Loyola of Los Angeles Law Review

Volume 36
Number 4 *Developments in California Homicide Law*

Article 19

6-1-2003

Damages Suits under ERISA: Why Third Parties with Discretion over Benefit Plans Must Be Held Accountable

John M. Teske

DAMAGES SUITS UNDER ERISA: WHY THIRD PARTIES WITH DISCRETION OVER BENEFIT PLANS MUST BE HELD ACCOUNTABLE

I. INTRODUCTION

Imagine you are employed by a small business that offers an employee health plan. Your employer purchases a group policy from an outside insurance company to pay claims as they come in. As the party establishing the plan, your employer is the plan sponsor and the designated "plan administrator" in the documents you receive. Although your employer is the named plan administrator, in reality it is too much work for the owner of a small business to handle all the claims, decide if they have merit, and actually pay them. Furthermore, your employer does not have the money, nor does he deem it necessary to hire someone to handle these matters. Therefore, he depends on the insurer to handle the bulk of these functions.

Now consider the following tragic situation: your child gets very sick and is diagnosed with a debilitating disease. Not only are you concerned with the child's health and getting the necessary treatment, but you also find out that the insurance company is disputing the claim based on your child's previous conditions. You now have medical bills that are approaching three times your annual salary and your child needs continued medical services.

You decide to sue the insurance company for payment of benefits under the Employee Retirement Income Security Act (ERISA), a federal Act that preempts state law governing employee benefits plans. However, you find out that you cannot sue the insurance company to recover the cost of your daughter's treatment. Your only option is to sue your employer because he is defined as the plan administrator. The problem is, your employer is a small business that is already close to financial crisis, and besides, it is your sole source of income.

How can the insurance company be protected from liability under a statute that was designed for the very purpose of protecting people like you? The frightening reality is that under federal law, this is exactly how many courts would hold. Any action for the payment of benefits would be barred unless the party sued is specifically defined in the plan documents as the plan administrator.[1]

Currently, the federal circuits are split on the issue of who a plan participant or beneficiary can sue for benefits owed under ERISA section 502(a)(1)(B).[2] The Ninth Circuit most recently faced this question in *Everhart v. Allmerica Financial Life Insurance Co.*[3] The court held de novo that third-party insurers were not proper defendants in a section 502(a)(1)(B) suit for damages.[4] There, the court interpreted ERISA to mean that a plaintiff may only bring an ERISA section 502(a)(1)(B) action against either the plan itself or the plan administrator.[5] This holding was broader, however, than previous Ninth Circuit holdings, which held that only the plan as an entity may be sued for benefits under section 502(a)(1)(B).[6]

The Ninth Circuit is not the only circuit with conflicting holdings on this issue. Across the circuits some courts have held that only the plan may be sued,[7] while others have held that the plan or the plan administrator may be sued.[8] Still other courts have held that the plan, the plan administrator, or a party with administrative

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1. Courts have also allowed plan participants to bring actions against the plan as an entity. *See* Everhart v. Allmerica Fin. Life Ins., 275 F.3d 751, 754 (9th Cir. 2001) (listing the cases that have ruled that the plan as an entity is a proper defendant in 502(a)(1)(B) actions).

2. *See* Hall v. LHACO, Inc., 140 F.3d 1190, 1194–95 (8th Cir. 1998) (summarizing the split among the circuits regarding who a proper defendant is under ERISA section 502(a)(1)(B)); *see also Everhart*, 275 F.3d at 754, 758–59 (discussing the split among the Ninth Circuit as well as the other circuits regarding who can be sued in a section 502(a)(1)(B) action).

3. *See Everhart*, 275 F.3d at 751.

4. *Id.* at 756.

5. *Id.* at 753–54.

6. "Entity" is used here to mean a suit against the assets of the plan, yet no one person associated with the plan in his/her individual capacity may be sued. *See* 29 U.S.C. § 1132(d)(2) (2002).

7. *See* Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1490 (7th Cir. 1996); Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993).

8. *See Everhart*, 275 F.3d at 756; Layes v. Mead Corp., 132 F.3d 1246, 1249 (8th Cir. 1998); Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir. 1988); Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994).

discretion are all proper defendants in an ERISA section 502(a)(1)(B) action.[9]

It is important that these conflicting circuit holdings are resolved because Congress originally intended that courts would develop a uniform common law in applying ERISA.[10] Congress realized that too many participants were being treated unfairly by their plans and employers and that existing law did not adequately deal with these problems.[11] However, given the overall complexity of employee benefit plans, Congress was also aware that ERISA itself could not possibly be considered the final word on benefit plan regulation. Thus, where conflicts arose that were not specifically addressed by the statute, Congress intended courts to decide these issues with national uniformity in mind.[12]

Because ERISA section 502(a)(1)(B) does not explicitly state who a potential defendant can be, achieving national uniformity of the law should be of utmost importance to the courts. Thus, in examining this issue, certain questions need to be addressed. For example, is there any consistency among the circuits regarding who a potential defendant is in an ERISA action for damages? Have the circuit courts complied with Congress's original intent that a uniform common law develop in applying ERISA? If so, what is it? If not, what should it be?

This Note will answer these questions and explain the different interpretations of the courts that have addressed the question of who may be sued in an ERISA action for damages. Furthermore, this Note will demonstrate that, in reaching conflicting holdings, federal courts have not complied with Congress's original intent that courts

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9. *See* Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997) ("The proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan."); Fisher v. Metro. Life Ins. Co., 895 F.2d 1073, 1077 (5th Cir. 1990) (holding liable a third-party insurer who was not designated as the "plan administrator" but had responsibility for actuarial calculations, and the evaluation, approval, calculation, and payment of employee claims).

10. *See* Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 (9th Cir. 1984) (explaining that Congress intended for "[t]he courts . . . to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA . . .").

11. *See* JAY CONISON, EMPLOYEE BENEFIT PLANS IN A NUTSHELL 69 (1993).

