LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS

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LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS

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Note: *The cases in this Supplement have been edited, including deletion of cites, footnotes and textual material. Not all deletions are indicated by ellipses.*

Chapter 1 ORIGINS AND REASONS FOR EMPLOYEE BENEFITS AND ERISA

Page 22
Replace bracketed material in first paragraph with the following:

[In 2015, the maximum taxable wage base is $118,500. In 2015, the average monthly benefit for a retired worker is estimated to be $1,306 while the maximum monthly benefit for a retired worker retiring at the normal retirement age of 66 is $2,663.]

Chapter 2 EMPLOYEE PENSION PLANS

Page 27
Insert after second full paragraph:

A defined benefit plan's benefits must not exceed the lesser of $210,000 (indexed for inflation) or 100 percent of the participant's average compensation for the high three years of service. IRC § 415(b).

Page 35
Insert after first full sentence:

In 2015, a 401(k) account holder cannot defer (contribute to the account from earnings) more than $18,000 (indexed for inflation).

Page 38
Replace first sentence in last carryover paragraph with the following:

An employee cannot contribute more than $18,000 to a 401(k) plan in 2015.

Page 42
Insert at end of page:

The Department of Labor issued final regulations effective for all plan years beginning on or after November 1, 2011, requiring the disclosure of plan fee and expense information to participants and beneficiaries in 401(k) plans. The regulations require that participants be provided with sufficient information regarding fees and expenses to make informed decisions with regard to the management of their individual accounts.

Participants must be provided with an explanation of any fees and expenses for general plan administrative services that may be charged against their individual accounts that are not reflected in the total annual operating expenses of any investment option, as well as the basis upon which the charge will be allocated to individual accounts. The regulations also require that participants be given an explanation of any fees and expenses that may be charged against their individual account on an individual basis and that are not reflected in the total annual operating expense of an investment option such as fees for investment advice and commissions.

Chapter 3 WELFARE BENEFITS

Page 110
Insert before Employer Mandates:

In a lengthy and divided opinion, the Supreme Court upheld the constitutionality of the Affordable Care Act's individual mandate in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012). Specifically, the Court held that the individual mandate constituted a valid exercise of Congress' power to lay and collect taxes. *Id.* at 2593-2601.

In *King v. Burwell*, 2015 U.S. LEXIS 4248 (June 25, 2015), the Supreme Court held that the Affordable Care Act's individual tax credits are available for health insurance purchased in states that have a federally-established Health Insurance Exchange.

Page 115
Replace *UAW v. Yard-Man, Inc.* and *Sprague v. General Motors Corp.* with:

M & G Polymers USA, LLC v. Tackett
135 S. Ct. 926 (2015)

Justice THOMAS delivered the opinion of the Court.

This case arises out of a disagreement between a group of retired employees and their former employer about the meaning of certain expired collective-bargaining agreements. The retirees (and their former union) claim that these agreements created a right to lifetime contribution-free health care benefits for retirees, their surviving spouses, and their dependents. The employer, for its part, claims that those provisions terminated when the agreements expired. The United States Court of Appeals for the Sixth Circuit sided with the retirees, relying on its conclusion in *International Union, United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Yard–Man, Inc.*, 716 F.2d 1476 (1983), that retiree health care benefits are unlikely to be left up to future negotiations. We granted certiorari and now conclude that such reasoning is incompatible with ordinary principles of contract law. We therefore vacate the judgment of the Court of Appeals and remand for it to apply ordinary principles of contract law in the first instance.

This case is about the interpretation of collective-bargaining agreements that define rights to welfare benefits plans. Although ERISA imposes elaborate minimum funding and vesting

standards for pension plans, it explicitly exempts welfare benefits plans from those rules, Welfare benefits plans must be "established and maintained pursuant to a written instrument," § 402(a)(1), but "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," *Curtiss–Wright Corp. v. Schoonejongen,* 514 U.S. 73 (1995). As we have previously recognized, "[E]mployers have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 833 (2003). And, we have observed, the rule that contractual "provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan." *Heimeshoff v. Hartford Life & Accident Ins. Co.,* 134 S.Ct. 604 (2013).

In this case, the Court of Appeals applied the *Yard–Man* inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. As we now explain, those inferences conflict with ordinary principles of contract law.

We disagree with the Court of Appeals' assessment that the inferences applied in *Yard–Man* and its progeny represent ordinary principles of contract law. As an initial matter, *Yard–Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law. *Yard–Man* 's assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention.

Yard–Man relied in part on the premise that retiree health care benefits are not subjects of mandatory collective bargaining. Parties, however, can and do voluntarily agree to make retiree benefits a subject of mandatory collective bargaining. Indeed, the employer and union in this case entered such an agreement in 2001. *Yard–Man* also relied on the premise that retiree benefits are a form of deferred compensation, but that characterization is contrary to Congress' determination otherwise. In ERISA, Congress specifically defined plans that "resul[t] in a deferral of income by employees" as pension plans, ERISA § 3(2)(A)(ii), and plans that offer medical benefits as welfare plans, ERISA § 3(1)(A). Thus, retiree health care benefits are not a form of deferred compensation.

Further compounding this error, the Court of Appeals has refused to apply general durational clauses to provisions governing retiree benefits. Having inferred that parties would not

leave retiree benefits to the contingencies of future negotiations, and that retiree benefits generally last as long as the recipient remains a retiree, the court in *Yard–Man* explicitly concluded that these inferences "outweigh[ed] any contrary implications derived from a routine duration clause terminating the agreement generally." 716 F.2d, at 1482–1483. The court's subsequent decisions went even further, requiring a contract to include a specific durational clause for retiree health care benefits to prevent vesting. These decisions distort the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties.

The Court of Appeals also failed even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises. Similarly, the Court of Appeals failed to consider the traditional principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." Indeed, we have already recognized that "a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration." *Ibid.* But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

We vacate the judgment of the Court of Appeals and remand the case for that court to apply ordinary principles of contract law in the first instance.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring.

Today's decision rightly holds that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement.

On remand, the Court of Appeals should examine the entire agreement to determine whether the parties intended retiree health-care benefits to vest. Because the retirees have a vested, lifetime right to a monthly pension, a provision stating that retirees "will receive" health-care benefits if they are "receiving a monthly pension" is relevant to this examination. So is a "survivor benefits" clause instructing that if a retiree dies, her surviving spouse will "continue to receive [the retiree's health-care] benefits ... until death or remarriage." If, after considering all relevant contractual language in light of industry practices, the Court of Appeals concludes that the contract is ambiguous, it may turn to extrinsic evidence—for example, the parties' bargaining

history. The Court of Appeals, however, must conduct the foregoing inspection without *Yard–Man* 's "thumb on the scale in favor of vested retiree benefits."

Because I understand the Court's opinion to be consistent with these basic rules of contract interpretation, I join it.

Page 133
Insert as first full paragraph:

In IRS Notice 2013-71, the IRS introduced a second "carryover" exception to the "use it or lose it" rule. Under this exception, a cafeteria plan may permit up to $500 in an employee's health FSA remaining at the end of a plan year to be carried over and used to reimburse medical expenses incurred at any time during the following plan year. Thus, for example, suppose an employee contributes $2,000 to a health FSA for the 2013 calendar year and the employee only incurs $1,300 in health care expenses in 2013. If the employer elects to adopt a carryover provision, the health FSA may carry over $500 of the $700 in unused contributions to reimburse the employee for health care expenses incurred in 2014. The remaining $200 in unused contributions must be forfeited. A health FSA may offer either a grace period of up to 2 ½ months or a carryover of up to $500. A plan may not include both a grace period and a carryover provision.

Page 135
Replace the second sentence with the following:

In 2015, the HDHP must have an annual deductible of at least $1,300 for individual coverage and $2,600 for family coverage, and must limit annual out-of-pocket expenses to no more than $6,450 for individuals and $12,900 for families.

Page 135
Replace fourth sentence with the following:

In 2015, the statutory dollar amount is $3,350 for a single-coverage HDHP and $6,650 for a family coverage HDHP.

Chapter 4 REGULATION OF EMPLOYEE BENEFIT PLANS

Page 170
Insert after QUESTIONS AND PROBLEMS:

ERISA § 510 also contains a whistleblower provision that prohibits an employer from discharging, fining, suspending, expelling or discriminating "against any person because he has given information or has testified or is about or testify in any inquiry or proceeding relating to [ERISA]…" The federal circuit courts are divided as to whether this provision extends to an employee's unsolicited, internal complaints to the employer. In *Sexton v. Panel Processing Inc.*, 754 F.3d 332 (6th Cir. 2014), the Sixth Circuit recently held that ERISA § 510 does not protect unsolicited internal employee complaints. Similarly, the Second, Third, and Fourth Circuit Court of Appeals have denied any protection to unsolicited internal ERISA complaints under Section 510. (*Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *Edwards v. A.H. Cornell & Son*, 610 F.3d 217 (3d Cir. 2010); *King v. Marriott Int'l, Inc.*, 337 F.3d 421 (4th Cir. 2003)). In contrast, the Fifth, Seventh and Ninth Circuit Court of Appeals have held that ERISA § 510 does protect an employee's unsolicited internal complaints about ERISA violations. (*Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812 (7th Cir. 2012); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, (9th Cir. 1993)).

Page 248
Insert:

In *Marin General Hospital v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir.2009), decided after *Davila*, a hospital sued an ERISA plan administrator in state court based on breach of an oral contract to cover 90 percent of an ERISA participant's expenses. The administrator removed to federal court, arguing that the claims were completely preempted. The Ninth Circuit disagreed. The claims failed the first part of the Davila test: "The Hospital does not contend that it is owed this additional amount because it is owed under the patient's ERISA plan. Quite the opposite. The Hospital is claiming this amount precisely because it is not owed under the patient's ERISA plan." Id. at 947. And the claims additionally failed the second part of the Davila test in that they implicated the independent legal duty of state contract law. Id. at 950. The Ninth Circuit directed that the case be remanded to state court for lack of federal jurisdiction.

Page 286
Insert:

On April 14, 2015, the U.S. Department of Labor ("DOL") issued a new proposed regulation that expands the definition of "fiduciary" under ERISA § 3(21).

More individuals and entities would be considered to be investment advice fiduciaries to ERISA retirement plans and IRAs. Certain sales activities and consulting, recordkeeping, participant education, and valuation services that in the past did not give rise to fiduciary status, would do so under the proposed regulation.

Persons would be considered a fiduciary advisor if, for a fee or other compensation, they provide one of four types of advice directly to a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner, and

1. the person or an affiliate has either acknowledged fiduciary status, or

2. the person provides the advice under an agreement, arrangement or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or management decisions with respect to securities or other property.

Four different types of "covered advice" could subject a person to fiduciary status:

1. Recommendations as to the advisability of acquiring, holding, disposing, or exchanging securities or other property including recommendations relating to an IRA distribution or roll over from a plan or an IRA;

2. Recommendations as to the management of securities or other property, including recommendations as to the management of assets to be rolled over to or distributed from an IRA;

3. Appraisals or opinions about the value of securities or other property if made in connection with a specific transaction involving the plan or an IRA: and

4. Recommendations of a person who will also receive a fee or other compensation for providing any of the three categories listed above.

The proposed regulation also includes certain discrete carve-outs that limit when a person who provides advice will be considered a fiduciary. One such carve-out permits plans with at least $100 million in assets and more than 100 plan participants to release persons from fiduciary status by stating the plan manages the assets and does not rely on the person to act in the best interest of the plan, to give impartial advice, or to give advice in a fiduciary capacity.

Chapter 6 PLAN ADMINISTRATION

Page 371
Delete *Moench v. Robertson* and insert:

Fifth Third Bancorp v. Dudenhoeffer
134 S. Ct. 2459 (2014)

Justice BREYER delivered the opinion of the Court.

