGERT, *supra* note 17, § 862, at 43-48; SCOTT & FRATCHER, *supra* note 17, § 258, at 399-401. For indemnity under trust law, *see* BOGERT & BOGERT, *supra* note 17, § 701, at 196; SCOTT & FRATCHER, *supra* note 17, §§ 258.1 & 258.2, at 401-405.

37. The common law recognizes "no action for breach of trust." *See* Note, *supra* note 34, at 806.

38. This article does not intend to provide a complete discussion of the equity rules for contribution and indemnity for trusts. It merely attempts to indicate that these rules, developed by the Chancery, have a separate origin from the rules for contribution and indemnity of the at law courts and are generally different from those at law court rules. Thus, the rules developed for torts under the at law courts do not necessarily apply for trust law.

39. *See* Attorney General v. Wilson, 41 Eng. Rep. 389 (Ch. 1842); *see also* American Bonding Co. of Baltimore v. Richardson, 214 F. 897 (6th Cir. 1914); *In re* Mallon's Estate, 89 N.Y.S. 554 (1905); Lathan v. Blakemore, 51 Tenn. 276 (4 Heisk.) (1871). For other nuances between equitable contribution

indemnity the Chancery required liability for an innocent breach seeking indemnity from a dishonest co-trustee that received a profit,[40] or from a co-trustee serving as the trust's solicitor.[41]

American pronouncements of the traditional trust law for contribution and indemnity do not always follow these nuances.[42] One well-respected commentator asserts that the merely negligent trustee can recover indemnity from an active co-trustee, without requiring dishonesty or solicitor status.[43] This situation generally results in contribution.[44] Another well-respected commentator neglects the element of profit by the dishonest co-trustee before the other co-trustee can recover indemnity and as a result can not explain when courts will grant indemnity.[45] The source of the confusion lies in trying to use in trust law the rules for contribution and indemnity developed subsequently by the at law courts for torts.

B. THE AMERICAN EXPANSION OF CONTRIBUTION AND INDEMNITY

In the twentieth century contribution and indemnity without agreement spread to various non-equitable fields in the United States, both by courts implying the action and by statute. These legal fields generally encompass torts, both under state law and various federal statutes. For state tort law eventually

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and legal contribution, *see* Robert A. Leflar, *Contribution and Indemnity Between Joint Tortfeasors*, 81 U. PA. L. REV. 130, 135 (1932) (noting origin in equity and adopted by at law courts; modern trend to meld, with at law courts adopting the in equity rules) & nn. 21 (citing texts for other nuances) *id.* at 22 (stating at law divided by number of all feasors, in equity divided by number of solvent feasors; at law did not survive death of feasor, in equity did).

40. *See* Wynne v. Tempest, [1897] 1 Ch. 110; *In re* Parlington, 57 L.T.R. 654 (Ch. 1888); *see also* Waters v. Waters, 148 A. 326, 327 (Conn. 1930) (tort law differs considerably on this point, requiring only that the indemnitor be active and the indemnitee, passive). *See, e.g.*, Kuhn v. Gen. Parking Corp., 424 N.E.2d 941, 947 (Ill. App. 1981); *accord* United States Lines, Inc. v. Newport News Shipbuilding & Dry Dock Co., 688 F.2d 236, 240-41 (4th Cir. 1982) (applying tort rule to maritime law); *see also* Joiner v. Diamond M. Drilling Co., 688 F.2d 256, 261-62 (5th Cir. 1982) (Lousiana law: describing the test as fault, no fault); Houdaille Indus., Inc. v. Edwards, 374 S.2d 490, 492-94 (Fla. 1979) (same).

41. *See In re* Lindsey, [1904] 2 Ch. 785; *In re* Turner [1897] 1 Ch. 536; *In re* Parlington, 57 L.T.R. 654 (Ch. 1888); Price v. Price, 42 T.L.R. 626 (Ch. 1880). For nuances between at law implied indemnity and in equity implied indemnity, *see infra* notes 27-28 & 39-41 and accompanying text. The modern trend is similar for contribution with courts adopting the at law rules. But the important distinction relates to equity's reluctance to enforce penalties. *See* Note, *supra* note 34, at 807 (reimbursement alone is a penalty, so equitable indemnity requires unjust enrichment, a profit).

42. RESTATEMENT (SECOND) OF TRUSTS, § 258 & 258(a) (1959). "[W]here two trustees are liable to the beneficiary for a breach of trust, each of them is entitled to contribution from the other, except that if one of them is substantially more at fault than the other, he is not entitled to contribution from the other but the other is entitled to indemnity from him . . ."). *Id.* Prominent law school faculty designed the restatements for the major fields of law to condense the rules of law into a powerful logic that would convince appellate judges of the correctness of the position of the restatements. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 269 (1989). Although some appellate judges cite them, they do not represent legal authority. *See Id.* at 269. In fact, they are sometimes counter to the majority rule of the courts. *Compare* RESTATEMENT OF THE LAW OF CONTRACTS § 230 (1930) (stating the position of classical contract theory on interpretation – use the objective meaning of a reasonable person) *with* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 201 (1981) (stating the position of neoclassical contract theory on interpretation – use subjective intent of the parties).

43. *See* BOGERT & BOGERT, *supra* note 17, § 862, at 45-47; *see also* Note, *supra* note 34, at 807.

44. *See* Robinson v. Hankin, [1896] 2 Ch. 415; Bahin v. Hughes, 31 Ch. D. 390, 396 (1886); *see also* Marsh v. Harrington, 18 Verm. 148 (1846).

45. *See* SCOTT & FRATCHER, *supra* note 17, § 258.1, at 401-403 (unable to explain when indemnity arises); *see also* Note, *supra* note 34, at 807.

nine jurisdictions recognized contribution and indemnity by case law,[46] followed by other states with statutory authorization, including some under the uniform statutes such as the Uniform Contribution Among Tortfeasors Act of 1939,[47] the Revised Uniform Contribution Among Tortfeasors Act of 1955,[48] and the Uniform Comparative Fault Act of 1977.[49] This state law also governs claims under federal statutes that do not preempt state law. So courts have recognized contribution and indemnity for the Lanham Act[50] and the Federal Employer's Liability Act.[51]

1. Expansion to Various Legal Fields

Under preemptive federal law the courts and Congress also have achieved recognition of contribution and indemnity. Federal courts have implied these remedies for negligent actions under admiralty law[52] and aviation law.[53] But as in earlier England, the courts have refused to extend contribution and indemnity to other non-negligence, tort-related fields, such as employment discrimination,[54] civil rights violations,[55] false claims,[56] commodities fraud,[57] and anti-trust

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46. *See* Keeton, *supra* note 7, at 337 (listing California, D.C., Iowa, Louisiana, Maine, Minnesota, Pennsylvania, Tennessee, and Wisconsin); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 220-21 (Harvard University Press, 1987) (listing eight states by court decision, 39 by statute, and 6 with no contribution); Note, *supra* note 31, at 558 (listing eleven states).

47. 12 U.L.A. 185-93 (1996) (adopted in Arizona, Colorado, Florida, Massachusetts, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee).

48. 12 U.L.A. 194-290 (1996).

49. 12 U.L.A. 123-53 (1996) (adopted in Iowa and Washington).

50. *See* Transdermal Prods., Inc. v. Performance Contract Packaging, Inc., 943 F. Supp. 551, 554 (E.D. Pa. 1996) (Pennsylvania law for contribution under the Lanham Act, 15 U.S.C. § 1051 (1997)); *contra* Santano Products, Inc. v. Bobrick Washroom Equip., Inc., 69 F.2d Supp. 678 (M.D. Pa. 1999) (N.Y. law does not allow contribution or indemnity under the Lanham Act); *see also* Getty Petroleum Corp. v. Island Transp. Corp., 862 F.2d 10, 16 (2d Cir. 1988) ("no federal common law of contribution" under the Lanham Act), *cert. denied,* 490 U.S. 1006 (1989).

51. *See* Ellison v. Shell Oil Co., 882 F.2d 349, 352 (9th Cir. 1989) (indemnity, California law under the Federal Employer's Liability Act, 45 U.S.C. § 51 (1986)); Armstrong v. Kansas City S. Ry. Co., 752 F.2d 1110, 1114 (5th Cir. 1985) (indemnity, Louisiana law); Alabama Great Southern R.R. Co. v. Chicago & Northwestern Ry Co., 493 F.2d 979, 973 (8th Cir. 1974) (indemnity, Mississippi law); *see also* Grunenthal v. Long Island R.R. Co., 388 F.2d 480, 482 (2d Cir. 1968) (denied indemnity under N.Y. law), *rev'd on other grounds,* 393 U.S. 156 (1968).

52. *See* McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) (noting settlement bar rule for contribution for negligent design of equipment); United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (citing contribution under the Suits in Admiralty Act, 46 U.S.C. § 741 (1975), the Jones Act, 46 U.S.C. § 688 (1975), and the Death on High Seas Act, § 6, 46 U.S.C. § 766 (1975), for negligent collision of vessels); Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106, 110-15 (1974) (finding contribution under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1986), for negligent cargo loading). The Supreme Court supplied the reason that it was correcting its mid-nineteenth century opinions following the then English rule for equal division of damages, internationally rejected by the Brussells Convention of 1910, and so did not need Congressional direction. *Reliable Transfer Co.,* 421 U.S. at 401-02, 410.

53. *See, e.g.,* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975) (noting contribution and indemnity under the Federal Aviation Act, §101, 49 U.S.C. § 1301 (1997) (amended 2002), for negligent mid-air collision).

54. *See* Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 90 (1981) (stating that no contribution under the Equal Pay Act, 29 U.S.C. § 201 (1998), for intentional wage differentials violating the statute).

55. *See id.* (recognizing contribution under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1994), for intentional wage differentials violating the statute).

violations.[58] The reason for the different treatment lies in whether the body of law is designed to compensate victims for negligent acts, such as with tort law, or whether that design is to punish intentional acts, such as with anti-trust violations.[59] The early American tort cases made the same distinction: allowing contribution for negligence and denying it for willful acts.[60] This same distinction occurred in the equitable field of trust law.[61]

Congressional design for the statute, however, can reverse the result. This has occurred for both the securities laws and the environmental laws. Both fields have some statutory contribution provisions. Congress expressly created the contribution right[62] and the indemnification right[63] in certain securities situations. In other situations dealing with fraud the courts have created the right.[64] However, under the 1933 act, the Securities and Exchange Commission has an anti-indemnification policy.[65] Consequently, some courts have refused to enforce indemnification agreements under the 1933 act regardless of culpability.[66] Similarly, courts have found contribution denied under the Trust Indenture Act.[67]

Congress originally did not expressly provide for the right to contribution

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56. *See* Mortgages Inc. v. United States District Court for the District of Nevada, Las Vegas, 934 F.2d 209 (9th Cir. 1991) (providing no contribution or indemnity under the False Claims Act, 31 U.S.C. § 3729 (1983), for intentional fraud which bears treble damages).

57. *See* Fleming v. Lind-Waldeck & Co., 922 F.2d 20, 28 (1st Cir. 1990) (noting contribution under the Commodity Exchange Act, 7 U.S.C. § 1 (1999), for intentional fraud based on legislative history); *see also Hearings on S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, pt. 3, 93d Cong., 2d Sess. 679, 683 (1974) (quoting testimony of Prof. Glenn Clark describing the naked commodity option scandal of 1973 as fraud, a swindle, and a nefarious scheme).

58. *See* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) (stating no contribution under the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1997) and the Clayton Anti-Trust Act, 15 U.S.C. § 12 (1997), for intentional price fixing conspiracy, which bears treble damages).

59. *See id.* at 635 "[T]o invoke principles of equity presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing." "[T]raditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts." *Id.* at 639. "The very idea of treble damages reveals an intent to punish. . .not to ameliorate the liability of wrongdoers." *Id.*

60. *Compare* Thweatt's Adm'r v. Jones, 22 Va. (1 Rand.) 328 (1823) (holding contribution available for mistake) *with* Peck v. Ellis, 2 Johns. Ch. 131 (N.Y.Ch. 1816) (holding no contribution for willful acts); *see also* KEETON, *supra* note 7, at 337.

61. *See supra* note 39 and accompanying text.

62. *See* 15 U.S.C. § 77k(f) (1997) (filing of false registration statements under § 11 of the 1933 act); *id.* § 78i(e) (manipulation of securities prices under § 9 of the 1934 act); *id.* § 78r(b) (misrepresentations in Securities and Exchange filings under § 18 of the 1934 act); *id.* § 78u-4(f) (for class actions under § 11 of the 1933 act and under the 1934 act).

63. *See* 15 U.S.C. § 77ooo(d)(2) (for indenture trustee against its own officers under § 315 of the Trust Indenture Act); *see also* LNC Invs., Inc. v. First Fid. Bank, Nat'l Ass'n, 935 F. Supp. 1333, 1344 (S.D.N.Y. 1996) (holding no implied contribution by collateral trustee against trustee).

64. *See, e.g.*, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 292-93 (1993) (discussing securities fraud under rule 10b-5, 17 C.F.R. § 240.10b-5 (2001) since the court can delineate the remedies for an implied cause of action); Nelson v. Quimby Island Reclamation Dist. Facilities Corp., 491 F. Supp. 1364, 1383 (N.D. Cal. 1980) (discussing fraud in a prospectus or oral communication under § 12(2) of the 1933 act); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, (S.D.N.Y. 1970), *aff'd* 442 F. 2d 1346 (2d Cir. 1971) (for fraud under § 17 of the 1933 act due to "general drift of the law today . . . toward allowance of contribution amongst joint tortfeasors").

65. 17 C.F.R. § 229.512(i) (2001).

66. *See, e.g.*, Eichenholtz v Brennan, 52 F.3d 478, 485 (3d Cir. 1995).

67. *See LNC Invs., Inc.*, 935 F. Supp. at 1344 (discussing no implied contribution by collateral trustee against trustee).

under the environmental laws.[68] Nonetheless courts implied such a right from the legislative history, which spoke of liability governed by traditional principles of the evolving common law for joint and several liability.[69] Since then, Congress has provided for contribution statutorily.[70]

2. Jurisprudential Criticism of the Expansion to Various Legal Fields

Recently, contribution in a non-equitable field, namely torts, has come under assault by the law-and-economics jurisprudential school.[71] The law-and-economics jurisprudential school concluded that in the tort context, a legal remedy, the contribution rule is inefficient. Both the contribution rule and non-contribution rule possess the same deterrent effect, with tortfeasors comporting their actions to a socially optimal level of care to minimize their expected costs.[72] But the contribution rule increases administrative costs due to additional court proceedings to allocate the liability.[73]

This criticism, however, does not extend to indemnity. The studies of the law-and-economics jurisprudential school indicate that the indemnity rule is economically optimum.[74] Tort law uses several tests to determine whether to indemnify. All three tests examined by the law-and-economics jurisprudential school shift the loss to the least-cost joint tortfeasor, the one who can avoid the act for the least cost.[75] One of the purposes of ERISA is to make sure that the costs of administration do not deter plan formation and continuation.[76]

The law-and-economics jurisprudential school further criticize the contribution rule since it also increases administrative costs by reducing the likelihood of settlement.[77] Under the contribution rule, the settlement does not bar a court from determining further liability in a subsequent lawsuit.[78] So the contribution rule encourages litigation, while the non-contribution rule encourages settlement, reducing administrative costs.[79]

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68. *See* Ellen J. Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 ECOLOGY L.Q. 365 (1987).

69. *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1266-67 (D. Del. 1986); United States v. Conservation Chemical Co., 619 F. Supp. 162, 199 (W.D. Mo. 1985), *rejected by* 810 F.2d 726 (8th Cir. 1987); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1486 (D. Colo. 1985). The legislative history referred to liability issues to be handled by traditional principles of evolving common law with the example of joint and several liability. *See* 126 CONG. REC. S14,964 (statement of Sen. Randolph), S14,980 (statement of Sen. Cohen), & S15,004 (daily ed. Nov. 24, 1980) (statement of Sen. Helms).

70. *See* 42 U.S.C. § 9613(f) (2000) (under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 § 113, as amended).

71. *See* LANDES & POSNER, *supra* note 46, 201-204.

72. *See id.* at 196.

73. *See id.* at 201-02.

74. *See id.* at 205-210.

75. *See id.* at 205-09. The three tests include the active-passive negligence test, the implied-contractual immunity test, and the primary versus secondary liability test. *Id.*

76. *See infra* notes 226-27 and accompanying text.

