ERISA & UNCERTAINTY

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ABSTRACT

In the United States, retirement income and health insurance are largely provided through private promises made incident to employment. These "benefit promises" are governed by a statute called ERISA, which many health care and pension scholars argue is the cause of fundamental problems with our nation's health and retirement policy. Inevitably, however, they advance narrowly tailored proposals to amend the statute. This occurs because of the widely held view that reform should leave undisturbed the underlying core of the statute. This Article develops a theory of ERISA designed to illustrate the unavoidable need for structural reform.

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This Article was prompted and made possible by our litigation of three major ERISA cases before the United States Supreme Court. *See* Conkright v. Frommert, 130 S. Ct. 1640 (2010) (argued by Professor Stris on January 20, 2010), LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S.Ct. 1020 (2008) (argued by Professor Stris on November 26, 2007), and Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006) (argued by Professor Stris on March 28, 2006); *see also* Linda Greenhouse, *Top Court Allows Suit Over 401(k)*, N.Y. TIMES, Feb. 21, 2008, at C1 ("With 70 million people holding about $3 trillion in 401(k) investments, the 9-to-0 decision [in *LaRue*] was one of the most important rulings in years on the meaning of the federal pension law . . . ."). During this process, many have generously shared their time. We are extremely grateful to have had the opportunity to discuss our ideas with experts at the Georgetown University Law Center Supreme Court Institute, the U.S. Department of Justice, the U.S. Department of Labor, the Pension Rights Center, the American Health Lawyers Association, the National Employment Lawyers Association, Public Citizen, and AARP. We have benefited immensely from discussions about ERISA with many of our colleagues in the academy including Professors Donald Bogan, Eric Chason, Jonathan Forman, David Pratt, Paul Secunda, Andrew Stumpff, James A. Wooten, and Edward Zelinsky. We thank Professor Norman Stein in particular for his extensive written comments on early drafts of this Article. And we are ever indebted to Madelaine Behr for her invaluable research assistance. All errors are ours alone.

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INTRODUCTION

More than other developed nations, the United States relies on *private* promises to assure health and retirement security.[1] These promises involve "employee benefits." They are subsidized by the first- and third-largest tax expenditures in the federal budget.[2] And they are heavily regulated by a

1. *See, e.g.*, Teresa Ghilarducci & Christian E. Weller, *Issues Still Facing Employer-Based Pensions*, *in* EMPLOYEE PENSIONS: POLICIES, PROBLEMS, & POSSIBILITIES 1, 1 (Teresa Ghilarducci & Christian E. Weller eds., 2007) ("The U.S. stands apart from developed market economies in relying heavily on individual employers to achieve the common goal of securing retirement income for American workers.").

2. *See, e.g.*, Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275, 1275 (1991) ("[T]he system of tax subsidies to employer pensions . . . is the federal government's largest tax expenditure."). In recent years, the pension subsidy referred to by Professor Weiss has been eclipsed by a related one. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 298 tbl.19-3 (2008), *available at* http://www.gpoaccess.gov/USbudget/fy09/pdf/spec.pdf (noting that the largest tax expenditure in 2008 was the "exclusion of employer contributions for medical insurance premiums and medical care," which cost the federal government more than $168 billion in revenue).

landmark statute known as ERISA.[3] In this Article, we develop a theory of uncertainty designed to evaluate ERISA and its regulation of the benefit promise.[4]

To set the stage, employee benefits come in varying forms. They include traditional monthly pensions,[5] 401(k) contributions,[6] and the payment of health insurance premiums.[7] As economists have long noted, these benefits are wage substitutes.[8] In other words, the promise of benefits entails a corresponding reduction in salary. No one disputes, therefore, that these promises should be secure, understood by both parties, and not too costly to make or administer. But legal rules that promote security and clarity may render benefit promises more costly; in other words, rules may have both desirable and undesirable consequences, and a given rule's ultimate desirability will virtually always require the assessment and balancing of competing concerns regarding security, clarity, and cost.

We argue that the most useful way to compare alternatives—both in terms of prospective rule selection and retrospective rule evaluation—is to frame the inquiry in terms of context-specific uncertainty. Economists have long recognized the power of such framing in making difficult choices between competing legal rules.[9] More recently, this mode of

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3. The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.). ERISA regulates "employee pension benefit plans." 29 U.S.C. § 1002(2)(A) (2006). Today, such plans hold more than $5.2 trillion in assets. BD. OF GOVERNORS OF THE FED. RESERVE SYS., FLOW OF FUND ACCOUNTS OF THE UNITED STATES: FLOWS AND OUTSTANDINGS, THIRD QUARTER 2009, at 77 (2009), *available at* http://www.federalreserve.gov/releases/Z1/20091210/z1.pdf. ERISA also regulates "employee welfare benefit plans." 29 U.S.C. § 1002(1) (2006). Today, a staggering percentage of health-care expenditures are paid with insurance provided by such plans. *See infra* notes 85, 87 (describing the explosive, and largely unanticipated, growth of employer-sponsored health insurance).

4. As one prominent health-care scholar recently noted, there is "an emerging body of work in legal theory . . . that examines how the framework of risk has developed into an explanatory model." Nan D. Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L.J. 1, 5 n.3 (2008) (citing JENNY STEELE, RISKS AND LEGAL THEORY (2004); Tom Baker & Jonathan Simon, *Embracing Risk*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 1 (2002); Mariana Valverde et al., *Legal Knowledge of Risks*, *in* LAW AND RISK 86, 87 (2005)). For ease of reference, the remainder of this paper will use the term "uncertainty" to refer to both risk and uncertainty. *See infra* notes 21, 24 and accompanying text (defining risk and uncertainty, respectively).

5. *See infra* Part II.A (discussing the "defined benefit" pension).

6. *See infra* Part II.B (discussing the "defined contribution" pension).

7. *See infra* Part II.C (discussing employer-sponsored group health insurance). Our three-item list is not exhaustive. Other significant benefits include, for example, severance and disability benefits, but in this Article we have chosen to focus on pensions and health insurance.

8. *See infra* Part I (explaining the wage-substitute theory of benefits).

9. *See, e.g.*, John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 VA. L. REV. 965, 965 (1984) ("analyz[ing] some ways in which uncertainty about the application of legal standards can give parties economic incentives to 'overcomply' or to

analysis has been employed by legal scholars to explain and evaluate specific areas such as commercial contracts,[10] property rights,[11] and criminal plea negotiations.[12] In our view, a similar approach is sorely needed in the ERISA context, where existing scholarly and judicial debates often suffer from a profoundly undertheorized conception of the benefit promise and its regulation.

To be sure, there will always be disagreement regarding whether, and how, government should provide, subsidize, or regulate pension and health-care benefits.[13] At the same time, thoughtful examination of existing policy often reveals areas in which some intervention is necessary.[14] Broad thinking is essential because, as ERISA scholars have long observed, the stakes are high.[15]

'undercomply'" with legal rules); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 205 (1999) (examining "how judicial independence affects uncertainty about judicial decisions" and "illustrat[ing] the link between the uncertainty surrounding court decisions and rates of litigation through an adaptation of the well-known Priest and Klein model").

10. *See, e.g.*, Eric L. Talley, *On Uncertainty, Ambiguity, and Contractual Conditions*, 34 DEL. J. CORP. L. 755 (2009) (arguing that uncertainty explains the use of material adverse events clauses rather than price adjustments).

11. *See, e.g.*, Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1286 (2008) (exploring "[w]hat impact, if any," a property owner's uncertainty about the scope of her rights should have on the remedies available to her against encroaching users).

12. *See, e.g.*, Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1995 (2006) (arguing that higher ambiguity aversion of defendants, as opposed to prosecutors, results in unbalanced plea negotiations).

13. *See, e.g.*, Alexander S. Preker et al., *Private Participation in Supporting the Social Contact in Health: New Insights from Institutional Economics*, *in* RECENT HEALTH POLICY INNOVATIONS IN SOCIAL SECURITY 209 (Aviva Ron & Xenia Scheil-Adlung eds., 2001); Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 177 (1989) (summarizing the relative preferences of liberals and conservatives).

14. *See, e.g.*, Abigail R. Moncrieff, *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, 109 COLUM. L. REV. 844 (2009) (arguing that, because of federal expenditures such as the tax subsidy for employer-sponsored health insurance, there is a need for federal intervention in medical malpractice reform); Michele Varnhagen, *U.S. Federal Pension Policy: Its Potential and Pitfalls*, *in* EMPLOYEE PENSIONS: POLICIES, PROBLEMS, & POSSIBILITIES 163, 181 (Teresa Ghilarducci & Christian E. Weller eds., 2007) (noting, regrettably, that "[i]n recent years when Social Security has been under review . . . , Social Security aficionados were loathe to add private pension and savings issues to the debate").

15. *See generally* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, A POLITICAL HISTORY (2004) [hereinafter WOOTEN, ERISA HISTORY]; John Bronsteen, Brendan S. Maher & Peter K. Stris, *ERISA, Agency Costs, and the Future of Health Care in the United States*, 76 FORDHAM L. REV. 2297 (2008); Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1 (2000); Norman Stein, *ERISA and the Limits of Equity*, 56 LAW & CONTEMP. PROBS. 71 (1993); Peter J. Wiedenbeck, *ERISA's Curious Coverage*, 76 WASH. U. L.Q. 311 (1998).

The Article proceeds as follows: In Part I, we argue that benefit promises necessarily implicate three species of uncertainty—(i) performance uncertainty (i.e., the likelihood that an agreed-upon benefit promise will not be performed); (ii) expectation uncertainty (i.e., the likelihood that a benefit promise does not reflect a mutual understanding of promise terms); and (iii) collective uncertainty (i.e., the likelihood that a proposed rule will undesirably reduce, overall, the number or generosity of future benefit promises). In Part II, we briefly rehearse the most common benefit arrangements regulated by ERISA. In Part III, we evaluate how the different categories and aspects of ERISA benefit promises implicate different mixes of uncertainty. In Part IV, we apply our model to several important Supreme Court decisions, explaining, in part, why the Court has written opinions that appear indefensible on purely doctrinal grounds. We conclude by criticizing both the Court and Congress for failing to candidly acknowledge that central questions inadvertently left open by ERISA cannot be resolved without a comprehensive legislative response.[16]

I. UNCERTAINTY IN THE BENEFIT PROMISE

The phrase "employee fringe benefit" is commonly used to describe any nonwage item of value provided by an employer to an employee. Yet employer-provided health insurance, pensions, and other perquisites now constitute a significant percentage of total compensation for working Americans.[17] Consequently, most scholars refer to these items only as "employee benefits."

Before delivery, an employee benefit is simply a wage substitute expressed as a promise of future consideration in whatever form the benefit takes (e.g., a monthly pension check, employer-paid health insurance premiums). In a well-known ERISA opinion written over twenty years ago, Judge Richard A. Posner expressed the point with characteristic elegance: "the less an employee's pension rights are worth, the higher are

16. Scholars have long expressed concern that the courts are ill equipped to resolve the various policy questions ERISA left unsettled. *See, e.g.*, Stein, *supra* note 15, at 110 (concluding that courts are "poorly suited" to address ERISA's gaps and competing policies and that the "prescription for ERISA reform . . . is for Congress to reconsider particular benefits issues and furnish specific answers to them"). Such is even more true today, as we explain.

17. *See* Peter J. Wiedenbeck, *Implementing ERISA: Of Policies and "Plans,"* 72 WASH. U. L.Q. 559, 560 (1994) (explaining that "[e]mployer-provided benefits are now a major component of compensation" and noting that "the cost of all employee benefits constituted 38.4% of payroll in 1990").

the wages that he will demand."[18] Although the existence of this wage-benefit tradeoff is widely accepted by economists,[19] it was not recognized by most American courts until the middle of the twentieth century.[20]

Any benefit promise will necessarily present "risks" (i.e., undesirable outcomes that could materialize).[21] And any rational decision maker[22] will attempt to quantify such risks before selecting a particular course of action.[23] If a decision maker cannot quantify a material risk, she faces

18. Van Boxel v. Journal Co. Emps.' Pension Trust, 836 F.2d 1048, 1051 (7th Cir. 1987). Judge Posner was speaking of pension benefits, but his reasoning applies to all forms of benefits. And Judge Posner was hardly the first to make this point. For a century, economists have characterized employee benefits as wage substitutes. *See, e.g.*, Albert deRoode, *Pensions as Wages*, 3 AM. ECON. REV. 287, 287 (1913) ("A pension system . . . is really paid by the employee, not perhaps in money, but in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system."). This is *not* to say, of course, that the benefit-wage trade-off is dollar for dollar. Numerous aggregate and individual market factors affect the particular benefit-wage trade-off that will be made in given circumstances. Nor do we insist that in all circumstances individual employees necessarily can or will perform an accurate wage-benefit trade-off calculation. The operative point we wish to highlight is that benefits, even when imperfectly valued or bargained for, are not gratuities.

19. *See, e.g.*, Nadia Karamcheva, Evaluating the Wage-Pension Trade-Off in a Dynamic Model of Search and Savings 1 (Nov. 17, 2009) (unpublished manuscript) (citing Stephen A. Woodbury, *Substitution Between Wage and Nonwage Benefits*, 73 AM. ECON. REV. 166 (1983)), *available at* http://fmwww.bc.edu/ec-j/semf2009/Kara.pdf (noting that "[s]tandard labor theory suggests that workers self-select into jobs that offer a mix of wage and non-wage benefits that best matches their preferences"); Karamcheva, *supra*, at 1 (citing Sherwin Rosen, *The Theory of Equalizing Differences*, *in* 1 HANDBOOK OF LABOR ECONOMICS 641 (Orley Ashenfelter & Richard Layard eds., 1986)) (observing that "the theory of equalizing differences implies that otherwise identical employees, who receive higher non-wage benefits will be paid a lower wage").