[ERISA] requires the fiduciary of a pension plan to act prudently in managing the plan's assets. [ERISA § 404(a)(1)(B)].This case focuses upon that duty of prudence as applied to the fiduciary of an "employee stock ownership plan" (ESOP), a type of pension plan that invests primarily in the stock of the company that employs the plan participants.

We consider whether, when an ESOP fiduciary's decision to buy or hold the employer's stock is challenged in court, the fiduciary is entitled to a defense-friendly standard that the lower courts have called a "presumption of prudence." The Courts of Appeals that have considered the question have held that such a presumption does apply, with the presumption generally defined as a requirement that the plaintiff make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse.

We hold that no such presumption applies. Instead, ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets. [ERISA § 404(a)(2)].

I

Petitioner Fifth Third Bancorp, a large financial services firm, maintains for its employees a defined-contribution retirement savings plan. Employees may choose to contribute a portion of their compensation to the Plan as retirement savings, and Fifth Third provides matching contributions of up to 4% of an employee's compensation. The Plan's assets are invested in 20 separate funds, including mutual funds and an ESOP. Plan participants can allocate their contributions among the funds however they like; Fifth Third's matching contributions, on the other hand, are always invested initially in the ESOP, though the participant can then choose to move them to another fund. The Plan requires the ESOP's funds to be "invested primarily in shares of common stock of Fifth Third."

Respondents, who are former Fifth Third employees and ESOP participants, filed this putative class action in Federal District Court in Ohio. They claim that petitioners, Fifth Third and various Fifth Third officers, were fiduciaries of the Plan and violated the duties of loyalty

and prudence imposed by ERISA. See [ERISA §§ 409(a), 502(a)(2)]. We limit our review to the duty-of-prudence claims.

The complaint alleges that by July 2007, the fiduciaries knew or should have known that Fifth Third's stock was overvalued and excessively risky for two separate reasons. First, publicly available information such as newspaper articles provided early warning signs that subprime lending, which formed a large part of Fifth Third's business, would soon leave creditors high and dry as the housing market collapsed and subprime borrowers became unable to pay off their mortgages. Second, nonpublic information (which petitioners knew because they were Fifth Third insiders) indicated that Fifth Third officers had deceived the market by making material misstatements about the company's financial prospects. Those misstatements led the market to overvalue Fifth Third stock-the ESOP's primary investment-and so petitioners, using the participants' money, were consequently paying more for that stock than it was worth.

The complaint further alleges that a prudent fiduciary in petitioners' position would have responded to this information in one or more of the following ways: (1) by selling the ESOP's holdings of Fifth Third stock before the value of those holdings declined, (2) by refraining from purchasing any more Fifth Third stock, (3) by canceling the Plan's ESOP option, and (4) by disclosing the inside information so that the market would adjust its valuation of Fifth Third stock downward and the ESOP would no longer be overpaying for it.

Rather than follow any of these courses of action, petitioners continued to hold and buy Fifth Third stock. Then the market crashed, and Fifth Third's stock price fell by 74% between July 2007 and September 2009, when the complaint was filed. Since the ESOP's funds were invested primarily in Fifth Third stock, this fall in price eliminated a large part of the retirement savings that the participants had invested in the ESOP. (The stock has since made a partial recovery to around half of its July 2007 price.)

The District Court dismissed the complaint for failure to state a claim. The court began from the premise that where a lawsuit challenges ESOP fiduciaries' investment decisions, "the plan fiduciaries start with a presumption that their 'decision to remain invested in employer securities was reasonable.'" The court next held that this rule is applicable at the pleading stage and then concluded that the complaint's allegations were insufficient to overcome it.

The Court of Appeals for the Sixth Circuit reversed. Although it agreed that ESOP fiduciaries are entitled to a presumption of prudence, it took the view that the presumption is evidentiary only and therefore does not apply at the pleading stage. Thus, the Sixth Circuit simply asked whether the allegations in the complaint were sufficient to state a claim for breach of fiduciary duty. It held that they were.

In light of differences among the Courts of Appeals as to the nature of the presumption of prudence applicable to ESOP fiduciaries, we granted the fiduciaries' petition for certiorari.

* * *

II

A

In applying a "presumption of prudence" that favors ESOP fiduciaries' purchasing or holding of employer stock, the lower courts have sought to reconcile congressional directives that are in some tension with each other. On the one hand, ERISA itself subjects pension plan fiduciaries to a duty of prudence. In a section titled "Fiduciary duties," [Court quotes ERISA § 404(a)(1)(A)-(D).]

On the other hand, Congress recognizes that ESOPs are "designed to invest primarily in" the stock of the participants' employer, [ERISA § 407(d)(6)(A)], meaning that they are not prudently diversified. And it has written into law its "interest in encouraging" their use. One statutory provision says:

> INTENT OF CONGRESS CONCERNING EMPLOYEE STOCK OWNERSHIP PLANS.-The Congress, in a series of laws [including ERISA] has made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat [ESOPs] as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans. Tax Reform Act of 1976, s 803(h), 90 Stat. 1590.

In addition, and in keeping with this statement of intent, Congress has given ESOP fiduciaries a statutory exemption from some of the duties imposed on ERISA fiduciaries. ERISA specifically provides that, in the case of ESOPs and other eligible individual account plans, "the diversification requirement of [ERISA § 404(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [ERISA § 404(a)(1)(B)] [are] not violated by acquisition or holding of [employer stock]." [ERISA § 404(a)(2)].

Thus, an ESOP fiduciary is not obliged under [ERISA § 404(a)(1)(C)] to "diversif[y] the investments of the plan so as to minimize the risk of large losses" or under [ERISA § 404(a)(1)(B)] to act "with the care, skill, prudence, and diligence" of a "prudent man" insofar as that duty "requires diversification."

B

Several Courts of Appeals have gone beyond ERISA's express provision that ESOP fiduciaries need not diversify by giving ESOP fiduciaries a "presumption of prudence" when their decisions to hold or buy employer stock are challenged as imprudent.

***

We must decide whether ERISA contains some such presumption.

III

A

In our view, the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings. This conclusion follows from the pertinent provisions of ERISA, which are set forth above.

[ERISA §404(a)(1)(B)] "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." Massachusetts Mutual. Life Ins. Co. v. Russell, 473 U.S. 134, 143, n. 10 (1985). Section [404(a)(1)(C)] requires ERISA fiduciaries to diversify plan assets. And [§ 404(a)(2)] establishes the extent to which those duties are loosened in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs. Section [404(a)(2)] makes no reference to a special "presumption" in favor of ESOP fiduciaries. It does not require plaintiffs to allege that the employer was on the "brink of collapse," under "extraordinary circumstances," or the like. Instead, [§ 404(a)(2)] simply modifies the duties imposed by § [404(a)(1)] in a precisely delineated way: It provides that an ESOP fiduciary is exempt from § [404(a)(1)(C)'s] diversification requirement and also from § [404(a)(1)(B)'s] duty of prudence, but "*only to the extent that it requires diversification*." § [404(a)(2)] (emphasis added).

Thus, ESOP fiduciaries, unlike ERISA fiduciaries generally, are not liable for losses that result from a failure to diversify. But aside from that distinction, because ESOP fiduciaries are ERISA fiduciaries and because § [404(a)(1)(B)'s] duty of prudence applies to all ERISA fiduciaries, ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are.

B

Petitioners make several arguments to the contrary. First, petitioners argue that the special purpose of an ESOP-investing participants' savings in the stock of their employer-calls for a presumption that such investments are prudent. * * *

We cannot accept the claim that underlies this argument, namely, that the content of ERISA's duty of prudence varies depending upon the specific nonpecuniary goal set out in an

ERISA plan, such as what petitioners claim is the nonpecuniary goal here. Taken in context, § [404(a)(1)(B)'s] reference to "an enterprise of a like character and with like aims" means an enterprise with what the immediately preceding provision calls the "exclusive purpose" to be pursued by all ERISA fiduciaries: "providing benefits to participants and their beneficiaries" while "defraying reasonable expenses of administering the plan." §§ [404(a)(1)(A)(i), (ii)]. Read in the context of ERISA as a whole, the term "benefits" in the provision just quoted must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. Cf. § [3(2)(A)] (defining "employee pension benefit plan" and "pension plan" to mean plans that provide employees with "retirement income" or other "deferral of income"). The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.

Consider the statute's requirement that fiduciaries act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter." § [404(a)(1)(D)]. This provision makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary. See also § [410(a)] (With irrelevant exceptions, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility ... for any ... duty under this part shall be void as against public policy"). This rule would make little sense if, as petitioners argue, the duty of prudence is defined by the aims of the particular plan as set out in the plan documents, since in that case the duty of prudence could never conflict with a plan document.

Consider also § [404(a)(2)], which exempts an ESOP fiduciary from § [404(a)(1)(B)'s] duty of prudence but "only to the extent that it requires diversification." What need would there be for this specific provision were the nature of § [404(a)(1)(B)'s] duty of prudence altered anyway in the case of an ESOP in light of the ESOP's aim of promoting employee ownership of employer stock? Cf. Arlington Central School Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 299, n. 1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage").

Petitioners are right to point out that Congress, in seeking to permit and promote ESOPs, was pursuing purposes other than the financial security of plan participants. See, e.g., Tax Reform Act of 1976, § 803(h), 90 Stat. 1590 (Congress intended ESOPs to help "secur[e] capital funds for necessary capital growth and ... brin[g] about stock ownership by all corporate employees"). Congress pursued those purposes by promoting ESOPs with tax incentives. See 26 U.S.C. §§ 402(e)(4), 404(k), 1042. And it also pursued them by exempting ESOPs from ERISA's diversification requirement, which otherwise would have precluded their creation. 29 U.S.C. § 1104(a)(2). But we are not convinced that Congress also sought to promote ESOPs by further relaxing the duty of prudence as applied to ESOPs with the sort of presumption proposed by petitioners.

Second, and relatedly, petitioners contend that the duty of prudence should be read in light of the rule under the common law of trusts that "the settlor can reduce or waive the prudent man standard of care by specific language in the trust instrument." * * * This argument fails, however, in light of this Court's holding that, by contrast to the rule at common law, "trust documents cannot excuse trustees from their duties under ERISA." Central States, Southeast & Southwest Areas Pension Fund, 472 U.S., at 568; see also [ERSIA §§ [404(a)(1)(D), 410(a).]

Third, petitioners argue that subjecting ESOP fiduciaries to a duty of prudence without the protection of a special presumption will lead to conflicts with the legal prohibition on insider trading. The potential for conflict arises because ESOP fiduciaries often are company insiders and because suits against insider fiduciaries frequently allege, as the complaint in this case alleges, that the fiduciaries were imprudent in failing to act on inside information they had about the value of the employer's stock.

This concern is a legitimate one. But an ESOP-specific rule that a fiduciary does not act imprudently in buying or holding company stock unless the company is on the brink of collapse (or the like) is an ill-fitting means of addressing it. While ESOP fiduciaries may be more likely to have insider information about a company that the fund is investing in than are other ERISA fiduciaries, the potential for conflict with the securities laws would be the same for a non-ESOP fiduciary who had relevant inside information about a potential investment. And the potential for conflict is the same for an ESOP fiduciary whose company is on the brink of collapse as for a fiduciary who is invested in a healthier company. (Surely a fiduciary is not obligated to break the insider trading laws even if his company is about to fail.) The potential for conflict therefore does not persuade us to accept a presumption of the sort adopted by the lower courts and proposed by petitioners. We discuss alternative means of dealing with the potential for conflict in Part IV, infra.