77. *See* LANDES & POSNER, *supra* note 46, at 202-03.

78. *See id.* at 202; *see also* Byrnes v. Phoenix Assurance Co. of N.Y., 303 F.2d 649, 652-53 (7th Cir. 1962) (non-settling defendants can seek contribution); KEETON, *supra* note 7, at 340 (same).

79. *See* Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 362 (1980).

To avoid the perceived deterrent to settlement of the contribution rule, some jurisdictions have adopted a rule barring further recovery against the settling tortfeasor[80] and allowing a reduction in the subsequent judgment against the non-settling tortfeasors.[81] The courts perform the judgment reduction under one of three methods: (1) pro rata, in which the court divides the judgment by the number of settling and non-settling tortfeasors with the non-settling tortfeasors paying their portion, (2) pro tanto, in which the court reduces the judgment dollar for dollar by the amount of the settlement, and (3) proportionate, in which the non-settling tortfeasor pays its respective percentage of the judgment.[82] The three methods of judgment reduction correspond to the three versions of statutory contribution.[83] The pro rata method belongs to the Uniform Contribution Among Tortfeasors Act of 1939, the pro tanto method belongs to the Revised Uniform Contribution Among Tortfeasors Act of 1955, and the proportional method belongs to the Uniform Comparative Fault Act of 1977.[84] The bar rule eliminates the settlement objection to contribution. Consequently, courts have extended the settlement bar rule to the equitable remedies of traditional trust law.[85]

Criticism of the law-and-economics jurisprudential school's conclusion claims the assumptions of the tort analysis to not hold in the real world.[86] Two of those assumptions, that all litigants have perfect information and all defendants are solvent,[87] do not apply to ERISA fiduciary breaches. Firstly, ERISA fiduciaries often do not have sufficient information to calculate the benefit of breach.[88] Secondly, they may have difficulty anticipating the standard of care the court might impose.[89] Thirdly, they may have difficulty calculating the probability of getting caught and losing at trial.[90] Fourthly, they may have difficulty estimating the potential liability if plaintiff prevails. Fifthly, they may have difficulty determining the likelihood that the co-fiduciaries will avoid

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80. *See, e.g., The Uniform Contribution Among Tortfeasors Act* § 4, 12 U.L.A. 264 (2002) (allowing escape from contribution for settlement with a proportionate rule).

81. *See In re* Jiffy Lube Securities Litigation, 927 F.2d 155, 160 (4th Cir. 1991).

82. *See id.* at 160 n.3.

83. *See* Thomas V. Harris, *Washington's Unique approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONGZAGA L. REV. 69, 77-78 (1985).

84. *See supra* notes 47-49 for these three statutes.

85. *See In re* Masters Mates & Pilots Pension Plan and IRAP Litigation, 957 F.2d 1020, 1028 (2d Cir. 1992).

86. *See* Lewis A. Kornhouser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L. J. 831, 837-40 (1989) (challenging the assumptions that: (1) a feasor is liable for the full loss caused; (2) feasors pay for damages attributable to non-negligent actors; (3) damages are apportioned equally among feasors on a per capita basis; and (4) courts apply a socially optimal standard of care); *see also* Lewis A. Kornhouser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.UNIV. L. REV. 427, 491-92 (1993).

87. *See* Di Cola, *supra* note 6, at 1557 (citing Jong G. Yi, *Litigation with Multiple Defendants: How to Settle Under Different Apportionment Rules* 18-20, Stanford University Center for Economic Policy Research Publication, No. 225. (1990).

88. Due to the fractionalization of fiduciaries, *see infra* notes 110-122 and accompanying text.

89. The standard is that of experts, which many of the fiduciaries are not. *See infra* notes 129-30 and accompanying text.

90. Other fiduciaries are supposed to monitor and may be liable for not monitoring. *See infra* note 138 and accompanying text.

liability.[91] Sixthly, they may have difficulty making the risk assessments of the co-fiduciaries.[92] Many small employers have employee benefit plans. These plans frequently have individuals serve as fiduciaries. The same holds true for some types of the fractionalized fiduciaries. Many of these individuals are not necessarily capable of paying large judgments.[93]

These criticisms of the law-and-economics jurisprudential school of course apply to torts, a legal field. Trust law and ERISA fiduciary breaches are equitable and so concerns for natural justice enter.[94] These considerations must have born heavily on Judge Richard Posner, the leading proponent of the law-and-economics jurisprudential school criticism of contribution for torts. So much so that when he considered contribution in an ERISA case, rather than respond with this criticism, he "assumed" ERISA allowed contribution.[95] So even the leading critic of contribution for torts refused to reverse his Circuit's recognition of contribution and indemnity for ERISA on the basis of this criticism.[96]

II. ERISA FIDUCIARY LAW

Fiduciary law for an ERISA plan differs considerably from that for traditional trusts. The English developed traditional trust law for donative transfers.[97] The law for retirement plans started from a donative background but only because early jurists, mindful of new business developments, initially experimented with analogous bodies of law. They toyed with the idea that the retirement plan constituted a "gift" from the employer.[98] The gratuity theory continued into the 1950's, most notably in New York.[99] But before ERISA's passage, jurists came to identify the retirement benefit promise with the law of contracts,[100] so much so that the Supreme Court once described pre-ERISA law as contractual.[101] Jurists had recognized that the retirement benefit promise arose in the employment context. Never the less, some pre-ERISA jurists used

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91. There are many fiduciaries and they have different tests for insulation against liability. *See infra* notes 140-43, and accompanying text.

92. *See* Di Cola, *supra* note 6, at 1560-61.

93. *See id.* at 1559-60.

94. *See* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 404-05(Harvard University Press 1990) (describing at law matters as logical and objective, equity as ethical and subjective); *see also infra* note 282 and accompanying text.

95. *See* Donovan v. Robbins, 752 F.2d 1170, 1178 (7th Cir. 1985) (Posner, J.).

96. *See infra* notes 234-37 and accompanying text for the Seventh Circuit's accceptance.

97. *See* S. REP. NO. 93-127 at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N., 4838, 4865 ("[T]rust law had developed in the context of testamentary and intervivos trusts (usually designed to pass designated property to an individual or small group of persons) with an intendant emphasis on carrying out the instructions of the settlor.") [hereinafter S. REP. NO. 93-127]; H.R. REP. NO. 93-533 at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N., 4639, 4650 (same) [hereinafter H.R. REP. NO. 93-533].

98. *See, e.g.*, McNevin v. Solvay Process Co., 53 N.Y. Supp. 98, 99-100 (1898), *aff'd per curiam*, 60 N.E. 1115 (1901) (establishing the gratuity theory for retirement plans).

99. *See* George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 LOY. L.A. L. REV. 361, 410 & n. 279; *see also id.* at 410-11 (for experimentation with other theories).

100. *See id.* at 374 & n. 84, 411 & n. 280.

101. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989) ("Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law.").

trust law,[102] mostly for plans under the Labor Management Relations Act,[103] since both that statute as well as the Internal Revenue Code required a trust for the plans.[104] Consequently, ERISA calls for both a contractual plan and a trust.[105] The historical significance of ERISA was to designate the employer controlled parties, predominantly the plan administrator and the trustee, as fiduciaries and to raise their behavioral standard above that of contract law to that of trust fiduciaries.[106]

In raising the standard of employee benefit plan fiduciaries Congress deviated from traditional trust law for two main reasons. Employee benefit plans have large numbers of participants and enormous amounts of money.[107] The Supreme Court has recognized another reason, namely, ERISA fiduciaries frequently have interests adverse to those of the beneficiaries.[108] Consequently, when fashioning the federal common law for ERISA's version of trust law, the Supreme Court starts with traditional trust law and then varies it to fit the ERISA situation weighing the two Congressional goals for ERISA to protect the benefits of beneficiaries and to keep costs low enough so as not to discourage employers from adopting plans.[109]

A. ERISA'S STATUTORY FIDUCIARY PROVISIONS

ERISA possesses numerous provisions relating to fiduciaries. ERISA defines a fiduciary to the plan broadly. A fiduciary of the plan is anyone who exercises discretion over the management of the plan assets, renders investment advice for compensation, or has discretion over the administration of the plan.[110] So the fiduciary sections of ERISA only apply to these persons.[111]

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102. *See* Flint, *supra* note 99, at 374 & n. 85, 411 & n. 281.

103. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2000)).

104. Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. § 186(c)(5) (1998); Revenue Act of 1921, ch. 136, § 219(f), 42 Stat. 227, 247 (1923).

105. Employee Retirement Income Security Act (ERISA) of 1974, §§ 402 & 403, 29 U.S.C. §§ 1102 (plan instrument) & 1103 (plan assets held in trust) (2000). *See* Flint, *supra* note 99, at 402-03 (delineating various provisions of ERISA recognizing the dual nature of employee benefit plans).

106. *See Bruch*, 489 U.S. at 110-11 ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions. . .'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'"); *see also* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829 (1983) (explaining contract law as limited to the morals of the marketplace governed by self-interest while fiduciary law requires the fiduciaries to act altruistically to further the interest of the beneficiary in preference to their own).

107. *See* S. REP. NO. 93-127, *supra* note 97, at 34, *reprinted in* 1974 U.S.C.C.A.N., at 4869-70.

108. *See* Pegram v. Herdich, 530 U.S. 211, 225-26 (2000).

109. *See* Varity v. Howe, 516 U.S. 489, 495 (1996); *see also id.* at 495 (raising the issue of when is an employer a fiduciary); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 80-81 (1995) (describing how an entity acts with intent); Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1993) (noting no liability for a non-fiduciary).

110. Employee Retirement Income Security Act (ERISA) of 1974, § 3(21), 29 U.S.C. § 1002(21) (1999); *see* H.R. CONF. REP. NO. 93-1280, at 323 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103 ("[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title.") [hereinafter H.R. CONF. REP. NO. 93-1280]; 29 C.F.R. § 2509.75-8 (2001) (Department of Labor regulation: does not include persons who perform purely "ministerial" functions).

111. *See Mertens*, 508 U.S. at 248 (1993) (drastically restricting the earlier tendencies of the courts to develop non-fiduciary liability under ERISA); *see also* Munoz v. Prudential Insurance Co., 633 F.

Due to the broad definition of fiduciary, ERISA specifies several types of fiduciaries with different duties. In fact ERISA's structure encourages the multiplicity of fiduciaries. ERISA requires the plan to provide for one or more named fiduciaries "with authority to control and manage the operation and administration of the plan."[112] Either the plan names the named fiduciary or the plan sponsor, typically the employer, appoints the named fiduciary.[113] The named fiduciary serves as the coordinator for all the other fiduciaries. The named fiduciary has authority to appoint advisors to any other fiduciary and to appoint investment advisors.[114] These advisors will become fiduciaries if they exercise discretionary authority over the operations or assets of the plan.[115] ERISA, however, singles out investment advisors as fiduciaries.[116] ERISA divides the remaining fiduciaries into two groups.[117] The plan administrator or a plan administrative committee handles the administration of the plan.[118] The

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Supp. 564, 569 (D. Colo. 1986). In this case, state law bad faith processing claim against a mere provider of administrative services, a non-fiduciary, was not preempted by ERISA. *Id.* The beneficiary cannot successfully bring a bad faith processing claim against an ERISA fiduciary. *Id. See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (noting that state claims for bad faith processing preempted by ERISA).

112. Employee Retirement Income Security Act (ERISA) of 1974, § 402(a), 29 U.S.C. § 1102(a)(1)(1999).

113. Employee Retirement Income Security Act (ERISA) of 1974, § 402(a)(2), 29 U.S.C. § 1102(a)(2)(1999); *see* H.R. CONF. REP. NO. 93-1280, *supra* note 110, at 323, *reprinted in* 1974 U.S.C.C.A.N., at 5103. "Under this definition, fiduciaries include officers and directors of a plan, members of a plan's investment committee and persons who select these individuals." *Id.*; Robert Eccles, *Fiduciary Litigation under ERISA: 1975-1988*, 23 REAL PROP. PROB. & TR. J. 679, 682-83 (1988) (noting employer is fiduciary to extent of the power to appoint other plan fiduciaries).

114. Employee Retirement Income Security Act (ERISA) of 1974, § 402(c)(2) & (3), 29 U.S.C. § 1102(c)(2) & (3) (1999).

115. *See* 29 C.F.R. § 2509.75-5 D-1(2001) (Department of Labor regulation for attorneys, accountants, actuaries, and consultants). The courts generally follow the Department of Labor rule. *See* Custer v. Sweeney, 89 F.3d 1156 (4th Cir. 1996) (holding attorney not a fiduciary); Hotel Employees Union Welfare Fund v. Gentner, 50 F.3d 719 (9th Cir. 1995) (same); Pappas v. Buck Consultants, Inc., 923 F.2d 531 (7th Cir. 1991) (ruling actuary not a fiduciary); Painters of Philadelphia District Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146 (3d Cir. 1989) (holding auditor not a fiduciary); *see also* Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) (noting accountants were fiduciaries, as they had exercised discretion).

116. Employee Retirement Income Security Act (ERISA) of 1974, § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii) (1999). The Department of Labor has tried to ameliorate this status by requiring the advice to be "on a regular basis" and pursuant to an agreement or understanding that "such services will serve as a primary basis for investment decisions" by the plan. 29 C.F.R. § 2510.3-21(c) (2001). These regulations also provide that routine execution of orders by brokers does not render them a fiduciary. 29 C.F.R. § 2510.3-21(d) (2001). But since brokers also offer investment recommendations, courts split over whether a particular broker has fiduciary status. *Compare* Olson v. E.F. Hutton & Co., Inc., 957 F.2d 622, 627 (8th Cir. 1992) (denying summary judgment motion that broker was not a fiduciary); Farm King Supply Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co., 884 F.2d 288, 292 (7th Cir. 1989) (ruling not a fiduciary as lacks authority to dispose of the assets); *with* Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1118 (9th Cir. 1994) (holding that broker was fiduciary due to a nine-year relationship); Wolin v. Smith Barney, Inc., 83 F.3d 847, 849 (7th Cir. 1996) (noting fiduciary as had influence approaching control); *see generally* Howard Pianko & Stephen J. Nelson, *Special Issues Involving Broker-Dealers and Their Employee Benefit Plan Clients*, 23 REAL PROP. PROB. & TR. J. 749 (1988).

117. ERISA allows persons to serve in more than one fiduciary capacity. Employee Retirement Income Security Act (ERISA) of 1974, § 402(c)(1), 29 U.S.C. § 1102(c)(1) (1999). As a result, many plans have the named fiduciary and the plan administrator as the employer.

118. Employee Retirement Income Security Act (ERISA) of 1974, § 3(16), 29 U.S.C. § 1002(16) (1999). The Department of Labor defines administrative discretion rendering one a fiduciary as including the power to make or interpret plan policies and as excluding ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating

employer frequently serves as or controls the plan administrator, and is a fiduciary in those capacities.[119] One or more trustees are to hold the plan assets.[120] And the plan may subject these trustees to the control of a named fiduciary who is not a trustee or an investment manager appointed by the named fiduciary.[121] ERISA specifically deems investment managers as fiduciaries.[122]

ERISA spells out four primary fiduciary duties. First is the exclusive benefit rule, the ERISA version of the fiduciary duty of loyalty. Plan fiduciaries "shall discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries and [for] the exclusive purpose [of] providing benefits to participants and their beneficiaries . . . ."[123] The ERISA exclusive benefit rule expanded the pre-ERISA exclusive benefit rule to all fiduciary duties, not just those of the trustees.[124] Two other ERISA provisions bolster the duty of loyalty, necessitated by the fractionalization of fiduciaries and their conflict of interest with the beneficiaries. The non-inurement rule prevents plan assets from benefiting the employer.[125] The prohibited transaction rules forbid

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benefits. 29 C.F.R. § 2509.75-8 D-2 (2001). Not all courts agree. *Compare* Healthsouth Rehab. Hosp. v. Am. Nat'l Red Cross, 101 F.3d 1005 (4th Cir. 1996) (holding that limited role in claims processing does not create a fiduciary); Witt v. Allstate Ins. Co., 50 F.3d 536 (8th Cir. 1995)(same); Kyle Rys. v. Pac. Admin. Servs., Inc., 990 F.2d 513 (9th Cir. 1993) (same); Baker v. Big Star Div. of the Grand Union Co., 893 F.2d 288 (11th Cir. 1990) (same); *with* Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio, 982 F.2d 1031, 1035 (6th Cir. 1993) (opining that authority to deny or grant claims renders one a fiduciary).

