

FIDUCIARY LIABILITY ISSUES IN ERISA PENSION PLAN TERMINATIONS

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I. INTRODUCTION

Although the number of employers offering defined benefit pension plans has been dwindling for many years, the current economic crisis has increased the rate at which the remaining plans are being terminated.¹ Some of these terminations have been voluntary, accomplished through the process known as a "standard termination" set out in the Employee Retirement Income Security Act of 1974 ("ERISA").² The Pension Benefit Guaranty Corporation ("PBGC"), which is responsible for insuring private tax-qualified defined benefit pension plans in the United States, reported that as of September 30, 2009, its liabilities for terminated plans were over \$82 billion, with another \$5 billion of liabilities for plans that are likely to be terminated.³

As the financial health of many of the employers sponsoring pension plans has deteriorated,⁴ a significant portion of plan terminations have been through ERISA's distress or involuntary termination procedures.⁵ Generally, plan sponsors seek distress terminations when they realize that they are financially unable to both continue their business and meet their pension obligations.⁶ Alternatively, if a pension plan is in financial straits, but the plan sponsor does not initiate a distress

1. Jed W. Brickner & Austin Ozawa, *Pensions in Pain: New Treatments for a New Time*, 37 TAX MGMT. COMP. PLAN. J. 199, 199 (2009).

2. 29 U.S.C. § 1341(b) (2006).

3. Pension Benefit Guaranty Corporation, 2009 Actuarial Report 3 (2009), available at <http://www.pbgc.gov/docs/2009ActuarialReport.pdf> (last visited Dec. 21, 2010).

4. Martin Rosenburgh & Andrew C. Spieler, *21st Century Pensions: The Risk, the Hedge and the Duty to Consider*, 8 J. INT'L BUS. & L. 45, 45 (2009).

5. Brickner & Ozawa, *supra* note 1, at 202.

6. See 29 U.S.C. § 1341(c)(2)(B)(iii)(I)-(II); see also Pension Benefit Guaranty Corp., *Distress Terminations*, <http://www.pbgc.gov/prac/terminations/distress-terminations.html> (last visited Dec. 21, 2010).

termination, the PBGC can seek involuntary termination of the plan.⁷

As the financial security of retirement benefits declines, the anxiety of retirees and employees approaching retirement increases.⁸ There has been a firestorm of ERISA fiduciary litigation in recent years, and there is little indication that it will stop as current and former employees seek this avenue as a way to recover benefits which they view as having been lost due to corporate mismanagement.⁹ Whether employers are considering eliminating plan benefits through standard terminations, or if they are seeking to shed burdensome pension obligations through distress terminations, they should be extremely mindful of their fiduciary responsibilities as plan sponsors and of the claims that plan participants may bring for breaching those responsibilities.

This Comment will discuss the fiduciary duties that arise when plan sponsors terminate single-employer defined benefit pension plans, and the potential ERISA claims that participants or other interested parties might bring against plan sponsors. Part II will give a background on issues with ERISA, and then explain the general rules associated with the different types of plan terminations. Part III will focus on the fiduciary duties that ERISA places upon defined benefit plan sponsors. Part IV will explore which of those ERISA fiduciary duties are likely to be implicated before, during, and after plan terminations. First, the common claims of fiduciary breach by employees following standard plan terminations will be explored. Next, the potential claims that could arise following distress or involuntary terminations will be discussed. Part V will analyze how employers can protect themselves against potential ERISA claims.

7. See 29 U.S.C. §§ 1343(c)(1), 1342(a), 1341(c)(3)(B)(iii); see also Pension Benefit Guaranty Corp., *Termination Fact Sheet*, available at <http://www.pbgc.gov/res/factsheets/page/termination.html>.

8. See Rosenburgh & Spieler, *supra* note 4, at 45.

9. See Jerry Crimmins, *Seyfarth, Shaw Report: FLSA, ERISA Driving Corporate Legal Spending*, Jan. 18, 2010, available at <http://www.allbusiness.com/legal/legal-services-litigation/13802150-1.html>.