Finally, petitioners argue that, without some sort of special presumption, the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOPs to their employees, contrary to the stated intent of Congress. ESOP plans instruct their fiduciaries to invest in company stock, and § [404(a)(1)(D)] requires fiduciaries to follow plan documents so long as they do not conflict with ERISA. Thus, in many cases an ESOP fiduciary who fears that continuing to invest in company stock may be imprudent finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of § [404(a)(1)(B)], but if he stops investing and the stock goes up he may be sued for disobeying the plan documents in violation of § [404(a)(1)(D)]. * ** Petitioners argue that, given the threat of such expensive litigation, ESOPs cannot thrive unless their fiduciaries are granted a defense-friendly presumption.

Petitioners are basically seeking relief from what they believe are meritless, economically burdensome lawsuits. We agree that Congress sought to encourage the creation of ESOPs. And we have recognized that "ERISA represents a ' "careful balancing" between ensuring fair and

prompt enforcement of rights under a plan and the encouragement of the creation of such plans.' " * * *

At the same time, we do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite "balancing." The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats. That important task can be better accomplished through careful, context-sensitive scrutiny of a complaint's allegations. We consequently stand by our conclusion that the law does not create a special presumption of prudence for ESOP fiduciaries.

IV

We consider more fully one important mechanism for weeding out meritless claims, the motion to dismiss for failure to state a claim. That mechanism, which gave rise to the lower court decisions at issue here, requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently. Because the content of the duty of prudence turns on "the circumstances ... prevailing" at the time the fiduciary acts, § [404(a)(1)(B)], the appropriate inquiry will necessarily be context specific.

The District Court in this case granted petitioners' motion to dismiss the complaint because it held that respondents could not overcome the presumption of prudence. The Court of Appeals, by contrast, concluded that no presumption applied. And we agree with that conclusion. The Court of Appeals, however, went on to hold that respondents had stated a plausible duty-of-prudence claim. The arguments made here, along with our review of the record, convince us that the judgment of the Court of Appeals should be vacated and the case remanded. On remand, the Court of Appeals should apply the pleading standard as discussed in Twombly and Iqbal in light of the following considerations.

A

Respondents allege that, as of July 2007, petitioners knew or should have known in light of publicly available information, such as newspaper articles, that continuing to hold and purchase Fifth Third stock was imprudent. * * *

In our view, where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. * * *

In other words, a fiduciary usually "is not imprudent to assume that a major stock market ... provides the best estimate of the value of the stocks traded on it that is available to him." * * *

We do not here consider whether a plaintiff could nonetheless plausibly allege imprudence on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as " 'an unbiased assessment of the security's value in light of all public information,' " Halliburton Co., supra, at ---- (slip op., at 12) (quoting Amgen Inc., supra, at ---- (slip op., at 5)), that would make reliance on the market's valuation imprudent. * * *

B

Respondents also claim that petitioners behaved imprudently by failing to act on the basis of nonpublic information that was available to them because they were Fifth Third insiders. * * *

To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. The following three points inform the requisite analysis.

First, in deciding whether the complaint states a claim upon which relief can be granted, courts must bear in mind that the duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law. * * * Federal securities laws "are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information." United States v. O'Hagan, 521 U.S. 642, 651-652 (1997). As every Court of Appeals to address the question has held, ERISA's duty of prudence cannot require an ESOP fiduciary to perform an action-such as divesting the fund's holdings of the employer's stock on the basis of inside information-that would violate the securities laws. * * *

Second, where a complaint faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued, additional considerations arise. The courts should consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws. * * * The U.S. Securities and Exchange Commission has not advised us of its views on these matters, and we believe those views may well be relevant.

Third, lower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases-which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment-or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

* * *

We leave it to the courts below to apply the foregoing to the complaint in this case in the first instance. The judgment of the Court of Appeals for the Sixth Circuit is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Page 401
Delete *Tibble v. Edison International* and insert:

Tibble v. Edison International
711 F.3d 1061 (9th Cir. 2013)

Edison International is a holding company for various electric utilities and other energy interests including Southern California Edison Company and the Edison Mission Group (collectively "Edison"), which itself consists of the Chicago-based Midwest Generation. Like most employer-organizations offering pensions today, Edison sponsors a 401(k) retirement plan for its workforce. During litigation, the total valuation of the "Edison 401(k) Savings Plan" was $3.8 billion, and it served approximately 20,000 employee-beneficiaries across the entire Edison International workforce.

To assist their decision making, Edison employees are provided a menu of possible investment options. Originally they had six choices. In response to a study and union negotiations, in 1999 the Plan grew to contain ten institutional or commingled pools, forty mutual fund-type investments, and an indirect investment in Edison stock known as a unitized fund. The mutual funds were similar to those offered to the general investing public, so-called retail-class mutual funds, which had higher administrative fees than alternatives available only to institutional investors.

Past and present Midwest Generation employees sued under the Employee Retirement Income Security Act of 1974 (ERISA) and obtained certification as a class action representing the whole of Edison's eligible workforce. Beneficiaries objected to the inclusion of the retail-class mutual funds, specifically claiming that their inclusion had been imprudent. . . Beneficiaries also claimed that offering a unitized stock fund, money market-style investments, and mutual funds, had been imprudent.
***

III

Edison claims that beneficiaries' entire case is proscribed by ERISA § 404(c), a safe harbor that can apply to a pension plan that "provides for individual accounts and permits a

participant or beneficiary to exercise control over the assets in his account." [ERISA § 404(c)(1)(A).]

As the Edison 401(k) is clearly such a plan we consider the terms of section 404(c)(1)A)(ii). It provides that:

"[N]o person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." [ERISA § 404(c)(1)(A)(ii)]

Edison reads this statutory language as insulating it from all of beneficiaries' claims because each challenged investment was a product of a "participant's or beneficiary's exercise of control," by virtue of his selection of it from the Plan menu. Disagreeing, the DOL directs us to its previously announced interpretations. In a 1992 regulation it stated that in order to fall within section 404's ambit, the breach or loss would need to be the "direct and necessary result" of the action by the beneficiary. 29 C.F.R. § 2550.404c–1(d)(2). A preamble that went through the notice-and-comment process and appeared in the agency's final rule, stated that "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA section 404(c) plan is a fiduciary function which ... is not a direct or necessary result of any participant direction." 57 Fed. Reg. 46,922, (Oct. 13, 1992). ***

Congress gave the Secretary of Labor authority to promulgate binding regulations interpreting Title I of ERISA, which includes section 404(c). It also empowered the Secretary to bring civil enforcement actions. ***

Thus as cogently explained by DOL in its brief, "the selection of the particular funds to include and retain as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot 'result[ ] from') a participant's decision to invest in any particular option." The preamble to the 1992 final rule states:

> ***Thus, for example, in the case of look-through investment vehicles, the plan fiduciary has a fiduciary obligation to prudently select such vehicles, as well as a residual fiduciary obligation to periodically evaluate the performance of such vehicles to determine, based on that evaluation, whether the vehicles should continue to be available as participant investment options. ***

In an opinion that has been read by some to support the no-deference view, the Third Circuit keyed in on the fact that section 404(c) also speaks of "any loss" resulting from a participant's control. . . it is admittedly the case that monetary damage flowing from a fiduciary's imprudent design of the investment menu passes through the participant, as intermediary. But is it proper to conclude that those losses, in the language of section 404(c), "result from" the participant's choice? This might seem an odd question given that, literally speaking, there can be no loss without the participant selecting an investment.

Undoubtedly, in these situations, a fiduciary's decision to include an investment option on the plan menu also is a cause of any participant's loss. Confronted with this difficulty, DOL has effectively imported the tort-law notion of proximate cause to conclude that the most salient cause (as between the two) is the fiduciary's imprudence.

We deem this "a reasonable interpretation of the statute." ERISA "allocates liability for plan-related misdeeds in reasonable proportion to the respective actors' power to control and prevent the misdeeds." As compared to the beneficiary, the fiduciary is better situated to prevent the losses that would stem from the inclusion of unsound investment options. It can design a prudent menu of options.***

We now turn to the merits of the main appeal. . .

Under the common law of trusts, which helps inform ERISA, a fiduciary "is duty-bound 'to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the [Plan] and the amount and regularity of the income to be derived.' "

A mutual fund is a pool of assets, chiefly a portfolio of securities bought with the capital contributions of the fund's shareholders. Beneficiaries seek a ruling that including mutual funds of the sort available to the investing public at large ("retail" or "brand-name" funds) is categorically imprudent. . . .

Also before us under the mutual fund umbrella is beneficiaries' claim that the particular mutual funds Edison selected charged excessive fees, which rendered their inclusion imprudent. Part of this challenge is a broadside against retail-class mutual funds, which do generally have higher expense ratios than their institutional-class counterparts. As the district court explained in its post-trial findings of fact, this is because with institutional-class mutual funds "the amount of assets invested is far greater than [that associated with] the typical individual investor." The Seventh Circuit has repeatedly rejected the argument that a fiduciary "should have offered only 'wholesale' or 'institutional' funds. ("[N]othing in ERISA requires [a] fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)."). We agree. There are simply too many relevant considerations for a fiduciary, for that type of bright-line approach to prudence to be tenable (a fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility").

Beneficiaries also charge that the inclusion of the unitized stock investment was imprudent, despite it being an industry standard for large 401(k)'s. Their main contention is that during the class period a roughly 77% gain in Edison's stock price yielded Plan investors only around a 67% return. But hindsight is the wrong metric for evaluating fiduciary duty.

This dilution, or "investment drag," that occurs when stock prices rise as compared to a direct stock investment is a well-recognized characteristic of unitized funds. The reason they are called "unitized" is that participants own units of a fund that invests primarily in company stock, but also in "cash and other similar highly liquid investments." These non-stock portions of the unitized fund generate lower rates of return than does the stock. Why use the device then? The advantages are twofold. The cash-buffer gives investors increased liquidity (explaining that money can be dispersed without delay because sales of units are paid out from the cash). Also, "in a market in which the relevant stock is declining, the presence of cash in the fund would be a good thing" because it functions as a hedge.

Continuing with our application of the prudence standard, we confront the final issue in the case: Edison's argument on cross appeal that the district court erred in concluding—after a three-day bench trial and months of post-trial evidence and briefing—that the company had been imprudent in deciding to include retail-class shares of three specific mutual funds in the Plan menu. The basis of liability was not the mere inclusion of retail-class shares, as the court had rejected that claim on summary judgment. Instead, beneficiaries prevailed on a theory that Edison has failed to investigate the possibility of institutional-share class alternatives.

In reviewing a judgment after a bench trial, we evaluate the district court's factual findings "for clear error and its legal conclusions de novo."

Here, the lower court's unchallenged findings are that during the relevant time period (i) all three funds offered institutional options in which the Edison 401(k) Savings Plan almost certainly could have participated, (ii) those options were in the range of 24 to 40 basis points cheaper than the retail class options the Plan did include, and—crucially—(iii) between the class profiles, there were no salient differences in the investment quality or management.

Since at least 1999, Edison has contracted with Hewitt Financial Services ("HFS") for investment consulting advice. It argued below, and re-urges here, that it reasonably depended on HFS for advice about which mutual fund share classes should be selected for the Plan.

[T]o keep Edison abreast of developments, it provides the Committee with monthly, quarterly, and annual investment reports. We offer this background to illustrate a point, which, though it should be unmistakable, seems to have eluded Edison in its briefing. HFS is its consultant, not the fiduciary. "

The district court found that Edison failed to satisfy element (3)—reasonable reliance. We agree. Just as fiduciaries cannot blindly rely on counsel or on credit rating agencies, a firm in Edison's position cannot reflexively and uncritically adopt investment recommendations. The trial evidence—from both beneficiaries' and Edison's own experts—shows that an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund. The district court found an utter absence of evidence that Edison

considered the possibility of institutional classes for the funds litigated—a startling fact considering that supposedly the "expense ratio" was a core investment criterion.