12. *See Menhorn*, 738 F.2d at 1500.

develop a uniform federal common law in this area of ERISA. Above all, this Note takes the position that federal courts should uniformly define the scope of defendants in an ERISA 502(a)(1)(B) action for damages as *any party who has discretionary authority over the plan and/or its claims*.

Expanding the scope of potential defendants to include any party with discretion over the plan is appropriate for several reasons. One important factor is that Congress clearly intended that ERISA would sweep broadly to protect plan participants and their benefit plans. However, the manner in which the majority of the circuits have interpreted the section creates a gap in this ERISA protection. Without the ability to hold a party liable for the very decisions it makes regarding an individual's benefits, there is left a major accountability problem when a participant feels he has been treated wrongly regarding his benefits. This lack of accountability can potentially lead to mismanagement of benefit plans.[13] As a result, too many plan participants are left with insufficient benefits when they might need them most.

To demonstrate the need for the position stated above, this Note will examine the various circuit holdings and then focus on public policy reasons for allowing damages suits to be brought against any party who has discretionary authority over an ERISA plan. Part II will briefly describe ERISA, focusing on the Congressional intent behind its creation and development, as well as how this intent relates to actions brought by plan participants. Part II will also examine ERISA section 502(a)(1)(B) more closely and define certain terms applicable to the Act. In Part III, this Note will examine several state and federal circuit decisions, revealing that although certain common threads can be found among the various holdings, in reality the holdings are contradictory. Finally, Part IV will summarize the findings of Part III and weigh them against Congress's original intent in enacting ERISA and the public policy surrounding the Act.

13. *See infra* Part IV. for discussion regarding lack of accountability when parties who have control over the plan are not held liable and the potentially detrimental results.

II. BACKGROUND: ERISA AND PLAN PARTICIPANT LAWSUITS UNDER SECTION 502(A)

A. ERISA Generally

President Gerald Ford signed ERISA in 1974.[14] A primary purpose of the Act was to "safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan."[15] Determined that employees should not be left without retirement benefits because of the actions of plan sponsors,[16] Congress devised a uniform set of standards, "including rules concerning reporting, disclosure, and fiduciary responsibility," that all employee benefit plan sponsors must meet.[17] Rather than limiting the reach of ERISA solely to retirement plans, however, Congress extended the Act's reach to employee welfare benefit plans that provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death."[18]

Congress not only wanted to protect all kinds of employee benefit plans, but also wanted ERISA to be comprehensive.[19] In order to accomplish this goal, Congress designed ERISA to preempt all state law that "related to" an employee health or welfare plan.[20] This expansive preemption clause ensured uniformity in employee benefit plan regulation throughout the United States.

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14. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (1994).

15. Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982).

16. The plan sponsor is typically defined as the party that establishes or maintains the employee benefit plan. *See* CONISON, *supra* note 11, at 12.

17. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983) (citing 29 U.S.C. §§ 1021–31, 1101–14 (1976 ed. & Supp. V)).

18. 29 U.S.C. § 1002(1) (2000).

19. It should be noted that certain areas do exist that Congress did not intend for ERISA to cover. One of these limitations is what Congress called the "saving clause." Essentially, this clause "save[s] state laws governing the business of insurance from preemption that would otherwise occur by application" of the preemption clause. Consequently, even if a state regulation "relates to" an ERISA plan, it is exempt from ERISA preemption if it regulates insurance. ERISA also expressly exempts from preemption employee benefit plans maintained "solely" to comply with state worker's compensation, disability, or unemployment laws, as well as government and church sponsored plans.

20. 29 U.S.C. § 1144(a) (2000).

Although uniformity is typically the goal when the federal government passes such an Act, it is recognized that this type of Act will necessarily be subject to judicial interpretation. Congress originally intended that courts establish a federal common law to assist in the enforcement of ERISA. During a Senate subcommittee hearing, Congress stated that "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 the private welfare and pension plans."[21] The courts, however, have thus far failed to follow Congress's intention.

Beyond providing uniform protection, Congress was also concerned with establishing standards of conduct, responsibility, and obligations for fiduciaries of the ERISA plans.[22] Although ERISA fiduciaries are subject to very stringent standards,[23] ERISA recognizes the uniqueness of various plans and allows for this when subjecting plan fiduciaries to these standards.[24] Fiduciaries under ERISA are defined as the individuals responsible for the operation of a plan.[25] ERISA lists specific examples of fiduciaries such as named fiduciaries, trustees, investment managers, and plan administrators.[26]

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21. *See* Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974, 4771 (Comm. Print 1976).

22. 29 U.S.C. § 1144 (1974) (establishing uniform standards of conduct for fiduciaries via preemption).

23. *See id.* §§ 1102–04 (2002).

24. *See* 29 C.F.R. § 2509.75–.80 (2002), at FR-12 (stating that "[a] plan may have as few or as many fiduciaries as are necessary for its operation and administration."); *see also* 29 U.S.C. § 1002(21)(A) (providing for a general definition of "fiduciary" that permits adjustment for the individual circumstances of each plan).

25. *See* 29 U.S.C. § 1102(a).

26. *See id.* § 1102(a)(1) (stating that named fiduciaries are those named in the plan documents as having "authority to control and manage the operation and administration of the plan."); *see id.* § 1103(a) (stating that a trustee is a person who holds the plan assets and has "authority and discretion to manage and control" them); *see id.* § 1002(38) (explaining that an investment manager is a person, other than the trustee, with "power to manage, acquire or dispose of" plan assets); *see id.* § 1002(16)(A) (defining the administrator as the person responsible for plan administration).