20. *See, e.g.*, Peter M. Rehon, *The Pension Expectation as Constitutional Property*, 8 HASTINGS CONST. L.Q. 153, 168 (1980) ("[M]ost courts in the late nineteenth and early twentieth centuries viewed noncontributory private pension plans as mere gratuities . . . ."). *See generally* A. Norman Somers & Louis Schwartz, *Pension and Welfare Plans: Gratuities or Compensation?*, 4 INDUS. & LAB. REL. REV. 77 (1950); Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96 (1955); Note, *Legal Status of Private Industrial Pension Plans*, 53 HARV. L. REV. 1375 (1940).

21. *See, e.g.*, Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1028 n.1 (1990) ("Technically speaking, 'risk' refers only to the probability of an event, with something like 'gravity' designating its possible adverse consequences.").

22. There is, of course, an extensive behavioral psychology and behavioral economics literature questioning the "rational actor" assumption. *See* Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1651 (2009) (citing Russell Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1060–66 (2000)) ("Evidence gathered by psychologists and behavioral economists about human decision making over the last three decades has raised a serious challenge to the rational actor assumption of neoclassical economics."). Concerns about cognitive biases are particularly acute in complex areas like retirement and health-care planning. *See generally* Gary Burtless, *An Economic View of Retirement*, *in* BEHAVIORAL DIMENSIONS OF RETIREMENT ECONOMICS 7 (Henry J. Aaron ed., 1999). We use the rational actor assumption as a starting point, not an ending one, in our analysis.

23. For example, a rational employee will consider the likelihood that an employer will refuse to pay the promised benefit before accepting a particular job offer. *See, e.g.*, Karamcheva, *supra* note 19, at 43–44 ("stud[ying] the trade-off that workers face when choosing between compensation in the form of wages versus pension contributions" and proposing a model in which "[t]he decision of a

what is often referred to by economists as "uncertainty."[24] As scholars regularly observe, "[i]gnoring major problems because of uncertainty is an invitation to disaster."[25] In this Part, we present our theory of uncertainty.[26] Part I.A addresses what we refer to as "performance uncertainty." Part I.B addresses what we refer to as "expectation uncertainty." Part I.C addresses what we refer to as "collective uncertainty."[27]

A. Performance Uncertainty

Imagine the following promise made by Promisor *A* to Promisee *B*: "If you today relinquish to me your seat on this crowded bus, exactly five weeks from today I will pay you five hundred American dollars in cash." The danger in relinquishing the seat is not that the promised benefit is unclear and that one might be entitled to something less than five hundred dollars; the danger is that the promise will not be performed. Among the many reasons the promise may not be performed is that the promisor may not *have* five hundred dollars available to give in five weeks' time. A meeting of the minds does not ensure performance, and in the benefit setting—where the beneficiaries are often elderly or ill when the promise ripens—performance is paramount.[28]

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worker to accept or reject a job offer is the result of an interplay between his preferences and the set of incentives and risks associated with the offered pension plan").

24. The distinction between risk and uncertainty was famously articulated in 1921 by noted economist Frank Knight. *See* FRANK KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921) (explaining that uncertainty is unquantifiable risk); *see also* M. GRANGER MORGAN & MAX HENRION, UNCERTAINTY: A GUIDE TO DEALING WITH UNCERTAINTY IN QUANTITATIVE RISK AND POLICY ANALYSIS (1990). Our use of the term "uncertainty" encompasses both quantifiable and unquantifiable risk.

25. Daniel A. Farber, Uncertainty 10 (Feb. 18, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555343.

> All too often, the response to . . . uncertainty is to ignore the problem in the hope that it will go away . . . . Alternatively, advocates seize on their own version of the true magnitude of the hazard, as if there were no doubt about the facts. Neither approach produces intelligent analysis or sound policy.

Id. at 2.

26. As noted above, we use the term uncertainty to refer to both uncertainty *and* quantifiable risk. For purposes of our conceptual model, the distinction will not matter. Of course, the distinction can have great significance in a variety of settings, but such analysis is beyond the scope of this Article.

27. An employee frequently faces both performance and expectation uncertainty. Generally speaking, an employer, because the employee's performance precedes benefit delivery, usually faces only expectation uncertainty. And the government—i.e., lawmakers and judges—is regularly confronted with collective uncertainty.

28. *See, e.g.*, RAY BOURHIS, INSULT TO INJURY: INSURANCE, FRAUD, AND THE BIG BUSINESS OF BAD FAITH (2005) (explaining one trial lawyer's account of the devastating consequences of wrongful benefit denials under ERISA).

In the benefit context, performance uncertainty describes the likelihood that the promisor will not perform in a way consistent with the shared expectations of the parties at promise inception. That is, it describes the possibility that the promisor will fail to deliver a benefit when there was, in fact, an original meeting of the minds regarding its amount and triggering conditions. The most obvious reason for such uncertainty is the possibility that the promisor will lack the assets needed to confer the promised benefit when the entitlement matures.[29]

Financial inability, however, is not the only threat to rightful benefit conferral. Performance uncertainty also describes the possibility that dishonesty, strategic play, or carelessness by the promisor or its agents will result in a wrongful refusal to confer a benefit, even where the promisor has sufficient assets and there was an original meeting of the minds regarding the terms of the benefit promise. In practice, it is often difficult to distinguish such an occurrence from what we call "expectation uncertainty."[30] This difficulty can pose challenging problems for policy makers and near-insurmountable problems for the judiciary.[31]

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29. ERISA's drafters were acutely conscious of this possibility. Few dispute that the statute was passed, in part, as a response to several high-profile pension defaults that arose from company failures that devastated the pensions of many workers. *See, e.g.*, James A. Wooten, "*The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683–84 (2001) ("When Studebaker-Packard closed the facility in December 1963 the pension plan for hourly workers did not have enough assets to meet its obligations. . . . [T]he plan defaulted on its obligations to younger employees. Some received a lump-sum payment worth a fraction of the pension they expected, and others got nothing at all.").

30. *See infra* Part I.B (discussing expectation uncertainty). This difficulty, however, does not prevent one from making reasonable assumptions. For example, those who make ERISA benefit decisions are often controlled directly or indirectly by the benefit-payor. *See, e.g.*, Bronsteen, *supra* note 15, at 2306. As such, conflicted decision making is common in many ERISA settings where "the promisor keeps one less dollar for every dollar paid in benefits." *Id*. at 2308; *see also id.* at 2308 n.36. Consider the incentives facing pension administrators for a traditional (i.e., "defined benefit") pension plan. *See infra* Part II.A (describing the mechanics of a defined benefit pension plan). To the extent that interpreting an ambiguous promise would reduce the outstanding defined pension obligation by *X* dollars, that is *X* fewer dollars the company would need to contribute at the next funding interval or make up in the event of funding shortfall. Whether the administrators are employees of the employer-promisor or outside independent contractors, there is likely significant performance uncertainty. *See, e.g.*, Bronsteen, *supra* note 15, at 2309. Of course, employers and their agents face reputational costs associated with wrongful benefit denials. *See, e.g.*, Richard A. Epstein & Alan O. Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 J. LEGAL STUD. 625, 642 (2001) ("[T]he notion that ERISA-covered plans can deny benefits willy-nilly without significant [reputational] penalty is plainly exaggerated."). That said, benefit decisions involving complex issues or significant discretion may have modest reputational consequences because few, if any, will appreciate or even believe the "wrongness" of the denial. *See, e.g.*, Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral*, 26 HOFSTRA LAB. & EMP. L.J. 387, 398 n.56 (2009) (arguing that "the extent to which market forces affect the behavior of . . . plan fiduciaries is an empirical question . . . [and] there is much evidence to suggest that market forces are woefully insufficient").

31. *See infra* Part I.C (discussing collective uncertainty).

B. Expectation Uncertainty

Expectation uncertainty describes the likelihood that, at promise inception, the parties do not share a material expectation regarding the meaning (usually, the *applied* meaning) of the promise.[32] The absence of a shared expectation can occur because (i) the parties have firm but differing initial expectations regarding the meaning of the promise in a particular circumstance (a "circumstance-specific expectation"), (ii) one party has an initial circumstance-specific expectation and the other party does not, or (iii) neither party has a circumstance-specific expectation.

Although the last two variants describe a total or partial absence of a *specific* expectation, they are nonetheless instances of expectation uncertainty because, in virtually all cases, a broad standard of conduct encompassed by the promise (or imposed by law) supplies a *general* expectation of promise content (e.g., the promisor would follow "fiduciary" standards of conduct in performing the promise). Missing, however, is an expectation regarding the application of that standard *in a particular circumstance* (e.g., that a fiduciary in situation *A* would do *X* and not *Y*).[33]

Indeed, a useful generalization regarding expectation uncertainty tracks the time honored rule-standard continuum.[34] If a one-sentence description of law is that it attaches consequences to conduct or circumstance (i.e., if Conduct *A* occurs, Consequence *B* follows), then, to oversimplify, classic "rules" are legal directives that, in objectively discernible circumstances, impose determinate results.[35] Classic "standards" are legal directives that,

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32. Expectation uncertainty varies significantly with the content and form of the promise. *See infra* Part III.

33. We explore this particular example in considerably more detail *infra* Part III.B–C (discussing uncertainties associated with, in particular, 401(k) plan management).

34. *See generally* H. L. A. HART, THE CONCEPT OF LAW 121–32 (1961); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42–53 (1990); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–39 (1967); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482–87 (1933); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400–18 (1985). Broadly speaking, rules offer the virtue of predictability but the vice of rigidity; standards offer the vice of uncertainty but the virtue of situational fairness. *See, e.g.*, Kaplow, *supra*, at 561–62 ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider.").

35. "Rule," obviously, has two meanings. One is a broad meaning, where "legal rule" is essentially a synonym for *any* "law" or "legal directive." Using that meaning, a "classic rule" and a

in circumstances possessing a certain character, authorize a range of consequences sensitive to situational facts.[36] Generally, a benefit promise that is contractually or statutorily "rule-based" will contain less expectation uncertainty than a "standard-based" promise. The more objective and discretely conditioned the promise, the more modest the expectation uncertainty.[37] Conversely, the more discretionary and ambiguously conditioned the promise, the higher the expectation uncertainty.[38]

Another useful generalization is that expectation uncertainty varies with promise complexity.[39] Complexity increases the likelihood that a promisee will either form incorrect circumstance-specific expectations (e.g., she may not appreciate that a specific provision of the promise directly speaks to the circumstance), or she may rely, for large portions of the promise, on a thematic standard-based expectation (e.g., "the fiduciary must do what is in my best interest").

"classic standard" are both *subsets* of the universe of rules. The narrow meaning of "rule" is "rule as opposed to a standard." *See supra* note 34. Because referring to the narrow meaning of rule as "classic rule" is cumbersome, throughout this Article we use the term "rule" in both the broad and narrow ways, with the relevant meaning supplied by context.

36. Of course, a directive may have both qualities.

> For example, a rule may determine which of two standards applies, or vice versa (as when two rules arguably govern and some principle must be invoked to choose between the rules). Even focusing on a single step in reaching a legal conclusion, a particular law will have qualities of rules and of standards, with competing formulations differing in the degree to which they are rule- or standard-like.

Kaplow, *supra* note 34, at 561 n.6. Moreover, application of a standard to a common fact pattern can result in a de facto rule, where all similar fact patterns are treated formalistically. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.1, at 583 (7th ed. 2007) ("[A]n accumulation of precedents dealing with the same question may create a rule of law having the same force as an explicit statutory rule."); *see also* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) (discussing precedents as rules). Imprecision, however, does not diminish the heuristic value of the rules-standards generalization.

37. For example, a simple pension promise of a fixed monthly payment, payable at age 65 and based exclusively on years worked, with no offset or adjustments for salary, poses relatively little expectation uncertainty. *Cf.* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1129 (1988) ("*[A]t the margin* there can be doubt about how particular [defined benefit pension] plan terms apply to particular circumstances.") (emphasis added).

38. Health insurance, using "medical necessity" as the coverage fulcrum, is a well-known, perhaps notorious, example. *See infra* Part III.C.

39. By complexity, we speak expansively. We refer to the number of operative parts of the promise (e.g., a pension promise with two conditions is easier to understand than one with twenty). We also refer to the extent to which nonexperts can understand a material element of the promise in a circumstance-specific way.

C. Collective Uncertainty

Broadly speaking, performance and expectation uncertainty impair the smooth functioning of the labor market.[40] In many cases, the result of such impairment is financially[41] or physically devastating.[42] Therefore, government intervention is often proposed. Experts have long recognized, however, that such measures are not free of consequences.[43] Put simply, ensuring performance and protecting promisee expectations may increase substantially the cost to the promisor.[44] That, in turn, could result in fewer

40. As noted above, benefits are compensation—not gifts. *See supra* notes 18–20 and accompanying text. A hypothetically rational employer (or employee) cannot offer (or accept) a compensation package without first understanding the expected value of both the promised benefits and the foregone wages. Performance and expectation uncertainty make it considerably more difficult to make the correct wage-benefit trade-off. An expectation risk example: an employee who voluntarily foregoes wages in exchange for health insurance would—all else being equal—have traded more wages than is rational if she believed the promised health insurance benefits were considerably more generous than an average impartial arbiter would have concluded. A performance risk example: an employee who voluntarily foregoes wages in exchange for a traditional pension would—all else being equal—have traded more wages than is rational if she understood the nominal value of the promised pension but failed entirely to consider a meaningful likelihood that the company will go bankrupt and have insufficient assets to pay its pensioners. Of course, even when players are not perfectly rational, performance and expectation uncertainty would still impair bargaining.

41. *See, e.g.*, Phelps v. C.T. Enters., Inc., 394 F.3d 213, 220 (4th Cir. 2005) (allegedly wrongful termination of health plan funding left employees with $286,000 in unpaid claims); Drennan v. Gen. Motors Corp., 977 F.2d 246, 249 (6th Cir. 1992) (GM allegedly told laid-off employees that they were not eligible for a particular plan in order to induce them to choose a substantially less generous plan).