On this record we have little difficulty agreeing with the district court that Edison did not exercise the "care, skill, prudence, and diligence under the circumstances" (ERISA § 404(a)(1)(B)) that ERISA demands in the selection of these retail mutual funds.

TIBBLE v. EDISON INTERNATIONAL

135 S. Ct. 1823 (2015)

Justice BREYER delivered the opinion of the Court.

. . . .

As relevant here, petitioners argued that respondents violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. Petitioners argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available (the lower price reflects lower administrative costs). Specifically, petitioners claimed that a large institutional investor with billions of dollars, like the Plan, can obtain materially identical lower priced institutional-class mutual funds that are not available to a retail investor. Petitioners asked, how could respondents have acted prudently in offering the six higher priced retail-class mutual funds when respondents could have offered them effectively the same six mutual funds at the lower price offered to institutional investors like the Plan?

As to the three funds added to the Plan in 2002, the District Court agreed. It wrote that respondents had "not offered any credible explanation" for offering retail-class, i.e., higher priced mutual funds that "cost the Plan participants wholly unnecessary [administrative] fees," and it concluded that, with respect to those mutual funds, respondents had failed to exercise "the care, skill, prudence and diligence under the circumstances" that ERISA demands of fiduciaries.

As to the three funds added to the Plan in 1999, however, the District Court held that petitioners' claims were untimely because, unlike the other contested mutual funds, these mutual funds were included in the Plan more than six years before the complaint was filed in 2007. As a result, the 6–year statutory period had run.

The District Court allowed petitioners to argue that, despite the 1999 selection of the three mutual funds, their complaint was nevertheless timely because these funds underwent significant changes within the 6–year statutory period that should have prompted respondents to

undertake a full due-diligence review and convert the higher priced retail-class mutual funds to lower priced institutional-class mutual funds. App. to Pet. for Cert. 142–150.

The District Court concluded, however, that petitioners had not met their burden of showing that a prudent fiduciary would have undertaken a full due-diligence review of these funds as a result of the alleged changed circumstances. According to the District Court, the circumstances had not changed enough to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class mutual funds. Ibid.

The Ninth Circuit affirmed the District Court as to the six mutual funds. 729 F.3d 1110 (2013). With respect to the three mutual funds added in 1999, the Ninth Circuit held that petitioners' claims were untimely because petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6–year statutory period. Petitioners filed a petition for certiorari asking us to review this latter holding. We agreed to do so.

[ERISA Section 413] reads, in relevant part, that "[n]o action may be commenced with respect to a fiduciary's breach of any responsibility, duty, or obligation" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." Both clauses of that provision require only a "breach or violation" to start the 6–year period. Petitioners contend that respondents breached the duty of prudence by offering higher priced retail-class mutual funds when the same investments were available as lower priced institutional-class mutual funds.

We believe the Ninth Circuit erred by applying a statutory bar to a claim of a "breach or violation" of a fiduciary duty without considering the nature of the fiduciary duty. The Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances. Of course, after the Ninth Circuit considers trust-law principles, it is possible that it will conclude that respondents did indeed conduct the sort of review that a prudent fiduciary would have conducted absent a significant change in circumstances.

An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. ERISA § 404(a)(1); see also Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014). We have often noted that an ERISA fiduciary's duty is "derived from the common law of trusts." Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570(1985). In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts. We are aware of no reason why the Ninth Circuit should not do so here.

Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise

prudence in selecting investments at the outset. The Bogert treatise states that "[t]he trustee cannot assume that if investments are legal and proper for retention at the beginning of the trust, or when purchased, they will remain so indefinitely." Rather, the trustee must "systematic[ally] conside[r] all the investments of the trust at regular intervals" to ensure that they are appropriate. Bogert 3d § 684, at 147–148. The Restatement (Third) of Trusts states the following:

"[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." § 90, Comment b, p. 295 (2007).

The Uniform Prudent Investor Act confirms that "[m]anaging embraces monitoring" and that a trustee has "continuing responsibility for oversight of the suitability of the investments already made." § 2, Comment, 7B U.L.A. 21 (1995) (internal quotation marks omitted). Scott on Trusts implies as much by stating that, "[w]hen the trust estate includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time." 4 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts § 19.3.1, p. 1439 (5th ed. 2007). Bogert says the same. Bogert 3d § 685, at 156–157 (explaining that if an investment is determined to be imprudent, the trustee "must dispose of it within a reasonable time"); see, e.g., State Street Trust Co. v. De Kalb, 259 Mass. 578, 583, 157 N.E. 334, 336 (1927) (trustee was required to take action to "protect the rights of the beneficiaries" when the value of trust assets declined).

In short, under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones. A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit erred by applying a 6–year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty.

The parties now agree that the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law. *** The parties disagree, however, with respect to the scope of that responsibility. Did it require a review of the contested mutual funds here, and if so, just what kind of review did it require? A fiduciary must discharge his responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. ERISA § 404(a)(1). We express no view on the scope of respondents' fiduciary duty in this case. We remand for the Ninth Circuit to consider petitioners' claims that respondents breached their duties within the relevant 6–year period under ERISA § 413, recognizing the importance of analogous trust law.

A final point: Respondents argue that petitioners did not raise the claim below that respondents committed new breaches of the duty of prudence by failing to monitor their

investments and remove imprudent ones absent a significant change in circumstances. We leave any questions of forfeiture for the Ninth Circuit on remand. The Ninth Circuit's judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chapter 7 ENFORCEMENT ISSUES

Page 453
Insert before: *Conkright v. Frommert*

In *Miller v. American Airlines*, 632 F.3d 837 (3d Cir. 2011) the court found that the termination of a claimant's disability benefits was arbitrary and capricious "in light of the numerous substantive deficiencies and procedural irregularities that pervaded [the plan's] decision-making process." Id. at 841

The court stated that:

> *Glenn* instructs that a conflict arises where an employer both funds and evaluates claims. The Supreme Court's broad view of whether a conflict of interest exists, therefore, encompasses an arrangement where an employer makes fixed contributions to a plan, evaluates claims, and pays claims through a trust. Even in an actuarially grounded plan, the employer provides the monetary contribution and any money saved reduces the employer's projected benefit obligation
>
> Turning to the case at hand, the Plan is a defined benefit plan that American funds based on an actuarial formula. The record reveals that although American did meet ERISA's minimum funding requirements in 2006, the year Miller's benefits were terminated, the Plan still lacked funds to meet a significant amount of its projected benefit obligation. Despite the fact that American made fixed contributions to the Plan, every dollar that American saved by reducing disability payments decreased its projected benefit obligation. Id. at 847-48.

The court noted:

> An administrator's reversal of its decision to award a claimant benefits without receiving any new medical information to support this change in position is an irregularity that counsels towards finding an abuse of discretion. Miller claims that American abruptly terminated his benefits in 2006 upon evaluating the same information that it had previously found to support an award of benefits.
>
> Turning to the District Court's . . . conclusion that American did not reverse its position, we disagree that the documentation from Dr. Gonzalez provided new information regarding Miller's eligibility for benefits. The records that American received from Dr. Gonzalez in 2005 and 2006 stating that Miller was asymptomatic do not differ in any material aspect from the records submitted in 2003 that American determined supported a disability finding. For example, Dr. Gonzalez reported in 2003 that Miller

was diagnosed with anxiety and brief reactive psychosis, but that he was currently asymptomatic. Later, in 2005, Dr. Gonzalez stated that Miller was asymptomatic and was working toward preventing manifestations of stress. Similarly, in 2006, Dr. Gonzalez reported that Miller's diagnoses remained the same and that he was asymptomatic. Each report mirrors the next and identifies Miller as "asymptomatic." Thus, the more recent records were only "new" to the extent that they had not been received before; they did not provide any new information.

Moreover, American admitted that it could not determine whether there was any change that occurred in Miller's psychiatric condition between January 2003 and May 2007. As a result, the information that American relied upon to terminate Miller's benefits in 2006 was the same type of documentation that American interpreted to support a disability finding in 1999 and again in 2003 through 2006. We recognize that American's initial payment of Miller's benefits does not operate as an estoppel such that they can never terminate benefits. But, in the absence of any meaningful evidence to support a change in position, American's abrupt reversal is cause for concern that weighs in favor of finding that its termination decision was arbitrary and capricious. Id. at 848-49.

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The application of *Russell* continues to deny relief to aggrieved plaintiffs. In *Smith v. Medical Benefit Administrators Group, Inc*. 639 F.3d 277 (7th Cir. 2011), a health plan participant alleged breach of fiduciary duty where the plan's third-party administrator preapproved his gastric bypass surgery, but later denied coverage based on the plan's exclusion for surgery and other medical services related to obesity. The participant sought an award of damages, restitution or other monetary relief to compensate him for the cost he paid for the surgery.

The Seventh Circuit agreed that the participant stated a viable theory of recovery. However, the participant could not obtain relief under 502(a)(1)(B) because the plan excluded his surgery from coverage and could not obtain relief under 502(a)(2) because he sought relief for personal rather than plan injuries. The court observed that *Russell* governed because the plan held no assets in trust for any individual participant. Nor was the participant entitled to equitable relief under 502(a)(3) since the restitution sought clearly was not equitable in nature.

The court did note, however, that there were other forms of declaratory and injunctive relief that might be wholly consistent with ERISA.

> To cite an obvious example (one that Smith himself noted below), the court could declare that Auxiant's method of handling requests for preauthorization either do not comply with the governing regulations (because, for example, Auxiant takes too long to respond) or amounts to a breach of fiduciary duty (because Auxiant misleads the insured into believing that preauthorization constitutes a determination that the claim will be paid). Consistent with such a declaration, the court might require Auxiant to modify its preauthorization practices so as to bring them into conformity with the governing regulations as well as its broader fiduciary obligations to plan participants. These might be entirely appropriate forms of relief if, as Smith's complaint alleges, what happened to him was not an isolated occurrence but was consistent with Auxiant's routine preauthorization practices; declaratory and injunctive relief would serve to define the parties' respective rights and obligations and to prevent the types of fiduciary breaches Smith has alleged from recurring. . . As the plan at issue is a health insurance plan, it is foreseeable that Smith himself may well seek preauthorization for medical services in the future, so the possibility of recurrence is more than theoretical. And, of course, whether or not a class is certified, there are presumably many other plan participants who might benefit from a modification of Auxiant's practices.

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Amara v. Cigna Corp.
775 F.3d 510 (2d Cir. 2014)

The Supreme Court granted defendants' petition and, in a decision issued on May 16, 2011, vacated this Court's judgment and remanded the case, concluding that the relief afforded by the district court was not available under § 502(a)(1)(B). [hereinafter "*Amara III* "]. The Supreme Court instructed, however, that the district court should consider on remand whether plaintiffs are entitled to relief under § 502(a)(3), which provides for "appropriate equitable relief" to redress specified violations of ERISA or of plan terms. In accordance with the Supreme Court's decisions, this Court vacated the district court's judgment on July 11, 2011, and remanded the case for further proceedings.

On remand, the district court denied a motion by defendants to decertify the class and again ordered CIGNA to provide plaintiffs with A+B benefits and new or corrected notices, this time ordering such relief under § 502(a)(3). *Amara v. CIGNA Corp.*, 925 F.Supp.2d 242 (D.Conn. 2012) [hereinafter "*Amara IV* "]. The present appeals ensued. CIGNA argues that the district court erred in declining to decertify the class and in ordering equitable relief pursuant to § 502(a)(3). Plaintiffs argue that the court erred in limiting relief to A+B benefits, as opposed to affording them the benefits they would have received pursuant to Part A.