B. Civil Actions Under ERISA Section 502(a)

One of Congress's main goals in enacting ERISA was to provide protection to plan participants and their beneficiaries. To achieve this goal, ERISA provides for "appropriate remedies, sanctions and ready access to federal courts."[27] ERISA was designed to allow civil actions to be brought on behalf of plan participants or beneficiaries.[28] ERISA section 502(a) authorizes a number of actions that may be brought by various parties.[29] Under section 502(a)(1)(B), a participant or beneficiary can sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[30] A plaintiff may bring suit in either state or federal court under this section.[31] The Supreme Court declared in *Metropolitan Life Insurance Co. v. Taylor*, that section 502(a)(1)(B) directly covers a suit by a beneficiary to recover benefits from a covered plan.[32] Furthermore, in *Pilot Life Ins. Co. v. Dedeaux*, the Court defined the type of relief that may be granted under this provision as taking the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits.[33] Thus, plan participants who seek to recover benefits due to them under their benefits plan must bring their action under section 502(a)(1)(B).

In contrast, section 502(a)(3) allows civil actions by a plan participant, beneficiary, or fiduciary to "enjoin any act or practice which violates any provision of [Title I] or the terms of the plan" or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [Title I] or the terms of the plan."[34] In *Mertens v. Hewitt Associates*, the Supreme Court ruled that section 502(a)(3) authorizes the recovery of equitable relief only and that such relief does not include damages.[35]

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27. *Id.* § 1001(b).
28. *See id.* §§ 1138–44.
29. *See id.* § 1132(a).
30. *Id.* § 1132(a)(1)(B).
31. *See id.* § 1132(e)(1).
32. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987).
33. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987).
34. 29 U.S.C. § 1132(a)(3).
35. Mertens v. Hewitt Assoc., 508 U.S. 248 (1993).

Even a cursory examination of the language of these two 502(a) sections provides a pretty good understanding as to who can bring an action under ERISA.[36] However, the Act is not clear in determining against whom the plan participant can bring the action.[37] This lack of clarity is precisely what has led to the inconsistency among circuits as to who an appropriate defendant is under section 502(a)(1)(B).

III. WHO IS A PROPER DEFENDANT UNDER ERISA SECTION 502(A)(1)(B)?

The Ninth Circuit's decision in *Everhart* is the most recent case to determine who a proper defendant is under ERISA section 502(a)(1)(B).[38] There, the court held that a plan participant or beneficiary could not sue a third-party insurer to recover benefits when the insurer is not functioning as the plan administrator.[39] In that case, the plaintiff's husband was an employee of Credence Systems Corporation, which had established an employee benefit plan subject to ERISA.[40] Credence acted as the plan administrator and purchased a plan from Allmerica, a third-party insurer.[41] According to the plan documents, if a plan participant died, his beneficiaries were to receive a death benefit of twice his annual earnings.[42]

The plaintiff's husband died in a plane crash, and as his beneficiary, the plaintiff sought twice his yearly salary, including commissions, which totaled approximately $480,000.[43] Allmerica sent her a check for only $202,829, a figure that did not include her husband's commissions.[44] She brought suit against Allmerica for recovery of benefits, arguing "annual earnings" should include not only his base salary, but also the commissions he earned.[45]

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36. *See* 29 U.S.C. § 1132(a)(1)(B), (a)(3) (a "participant," "beneficiary," "fiduciary").
37. *See id.*
38. Everhart v. Allmerica Fin. Life Ins. Co., 275 F.3d 751 (9th Cir. 2001).
39. *See id.*
40. *See id.* at 752.
41. *See id.*
42. *See id.*
43. *See id.* at 753.

The majority recognized that a participant could recover benefits due under the terms of the plan.[46] However, upon guidance from both its own decision in *Gelardi v. Pertec Computer Corp.*[47] and precedent from other circuits,[48] the court held that a money judgment for an action brought under section 502(a)(1)(B) could be enforced only against the plan as an entity or the plan administrator.[49] In doing so, the court actually broadened *Gelardi*, which held that damages actions could be brought only against the plan.[50] However, because the plan documents defined the employer as the plan administrator, not Allmerica, the court held against the plaintiff.[51]

Although the *Everhart* court broadened its previous holding of *Gelardi*, it still used *Gelardi* as precedent against extending possible liability to third parties.[52] In *Gelardi*, the plaintiff attempted to sue her employer and the third-party administrator of the plan.[53] The court did not allow the suit against the employer or the third-party administrator because neither of them had discretionary control over the disposition of claims. Rather, a separate committee had been designated by the employer to handle claims.[54] The court reasoned that the "[plaintiff] must sue either the plan or the fiduciary," meaning that only the committee could be sued because it was the only party with discretion over the consideration of claims.[55]

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46. *See id.*

47. 761 F.2d 1323 (9th Cir. 1985).

48. *See Everhart*, 275 F.3d at 754 (The court cites the following cases to support its proposition: Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1471 (9th Cir. 1993) (holding that "[t]he beneficiary of an ERISA plan may bring a civil action against a plan administrator" to recover benefits under § 1132(a)(1)(B)); Layes v. Mead Corp., 132 F.3d 1246, 1249 (8th Cir. 1998) (permitting suit under § 1132(a)(1)(B) against plan administrator but not employer); Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997) ("The proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan."); Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir. 1988) (holding that an employer is not a proper defendant in an action for benefits under ERISA unless it is "shown to control administration of a plan")).

49. *See id.* at 746.

50. *See Gelardi*, 761 F.2d at 1323.

51. *See Everhart*, 275 F.3d at 754.

52. *Id.* at 751.

53. *See Gelardi*, 761 F.2d at 1324.

54. *See id.* at 1325.

55. *See id.*

Gelardi, however, presents a relatively unusual set of facts. Pertec, the employer, set up a separate committee as the fiduciary and there was no third-party insurer involved—Self Insurance was only hired to perform non-discretionary administrative functions.[56] Therefore, a credible argument can be made that *Gelardi* did not create a general rule that actions cannot be brought against third parties, as the *Everhart* majority construed it. Instead, as the dissent argued, *Gelardi* should be interpreted as ruling that liability should lie against whichever party has discretionary authority over the plan.