II. ERISA: BASIC OVERVIEW OF DEFINED BENEFIT PENSION PLANS FROM INCEPTION TO TERMINATION

A. ERISA Basics

1. ERISA History and the PBGC

ERISA was enacted by Congress in 1974 to provide for more regulated and stable retirement income for employees through private employer pensions.¹⁰ Congress recognized problems with the pension system as it existed before ERISA's passage.¹¹ One of the problems specifically identified was that by "owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits."¹²

To remedy these and other problems with employee benefits plans, ERISA included provisions governing vesting schedules, broadening fiduciary duties of plan sponsors, mandating minimum funding standards, and creating a national system of pension insurance.¹³ Pension insurance is provided by the Pension Benefit Guaranty Corporation ("PBGC"), a federal corporation that guarantees the benefits that have been promised to current and future retirees in the covered plans in return for premium payments from employers who sponsor defined benefit pension plans.¹⁴ If a sponsoring employer cannot pay the benefits it promised to plan participants and beneficiaries, then the PBGC becomes responsible for the plan administration and liabilities that the employer failed to satisfy.¹⁵ However, the amount that the PBGC can pay to individual participants is capped at a statutory amount set out each year under ERISA.¹⁶

10. See 29 U.S.C. § 1001(a) (stating with respect to employee benefits plans, "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered").

11. See *id.*; David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 443-45 (1987) (describing the bleak and uncertain state of employee benefit plans in the decades leading up to ERISA's passage).

12. *Id.*; Mark Daniels, *Pensions in Peril: Single Employer Pension Plan Terminations in the Context of Corporate Bankruptcies*, 9 HOFSTRA LAB. L.J. 25, 37 (1991) (noting that before ERISA, only about one-third of pension plans held sufficient assets to pay benefit obligations after plan termination).

13. Gregory, *supra* note 11, at 446-48.

14. Janice Kay McClendon, *The Death Knell of Traditional Defined Benefit Pension Plans: Avoiding a Race to the 401(k) Bottom*, 80 TEMPLE L. REV. 809, 809-10 (2007).

15. *Id.* at 810.

16. See Pension Benefit Guaranty Corp., *What PBGC Guarantees*, <http://www.pb.gc.gov/workers-retirees/benefits-information/content/page13181.html> (last visited December 21, 2010).

The PBGC is also Congress's chosen organization for supervising the termination of pension plans through any of the three methods of termination specified in ERISA.¹⁷

2. Pension Plan Basics

Employer-sponsored pension plans broadly fall into two basic types defined under ERISA: defined benefit and defined contribution plans.¹⁸ In a traditional defined benefit pension plan, benefits are generally defined as an annuity at a certain retirement age, based on a particular formula that considers an employee's service and pay.¹⁹ A defined-contribution plan's benefits will determine benefits based on contributions from both the employer and employee over the course of that particular employee's term of employment.²⁰ The fundamental distinction between defined benefit and defined contribution plans is that the employer (and the PBGC) bears the risk of investment loss and insufficient funds in a defined benefit plan, while the employee bears the bulk of the risk in a defined contribution plan.²¹

This comment deals exclusively with defined benefit pension plans, but many of the fiduciary issues discussed below apply to both defined benefit and defined contribution plans. Defined benefit plan sponsors are generally considered either single-employer or multiemployer plan sponsors.²² As distinguished from a single-employer plan where a single sponsor contributes to fund employee benefits, a multiemployer plan is a "collectively bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union."²³ Unless specifically noted, the plans discussed within this comment are exclusively single-employer pension plans.

17. See 29 U.S.C. §§ 1341-42 (2006) (outlining termination procedures and the role of PBGC therein); see also § 1301(a)(4) ("corporation" refers to PBGC).

18. Shelby D. Green, *To Disclose or Not to Disclose? That is the Question for the Corporate Fiduciary Who is Also a Pension Plan Fiduciary under ERISA: Resolving the Conflict of Duty*,

9 U. PA. J. LAB. & EMP. L. 831, 845 (2007).

19. See *id.*

20. See *id.*

21. See *id.* at 845-46.

22. Pension Benefit Guaranty Corporation, Fact Sheet, available at <http://www.pbgc.gov/res/factsheets/page/pbgc-facts.html>.