119. If the plan names no administrator, ERISA deems the employer as the administrator. Employee Retirement Income Act (ERISA) of 1974, § 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii) (1999). Consequently, the fiduciary sections can also apply to employers. *See* Barnes v. A.S. Lacy, D.C., 927 F.2d 539, 544 (11th Cir. 1991) (deciding that employers who act as plan administrator are fiduciaries to the extent they function in their capacity as plan administrator); *see also* Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992) (ruling that employers who act as plan administrator are fiduciaries to the extent they function in their capacity as plan administrator even when the plan designates another as plan administrator if the employer actively administers the plan); Rosen v. TRW, Inc., 979 F.2d 191 (11th Cir. 1992) (same). Employers, however, are not plan fiduciaries for plan establishment, design, amendment, or termination. *See, e.g.*, Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990) (denying early retirement request); *see also* Jane Kheel Stanley, *The Definition of a Fiduciary under ERISA: Basic Principles*, 27 REAL PROP. PROB. & TR. J. 237, 244-45 (1992) (describing the exception to ERISA § 3(21), 29 U.S.C. § 1002(21) (1999), for the settlor functions of the Department of Labor and business functions of the courts); *see generally* Frank P. VanderPloeg, *Role-Playing under ERISA: The Company as Employer' and Fiduciary'*, 9 DEPAUL BUS. L.J. 259 (1997).

120. Employee Retirement Income Security Act (ERISA) of 1974, § 403(a), 29 U.S.C. § 1103(a)(1999).

121. Employee Retirement Income Security Act (ERISA) of 1974, §§ 402(c)(3), 403(a)(1) & (2), 29 U.S.C. §§ 1102(c)(3), 1103(a)(1) & (2) (1999).

122. Employee Retirement Income Security Act (ERISA) of 1974, § 3(38), 29 U.S.C. § 1002(38) (1999). Only certain entities can serve as investment managers, namely banks, insurance companies, and investment advisors registered under the Investment Advisors Act of 1940, Publ. L. No. 76-768, 54 Stat. 847 (1941) (codified as amended at 15 U.S.C. §§ 80b-1 to 80b-21(1997)), and only if they acknowledge it writing that they are a plan fiduciary. Employee Retirement Income Security Act of 1974, § 3(38), 29 U.S.C. § 1002(38)(c) (1999).

123. Employee Retirement Income Security Act (ERISA) of 1974, § 404(a)(1)(A)(I), 29 U.S.C. § 1104(a)(1)(A)(i) (1999).

124. The Revenue Act of 1921 required the employer to establish a trust "for the exclusive benefit of some or all of [the] employees." Revenue Act of 1921, ch. 136, § 219(f), 42 Stat. 227, 247 (1921); *see also* 52 Stat. 447, 518 (1938) (Revenue Act of 1938) (same). The Labor Management Relations Act of 1947 required contributions be made "for the sole and exclusive benefit of the employees . . . ." Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. § 186(c)(5) (2000). Congress stated that the exclusive benefit rule came from § 401 of the Internal Revenue Code. H.R. CONF. REP. NO. 93-1280, *supra* note 110, at 302, *reprinted in* 1974 U.S.C.C.A.N., at 5083.

125. Employee Retirement Income Security Act of 1974, § 403(c)(1), 29 U.S.C. § 1103(c)(1) (1999)

every sale, loan, or transfer of plan assets to a party-in-interest and self-dealing by a fiduciary.[126] Congress modeled the prohibited transaction rules after comparable rules designed to prevent insiders from abusing the assets of charitable foundations.[127] These prohibitions are so sweeping, ERISA contains an elaborate set of exemptions to rescue innocent transactions such as compensation to service providers and paying benefits to one serving as a fiduciary.[128]

Second is the ERISA version of the prudent person rule. Plan fiduciaries shall exercise "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims."[129] "Like capacity" and "enterprise of like character" suggests a standard governed by the acts of prudent fiduciaries of ERISA plans, if not bank trust departments and insurance company policy administrators. Moreover, many plans use bank trust departments and insurance company administrators, experts in their fields. So the standard is one of an expert in the field.[130] Unfortunately, courts have not reviewed fiduciary behavior under this standard, but instead have limited its application to investments.[131]

Third is the ERISA version of the diversification rule. Plan fiduciaries shall "diversif[y] the investments of the plan so as to minimize the risk of large losses,

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("[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive [purpose] of providing benefits to participants in the plan and their beneficiaries . . .").

126. Employee Retirement Income Security Act (ERISA) of 1974, § 406(a) & (b), 29 U.S.C. § 1106 (a) & (b) (1999).

127. *See* H.R. CONF. REP. NO. 93-1280, *supra* note 110, at 295, *reprinted in* 1974 U.S.C.C.A.N., at 5076 (discussing rules against self-dealing that apply to private foundations); *compare* Pub. L. No. 91-172, 83 U.S. Stat. 487, 499-502 (1969) (adding § 4941 to the Internal Revenue Code) *with* Employee Retirement Security Act (ERISA) of 1974, § 406, 29 U.S.C. § 1106 (1999).

128. Employee Retirement Income Security Act (ERISA) of 1974, §§ 407, 408, 408(b)(2) & 408(b)(9), 29 U.S.C. §§ 1107 (indicating limitations for employer realty and stock held by the plan), 1108 (enumerating various innocent situations and Department of Labor authority to grant additional exemptions), 1108(b)(2) (providing for arrangement with service contractors), & 1108(b)(9) (1999) (fiduciary plan benefits).

129. Employee Retirement Income Security Act (ERISA) of 1974, § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (2000).

130. *See* Joseph R. Simone & Glenn E. Bulash, *Fiduciary Responsibility and Prohibited Transactions under ERISA*, 502 PRACTICING L. INST./TAX 675, 685 (2001) ("commonly referred to as . . . the . . . 'prudent expert' rule" due to the "like capacity" and "like character" language). Most of the cases deal with using the proper investigative procedures. *See, e.g.*, *In re* Unisys Savings Plan Litigation, 74 F.3d 420 (3d Cir. 1996); Zanditon v. Feinstein, 849 F.2d 692 (1st Cir. 1988); Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951 (D.C. Cir. 1985); Katsaros v. Cody, 744 F.2d 270 (2nd Cir.), *cert. denied* 469 U.S. 1072 (1984); Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983), *cert. denied* 464 U.S. 1040 (1984).

131. *See* Wendy K. Mariner, *Slouching Toward Managed Care Liability: Reflections on Doctrinal Boundaries, Paradigm Shifts, and Incremental Reform*, 29 J. L. MED. & ETHICS 253, 263 (2001) (noting problem of applying prudent person standard to acts other than asset management); Schwartz v. Interfaith Med. Ctr., 715 F. Supp. 1190, 1195 (E.D.N.Y. 1989) (noting the "prudent man standard of care relates primarily to the management of plan assets"); *see also* George Lee Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133, 135-36 (1989), *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) (using an abuse of discretion standard to review plan administrator action, not the prudent person standard); DeBruyne v. Equitable Life Assurance Soc., 920 F.2d 457, 465 (7th Cir. 1990) (using the prudent person standard for investments); *but see* S. REP. NO. 93-127, *supra* note 97, at 31, *reprinted in* 1974 U.S.C.C.A.N., at 4867 ("[E]ven with respect to the [otherwise prohibited] transactions expressly allowed, the fiduciary's conduct must be consistent with the prudent man standards.").

unless under the circumstances it is clearly prudent not to do so . . . ."[132] And fourth, plan fiduciaries shall act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]."[133] So the trust documents cannot countermand the statutory duties of a fiduciary under ERISA.[134]

Since ERISA provides for so many different fiduciaries, it also contains a co-fiduciary liability provision. ERISA specifically provides for fiduciary liability for the acts of another fiduciary when the fiduciary (1) knowingly participates in or conceals the fiduciary breach, (2) enables the other fiduciary to commit the breach, or (3) knows of the breach but fails to take corrective action.[135] Constructive knowledge will bring the duty into play.[136] Inaction constitutes enablement.[137] And some courts have imposed the duty to monitor the co-fiduciary.[138] The obvious reason for the fractionalization of the fiduciaries and imposing co-fiduciary liability is to insure sufficient policing to detect defalcations.

Courts have described this co-fiduciary liability as joint and several.[139] Consequently, ERISA plaintiffs may bring an action against only some of the fiduciaries, without bringing an action against all of them.[140] Due to the joint and several liability under the co-liability provision, a co-fiduciary could easily become liable for dastardly deeds done by another fiduciary. So the issue of contribution and indemnification becomes of significant interest to fiduciaries.

Because of the co-fiduciary liability provision, ERISA expressly allows trustees to allocate by agreement, if authorized by the plan, their responsibilities, obligations and duties so as not to be liable for defalcations with respect to those assets controlled by the other trustees, except as provided for in the three co-

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132. Employee Retirement Income Security Act (ERISA) of 1974, § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C) (2000).

133. Employee Retirement Income Security Act (ERISA) of 1974, § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (2000).

134. *See* Central States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568 (1985).

135. Employee Retirement Income Security Act (ERISA)of 1974, § 405(a), 29 U.S.C. § 1105(a) (2000).

136. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 283 (2d Cir. 1992).

137. *See* Free v. Briody, 732 F.2d 1331, 1335 (7th Cir. 1984).

138. *See* Raff v. Belstock, 933 F. Supp. 909, 915 (N.D. Cal. 1996); Mazur v. Gaudet, 826 F. Supp. 188, 192 (E.D. La. 1992); Russo v. Unger, 1991 WL 254570, *5 (S.D.N.Y. Nov. 20, 1991); *see also* 29 CFR § i509.75-8 (2001) (Department of Labor regulation that appoints fiduciary duty to monitor).

139. *See In re* Masters, Mates & Pilots Pension Plan and IRAP Litig., 957 F.2d 1020, 1027-28 (2d Cir. 1992); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1221 (2d Cir. 1987); Donovan v. Robbins, 752 F.2d 1170, 1185 (7th Cir. 1985) (Coffe, J., concurring); Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983); District 65 Ret. Trust v. Prudential Sec., Inc., 925 F. Supp. 1551 (N.D. Ga. 1996); Davidson v. Cook, 567 F. Supp. 225, 240 (E.D. Va. 1983), *aff'd mem.*, 734 F.2d 10 (4th Cir. 1984); *see also* S. REP. NO. 93-127, *supra* note 97, at 46, *reprinted in* 1974 U.S.C.C.A.N., at 4882 ("[C]o-fiduciaries are jointly and severally liable.").

140. *See* Struble v. N.J. Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 332 (3d Cir. 1984) (unsued trustees were not indispensable parties for fiduciary duty action since multiple trustees may be held jointly and severally liable); Jennings v. Pierce, 1995 WL 88795, *2-3 (N.D. Ill.) (same); *see also* Donovan v. Tricario, 5 Employee Benefit Cas. 2057 (S.D. Fla. 1984) (defendant trustee liable to restore all losses not previously restored to plan through settlement agreement with other defendants), *aff'd sub. nom.* Brock v. Tricario, 768 F.2d 1351 (11th Cir. 1985).

fiduciary liability situations.[141] A similar rule allows the named fiduciaries to split responsibilities and not be liable for other named fiduciary defalcations except as provided for the three co-fiduciary liability situations.[142] The named fiduciaries, however, remain liable for fiduciary breaches in making the allocation, implementing it, or continuing it.[143]

ERISA makes fiduciaries who commit a breach of their fiduciary responsibilities, obligations, or duties "personally liable to make good to [the] plan any losses," as well as to restore any profits "made through use of assets of the plan."[144] These fiduciaries in such situations are also subject "to such other equitable or remedial relief as the court may deem appropriate . . . ."[145]

For the contribution and indemnity issue, the most important provisions are the provisions concerning exculpation agreements and insurance. ERISA section 410(a) voids all exculpatory agreements relieving fiduciaries from liability as against public policy, except the agreements splitting up responsibilities with respect to trustees and investment managers:

> Except as provided in [the] section [relieving a trustee of responsibility with respect to assets under the control of a co-trustee] and [insulating trustee responsibility with respect to assets under the control of an investment manager], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.[146]

The Department of Labor has interpreted this provision to mean that the plan cannot agree to indemnify a plan fiduciary.[147] Legislative history indicates that the reason for non-exculpation was that ERISA plans differ significantly from testamentary trusts. Employee benefit plans have large numbers of participants and enormous amounts of money.[148] ERISA does contain one exculpation provision for an individual account controlled by a participant, but only for losses resulting from that participant's exercise of control.[149] Courts considering ERISA section 410(a) have concluded that Congress intended to specify the standard of conduct for ERISA fiduciaries and did not want fiduciaries to modify that standard through exculpation or indemnity agreements.[150] These courts,

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141. Employee Retirement Income Security Act (ERISA) of 1974, § 405(b)(1)(B) & (b)(2), 29 U.S.C. § 1105(b)(1)(B) & (b)(2) (1999).

142. Employee Retirement Income Security Act (ERISA) of 1974, § 405(c)(1) & (c)(2), 29 U.S.C. § 1104(c)(1) & (c)(2) (1999).

143. *Id.*

144. Employee Retirement Income Security Act (ERISA) of 1974, § 409(a), 29 U.S.C. § 1109(a) (1999).

145. *Id.*

146. Employee Retirement Income Security Act (ERISA) of 1974, § 410(a), 29 U.S.C. § 1110(a)(1999).

147. *See* 29 CFR § 2509.75-4 (2001).

148. S. REP. NO. 93-127, *supra* note 97, at 34, *reprinted in* 1974 U.S.C.C.A.N., at 4870.

149. Employee Retirement Income Security Act (ERISA) of 1974, § 404(c), 29 U.S.C. § 1104(c) (1999).

150. *See, e.g.*, Fujikawa v. Gushiken, 823 F.2d 1341, 1345 (9th Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988); *see also* IT Corp. v. General American Life Ins. Co., 107 F.3d 1415, 1418 (9th Cir. 1997) ("a contract exonerating an ERISA fiduciary from fiduciary responsibilities is void as a matter of law"), *cert denied*, 522 U.S. 1068 (1998); Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1460 (9th Cir. 1995)

however, have allowed indemnification of legal expenses of a fiduciary in the successful defense of a fiduciary breach action by the plan.[151] The theory for these agreements to reimburse defense attorney's fees is that since no fiduciary breach happened, no relieving of liability occurred, and hence no exculpation. So except for limited situations ERISA does not even allow the practice common in seventeenth century England of indemnifying sureties under an agreement.[152]

ERISA also prohibits the plan from purchasing insurance protecting the fiduciaries, unless the insurance provides that the insurer has recourse against the fiduciary for the fiduciary's own breach:

> Nothing in this subpart shall preclude a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary.[153]

Legislative history indicates that concern for the cost of the premiums without the recourse ability prompted the provision.[154] That legislative history also delineates the Congressional intent that the wrong-doing fiduciary not escape liability. The Senate-passed bill only provided that the anti-exculpatory provision did not bar insurance subject to Department of Labor regulations.[155] The House-passed version did not have the insurance exception.[156] The report prepared for the use of the House and Senate conferees on the bill contained the recommendations (1) to allow the plan to purchase the insurance for the fiduciaries provided the insurer had "the right of subrogation against the persons causing such loss", (2) that a fiduciary could purchase its own insurance, and (3)

("any interpretation of the Plan which prevents individuals acting in a fiduciary capacity from being found liable as fiduciaries is void"); Martin v. Nationsbank, 1993 WL 345606 (N.D. Ga.) (refusing to enforce provision of trust agreement which provided complete indemnification of trustee that followed precisely the participant's direction provisions of the plan document).

151. *See, e.g.*, Packer Engineering, Inc. v. Kratville, 965 F.2d 174 (7th Cir. 1992); *see also* Spickerman v. Central States, Southeast & Southwest Areas Health & Welfare Fund, 801 F.2d 257, 261 & n.3 (7th Cir. 1986); Martin v. Walton, 773 F. Supp. 1524, 1527 (S.D. Fla. 1991) (requiring indemnity of legal expenses to fiduciary for alleged breach of fiduciary duty is not a reasonable expense of plan administration); *but see* Moore v. Williams, 902 F. Supp. 957, 966-67 (N.D. Iowa 1995) (can advance expenses by fund until liability determined). This merely follows the pre-ERISA practice for plans subject to the Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, 29 U.S.C. § 401(a) (1998), which also had a specific provision voiding exculpatory provisions. *See* 29 U.S.C. § 501 (1998); Morrissey v. Segal, 526 F.2d 121, 126 (2d Cir. 1975) (rule from traditional trust law, trustee can not obtain indemnification if due to his own fault, citing Restatement (Second) of Trusts § 245); McNamara v. Johnston, 522 F.2d 1157, 1167 (7th Cir. 1975) (allow repayment of legal fees only if defendants prevail); Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962) (union can reimburse if successful or based on reasonable judgment); *see also* Leigh v. Engle, 619 F. Supp. 154 (N.D. Ill. 1985) (policy of LMRDA and ERISA same on legal fee indemnity).