The *Everhart* dissent took the position that liability should lie with a third party who has discretion over the plan. It distinguished *Gelardi* from *Everhart* and argued that the majority misread *Gelardi* when it stated that "[the plaintiff] must sue either the plan or the fiduciary."[57] The dissent effectively argued that the majority was mixing the words of another ERISA section into section 502(a)(1)(B).[58] For instance, only in section 502(d)(1) does the Act state that the plan as an entity may be sued. This language, however, is missing from section 502(a)(1)(B).[59] That section applies only to suing the plan, as opposed to reaching past the plan to collect from individual trustees or others that are somehow associated with the plan. Moreover, 502(a)(1)(B) does not refer to suits that may be brought against other parties under ERISA.[60] The dissent indicates that it merely "puts ERISA litigants on notice that to obtain and enforce a money judgment against any party other than the plan, they must sue that other party directly."[61]

The *Everhart* dissent went on to argue that, because neither the employer nor the insurer had discretion over the disposition of claims, the court's language meant that "given the provisions of the plan at issue . . . the only parties [the plaintiff] could sue were the parties with the authority or obligation to determine or pay the benefits—the Plan and the fiduciary."[62] Thus, the dissent concluded,

56. *See id.*
57. *Id.*
58. *Id.* at 757–58 (Reinhardt, J., dissenting).
59. 29 U.S.C. § 1132(d)(1)-(2) (2002).
60. *Everhart*, 275 F.3d at 757 (Reinhardt, J., dissenting).
61. *Id.* at 758.
62. *Id.* (emphasis omitted).

the court was not establishing a general rule as to whom employees may sue.[63]

Like the *Everhart* majority, the Seventh and Second Circuits also relied on *Gelardi* in reaching a decision as to who a proper defendant is in section 502(a)(1)(B) actions.[64] Those circuits held that only the plan as an entity can be sued for benefits and have not yet extended the realm of possible defendants.

However, like the Ninth Circuit, other circuits have extended section 502(a)(1)(B) to include actions against both the plan as an entity as well as the plan administrator.[65] The Third, Sixth, Eighth, and Eleventh Circuits have all held that a potential defendant can be either the plan itself or the plan administrator.[66] However, recall that the Ninth Circuit in *Everhart* was unwilling to extend the definition to a third-party insurer. There, the majority refused to include the third-party insurer as a defendant even though it had discretionary authority over the payment of claims. Thus, the problem lies in exactly how a "plan administrator" is defined.

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63. *See id.*

64. *See* Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1490 (7th Cir. 1996) (holding that ERISA section 502(a)(1)(B) "permits suits to recover benefits only against the plan as an entity."); Riordan v. Commonwealth Edison Co., 128 F.3d 549, 551 (7th Cir. 1997) ("It is true that ERISA permits suits to recover benefits only against the plan as an entity."); Lee v. Burkhart, 991 F.2d 1004 (2d Cir. 1993) (holding that ERISA section 502(a)(1)(B) only allows suits against the plan as an entity).

65. *See* Layes v. Mead Corp., 132 F.3d 1246 (8th Cir. 1998) (section 502(a)(1)(B) action permitted against plan administrator but not the employer); Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186 (11th Cir. 1997) (holding that the proper defendant in a section 502(a)(1)(B) action is the party who administers the plan); Daniel v. Eaton Corp., 839 F.2d 263 (6th Cir. 1988) (holding that an employer is only liable in an action for benefits when it is shown they administered the plan); Hall v. LHACO, Inc., 140 F. 3d 1190 (8th Cir. 1998) (holding that the proper defendant in an ERISA section 502(a)(1)(B) action is either the plan as an entity or the administrator of the plan); Mitchell v. Eastman Kodak Co., 113 F.3d 433 (3d Cir. 1997) (entertaining an action against the plan administrator to recover benefits under section 502(a)(1)(B)); Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994) (acknowledging that ERISA allows suits to recover benefits against the plan as an entity and against the fiduciary of the plan, and finding that a plan administrator is such a fiduciary).

66. *See Layes*, 132 F.3d at 1246; *Garren*, 114 F.3d at 186; *Daniel*, 839 F.2d at 263; *Hall*, 140 F.3d at 1190; *Mitchell*, 113 f.3d at 433; *Curcio*, 33 F.3d at 226.

A closer examination of the meaning of the term "plan administrator" reveals that third-party insurers (as well as other parties with discretionary control over the plan) qualify as "plan administrators" and therefore should be included as defendants in an action for damages.

A. Third-Party Administrators Should Be Regarded as Plan Administrators When They Possess Discretionary Authority Over Benefit Plans

ERISA section 316(A) defines the administrator as the person who is responsible for plan administration, including record keeping and overseeing of benefit payments.[67] The administrator is necessarily a fiduciary because it has discretionary authority or responsibility in the administration of the plan.[68] However, courts have also been careful to indicate that not every person who performs plan administrative tasks is an administrator, or even a fiduciary.[69] Someone who performs purely ministerial functions relating to reports, record-keeping, benefit payments, and benefit claims, all "within a framework of policies, interpretations, rules, practices and procedures made by other persons," is not a fiduciary because he does not have the requisite discretion in plan administration.[70] Therefore, establishing discretion in plan administration seems to be a key factor in defining who counts as a "plan administrator."[71]

Because *Everhart* recognized that plan administrators are valid defendants in ERISA actions, and administrators are defined as having discretion in the administration of the plan, it follows that the court incorrectly held the action could not be brought against the third-party insurer. The majority in *Everhart* does not deny that Allmerica, the third-party insurer, had discretionary authority as to

67. 29 U.S.C. § 1002(16)(A) (2000).
68. *See* CONISON, *supra* note 11, at 12.
69. *See id.* at 12–13.
70. 29 C.F.R. § 2509.75–.80, at D-2 (2002) (N.D. Ga. 1986).
71. *See e.g.*, Chambers v. Kaleidoscope, Inc., 650 F. Supp. 359, 376 (1986) (holding that a defendant was not a fiduciary of the plan because the plan administrator did not grant defendant any discretionary or decision making authority).