23. Introduction to Multiemployer Plans, available at <http://www.pbgc.gov/practitioners/multiemployer-plans/content/page13645.html#1> (last visited Dec. 21, 2010).

B. *Types of Plan Terminations Under ERISA*

1. Standard Plan Termination

There are a number of business reasons that an employer might decide to terminate a defined benefit pension plan, even if the plan has enough assets to cover benefit obligations. For example, an employer might recognize that adverse business conditions could make maintenance of the plan untenable in the future. Another reason might be that the employer recognizes that most employees would prefer a different type of benefit or compensation. While there may be many other reasons for deciding to terminate a well-funded pension plan,²⁴ the increased funding and disclosure requirements that the Pension Protection Act of 2006 imposes on plan sponsors could make maintaining a defined benefit plan undesirable.²⁵

Employers who are motivated to terminate pension plans for reasons like the foregoing would likely proceed under a standard termination.²⁶ Under these types of terminations, the plan administrator must provide a Notice of Intent to Terminate ("NOIT") to plan participants at least sixty days prior to the intended date of termination.²⁷ Next, the plan administrator must provide to the PBGC a certification from an enrolled actuary that the plan is projected to have sufficient assets on the termination date to cover all of the plan's liabilities.²⁸

After the PBGC notice, the plan administrator must provide extensive benefit information to each participant covered by the plan.²⁹ Finally, the plan may distribute benefits to participants, provided that the PBGC does not send a notice of noncompliance to the plan administrator within sixty days after the PBGC receives the actuarial certification.³⁰

Once the plan administrator has paid out all benefits owed under the plan, or otherwise covered all the liabilities (e.g., through the purchase of an annuity), there might be residual

24. See Daniels, *supra* note 12, at 37-38 (discussing that many voluntary terminations took place in the 1980s in connection with corporate mergers, at a time when favorable stock market performance had resulted in many plans having assets in excess of their obligations).

25. See Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780.

26. See 29 U.S.C. § 1341(b) (2006).

27. *Id.* § 1341(b)(1)(A).

28. *Id.* § 1341(b)(2)(A).

29. *Id.* § 1341(b)(2)(B).

30. *Id.* § 1341(b)(2)(D).

assets remaining in the trust.³¹ Although funds contributed to employee benefit plans are generally strictly off-limits to employers,³² ERISA does allow for an exception if assets remain after a pension plan has been terminated, provided that three conditions are met: "(1) all liabilities of the plan to participants and their beneficiaries have been satisfied, (2) the distribution does not contravene any provision of law, and (3) the plan provides for such a distribution in these circumstances."³³

Of course, an explicit provision in the plan document stating that residual assets may revert to the employer following termination is the safest approach to ensuring that such a reversion will be allowed.³⁴ However, the provision must have been in operation for at least five years before the plan is terminated.³⁵

An important consideration in this context is that the Internal Revenue Code imposes an excise tax on any assets that revert to the employer following the termination of a pension plan.³⁶

2. Distress Plan Terminations

Plan sponsors may seek to terminate underfunded defined benefit pension plans in certain situations. As in the standard termination context, the plan administrator must provide a NOIT to all affected parties,³⁷ and they must provide an actuarial certification regarding the plan's funded status to the PBGC.³⁸ The PBGC will allow the plan to be terminated if each person who is a contributing sponsor or a member of such sponsor's controlled group meets one of the following conditions:

- (1) the person has filed, or has had filed against it, a liquidation proceeding under the Bankruptcy Code,³⁹

31. See, e.g., 29 C.F.R. § 4050.12(e) (2010).

32. 29 U.S.C. § 1103(c)(1).

33. *Id.* § 1344(d)(1).

34. See generally District 65, *UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1479 (S.D.N.Y. 1983) (holding that an employer had the right to surplus assets when the plan document contained a provision stating that reversion of assets following plan termination was permissible "if all benefits have been allocated and distributed under this Article and all liabilities of the Plan to affected Members, Former Members and Beneficiaries have been satisfied").

35. 29 U.S.C. § 1344(d)(1)(C).

36. I.R.C. § 4980(a) (2006).

37. 29 U.S.C. § 1341(c)(1).