152. *But see infra* note 166 and accompanying text for another exception authorized by the Department of Labor.

153. Employee Retirement Income Security Act (ERISA) of 1974, § 410(b)(1), 29 U.S.C. § 1110(b)(1) (2000).

154. *See* Jeffrey R. Fuller, *Fidelity Liability Insurance*, 35 Annual N.Y.U. Inst. on Fed. Tax – ERISA Suppl. 31, 37 (1977) (to save exorbitant premiums).

155. *See* SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: PUBLIC LAW 93-4063, 94th Cong., 2d Sess. (1976), [hereinafter Legislative History].

156. *See id.* at 3955.

an employer could purchase insurance for its employees serving as fiduciaries.[157] So plan-purchased insurance would only have value to the innocent fiduciary.[158]

But there is a more potent reason for the recourse provision. It increases the liability of a co-fiduciary. The ERISA provision permitting the plan to purchase insurance with recourse abrogates the common law rule against subrogation against a co-insured when the policy covers both, as is typical with ERISA fiduciary liability policies.[159] Insurance law allows an implied subrogation action in certain situations when the insurer pays the insured, especially when it will prevent a feasor from escaping liability.[160] But this right of subrogation does not extend to an insurer suing its own insured, in order to prevent the insuror's recovery of the payment to the insured.[161] This anti-subrogation rule also applies to additional insureds even if their negligence caused the loss.[162] So under insurance law an insurer paying a judgment or settlement on behalf of one of several jointly and severally liable and insured co-trustees could not sue by subrogation the additional insured, but responsible co-trustee.[163] This insurance law anti-subrogation rule might otherwise apply to ERISA plans since the ERISA preemption provision contains an exception for state insurance law.[164] The effect of the ERISA provision is to eliminate this state common law rule and allow the insurer to proceed against the fiduciary committing the breach, thus increasing the liability of that ERISA fiduciary.

ERISA, however, does permit the fiduciaries to purchase insurance on their own behalf, and the employer to purchase insurance to protect the fiduciaries.[165] The above subrogation rule should provide a strong incentive for a fiduciary to purchase insurance without the recourse provision. The Department of Labor has interpreted this non-plan-purchased insurance provision as authorizing indemnification agreements in the same manner that other parties may purchase insurance for fiduciaries.[166] So ERISA authorizes indemnification of fiduciaries

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157. *See id.* at 5261 ("Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform").

158. *See* Fuller, *supra* note 154, at 37 (noting just very little protection against liability for errors and omissions); *see also*, LEGISLATIVE HISTORY, *supra* note 155, at 5261 (recommendation to conferees on the bill to allow the plan to purchase the insurance for the fiduciaries provided the insurer had "the right of subrogation against the persons causing such loss").

159. *See infra* notes 171-77 and accompanying text for typical ERISA fiduciary liability insurance policy provisions.

160. *See* Robert Keeton, *Insurance Law: A Gudie to Fundamental Principles, Legal Doctrines, and Commercial Practices* 222 (West Publ. Co., 4th ed. 1988).

161. *See id.* at 221; John A. Selzer, Note, *Extension of the No Subrogation Against Insured Rule*, 56 NEB. L. REV. 765, 773 (1977).

162. *See* Bruce B. Zager, Note, *Conflicts Regarding the No Subrogation Against Insured' Rule*, 29 DRAKE L. REV. 811, 817 (1980) (generally subcontractors of the general contractor).

163. *But see id.* at 813 (minor trend away from anti-subrogation rule for builders' risk contracts).

164. Employee Retirement Income Security Act (ERISA) of 1974, § 514(b)(2)(A), 29 U.S.C. § 1134(b)(2)(A) (1999).

165. Employee Retirement Income Security Act (ERISA) of 1974, § 410(b)(2) & (3), 29 U.S.C. § 1110(b)(2) & (3) (1999). The purpose of this structure is not to relieve the plan of the cost of insuring itself. Plans can pay reasonable service provider fees to fiduciaries. Employee Retirement Income Security Act (ERISA) of 1974, § 408(b)(2), 29 U.S.C. § 1110(b)(2) (1999). Reasonable fiduciary fees, meshed in with the fiduciary's overhead, would cover the fiduciary's costs, including insurance premiums. *Id.*

166. *See* 29 C.F.R. § 2509.75-4 (2001) (indemnification in the same manner as purchase of

by employers.[167] Legislative history indicates that the function of the ability for fiduciaries to purchase insurance, even without recourse, or having the employer purchase it for them, was to alleviate the harshness of the non-exculpation rule.[168]

ERISA also requires bonding to protect the plan from fiduciary theft.[169] These provisions have left the impression among some that Congress desired professional fiduciaries for ERISA plans, not laymen as is often the case for testamentary trusts.[170]

As a result of these ERISA insurance provisions, insurance companies have developed three types of insurance for plans: (1) the fidelity bond, (2) employee benefit liability that covers administrative matters only, and (3) fiduciary liability that provides fuller coverage.[171] These policies generally cover all the fiduciaries and the plan.[172] They pay on claims made during the coverage period.[173] Since plans generally pay for these policies, the latter two types of policies have the recourse provision. But a fiduciary or the employer can purchase of a waiver of recourse.[174] The cost of these waivers, contrary to Congressional expectation,[175] usually is nominal.[176] The fiduciary liability policy usually has exclusions for (1) administrative expenses (eliminating lawsuits that allege the fiduciary paid too much for services), (2) for investment decisions made by others than a qualified professional asset manager (identified by the Department of Labor and typically a bank or large investment house), (3) co-trustee liability (to avoid the politics of a lawsuit brought by one fiduciary against another), and (4) for former fiduciaries.[177] Since the policies are claims-based, the latter exclusion is significant to a retiring or removed fiduciary. The appearance of insurance provisions in ERISA exhibits a Congressional effort to ameliorate the harsh aspects of the fiduciary rules.

Jurisdiction for the contribution and indemnity actions under ERISA lies

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insurance).

167. *See* 29 C.F.R. § 2509.75-4 (2001) (providing indemnification examples of fiduciary by employer and employee of fiduciary by fiduciary); *see also* Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1243 (2d Cir. 1989) (dicta following the Department of Labor regulation for employee of fiduciary); Donovan v. Cunningham, 541 F. Supp. 276, 279 n.1 (S.D. Tex 1982) (indemnification by employer in plan provision). The court rejected indemnification by employer of employee since the plan owned stock in the employer. *Id.* at 289, *rev'd in part on other grounds*, 716 F.2d 1455 (5th Cir. 1983).

168. H.R. Conf. Rep. No. 93-1280, at 320-21 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5101.

169. Employee Retirement Income Security Act (ERISA) of 1974, § 412, 29 U.S.C. § 1112 (1999).

170. *See* Geoffrey V. White, *Prudent Delegation of Trustees' Responsibilities to Professionals*, 29 LAB. L.J. 586, 587 (1978) (prudent person rule designed to keep amateurs out as fiduciaries of pension trusts).

171. *See generally* John L. Bayley, *A General Overview of Fiduciary Liability Insurance Coverage*, ELC GLASS CLE 619 (1998).

172. *See* Sandy Codding, *Analyzing the Fiduciary Liability Policy*, 339 PRACTICING LAW INSTITUTE/TAX 79, 84 (1993).

173. *See id.* at 81.

174. *See id.*

175. *See supra* note 154 and accompanying text.

176. *See* Fuller, *supra* note 154, at 37 (slight difference between the two).

177. *See generally* Bayley, *supra* note 171.

with the federal courts.[178] Consequently, the claim for contribution or indemnity almost always arises under the Federal Rules of Civil Procedure for counterclaims, if the co-fiduciary is already a party, and third-party claims, if the co-fiduciary is not already a party.[179]

B. DIFFERENCES BETWEEN ERISA TRUST LAW AND TRADITIONAL TRUST LAW

Traditional trust law does recognize contribution and indemnification for a jointly and severally liable fiduciary.[180] But traditional trust law also differs significantly from ERISA fiduciary law in several respects.[181] Employee benefit plans have large numbers of participants and involve enormous amounts of money.[182] ERISA fiduciaries frequently have interests adverse to those of the beneficiaries.[183] Consequently, Congress designed ERISA fiduciary law at variance from traditional trust law in several respects.

First, under traditional trust law the definition of the entity with the fiduciary responsibilities is much narrower. The fiduciary under traditional trust law is the entity holding title to the property,[184] not the entity with discretion over management, assets, or administration. Consequently, traditional trust law does not envision the fractionalization of fiduciaries present for an ERISA plan. Traditional trust law provides for a single trustee, whether an individual or a corporate fiduciary such as a bank trust department, or a set of co-trustees as the fiduciaries.[185] But where there are co-trustees, they perform the trusteeship functions jointly, acting with unanimity unless the settlor provides otherwise by the terms of the trust.[186] Moreover, because of traditional trust law's narrow definition of fiduciary, that law extends fiduciary liability to non-fiduciaries.[187] ERISA has no need for this rule since many of these non-fiduciaries participating in a fiduciary breach are themselves deemed fiduciaries under ERISA.[188]

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178. Employee Retirement Income Security Act (ERISA) of 1974, § 502 (e), 29 U.S.C. § 1132(e) (1999).

179. FED. R. CIV. P. 13 & 14.

180. *See supra* notes 32-36 and accompanying text.

181. This article does not intend to provide a complete discussion of the differences between ERISA's fiduciary rules and those of traditional trust law. It merely attempts to indicate that there are differences and focuses on those differences that should have a bearing on the issue of whether ERISA allows contribution and indemnity.

182. *See* S. REP. NO. 93-127, *supra* note 97, at 34, *reprinted in* 1974 U.S.C.C.A.N., at 4869-70.

183. Pegram v. Herdich, 530 U.S. 211, 225 (2000).

184. RESTATEMENT (SECOND) OF TRUSTS, § 2 (1959). "A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties . . . ." *Id.*

185. *See id.*

186. *See* RESTATEMENT (SECOND) OF TRUSTS, §§ 184 & 194 (1959). "If there are several trustees, each trustee is under a duty to the beneficiar[ies] to participate in the administration of the trust and to use reasonable care to prevent a co-trustee from committing a breach of trust, [and if necessary] to compel a co-trustee to redress a breach of trust." *Id.* § 184. "If there are two or more trustees, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust." *Id.* § 194.

187. *See* Smith v. Ayer, 101 U.S. 320, 325 (1879); BOGERT & BOGERT, *supra* note 17, § 90, at 304; RESTATEMENT (SECOND) OF TRUSTS §§ 281-295, 321-326 (1959).

188. *See* Reich v. Compton, 57 F.3d 270 (3d Cir. 1995); Reich v. Continental Casualty Co., 33 F.3d

Secondly, traditional trust law requires a fiduciary duty to treat multiple beneficiaries impartially.[189] ERISA plans have far more beneficiaries that do traditional trusts and so the potential for conflicting interests among beneficiaries is endemic. So ERISA contains no pronouncement of this fiduciary duty. Some courts, never the less, have operated under the assumption the exclusive benefit rule includes the impartiality duty.[190]

Thirdly, traditional trust law's co-fiduciary liability encompasses more than the three situations enumerated in ERISA. Under traditional trust law, participation and concealing is not limited by knowledge, concealing includes acquiescence and approval, and improper delegation to a co-trustee is an additional ground.[191]

Fourthly, the prudent person standard of traditional trust law is less strenuous than that of ERISA. Traditional trust law calls for the prudence a person would use for his own property.[192] ERISA's standard is that of an expert, namely one acting in like capacity, familiar with the transaction, and conducting an enterprise of like character.[193] As a result ERISA fiduciaries try to insulate themselves with paid expert witnesses at trial.[194] ERISA also allows adherence to modern portfolio theory,[195] while traditional trust law does not.[196]

Fifthly, the co-trustee liability provision for traditional trust law is more strenuous than that of ERISA. Traditional trust law requires the co-trustee to use reasonable care to prevent the co-trustee's breach, and compel the co-trustee to redress the breach.[197] ERISA, due to its fractionalization of fiduciaries, allows delegation of duties and insulation from liability.[198] So the requirement is to take reasonable steps to remedy the breach, if and when the co-fiduciary has

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754 (7th Cir. 1994); Reich v. Rowe, 20 F.3d 25, 32 (1st Cir. 1994) ("Congress decided that the best approach was to limit liability for non-fiduciaries, especially service providers, while at the same time increasing the number of fiduciary parties and the scope of fiduciary responsibility."); *see also* Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) (holding there is no damage action against non-fiduciaries, leaving open equitable relief against non-fiduciaries).

189. *See* RESTATEMENT (SECOND) OF TRUSTS, §§ 183 ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.") & 232 ("If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.").

190. *See* Oster v. Barco of California Employees' Retirement Plan, 869 F.2d 1215, 1217 (9th Cir. 1988); Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984); Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984).

191. *Compare* RESTATEMENT (SECOND) OF TRUSTS § 224(2) *with* Employee Retirement Income Security Act (ERISA) of 1974, § 405(a), 29 U.S.C. § 1105(a) (1999).

192. *See* RESTATEMENT (SECOND) OF TRUSTS § 174.

193. *See supra* notes 129-30 and accompanying text.

194. *See In re* Unysis Savings Plan Litigation, 173 F.3d 145, 156-57 (3d Cir. 1999) (rejecting an expert with less than stellar credentials); Howard v. Shay, 100 F.3d 1484, 1489-90 (9th Cir. 1996) (noting that an independent appraisal does not insulate a fiduciary).

195. *See* 29 C.F.R. § 2550.404a-1 (2001) (outlining the Department of Labor regulation on investment duties); Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc., 173 F.3d 313, 322 (5th Cir. 1999) (noting that modern portfolio managers allowed to use modern portfolio theory since 1979).

196. Traditional trust law judges riskiness of each investment in isolation from the others. *See* Leslie Joyner Bobo, Comment, *Nontraditonal Investments of Fiduciaries: Re-Examining the Prudent Investor Rule,* 33 EMORY L.J. 1067, 1077-78 (1984).

197. *See* RESTATEMENT (SECOND) OF TRUSTS § 184.

198. *See supra* notes 141-43 and accompanying text.

knowledge of the breach, not to enable, and not to participate in the breach.[199]

Seventhly, traditional trust law permits the trust documents to void any trust law rule,[200] contrary to ERISA's hierarchy placing the statute over the documents. Traditional trust law allows the trust documents to relieve trustees from fiduciary liability,[201] contrary to ERISA's non-exculpation scheme to insure plan recovery for defalcations by fiduciaries. Traditional trust law allows trustee liability insurance purchased by the trustee, as does ERISA. But traditional trust law does not allow the trust to purchase insurance for the trustee for trustee defalcations since the trust receives no benefit.[202] ERISA allows this latter insurance, if accompanied by recourse.[203]

So in interpreting ERISA's statutory provisions, the interpreter must bear in mind the both differing trust structure of an ERISA plan and the differing fiduciary law of ERISA from that of the traditional trust and its law. Similarly, a court can not just import a traditional trust law rule into the ERISA context without first insuring that such a rule comports with the remainder of ERISA's trust law.

C. ERISA LEGISLATIVE HISTORY CONCERNING THE FIDUCIARY PROVISIONS

The legislative history of ERISA bears out this scenario of raising the behavioral level of plan officials to that of a fiduciary along with the admonition to note the differences with traditional trust law.

Early efforts at pension reform revealed a substantial split between labor groups and business groups. In the 1950's Congressional hearings revealed abuses such as looting, corrupt administration, outrageous administrative and investment costs, and excessive investments in employer securities.[204] Since most abuses related to multi-employer plans controlled by labor groups, business groups opposed extension of the reform to private plans.[205] So only a much weakened disclosure act, the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), with no enforcement authority in any federal agency passed.[206] In the early 1960's a private report spawned a Presidential committee to respond to public outcries of the ineffectiveness of the WPPDA and the collapse of the

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199. *See supra* note 135 and accompanying text.

200. *See* RESTATEMENT (SECOND) OF TRUSTS § 164 (noting that instrument specifies the trustee's duties, and traditional trust law applies only when the instrument is silent); SCOTT & FRATCHER, *supra* note 17, § 164, at 250; BOGERT & BOGERT, *supra* note 17, §§ 42, at 432-433 & 541, at 161-62.