whether benefits are paid or owed.[72] They dismiss that authority, however, by stating that this discretion makes the third-party insurer a fiduciary, not an administrator.[73] On the other hand, *Gelardi*, the very precedent on which the *Everhart* majority relied, affirmed that "Gelardi must sue either the Plan or the fiduciary and [the employer nor the insurer] were neither."[74] The apparent inconsistency is that *Everhart* called Allmerica a fiduciary yet based its holding (that Allmerica is not a proper defendant) on precedent that states that a fiduciary is a proper defendant.[75] However, this is not to say that an action for breach of fiduciary duty can always be brought under section 502(a)(1)(B). Rather, one may argue that when a third-party insurer has discretion in payment of benefits, even though not considered the "plan administrator," an action should be allowed against the third-party insurer to collect these benefits.[76]

The *Everhart* majority was also arguably faulty in using *Gibson v. Prudential Insurance Co. of America*[77] as precedent to support its holding. *Gibson* held an insurance company could not be sued to recover benefits under section 502(a)(1)(B).[78] However, *Gibson* can be distinguished because the insurance company merely served as the plan's claims-handling agent and did not have discretionary control over the benefits plan.

Holdings in other circuits also provide support for the premise that the definition of "plan administrator," and hence liability, should be extended to parties beyond merely the *stated* "plan administrator" and the plan as an entity. These circuits recognize a distinction between parties who perform mere administrative functions and those that have discretion over administrative functions.

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72. *See Everhart v. Allmerica Fin. Life Ins. Co.*, 275 F.3d 751, 754 (9th Cir. 2001).

73. *See id.*

74. *Gelardi v. Pertec, Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985).

75. It may be that the *Everhart* majority took the *Gelardi* statement that "Gelardi must sue either the Plan or the fiduciary" to mean that only the plan can be sued to recover benefits under § 502(a)(1)(B), and a fiduciary is only a proper defendant under § 502(a)(3) for equitable relief. However, the language of these provisions neither excludes nor limits the scope of defendants.

76. *See* Pilot Life Ins. v. Dedeaux, 481 U.S. 41 (1987) (holding that actions for breach of fiduciary belong under § 502(a)(3) as opposed to § 502(a)(1)(B)).

77. Gibson v. Prudential Ins. Co. of Am., 915 F.2d 414 (9th Cir. 1990).

78. *See id.*

For instance, in *Hall v. LHACO, Inc.*,[79] the Eighth Circuit analyzed the meaning of "plan administrator" in determining whether it was proper to bring a section 502(a)(1)(B) action against the defendant.[80] The court looked at whether the defendant, a third-party administrator of the employment benefit plan, had discretion in administrative functions, as opposed to a party merely engaging in administrative services. The court viewed this distinction as being a material factor in determining whether or not the party was a proper defendant.[81]

The *Hall* court defined "administrator" as: "(i) the person specifically designated as the administrator by the terms of the plan [documents]; (ii) if the [plan documents do] not designate an administrator, the plan sponsor; or (iii) if no administrator is designated and a plan sponsor cannot be identified, a person prescribed by the Secretary in regulations."[82] The court also recognized that a circuit split existed as to whether a party other than the one designated in the plan documents could be a "de facto" administrator of the plan.[83] The court noted that "[t]he First Circuit, and possibly the Fifth and Eleventh, are willing to deem nonadministrators 'de facto' plan administrators; the other circuits (except the Third and Eighth, which have not been heard from on this issue) are not."[84]

Although the *Hall* court avoided making a decision on the question of whether a party other than the one designated in ERISA plan documents can be sued under section 502(a)(1)(B) as a "de facto" plan administrator, the First Circuit held that it can be. In making this decision, the First Circuit in *Law v. Ernst & Young*[85] stated that it is:

> consistent with the intent of Congress that employees have a remedy when they are denied timely information about their ERISA benefits. To hold that an entity not named as administrator in the plan documents may not be held liable

79. 140 F.3d 1190, 1195 (8th Cir. 1998).
80. *See id.* at 1195.
81. *See id.* at 1191, 1194.
82. *Id.* at 1195 (citing 29 U.S.C. § 1002(16)(A)).
83. *See id.* (citing Jones v. UOP, 16 F.3d 141, 145 (7th Cir. 1994)).
84. *Id.*
85. 956 F.2d 364 (1st Cir. 1992).

> under § 1132(c),[86] even though it actually controls the dissemination of plan information, would cut off the remedy Congress intended to create.[87]

The Eleventh Circuit followed *Law* and held that when a company is administering the plan, it can be held liable for benefits under ERISA regardless of who the plan documents define as the "plan administrator."[88] The reasoning of these courts, and others, is that when a party has discretion and a certain amount of control over claims arising from the benefits plan, it should be liable under ERISA as if it *were* the plan administrator.[89]

Thus, there is overwhelming support that the *Everhart* court should have treated the third-party insurer as if it were a plan administrator in deciding whether an action for damages could be brought against it. The third-party insurer there "was responsible for evaluating and determining the merits of claims filed by the plan's participants and beneficiaries. It controlled the administration of the plan and made the discretionary decisions as to whether benefits were owed."[90] Following both the definition of plan administrator, under ERISA section 316(A), and the recognition of parties with discretionary authority over the plan as "de facto" administrators from *Hall* and the line of cases it followed, it is apparent that an action should have been allowed against the third-party insurer in *Everhart*.

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86. 29 U.S.C. § 1132 (c)(1) provides:

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required . . . to furnish to a participant or beneficiary . . . by mailing the material requested within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day . . . .

29 U.S.C. § 1132(c)(1) (2000). Although the court made its decision regarding § 502(c) of ERISA, similar reasoning should be utilized with § 502(a)(1)(B) actions since both relate to § 502(a) civil actions by plan participants.

87. *Law*, 956 F.2d at 373.

88. *See* Rosen v. TRW, Inc., 979 F.2d 191, 192 (11th Cir. 1992).