We conclude, first, that the district court acted within the scope of its discretion in denying CIGNA's motion to decertify the plaintiff class. Next, we conclude that the district court did not abuse its discretion in determining that the elements of reformation have been satisfied and that the plan should be reformed to adhere to representations made by the plan administrator. Finally, based on the particular facts of this case, we hold that the district court did not abuse its discretion in limiting relief to A+B benefits rather than ordering a return to the terms of CIGNA's original retirement plan.

***

B. Reformation

Defendants' next set of arguments on appeal—that the district court erred in ordering reformation of the CIGNA Pension Plan to reflect the A+B remedy—relies on two principal contentions: first, that the court erroneously applied contract, rather than trust, principles in reforming the plan; and, second, that even assuming contract principles applied, it erred in concluding that the elements of reformation had been established. We are not persuaded.

i) Contract Principles Were Properly Applied

The defendants argue, first, that the district court erred in reforming the CIGNA Pension Plan in accordance with contract, rather than trust law principles. They propose that the court should have applied trust law and considered the *settlor's* intent when reforming the plan. Since CIGNA, as settlor, was not shown to have "intended to provide A+B, or anything other than the benefits described in the actual Part B plan document," there can be no reformation. For the following reasons, we disagree.

"Retirement plan documents are similar to both trusts and contracts." In *Amara III*, the Supreme Court did note that ERISA typically treats a plan fiduciary as a trustee and a retirement plan as a trust. But in discussing the availability of a reformation remedy under § 502(a)(3), the Court exclusively referred to principles of contract law, not trust law. That focus is consistent with the Restatement (Third) of Trusts, which explains that trust reformation is dictated by principles of contract law "[w]here consideration is involved in the creation of a trust." *Id.* § 62 cmt. a (2003). And under contract law, when a party induces assent to a writing by fraud or intentional misrepresentation, a court may reform that writing to reflect the terms as represented to the innocent party. *See* Rest. (Second) of Contracts § 166.

We agree with the district court that, because the CIGNA Pension Plan is part of a compensation package for employees that stems from their employment agreements, plaintiffs

have given consideration for their participation in the retirement plan so that it is appropriate, to the extent this plan constitutes a trust, to analyze reformation under contract principles. The district court therefore properly reformed the CIGNA plan to reflect the representations that the defendants made to the plaintiffs. Indeed, as the district court observed, defendants have not identified a single pre-merger case showing that a court of equity would have applied the standards of trust reformation to "an analogous trust-contract hybrid, ... rather than contract reformation." *Amara IV,* 925 F.Supp.2d at 251. To hold otherwise—and rule that reformation of an ERISA plan is governed solely by the settlor's intent even in cases involving intentional misrepresentations—would produce the unreasonable result that a pension plan could only be reformed when the employer is mistaken about its attributes, but not when employees are deceived.

ii) Plaintiffs Established the Prerequisites for Reformation

Defendants next argue that the district court erred in concluding that the elements of reformation have been established—in particular, that plaintiffs satisfied their burden of establishing mistake. In applying the standards of contract reformation in the context of ERISA, this Court looks to federal common law rather than any particular state's contract law. A contract may be reformed due to the mutual mistake of both parties, or where one party is mistaken and the other commits fraud or engages in inequitable conduct. *see also Amara III,* 131 S.Ct. at 1879 ("The power to reform contracts ... is a traditional power of an equity court ... and was used to prevent fraud."); 27 Williston on Contracts § 69:55, at 160 (4th ed.2010) (reformation is available in a situation where "owing to the fraud of one of the parties and mistake of the other[, the writing] fails to express the agreement at which they arrived"). Since the parties agree that CIGNA was not mistaken about the terms of the plan, plaintiffs, to establish that reformation was appropriate, were required to show that defendants committed fraud or similar inequitable conduct and that such fraud reasonably caused plaintiffs to be mistaken about the terms of the pension plan. *See* Rest. (Second) of Contracts § 166. The facts required to satisfy the elements of reformation must be proven by clear and convincing evidence.

Based on our review of the record as a whole, we conclude that the district court did not err—much less clearly err—in determining that the plaintiffs established "a basis for [the court] to reform the CIGNA Pension Plan due to CIGNA's fraud paired with Plaintiffs' unilateral mistake." We address the elements in turn.

(a) Fraud

While no "single statement ... accurately define[s] the equitable conception of fraud," it generally consists of "obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith." 3 John N. Pomeroy, *A Treatise on Equity*

Jurisprudence § 873 at 420–21 (5th ed.1941). Here, defendants misrepresented the terms of CIGNA's new pension plan and actively prevented employees from learning the truth about the plan. As Judge Kravitz put it in *Amara I,* "CIGNA employees suffered from the lack of accurate information in CIGNA's disclosures, and CIGNA was aware of this fact." CIGNA's misbehavior was designed to "ease the transition to a less favorable retirement program." As a result, the district court did not err in finding that defendants obtained undue advantage through these actions by avoiding adverse employee reactions (ruling that "CIGNA engaged in fraud or similarly inequitable conduct").

. . . Among other things, CIGNA concealed the *possibility* of wear away from its employees and misled them about the conversion of their accrued benefits into the Part B plan. Regardless of how benefits actually accrued under plaintiffs' plans, at the time of the conversion to Part B their accrued benefits were at risk of wear away due to fluctuating future interest rates. By hiding the truth about the plan, CIGNA prevented *all* of its employees from becoming disaffected, spreading knowledge regarding the plan to others who stood to lose more from the benefit conversion, and from planning for their retirement. Therefore the district court did not err in determining that CIGNA committed fraud or inequitable conduct against *all* of the class members.

Defendants also argue that any fraud was committed by CIGNA acting in its capacity as plan administrator, which is not a basis for reformation because ERISA does not "giv[e] the administrator the power to set plan terms indirectly by including them in summary plan descriptions." We agree with the district court that to deny reformation solely due to the general distinction between sponsor and administrator in ERISA would be inequitable in the circumstances here, where CIGNA performed both roles and used that dual position intentionally to mislead employees about plan terms. It is noteworthy, moreover, that the Supreme Court was aware that the misleading summary descriptions of the plan were proffered to employees by CIGNA in its role as plan administrator. Yet, it still remanded the case for the district court to determine whether the plan (provided to employees by CIGNA as plan sponsor) could be reformed in order to remedy these falsehoods.

Further, while ERISA generally does draw a distinction between the roles of plan administrator and plan sponsor, § 502(a)(3) can be used to redress harms committed by both types of entities. *See Varity Corp.*, 516 U.S. at 492–505, (affirming § 502(a)(3) relief requiring reinstatement of employees into a plan to redress inequitable conduct by a plan administrator, when the administrator was also the employer). That § 502(a)(3) provides for an *equitable* remedy, moreover, further supports preventing CIGNA from gaining advantage by virtue of its dual roles, since the traditional purpose of equity is to redress wrongful conduct causing harm that would otherwise be uncompensated by a rigid interpretation of the law.

Finally (and contrary to defendants' claim), reforming the CIGNA retirement plan partly in light of the misleading representations made in the SPDs and other plan communications is consistent with the applicable principles of reformation. As described above, under contract law, when a party induces assent to a writing by fraud or intentional misrepresentation, a court may reform that writing to reflect the terms as represented to the innocent party.

In *Amara III,* the Supreme Court stated that the documents CIGNA provided summarizing the new plan "do not themselves constitute the *terms* of the plan *for purposes of § 502(a)(1)(B).*" These documents, however, do "provide communication with beneficiaries *about* the plan." The district court did not read CIGNA's communications about the plan to be terms of the plan itself. Instead, representations CIGNA made in its capacity as plan administrator constituted evidence of CIGNA's fraud and evidence regarding what CIGNA's employees understood the transition from Part A to Part B to entail. We therefore agree with the district court that, in the circumstances of this case, reforming the CIGNA plan based in part on CIGNA's misleading representations does not impermissibly grant plan administrators "the power to set plan terms." *Amara III,* 131 S.Ct. at 1877.

(b) Mistake

Defendants next contend that the district court erred in concluding that mistake had been shown as to the members of the class. Proving mistake for purposes of granting reformation requires a showing that a party entered a contract "in ignorance or mistake of facts material to its operation." Defendants argue that determining mistake is "an individualized inquiry that depends on each class member's state of mind and cannot be decided on a classwide basis." But plaintiffs can prove ignorance of a contract's terms through generalized circumstantial evidence in appropriate cases. Such proof may be more than sufficient, moreover, in certain cases where, as here, defendants have made uniform misrepresentations about an agreement's contents and have undertaken efforts to conceal its effect.

The district court did not clearly err in determining that defendants' misrepresentations about the contents of the retirement plan were uniform, and helped to establish that the plaintiffs did not know the truth about their retirement benefits. As to uniformity, CIGNA's misrepresentations came in the form of two SPDs, a summary of material modifications, and a 204(h) notice. These documents were sent to the entire class and were "essential in informing employees of their rights under employers' pension plans."

The district court likewise committed no clear error in finding, based on record evidence, that "employees read the disclosures looking for harmful changes," and that "others expected that they would hear through the office grapevine if the notices disclosed detrimental changes to the benefits." For instance, according to an internal *CIGNA* survey, 92% of those who responded

"thoroughly read the retirement communications [they] received" about the switch to Part B. ("[Employees who did not read CIGNA's communications about the transition between plans] may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful."). Moreover, this widespread focus on the plan materials was no surprise to CIGNA. The company was "aware of the significant reduction in the rate of future benefit accrual," the fact that a "sizeable group of employees" would suffer from wear away, and of complaints from employees at other companies that had switched to defined contribution plans. Facing these obstacles to a smooth transition to Part B, CIGNA "sought to negate the risk of backlash by producing affirmatively and materially misleading notices."

CIGNA's misrepresentations achieved the desired result: defendants have not pointed to evidence that any employee understood the ways in which Part A benefits were reduced as a result of the plan conversion or provided testimony from even a single employee stating that he or she understood that the new plan could cause wear away. We can discern no error, moreover, in the district court's inference that informed employees, aware that their pension benefits were less valuable, would have protested the change, requested a higher salary, filed a lawsuit, or left for another employer. * * *

. . . In all, the evidence before the district court was sufficient to support its conclusion that defendants' misrepresentations led to a class-wide mistake about the terms of the plan.

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Insert following 7-14 Questions and Problems:

Gearlds v. Entergy Services, Inc.
709 F.3d 448 (5th Cir. 2013)

Plaintiff Aaron Gearlds, Jr. appeals from the district court's dismissal of his suit alleging claims of equitable estoppel and breach of fiduciary duties pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court dismissed the suit under Federal Rule of Civil Procedure 12(b)(6). Because we conclude that Gearlds stated a claim for relief that is cognizable under ERISA, we REVERSE the district court's judgment for Entergy Services, Inc.

According to the complaint, the facts of which we accept as true, Gearlds was employed by Defendant Entergy Mississippi and participated as a beneficiary of an ERISA plan administered by Defendant Entergy Services, Inc. (henceforth only "Entergy"). Gearlds worked for Entergy Mississippi from 1976 until 1994 when he began collecting long term disability benefits. Those benefits ended in 2002 because he was deemed no longer disabled. Although Gearlds's employment was not terminated, Entergy Mississippi did not pay Gearlds from that point on. In 2005, Gearlds took early retirement at the age of 55, receiving a reduced pension and

full medical, dental, and vision benefits. Gearlds alleged in his complaint that he agreed to retire early because the defendants told him orally and in writing that he was covered by Entergy's Medical Benefits Plus Plan and would continue to receive medical benefits. At some point, Gearlds waived medical benefits available under his wife's retirement plan when she retired from her employment because of the assurances he had received from Entergy.