38. *Id.* § 1341(c)(2)(A).

39. *Id.* § 1341(c)(2)(B)(i).

- (2) the person has filed, or has had filed against it, a reorganization proceeding under the Bankruptcy Code, and the bankruptcy court finds that, unless the plan is terminated, the person will not be able to complete a reorganization plan within bankruptcy or continue to do business outside of bankruptcy,⁴⁰
- (3) unless the distress termination occurs, the person will be unable to pay his debts when due and will be unable to continue to do business,⁴¹ or
- (4) the costs of providing pension coverage have become unreasonably burdensome solely because of a reduction in the person's workforce covered under all single-employer plans of which such person is a contributing sponsor.⁴²

3. Involuntary Plan Terminations

The PBGC has authority to initiate termination proceedings against a plan if it finds that the plan:

- (1) has not met minimum funding standards,⁴³
- (2) will be unable to pay benefits when due,⁴⁴
- (3) has made a distribution of more than \$10,000 to a substantial owner, and the plan is underfunded after such distribution,⁴⁵ and
- (4) is likely to unreasonably increase the long-term loss to the PBGC if it is not terminated.⁴⁶

In contrast to the permissive reasons listed above for terminating a plan, the PBGC must initiate termination proceedings against a plan if it determines that the plan is

40. *Id.* § 1341(c)(2)(B)(ii)(IV).

41. *Id.* § 1341(c)(2)(B)(iii)(I).

42. *Id.* § 1341(c)(2)(B)(iii)(II).

43. *Id.* § 1342(a)(1).

44. *Id.* § 1342(a)(2).

45. *Id.* §§ 1342(a)(3), 1343(c)(7).

46. *Id.* § 1342(a)(4).

unable to pay benefits currently due.⁴⁷ While the PBGC has historically been reluctant to initiate termination proceedings against plans when it is not required to,⁴⁸ given its current precarious financial situation, it might use this option more often in the future to prevent mismanaged plans from becoming even more underfunded. When the PBGC does involuntarily terminate a plan, it can appoint itself as trustee, and it is not required to consider the interest of the plan sponsor in its actions; rather, it must only consider the interests of the plan participants and the PBGC as an entity.⁴⁹

4. Plan Terminations in Bankruptcy

Because a defined benefit pension plan's assets are maintained in a trust that is separate from the sponsoring employer's general assets, it is possible for the plan to be sufficiently funded to pay benefit liabilities, even if the sponsoring employer is in bankruptcy.⁵⁰ This was the case in *Beck v. Pace International Union*, a case in which the PBGC approved the standard termination of a plan sponsored by a Chapter 11 debtor corporation.⁵¹

While it is possible that a bankrupt corporation sponsors a fully funded pension plan, the much more likely scenario is that the plans of struggling plan sponsors will be underfunded.⁵² In such a case, a corporation who has filed for bankruptcy will often seek to rid itself of pension liabilities through a distress termination.⁵³

In *In re U.S. Airways Group*, the Chapter 11 debtor corporation sought a determination from the bankruptcy court that it met the financial requirements for a distress termination

47. *Id.* § 1342(a).

48. *See Solvency of the Pension Benefit Guaranty Corp., Current Financial Condition and Potential Risks: Hearing Before the S. Comm. on Budget*, 109th Cong. 9 (2005) (statement of Bradley D. Belt, Executive Director, Pension Benefit Guar. Corp.), available at http://www.budget.senate.gov/democratic/testimony/2005/belt_pbgc061505.pdf (stating that when determining whether to involuntarily terminate a plan, the PBGC must weigh the interests of the participants in that plan against the interests of all participants covered by the PBGC).

49. *Cf. Beck v. Pace Int'l Union*, 551 U.S. 96, 99 (2007) (discussing a situation in which a debtor corporation in Chapter 11 bankruptcy sponsored a fully funded pension plan that qualified for standard termination).

50. *See Daniels, supra* note 12, at 59-60.

51. *Beck*, 551 U.S. at 99.

52. *See Brickner & Ozawa, supra* note 1, at 2.