89. *See e.g.*, Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073 (5th Cir. 1990) (holding liable a third-party insurer, who was not designated as the "plan administrator," but had responsibility for actuarial calculations, and the evaluation, approval, calculation, and payment of employee claims).

90. *Everhart v. Allmerica Fin. Life Ins. Co.*, 275 F.3d 751, 759 (9th Cir. 2001).

B. The Language of ERISA Section 502(a)(1)(B) Does Not Limit Potential Defendants to Plans and Plan Administrators

When deciding who a plan participant or beneficiary may sue for damages under ERISA, the most logical place to look for guidance is the statute itself. However, the language of section 502(a)(1)(B) in no way excludes or limits the potential scope of defendants that a plan participant can sue.[91] Where the statute does not address the question, it is likely an issue that Congress intended a consistent common law interpretation developed through the courts, to emerge and provide guidance.

In *Harris Trust v. Salomon Smith Barney*,[92] the United States Supreme Court was faced with interpreting a similar statutory omission in ERISA section 502(a)(3).[93] The Court recognized that section 502(a)(3) "admits of no limit . . . on the universe of possible defendants."[94] Furthermore, the Court acknowledged that "[o]ther provisions of ERISA, by contrast, [do] expressly address who may be a [proper] defendant." The Court went on to state that "section 502(a) itself demonstrates Congress's care in delineating the universe of [proper] *plaintiffs* who may bring certain civil actions."[95] Although, the Court warned "ERISA's 'comprehensive and reticulated' scheme warrants a cautious approach to inferring remedies not expressly authorized by the text,"[96] it concluded that "defendant status under section 502(a)(3) may arise from duties imposed by [the section] itself, and hence does not turn on whether

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91. *See* 29 U.S.C. § 1132(a)(1)(B).

92. 530 U.S. 238 (2000).

93. Section 502(a)(3) states: "(a) A civil action may be brought—(3) by a participant . . . (A) to enjoin any act or practice which violates this title or the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a).

94. *Harris*, 530 U.S. at 246.

95. *Id.* (As examples, the court cites § 409(a) (stating that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable"); section 502(l) (authorizing imposition of civil penalties against a "fiduciary" who violates part 4 of Title I or "any other person" who knowingly participates in such a violation).

96. *Harris*, 530 U.S. at 247 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)).

the defendant is expressly subject to a duty under one of ERISA's substantive provisions."[97]

Because the Supreme Court in *Harris* authorized a suit for injunction against a fiduciary under section 502(a)(3), the same reasoning should apply to a damages suit under section 502(a)(1)(B); the only difference is the type of remedy sought. This is particularly true where the third party had discretionary authority over the plan. Because other ERISA sections do specifically place limits upon who a plan participant can sue, courts should follow the approach the United States Supreme Court took when the statute is silent.

The United States Supreme Court case *Mertens* lends further support for the view that section 502(a)(1)(B) provides for actions against parties with discretion over the plan.[98] There, the Court was divided five to four on whether equitable relief under section 502(a)(3) included monetary damages.[99] The Court focused on the well-accepted view that ERISA analysis is based on the common law of trusts.[100] The Court reasoned that because ERISA's analysis derives from the common law of trusts, equitable relief should be understood to refer to remedies available in equity for breach of trust, including monetary damages.[101] The dissent argued that under trust law, a non-fiduciary was liable for knowing participation in a breach of trust. Therefore, a non-fiduciary ought to be liable for similar conduct under ERISA as well.[102] The majority, although acknowledging that damages were available in equity for breach of trust, found that equitable relief under section 502(a)(3) should be limited to injunction and restitution.[103]

The importance of *Mertens* is not the holding itself—it is accepted that section 502(a)(3) only provides for equitable relief, not

97. *Id.*

98. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993).

99. *See id.* at 266–67.

100. *See id.* at 255–56; *see e.g.*, Varity Corp. v. Howe, 516 U.S. 489 (1995); *see also* 2 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Ser. No. 93-406, pp. 2350–52, 2358–60 (1976).

101. *See Mertens*, 508 U.S. at 264, 267 (White, J., dissenting).

102. *See id.* at 266 (White, J., dissenting).

103. *See id.* at 256.

damages.[104] However, the reasoning the Court used to reach its holding is very important in determining whether all parties with discretionary authority should be liable for damages under section 502(1)(1)(B).

Although the case involved a breach of fiduciary duty under section 502(a)(3), the Court looked to ERISA's roots in trust law in reaching its decision.[105] The Court recognized that at common law, courts of equity had exclusive jurisdiction over actions by beneficiaries for breach of trust and that money damages were available in those courts against the trustee.[106] The Court based its holding, however, on the specific language of section 502(a)(3) which limits the relief to "equitable relief."[107] The Court interpreted the wording of that section to mean that Congress intended relief under section 502(a)(3) to be only the traditional forms of equitable relief—for example, an injunction or restitution.[108]

The fact that the Supreme Court recognized that ERISA was rooted in trust law and looked to it in interpreting the section in question is evidence that, in the absence of specific statutory language, courts should look to trust law in interpreting ERISA where Congress has not provided explicit guidance.[109] In other words, if ERISA's roots are in trust law, and in trust law even a *non-fiduciary* can be held liable for damages, it follows that a party with discretionary authority over a plan *and who is a fiduciary* should be liable for damages under section 502(a)(1)(B).

In sum, given the Supreme Court's analysis in *Harris* regarding the precise wording of ERISA in deciding who can be sued, relative to the imprecise wording of section 502(a)(1)(B), courts should be cautious when reading limits into the statute that do not explicitly

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104. *See e.g*, Great West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (finding that plaintiffs were not entitled to relief under ERISA § 502(a)(3) because the relief they sought was for damages, not equitable relief).

105. *See Mertens*, 508 U.S. at 255–56; *see also Varity Corp.*, 516 U.S. at 497 (recognizing that trust law may provide a "starting point" for analysis of ERISA where it is not inconsistent with "the language of the statute, its structure, or its purposes.").