In 2010, however, Entergy notified Gearlds that it was discontinuing his medical benefits. Apparently, when Entergy determined the benefits to which Gearlds was entitled upon retirement in 2005, it believed that Gearlds was still receiving long term disability benefits, which had actually ended three years earlier, and it therefore included the time from 2002 to 2005 when computing Gearlds's service time under the retirement plan. This error caused Entergy to determine that Gearlds was eligible for medical coverage and that his monthly retirement benefit would be $800.65. Entergy informed Gearlds that he was actually not entitled to medical and Gearlds's medical coverage would cease.

Gearlds filed the instant suit, alleging that Entergy negligently induced him to take early retirement insofar as it promised him health care benefits. He asserted claims for (1) breach of fiduciary duty pursuant to ERISA § 502(a)(3), now codified as ERISA § 502(a)(3), and (2) equitable estoppel. Gearlds sought as damages past and future medical expenses, interest, attorneys' fees, costs, and any other damages, equitable or otherwise, to which he may be entitled.

Upon motion by Entergy, the district court dismissed the complaint for failure to state a claim. The district court reasoned that Gearlds sought only compensatory money damages, which was not an available equitable remedy under § 502(a)(3). The court further held that Gearlds's claim for equitable estoppel failed because Gearlds had not alleged the kind of extraordinary circumstances necessary under our precedent. Gearlds now appeals.

As relevant to the instant case, § 502(a)(3) permits a plan beneficiary to bring a civil action to obtain "other appropriate equitable relief" for ERISA violations. Until recently, it was accepted in this and other circuits that "other appropriate equitable relief" was limited to the kinds of remedies typically available at equity, such as injunctions, mandamus, or restitution, and that so-called "make-whole" monetary damages were not within the scope of the statute. Because the remedy sought "was not typically available in pre-fusion courts of equity," we denied relief. Under this precedent, Gearlds's claim for monetary damages is inappropriate under § 502(a)(3). Because of recent Supreme Court precedent, however, we must reevaluate that conclusion.

The Supreme Court recently stated an expansion of the kind of relief available under § 502(a)(3) when the plaintiff is suing a plan fiduciary and the relief sought makes the plaintiff whole for losses caused by the defendant's breach of a fiduciary duty. *See CIGNA Corp. v.*

Amara, 131 S.Ct. 1866 (2011). In *Amara*, a class of plaintiffs sued an employer and a pension plan because the employer misled the plaintiffs about the conversion of a defined benefit retirement plan into a cash balance plan and provided less generous benefits. The district court found that the defendant had intentionally misled the employees, and it reformed the terms of the new plan. *Id.* at 1874–75. The district court, *inter alia*, "require[d] the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed."

Although the district court's remedy was in the form of money, the Supreme Court reasoned that it was not beyond the scope of traditional equitable relief because "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. This form of relief was commonly known as "surcharge." The Court believed it "critical" that the *Amara* defendant's position as a fiduciary was analogous to a trustee, and it concluded that "an award of make-whole relief" in the form of surcharge was within the scope of "appropriate equitable relief" for purposes of § 502(a)(3).

In the instant case, Gearlds argues that *Amara* is controlling. He contends that Entergy breached its fiduciary duty by representing that he was eligible for plan benefits for the remainder of his life by opting for early retirement, and that he detrimentally relied on the misrepresentations. Gearlds argues that he continued paying premiums for his benefits and lost the opportunity to obtain alternate benefits through his wife's retirement plan. He seeks to recover the amount of insurance benefits that he has lost as a result of the defendants' alleged breach and misrepresentations.

The district court cited *Amara* but it did not consider whether surcharge was an appropriate remedy. The district court instead dismissed the suit because Gearlds sought only money damages, which is ordinarily a legal remedy. After *Amara*, however, that is not the end of the inquiry into equity. Gearlds's complaint is viable in light of *Amara.*

To be sure, Gearlds did not expressly plead or argue "surcharge," but he did argue that he should be made whole in the form of compensation for lost benefits, and his complaint specifically asked for "[a]ny and all other damages and/or relief, equitable or otherwise, to which [he] may be entitled under federal law." Courts must focus on the substance of the relief sought and the allegations pleaded, not on the label used. . . .We leave to the district court the determination whether Gearlds's breach of fiduciary duty claim may prevail on the merits and whether the circumstances of the case warrant the relief of surcharge.

In *Kenseth v. Dean Health Plan*, 722 F.3d 869 (7th Cir. June 13, 2013), the Seventh Circuit also held that money damages were available for a plan beneficiary who had been mistakenly led to believe that her health insurance would pay for an operation. After she had undergone the operation, she learned that the plan did not cover and would not pay for the cost of the operation. The court held that, under *Amara* holding, reimbursement for the cost of the operation was an available equitable remedy.

U.S. Airways v. McCutchen
133 S. Ct. 1537 (2013)

Justice Kagan delivered the opinion of the Court.

Respondent James McCutchen participated in a health benefits plan that his employer, petitioner US Airways, established under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. That plan obliged US Airways to pay any medical expenses McCutchen incurred as a result of a third party's actions—for example, another person's negligent driving. The plan in turn entitled US Airways to reimbursement if McCutchen later recovered money from the third party.

This Court has held that a health-plan administrator like US Airways may enforce such a reimbursement provision by filing suit under § 502(a)(3) of ERISA. That section authorizes a civil action "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." We here consider whether in that kind of suit, a plan participant like McCutchen may raise certain equitable defenses deriving from principles of unjust enrichment. In particular, we address one equitable doctrine limiting reimbursement to the amount of an insured's "double recovery" and another requiring the party seeking reimbursement to pay a share of the attorney's fees incurred in securing funds from the third party. We hold that neither of those equitable rules can override the clear terms of a plan. But we explain that the latter, usually called the common-fund doctrine, plays a role in interpreting US Airways' plan because the plan is silent about allocating the costs of recovery.

I

In January 2007, McCutchen suffered serious injuries when another driver lost control of her car and collided with McCutchen's. At the time, McCutchen was an employee of US Airways and a participant in its self-funded health plan. The plan paid $66,866 in medical expenses arising from the accident on McCutchen's behalf.

McCutchen retained attorneys, in exchange for a 40% contingency fee, to seek recovery of all his accident-related damages, estimated to exceed $1 million. The attorneys sued the driver responsible for the crash, but settled for only $10,000 because she had limited insurance coverage and the accident had killed or seriously injured three other people. Counsel

also secured a payment from McCutchen's own automobile insurer of $100,000, the maximum amount available under his policy. McCutchen thus received $110,000—and after deducting $44,000 for the lawyer's fee, $66,000.

On learning of McCutchen's recovery, US Airways demanded reimbursement of the $66,866 it had paid in medical expenses. In support of that claim, US Airways relied on the following statement in its summary plan description:

> If [US Airways] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, . . . [y]ou will be required to reimburse [US Airways] for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise. App. 20.

McCutchen denied that US Airways was entitled to any reimbursement, but his attorneys placed $41,500 in an escrow account pending resolution of the dispute. That amount represented US Airways' full claim minus a proportionate share of the promised attorney's fees.

US Airways then filed this action under §502(a)(3), seeking "appropriate equitable relief" to enforce the plan's reimbursement provision. The suit requested an equitable lien on $66,866—the $41,500 in the escrow account and $25,366 more in McCutchen's possession. McCutchen countered by raising two defenses relevant here. First, he maintained that US Airways could not receive the relief it sought because he had recovered only a small portion of his total damages; absent over-recovery on his part, US Airways' right to reimbursement did not kick in. Second, he contended that US Airways at least had to contribute its fair share to the costs he incurred to get his recovery; any reimbursement therefore had to be marked down by 40%, to cover the promised contingency fee. The District Court rejected both arguments, granting summary judgment to US Airways on the ground that the plan "clear[ly] and unambiguous[ly]" provided for full reimbursement of the medical expenses paid. App. to Pet. for Cert. 30a; see id., at 32a.

The Court of Appeals for the Third Circuit vacated the District Court's order. The Third Circuit reasoned that in a suit for "appropriate equitable relief" under §502(a)(3), a court must apply any "equitable doctrines and defenses" that traditionally limited the relief requested. 663 F. 3d 671, 676 (CA3 2011). And here, the court continued, "'the principle of unjust enrichment'" should "'serve to limit the effectiveness'" of the plan's reimbursement provision. See id., at 677 (quoting 4 G. Palmer, Law of Restitution §23.18, p. 472-473 [11] (1978)). Full reimbursement, the Third Circuit thought, would "leav[e] [McCutchen] with less than full payment" for his medical bills; at the same time, it would provide a "windfall" to US Airways given its failure to "contribute to the cost of obtaining the third-party recovery." 663 F. 3d, at 679. The Third Circuit then instructed the District Court to determine what amount, shy of the entire $66,866, would qualify as "appropriate equitable relief." Ibid.

We granted certiorari to resolve a circuit split on whether equitable defenses can so override an ERISA plan's reimbursement provision. We now vacate the Third Circuit's decision.

II

A health-plan administrator like US Airways may bring suit under §502(a)(3) for "appropriate equitable relief . . . to enforce . . . the terms of the plan." That provision, we have held, authorizes the kinds of relief "typically available in equity" in the days of "the divided bench," before law and equity merged. Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993).

In Sereboff v. Mid Atlantic Medical Services, we allowed a health-plan administrator to bring a suit just like this one under §502(a)(3). Mid Atlantic had paid medical expenses for the Sereboffs after they were injured in a car crash. When they settled a tort suit against the other driver, Mid Atlantic claimed a share of the proceeds, invoking the plan's reimbursement clause. We held that Mid Atlantic's action sought "equitable relief," as §502(a)(3) requires. See 547 U.S., at 369. The "nature of the recovery" requested was equitable because Mid Atlantic claimed "specifically identifiable funds" within the Sereboffs' control—that is, a portion of the settlement they had gotten. Id., at 362-363. And the "basis for [the] claim" was equitable too, because Mid Atlantic relied on " 'the familiar rul[e] of equity that a contract to convey a specific object' " not yet acquired " 'create[s] a lien' " on that object as soon as " 'the contractor . . . gets a title to the thing.' " Id. at 363-64. Mid Atlantic's claim for reimbursement, we determined, was the modern-day equivalent of an action in equity to enforce such a contract-based lien—called an "equitable lien by agreement." 547 U.S., at 364-365. Accordingly, Mid Atlantic could bring an action under §502(a)(3) seeking the funds that its beneficiaries had promised to turn over. And here, as all parties agree, US Airways can do the same thing.

The question in this case concerns the role that equitable defenses alleging unjust enrichment can play in such a suit. As earlier noted, the Third Circuit held that "the principle of unjust enrichment" overrides US Airways' reimbursement clause if and when they come into conflict. 663 F. 3d, at 677. McCutchen offers a more refined version of that view, alleging that two specific equitable doctrines meant to "prevent unjust enrichment" defeat the reimbursement provision. Brief for Respondents i. First, he contends that in equity, an insurer in US Airways' position could recoup no more than an insured's "double recovery"—the amount the insured has received from a third party to compensate for the same loss the insurance covered. That rule would limit US Airways' reimbursement to the share of McCutchen's settlements paying for medical expenses; McCutchen would keep the rest (e.g., damages for loss of future earnings or pain and suffering), even though the plan gives US Airways first claim on the whole third-party recovery. Second, McCutchen claims that in equity the common-fund doctrine would have operated to reduce any award to US Airways. Under that rule, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472,

478, (1980). McCutchen urges that this doctrine, which is designed to prevent freeloading, enables him to pass on a share of his lawyer's fees to US Airways, no matter what the plan provides.