53. *See id.*; *see generally* David D. Hanss, *Too Little, Too Late: Why the Pension Protection Act of 2006 will not Live up to its Name*, 45 HOUS. L. REV. 509, 515-18 (2008) (describing the mechanics of how pension liabilities are shed when the plan sponsor is in bankruptcy).

of its defined benefit pension plan for pilots.⁵⁴ The bankruptcy court found that the debtor had carried its burden of showing that no reorganization plan would succeed unless the pension plan was terminated.⁵⁵ Thus, under 29 U.S.C. § 1341(c)(2)(B)(ii), the plan sponsor could proceed with the distress plan termination.⁵⁶

The court noted that the plan sponsor had considered (and ultimately rejected) other options before seeking distress termination.⁵⁷ However, it also noted that these considerations took place with the realization that the PBGC could involuntarily terminate the plan at any time.⁵⁸ Thus, the possibility of an involuntary termination by the PBGC influences whether and at what point a plan sponsor might seek a distress termination.⁵⁹

III. GENERAL FIDUCIARY DUTIES OF PENSION PLAN SPONSORS UNDER ERISA

One of Congress's major purposes in enacting ERISA was to define stricter standards of conduct for fiduciaries of employee benefits plans.⁶⁰ The specific requirements are found in 29 U.S.C. § 1104(a)(1):

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

54. *In re* U.S. Airways Group, Inc., 296 B.R. 734, 744 (Bankr. E.D. Va. 2003).

55. *Id.* at 745.

56. *See id.* at 745-46.

57. *Id.* at 738-39.

58. *Id.* at 739.

59. *See id.*

60. *See* 29 U.S.C. § 1001(b) (2006) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.").

- (ii) defraying reasonable expenses of administering the plan;
- (B) 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 in the conduct of an enterprise of a like character and with like aims;
- (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
- (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.⁶¹

A. *Preamble: Exceptions to § 1104(a)(1) Requirements*

First, the ERISA section which defines a fiduciary's responsibilities makes specific exceptions for the provisions that describe how trust assets are to be treated following plan termination.⁶² These exceptions contemplate that a plan fiduciary may have multiple roles, and that during those roles, the typical fiduciary duties may not arise.⁶³

61. *Id.* § 1104(a)(1).

62. *See id.* (excepting a total of four sections from § 1104(a)(1)); *Id.* § 1103(c) (stating that plan assets may not inure to the benefit of the employer except as described in the sections describing how a plan is to be terminated); *Id.* § 1103(d) (stating that upon termination of the plan, the assets of the plan should be distributed in accordance with the ERISA sections describing how a plan is to be terminated); *Id.* § 1342 (laying out the method for an involuntary pension plan termination initiated by the PBGC); *Id.* § 1344 (laying out the proper method for allocation of plan assets following a pension plan termination).

63. *See Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 295 (5th Cir. 2000) (stating that "although the balance of § 1104(a)(1) would appear to make a return of assets to an employer a violation of the duty to act 'solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants,' § 1104(a)(1)(A)(i), the provision's initial phrase precludes such an interpretation").

B. § 1104(a)(1)(A): *Duty of Loyalty*

When acting in its fiduciary role with respect to a pension plan, a plan sponsor owes a duty of loyalty to plan participants and beneficiaries.⁶⁴ The ERISA duty of loyalty has been called "the highest known to the law,"⁶⁵ and requires a plan administrator to strictly consider the interests of participants and beneficiaries foremost in its dealings with the plan.⁶⁶

C. § 1104(a)(1)(B): *Duty of Prudence*

Like the duty of loyalty, the duty of prudence required by a fiduciary of a pension plan is often examined by courts in terms of the common law of trusts.⁶⁷ This duty is generally treated by courts as an objective standard under which a plan sponsor's subjective good faith is not sufficient to overcome a charge of imprudence.⁶⁸ This standard is often applied to judge whether a plan administrator's investment decisions have complied with the fiduciary requirements of ERISA.⁶⁹ Further, plan administrators often are required to prove that they conducted appropriate investigations before making decisions that would affect the plan.⁷⁰

D. § 1104(a)(1)(B): *Duty to Diversify*

Courts have been reluctant to place any specific parameters on how to judge whether a plan administrator has met its

64. 29 U.S.C. § 1104. Courts often combine the "solely in the interest of" standard in § 1104(a)(1) and the "for the exclusive purpose of" standard in § 1104(a)(1)(A) into a single standard known as the duty of loyalty. *See Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978).

65. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2nd Cir. 1982).

66. *See Pegram v. Herdrich*, 530 U.S. 211, 223-25 (2000) (analogizing the duty of loyalty to the duty of a trustee to administer the trust solely for the benefit of the trust's beneficiaries).

67. *See Rosenburgh & Spieler, supra* note 4, at 47 (noting that the duty of prudence is often viewed as an adoption of the "prudent person" standard found in trust law).

68. *See Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir. 1983); *see also Bierwirth*, 680 F.2d at 272 n.8 (stressing the extremely high standard of care required of pension plan fiduciaries under ERISA).

69. *See Rosenburgh & Spieler, supra* note 4, at 47-50 (explaining that the statutory language of § 1104(a)(1)(B), together with the provisions in Department of Labor Regulation 2550.404a-1, form the basis for judicial review of plan administrator's investment decisions).

70. *See Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999) (stating that in examining the level of care that a plan administrator employed, "the appropriate inquiry is whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment").

fiduciary obligation to diversify plan assets.⁷¹ While the Department of Labor has issued various items of guidance to assist plan administrators in meeting their fiduciary duty to diversify, plan administrators have historically been given a considerable amount of discretion in choosing their investment portfolios.⁷²

E. *§ 1104(a)(1)(B): Duty to Operate in Accordance with Governing Documents*

Finally, ERISA includes the requirement that fiduciaries generally operate the plan in accordance with the governing documents.⁷³ Lawsuits alleging a breach of this duty are not very common because most benefit disputes allege that the plan administrator's interpretation is incorrect and recover under the plan's standard method of disputing benefit claims rather than under ERISA's fiduciary breach recovery options.⁷⁴ This duty is also implicated when plan administrators fail to follow procedures specified in the plan document.⁷⁵

IV. FIDUCIARY DUTIES BEFORE, DURING, AND AFTER PLAN TERMINATIONS: WHERE THE LAW IS AND WHERE IT COULD GO

Decisions to terminate pension plans generally do not happen overnight, but usually follow months or even years of discussions with and studies by actuaries, lawyers, and investment consultants.⁷⁶ To present a more complete picture of the types of situations that could give rise to ERISA fiduciary litigation, the discussion that follows explores every stage of the plan termination process, and even those steps that were taken long before plan termination was a certainty.

71. See *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 438-40 (3rd Cir. 1996).

72. See Rosenburgh & Spieler, *supra* note 4, at 50-51. The U.S. Department in an advisory opinion stated: "Within the framework of ERISA's prudence, exclusive purpose and diversification requirements, the Department believes that plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans. In this regard, the Department does not believe that there is anything in the statute of the regulations that would limit a plan fiduciary's ability to take into account the risks associated with benefit liabilities or how those risks relate to the portfolio management in designing an investment strategy." DOL Adv. Op. 2006-08A (Oct. 3 2006).

73. 29 U.S.C. § 1104(a)(1)(D) (2006).

74. *Cf. Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109-10 (1989) (defining the proper standard of review for cases where plan interpretation is in dispute).

75. See, e.g., *Donovan v. Cunningham*, 716 F.2d 1455, 1468 (5th Cir. 1983).

76. See generally *In re U.S. Airways Group, Inc.*, 296 B.R. 734 (Bankr. E.D. Va. 2003) (showing that U.S. Airways attempted to find an alternative solution in the years preceding its decision to terminate the pension plan).