106. *See Mertens*, 508 U.S. at 256.

107. *Id.* at 257.

108. *See id.*

109. The Supreme Court in fact stated this proposition in *Varity Corp.*, 516 U.S. at 496.

exist. It is simply unfair to deny a person the ability to sue, for benefits, the very entity that is responsible for paying those benefits in the first place.

IV. PARTIES WITH DISCRETIONARY AUTHORITY OVER EMPLOYEE BENEFIT PLANS NEED TO BE HELD ACCOUNTABLE UNDER SECTION 502(A)(1)(B) IN ORDER TO BEST SERVE CONGRESSIONAL INTENT AND PUBLIC POLICY

This Note has shown that precedent allows section 502(a)(1)(B) liability against parties other than the *stated* plan administrator and/or the plan as an entity. It has further shown that the wording of the statute does not limit liability to those two potential defendants. Throughout the discussion of the factors of precedent and statutory language, this Note has established that Congress intended for courts to develop a universal common law with regard to ERISA. However, simply creating a common law is not enough. The common law that results must correspond with Congress's original policy objectives for creating ERISA.

A. It is Imperative That Courts Conform to Congress's Original Intent and Create a Universal ERISA Common Law

When Congress passed ERISA in 1974, there was much concern about the abuse and mismanagement of pension and employee benefit plans.[110] With this is mind, one of Congress's primary reasons for enacting ERISA was to ensure that employees received the pensions and other benefits which they were entitled to under their benefit plans.[111] To enforce this principle, Congress mandated that the courts develop a "federal common law of rights and obligations under ERISA-regulated plans."[112] Furthermore, the federal common law applicable to ERISA was to be formulated

110. See Shelley L. Ward, Note, *Enlarging an Employer's Fiduciary Hat: Varity Corp. v. Howe Increases Employers' Exposure to Liability When They Act as ERISA Fiduciaries*, 34 HOUS. L. REV. 1195, 1199 n.23 (citing H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676–77).

111. *See* Welfare and Pension Plan Legislation, 1973: Hearings on H.R. 2 Before the Subcomm. on Labor of the Comm. on Educ. and Labor, 93d Cong. 1 (1973) (statement of Rep. Dent, Chairman of subcommittee).

112. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

based on the "federal policies at issue."[113] Therefore, the intention was to create a uniform federal law that would favor plan participants' rights to their employment benefits, specifically employees' rights "against employers, insurers and administrators of employee benefit plans."[114]

However, circuit courts have not complied with Congress's intent in two ways: (1) the circuit courts have been inconsistent in their holdings, thereby failing to create a uniform federal law; and (2) in failing to establish uniform law, the circuit courts are inconsistent in carrying out Congress's goal to protect plan participants against those with discretionary control over their plans.

Adopting a uniform law that plan participants should be able to sue for damages those parties who have discretionary control over their benefit plans would enhance the system by making potential lawsuits against parties with discretion over plans more predictable. Congress wanted to eliminate the possibility that the law governing employment benefits would differ from state to state.[115] Additionally, Congress wanted to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."[116]

Congress was concerned that dissimilar state laws regarding employee benefit plans would result in less effective protection of those plans. The United States Supreme Court also expressed that fear in *FMC Corp. v. Holliday*.[117] There, the Court stated its concern that requiring "plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits."[118] The Court further articulated in *Shaw v. Delta Airlines*[119] that the costs of

113. Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 (9th Cir. 1984).

114. Emard v. Hughes Aircraft Co., 153 F.3d 949, 958 (9th Cir. 1998).

115. *See* 120 CONG. REC. 29942 (1974).

116. H.R. REP. NO. 93-533, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.

117. 498 U.S. 52 (1990).

118. *Id.* at 60 (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523–26 (1981)).

119. 463 U.S. 85 (1983).

tailoring plans to the different laws of various states might cause the employer to reduce benefits.[120]

A uniform common law in this area of ERISA would, in addition, eliminate the need for businesses and insurers to transact differently in one state than another. For example, third-party insurers might be tempted to favor doing business in one region of the country over another or to grant benefits according to different criteria in one state versus others. It is likely that employment benefit discrepancies would potentially cause variations in the administrative and accounting practices of multistate plans, leading to extensive inefficiencies. For example, plan participants would ultimately bear the costs in choice-of-law litigation. Finally, as multistate plans attempt to defend themselves against liability in "favorable jurisdictions," opportunistic forum shopping situations would likely arise.

B. Public Policy Compels a Uniform ERISA Common Law that Allows Damages Suits Against All Parties with Discretionary Authority Over Employment Benefit Plans

Not only is it imperative that courts develop a uniform ERISA common law, but in addition, they must create a common law that expands liability to all parties with discretion over employee benefit plans. Such a common law is justified by Congress's original public policy objectives.

It was precisely public policy reasons that prompted Congress to initially enact ERISA. Congress stated its reason for establishing ERISA as follows:

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire. This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income.[121]

120. *See id.* at 105 n.25.

121. H.R. REP. NO. 93-807, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676.

When courts interpret statutes such as section 502(a)(1)(B) they should give weight to Congress's expressed intent and keep policy objectives in mind. By holding parties with discretion over employee benefit plans fully accountable for their decisions, courts would protect the plans and increase the overall efficiency of the employment benefit plan system.

The protection of employment benefits was clearly a principle factor for establishing ERISA in 1974. With the sheer growth of employment benefit plans since ERISA's enactment, the importance of meeting the policy objective of protecting employment benefits has become even more substantial. In 1974, when ERISA was enacted, private pension plan assets amounted to $164 billion.[122] Today total pension assets amount to more than $4 trillion.[123] Moreover, these figures do not even include the assets involved in medical insurance, life insurance, and other welfare plans.[124] Clearly, because ERISA covers nearly all private sector employees,[125] the potential impact upon individual employees and society as a whole is immense.