We rejected a similar claim in Sereboff, though without altogether foreclosing McCutchen's position. The Sereboffs argued, among other things, that the lower courts erred in enforcing Mid Atlantic's reimbursement clause "without imposing various limitations" that would "apply to truly equitable relief grounded in principles of subrogation." 547 U.S., at 368. In particular, the Sereboffs contended that a variant of the double-recovery rule, called the make-whole doctrine, trumped the plan's terms. We rebuffed that argument, explaining that the Sereboffs were improperly mixing and matching rules from different equitable boxes. The Sereboffs asserted a "parcel of equitable defenses" available when an out-of-pocket insurer brought a "freestanding action for equitable subrogation," not founded on a contract, to succeed to an insured's judgment against a third party. Ibid. But Mid Atlantic's reimbursement claim was "considered equitable," we replied, because it sought to enforce a " lien based on agreement"—not a lien imposed independent of contract by virtue of equitable subrogation. Ibid. In light of that fact, we viewed the Sereboffs' equitable defenses—which again, closely resemble McCutchen's—as "beside the point." Ibid. And yet, we left a narrow opening for future litigants in the Sereboffs' position to make a like claim. In a footnote, we observed that the Sereboffs had forfeited a "distinct assertion" that the contract-based relief Mid Atlantic requested, although "equitable," was not "appropriate" under §502(a)(3) because "it contravened principles like the make-whole doctrine." Id., at 368-369 n. 2. Enter McCutchen, to make that basic argument.

In the end, however, Sereboff's logic dooms McCutchen's effort. US Airways, like Mid Atlantic, is seeking to enforce the modern-day equivalent of an "equitable lien by agreement." And that kind of lien—as its name announces—both arises from and serves to carry out a contract's provisions. See id., at 363-364; 4 S. Symons, Pomeroy's Equity Jurisprudence §1234, p. 695 (5th ed. 1941). So enforcing the lien means holding the parties to their mutual promises. See, e.g., Barnes, 232 U.S., at 121; Walker v. Brown, 165 U.S. 654, 664 (1897). Conversely, it means declining to apply rules—even if they would be "equitable" in a contract's absence—at odds with the parties' expressed commitments. McCutchen therefore cannot rely on theories of unjust enrichment to defeat US Airways' appeal to the plan's clear terms. Those principles, as we said in Sereboff, are "beside the point" when parties demand what they bargained for in a valid agreement. See Restatement (Third) of Restitution and Unjust Enrichment §2(2), p. 15 (2010) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment"). In those circumstances, hewing to the parties' exchange yields "appropriate" as well as "equitable" relief.

We have found nothing to the contrary in the historic practice of equity courts. McCutchen offers us a slew of cases in which those courts applied the double-recovery or common-fund rule to limit insurers' efforts to recoup funds from their beneficiaries' tort judgments. See Brief for Respondents 21-25. But his citations are not on point. In some of

McCutchen's cases, courts apparently applied equitable doctrines in the absence of any relevant contract provision. See, e.g., Washtenaw Mut. Fire Ins. Co. v. Budd, 2175 N.W. 231, 232 (1919); Fire Assn. of Philadelphia v. Wells, 94 A. 619, 621 (1915). In others, courts found those rules to comport with the applicable contract term. For example, in Svea Assurance Co. v. Packham, 92 Md. 464, 48 A. 359 (1901)—the case McCutchen calls his best,—the court viewed the double-recovery rule as according with "the intention" of the contracting parties; "[b]road as [the] language is," the court explained, the agreement "cannot be construed to" give the insurer any greater recovery. 92 Md., at 478, 48 A., at 362; see also Knaffl v. Knoxville Banking & Trust Co., 133 Tenn. 655, 661, 182 S. W. 232, 233 (1916); Camden Fire Ins. Assn. v. Prezioso, 319-320, 116 A. 694 (Ch. Div. 1922). But in none of these cases—nor in any other we can find—did an equity court apply the double-recovery or common-fund rule to override a plain contract term. That is, in none did an equity court do what McCutchen asks of us.

Nevertheless, the United States, appearing as amicus curiae, claims that the common-fund rule has a special capacity to trump a conflicting contract. The Government begins its brief foursquare with our (and Sereboff's) analysis: In a suit like this one, to enforce an equitable lien by agreement, "the agreement, not general restitutionary principles of unjust enrichment, provides the measure of relief due." Brief for United States 6. Because that is so, the Government (naturally enough) concludes, McCutchen cannot invoke the double-recovery rule to defeat the plan. But then the Government takes an unexpected turn. "When it comes to the costs incurred" by a beneficiary to obtain money from a third party, "the terms of the plan do not control." Id., at 21. An equity court, the Government contends, has "inherent authority" to apportion litigation costs in accord with the "longstanding equitable common-fund doctrine," even if that conflicts with the parties' contract. Id., at 22.

But if the agreement governs, the agreement governs: The reasons we have given (and the Government mostly accepts) for looking to the contract's terms do not permit an attorney's-fees exception. We have no doubt that the common-fund doctrine has deep roots in equity. Those roots, however, are set in the soil of unjust enrichment: To allow "others to obtain full benefit from the plaintiff's efforts without contributing . . . to the litigation expenses," we have often noted, "would be to enrich the others unjustly at the plaintiff's expense." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970); see Boeing, 444 U.S., at 478; Trustees v. Greenough, 105 U.S. 527, 532 (1882). And as we have just explained, principles of unjust enrichment give way when a court enforces an equitable lien by agreement. The agreement itself becomes the measure of the parties' equities; so if a contract abrogates the common-fund doctrine, the insurer is not unjustly enriched by claiming the benefit of its bargain. That is why the Government, like McCutchen, fails to produce a single case in which an equity court applied the common-fund rule (any more than the double-recovery rule) when a contract provided to the contrary. Even in equity, when a party sought to enforce a lien by agreement, all provisions of that agreement controlled. So too, then, in a suit like this one.

The result we reach, based on the historical analysis our prior cases prescribe, fits lock and key with ERISA's focus on what a plan provides. The section under which this suit is brought "does not, after all, authorize 'appropriate equitable relief' at large," Mertens, 508 U.S., at 253 (quoting §1132(a)(3)); rather, it countenances only such relief as will enforce "the terms of the plan" or the statute, §1132(a)(3) (emphasis added). That limitation reflects ERISA's principal function: to "protect contractually defined benefits." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985). The statutory scheme, we have often noted, "is built around reliance on the face of written plan documents." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995). "Every employee benefit plan shall be established and maintained pursuant to a written instrument," [ERISA §402(a)(1)], and an administrator must act "in accordance with the documents and instruments governing the plan" insofar as they accord with the statute, [ERISA §404(a)(1)(D)]. The plan, in short, is at the center of ERISA. And precluding McCutchen's equitable defenses from overriding plain contract terms helps it to remain there.

III

Yet McCutchen's arguments are not all for naught. If the equitable rules he describes cannot trump a reimbursement provision, they still might aid in properly construing it. And for US Airways' plan, the common-fund doctrine (though not the double-recovery rule) serves that function. The plan is silent on the allocation of attorney's fees, and in those circumstances, the common-fund doctrine provides the appropriate default. In other words, if US Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so—and here it did not.[1]

Ordinary principles of contract interpretation point toward this conclusion. Courts construe ERISA plans, as they do other contracts, by "looking to the terms of the plan" as well as to "other manifestations of the parties' intent." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989). The words of a plan may speak clearly, but they may also leave gaps. And so a court must often "look outside the plan's written language" to decide what an agreement means.

[1] The dissent faults us for addressing this issue, but we think it adequately preserved and presented. The language the dissent highlights in McCutchen's brief in opposition, indicating that the plan clearly abrogates the common-fund doctrine, comes from his description of US Airways' claim in the District Court. McCutchen's argument in that court urged the very position we adopt—that the common-fund doctrine applies because the plan is silent. ("If [US Airways] wanted to exclude a deduction for attorney fees, it easily could have so expressed"). To be sure, McCutchen shifted ground on appeal because the District Court ruled that Third Circuit precedent foreclosed his contract-based argument; the Court of Appeals' decision then put front-and-center his alternative contention that the common-fund rule trumps a contract. But both claims have the same basis (the nature and function of the common-fund doctrine), which the parties have disputed throughout this litigation. And similarly, the question we decide here is included in the question presented. The principal clause of that question asks whether a court may use "equitable principles to rewrite contractual language." Pet. for Cert. i. We answer "not rewrite, but inform"—a reply well within the question's scope.

In undertaking that task, a court properly takes account of background legal rules—the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise. See Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Wells, 213 F.3d 398, 402 (CA7 2000) (Posner, J.) ("[C]ontracts . . . are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' [contrary] intent"); 11 R. Lord, Williston on Contracts §31:7 (4th ed. 2012); Restatement (Second) of Contracts §221 (1979). Indeed, ignoring those rules is likely to frustrate the parties' intent and produce perverse consequences.

The reimbursement provision at issue here precludes looking to the double-recovery rule in this manner. Both the contract term and the equitable principle address the same problem: how to apportion, as between an insurer and a beneficiary, a third party's payment to recompense an injury. But the allocation formulas they prescribe differ markedly. According to the plan, US Airways has first claim on the entire recovery—as the plan description states, on "any monies recovered from [the] third party"; McCutchen receives only whatever is left over (if anything). By contrast, the double-recovery rule would give McCutchen first dibs on the portion of the recovery compensating for losses that the plan did not cover (e.g., future earnings or pain and suffering); US Airways' claim would attach only to the share of the recovery for medical expenses. The express contract term, in short, contradicts the background equitable rule; and where that is so, for all the reasons we have given, the agreement must govern.

By contrast, the plan provision here leaves space for the common-fund rule to operate. That equitable doctrine, as earlier noted, addresses not how to allocate a third-party recovery, but instead how to pay for the costs of obtaining it. And the contract, for its part, says nothing specific about that issue. The District Court below thus erred when it found that the plan clearly repudiated the common-fund rule. To be sure, the plan's allocation formula—first claim on the recovery goes to US Airways—might operate on every dollar received from a third party, even those covering the beneficiary's litigation costs. But alternatively, that formula could apply to only the true recovery, after the costs of obtaining it are deducted. (Consider, for comparative purposes, how an income tax is levied on net, not gross, receipts.) See Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597, 1606-1607 (1974) ("[T]he claim for legal services is a first charge on the fund and must be satisfied before any distribution occurs"). The plan's terms fail to select between these two alternatives: whether the recovery to which US Airways has first claim is every cent the third party paid or, instead, the money the beneficiary took away.

Given that contractual gap, the common-fund doctrine provides the best indication of the parties' intent. No one can doubt that the common-fund rule would govern here in the absence of a contrary agreement. This Court has "recognized consistently" that someone "who recovers a common fund for the benefit of persons other than himself" is due "a reasonable attorney's fee from the fund as whole." Boeing Co., 444 U.S., at 478. We have understood that rule as

"reflect[ing] the traditional practice in courts of equity." Ibid.; see Sprague, 307 U.S., at 164-166. And we have applied it in a wide range of circumstances as part of our inherent authority. State courts have done the same; the "overwhelming majority" routinely use the common-fund rule to allocate the costs of third-party recoveries between insurers and beneficiaries. A party would not typically expect or intend a plan saying nothing about attorney's fees to abrogate so strong and uniform a background rule. And that means a court should be loath to read such a plan in that way.