42. *See, e.g.*, Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1005–06 (9th Cir. 1998) (death allegedly caused by delayed authorization for bone marrow transplant); Cannon v. Grp. Health Serv. of Okla., Inc., 77 F.3d 1270, 1271 (10th Cir. 1996) (death allegedly caused by delayed authorization for treatment); Tolton v. Am. Biodyne, Inc., 48 F.3d 937, 940 (6th Cir. 1995) (suicide allegedly resulting from refusal to authorize psychiatric benefits under the plan); Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131 (9th Cir. 1993) (death allegedly caused by withdrawn authorization for surgery); Kuhl v. Lincoln Nat'l Health Plan, Inc., 999 F.2d 298, 300 (8th Cir. 1993) (death allegedly resulting from delayed authorization for surgery); Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1324 (5th Cir. 1992) (death of unborn child allegedly caused by denial of authorization for hospitalization); Turner v. Fallon Cmty. Health Plan, 953 F. Supp. 419, 421 (D. Mass. 1997), *aff'd*, 127 F.3d 196, 197 (1st Cir. 1997) (death allegedly resulting from the denial of a bone marrow transplant).

43. *See, e.g.*, John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 228 [hereinafter Langbein, *Supreme Court Flunks Trusts*] ("[T]he price of [stronger protective legal rules] will be lowered levels of plan formation and less generous funding."); Stein, *supra* note 15, at 73 ("[T]he overarching policy decision to furnish retirement and health benefits through the private employment market rests uneasily on competing notions: government regulation is necessary to ensure that private law adequately delivers benefits, but too much regulation diminishes the willingness of employers to sponsor plans at all.").

44. *See, e.g.*, Carole Roan Gresenz et al., *A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries*, RAND HEALTH LAW 2 tbl.1 (1999), *available at* http://www.rand.org/pubs/issue_papers/2006/IP184.pdf (column entitled "opponents of changing remedies").

employers making promises[45] or employers making less generous promises.[46]

ERISA is commonly read to reflect a legislative desire for more (and more generous) plans. Not only does such sentiment appear, in the view of some, in the legislative history, but it also sounds in favor of the tax subsidy.[47] ERISA's drafters, one could argue, made the proper normative judgment (i.e., that it is socially desirable to encourage additional retirement savings and greater welfare—such as health—insurance coverage). Accordingly, some observers presumptively view governmental measures that could diminish the overall frequency or generosity of benefits to constitute a decrease in the welfare of promisees as a group—and perhaps the nation as a whole.

"Collective uncertainty" is our term for the possibility that, for an imagined rule affecting the benefit promise, the costs associated with compliance and enforcement will be such that the rule on balance may or will actually decrease overall welfare.[48] To the extent that they are made explicit, concerns about collective uncertainty are often formulated as follows: if Judicial Rule *A* or Regulation *B* or Statutory Amendment *C* is put in place, the undesirable consequence will be fewer or less generous plans. That is, collective uncertainty admits of the possibility that making benefit promises more secure will not be "worth" it because it may lead to

45. *See, e.g.*, Dana M. Muir, *The Plan Amendment Trilogy: Settling the Scope of the Settlor Doctrine*, 15 LAB. LAW. 205, 213 (1999) ("An inherent tension exists in ERISA between, on the one hand, protecting the benefit expectations of plan participants and, on the other hand, limiting the costs imposed upon benefit plan sponsors so as not to overly discourage voluntary plan sponsorship.").

46. *Cf.* SHARON TENNYSON & WILLIAM J. WARFEL, NAT'L ASS'N MUT. INS. COS., FIRST-PARTY INSURANCE BAD FAITH LIABILITY: LAW, THEORY, AND ECONOMIC CONSEQUENCES 14 (2008), *available at* http://www.namic.org/publicpolicy/080926BadFaith.pdf (arguing that the careless expansion of liability "will [result in] unwarranted increases in claim costs that are ultimately distributed to the insuring public in the form of higher insurance premiums").

47. *See infra* Part II.A (discussing subsidy). A keen observer might argue that the legislative history can more accurately be portrayed as expressing congressional concern only that there not be appreciably fewer or less generous plans, as opposed to a desire to affirmatively encourage plan formation or more generous benefits. The merits of this distinction aside, the Supreme Court does not appear to accept it. *See, e.g.*, Conkright v. Frommert, 130 S. Ct. 1640, 1648–49 (2010) (quoting Aetna Health Inc. v. Davila, 542 U.S. 200, 215 (2004)) ("We have therefore 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.'").

48. Any government action presents the possibility of decreasing overall social welfare. *See, e.g.*, Gillette & Krier, *supra* note 21, at 1028 ("[T]hough risk by definition is costly, avoiding risk is costly as well."). Some regulatory costs are direct (e.g., the salaries of government employees). Others result from incentives created by the government intervention. *See, e.g.*, Stris, *supra* note 30, at 396–99 (discussing, at some length, typical incentive arguments made by each side of the debate over the proper liability rules for wrongful denial of ERISA benefits); *see also* Gillette & Krier, *supra* note 21, at 1028 (noting that "the objective of risk management must be . . . the minimization of all risk-related costs").

a possible reduction in collective welfare. In other words, a few broken promises or defeated expectations may be acceptable if the result is more plans and more generous benefit promises overall.[49]

A decrease in collective welfare associated with benefit promise rule choice is not abstract fantasy. Consider the following hypothetical proposal: Congress, to increase the deterrent power of ERISA remedies, amends the statute to require that all wrongful health-care benefit denials result in the imposition of punitive damages equal to five times the value of the denied benefit. There is little doubt that such an amendment would cause many employers to cease offering health insurance as an employee benefit. Given the lack of reasonable individual (nongroup) health insurance options in America,[50] such a result would be undesirable in the eyes of many observers.[51]

II. THE ERISA BENEFIT PROMISE

In this Part, we rehearse the most common benefit promises that are regulated by ERISA. Part II.A explores the traditional pension promise. Part II.B evaluates the now-dominant pension promise of which the 401(k) is the most common example. Part II.C briefly addresses typical welfare benefit promises (e.g., health, disability, and life insurance).

A. The Defined Benefit Pension Promise

ERISA governs two kinds of employee benefit plans:[52] One—a pension plan—is defined by the statute as "any plan, fund, or program . . . established or maintained by an employer" that "provides retirement

49. *See, e.g.*, Brendan S. Maher, *Creating a Paternalistic Market for Legal Rules Affecting the Benefit Promise*, 2009 WIS. L. REV. 657, 665–69 (discussing possible consequences of more protective rules). As we discuss later, certain promise types (and subsets of promise types), as well as attendant legal rules, can be more "volatile" and uncertain than others. This may deter risk-averse employers from making the promise in the first place or result in risk-averse employers promising less. *See infra* Part III.A and accompanying notes.

50. *See generally* Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643 (2008); Mark A. Hall, *Of Magic Wands and Kaleidoscopes: Fixing Problems in the Individual Market*, HEALTH AFF., Oct. 23, 2002, *available at* http://content.healthaffairs.org/cgi/reprint/hlthaff.w2.353v1.

51. Recent health-care reform—depending on the degree to which it survives the parade of legal challenges—may, of course, make desirable and affordable individual health insurance more readily available. We merely use a hypothetical health-care legal rule to illustrate the concept of collective uncertainty in a given benefit regime.

52. 29 U.S.C. § 1002(3) (2006) ("The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.").

income" or "results in a deferral of income by employees . . . ."[53] The statute expressly divides all pension plans into two further categories: "defined benefit" and "defined contribution."[54]

A defined benefit plan is intended "to provide systematically for the payment of definitely determinable benefits to . . . employees over a period of years, usually for life, after retirement."[55] The amount of the benefit is calculated pursuant to a formula that customarily takes into account the participant's years of service and compensation.[56] When ERISA was enacted in 1974, the vast majority of retirement plan participants were covered by a defined benefit plan.[57]

No employer is required to sponsor a defined benefit (or any other) pension plan. In order to encourage sponsorship, however, the federal government has long awarded preferential tax treatment to such plans.[58] Broadly speaking, the mechanics of this preference can be summarized as follows: "employer contributions to the plans are deductible expenses . . . at the time the contributions are made . . . and neither the contributions nor the investment earnings . . . are taxable until benefits are actually paid to the plan participants."[59]

The basic thinking is as follows: many employees will likely be indifferent (at best) as between $\$X$ in current salary and a guaranteed future income stream whose net present value is $\$X$. If the latter is subject to more favorable tax treatment, however, a greater number of employees may choose to forego pretax wages in exchange for it. Accordingly, the government has elected to afford more favorable tax treatment to pensions in order to encourage employees to defer compensation so that they will have a steady stream of income once they reach the age of retirement. This

53. 29 U.S.C. § 1002(2)(A)(i)–(ii).

54. 29 U.S.C. § 1002(34) (defined contribution); § 1002(35) (defined benefit).

55. 26 C.F.R. § 1.401-1(b)(1)(i) (2004).

56. *See* DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS 201–12 (7th ed. 1996); *see also* Jonathan Barry Forman, *Public Pensions: Choosing Between Defined Benefit and Defined Contribution Plans*, 1999 LAW REV. MICH. ST. U.-DETROIT C. L. 187, 187 (citing Ann C. Foster, *Public and Private Sector Defined Benefit Pensions: A Comparison*, 2 COMPENSATION & WORKING CONDITIONS 37 (1997)) ("For example, a [defined benefit pension] plan might provide that a worker's annual retirement benefit is equal to 2% times years of service times final average compensation (*B = 2% x yos x fac*).").

57. WOOTEN, ERISA HISTORY, *supra* note 15, at 278 ("As late as 1979, more than 80 percent of individuals who participated in a private retirement plan were in a defined-benefit plan."); Fishel & Langbein, *supra* note 37, at 1112. There were employees covered by what today we would call defined contribution plans, but the assets in those plans were vastly smaller than the assets backing the defined benefit plans.

58. *See* PRIVATE PENSIONS AND PUBLIC POLICIES, at vii (William G. Gale, John B. Shoven, & Mark J. Warshawsky eds., 2004) ("Tax incentives for employer-based pensions originated in 1921.").

59. MCGILL, *supra* note 56, at 136; *see also* 26 U.S.C. §§ 402–404 (2006).

was a major social policy decision.[60] It results in the loss of almost fifty billion dollars in tax revenue each year.[61] And it is an enduring justification for the extensive restrictions that are placed on private-sector pension plans.[62]

It is worth noting that defined benefit plans were used prior to the level of tax preference that exists today.[63] This illustrates that there are nontax reasons to sponsor such plans. For example, a defined benefit plan can be used to create incentives that influence significantly the timing of employees' retirement decisions,[64] to create incentives that discourage quitting by employees in whom the employer has made a substantial investment,[65] and to improve job performance by giving employees a direct financial stake in the viability of the firm.[66]

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60. *See, e.g.*, Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 73 (2002) ("The passage of [ERISA] marked the federal government's recognition that promoting retirement security through employer-sponsored pension plans was an important national goal.").

61. *See* OFFICE OF MGMT. & BUDGET, *supra* note 2, at 298 tbl.19-3 (noting that the tax expenditure for "employer plans" was more than $45 billion in 2009). The foregone revenues associated with other employer-sponsored pensions (e.g., 401(k) and Keogh plans) are listed separately. *See id.*

62. *See, e.g.*, 26 U.S.C. § 401(a) (2006) (listing various requirements that a plan must satisfy in order to "qualify" for preferential tax treatment).

63. "By 1933, private [defined benefit] pensions covered roughly one in six workers in the economy." RICHARD A. IPPOLITO, PENSION PLANS AND EMPLOYEE PERFORMANCE: EVIDENCE, ANALYSIS, AND POLICY 3 (1997) [hereinafter IPPOLITO, EMPLOYEE PERFORMANCE].

64. *See, e.g.*, Jonathan Barry Forman & Yung-Ping Chen, *Optimal Retirement Age*, *in* 2 NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND COMPENSATION § 14.03(2) (2008) (noting that a defined benefit plan will customarily "impose large financial penalties on workers who stay past the plan's normal retirement age" and "often offer early retirement incentives"); *see also* IPPOLITO, EMPLOYEE PERFORMANCE, *supra* note 63, at 12 ("Virtually all firms penalize late retirement through the [defined benefit] pension plan" by "refraining from awarding offsetting increases in annuities to workers who choose to retire beyond the normal retirement age."); Richard A. Ippolito, *A Study of the Regulatory Effect of the Employee Retirement Income Security Act*, 31 J.L. & Econ. 85, 87 (1988) [hereinafter Ippolito, *ERISA Study*] (asserting that defined benefit plans "permit the firm to penalize workers who . . . retire 'too late'"); Andrew A. Samwick, *New Evidence on Pensions, Social Security, and the Timing of Retirement*, 70 J. PUB. ECON. 207 (1998); James H. Stock & David A. Wise, *Pensions, the Option Value of Work, and Retirement*, 58 ECONOMETRICA 1151 (1990). *See generally* Laurence J. Kotlikoff & David A. Wise, *The Incentive Effects of Private Pension Plans*, *in* ISSUES IN PENSION ECONOMICS 283 (1987).