201. *See* RESTATEMENT (SECOND) OF TRUSTS, § 222 (1959) (noting that the trustee, by provisions in the trust, can be relieved of liability for breach of trust.). The two exceptions to this rule are for bad faith, intentional, or reckless behavior of the fiduciary and for abuse of a confidential relationship with the settlor. *Id.*

202. *See* BOGERT & BOGERT, *supra* note 17, § 599, at 500 (without support: as no advantage to the trust); *see also* SCOTT & FRATCHER, *supra* note 17, § 246-47, at 345-50 (trustee not entitled to reimbursement for contract or tort when no benefit is conferred on the trust).

203. *See supra* note 153 and accompanying text.

204. Michael Gordon, *Overview: Why Was ERISA Enacted?*, U.S. Senate, Special Comm. On Aging, *The Employee Retirement Income Security Act of 1974: The First Decade* 6 (1984).

205. *Id.* at 7.

206. *Id.* at 6.

Studebaker plan.[207] But the Presidential committee specifically recommended against the imposition of any federal fiduciary standards.[208]

In the mid-1960's, however, Senate hearings concerning the ineffectiveness of the WPPDA to deter abuse for multi-employer plans prompted Republican Senator Jacob K. Javits, a member of the committee conducting the hearings, to introduce a bill to amend the Labor Management Relations Act of 1947 (LMRA) by imposing fiduciary standards on multi-employer plans with the right to enforce lying both with the participants and the Department of Labor.[209] The Democratic Administration countered with a bill, also imposing fiduciary standards, to amend the WPPDA so that the fiduciary standards would also apply to private plans.[210] Javits introduced a more comprehensive bill in 1967 drafted by experienced labor lawyers serving the Senate Committee on Labor and Public Welfare.[211] Thereafter, the battle over the drafting and contents of ERISA was between the Senate Labor Subcommittee and the Administration.[212] In 1972, Democrat Senator Harrison Williams and Javits introduced a joint bill that replaced the original Javits proposal, retaining its structure and approach but with the Department of Labor supervision to gain Labor's support to offset an obvious business opposition to the substantive parts of the bill.[213] Williams served on the Senate Committee on Labor and Public Welfare, the other co-sponsor of the bill, and the floor manager of the bill.[214] The business groups preferred the Administration's bill.[215] Legislative maneuvering allowed the Senate Committee on Finance to gut the reforms, recommended unanimously by the Senate Labor and Welfare Committee, as affecting tax jurisdiction.[216] Public outcry, spawned by an impassioned speech by Javits, led to the staffs of the Senate Committees on Labor and Public Welfare and Finance to prepare a joint labor-tax bill embodying the Williams-Javits reforms, that ultimately passed.[217]

Since ERISA involved tax provisions, two committees in each house considered the matter, one for the labor provisions and one for the tax provisions. The fiduciary provisions, appearing in the labor portions of ERISA, came before the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor. Since the motivating force behind the bill

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207. *Id.* at 8-9.

208. *Id.* at 9.

209. *Id.* at 11; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (recognizing Javits as co-sponsor of the legislation). *See supra* note 213 and accompanying text (noting that although Javits became co-sponsor of ERISA, he was originally the sole sponsor of the legislation). By the time of the passage of ERISA, Javits was the ranking Republican on the Senate Committee on Labor and Public Welfare. 1974 U.S.C.C.A.N. XCII (showing Javits membership on the committee).

210. Gordon, *supra* note 204, at 11.

211. *Id.* at 12.

212. *Id.* at 14, 18.

213. *Id.* at 20.

214. *See* 1974 U.S.C.C.A.N. XCII; Theodore Paul Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 61 (1979); Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REFORM 109, 113 (1985).

215. Gordon, *supra* note 204, at 20.

216. *Id.* at 23.

217. *Id.* at 23-24.

were Senators Javits and Harrison, the report of their committee is essentially the voice of the draftsmen. As a result the report of the corresponding House committee merely parroted the Senate report, even where the House bill differed in language.[218] The report of the Senate Committee on Labor and Public Welfare prepared by the draftsmen of the legislation made it clear that these draftsmen lifted the fiduciary standards from traditional trust law.

> The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.
>
> . . . .
>
> [The act] incorporate[s] the core principles of fiduciary conduct as adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated . . . .[219]

These draftsmen did not blindly follow traditional trust law. They made those modifications they felt necessary to apply traditional trust law to employee benefit plans, specifically mentioning three characteristics of traditional trust law they wanted changed: (1) They desired the fiduciary standards to apply even if the funding mechanism was not in trust form, (2) they wanted the fiduciary standards to apply even if the settlor, the employer for many employee benefit plans, specified contrary rules, mentioning specifically the exculpation clause, and (3) they wanted uniform national rules.

> The section was deemed necessary for several reasons:
>
> First, a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable . . . . Second, even where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, *if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even*

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218. *See* George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 643-47 (1994) (discussing the deletion myth for the absence of legal remedies based on the differences in the two bills, yet the two reports say the same thing).

219. S. REP. NO. 93-127, at 29-30 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865-66. *Compare with* H.R. REP. NO. 533, at 12-13 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650-51.

> *thousands of participants, is quite different from the testamentary trust both in purpose and in nature.* Third, . . . a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act . . . .
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> . . . .
>
> There follows a list of proscriptions [the prohibited transactions] which represents the most serious type of fiduciary misconduct which in one way or another has occurred in connection with some welfare or pension plans . . . .[220]

Consequently, Congress specifically expressed its distaste for agreements that relieved fiduciaries from their liabilities that state courts then enforced under traditional trust law.

The report of the Senate Committee on Labor and Public Welfare as the report of the draftsmen, but not the parroted version of the House Committee on Education and Labor, went on to elaborate on a few of these modified trust law principles: (1) the prudent person standard should apply to all the fiduciary duties, not just investment, (2) the personal liability provisions were codified from the traditional law of trusts, and (3) fiduciaries could limit their liability by allocating duties amongst themselves.

> It is emphasized, however, that even with respect to the transactions expressly allowed, the fiduciary's conduct must be consistent with the prudent man standards . . . .
>
> Thus [by the codification of traditional trust law] a fiduciary is made personally liable for his breach of any responsibility, duty, or obligation owed to the fund, and must reimburse the fund for any loss resulting from such a breach. He must also pay over to the fund any personal profit realized through use of fund assets . . . .
>
> In this connection [referring to the ban on exculpatory provisions], it should be noted that while co-fiduciaries are permitted to allocate responsibilities among themselves and, by so doing, generally limit their liability to the extent of their specified duties, a co-fiduciary who has specific knowledge of a breach of trust committed by a co-fiduciary or who could have reasonably been expected to realize that another co-fiduciary was breaching his trust, can be held personally liable for failure to compel redress of the breach or prevent the breach . . . any fiduciary who breaches his trust is personally liable for losses resulting from such breach, and co-fiduciaries are jointly and severally liable . . . .[221]

After each house passed their bills, the conference committee, composed of those legislators most knowledgeable about the legislation, reported. Statements

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220. S. REP. NO. 93-127, *supra* note 97, at 29-30, *reprinted in* 1974 U.S.C.C.A.N., 4838, 4865-66 (emphasis added); H.R. REP. NO. 93-533, *supra* note 97, at 12-13, *reprinted in* 1974 U.S.C.C.A.N., 4639, 4649-51.

221. S. REP. NO. 93-127, *supra* note 97, at 31, 33, 34, 46-47, *reprinted in* 1974 U.S.C.C.A.N., 4838, 4867, 4869, 4870, 4882.

by the sponsors of the bill, the spokesmen for the draftsmen, made introducing the Conference Committee's report again indicated the traditional trust law source.

"The objectives of these [fiduciary] provisions are to make applicable the law of trusts . . . ."[222] The Conference Committee's report added information concerning the remedies available: (1) they were similar to those of traditional trust law, (2) a court could impose other appropriate relief, and (3) liability existed only while serving as a fiduciary.

> The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries . . . .
>
> Under the labor provisions (but not the tax provisions) of the substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach. Such a fiduciary is also to be liable for restoring to the plan any profits which he has made through the use of any plan asset. In addition, such a fiduciary is to be subject to other appropriate relief (including removal) as ordered by a court . . . .
>
> Generally, a plan fiduciary is not to be liable for any breach of fiduciary duty if it occurred before he became a fiduciary or after he was no longer a fiduciary.[223]

The conference report contained a long passage concerning co-fiduciary liability, including an admonition concerning the remedy.

> The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.[224]

The conference report directed the courts to consider the purposes of ERISA when interpreting the fiduciary standards.

> The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.[225]

D. THE PURPOSES OF THE ERISA FIDUCIARY PROVISIONS

There are two purposes that courts need to bear in mind when interpreting the ERISA fiduciary provisions.[226] The first deals with protecting the expectations of participants, the second, with fostering plan growth. The typical interplay is that participant expectations are protected by the higher behavioral standards contained in the labor portions of ERISA and plan growth is fostered by the tax subsidy contained in the tax sections of ERISA.

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222. 120 CONG. REC. S29,932 (daily ed. Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 1974 U.S.C.C.A.N., at 5186.

223. H.R. CONF. REP. NO. 93-1280, *supra* note 110, at 295, 320 (1974), *reprinted in* 1974 U.S.C.C.A.N., 5076, 5100.

224. *Id.* at 300, *reprinted in* 1974 U.S.C.C.A.N., at 5080.

225. *Id.* at 302, *reprinted in* 1974 U.S.C.C.A.N., at 5083.

226. *See* George Lee Flint, Jr., *ERISA: Reformulating the Federal Common Law for Plan Interpretation*, 32 SAN DIEGO L. REV. 955, 978-94 (1995).

But the efficacy of any tax subsidy depends on that subsidy exceeding the added cost of the compliance with the higher standards. So the test for any interpretation of the fiduciary sections of ERISA, including whether contribution and indemnity is included, is both to make sure the court rule protects the interests of participant, and also does not seriously adversely affect the costs of plan operation.[227]

To provide the appearance of independence some employers need to hire professional fiduciaries, such as bank trust departments or insurance company administrators. These entities are not likely to serve as fiduciaries unless they receive adequate compensation for exposing themselves to fiduciary liability, especially for the defalcations of other fiduciaries. To limit that liability, they negotiate for limited duties in the trust or administrative documents. Since ERISA prevents exculpation provisions or insurance paid for by the plan, these entities negotiate for employer paid insurance or raise their fees to cover such an added expense. In either case the cost of such insurance will be born by the plan, either through reduced employer contributions when the employer obtains the insurance or pays the fiduciary's fee or by paying the fiduciary fee. So the issue of whether these entities have the right to contribution and indemnity becomes important. They might not serve as fiduciaries[228] or at such a higher cost that might discourage the employer from adopting the plan or scaling it down.

III. POSITIONS OF THE COURTS AND COMMENTATORS

The Supreme Court has spelled out two approaches for determining whether a preemptive federal statute encompasses a certain remedy. Under the statutory construction method, the Supreme Court has mandated that the court examine four relevant factors: (1) the language of the statute, (2) the legislative history for the statute, (3) the underlying statutory scheme, and (4) the Congressional intent to supersede state law.[229] For ERISA the relevant statutory remedies provision, section 502(a), permits plan fiduciaries to bring civil actions in three situations: (1) for "appropriate relief" for breach of fiduciary duty, (2) to enjoin violations of the plan or ERISA, and (3) to obtain "other appropriate equitable relief" to redress such violations or enforce provisions of the plan or

227. *See* Varity v. Howe, 516 U.S. 489, 538 (1996) (Thomas, J., dissenting) (noting the importance of reducing employer costs so as not to discourage the growth of private pension plans); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 n.17 (1985) (same); Larocca v. Borden, Inc., 276 F.3d 22, 30 (1st Cir. 2002) (same); *see also* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 658 (1990) (Stevens, J., dissenting) (PBGC should favor alternatives that increase a company's use and maintenance of private pension plans); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 379-80 n.30 (1980) (expressing concern that right to go against employer assets not be so great as to discourage growth of private pension plans); *id.* at 385 n.35 (noting that banning employer liability disclaimer clauses would be inconsistent with Congress' intent to encourage maintenance of private pension plans); Employee Retirement Income Security Act (ERISA) of 1974 § 4002(a)(1), 29 U.S.C. §1302(a)(1) (2000) (PBGC created "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants.").

228. *See* NARDA, Inc. v. Rhode Island Hosp. Trust Nat'l Bank, 744 F.Supp. 685, 698 (D. Md. 1990) (absence of contribution or indemnity "would inhibit otherwise willing persons from agreeing to act" as fiduciaries for fear of becoming liable for acts of those over which they have no control without any possible legal recourse).

229. *See* Northwest Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 91 (1981).

ERISA.[230] So this approach would attempt to find that one of these actions encompasses contribution and indemnity.

Under the other method, federal common law implication, the Supreme Court has mandated the court examine a very similar set of four relevant factors: (1) whether the plaintiff belongs to the class for whose benefit Congress enacted the statute, (2) whether the legislative history shows an intent to create or deny the remedy, (3) whether the remedy comports with the legislative scheme, and (4) whether Congress traditionally relegates the subject matter to the states making implication of the remedy inappropriate.[231]

Three Circuit Courts have investigated whether ERISA permits contribution and indemnity. The earliest circuit, the Seventh Circuit, used the statutory construction method and found contribution and indemnity in the first action, as "appropriate relief" for breach of fiduciary duty. But the other federal courts have not followed the Seventh Circuit since the Supreme Court erroneously concluded that the language "appropriate relief" for the first action limits recovery to the plan, not a beneficiary[232] much less a fiduciary.

The latter two Circuit Courts, the Ninth and the Second Circuits, however, have failed to examine whether any of the other statutorily authorized actions permit contribution and indemnity. Instead, these Circuit Courts have boldly concluded that ERISA does not explicitly provide for contribution and indemnity due to the absence of the words "contribution and indemnity".[233] As a result of the assumption that ERISA contains no contribution and indemnity remedy, these Circuit Courts have focused on the implication method. Those courts focusing on the first factor, namely the class Congress intended to benefit, have concluded that ERISA bars contribution and indemnity. Those courts focusing on the second factor, namely the legislative history, have concluded that ERISA permits contribution and indemnity. Neither have examined whether contribution and indemnity comports with ERISA's liability and remedial schemes.

A. CONTRIBUTION AND INDEMNITY ALLOWED AS A REMEDY FOR FIDUCIARY BREACH

The Seventh Circuit found that "appropriate relief" for fiduciary breach

230. Employee Retirement Income Security Act (ERISA) of 1974, § 502(a)(2), (3), 29 U.S.C. § 1132(a) (1999) ("A civil action may be brought . . . (2) by . . . a fiduciary for appropriate relief under section 1109 [for breach of fiduciary duty], (3) by a . . . 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 . . . .").

231. *See* Cort v. Ash, 422 U.S. 66, 78 (1975).

232. *See* Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985); Employee Retirement Income Security Act (ERISA) of 1974, § 409(a), 29 U.S.C. § 1109(a) (1999); *see also infra* note 242 for an explanation of the Supreme Court's misconstruction of the provision.