Indeed, it was precisely because of the potential harm to society that Congress recognized the need for broad participant relief through ERISA. Congress recognized that:

> the growth in size, scope, and numbers of employee benefit plans . . . has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly

122. *See* Michael S. Sirkin, *Symposium: The 20th Anniversary of the Employee Retirement Income Security Act (1974–1944): The 20 Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 322 n.3 (1994) (citing H.R. REP. NO. 533, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641) (estimating that in 1974 assets of private pension plans totaled over 150 billion dollars).

123. *See Private Pension Plan Assets Reached $4.02 Trillion In 1998, According To PWBA Report* (June 19, 2002), *at* http://www.spencernet.com/Archive/News061902.html#Anchor-49575 (last visited Jan. 23, 2003).

124. *See id.*

125. *See* Mark T. McDermott, *It's The Law: Health Insurance For Adopted Children*, ADOPTIVE FAMILIES (Mar.–Apr. 2002) *at* https://www.adoptivefamilies.com//pdf/health_ins.pdf (stating that "ERISA covers almost all employers except government employers").

> affected by these plans; [and] that they are affected with a national public interest.[126]

Allowing plan participants the opportunity to hold accountable those parties with discretion over their benefit plans is a key component in safeguarding Congress's stated policies. It makes no sense for courts to allow plan participants to bring actions against parties who did not make decisions regarding their benefits while forbidding actions against the party who did. The health insurance industry serves as an example. In 2001, national health care expenditures totaled nearly 1.5 trillion dollars.[127] More than fifty percent of that total came from private sources—mainly contributions to employee benefit plans covered by ERISA.[128] Over the years, third-party insurer systems developed to assist patients with rising medical costs. When the individual has medical needs a third-party insurer typically pays for the treatment. Currently, nearly all consumer health care expenditures are paid for through some type of third-party insurer; only about twenty-nine percent is paid through direct out-of-pocket payments.[129]

Third-party insurers will typically utilize some sort of review process to evaluate the necessity of treatment.[130] These third-party insurers—through a review of the validity or the necessity of a patient's claim—frequently make decisions regarding employees' benefit plans determining what is or is not covered. Such insurers need to be held accountable when they are in a discretionary position over an individual's benefit plan. Again, it does not make sense for a court to allow plan participants to bring actions under ERISA section

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126. 29 U.S.C. § 1001(a) (1994) (stating policy reasons for enactment of ERISA).

127. *See* Center for Medicare and Medicaid Services, *Table 3: National Health Expenditures, By Source of Funds and Type of Expenditure: Selected Calendar Years 1996 – 2001, at* http://cms.hhs.gov/statistics/nhe/historical/t3.asp (last visited Jan. 24, 2003).

128. *See id.*

129. *See id.*

130. *See* Theodore R. Marmor & Michael S. Barr, *Making Sense of the National Health Insurance Reform Debate*, 10 YALE L. & POL'Y REV. 228, 232 (1992) ("[P]rivate insurance firms spend large and increasing sums on utilization reviews, marketing, and billing.").

502(a)(1)(B) against the employer or another party but not against the party who actually made the decision regarding their plan.

Third-party insurers, as well as any other party with discretion over benefit plans, will always have an incentive to minimize costs through review procedures. There is admittedly nothing wrong with taking cost-saving measures. However, if third-party insurers are not held liable for damages, they will have less incentive to use utmost care in their decision-making capacity than they otherwise would have.

V. CONCLUSION

One of Congress's primary goals in establishing ERISA was to protect employee benefit plan participants from those in charge of their plans. The manner in which the circuit courts have interpreted section 502(a)(1)(B) has left a gap in this intended protection that needs to be filled. When a party has a discretionary role in the administration of an employee benefit plan, there is no reason it should not be liable for damages if a plan participant or beneficiary pursues a suit against it.

Although ERISA itself is relatively new, every U.S. circuit court has decided who a proper defendant is under section 502(a)(1)(B). Unfortunately, the circuits have not complied with Congress's original intent that a uniform common law should be developed in this area of the law. Today, not only are the circuits split on this issue, but many intra-circuit splits exist as well. Because there is no uniformity as to who is a proper defendant under section 502(a)(1)(B), it is impossible to know exactly who to hold accountable, and it is very difficult to predict how courts will rule on this issue.

A uniform law should be promulgated placing liability for damages on any party who has discretionary control over an employee benefit plan. Doing so would comply with Congress's original intention of broad protection over plan participants and their benefit plans against those in control of their plans. A good deal of precedent already exists in some of the circuits that apply this rule. Additionally, it would further important public policy objectives by placing accountability on all parties that actually make decisions regarding employee benefit plans. Meeting this objective would

increase the overall efficiency of the manner in which benefit plans are run and granted to the plan participants.

Employee benefits programs have greatly increased in size and importance since ERISA was first enacted in 1974. This trend will likely increase as pension plans grow and more benefits are offered to employees. The importance of safeguarding employees' benefits have been front page news over the past couple years as employee pension plans within major corporations have dwindled in assets because of actions of individuals with fiduciary discretion over these plans.[131] These scenarios should serve as examples of what can happen when parties with discretionary authority over benefit plans are not held accountable. As employee benefit plans become increasingly important to the well-being of the individuals in our society, our courts must allow employees the ability to protect themselves to the fullest extent possible.

John M. Teske*

131. *See* Susan A. Davis, *We Must Safeguard Employee Pensions*, Feb. 7, 2002, *available at* http://www.house.gov/susandavis/editorials/ed20702EmployeePensions.html (discussing need for increased protection of employee benefit plans and offering the Enron bankruptcy as one example of a situation where those parties with fiduciary duties over the plan need to be held accountable in order to accomplish the desired protection).

* J.D. Candidate, May 2004, Loyola Law School. I would like to dedicate this Note to my wife, Jennifer, for all her love and support. I am also grateful to the entire Editorial Board and staff of the *Loyola of Los Angeles Law Review* for their advice and assistance.