65. *See, e.g.*, Forman & Chen, *supra* note 64, § 14.03(2) (noting that a defined benefit plan will typically "provide large financial incentives for workers to stay with a firm at least until they are eligible for early retirement"); *see also* IPPOLITO, EMPLOYEE PERFORMANCE, *supra* note 63, at 3 (noting "the traditional view that [defined benefit] pensions help employers reduce quit rates at early ages"); *id*. at 17 (arguing that "[d]eparture from the firm . . . 'too early' . . . breaks the contract and triggers pensions penalties"); *id.* at 18–29 (evaluating the impact of defined benefit pensions on quit rates); ALICIA H. MUNNELL & ANNIKA SUNDÚN, COMING UP SHORT, THE CHALLENGE OF 401(K) PLANS 2 (2004) ("Since pension benefits based on final earnings increase rapidly as job tenures lengthen, these plans motivate workers to remain with the firm."); Ippolito, *ERISA Study*, *supra* note

B. The Defined Contribution Pension Promise

Unlike a defined benefit plan, a defined contribution plan does not promise a specific amount of benefits at retirement. Instead, an employee who participates in a defined contribution plan is assigned an individual account within the plan to which money is contributed by the employee, her employer, or both.[67] The employee is a beneficial owner of the funds allocated to her individual account.[68] At any point in time, her account balance is equal to the total amount of past contributions, adjusted to reflect the account's share of any income or expenses, any gains or losses, and any forfeitures of other participants' accounts.[69] Upon retirement, the employee's benefit is simply the balance of her account.[70] In essence, a defined contribution pension plan is a "tax-preferred savings account[]."[71]

As noted above, in terms of assets and number of participants, defined benefit plans were the dominant variety of retirement arrangements when ERISA was enacted in 1974.[72] The pension landscape, however, has dramatically changed since that time.[73] In fact, scholars generally agree that the most important development in private pensions over the past two decades is the massive shift away from defined benefit to defined

64, at 87 (asserting that defined benefit plans "permit the firm to penalize workers who . . . quit the firm 'too early'").

66. IPPOLITO, EMPLOYEE PERFORMANCE, *supra* note 63, at 4 (noting the settled view that "defined benefit plans . . . dissuade workers from shirking or engaging in malfeasance on the job"); Ippolito, *ERISA Study*, *supra* note 64, at 87 (noting that defined benefit plans "expose the work force as a whole to losses in the event of firm failure, thereby giving workers a stake in the long-term viability of the firm"). Employees with certain preferences are willing to accept such a deal (i.e., to join an employer with a defined benefit plan thereby foregoing wages) because such employment "provid[es] an opportunity . . . to spread investment risks over a large number of cohorts," Ippolito, *ERISA Study*, *supra* note 64, at 88, by "tak[ing] advantage of the long horizon of firms relative to workers . . . ." *Id.* at 87–88.

67. 29 U.S.C. § 1002(34) (2006).

68. *See infra* note 92 and accompanying text.

69. *See* 29 U.S.C. § 1002(23)(B) (2006); 26 U.S.C. § 411(a)(7)(A)(ii) (2006).

70. *See, e.g.*, Forman, *supra* note 56, at 188 n.3 ("[C]ontributions might be set at 10% of annual compensation. Under such a plan, a worker who earned $30,000 in a given year would have $3,000 contributed to an individual investment account for her. Her benefit at retirement would be based on all such contributions plus investment earnings thereon.").

71. Ippolito, *ERISA Study*, *supra* note 64, at 87 (also explaining that, in such a plan, "[t]he firm deposits a portion of wages into each worker's account each year and, after short vesting periods . . . , the account belongs to the workers").

72. Even as recently as 1988, "[a]pproximately four out of five pension participants [we]re covered primarily by defined benefit pension plans." Ippolito, *ERISA Study*, *supra* note 64, at 87 (emphasis omitted).

73. Forman, *supra* note 56, at 189 ("In the private sector, the shift away from defined benefit plans has been going on for years.").

contribution plans.[74] In the United States, this is largely attributable to the explosive growth of the 401(k) plan—named after a provision in the Internal Revenue Code that did not exist when ERISA was signed into law.[75]

Several theories have been advanced to explain this shift to defined contribution plans. Some focus on changes in federal regulatory policy that increased the relative cost of administering defined benefit plans.[76] Others focus on what they argue is disproportionately favorable tax treatment of the 401(k).[77] Still others maintain that something more fundamental occurred—a change in the way Americans think about savings.[78] Regardless of the reason, this shift has led to much debate about what, if any, changes in government policy should be implemented in response.[79]

C. The Welfare Benefit Promise

As previously noted, ERISA was not limited to the regulation of pension plans; it also governs what the statute refers to as "welfare" plans.[80] A welfare plan is defined as "any plan, fund, or program . . .

74. IPPOLITO, EMPLOYEE PERFORMANCE, *supra* note 63, at 4 ("The most important development in private pensions in the past fifteen years is the gradual shift away from defined benefit plans and toward defined contribution plans.").

75. *See, e.g.*, WOOTEN, ERISA HISTORY, *supra* note 15, at 279. To be sure, however, "there has been a worldwide trend towards defined contribution plans that seems to be affecting both private pensions and national social security programs." Forman, *supra* note 56, at 189–90 (footnote omitted) (citing WORLD BANK, AVERTING THE OLD AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH (1994); Kevin Dent & David Sloss, *The Global Outlook for Defined Contribution Versus Defined Benefit Pension Plans*, 12 BENEFITS Q. 23 (1996); Jonathan Barry Forman, *Whose Pension Is It Anyway? Protecting Spousal Rights in a Privatized Social Security System*, 76 N.C. L. REV. 1653, 1660–64 (1998)).

76. *See* MCGILL, *supra* note 56, at 40 ("While the possible explanations for the decline in defined benefit plans and the shift toward defined contribution plans are numerous, at least part of the reason is the increasing expense of administering defined benefit plans.").

77. IPPOLITO, EMPLOYEE PERFORMANCE, *supra* note 63, at 7 ("Congress enacted legislation that increased the relative costs of defined benefit plans, in terms of both higher regulatory burden and smaller tax advantages.").

78. *See generally* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004).

79. "[T]here is a good deal of debate about how and whether government policies should be changed to stem the 'erosion' in traditional defined benefit plans." Forman, *supra* note 56, at 190 (citing ADVISORY COUNCIL OF EMP. WELFARE & PENSION BENEFITS, U.S. DEP'T OF LABOR, REPORT ON THE WORKING GROUP ON THE MERITS OF DEFINED CONTRIBUTION VS. DEFINED BENEFIT PLANS WITH AN EMPHASIS ON SMALL BUSINESS CONCERNS (1997); Sue Burzawa, *Defined Benefit vs. Defined Contribution Plans—Current State of the Debate and Future Influences*, 51 EMP. BENEFIT PLAN REV. 10 (1997); Christopher Conte, *Retirement Prospects in a Defined Contribution World: A Report on EBRI's April 30, 1997, Policy Forum*, 18 EBRI NOTES 1 (1997)).

80. *See supra* note 3.

established or maintained by an employer" that "provid[es] . . . medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . ."[81] Today, many welfare plan benefits take the form of insurance (whether through self-insurance or a third-party policy the employer purchases).[82] Pursuant to such an arrangement, an employee gives up some amount of current wages in exchange for a promise of a contractually defined benefit payment if and when a contingent event should occur.[83]

As of 2002, ERISA-governed welfare plans covered 137 million workers, retirees, and their families.[84] These plans have an extraordinary influence on the delivery of health-care[85] and other nonretirement benefits such as severance pay, life insurance, and disability insurance.[86] This astonishing growth in welfare benefits—most notably employer-sponsored health insurance—was almost certainly not anticipated by those who drafted the statute.[87]

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81. 29 U.S.C. § 1002(1) (2006).

82. *See infra* note 85.

83. There are several perils that are often covered by employer-sponsored insurance: illness (health insurance), debilitating injuries (disability insurance), death (life insurance), and income disruption (severance pay).

84. *See* Brief of the Secretary of Labor as Amicus Curiae in Support of Qualchoice's Petition for En Banc Rehearing at 13, Qualchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004) (No. 02-3614).

85. The majority of private health insurance in the United States is provided through ERISA-governed welfare plans. *See* Sara R. Collins, Chapin White & Jennifer L. Kriss, *Whither Employer-Based Health Insurance? The Current and Future Role of U.S. Companies in the Provision and Financing of Health Insurance*, THE COMMONWEALTH FUND, Sept. 2007, at 7 fig.1, *available at* http://www. commonwealthfund.org/Content/Publications/Issue-Briefs/2007/Sep/Whither-Employer-Based-Health-Insurance--The-Current-and-Future-Role-of-U-S--Companies-in-the-Provis.aspx (noting that, in 2006, 62% of nonelderly Americans received private health insurance from an employer); *see also* GARY OLIN, MEDICAL EXPENDITURES OF THE NON-ELDERLY BY AGE AND INSURANCE STATUS, 2004, at 1 (2008), *available at* http://www.meps.ahrq.gov/mepsweb/data_files/publications/st197/stat197.pdf (noting that 79% of all medical expenditures were made by those with private health insurance in 2004).

86. For example, "[s]hort- and long-term disability benefits were available [in 2004] to 39 and 30 percent of workers, respectively, and nearly all participated." U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2004, at 1 (2004), *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0002.pdf.

87. *See, e.g.*, WOOTEN, ERISA HISTORY, *supra* note 15, at 281 ("In the political history of pension reform, there was little discussion of employer-sponsored health plans."); Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 165 (1995) (ERISA's drafters gave "relatively little thought to the problem of health benefits . . . ."); David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 29 (2001) ("Health benefits were included in ERISA as an afterthought, with little consideration given to whether the same regulatory framework would work . . . .").

III. UNCERTAINTY IN THE ERISA BENEFIT PROMISE

ERISA's passage was premised on a simple trade-off. Congress wished to make benefit promises more secure, but not so costly as to result in appreciably fewer or less generous benefit promises being made overall. Legal rules can significantly affect both promise security and cost. Consequently, the question of what rules to impose is one of central importance. As explained in Part I, the answer must turn on the performance, expectation, and collective uncertainties that attend the benefit promise at issue.[88] In this Part, we evaluate the nuanced ways in which these uncertainties differ both across and within the primary benefit arrangements governed by ERISA.

A. Defined Benefit Pension Promise Uncertainty

The overwhelming focus of ERISA was the defined benefit pension plan.[89] Unsurprisingly, therefore, examination of the statute reveals that Congress gave thoughtful consideration to the promise-security versus promise-cost trade-off in selecting legal rules to govern this category of employee benefits.

Performance Uncertainty. A major threat to the traditional pension was one specific manifestation of performance uncertainty—promises broken for lack of funds.[90] ERISA included potent safeguards to minimize this type of uncertainty. Congress established mandatory funding rules,[91] required that plan assets be held in trust,[92] imposed specific obligations and prohibitions on those who administered the trust,[93] and collected premium payments from plan sponsors to fund a government-run pension insurance program.[94] Although one could argue that these safeguards are

88. For example, promises—or identifiable aspects of promises—that pose massive performance uncertainty but little collective uncertainty likely deserve different legal rules than promises with a converse balance of uncertainty. The simple reason is that rules that potently address uncertainty of a certain type and magnitude may do little to address (and often worsen) uncertainty of a different type and size. The uncertainty to be tamed drives rule selection.

89. Ippolito, *ERISA Study*, *supra* note 64, at 87 ("Defined benefit pension plans are the primary focus of ERISA . . . .").

90. *See supra* note 29.

91. 29 U.S.C. §§ 1081–1086 (2006).

92. 29 U.S.C. § 1103(a) (2006) ("[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees" who, subject to limited exceptions, "shall have exclusive authority and discretion to manage and control the assets of the plan . . . .").

93. 29 U.S.C. § 1104(a) (2006); *see also infra* note 126 and accompanying text.

94. 29 U.S.C. § 1302 (2006). According to ERISA, the Pension Benefit Guaranty Corporation (PBGC) was created:

too "costly,"[95] observers seem to agree that ERISA has been successful in this area.[96]

Expectation Uncertainty. The obvious (though often ignored) point of any defined employee benefit is to *define* the benefit (i.e., to limit by contract and statutory command the likelihood that the parties will have differing understandings regarding the content of the promise). This, indeed, is the appeal of a defined benefit; all parties involved know its value. As such, they are better able to bargain over wages and benefits, and to plan accordingly for retirement. A central *aim* of a defined benefit arrangement, then, is to reduce expectation uncertainty.[97] Of course, successful mitigation of such uncertainty will also lessen performance uncertainty because clearer promises are more difficult to break with impunity (i.e., there are reputational consequences and a greater likelihood of ex post legal sanction).[98]

In order to improve the definition of all employee benefits, ERISA imposed several general requirements. It required that plans be in writing[99] and "specify the basis on which payments are made . . . from the plan."[100] For similar reasons, it imposed disclosure and reporting requirements.[101]

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

Id.

95. The argument would be that strict funding requirements—and the cost of regulatory compliance—discourage the offering of pensions, including *some* pensions that would have in fact been performed (i.e., the reduced performance uncertainty of strict funding requirements is outweighed by increased collective uncertainty).

96. This is not to say there are not grounds for criticism regarding the PBGC insurance program. Appropriate premium levels and funding rules have been and are subject to considerable debate. *See, e.g.*, Daniel B. Klaff, *The Pension Protection Act of 2006: Reforming the Defined Benefit Pension System*, 44 HARV. J. ON LEGIS. 553, 559–60 (2007) (mentioning recent legislative debate over funding and premiums).

97. Certainly defined benefits also transfer retirement income risk from the promisee to the promisor, although that self-evidently depends on the financial robustness of the promisor and the scope of any government guarantee. In contrast, far too infrequently acknowledged is the real work that *defining* the benefit accomplishes. Clarity supplies utility whether the promise is soundly or weakly backed.

98. *Cf. infra* note 108.

99. 29 U.S.C. § 1102(a)(1) (2006).

100. 29 U.S.C. § 1102(b)(4); *see also* MCGILL, *supra* note 56, at 46 ("This requirement's fundamental purpose is to ensure that the plan is a formal arrangement, communicated as such to all employees affected, and that it is distinguishable from the informal and unenforceable arrangements that characterized the early years of the private pension movement in this country.").