233. *See* Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 15 (2d Cir. 1991); *cert. denied* 505 U.S. 1212 (1992); *see also* Kim v. Fujikawa, 871 F.2d 1427, 1432 (9th Cir. 1989) (searching only the discredited "equitable remedies" of ERISA, § 409(a), 29 U.S.C. §1109(a) (1999), for the remedy).

included contribution and indemnity.[234] Since the inactive trustee seeking contribution and indemnity conceded that the court should not seek contribution and indemnity under the federal common law, the Seventh Circuit focused on the statutory construction method.[235] So the Seventh Circuit sought consistency between the remedy of contribution and indemnity and the four factors for statutory construction: (1) the language of the statute, (2) the legislative history of the statute, (3) the purposes and structure of the statute, and (4) Congressional intent to supersede state law remedies.[236]

The court found the requisite statutory language for apportioning damages equitably among wrongdoers in "appropriate relief" for breach of fiduciary duty.[237] But the issue for finding contribution and indemnity in a preemptive federal statute is not whether such remedy could lie in certain language, but whether Congress designed the statutory language to compensate victims for negligent acts or to punish willful acts and whether the statutory language ameliorates any feasor wrongdoing.[238] The legislative history suggests punishment of skulduggery[239] and proscription of self-dealing.[240] But ERISA provides amelioration through insurance.[241] The Supreme Court holds that the language of this remedy provides compensation only for the plan, not a participant, much less a fiduciary.[242]

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234. *See* Free v. Briody, 732 F.2d 1331, 1336 (7th Cir. 1984); *see also* Donovan v. Robbins, 752 F.2d 1170, 1178 (7th Cir. 1985) (Posner assumed the result applies in using the proportionate fault rule to limit a non-settling fiduciary's right to contribution), 1183-86 (Coffey, J., concurring, reiterating the *Free* analysis to counter Posner's proportionate rule); Alton Mem'l Hosp. v. Metro. Life Ins. Co., 656 F.2d 245, 250 (7th Cir. 1981) (dicta); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 n.1 (W.D. Wis. 1979) (same); Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 453 (7th Cir. 1991) (stating non-settling fiduciary has no right to contribution after application of the proportionate rule). *See supra* note 82 and accompanying text for the proportionate rule. In *Free* a participant sued co-trustees, the controlling trustee for prohibited transactions and transfers to a purported investment advisor contrary to advise and the inactive trustee, a friend and insurance agent for the controlling trustee, for failure to supervise and control plan assets. The controlling trustee filed for bankruptcy. The inactive trustee cross-claimed against the controlling trustee. *Free*, 732 F.2d 1331 (quoting Alton Mem'l Hosp. v. Metro. Life Ins. Co., 656 F.2d 245, 250 (7th Cir. 1981)).

235. *See Free*, 732 F.2d at 1336.

236. *See id.* at 1336.

237. *See id.* at 1337; Employee Retirement Income Security Act of 1974, §§ 409(a), 502(a)(2), (3), 29 U.S.C. §§ 1109(a) ("such other equitable or remedial relief") & 1132(a)(2) (1999) ("appropriate relief under section 1109").

238. *See supra* notes 59-61 and accompanying text.

239. *See supra* notes 204-17 and accompanying text.

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

241. *See supra* notes 153-68 and accompanying text.

242. *See* Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985). The statutory provision states:

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

Employee Retirement Income Security Act (ERISA) of 1974, § 409(a), 29 U.S.C. § 1109(a) (1999). In interpreting "such other equitable or remedial relief" in the second clause for a beneficiary's damage action for improper claims processing, the Supreme Court focused on the remedy limitation in the first clause "to such plan" and "of such plan" in the first clause to rule such limitation also applied to the second clause, ignoring its separation from such language by the comma and the repetition of "shall". *See Massachusetts Mutual Life Ins. Co.*, 473 U.S. at 140. Realizing its mistake, the Supreme Court

The court found secondly that the legislative history of ERISA indicated an intent to codify the principles of traditional trust law, which includes contribution and indemnity.[243] This conclusion overstates the legislative history. That history clearly labels traditional trust law as a source, but requires modification to fit ERISA.[244] And the Seventh Circuit made no analysis as to whether contribution and indemnity fits the ERISA modified trust law.

The court found thirdly that the structure of ERISA revealed a purpose to prevent trustees from acting as insurers of co-fiduciary actions by limiting co-fiduciary liability to three circumstances and allowing the fiduciaries to allocate various functions and avoid liability for breaches allocated to another fiduciary.[245] The liability limitation noted by the Seventh Circuit does not indicate a desire not to have fiduciaries as insurers. Rather it reflects one of the major reasons for deviation from traditional trust law – namely, the large amounts of money contained in the plans. So these delegation and limitation provisions fragment the liability so as not to exceed the assets of the fiduciary. In other words, each fiduciary could be the insurer of a portion of the plan's assets or administration.

The court did not deal with the fourth factor since ERISA preemption of state law is statutory.[246] Consequently, the Seventh Circuit reversed the district court's dismissal of the contribution and indemnity cross-claim.[247]

The Seventh Circuit's rationale has not significantly influenced subsequent courts due to the Supreme Court's misinterpretation of the ERISA fiduciary breach remedy relied upon by the Seventh Circuit.[248] The Supreme Court read ERISA's fiduciary breach section as providing only the plan a remedy.[249] Consequently, one renegade district court judge in the Seventh Circuit has concluded co-fiduciaries have no right to contribution and indemnity under ERISA.[250] Never the less, other judges in district courts in the Seventh Circuit

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subsequently has authorized beneficiary reinstatement in welfare plans for the fiduciary breach of supplying misinformation, not under Employee Retirement Income Security Act of 1974, §§ 409(a) & 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2) (1999), but under "other appropriate equitable relief" of Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3) (1999). *See* Varity Corp. v. Howe, 516 U.S. 489, 509-10 (1996). In other words a fiduciary breach warrants recovery by the plan under ERISA § 502(a)(2) and by the beneficiary under ERISA § 502(a)(3)(B).

243. *See Free*, 732 F.2d at 1337; *see supra* note 219 and accompanying text for codification of traditional trust law and *supra* notes 34-35 and accompanying text for traditional trust law.

244. *See supra* note 221 and accompanying text.

245. *See Free*, 732 F.2d at 1337; *see supra* notes 136-43 and accompanying text for the structure of co-fiduciary liability and the separation technique of avoiding liability.

246. *See* Employee Retirement Income Security Act (ERISA) of 1974, § 514, 29 U.S.C. § 1144 (2000).

247. *See Free*, 732 F.2d at 1338. Subsequent courts, however, have described this conclusion as dicta. *See Donvan v. Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1985); Mutual Life Ins. Co. of N.Y. v. Yampol, 706 F. Supp. 596, 599 (N.D. Ill. 1989) (so the court could dismiss the opinion as not binding and find no ERISA right to contribution and indemnity).

248. *See Yampol*, 706 F. Supp. at 598-599 (rejecting *Free v. Briody*, due to the Supreme Court pronouncement).

249. *See supra* note 242 and accompanying text.

250. *See Yampol*, 706 F. Supp. at 596 (Leinenweber, J.); *accord* Plumbers Local 93 Health and Welfare Pension Fund v. Dipietro Plumbing Co., No. 94-C-7378, 1999 WL 301666 *4 (N.D. Ill. Apr. 30, 1991) (Leinenweber following *Yampol*). In *Yampol* the claims administrator, as assignee of the trust liquidator, brought suit against the trustees for breaches of fiduciary duty. The trustees cross-claimed

continue to follow the directive[251] as has a district court in the Fourth Circuit.[252] A district court in the Ninth[253] Circuit has revised the Seventh Circuit's rationale and followed it. That district court avoided the Ninth Circuit's pronouncement that ERISA does not include contribution and indemnity[254] by noting that those opinions dealt with claims under ERISA for fiduciary breach[255] and not for "other appropriate equitable relief" to redress violations.[256] Using the Seventh Circuit rationale, the court only need consider whether contribution and indemnity fits the statutory language of ERISA for "other appropriate equitable relief", namely they are equitable and seek to redress violations of the plan, the first step of the Seventh Circuit's analysis. The court found the remedy equitable.[257] And miscalculation dealt with plan terms.[258] So ERISA permits contribution and indemnity.

B. IMPLIED CONTRIBUTION AND INDEMNITY REMEDY BARRED

The Ninth Circuit is the leading proponent that ERISA does not permit contribution and indemnity.[259] Since the paying fiduciary counterclaimed under ERISA's fiduciary breach action, the Ninth Circuit viewed the action as one involving statutory construction for breach of fiduciary duty for which the

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and brought a third-party claim against the investment advisors. In *Plumbers Local 93* the trustees brought an action against one successor employer for delinquent contributions of the original employer. The successor employer, as a non-settling fiduciary, claimed the right of contribution under the proportionate rule. *See infra* note 82 and accompanying text for the proportionate rule. *Yampol's* rationale followed *Free,* 732 F.2d at 1336-38, except it found no statutory language in ERISA , no ERISA legislative history, and, in light of *Massachusetts Mutual Life Ins. Co.,* 473 U.S. 134, no statutory purpose or structure supportive of contribution and indemnity.

251. *See* Harris Trust & Savings Bank v. Salomon Brothers, Inc., 832 F. Supp. 1169, 1177-79 (N.D. Ill. 1993) (following *Lumpkin,* 933 F.2d at 464); Anderson v. Rockford Products Corp., No. 92C – 20125, 1992 WL 390781 *4 (N.D. Ill. Dec. 22, 1992) (following *Free,* 732 F.2d at 1337). In *Harris* the trustees brought an action against the investment advisor for knowingly participating in a fiduciary breach by another fiduciary. The investment advisor counterclaimed for contribution. In *Anderson* a beneficiary sued the employer for denial of benefits. The employer filed a third-party claim against the outside administrator for failing to investigate the claim, failing to keep records of the claim denial, and failing to act in accordance with industry standards.

252. *See* Brock v. Gillikin, 677 F. Supp. 398, 402 (E.D.N.C. 1987) (following *Free,* 732 F.2d at 1337). In *Gillikin,* the Department of Labor sued the trustee for breach of the exclusive benefit rule and engaging in prohibited transactions. The trustee brought a third-party action against the employer for indemnification. The court denied relief since the employer was the inactive fiduciary. *Id.*

253. *See* Youngberg v. Bekins Co., 930 F. Supp. 1396, 1398 (E.D. Cal. 1996). In *Youngberg,* a beneficiary sued the employer and outside plan administrator for denied benefits due to a miscalculation. The employer cross-claimed against the plan administrator for indemnification. *Id.*

254. *See infra* notes 259-65 and accompanying text.

255. Employee Retirement Income Security Act of 1974, §§ 409(a) & 502(a)(2), 29 U.S.C. §§ 1109(a) & 1132(a)(2) (2000).

256. *Youngberg,* 930 F. Supp. at 1399-1400; Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (1999).

257. *Youngberg,* 930 F. Supp. at 1400 (citing 29 U.S.C. § 1132(a)(3)).

258. *Youngberg,* 930 F. Supp. at 1401.

259. *See* Kim v. Fujikawa, 871 F.2d 1427, 1432 (9thCir. 1989); *accord* Call v. Sumitomo Bank of Calif., 881 F.2d 626, 630-31 (9thCir. 1989). In *Kim,* a management trustee of a multi-employer plan sued a union trustee for using plan funds to pay union salaries. The court assessed the union trustee with the entire cost of the prohibited transaction. The union trustee counter-sued for contribution from the management trustee and brought a third-party claim against the other plan trustees. *Kim,* 871 F.2d at 1432. For the facts of *Call, see supra* notes 1-3 and accompanying text.

Supreme Court has decreed only the plan may recover.[260] So a breaching fiduciary can have no equitable remedy of contribution.[261] District courts in the Ninth Circuit have followed this conclusion even when the fiduciary brings a counterclaim or third-party action under another section of ERISA.[262]

The Ninth Circuit, fearing that following the Supreme Court's mistake under the fiduciary breach remedy alone might not convince, went further and investigated two of the factors from the implication method. The Ninth Circuit noted that Congress enacted ERISA to protect participants, not fiduciaries.[263] This observation failed to investigate the possibility of an indirect benefit to participants from apportionment of liability amongst culpable fiduciaries. The Ninth Circuit then concluded that adding the additional remedy of contribution and indemnity would not comport with the Supreme Court's alleged reticulated ERISA remedial scheme.[264] The issue for finding contribution and indemnity in a preemptive federal statute is not whether the remedy would add to the statutory scheme, but whether Congress designed the statutory scheme to compensate victims for negligent acts or to punish willful acts and whether the statutory scheme ameliorates any feasor wrongdoing.[265]

District Courts in the Eighth[266] and Eleventh[267] Circuits have followed this lead. Some courts in the Fourth,[268] Fifth,[269] and Sixth[270] Circuits have concurred

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260. *See Kim*, 871 F.2d at 1431.

261. *See id.* at 1432.

262. *See* Meoli v. American Medical Services of San Diego, 35 F. Supp. 2d 761, 763-64 (S.D. Cal. 1999) (extending the rationale of *Kim* to actions under Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (1999), and to indemnity); Moreland v. Behl, 1995 WL 150579, *4 (N.D. Cal.) (reasoning of *Kim*, 871 F.2d at 1432 applies); Rossio v. Massachusetts Mutual Life Ins. Co., 789 F. Supp. 1047 (E.D. Cal. 1992) (same); *contra* Youngberg v. Bekins Co., 930 F. Supp. 1396, 1401 (E.D. Cal. 1996). In *Meoli*, participants sued the trustees and plan administrators for mismanagement. The trustees and plan administrators counterclaimed against certain participants who served on an advisory committee for failure to direct the trustees, to give notices with respect to the plan, and to remedy participant filed grievances. *Meoli*, 35 F.Supp. at 2. In *Moreland*, individual clients of an accountant sued the seller of Voluntary Employee Benefit Association programs for breaches of fiduciary duty and prohibited transactions. The seller filed a third-party claim against the accountant for contribution and indemnity. *Moreland*, 1995 WL 150579 at *1. In *Rossio*, the trustees sued the sponsor of a proto-type plan and the outside plan administrators. The sponsor counterclaimed against the trustees and cross-claimed against the administrators for contribution and indemnity. *Rossio*, 789 F.Supp. at 1048-50. For the facts of *Youngberg*, *see supra* note 253.

263. *See Kim*, 871 F.2d at 1433. The Ninth Circuit bolstered this conclusion by noting that Congress intended ERISA to regulate fiduciaries, not to soften their liability for wrongdoing. *Id.* at 1433.

264. *See id.* at 1432. The reticulated remedy scheme comes from *Massachusetts Mut. Life Ins. Co. v. Russell* ,473 U.S. 134, 176 (1984).

265. *See supra* notes 59-61 and accompanying text.

266. *See* Physicians Healthchoice, Inc. v. Trustees of Automotive Employee Ben. Trust., 764 F. Supp. 1360 (D. Minn. 1991) (following *Kim*, 871 F.2d at 1432); Hunt v. Magnell, 766 F. Supp. 727 (D. Minn. 1990) (same). In *Physicians Healthchoice*, the plan administrator sued the plan trustees for mismanagement. The trustees counterclaimed for contribution and indemnity. *Physicians Healthchoice*, 764 F.Supp. at 1361. In *Hunt*, participants sued trustees for risky investments. The trustees brought third-party claims for contribution against the plan administrator. *Hunt*, 766 F.Supp. at 728.

267. *See* Hollingshead v. Burford Equipment Co., 747 F. Supp. 1421 (M.D. Ala. 1990) (following the rationale of *Kim*, 871 F.2d at 1432.). In *Hollingshead*, participants sued the employer contending the employer had established a plan. The employer brought a third-party complaint against a director for indemnification. *Hollingshead*, 747 F.Supp. at 1425.

268. *See* NARDA, Inc. v. Rhode Island Hosp. Trust Nat'l Bank, 744 F. Supp. 685, 695-98 (D. Md. 1990). In *NARDA* the association-sponsor of a self-funded welfare plan sued the service provider Bank that collected the payments for premiums, the administrator, and the insurance company for

in the conclusion. Two of these district courts changed the argument to fit the ERISA remedy for violation of plan terms.[271] These courts contended this remedy did not apply to a fiduciary breach as did the ERISA fiduciary breach remedy.[272] These courts concluded that fiduciaries do not need contribution and indemnity since (1) they are only liable as fiduciaries to the extent they exercise discretion, (2) they have narrower co-fiduciary liability than under traditional trust law, and (3) they can allocate responsibility and thereby limit liability.[273] This analysis again fails to confront the issues needed to determine whether Congress included contribution and indemnity in a preemptive federal statute.

Some courts in the Ninth Circuit have tried to get around their Circuit's ban on contribution and indemnity. One method allows indemnity by limiting the facts of the Ninth Circuit's cases to their facts, which involved contribution.[274] Another method is to bring a suit or cross-claim against the co-fiduciary on behalf of the plan for breach of fiduciary duty, rather than a third party claim or cross claim for contribution and indemnity, a technique approved by the Ninth Circuit.[275] This technique, however, does not work for all fiduciaries. Former fiduciaries lack standing to bring an ERISA action.[276]

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mismanagement of the funds. The defendants counterclaimed against the association, which along with the Bank sought indemnification. *Id.* At 687-88.

269. *See* Lawrence v. Jackson Mach. Sales, Inc., 837 F. Supp. 771, 791 (S.D. Miss. 1992) (following a non-fiduciary contribution case); Schloegel v. Boswell, 766 F. Supp. 563, 565 (S.D. Miss. 1991) (agreeing with *Mutual Life Ins. Co. of New York v.Yampol*, 706 F. Supp. 596 (N.D. Ill. 1989), the renegade Seventh Circuit opinion). In *Lawrence*, a participant sued the employer and insurance company administrator for benefits due under COBRA. The employer cross-claimed against the insurance company. *Lawrence*, 837 F.Supp. at 775-77. In *Schloegel*, a participant and plan sued an insurance agent for mis-advice concerning a life insurance investment for his profit-sharing account. The agent counter-sued the plan and brought a third-party action against the employer. *Schloegel*, 766 F.Supp. at 564-65.