Courts have repeatedly held that an employer's fiduciary duties under ERISA must be analyzed in terms of whether it is acting in its fiduciary role as plan administrator, or in its non-fiduciary role as plan sponsor.⁷⁷ Deciding which role the employer occupies at a given time can be exceedingly complex and lead to seemingly conflicting results.⁷⁸ An employer can have entirely self-interested motives in deciding whether or not to terminate a pension plan because decisions to amend or terminate plans are considered settlor functions not governed by ERISA.⁷⁹

In fact, a plan sponsor does not breach any ERISA fiduciary duties by deciding to terminate a pension plan for the sole purpose of recovering surplus assets from an overfunded plan.⁸⁰ This is true even though the decision to terminate would certainly not be in the best interest of participants still accruing benefits under the plan, or of those who could still grow into subsidized early retirement benefits.⁸¹

Fiduciary duties are simply not invoked when the employer is acting in its settlor capacity.⁸² Although employers are not required to act as fiduciaries when they decide to amend or terminate a pension plan, this does not necessarily shield the plan's fiduciaries from liability for actions in violation of their duties during the implementation and pendency of the termination.⁸³ The following discussion explores this point in more detail.

77. See *Beck v. Pace Int'l Union*, 551 U.S. 96, 101-02 (2007); see also *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets.").

78. See *Beck*, 551 U.S. at 101-03.

79. *Id.* at 101-02.

80. See *District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1479 (S.D.N.Y. 1983) (holding that employer had right to surplus assets when plan document contained provision stating that reversion of assets following plan termination was permissible "if all benefits have been allocated and distributed under this Article and all liabilities of the Plan to affected Members, Former Members and Beneficiaries have been satisfied").

81. See, e.g., *id.* at 1480-81 (holding that Plaintiffs' breach of fiduciary duty claims were without merit despite Plaintiffs' argument that "the lump-sum received by participants was unreasonably small" and "that the use of a 15 percent interest rate by Harper & Row was unfair to plan participants because they 'could not be expected to earn more than about 7 percent, on a long-term basis . . .").

82. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (stating that the ERISA definition of fiduciary does not include such functions as plan design, so an employer may decide to amend its plan without being subject to the fiduciary duties it has as plan administrator).

83. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (stating that the employees could have viewed employer's actions as being both that of plan administrator and plan

A. *Current Law and Common Types of Claims in Standard Terminations*

1. Method of distribution

Pension plan sponsors must act as fiduciaries in all stages of implementing a plan termination, including in selecting the method of distribution of assets.⁸⁴ Merely receiving a favorable determination from the PBGC that the plan termination was in compliance with the laws and regulations administered by the PBGC does not insulate the plan administrator or plan sponsor from claims of ERISA fiduciary violations.⁸⁵

A case that provides an excellent overview of several types of ERISA fiduciary liability that can arise in the course of a defined benefit plan standard termination is *Bussian v. RJR Nabisco, Inc.*⁸⁶ In *Bussian*, the Fifth Circuit reversed the district court's grant of summary judgment to a defendant company that was sued by former employees for breach of fiduciary duties in connection with the termination of a defined benefit pension plan.⁸⁷ The employer, RJR, had purchased a single-premium annuity contract from Executive Life to cover the liabilities under the pension plan it was terminating.⁸⁸ RJR had engaged an outside consultant to help it determine which annuity to purchase; Executive Life submitted the lowest bid and was ultimately selected by RJR as the annuity provider.⁸⁹ The case

sponsor, so the employer was acting in a fiduciary capacity when it made misleading statements to employees about the prospect of future benefits).

84. See *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1343 (9th Cir. 1994).

85. See *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 292 n.7 (5th Cir. 2000) ("A statement that a termination is in accordance with the laws and regulations administered by the PBGC is not a statement that the PBGC considers the termination to be in accordance with fiduciary standards set forth in Title I of ERISA.").

86. *Id.*

87. *Id.* at 288; see also 29 U.S.C. § 1132(a)(9) (2006) (The ERISA provision under which relief was sought: "in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.").

88. *Bussian*, 223 F.3d at 299; see also 29 U.S.C. § 1341(b)(3)(a)(i) (listing "the purchase of irrevocable commitments from an insurer" as a permissible method of distributing assets from a single-employer pension plan that is terminated in a standard termination). A single-premium annuity contract is included in the definition of "irrevocable commitments from an insurer." See 29 C.F.R. § 4001.2 (2010).