101. *See, e.g.*, 29 U.S.C. § 1022(a) (2006) (requiring a summary plan description "written in a manner calculated to be understood by the average plan participant"); S. REP. NO. 93-127, at 11 (1973)

With regard to defined benefit pension plans, ERISA went even further. It imposed certain mandatory contract terms regarding vesting.[102] It also included specific requirements regarding the form of written promises.[103] The corresponding reduction in expectation uncertainty is self-evident. We consider next the more difficult question: to what extent does enforcement of such rules heighten collective uncertainty?

Collective Uncertainty. In regulating the traditional pension promise, Congress was careful to avoid broadly mandating specific promise content (i.e., a pension benefit must be at least *X*% of an employee's highest annual salary). Congress also made numerous decisions in drafting ERISA that were designed to minimize the costs of regulatory compliance.[104] Congress was evidently concerned about the collective uncertainty that might arise from rules which could substantially increase promise cost.

Concerns about the chilling effects of high promise cost did not, however, lead Congress to abandon traditional civil enforcement rules.[105] This is not surprising because there is little reason to believe that judicial application of traditional liability rules would imperil the frequency or generosity of defined benefit pension promises any more than default contract rules in general limit deal content and frequency.[106] To be fair, defined benefit promises have grown considerably more complicated in the years following ERISA's enactment. But increased complexity does

("Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used."); *see also* 29 U.S.C. § 1132(a)(1)(A) (2006) (providing remedies for violations of disclosure and reporting requirements).

102. 29 U.S.C. § 1053(a) (2006). The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, amended ERISA and shortened the vesting periods. *See also* Langbein, *supra* note 43, at 227 (footnote omitted) ("ERISA abridges freedom of contract in some respects, but not others. For example, ERISA's vesting rules greatly restrict the parties' freedom to agree upon forfeiture of accrued pension benefits, yet ERISA's vesting rules do not apply to nonpension benefits such as health care.").

103. Defined benefit pension plans are required to provide benefits that are computed via a fixed formula and not within the discretion of the promisor. *See* Rev. Rul. 74-385, 1974-2 C.B. 130 (confirming that benefits are definitely determinable when computed via a fixed formula and "not within the discretion of the employer"); 26 C.F.R. § 1.401-1(b)(1)(i) (2009) (requiring that a plan provide "definitely determinable benefits"); *see also* 26 U.S.C. § 401(a)(25) (2006) (pertaining to "actuarial assumptions").

104. One such example was the inclusion of broad preemption provisions. *See* 29 U.S.C. § 1144(a) (2006). Preemption, among other things, shields promisors that conduct multistate business from having to comply with the regulatory requirements of several jurisdictions, which can pose significant cost.

105. Congress specifically authorized a private right of action permitting a participant or beneficiary in any ERISA plan to bring suit to, *inter alia*, "enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (2006); *see also infra* note 151 and accompanying text.

106. For reasons we explore below, however, ERISA has been interpreted by the Supreme Court such that "consequential damages are not allowed." Epstein & Sykes, *supra* note 30, at 632.

not warrant restriction or abandonment of the protective rules included in ERISA addressing the traditional pension promise. If anything, it militates in favor of increased protection.

This is so for two reasons. First, promise complexity significantly increases expectation uncertainty on the part of employees, which frustrates meaningful bargaining and planning.[107] Second, promise complexity significantly increases performance uncertainty because it provides greater opportunity for opportunistic behavior by the promisor.[108] In our view, these uncertainty perils faced by an employee who has been promised a complicated pension are not counterbalanced by significant collective uncertainty associated with traditional liability rules. It is important to understand why.

Few, if any, benefit promises offer interpretative certainty. After all, benefit promises convey an entitlement triggered upon obtaining a certain state of the world, and entitlements contingent upon world states will contain some degree of ambiguity as to the content of the entitlement or the existence of the triggering world state. There will always be some possibility—whether small or large—that two impartial arbiters will conclude that the meaning of a benefit promise is slightly different. So let us say that for a given benefit promise, the more likely it is that impartial arbiters will disagree about the meaning of a benefit promise, the more "volatile" the promise is. Comparatively high volatility can pose collective uncertainty problems because risk-averse promisors will be less likely to make high-volatility promises or will offer less generous promises (in effect, charging the average promisee an "interpretative volatility premium").[109]

Comparatively speaking, however, defined benefit pension promises are not volatile; after all, they are necessarily *formulas* memorialized in contract.[110] Indeed, to the extent a pension promise is so complicated that

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107. Employees face well-recognized cognitive and transaction cost limitations. *See, e.g.*, *supra* note 22. Thus, the more complex the defined benefit promise, the more likely the employee will be unaware of its terms.

108. Failure to honor a complex promise may never be detected (i.e., some beneficiaries may not ultimately realize that the promisor is interpreting the promise in a less generous manner than originally intended). Failure to honor a complex promise is also less likely to result in reputational costs (i.e., violating the clear terms of a simple pension is considerably more likely to damage a promisor's reputation). And failure to honor a complex promise is less likely to result in ex post legal sanction because it may be difficult, in practice, to establish that the promise was broken.

109. In other words, a benefit promise change, occasioned by a new legal rule or otherwise, that is expected to be *X*% more costly will be avoided by promisors who have no tolerance for high variance around an expected *X*% increase. Alternatively, such promisors could severely reduce the generosity of the promise as a hedge against cost variance.

110. In our view, the same cannot be said for non-formula-based defined benefits such as health

it is susceptible to more than a modest range of interpretations, it bears little resemblance to the "defined" promise ERISA intended to subsidize.[111] In our view, it is odd to choose legal rules prioritizing the minimization of collective uncertainty, which is the direct result of the underlying promise having fundamentally strayed from the central attributes the statute intended to encourage.

Perhaps more importantly, however, promisors are well positioned to deal with volatility *privately* (i.e., by making less complicated promises).[112] After all, ERISA explicitly requires that traditional pension benefits are defined and disclosed in a manner comprehensible to the "average plan participant."[113] To us, this indicates a preference for rules that are more likely to render promises simple and intelligible. It hardly seems faithful to congressional intent, therefore, to favor rules that permit complicated promises at the cost of heightened performance and expectation uncertainty.

Two Wrinkles. Although far less common, defined benefit pension disputes can arise over matters other than promise content. One important category presents acute expectation and collective uncertainties (i.e., disputes over the right of a promisor to *change* the terms of the promise). The importance of rule selection and interpretation in this context is difficult to overstate: an unfettered right to modify promise content essentially makes a pension promise illusory (and thus often "broken"); the lack of a right to modify content makes a promise permanent (and thus rarely made). The mix of uncertainties implicated by this issue is both complex and unique; thorough examination is beyond the scope of this paper.[114]

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insurance. *See infra* Part III.C (exploring, at length, the nature and consequences of the health insurance benefit).

111. *See supra* note 103 (discussing numerous ERISA provisions requiring specificity in the defined benefit pension promise).

112. Perhaps the downside is that simpler promises do not accurately reflect the nuanced preferences of the players. But that is a policy judgment. Imagine the following: Under Regime *A*, pension promises are subject to traditional or employee-favoring legal rules. In such a regime, one would expect simple and generic defined benefit pensions that closely resemble (or in fact are) standard annuities bought and sold on the open market, with little expectation uncertainty and few disputes. Under Regime *B*, pension promises are subject to promisor-favoring legal rules (e.g., damage limitations, standards of review deferential to the promisor, and mandatory administrative review prior to commencement of suit). One would expect complicated pensions that might better reflect the specific preferences of many employees but which would also pose heightened expectation risk. Which regime is "better" depends on empirics and normative judgments.

113. 29 U.S.C. § 1022(a) (2006); *see also supra* note 101 (discussing § 1022(a)).

114. For an excellent treatment of the economic arguments underlying the debate over this issue, see James A. Wooten, Who Should Own a Pension Surplus—Employer or Employees? An Assessment of Arguments about Asymmetry of Risks and Rewards and Deferred Wages in Pension

A second major category implicates what are commonly referred to as fiduciary duties and statuses. Fiduciary matters, and their attendant uncertainty, can arise in any benefit arrangement; however, they *pervade* the defined contribution pension promise. As such, we address them in our discussion below.[115]

B. Defined Contribution Pension Promise Uncertainty

From its inception, ERISA has regulated defined contribution pension plans. When the statute was enacted, however, such plans were a relatively minor part of the pension landscape. Because there are some uncertainties associated with *any* pension plan arrangement, Congress subjected defined contribution arrangements to some of the rules it had designed to govern defined benefit pension plans.[116] The uncertainties associated with the modern defined contribution pension arrangement, however, are markedly different from those associated with a traditional pension plan.

Conceptualizing the Promise. To the uninitiated, the phrase "defined contribution" arrangement may prompt the question: who is contributing what to what? The simple answer: an employee is contributing some of her current compensation (which conceptually includes an employer's matching contribution) to an individual investment account.[117] The simple answer, however, does not immediately reveal what, if anything, the promisor is agreeing *to do*. Logically, a defined contribution pension arrangement is comprised of two promises. First, the employer promises to make contributions of a certain amount to an employee's account.[118] Second, the employer promises to have some involvement in connection with the administiration or investment of that account or both.[119]

Plans (May 21, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1141918. For a comprehensive economic analysis of an analogous issue in the non-retirement-plan setting, see MARK J. WARSHAWSKY, THE UNCERTAIN PROMISE OF RETIREE HEALTH BENEFITS 10 (1992) (evaluating two policy options: "the status quo and 'ERISA-fication'").

115. *See infra* Part III.B–C.

116. *See, e.g.*, *supra* notes 92, 93, 100, 101 and accompanying text.

117. Some arrangements couple an employee's pretax wage contribution with a employer match, but, functionally, the total "contribution" is all employee compensation. In economic terms, the match represents foregone wages. *See supra* text accompanying note 18 (explaining that all benefits are wage substitutes).

118. This is true even where there is no matching contribution; in that case, the employer is promising to administer the transfer of the employee contribution.

119. Were neither of these the case, the arrangement would not be a *bilateral* benefit promise. It would be an individual tax-preferred savings plan self-administered by the employee who self-funded with wages.

The first promise—an agreement to contribute—is similar to the formula promise in a defined benefit pension plan. Because it is extremely simple, the promise to contribute poses little performance and expectation uncertainty. Likewise, legal rules designed to enforce this promise are unlikely to cause meaningful collective uncertainty. The second promise—related to account involvement—presents a considerably different mix of uncertainties. Broadly speaking, it implicates what we refer to as "fiduciary" considerations.[120]

Fiduciary relationships arise in situations where a principal wishes to engage an agent to act on her behalf, but is unwilling or unable to engage in sufficient monitoring of the agent's activities to ensure the agent is faithfully serving the principal's interest.[121] Frequently, an agent possesses expertise, training, or capability that the principal lacks. This makes reliable monitoring challenging. In lieu of direct monitoring, a fiduciary bargain can be struck, pursuant to which the agent agrees to assume particular duties to the principal. Alternatively, there are circumstances where law, in the absence of a bargain, imposes fiduciary duties on parties with a certain type of relationship.[122] In either case, it is often too costly or difficult to specify in advance how, precisely, a fiduciary should act on the principal's behalf. Accordingly, whether arising by agreement or by law, fiduciary relationships are routinely defined by various standards of conduct that have been developed to clarify a fiduciary's duties.[123]

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120. *See supra* text accompanying note 115 (identifying the relevance of fiduciary duties in some defined benefit pension plan disputes).

121. We use principal and agent in the economic sense—where Party *A* engages Party *B* to act on Party *A*'s behalf—not the formal legal sense, where control is an element of agency.

122. To what extent such duties are subject to change by agreement is a matter of much academic debate. *See, e.g.*, Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 598 (1997).

> The conditions that generate state-imposed fiduciary restrictions not only impel limits on the fiduciary's power, but they impel limits on the beneficiary's power . . . to consent to departure from those restrictions. Those limits are more rigorous than the limits on the non-beneficiary's power to consent to departure from the restrictions of "mere" contract doctrine.

Id. (footnotes omitted). *See generally* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH L. REV. 1 (1990); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491 (2004).

123. *See, e.g.*, Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 303 (1999) ("Fiduciary law delineates the ways in which such relationships arise and identifies the standards of conduct to which a fiduciary must conform, including requirements of loyalty, zeal, and self-sacrifice.").

In virtually all defined contribution pension plans, promisees rely on plan fiduciaries to perform functions that are too difficult or costly for promisees to perform on their own.[124] While some fiduciary obligations, such as the restrictions on "prohibited transactions," have been expressed in sets of fairly clear rules,[125] the core aspects of fiduciary duties under ERISA are expressed and applied as standards—such as the duty to act "solely in the interest of beneficiaries" and the duty to prudently administer the plan.[126] Few, if any, promisees understand with confidence what such duties mean in a circumstance-specific way.[127] Accordingly, these fiduciary promises are particularly susceptible to expectation uncertainty.[128]

Uncertainty Implications. The expectation uncertainty that permeates fiduciary promises may lead to collective uncertainty. Whether the

124. For defined contribution plans that do not offer the option of investment self-direction, the promisor's fiduciary role is obvious and enormous: the fiduciary is actively deciding how to invest assets beneficially owned by the plan participant. But even for plans that do offer self-directed accounts (and with respect to promisees who exercise that option), residual fiduciary duties remain.

125. 29 U.S.C. § 1106 (2006).

126. 29 U.S.C. § 1104(a)(1) (2006). ERISA defines a fiduciary as one who "has any discretionary authority or discretionary responsibility in the administration" of a pension or welfare plan. 29 U.S.C. § 1002(21)(A)(iii) (2006). It subjects every fiduciary to a general duty of loyalty by providing that he "shall discharge his duties . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . and . . . defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1). Similarly, it subjects every fiduciary to a general duty of care by providing that he "shall discharge his duties . . . with the care, skill prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1).

127. For example, in plans where the participants do not self-direct their investments, they may have little or no understanding of what it means for the fiduciary to be investing prudently. Even in plans where the participants select their own investments, there may be considerable expectation uncertainty because of the fiduciary relationship. For example, participants in such a plan may have little or no understanding of the size and prudence of various fees the fiduciary negotiates with essential third parties (i.e., financial intermediaries).