270. *See* Roberts v. Taussig, 39 F. Supp. 2d 1010 (N.D. Ohio 1999) (following *NARDA*, 744 F. Supp. at 695-98 and *Schloegel*, 766 F. Supp. at 567); Daniels v. Nat'l Employee Benefit Servs., Inc., 877 F. Supp. 1067, 1074 (N.D. Ohio 1995) (following *Schloegel*, 766 F.Supp. at 563; and *Yampol*, 706 F.Supp. at 596). In *Roberts*, a former plan administrator sued the employer for diverting sale proceeds from an employee stock ownership plan. The employer counterclaimed for equitable indemnification. *Roberts*, 39 F.Supp. at 1010. In *Daniels*, plan trustees sued the plan administrator for fraudulently selling securities to the plans while receiving commissions. The plan administrator cross-claimed against the trustees. *Daniels*, 877 F.Supp. at 1069-70.

271. Employee Retirement Income Security Act (ERISA) of 1974, § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1999).

272. Employee Retirement Income Security Act (ERISA) of 1974, § 409(a), 29 U.S.C. § 1109(a) (1999). This conclusion is erroneous. One of the fiduciary duties is to follow the plan terms. Employee Retirement Income Security Act (ERISA) of 1974, § 405(a)(1)(D), 20 U.S.C. § 1105(a)(1)(D) (1999).

273. *See NARDA*, 744 F. Supp. at 698; *Roberts*, 39 F. Supp. 2d at 1012 (following *NARDA*, 774 F.Supp. 685 (D. Md. 1990)).

274. *See* Youngberg v. Bekins Co., 930 F. Supp. 1396 (E.D. Cal. 1996); *but see* Meoli v. American Medical Servs. of San Diego, 35 F. Supp. 2d 761 (S.D. Cal. 1999) (rejecting the distinction); *but cf.* Schloegel v. Boswell, 766 F. Supp. 563 (S.D. Miss. 1991) (agreeing with the Fifth Circuit).

275. *See* Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995); Schraeder v. Hamilton, 959 F. Supp. 1205, 1208 & 1210 n.8 (C.D. Cal. 1997).

276. *See, e.g.*, Corbin v. Blankenberg, 39 F.3d 650, 652-53 (6thCir. 1994), *cert. denied*, 513 U.S. 1192 (1995) (no abatement of suit brought while a fiduciary since successor takes over); Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 14 (2d Cir. 1991); Blackmar v. Lichtenstein, 603 F.3d 1306, 1310 (8th Cir. 1979).

C. CONTRIBUTION AND INDEMNITY ALLOWED AS A TRADITIONAL TRUST LAW REMEDY

The Second Circuit is the leading proponent that ERISA allows contribution and indemnity.[277] Since the paying fiduciary conceded that ERISA had no language for contribution and indemnity and presented the issue as one of implying the remedy, the Second Circuit noted Supreme Court pronouncements directing the federal courts to develop a federal common law of ERISA and to apply principles of the common law of trusts to ERISA fiduciaries.[278] Concluding that the federal courts were authorized to use traditional trust law in fashioning that federal common law, the Second Circuit noted that a universally recognized trust law permits contribution and indemnity.[279] So ERISA includes the right of contribution and indemnity. This conclusion again overstates the legislative history, which clearly labels traditional trust law as a source, but requires modification to fit ERISA.[280] The Second Circuit then noted that such a remedy had no financial impact on participants, comported with the fairness principle that liability should lie with those responsible, and avoided liability based solely on the plaintiff's choice of defendant.[281] This observation reveals the real problem with denying contribution and indemnity. It runs counter to the American sense of fairness.[282]

The Second Circuit's majority opinion, however, spawned a dissent. The dissent felt that Congress had considered the matter and had not provided the remedy.[283] The co-fiduciary liability provision evidenced Congressional awareness of the problem and language of incorporating traditional trust law revealed Congressional awareness of the remedy. But the dissenter did not delineate any language or provisions counter to contribution and indemnity. Consequently, district courts in the Second Circuit have followed the majority's conclusion.[284]

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277. *See* Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 16 (2d Cir. 1991); *see also* In re Masters, Mates & Pilots Pension Plan, 957 F.2d 1020 (2d Cir. 1992) (settlement without approval of non-settling co-fiduciaries is improper because it precluded their subsequently seeking contribution if themselves adjudged liable); Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1241 (2d Cir. 1989) (stating in dicta that trustees might be liable for separate suits for contribution or indemnity brought by co-fiduciaries). In *Chemung Canal Trust Co.*, the original trustee engaged in imprudent investments and prohibited transactions. The second succeeding trustee brought an action against the first succeeding trustee for recovery of losses from lack of prudence with respect to the original investments. The first succeeding trustee, if found liable, sought contribution and indemnity from the employer for failing to monitor the original trustee and the second succeeding trustee for not adequately pursuing the plan's claims.

278. *See Chemung Canal Trust Co.*, 939 F.2d at 16 (Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) for the directive and Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) for using trust law).

279. *See Chemung Canal Trust Co.*, 939 F.2d at 16 (citing the Restatement (Second) of Trusts § 258 (1959) and George Gleason Bogert, *The Law of Trusts and Trustees*, § 701 (2d ed. Rev. 1982)).

280. *See supra* note 221 and accompanying text.

281. *See Chemung Canal Trust Co.*, 939 F.2d at 16.

282. *See* Posner, *supra* note 94, at 313-15 (describing Aristotle's corrective justice remedy applicable to torts and contracts as taking away the gain of the feasor or restoring equality); ARISTOTLE, NICHOMACHEAN ETHICS 121 (Martin Ostwald, trans., Bobbs-Merrill ed., 1962).

283. *See Chemung Canal Trust Co.*, 939 F.2d at 18-19.

284. *See* Brock v. Group Legal Administrators, Inc., 702 F. Supp. 475, 476 (S.D.N.Y. 1989) (contribution and indemnity are equitable actions so no jury trial). In *Brock* the Department of Labor

District courts in the First [285] and Third[286] Circuits also have followed the lead of the majority in the Second Circuit. So have some district courts in the Fourth,[287] Fifth[288] and Eleventh[289] Circuits. A district court in the Tenth Circuit[290] has concurred in the conclusion. That district court used the four-factor analysis of the Supreme Court's implication method.[291] For the four points, the court found firstly Congress designated the participants as the protected class and contribution and indemnification indirectly benefits them by enhancing the deterrent effect. Secondly, there is evidence Congress intended to incorporate traditional trust law into ERISA. This conclusion again overstates the legislative history, which clearly labels traditional trust law as a source, but requires modification to fit ERISA.[292] Thirdly, the remedy is consistent with the statute by providing a remedial relationship between co-fiduciaries as well as those stated in ERISA. This analysis again fails to confront the issues needed to determine whether Congress included contribution and indemnity in a preemptive federal statute.[293] The issue for finding contribution and indemnity in a preemptive federal statute is not whether the remedy does not comport with the statutory scheme, but whether Congress designed the statutory scheme to

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sued the trustees for restitution for purchasing a prepaid legal services contract and failing to monitor the actions of the service provider. The trustees cross-claimed against the service provider. *Id.*

285. *See* Duncan v. Santaniello, 900 F. Supp. 547, 550 (D. Mass. 1995) (relying on the analysis of *Chemung Canal Trust Co.*, 939 F.2d at 16). In *Duncan* the current trustees brought an action against the lawyers advising the former trustees concerning a prohibited transaction entered into without a Department of Labor ruling. The lawyers brought a third-party action for contribution and indemnity against the former trustees. The lawyers had counseled against the transaction unless the plan obtained a Department of Labor exemption ruling and had so prepared the documents.

286. *See* McCurdy v. Wedgewood Capital Management Co., Inc., 1999 W.L. 554590 (E.D. Pa.) (relying on the analysis of *Chemung Canal Trust Co.*, 939 F.2d at 16); Green v. William Mason & Co., 976 F. Supp. 298, 301 (D.N.J. 1997) (same); Cohen v. Baker, 845 F. Supp. 289, 291 (E.D. Pa. 1994) (same). In *McCurdy* the trustee sued the investment manager. The investment manager brought a third-party action against the investment advisor and its own chief investment officer during the relevant time period. In *Green* the trustees sued the investment advisor and investment manager concerning certain inappropriate investments. The investment advisor counterclaimed for contribution and indemnity against the trustees since they had access to the same information as the investment advisor and failed to prevent the plan losses. In *Cohen* the beneficiaries sued the trustees for investments in certificate of deposits over the federally guaranteed amount. The trustees brought a third-party action for contribution and indemnity against the beneficiaries, as administrators, since they selected the investment vehicle.

287. *See* Cooper v. Kossan, 993 F. Supp. 375 (E.D. Va. 1998) (relying on the analysis of *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12, 16 (2nd Cir. 1991). In *Cooper* participants sued one trustee for moneys borrowed. That trustee brought a third-party claim against another trustee for contribution. *Id.*

288. *See* Maher v. Strachan Shipping Co., 817 F. Supp. 43, 44 (E.D. La. 1993) (adopting analysis of the Second Circuit). In *Maher* beneficiaries sued the employer for terminating the plan and purchasing an annuity benefit. The employer filed a third-party complaint against the outside plan administrator for aiding and abetting and recommending the purchase. *Id.*

289. *See* Jones v. Trevor, Stewart, Burton and Jacobsen, Inc., 1992 WL 252137 (N.D. Ga. 1992) (adopting the analysis of *Chemung Canal Trust Co.*, 939 F.2d at 16). In *Jones* the trustees sued a former investment manager for mismanagement. The investment manager counterclaimed against the trustees and investment advisor for contribution and indemnity for inadequate monitoring and advisement. *Id.*

290. *See* Emmons v. Equitable Life Assurance Soc'y of the United States, 799 F. Supp. 1123, 1125 (D. N.M. 1992) (noting the analysis of *Chemung Canal Trust Co.*, 939 F.2d at 16). In *Emmons* a beneficiary sued the employer and outside plan administrator for terminating his disability coverage when the plan administrator had never advised of continuation options. The employer cross-claimed against the plan administrator for indemnity.

291. *See* Cort v. Ash, 422 U.S. 66, 78 (1975).

292. *See supra* note 221 and accompanying text.

293. *See supra* notes 59-61 and accompanying text.

compensate victims for negligent acts or to punish willful acts and whether the statutory scheme ameliorates any feasor wrongdoing.[294] Fourthly, state law is preempted by ERISA expressly.

D. OPINIONS OF THE COMMENTATORS

Various commentators have examined the issue of whether ERISA includes a remedy of contribution and indemnity for breaching fiduciaries. The early commentators, law students, favored allowing contribution and indemnity. The later commentators, practitioners and law professors, opposed extending contribution and indemnity to ERISA. None have examined the indemnity and exculpation provisions of ERISA in their analysis. They also make no distinction between equitable contribution and indemnity and legal contribution and indemnity.

1. Favorable Commentators

The earliest commentator appeared shortly after the Ninth Circuit's opinion denying contribution requested under "appropriate relief" for fiduciary breach.[295] Consequently, the commentator confined his comments to contribution.[296] This commentator had two arguments favoring contribution for ERISA, both focusing on "other appropriate equitable relief" to redress violations of ERISA or the plan.[297] The Supreme Court's pronouncement that only the plan can recover under the fiduciary breach action does not apply to this section.[298] The first argument dealt with the express language. Since contribution is an equitable remedy, at least for a trustee's breach of fiduciary duty, it is "equitable".[299] Allowing contribution to a passive trustee is "appropriate".[300] This conclusion ignores the ERISA co-fiduciary liability provisions, which the courts claim require some monitoring and are violated by mere inattentiveness, that is, being passive.[301]

The second argument involved implication of the remedy. Using the above language for the statutory language requirement and skipping over the structure of the statute requirement, this commentator dwelled on legislative history, namely the pronouncements for the "full range of legal and equitable remedies," the statements concerning the incorporation of traditional trust law, and the directive to develop federal common law.[302] Since contribution is within the

294. *See supra* notes 59-61 and accompanying text.

295. *See* Paul James Hunt, *Bucking the Trend: An Argument in Favor of a Fiduciary's Implied Right to Contribution Under ERISA*, 76 VA. L. REV. 1377 (1990); *see also* Employee Retirement Income Security Act (ERISA) of 1974 §§ 409(a) & 502(a)(2), 29 U.S.C. §§ 1109(a) & 1132(a)(2) (1999).

296. *See* Hunt, *supra* note 295, at 1377 n.2.

297. *See* Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1999).

298. *See* Hunt, *supra* note 295, at 1387.

299. *See id.* at 1396-97.

300. *See id.* at 1397.

301. *See supra* notes 137-38 and accompanying text.

302. *See* Hunt, *supra* note 295, at 1399-1401. For a discussion of the "full range" of remedies, *see* Flint, *supra* note 218, at 642-59. For a discussion of the incorporation of traditional trust law, *see supra*

ambit of trust law, a court may imply the remedy.[303] The function of the legislative history requirement of the Supreme Court's implication method is to locate something relative to contribution and indemnity, that is apportionment or reimbursement. Mere statements of a general nature are not sufficient to convince.

This law student commentator then provided three policy reasons for allowing contribution for ERISA actions, namely the contribution action would (1) produce more evidence to prove the breach of fiduciary duty action from the fiduciary trying to shift the loss, (2) remove collusion between the plaintiff and the active breaching fiduciary to sue the passive fiduciary, and (3) avoid non-deterrence by a fiduciary willing to gamble it will not be the one sued.[304] This commentator never examined the structure of ERISA to determine either "appropriateness" for the express language argument or as an element of the implication argument.

The second commentator focused on policy arguments to determine that ERISA should include contribution and indemnity, whether by court decision or Congressional legislation.[305] Since the court's task is to fathom Congressional intentions for ERISA, her comments are not likely to bear heavily on the judges. This commentator considered three policies, one against contribution, namely the efficiency requirement, and two for contribution, namely the fairness doctrine and the historical trend. This commentator outlined the law-and-economic jurisprudential school's position against contribution for torts, examines its assumptions, and shows their inapplicability to ERISA fiduciary breaches.[306] She noted that the Supreme Court has rejected efficiency as a reason to oppose contribution for the admiralty laws.[307] She also noted that, other than for misappropriation of plan funds, ERISA fiduciary breaches yield little profit to the fiduciary and so fiduciaries will view the penalty of total liability as excessive, increasing plan costs counter to one of ERISA's purposes.[308]

This commentator's examination of the fairness doctrine indicated that ERISA acerbates the unfairness of a no contribution rule.[309] Among the acerbations are (1) the inability of former fiduciaries to bring a lawsuit under ERISA so they can not avail themselves of the alternative technique described above to hold the other fiduciaries liable,[310] (2) collusive settlements under a no contribution rule where a favored defendant exchanges information for a small amount for an agreement not to sue, leaving the other fiduciaries with a greater liability, a situation likely to be endemic with ERISA's fractionalized

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notes 180-203 and accompanying text. For a discussion of the development of federal common law, *see id.* at 970-78.

303. *See* Hunt, *supra* note 295, at 1402-03.

304. *See id.* at 1405-06.

305. *See* Di Cola, *supra* note 6.

306. *See id.* at 1553-62; *see also supra* notes 86-93 and accompanying text.

307. *See* Di Cola, *supra* note 6, at 1561; *see also supra* note 52.

308. *See* Di Cola, *supra* note 6, at 1571-73.

309. *See id.* at 1562-71.

310. *See id.* at 1565-67; *see also supra* note 276 and accompanying text.

fiduciaries,[311] (3) "whipsaw" settlement tactics forcing higher settlements to avoid being the last one holding the bag, a tactic already used by the Department of Labor in ERISA actions,[312] and (4) the inability to escape liability by appointing an expert to handle the matter due to ERISA's requirement to monitor the expert.[313]

Lastly, this law-student commentator noted that the historical trend is toward allowing contribution, noting the cases of torts, securities laws, and the environmental laws.[314] Unfortunately, she saw only the anti-trust laws as an anomaly,[315] overlooking the other fields, some of which include the securities laws.[316] Again this commentator did not examine the structure of the statute for clues on the issue.