The rationale for the common-fund rule reinforces that conclusion. Third-party recoveries do not often come free: To get one, an insured must incur lawyer's fees and expenses. Without cost sharing, the insurer free rides on its beneficiary's efforts—taking the fruits while contributing nothing to the labor. Odder still, in some cases—indeed, in this case—the beneficiary is made worse off by pursuing a third party. Recall that McCutchen spent $44,000 (representing a 40% contingency fee) to get $110,000, leaving him with a real recovery of $66,000. But US Airways claimed $66,866 in medical expenses. That would put McCutchen $866 in the hole; in effect, he would pay for the privilege of serving as US Airways' collection agent. We think McCutchen would not have foreseen that result when he signed on to the plan. And we doubt if even US Airways should want it. When the next McCutchen comes along, he is not likely to relieve US Airways of the costs of recovery. See Blackburn v. Sundstrand Corp., 115 F. 3d 493, 496 (7th Cir. 1997) (Easterbrook, J.) ("[I]f . . . injured persons could not charge legal costs against recoveries, people like [McCutchen] would in the future have every reason" to make different judgments about bringing suit, "throwing on plans the burden and expense of collection"). The prospect of generating those strange results again militates against reading a general reimbursement provision—like the one here—for more than it is worth. Only if US Airways' plan expressly addressed the costs of recovery would it alter the common-fund doctrine.

IV

Our holding today has two parts, one favoring US Airways, the other McCutchen. First, in an action brought under §502(a)(3) based on an equitable lien by agreement, the terms of the ERISA plan govern. Neither general principles of unjust enrichment nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the applicable contract. We therefore reject the Third Circuit's decision. But second, the common-fund rule informs interpretation of US Airways' reimbursement provision. Because that term does not advert to the costs of recovery, it is properly read to retain the common-fund doctrine. We therefore also disagree with the District Court's decision. In light of these rulings, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Scalia, with whom The Chief Justice, Justice Thomas, and Justice Alito join, dissenting.

I agree with Parts I and II of the Court's opinion, which conclude that equity cannot override the plain terms of the contract.

The Court goes on in Parts III and IV, however, to hold that the terms are not plain and to apply the "common-fund" doctrine to fill that "contractual gap". The problem with this is that we granted certiorari on a question that presumed the contract's terms were unambiguous—namely, "where the plan's terms give it an absolute right to full reimbursement." Respondents interpreted "full reimbursement" to mean what it plainly says—reimbursement of all the funds the Plan had expended. In their brief in opposition to the petition they conceded that, under the contract, "a beneficiary is required to reimburse the Plan for any amounts it has paid out of any monies the beneficiary recovers from a third-party, without any contribution to attorney's fees and expenses." All the parties, as well as the Solicitor General, have treated that concession as valid. The Court thus has no business deploying against petitioner an argument that was neither preserved, nor fairly included within the question presented. I would reverse the judgment of the Third Circuit.

Commentators have pointed out that in the future, plan sponsors will not make the mistake that US Airways' made as to how to pay for the costs of recovery, but will include language that will overcome the common-fund doctrine. As stated by the Court:

> The plan is silent on the allocation of attorney's fees, and in those circumstances, the common-fund doctrine provides the appropriate default. [Under that rule, a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.] In other words, if U.S. Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so—and here it did not.

One commentator pointed out that if the plan rejects the application of the common-fund doctrine, the result will be that the injured party and his or her lawyer have little incentive to bring a lawsuit against a third party. Therefore, the plan sponsor may want to include language in the plan that it will consider alternative reimbursement arrangements, i.e. agree to pay the lawyer, but such an arrangement would have to be negotiated in advance of the filing of the lawsuit.

Page 505
Insert after *Myer*:

The *Tibble* case, previously discussed with respect to fiduciary responsibilities in Chapter 6[H][1], also considered the application of the six-year statute of limitations under ERISA § 413.

TIBBLE v. EDISON INTERNATIONAL
135 S. Ct. 1823 (2015)

Justice BREYER delivered the opinion of the Court.

Under the Employee Retirement Income Security Act of 1974 (ERISA), a breach of fiduciary duty complaint is timely if filed no more than six years after "the date of the last action which constituted a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation."[ERISA § 413]. The question before us concerns application of this provision to the timeliness of a fiduciary duty complaint. It requires us to consider whether a fiduciary's allegedly imprudent retention of an investment is an "action" or "omission" that triggers the running of the 6–year limitations period.

In 2007, several individual beneficiaries of the Edison 401(k) Savings Plan (Plan) filed a lawsuit on behalf of the Plan and all similarly situated beneficiaries (collectively, petitioners) against Edison International and others (collectively, respondents). Petitioners sought to recover damages for alleged losses suffered by the Plan, in addition to injunctive and other equitable relief based on alleged breaches of respondents' fiduciary duties.

The Plan is a defined-contribution plan, meaning that participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses. Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan.

As relevant here, petitioners argued that respondents violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. Petitioners argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available (the lower price reflects lower administrative costs). Specifically, petitioners claimed that a large institutional investor with billions of dollars, like the Plan, can obtain materially identical lower priced institutional-class mutual funds that are not available to a retail investor. Petitioners asked, how could respondents have acted prudently in offering the six higher priced retail-class mutual funds when respondents could have offered them effectively the same six mutual funds at the lower price offered to institutional investors like the Plan?

As to the three funds added to the Plan in 2002, the District Court agreed. It wrote that respondents had "not offered any credible explanation" for offering retail-class, i.e., higher priced mutual funds that "cost the Plan participants wholly unnecessary [administrative] fees," and it concluded that, with respect to those mutual funds, respondents had failed to exercise "the care, skill, prudence and diligence under the circumstances" that ERISA demands of fiduciaries.

As to the three funds added to the Plan in 1999, however, the District Court held that petitioners' claims were untimely because, unlike the other contested mutual funds, these mutual funds were included in the Plan more than six years before the complaint was filed in 2007. As a result, the 6–year statutory period had run.

The District Court allowed petitioners to argue that, despite the 1999 selection of the three mutual funds, their complaint was nevertheless timely because these funds underwent significant changes within the 6–year statutory period that should have prompted respondents to undertake a full due-diligence review and convert the higher priced retail-class mutual funds to lower priced institutional-class mutual funds.

The District Court concluded, however, that petitioners had not met their burden of showing that a prudent fiduciary would have undertaken a full due-diligence review of these funds as a result of the alleged changed circumstances. According to the District Court, the circumstances had not changed enough to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class mutual funds. Ibid.

The Ninth Circuit affirmed the District Court as to the six mutual funds. 729 F.3d 1110 (2013). With respect to the three mutual funds added in 1999, the Ninth Circuit held that petitioners' claims were untimely because petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6–year statutory period. Petitioners filed a petition for certiorari asking us to review this latter holding. We agreed to do so.

ERISA Section 413 reads, in relevant part, that "[n]o action may be commenced with respect to a fiduciary's breach of any responsibility, duty, or obligation" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." Both clauses of that provision require only a "breach or violation" to start the 6–year period. Petitioners contend that respondents breached the duty of prudence by offering higher priced retail-class mutual funds when the same investments were available as lower priced institutional-class mutual funds.

The Ninth Circuit, without considering the role of the fiduciary's duty of prudence under trust law, rejected petitioners' claims as untimely under § 413 on the basis that respondents had selected the three mutual funds more than six years before petitioners brought this action. The Ninth Circuit correctly asked whether the "last action which constituted a part of the breach or

violation" of respondents' duty of prudence occurred within the relevant 6–year period. It focused, however, upon the act of "designating an investment for inclusion" to start the 6–year period. The Ninth Circuit stated that "[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach would render" the statute meaningless and could even expose present fiduciaries to liability for decisions made decades ago. But the Ninth Circuit jumped from this observation to the conclusion that only a significant change in circumstances could engender a new breach of a fiduciary duty, stating that the District Court was "entirely correct" to have entertained the "possibility" that "significant changes" occurring "within the limitations period" might require " 'a full due diligence review of the funds,' " equivalent to the diligence review that respondents conduct when adding new funds to the Plan. Ibid.

We believe the Ninth Circuit erred by applying a statutory bar to a claim of a "breach or violation" of a fiduciary duty without considering the nature of the fiduciary duty. The Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances. Of course, after the Ninth Circuit considers trust-law principles, it is possible that it will conclude that respondents did indeed conduct the sort of review that a prudent fiduciary would have conducted absent a significant change in circumstances.

Page 512
Insert before *Harrow v. Prudential Insurance Co. of America*:

The Patient Protection and Affordable Care Act of 2010 requires welfare benefit plans that provide health insurance to have effective internal and external appeals process. PHSA § 2719.

The internal claims and appeals rules apply to insured plans and their insurers but if either the insurer or the plan complies, then the requirement has been satisfied.

The new regulations impose six new, additional obligations: (1) a broader definition of "adverse benefit determination", to include a rescission of coverage; (2) a requirement that urgent care claims be decided as soon as possible, but generally no later than 24 hours following receipt (previously 72 hours); (3) additional criteria to ensure that a claimant receives a full and fair review, including a requirement that a plan provide to the claimant, free of charge, any new or additional evidence considered or generated in connection with the claim, as well as an explanation of the rationale underlying the determination, before providing notice of the final adverse benefit determination; (4) a requirement that all claims determinations and appeals must be designed to ensure impartiality and independence with respect to the persons making the decisions; (5) new notice standards; and (6) a requirement of strict adherence. If the new rules

are not strictly followed by the plan, the claimant will be deemed to have exhausted the internal claims and appeals procedures and so can seek immediate judicial review of the benefit denial.

The plan or issuer must provide continued coverage pending the outcome of any appeal.

Chapter 8 NONDISCRIMINATION RULES

Page 536
Replace last sentence of second paragraph with the following:

As of 2015, the IRC § 414(q)(1)(B) limit, as adjusted for the cost of living, is $120,000.

Page 538
Replace parenthetical in third sentence of third full paragraph with the following:

(equal to $118,500 in 2015)

Page 562
Replace parenthetical in first line with the following:

(equal to $118,500 in 2015)

Chapter 9 PLAN OPERATION

Page 568
Replace last line in the first full paragraph with the following:

In 2015, the IRC § 401(a)(17)(A) limit, as adjusted is $265,000.

Page 568
Replace last line in last full paragraph with the following:

In 2015, the IRC § 415(c)(1)(A) limit, as adjusted is $53,000.

Page 569
Replace last line in first full paragraph with the following:

In 2015, the IRC § 415(b)(1)(A) limit, as adjusted is $210,000.

Page 571
Replace last line in first full paragraph with the following:

In 2015, the IRC § 402(g) limit, as adjusted is $18,000.

Page 573
Replace last line in first full paragraph with the following:

In 2015, the IRC § 414(v)(2)(B)(i) limit, as adjusted is $6,000.

Page 593
Replace second line in last carryover paragraph with the following:

First, the income ceiling for individuals with an employer-sponsored plan was raised so that in 2015, single taxpayers with an adjusted gross income of no more than $61,000 and married taxpayers with an adjusted gross income of no more than $98,000 are eligible to make tax deductible contributions to an IRA even if they participate in an employer–sponsored retirement plan.

Page 594
Replace first line in first full paragraph with the following:

Second, the spouse of an individual participating in an employer-sponsored plan can set up his or her own IRA, even if the spouse has no earned income, as long as the couple's adjusted gross income is no more than $183,000 in 2015.

Page 594
Replace second line in first full paragraph with the following:

Finally, both an individual participating in an employer-sponsored retirement plan and the participant's spouse can set up a Roth IRA, so long as the couple's adjusted gross income does not exceed $183,000 (or $116,000 for single taxpayers).

Page 594
Replace fourth sentence in third full paragraph with the following:

In 2015, the IRA limit is $5,500.

Chapter 10 PLAN AMENDMENT AND TERMINATION

Page 626

Replace dollar numbers in last paragraph:

In 2015, the per-participant premium rate is $57 with underfunded plans charged an additional $24 per $1,000 of unfunded vested benefits.

Page 629

Insert:

The PBGC limits the amount that it will pay as a pension. In 2015, a 65 year old retiree, who does not elect spousal benefits, may collect a maximum of $60,136. The maximum limit, however, does not affect most retirees who receive their pension from the PBGC as 85 percent receive the full amount of their promised pension - meaning that the pension is less than the maximum allowed amount.