128. Some prominent theorists have described the fiduciary relationship as an example of a "relational" or "incomplete" contract. *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1127 (1981) (arguing that fiduciary relationships "are properly analyzed as relational contracts because they tend to be characterized by uncertainty about factual conditions during performance and an extraordinary degree of difficulty in describing specifically the desired adaptations to contingencies"). In our view, analysis of ERISA fiduciary law could benefit greatly from consideration of the well-developed literature regarding incomplete contracts. *See, e.g.*, Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CALIF. L. REV. 1123 (1986). In exploring the regulation of ERISA-governed health benefits, at least one notable scholar has persuasively drawn from this literature. *See* Russell Korobkin, *The Efficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1 (1999) (recognizing the incomplete nature of the health insurance contract and arguing that certain benefit mandates may, therefore, be economically efficient).

fiduciary is the promisor itself or a party working with the promisor to administer the defined contribution plan, a legal regime designed to protect individual promisees—by construing strictly and broadly the fiduciary obligations—is likely to discourage players from wishing to serve as fiduciaries, or, alternatively, cause them to charge more for doing so. Thus, "fiduciary chill" is a legitimate concern when selecting legal rules governing fiduciary conduct. There are, however, measures that may efficiently mitigate "fiduciary chill." For example, it is sometimes possible to couple strongly protective liability rules with "safe harbor" carve outs (i.e., ex ante statutory descriptions of circumstances in which the fiduciary obligation is eliminated or significantly limited).[129] Put simply, the objective is to reduce the scope of conduct governed by standards by subjecting a commonly recurring fact pattern to classic rules.[130]

A Wrinkle Returns. There is one fiduciary issue that, as mentioned above, recurs across ERISA promises: misrepresentation. Whatever the underlying promise, such disputes arise when (i) a promisee seeks advice from the fiduciary about either the content of the benefit or the consequences of a benefit-related action or decision, (ii) the fiduciary provides inaccurate or incomplete advice, and (iii) the promisee relies on it to her detriment.[131] The challenge is determining what legal rules should apply in such cases. Weakly protective rules may have devastating consequences in performance and expectation uncertainty terms.[132] On the

129. *See, e.g.*, 29 U.S.C. § 1104(c) (2006). Pursuant to this safe harbor, the fiduciary obligations of a promisor are vastly reduced in cases where the promisee is directing her own defined contribution plan investments. There are disputes, of course, about what residual fiduciary duties remain. But disputes on the margins pose less collective uncertainty than would be present in the absence of a safe harbor.

130. Whether converting the fiduciary standard to a specialized rule is desirable in any particular circumstance is, of course, a separate question. The predictability of any rule may be outweighed by the loss of flexibility inherent in the fiduciary standard. Moreover, one might challenge the likelihood that government officials will select a desirable rule. *See, e.g.*, Richard A. Epstein & David A. Hyman, Controlling the Cost of Medical Care: A Dose of Deregulation 1 (Oct. 1, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1158547 ("We take seriously the insights of the Hayekian tradition that decentralized market actors are better able to identify and use relevant information than a single sclerotic government agency that is beset with administrative and political problems of its own."). And some matters are so dependent on idiosyncratic factual specifics that a useful standard to rule conversion would be functionally impossible. Put simply, efforts to convert ERISA's fiduciary promise into one that relies *entirely* on contract principles are misguided. *Cf.* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880 ("My thesis is that, even considering the obligation's elusive nature, descriptions drawn exclusively from contract principles are surely mistaken.").

131. *See, e.g.*, Amschwand v. Spherion Corp., 505 F.3d 342, 344 (5th Cir. 2007) (employee was told that he was not required to be an active employee in order to receive benefits; upon his death, his widow was denied benefits on the grounds that he was not an active employee).

132. This is true because fiduciaries may have insufficient incentive to exercise care in dispensing

other hand, strongly protective rules may increase collective uncertainty.[133] Arguably, these increased costs will be substantial because misrepresentation allegations, especially if, in part, oral, may be costly to disprove.

C. Welfare Benefit Promise Uncertainty

As noted above, ERISA was not confined to the regulation of pension plans. The inclusion of welfare plans within the statute is often described by scholars as an "afterthought," whose regulatory consequences were hardly contemplated by legislators who had devoted years to examining pension reform.[134]

Self-evident is that welfare plan promises—which supply life, disability, and, most importantly, health insurance—are of a different character entirely than retirement promises and implicate different uncertainties. Below, we focus on the uncertainties that attend the health insurance promise, because nowhere are the unanticipated consequences of ERISA's welfare plan regulation more severe. Indeed, it is no overstatement to say that the collective uncertainty associated with application of ERISA's civil enforcement provisions to employer-sponsored health insurance has fundamentally transformed the practical effect of the statute in numerous areas. There is simply no chance that the path of the law would have unfolded as it did if health insurance promises had been excluded from the statute's dominion. In order to appreciate this reality, we need to first understand the nature of health insurance in America today. Such will illuminate how and why employer-sponsored health insurance presents a unique and powerful mix of uncertainties.

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advice. Accordingly, fiduciary conduct (or inaction) may result in promisees actively forming mistaken expectations about the content or consequences of the benefit promise. *See, e.g.*, Griggs v. E.I. DuPont De Nemours & Co., 237 F.3d 371, 374–76 (4th Cir. 2001) (fiduciary told employee that he could receive a lump sum early retirement distribution tax-deferred but failed to notify him when it found out that a tax-deferred lump sum was not permitted under federal laws).

133. This is true for two reasons. First, exposure to civil liability (for advice that can be attacked ex post as imperfect) may reduce the willingness of promisors to authorize their agents to discuss the meaning of the plans with promisees. This chilling of communication may be perceived as undesirable because, in most cases, the fiduciary will have correctly explained to the promisee a plan condition or consequence that the promisee did not previously understand. Second, exposure to civil liability (for advice that can be attacked ex post as imperfect) may increase the cost of plan administration. Put simply, fiduciaries may continue to give advice but price into their services the expected cost of the increased liability. In the case of a fiduciary-promisor, this increased cost merely takes the form of a reduction in the generosity of the initial promise.

134. Hyman & Hall, *supra* note 87; *see also supra* note 87.

The Health Insurance Promise. Insurance is a hedge against risk where one agrees to incur a small certain loss (the premium) in order to protect against a large uncertain loss (the loss-payout event). To oversimplify, willingness to pay an insurance premium depends upon the likelihood of the loss-payout event, the magnitude of the loss payout, and the insured's level of risk aversion.

Consider "dice insurance." If one had to pay six dollars should a fair die come up "6," what would one pay to insure against the loss? The likelihood of loss is 1/6; the magnitude of the loss is minus six dollars. A fair premium is one dollar, plus some amount corresponding to one's risk aversion regarding a six dollar loss. Most people, relative to a six dollar loss, are risk neutral, and thus would not be willing to pay more than a one dollar premium. At the risk of stating the obvious, health insurance is far more complex. In dice insurance, the calculus is straightforward: one knows precisely how much money one *needs* to address the loss event, as well as the likelihood of the loss event.

Health insurance is a considerably more difficult bet because very few individuals know the average cost of treatment they will need should they become ill or the likelihood of getting ill. Therefore, they will be unable to calculate an actuarially fair premium based on their expected treatment cost. Nor do they have any sense of the variance associated with any ex ante estimates of either of those two inputs. So they will be unable to determine the additional risk premium they are willing to pay.[135] Practically speaking, then, a potential insured lacks the ability to calculate the expected cost to "fix" herself if sick or to determine how much that expected cost will vary. Accordingly, she cannot price insurance using a straightforward calculus.

What a potential insured can do, presumably, is estimate a "reservation price premium" by determining the highest premium she would pay in exchange for an insurance deal that promised to restore her health (within the limits of modern medicine) in the event she becomes sick. In a decently functioning market with informed insurers, a buyer armed only with an idiosyncratic reservation price (but one that is, unknown to the

135. Assume a potential insured determines that the likelihood of getting sick in the coming year is 20%, and the average cost of treatment is $200. An actuarially fair premium is .2 x 200, or $40. Of course, the various illnesses one could get vary widely. As such, the cost of treatment varies enormously. Without knowing the extent of such variance, one would have little basis upon which to reasonably calculate the additional risk premium one was willing to pay. Cognitive biases, of course, complicate the matter further. *See, e.g.*, Jeffrey J. Rachlinksi, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1218 (2003) (discussing cognitive biases in insurance purchasing).

buyer, in fact reasonable) can still strike something approximating an actuarially fair deal by initiating a result-specific reverse auction (i.e., "I would like to buy insurance from whomever gives me the best price on the following promise: you will give me whatever income I need to pay the cost of medical services needed to remediate any adverse medical state"). Insurers will compete to offer the best price, based on their respective calculations of the relevant inputs.[136] If the best seller price is lower than a potential insured's reservation price, then an insurance deal premised on "medical necessity" will be struck—with the insured never having made anything other than the vaguest expected loss calculation or assessment of his risk aversion.[137]

Uncertainty Implications. It is difficult to overstate the magnitude of expectation uncertainty associated with the promise of "medically necessary" care. To put it mildly, it dwarfs the expectation uncertainty present in all other benefit promises. Accordingly, promisees regularly assert claims for medical care that are denied.[138] And these administrative claims frequently lead to civil litigation in which courts must then ascertain the circumstance-specific meaning of "medical necessity."[139]

The health insurance promise is highly volatile because impartial arbiters often disagree about several important aspects of the necessity standard.[140] In addition, because a promise of medically necessary care does not explicitly include a marginal cost limitation, there is relentless upward cost pressure on the promise. To the extent that medically

136. Actual insurance markets are vastly more complicated; we, of course, do not claim every potential insured is in fact conducting a reverse auction. In the ERISA context, matters are additionally complicated because insurance selection involves the employer, whose interests are not perfectly aligned with those of the employees. Such complications do not concern us here; we are simply illustrating how insurance deals can be struck when it is obvious that insureds have not made ex ante actuarial calculations that resemble dice insurance calculations.

137. Moreover, such a deal is consistent with social norms always and everywhere promoting the supremacy of health among life's circumstances.

138. *See, e.g.*, Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2350 (2008) (citation omitted) (noting that approximately "1.9 million beneficiaries of ERISA plans have health care claims denied each year").

139. *See* JAYNE E. ZANGLEIN & SUSAN J. STABILE, ERISA LITIGATION 544 (2d ed. 2005) ("Many cases involving medical benefit denials concern the issue of whether a treatment is medically necessary."); *see also id.* at 542 ("Medical plans typically exclude experimental and investigational treatments. There has been a significant amount of litigation regarding treatments that insurers have characterized as experimental and therefore not reimbursable."); William M. Sage, *Managed Care's Crimea: Medical Necessity, Therapeutic Benefit, and the Goals of Administrative Process in Health Insurance*, 53 DUKE L.J. 597, 599 (2003) ("explor[ing] the concept of medical necessity as it has evolved in the judicial and administrative oversight of managed care").

140. This volatility is arguably increased because impartial arbiters may be emotionally biased in favor of individuals seeking care.

necessary care is held to encompass any potentially beneficial care, irrespective of its marginal cost,[141] an insured—who is insulated from the marginal cost—has strong incentive to demand it.[142] Health-care professionals have strong incentives to recommend such goods and services without regard for cost-adjusted utility.[143] And, as a result, entrepreneurs have strong incentives to create them. The resulting process drives up the price of health care, with corresponding upward pressure on insurance premiums.[144]

Rising health-care prices unquestionably threaten the vitality of employer-provided health insurance. Accordingly, legal rules perceived as contributing to price inflation pose significant collective uncertainty. For example, the volatility and cost of the health insurance promise are increased by the availability of punitive damages or recovery for

141. A unit of medical care (e.g., a drug, surgery, or diagnostic procedure) that does five peppercorns of good is arguably more "necessary" than one that does four peppercorns of good, irrespective of the potentially steep cost of the fifth peppercorn.

142. As one noted economist recognized over forty years ago, total indemnity creates what is now commonly referred to as ex post moral hazard: insureds facing a loss event will choose the "fix" most consistent with their preferences without regard to cost. *See* Mark V. Pauly, Comment, *The Economics of Moral Hazard*, 58 AM. ECON. REV. 531 (1968). Instead of "moral hazard," we prefer the more neutral term "discretionary cost pressure." *See generally* JOHN A. NYMAN, THE THEORY OF DEMAND FOR HEALTH INSURANCE (2003) (arguing that some additional health care purchased because of income transfers when ill is, in fact, worth more to the consumer than it costs to produce and therefore a welfare gain).

143. Insofar as the extent of a triggering loss and possible fixes are not readily ascertainable, an expert (i.e., physician) will need to be engaged in connection with performance of the indemnity. The expert, as an agent, may have interests divergent from both the insurer and the insured, and thus presents the possibility that he will act in ways injurious to one or both. How the expert is incentivized and monitored, of course, matters with regard to the ways in which self-interested behavior will materialize; expert engagement arrangements can be structured to be more likely to favor the insured or the insurer. For example, a common critique of the fee-for-service model dominant in health care until recently was that physicians routinely charged for unnecessary services to enrich themselves and to please cost-indifferent patients. A common critique of the capitation model dominant in HMO health care—where physicians are paid a flat fee to provide a predetermined type of care—is that doctors underprovide care (i.e., "stint") once the capitation fee is consumed. *See, e.g.*, Randall P. Ellis & Thomas G. McGuire, *Optimal Payment Systems for Health Services*, 9 J. HEALTH ECON. 375 (1990) (advancing, *inter alia*, an important theory of stinting); Randall P. Ellis & Thomas G. McGuire, *Provider Behavior Under Prospective Reimbursement: Cost Sharing and Supply*, 5 J. HEALTH ECON. 129 (1986) (same).