The third commentator [317] noted further acerbations, namely (1) the fractionalization of ERISA fiduciaries renders liable those not knowing they are fiduciaries and hence do not purchase fiduciary liability insurance[318] and (2) ERISA preemption, which prevents application of traditional trust law's contribution and indemnity remedies.[319]

This commentator then proceeded with the Supreme Court's directions, to imply the remedy from the language of the statute or under the federal common law. For the implication argument this commentator focused both on the language for breach of a fiduciary duty, limiting derogatory remarks of the Supreme Court and limiting the section to remedies of the plan to the facts of that case, namely it applies only to extra-contractual damages, and the language for violations of the statute or plan.[320] He also asserted that since contribution and indemnity are procedural devices to give substance to another remedy, namely the right for the plan to recover, that the strict implication requirements of the Supreme Court do not apply.[321] For the legislative intent this commentator relied on the full range of legal and equitable remedies language and codification of traditional trust law language.[322] As for the purposes of ERISA, this commentator claimed that allowing contribution will facilitate making the plan whole since more deep pockets will be available.[323] This advantage may be insignificant, since the plan can sue as many fiduciaries as

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311. *See* Di Cola, *supra* note 6, at 1567-68.

312. *See id.* at 1568-69.

313. *See id.* at 1570-71; *see also supra* notes 138 & 194 and accompanying text.

314. *See* Di Cola, *supra* note 6, at 1575-85.

315. *See id.* at 1586-89.

316. *See supra* notes 54-58 and accompanying text.

317. *See* John A. Pereira, Note, *A Fiduciary's Right to Contribution or Indemnity Under ERISA*, 21 OKLA. CITY U. L. REV. 507 (1996).

318. *See id.* at 531; *see, e.g.*,Chapman v. Klemick, 750 F. Supp. 520, 524 (S.D. Fla. 1990) (finding beneficiary's attorney a plan fiduciary where attorney advised client not to pay insurance recoveries under subrogation agreement with plan since beneficiary was judgment proof and could declare bankruptcy, thus deterring the plan from suing under the subrogation agreement).

319. *See* Pereira, *supra* note 317, at 532.

320. *See id.* at 542, 546 & 557.

321. *See id.*

322. *See id.* at 549.

323. *See id.* at 551; *see* Arthur H. Kroll, *ERISA Fiduciaries' Rights of Contribution*, 7 OCT PROBATE & PROPERTY 39, 40 (1993).

needed until recovery is complete, and failing to do so due to under-settlements would make the current fiduciaries liable.

For the federal common law argument, this law student commentator relied on language in a concurrence that "other appropriate equitable relief" is a license to fine tune ERISA's remedial scheme and language in a court syllabus that principles of trust law must guide the court.[324] Consequently, this commentator concluded that the no contribution rule fails to follow the guide of the principles of trust law.[325] This commentator, however, did not investigate the exculpation provisions. For him they constituted merely an amelioration of the acerbations caused by ERISA.[326]

2. *Unfavorable Commentators*

The more recent commentators adopted a position opposite to the law-student commentators. But they were interested solely in the federal common law, and so their comments on the issue of contribution and indemnity were brief and served only as a part of a larger criticism.

The earliest of these commentators attacked a few of the points of the last student commentator. A court needed more than a mere lack of Congressional prohibition to imply contribution and indemnity.[327] Adding to the Second Circuit's dissent, this commentator noted that Congress thought of the problem when it provided co-fiduciary liability. Consequently, Congressional awareness of the problem and subsequent provision for a remedial scheme that makes no mention of contribution and indemnity shows Congressional intent against providing that remedy.[328] For this commentator the contribution and indemnity rule is not a collateral or subsidiary rule, but a conscious policy of a court to act contrary to the Congressional choice not to allow sharing of liability.[329] Moreover, if Congress wanted traditional trust law to guide, then there would have been no reason to lay out a remedial scheme.[330] Congress could just say previous state remedies were still available under ERISA.[331] But Congress did not incorporate traditional trust law, only some parts.[332] Again this commentator did not investigate the exculpation and insurance provisions as providing a remedy contrary to contribution and indemnity.

The crux of this professorial commentator's position was the statement made by Javits concerning the development of the federal common law of

324. *See* Pereira, *supra* note 317, at 562 (citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 155 (1985) (Brennan, J., concurring)), 564 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 102 (1989)).

325. *See id.* at 566.

326. *See id.* at 532.

327. *See* Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J. OF LAW & PUB. POL'Y 541, 590 (1998).

328. *See id.*

329. *See id.* at 591.

330. *See id.*

331. *See id.*

332. *See id.* (citing S. Rep. No. 93-127 containing language about "certain principles" and "with modifications"); *see also supra* note 219 and accompanying text for the language of the Senate Report.

ERISA by the courts.[333] He rejected the authority to fashion federal common law, calling it a delegation, since it made by a single member of Congress.[334] This position ignores the fact that Senator Javits was more than a single legislator, or sponsor of a bill. He was the motivating force behind the bill, including its drafting, and as a result is the spokesman of the drafters.[335] This commentator's position is merely a reflection of the English practice of rejecting legislative history to interpret statutes based on the idea that a court can not impute the intent of one legislator to the body.[336]

The most recent commentator, a practitioner, raised three points.[337] Firstly, contribution and indemnity are inconsistent with the detailed liability rules.[338] Without providing support, this commentator asserted it is inappropriate for a court (1) to assume additional rights and remedies given the broad sweep of the liability rules and (2) to read a few references to the traditional law of trusts to allow a remedy not contemplated by Congress.[339] Secondly, there is no reason for courts to believe that the authorization to make federal common law extends to areas with no relation to the stated purposes.[340] This is not exactly correct. Courts have the power to fill interstices in the common law. Thirdly, the Supreme Court's test for implication of the remedy are not satisfied: fiduciaries are not the protected class, the structure makes no mention of contribution and indemnity, the legislative history is silent, and there is no state interest at issue.[341] The ERISA statutory structure, however, does prohibit indemnity agreements.[342] The law-and-economics jurisprudential school noted that there must be some state interest in favor of contribution and note it occurs most heavily in those states with a large social program.[343]

IV. THE SOLUTION

In order to determine whether ERISA authorizes the court to allow a contribution or indemnity lawsuit by one fiduciary against another, the Supreme Court has specified consideration of various factors among several different approaches.[344] The courts and commentators have examined these factors, come to different conclusions, and have yet to come up with a solution that has gained

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333. *See* Brauch, *supra* note 327, at 550, 558-63; *see also* 120 Cong. Rec. S29942 (daily ed. Aug. 22, 1974) (quoting statement of Sen. Javits: "It is also intended that a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.").

334. *See* Brauch, *supra* note 327, at 558 (disparaging the statement as made by a single legislator).

335. *See supra* notes 209-17 and accompanying text.

336. *See* George Lee Flint, Jr., *ERISA: Nonwaivability of Preemption*, 39 U. KAN. L. REV. 297, 326 n. 209 & 326-37.

337. *See* Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW. 391 (2001).

338. *See id.* at 416.

339. *See id.* at 417.

340. *See id.* at 418.

341. *See id.* at 418-19.

342. *See supra* notes 146-47 and accompanying text.

343. *See* LANDES & POSNER, *supra* note 46, at 219-24.

344. *See supra* notes 229-30 and accompanying text for the approaches and their factors.

dominance.[345] With respect to the statutory language, the best they have come up with is "appropriate relief" of the fiduciary breach action and "other appropriate equitable relief" of the action to redress a statutory or plan violation.[346] With respect to the statutory structure, the best they have come up with is a reticulated remedial scheme authorizing lawsuits.[347] With respect to legislative history the best they have exhumed is a few statements on traditional trust law and the ability to fashion federal common law.[348] Nothing overwhelming. They have not discovered the ERISA prohibitions against indemnity agreements. They have not discovered the ERISA remedial alternative to indemnity. Nor have they investigated the legislative history of these overlooked sections of ERISA.

The reason for this situation is that the lawyers have been focusing on the factors specified by the Supreme Court rather than concentrating on the real task – to fathom the intent of Congress. The specified factors generally contain the key indications of that intent that the Supreme Court seeks.

A. STATUTORY INTERPRETATION

But when one steps back from the factors and examines the long historical trend in Anglo-American jurisprudence it becomes obvious where to look for the indication of Congressional intent. Anglo-American jurisprudence first recognized contribution and indemnity by enforcing contribution and indemnity agreements.[349] It was only later that the courts implied the agreement through quasi-contracts and finally implied the action without any semblance of an agreement.[350] The courts and commentators are at this third stage, allowing the implication without an agreement, in their hunt for the Congressional intent concerning contribution and indemnity for ERISA. Since Congress never got past the first stage, allowing the action only by agreement, these courts and commentators have been left to grasp at figments of their imaginations. Instead, they should focus on that first stage. Congress did make a pronouncement for that first stage in the statute. ERISA provides that no court shall enforce an agreement relieving a fiduciary of liability.[351] The courts and commentators have missed this pronouncement because they are hunting for an inkling concerning the words "contribution" and "indemnity", not "agreement". Their sought words are missing in the Congressional pronouncement. For some of the courts and commentators it is even easier to overlook the key word since they are blinded by what they perceive as "fairness".[352]

One could now focus on whether "an agreement . . . to relieve a fiduciary from . . . liability" includes an agreement concerning contribution and indemnity.

345. *See supra* notes 234-343 and accompanying text.
346. *See supra* notes 234 & 256 and accompanying text.
347. *See supra* note 264 and accompanying text.
348. *See supra* notes 278-79 and accompanying text.
349. *See supra* notes 30-31 and accompanying text.
350. *See supra* notes 32-35 and accompanying text.
351. *See supra* notes 146-52 and accompanying text.
352. *See supra* notes 281-82 and accompanying text.

One might suspect that contribution and indemnity allow liability for one's share of liability. The counter, of course, would be that the ERISA co-fiduciary provisions make one fiduciary liable for the acts of others whose acts the co-fiduciary knew about but failed to correct. So any form of relief, whether proportionate by contribution or not, would relieve the fiduciary from liability.

That this is the proper conclusion is further supported by noting the historical trend in the tort-related fields. The Supreme Court refuses to implicate contribution and indemnity for statutes designed to punish wrongdoers, such as anti-trust violators and commodity fraud schemes.[353] ERISA has a similar background. It arose out of scandals of wrong-doing with multi-employer plans and the failure of disclosure statutes to stem the wrongdoing.[354] Clearly, Congress sought something stronger than the securities law disclosure approach.[355] That something was specter of liability for the acts of co-fiduciaries, unless the fiduciary took action to correct the co-fiduciary breach.[356] So Congress crafted the penalty.

B. COMPORT WITH ERISA'S LEGISLATIVE HISTORY

Congress, however, did not stop at one pronouncement concerning the matter. The legislative history indicates that Congress did worry that such total liability might be too much.[357] As a result ERISA itself provides the relief. A court should not destroy this ERISA relief with a parallel system of contribution and indemnity. The Congressional relief was to allow plans, fiduciaries, and employers to purchase insurance for their liabilities.[358] Every first-year law student is taught in torts that the function of liability insurance is to spread the costs of a risk.[359] Liability insurance provides this spreading effect essentially by providing that all insureds pay an annual premium. Those insureds suffering the impact of the risk that year receive the insurance benefits. The other insureds, having avoided the impact of the risk, receive nothing. The net effect is that everyone pays a little for the disaster, and the victim of the disaster receives compensation. Insurance companies can calculate the premiums from historical data to insure the little paid by all covers the benefit payments and overhead, less earnings on the moneys in the interim.

If all fiduciaries purchased their own insurance, or refused to serve until the employer purchased their insurance, then courts by allowing contribution and

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353. *See supra* notes 59-61 and accompanying text.

354. *See supra* notes 204-17 and accompanying text.

355. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co., 1913). "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LARRY D. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION 2-3 (Foundation Press, 4th ed. 1999). New Deal program for the securities statutes passed in 1933 and 1934 was disclosure rather than merit regulation. *Id.*

356. *See supra* notes 135-40 and accompanying text.

357. *See supra* notes 153-68 and accompanying text.

358. *See supra* notes 153-68 and accompanying text; *but see* Emmons.v. Equitable Life Assurance Soc'y Of the United States, 799 F. Supp. 1123, 1128 (D. N.M. 1992) (rejecting the argument that insurance is the only Congressional method of relief from liability).

359. *See, e.g.*, Robert Keeton, *supra* note 160, at 11-12 (explaining risk transferance).

indemnity interfere with the Congressional risk allocation system. They also cast aside the Congressional goal of minimizing costs to plans by adding the additional costs of litigation to determine the proportional amount of liability for contribution or whether the requirements of unjust enrichment for indemnity had been met. In other words, contribution and indemnity are only of use to fiduciaries who failed to get insurance, or tail insurance when their terms as fiduciaries expired.

C. COMPORT WITH ERISA'S PURPOSES

Perhaps the courts should cooperate in driving these uninsured fiduciaries out of serving as fiduciaries on ERISA plans. The ERISA prudent standard is that of an expert.[360] One reason for the variations of ERISA trust law from traditional trust law deal with the enormous amounts of moneys.[361] To protect participant expectations Congress requires professional fiduciaries, either one that has sufficient assets to support the liability such as a bank or insurance company or one with enough business experience to not accept an ERISA fiduciary position without the proper insurance, which also has the effect of providing sufficient moneys to support the liability.

To further protect these participant expectations, Congress requires that ERISA fiduciaries monitor each other's activities.[362] Congress fractionalized the ERISA fiduciaries to insure legions of monitors.[363] Congress designed the co-fiduciary liability rules to insure a motive to monitor. The only relaxation of these incentives is the insurance provision, designed to spread the risk through insurance premiums. The Department of Labor has allowed liability relieving agreements to the same extent that would have been provided by that insurance. For a court to allow implied contribution and agreement upsets this craftily, Congressionally-designed risk allocation.

V. CONCLUSION

Congress in designing ERISA created a scheme considerably different from traditional trust law. Retirement plans involve large numbers of participants, large amounts of money, and fiduciaries with inherent conflicts of interest, receiving benefits or fees from the plan. Faced with plans looted by their fiduciaries, Congress determined to raise the standards of behavior for these fiduciaries above that of contract law to that of traditional trust law. Then Congress set up a policing system to insure that a particular fiduciary no longer could loot plans without detection. That policing system requires two main elements: (1) professional fiduciaries and (2) fiduciary monitoring of other fiduciaries. Those provisions of ERISA setting the standard of the expert prudent person provides the motive for non-professional fiduciaries to leave the

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360. *See supra* notes 129-30 and accompanying text.
361. *See supra* notes 182-83 and accompanying text.
362. *See supra* notes 135-38 and accompanying text.
363. *See supra* notes 110-22 and accompanying text.

field, or at least seek expert advice. Those provisions of ERISA creating co-fiduciary liability, imputing the liability of the feasor to an otherwise innocent co-fiduciary, set up the motive for fiduciaries to observe the actions of other fiduciaries. The fiduciaries seeking court implied contribution and indemnity in the scenario commencing this article failed in their monitoring duties. They had specified recorded deeds, yet never sought to make sure those fiduciaries charged with that task actually did as directed.

Fearing that the monitoring and expert duties might impose too much liability on a particular fiduciary, Congress considered the possibility of amelioration through contribution and indemnity. The result was the exculpation and insurance provisions of ERISA. The exculpation provisions generally banned indemnity except in limited circumstances. The insurance provisions generally allowed a type of contribution, if the plan paid the premiums. These provisions negate the conclusions of the courts and commentators that ERISA has no provisions on contribution and indemnity. And they most certainly negate any assertion that Congress did not consider contribution and indemnity in the ERISA context. The fiduciaries seeking court implied contribution and indemnity in the scenario commencing this article failed to obtain that insurance. That failure risks lesser payments to the plan for the damage done, if the fiduciaries no longer have sufficient assets for the plan to levy against.

The system set up by Congress is not only a reticulated remedial scheme, but it relates to contribution and indemnity. In these situations, the Supreme Court has always followed the Congressional scheme and denied court implied contribution and indemnity. One might suggest that a court may allow court implied contribution and indemnity to the extent provided by agreement between the parties authorized in the ERISA provisions. But this would violate the Congressional scheme. That scheme is the parties to private pension plans, not only have the power to specify the plan terms within the parameters set forth in ERISA, but also have the power to allocate liabilities amongst themselves. If they fail to so allocate, the courts should not second guess their decisions, especially when it involves additional litigation costs to determine the amount of such liability and whether the court should impose such liability.