144. Health-economics literature abounds with proposals to control costs. In recent years, the most common method of cost control has probably been explicit cost-sharing mechanisms such as deductibles and coinsurance. Of course, these mechanisms have clear limitations. For example, any such measure must be capped or it is insufficiently attractive to rational risk-averse players. Accordingly, for demands above the cap, explicit cost sharing will not constrain the selection of more costly fixes by an insured. Perhaps more importantly, cost sharing worries many observers because of the specific types of foregone consumption that it has been proven to induce. *See, e.g.*, JOSEPH P. NEWHOUSE, PRICING THE PRICELESS: A HEALTH CARE CONUNDRUM 79–103 (2002).

emotional distress caused by wrongful coverage decisions.[145] Therefore, limiting remedies will reduce the cost of making the health insurance promise. So, too, would adoption of judicial review standards that favor coverage judgments made by the promisor or its agent. The selection of legal rules in this area requires a delicate balancing of many important considerations.[146] A studied (and ideally legislative) assessment of whether the collective uncertainty associated with any given legal rule (e.g., limiting civil remedies) is outweighed by concerns regarding competing uncertainties is necessary.[147]

IV. UNCERTAINTY IN THE SUPREME COURT

Much legal scholarship has addressed the manner in which ERISA should be interpreted by the federal judiciary.[148] And no object of judicial interpretation has generated more interest among scholars than the complex private right of action created by the statute.[149] In this Part, we

145. There are volatility concerns even in the context of "physical" consequential injuries (i.e., a worsened physical condition). The likelihood of such consequences varies widely and is extraordinarily difficult to predict. *Cf.* McCahill v. N.Y. Transp. Co., 94 N.E. 616 (N.Y. 1911) (man dies from delirium tremens while hospitalized from car accident). Moreover, it is often difficult to assess whether the consequential injury was partially, or entirely, the result of something other than the benefit denial or delay. *See, e.g.*, Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

146. *See, e.g.*, David M. Studdert et al., *Expanded Managed Care Liability: What Impact on Employer Coverage?*, 18 HEALTH AFF. 7, 8 (1999) (noting that the rules in this context may effect "coverage decision making, information exchange, risk contracting, and the extent of employers' involvement in health coverage").

147. For example, it is likely that the limitation of remedies available to victims of wrongful benefit denial or delay will significantly increase performance uncertainty. *See* Stris, *supra* note 30, at 396–97 (outlining the argument). Promisors who are not exposed to any consequential damages for wrongful denial are considerably more likely to engage in opportunistic or careless behavior. *See, e.g.*, *id*. at 398 n.56 (noting resolution of a recent controversy where the largest disability insurer in the United States agreed to reexamine more than 200,000 disability claims that it had denied). While we believe that the case for consequential damages in this context is strong, our even stronger belief is this: prohibiting traditional consequential damages as a cost-control measure is like using a bucket to bail out the Titanic. Arresting the rising cost of health care requires sweeping changes in how health care is delivered, administered, and financed. Selecting remedial legal rules to govern the promise of employer-sponsored health insurance is merely one small part of that larger discussion.

148. *See, e.g.*, Fischel & Langbein, *supra* note 37, at 1107 (arguing that "the mess in ERISA fiduciary law cannot be ameliorated until courts . . . recognize the multiplicity of interests that inhere in the modern pension and employee benefit trust"); Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L. REV. 457, 460 (2003) (arguing that "the Supreme Court, in interpreting ERISA, rather than Congress in drafting it, . . . is most responsible for the current confused and illogical state of managed care law"); Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 242 (1995) (arguing "that the protections of section 510 [of ERISA] should extend to plant closing situations").

149. *See infra* notes 154, 155.

employ our theory of uncertainty to explain the allure and persistence of the Court's maligned doctrinal approach to private civil enforcement. We argue that, when given the opportunity, the Court has exploited textual ambiguity to give voice to a profound fear of collective uncertainty. It has done so by admittedly developing several restrictive "judicial glosses."[150]

A. Civil Enforcement

The particulars of civil enforcement under ERISA defy concise summary, but the essential provisions can be described generally as follows: A "benefits" provision creates a private right of action through which a participant in any pension or welfare plan may seek benefits due under the plan.[151] A "fiduciary" provision creates a private right of action through which a participant in any pension or welfare plan may police the conduct of those who administer her plan.[152] Finally, a "catchall" provision creates a private right of action though which various stakeholders may seek to obtain "other appropriate equitable relief."[153]

Because of their extraordinary practical importance, these provisions have regularly captured the attention of the United States Supreme Court.

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150. At one oral argument, Chief Justice John Roberts candidly remarked: "you're right that we judicially have developed a number of glosses on [ERISA], including I think most importantly the *Firestone* deference principle. But if you're right [in your current interpretation], then all of that work has been in vain." Transcript of Oral Argument at 9, LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008) (No. 06-856), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-856.pdf (responding to Professor Stris's claim that the plain meaning of an ERISA provision should not be trumped by a "judicial gloss" on the statute). These judicial glosses, wholly apart from their effect on the regulatory system, provide an important vehicle for assessing the relationship between Congress and the federal courts. *See, e.g.*, Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 346–51 (2002) (discussing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002)); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 256–58 (2003) (same).

151. *See* 29 U.S.C. § 1132(a)(1)(B) (2006) (authorizing a participant in an ERISA plan to file a civil action to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan"); *see also* Conkright v. Frommert, 130 S. Ct. 1640 (2010); Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

152. *See* 29 U.S.C. § 1132(a)(2) (authorizing a civil action to recover "appropriate relief"); 29 U.S.C. § 1109(a) (2006) (defining appropriate relief for purposes of § 1132(a)(2) to include restoration by a fiduciary of "any losses to the plan resulting from [fiduciary breach]"); *see also* LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985); *supra* note 126 (discussing ERISA's definition of fiduciary and codification of broad duties of loyalty and prudence).

153. 29 U.S.C. § 1132(a)(3)(B) (authorizing a civil action to recover "appropriate equitable relief" to redress violations of the statute or the terms of the ERISA plan at issue); *see, e.g.*, Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248 (1993); *cf.* Varity Corp. v. Howe, 516 U.S. 489 (1996).

For nearly two decades, scholars have sharply criticized the Court for its jurisprudence in this area. The most prominent critic has been Yale Law School Professor John H. Langbein.[154] But he is hardly alone.[155] In the sections that follow, we apply our theory to several of these important Supreme Court decisions.

B. Limiting Remedies

In 1985, the Supreme Court decided *Massachusetts Mutual Life Insurance Co. v. Russell*.[156] At issue was the plight of Doris Russell, a Massachusetts Mutual employee suffering from a back ailment. Ms. Russell initially received disability insurance payments for her condition from an ERISA-governed welfare plan.[157] After several months, however, these benefits were terminated based on the report of an examining physician.[158] Ms. Russell pursued internal review of the denial; several months later, she was able to persuade the plan to reinstate her benefits

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154. For example, in 1991, Professor Langbein wrote that a decision penned by Justice O'Connor was "such a crude piece of work that one may well question whether it had the full attention of the Court." Langbein, *supra* note 43, at 228 (criticizing the Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)). He went so far as to question the Court's commitment to competent adjudication of ERISA cases. He wrote:

> I do not believe that either Justice O'Connor or her colleagues who joined this unanimous opinion would have uttered such doctrinal hash if they had been seriously engaged in the enterprise.
>
> . . . If the Court is bored with the detail of supervising complex bodies of statutory law, thought should be given to having that job done by a court that would take it seriously.

Langbein, *supra* note 43, at 228–29 (footnote omitted); *see also* John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1365 (2003) [hereinafter Langbein, *Trail of Error*] (arguing that "[t]he Supreme Court needs to confess its error in ERISA remedy law, much as it has recently confronted its mishandling of ERISA preemption").

155. On the issue of limited remedies, see, for example, Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619, 667–68 (1994); George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 665 (1994); Maher, *supra* note 49, at 679–81; Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 461 (2000) [hereinafter Muir, *Perversity of ERISA*]; Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1612–14 (2002); David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 23 (2004). On the issue of judicial review, see generally Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry Into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637 (2005); Donald T. Bogan, *ERISA: Re-thinking* Firestone *in Light of* Great-West*—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629 (2004); Kathyrn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083 (2001).

156. 473 U.S. 134 (1985).

157. *Id.* at 136.

158. *Id*.

and make retroactive payments for the period during which they had been improperly withheld.[159] Nonetheless, Ms. Russell filed a civil lawsuit.[160] She sought consequential damages for the financial distress and aggravation of her medical condition that she alleged arose from the several-month period during which benefits were improperly withheld.[161] Her lawsuit relied exclusively on ERISA's "fiduciary" provision, which, as noted above, permits recovery for fiduciary breach in connection with plan operation.[162]

In an opinion written by Justice Stevens, the Court held that Ms. Russell could not use the fiduciary provision to obtain consequential damages for her temporary benefit denial.[163] This was not surprising because her interpretation of *that* provision found little support in the plain text or legislative history of the statute. As the Court noted, its purpose was to impose personal liability on an administrator for "losses to the *plan*."[164]

Russell should have been a straightforward decision with limited significance because Ms. Russell relied solely on the "fiduciary" provision. In dicta that was subsequently and colorfully described by Professor Langbein as the beginning of a "Trail of Error,"[165] however, Justice Stevens broadly asserted that ERISA "says nothing about the recovery of extracontractual damages" in connection with benefit denial or delay.[166] Because Ms. Russell disclaimed use of the "catchall" provision, the Court expressly reserved judgment on whether consequential damages would be recoverable under that provision of the statute.[167] Nonetheless, *Russell* was widely read as meaning that, absent some loss to the plan, consequential damages in connection with benefit delay or denial are not

159. *Id.*

160. *Id.* at 137.

161. *Id.* at 137–38.

162. *See supra* note 152 (discussing 29 U.S.C. § 1132(a)(2) (2006)). Ms. Russell had also asserted state-law claims, but they were held preempted. *Russell*, 473 U.S. at 137.

163. *Id.* at 138.

164. *Id.* at 140 (emphasis deleted) (quoting 29 U.S.C. § 1109(a) (2006)). According to Justice Stevens, a "contextual reading of the statute" confirmed that the fiduciary provision was "primarily concerned with the possible misuse of plan assets . . . rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142.

165. Langbein, *Trail of Error*, *supra* note 154.

166. *Russell*, 473 U.S. at 144.

167. *Id.* at 139 n.5 ("Because respondent relies entirely on [the fiduciary provision], and expressly disclaims reliance on [the catchall provision], we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages.").

available to a promisee; all that is recoverable is the value of the promised benefits.[168]

In *Mertens v. Hewitt Associates*,[169] the Court addressed the issue that it expressly left open in *Russell*. *Mertens* involved a claim against third-party actuaries (Hewitt) of the Kaiser Steel Corporation (Kaiser) pension plan. The plaintiffs, retired employees of Kaiser, alleged that Hewitt had failed to modify its actuarial adjustments in connection with Kaiser plant shutdowns, leaving the plan with insufficient funds to meet the demands of Kaiser retirees.[170] They sued Hewitt, *inter alia*, under the "catchall provision."[171]

Justice Scalia, writing for the Court's five-to-four majority, produced an opinion that remains surprising. Resurrecting the ancient law and equity distinction, Justice Scalia concluded that the catchall provision's reference to "appropriate equitable relief" solely authorized "relief . . . *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[172] In contrast, Mertens and the United States (as amicus curiae) had urged that "appropriate equitable relief" simply meant "whatever relief a court of equity [was] employed to provide in the particular case at issue"[173]—with there being no dispute that premerger courts of equity had affirmative power to and often did award compensatory damages in connection with breaches of trust.[174] Indeed, Justice Scalia acknowledged that "equitable relief" could "assuredly mean" precisely what Mertens and the United States proposed.[175] Nonetheless, he concluded that "in the context of the present statute,"

168. Although dicta, the lower courts interpreted the broad language in *Russell* to mean that consequential damages are not available in actions brought to recover benefits due under the plan. *See* Flint, *supra* note 155, at 621 (noting that, as a result of dicta in *Russell*, "many subsequent courts have concluded, without examining the legislative history, that ERISA forecloses traditional contractual remedies permitting recovery of extracontractual damages in the benefits-due lawsuit"); *see also supra* note 151 (discussing 29 U.S.C. § 1132(a)(1)(B) (2006)). Today, the issue appears settled. *See* Muir, *Perversity of ERISA*, *supra* note 155, at 436 ("Without exception, the benefits enforcement section has been construed to permit only the recovery of benefits due under a plan.").

169. 508 U.S. 248 (1993).

170. *Id.* at 250.

171. *Id.* The catchall provision does not specify who may be sued. In *Mertens*, the parties did not dispute that the cause of action could be asserted against Hewitt; rather, the dispute was exclusively over what *relief* was available. *Id.* at 251. The Court expressed some skepticism as to whether the catchall provision could properly be used to sue a party in Hewitt's position but nonetheless "decide[d] th[e] case on the narrow battlefield the parties have chosen, and reserve[d] decision [on the] antecedent question." *Id.* at 254–55.

172. *Id.* at 256.

173. *Id.*

174. *Id.*

175. *Id.*

Congress intended to limit relief to such as was "typically" available in equity.[176]

Standing together, *Russell* and *Mertens* severely limited, if not erased, the right of an ERISA beneficiary to recover consequential damages in connection with benefit denials or fiduciary breaches.[177] While both decisions engage in extensive consideration of ERISA's statutory text, there is no serious disagreement that, *at best*, the Court's holdings in both cases are plausible, rather than decisive, readings of ambiguous language.[178] On doctrinal grounds, scholarly disapproval of the Court's decisions is widespread.[179] As Justice Ginsburg has repeatedly noted, it strains credulity to conclude that the ninety-third Congress aimed to provide a limited remedy reliant on a working knowledge of fifteenth- and sixteenth-century precedent.[180]

In our view, both opinions are more fully understood as the work of a Court troubled by the collective uncertainty associated with the legal rules they rejected.[181] Consider *Russell*: a right to recover consequential

176. *Id.* The Court affirmed its historical approach in *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In both cases, the issue was what particular conditions equity imposed on an insurer's recovery of tort proceeds from an insured. For a comprehensive discussion of tort subrogation, see Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49, 79–82 (2008).

177. One exception is that if a fiduciary breach causes a loss to the plan or a gain to the fiduciary, the *plan* may seek restoration of losses or disgorgement of gains. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008) (construing the "fiduciary" remedy); *see also* Linda Greenhouse, *Top Court Allows Suit Over 401(k)*, N.Y. TIMES, Feb. 21, 2008, at C1 ("With 70 million people holding about $3 trillion in 401(k) investments, the 9-to-0 decision [in *LaRue*] was one of the most important rulings in years on the meaning of the federal pension law . . . ."). In addition, the *scope* of the catchall provision as interpreted by the Supreme Court—that is, what manner of relief was "typically" available in equity—is still unresolved. Equitable remedies such as "surcharge" may, in certain narrow circumstances, function as a compensatory damage analogue. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with . . . any loss or depredation in value of the trust estate resulting from the breach of trust.").

178. *See Mertens*, 508 U.S. at 263 (White, J., dissenting) ("The majority candidly acknowledges that it is plausible to interpret the phrase 'appropriate equitable relief' as used in [the catchall provision] . . . as meaning that relief which was available in the courts of equity for a breach of trust."); *see also* Maher, *supra* note 49, at 672 (discussing textual construction of the "benefits" provision).

179. *See supra* notes 154, 155 and accompanying text.

180. In a recent oral argument, Justice Ginsburg pointedly asked: "Do you really think that Congress had in mind the distinction that you are now drawing in the ring case based on 15th and 16th century English precedent?" Transcript of Oral Argument at 18, Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2005) (No. 05-260), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-206.pdf (questioning Professor Stris regarding his answer to a hypothetical posed by Justice Breyer).

181. In *Mertens*, Justice Scalia rather weakly defended the majority's construction of the catchall provision as "not nonsensical," and explained that the rule urged by Mertens would "impose high

damages in connection with welfare benefit denial or delay implicates massive collective uncertainty. The underlying benefit promise is undeniably volatile and, particularly in the health-care context, trends relentlessly upward in terms of cost.[182] If, in the event of an improper denial, a promisor (or an affiliated fiduciary) were subject to consequential damages, the average payout and outcome volatility associated with an insurance promise could increase considerably. Eliminating recovery for consequential damages addresses that concern.[183]

Consider *Mertens*: at issue in that case was the relief available for what was functionally a fiduciary breach in connection with plan administration.[184] Fiduciary conduct rules, as we have explained, can be volatile and pose significant collective uncertainty, particularly so in certain circumstances. If the damages for such conduct are limited to *Mertens*-bounded "equitable" relief (such as restitution, i.e., the return of an ill-gotten *discrete* amount, or injunctive relief, as opposed to traditional "legal" consequential damages), the costs of breach are constrained and collective uncertainty concerns assuaged.

The downside, however, is that the Court's limitation of the catchall provision also results in heightened performance uncertainty. Such may not be immediately obvious because the fiduciary provision authorizes monetary damages if breach results in a loss to the plan or ill-gotten profits to the fiduciary.[185] But there is a setting in which the *Mertens* limitation

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insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Mertens*, 508 U.S. at 262. In *Russell*, Justice Stevens described the Court's holding as consonant with Congress's concern that "the cost of federal standards [would] discourage the growth of private pension plans." Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 n.17 (1985).

182. *See supra* Part III.B–C. *Russell* was a disability (not health) insurance case. But it strains credulity to believe that the Court, in deciding *Russell*, was not imagining a world filled with plaintiffs seeking consequential damages in health care disputes. And health insurance is more volatile than disability insurance because disability insurance has a determinate contractual payout. Health insurance does not. Moreover, the consequential damages for health coverage denials, for obvious reasons, present even greater collective uncertainty than they would in the disability insurance setting.

183. As noted above, the elimination of consequential damages will likely heighten performance uncertainty; the temptation to engage in strategic or careless denials is stronger when the only risk is the modest possibility of a promisee recovering attorneys' fees. Even scholars who believe reputational concerns do much to police enforcement acknowledge the danger of eliminating such damages in the context of health insurance. *See, e.g.*, Epstein & Sykes, *supra* note 30, at 643 (noting that the arguments in favor of consequential damages have "considerable force and may in the end be convincing").

184. That Hewitt was not a fiduciary, *Mertens*, 508 U.S. at 253, is immaterial. At issue was the relief available regarding a claim asserted to be actionable because it fell short of a fiduciary-like standard of care.

185. In many cases, then, fiduciary conduct will be appropriately policed, to the extent that the breach satisfies one of the fiduciary provision's two conditions.

results in enormous performance uncertainty: misrepresentations. When a fiduciary renders inaccurate advice to a promisee who thereafter relies on the advice to her detriment, there often is no loss to the plan and no gain by the fiduciary. In such cases, the fiduciary provision simply will not apply. And if, as is often the case, the fiduciary misrepresentation did not deny the promisee any benefits to which she was contractually entitled, the benefits provision will provide no remedy. In these settings, a fiduciary may be able to supply careless advice with no consequence.[186] This result has, understandably, troubled observers.[187]

C. Limiting Review

The second important judicial gloss upon ERISA's private right of action concerns the standard of review in benefit disputes. In *Firestone Tire & Rubber Co. v. Bruch*,[188] the Court considered the appropriate standard of review in an action over an allegedly improper denial of severance benefits in connection with a corporate sale.[189] Firestone urged deferential review (i.e., adoption of the rule that a reviewing court may overturn a plan administrator's benefit denial only if it was "arbitrary and capricious").[190]

In an opinion written by Justice O'Connor, the Court rejected Firestone's argument and held that the proper standard of review for benefit decisions was de novo.[191] Nonetheless, in a regrettable and unnecessary detour, the Court declared that deferential review would be required where the plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[192] The only limit the *Firestone* Court announced on deferential review was that a reviewing court must consider a fiduciary's actual conflict of interest as "a 'facto[r] in determining whether there is an abuse of discretion.'"[193] In other words: plans could simply write discretionary

186. *See supra* note 131 (discussing Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007)).

187. *See, e.g.*, Amschwand v. Spherion Corp., 505 F.3d 342, 348–49 (5th Cir. 2007) (Benavides, J., concurring) (noting that the facts of the case "scream out for a remedy," but ERISA does not permit relief).

188. 489 U.S. 101 (1989).

189. 489 U.S. at 105–06. *Firestone* was limited to the appropriate standard of review in suits premised on the "benefits" remedial provision. The Court "express[ed] no view as to the appropriate standard of review for actions under other remedial provisions of ERISA." *Id.* at 108.

190. *Id.* at 111–12.

191. *Id.* at 115.

192. *Id*. The detour was unnecessary because the Firestone plan lacked a discretionary provision.

193. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)).

authority—and thus deferential review—into the plan document, *and even in the presence of a conflict of interest*, courts must use an abuse-of-discretion review, modified in some unspecified way by the presence of the conflict. Plan provisions awarding discretion to administrators immediately became *de riguer*. For two decades thereafter, the lower courts have struggled to identify in benefits disputes when a conflict of interest exists and how such a conflict should be weighed as a "factor" in conducting an abuse-of-discretion review.[194]

In *Metropolitan Life Insurance Co. v. Glenn*,[195] the Court recently addressed both issues. *Glenn* arose from a denial of disability benefits, where an insurer, MetLife (on behalf of employer Sears Roebuck), administered and paid benefits.[196] As an initial matter, the Court determined that a fiduciary who both administered the plan and paid benefits suffered from a conflict of interest.[197] Nonetheless, the Court declined to disturb *Firestone*, affirming that, even where a conflict of interest is present, the standard of review is one of abuse of discretion.[198] The Court attempted to add substance to the "factor" analysis of *Firestone* by explaining that "circumstances" should inform a reviewing court in weighing the presence of the conflict; it refused, however, to offer "'talismanic words that can avoid the process of judgment.'"[199]

Because virtually all plans include discretionary provisions, *Firestone* and *Glenn* supply a de facto deferential standard of review in all lawsuits challenging benefit determinations. Such might be a sensible rule were benefit determinations customarily made by impartial arbiters. Yet the opposite is true under ERISA. Because the statute does not prohibit plan sponsors from directly or indirectly controlling those charged with administering the plan, conflicted fiduciaries are commonplace.[200]

That a statute intended to protect promisees would subject the decisions of conflicted administrators to weak judicial review is hard to believe.[201]

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194. *See* Bogan & Fu, *supra* note 155, at 652 n.71 (discussing standards of "conflict" review across circuits).

195. 128 S. Ct. 2343 (2008).

196. *Id.* at 2346–47.

197. *Id.* at 2348 (holding that there is a conflict where "a plan administrator both evaluates claims for benefits and pays benefits claims"). MetLife had argued that no conflict existed.

198. *Id.* at 2350.

199. *Id.* at 2352 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951)).

200. *See, e.g.*, Bronsteen, *supra* note 15, at 2297; *see also* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1325 (2007) ("[M]ost ERISA plan benefit denials are the work of decisionmakers operating under serious conflicts of interest.").

201. Employees face many obstacles that limit their ability to bargain fairly. *See, e.g.*, Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor*

But deferential review has the obvious appeal of minimizing collective uncertainty. Plan sponsors have assurances that their benefit promises will be construed in a manner favorable to them, and challenges to benefit determinations may decline as a result of a promisee facing an uphill legal battle.[202] For those disputes that do proceed to litigation, promise volatility associated with judicial construction is largely avoided because courts will defer absent an abuse of discretion.[203] Employers are, all things being equal, more likely to offer plans and generous benefits when their promises are subjected only to deferential review. Of course, deferential review also leads to acute performance uncertainty by encouraging self-serving benefit determinations that fall short of being arbitrary and capricious. And it incentivizes promise complexity—and thus heightens expectation uncertainty.[204] Where a promisor's construction of a complex promise must be accepted by the courts unless it is arbitrary, one would expect increasingly complicated promises.

CONCLUSION

ERISA is a statutory conglomerate.[205] It regulates benefit promises so different in character that they resemble one another only insofar as they share a common nexus to employment. In modern America, these benefit promises have enormous social significance: they govern over $5 trillion

and Employment Law, 68 IND. L.J. 685, 688–95 (1993) (discussing employee bargaining problems). This, indeed, is in part why ERISA was enacted in the first place. Were employees capable of negotiating the best deal for themselves, many of ERISA's protections would be unnecessary.

202. *Cf.* Mark A. Hall et al., *Judicial Protection of Managed Care Consumers: An Empirical Study of Insurance Coverage Disputes*, 26 SETON HALL L. REV. 1055, 1068 (1996) (noting that patients often "find it too expensive or too difficult to pursue their objections through the costly and time-consuming judicial process").

203. The Court recently held that even after an administrator acts arbitrarily and capriciously, the administrator does not automatically lose deference by the reviewing court if the administrators had simply made an "honest mistake." *See* Conkright v. Frommert, 130 S. Ct. 1640, 1649 (2010). Among the rationales the Court cited for its decision were efficiency, predictability, and uniformity. *Id.* at 1649–51.

204. *See supra* Part I.B–C.

205. Coincidentally, its drafting and passage overlapped with a different type of conglomerate. *See, e.g.*, Harvey H. Segal, *The Urge to Merge: The Time of the Conglomerates*, N.Y. TIMES, Oct. 27, 1968, at SM32. In the late '60s and early '70s, corporate "conglomerates"—entities with disparate businesses in largely unconnected market sectors—enjoyed their modern heyday. *See* CHARLES R. SPRUILL, CONGLOMERATES AND THE EVOLUTION OF CAPITALISM 1 (1982) (defining conglomerates as "firms which face numerous distinct markets, each with its own supply, demand, and profit characteristics"); *see also* Brian Cheffins & John Armour, *The Eclipse of Private Equity*, 33 DEL. J. CORP. L. 1, 26 (2008) (explaining that in the '70s, "conglomerates became a familiar part of the fabric of U.S. business"). They did not fare well throughout the '70s or thereafter. Although some have survived, "conglomerates remain largely discredited." *Id.* at 27.

in retirement funds;[206] they set forth the terms by which more than 100 million citizens receive health care;[207] and they receive approximately $250 billion in annual tax subsidization.[208] The legal rules that govern such promises are necessarily of fundamental importance.

Throughout this Article, we have used uncertainty analysis to challenge the notion that ERISA—as currently written, interpreted, and applied—is supplying optimal benefit promise rules. The characteristics and likely disputes that attend different benefit promises vary widely. As such, any thoughtful selection of legal rules must entail identification, weighing, and balancing of context-specific uncertainties. For reasons we have illustrated, this task is beyond the capability and—as retired Justice David Souter made clear—interest of the judiciary.[209]

ERISA must be fundamentally reexamined. It was originally passed after almost ten years of study involving the paradigmatic benefit promise of 1974—the traditional pension.[210] The statute has been quite successful in meeting its original goals. But the benefit promise has dramatically changed in thirty-five years. Consequently, thorough examination of the relevant uncertainties in the *new* benefit promise has never been systematically undertaken. Until such examination occurs, continued reliance on private promises will unsatisfactorily protect the health and retirement security of the American public.

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206. *See supra* note 3.

207. *See supra* note 84 and accompanying text.

208. *See supra* notes 2, 61 and accompanying text.

209. *See, e.g.*, Jess Bravin & Evan Perez, *Justice Souter to Retire From Court*, WALL ST. J., May 1, 2009, at A1 ("Justice Souter has complained about life in Washington and even about aspects of the court's work, such as the numbingly technical cases involving applications of pension or benefits law.").

210. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) (explaining that ERISA was enacted after "almost a decade of studying the Nation's private pension plans").