89. *Bussian*, 223 F.3d at 291.

was initiated by former plan participants after the collapse of Executive Life left them with less than the full amount of benefits that they were owed under the pension plan.⁹⁰

The court first held that a plan sponsor does not breach its duty to diversify by failing to select an insurance provider whose portfolio is sufficiently diversified; ERISA defines this duty with respect to "investments of the plan," which does not include the purchase of an annuity in connection with the termination of a pension plan.⁹¹ Thus, RJR was held not to have violated its ERISA duty to diversify, even though Executive Life held an unusually high level of junk bonds compared to other insurance companies selling annuity contracts to pension plans.⁹²

While acknowledging that RJR was entitled to a reversion of any assets remaining in the trust after all benefit liabilities had been satisfied through a permissible method of asset distribution,⁹³ the court stated that steps taken by a plan sponsor to maximize the amount of this reversion at the expense of plan participants would be a breach of the duty of loyalty.⁹⁴ In other words, if RJR had employed an improper, self-serving motive in choosing Executive Life as the annuity provider, then it would have breached its duty of loyalty to the plan.⁹⁵ The Supreme Court has seemingly acknowledged this position that an employer has a fiduciary duty under ERISA to pick an appropriate annuity provider if an annuity purchase is used in a plan termination.⁹⁶

The plaintiffs in *Bussian* argued that the plan sponsor's duty of loyalty could only be satisfied by choosing the insurer that would provide the safest annuity for plan participants and beneficiaries.⁹⁷ Although this standard was supported by the Department of Labor in its amicus curiae brief, the court rejected

90. *Id.* at 292-93.

91. *Id.* at 294; *see also* 29 U.S.C. § 1104(a)(1)(C) (defining the fiduciary duty to diversify investments of the plan).

92. *Bussian*, 223 F.3d at 290, 294 (noting that at the time of the annuity purchase, Executive Life held over 50% of its assets in low-quality bonds, while the typical insurer held only about 6% to 7% in such assets).

93. *See* District 65, *UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1479 (S.D.N.Y. 1983) (holding that an employer had the right to surplus assets when the plan document contained a provision stating that reversion of assets was permissible "if all benefits have been allocated and distributed under this Article and all liabilities of the Plan to affected Members, Former Members and Beneficiaries have been satisfied").

94. *Bussian*, 223 F.3d at 296; *see* 29 U.S.C. § 1104(a)(1).

95. *See Bussian*, 223 F.3d at 296.

96. *See Beck v. Pace Int'l Union*, 551 U.S. 96, 101-02 (2007) (citing 29 CFR §§ 2509.95-1, 4041.28(c)(3) (2006)) (listing the factors that a plan sponsor should consider in selecting an appropriate annuity provider).

97. *Bussian*, 223 F.3d at 294.

this position.⁹⁸ Instead, it held that fiduciaries will satisfy their ERISA obligations if "their decisions [are] made with an eye single to the interests of the participants and beneficiaries."⁹⁹ The court determined that the focus should be on the fiduciary's conduct (i.e., whether the fiduciary subordinated the interests of plan participants to those of a third party) rather than the quality of the annuity purchased.¹⁰⁰ This is the general standard by which courts determine whether a fiduciary has breached its duties of loyalty or care in making decisions that affect plan participants.¹⁰¹

To decide whether a plan sponsor breached its fiduciary duty of care in selecting an annuity provider, the *Bussian* court held that the plan's fiduciary must carefully and impartially investigate potential providers so as to allow the fiduciary to pick the annuity that would be in the best interests of participants and beneficiaries of the plan.¹⁰² The court noted that the duty of care overlaps with the duty of loyalty, so such an investigation is also relevant to determining whether a fiduciary has breached his duty of loyalty.¹⁰³

To determine whether a plan fiduciary has made a proper investigation, the court noted several factors that should be considered by the fiduciary, including the "quality and diversification" of an insurer's portfolio, the insurer's size and exposure to liability, as well as the safety of the annuity contract itself.¹⁰⁴ Especially for plan sponsors with a conflict of interest (i.e., those terminating pension plans with the expectation of a large reversion of assets),¹⁰⁵ the court suggested that another

98. *Id.* at 296-98. The court also went through a lengthy discussion of whether it was required to give deference to the DOL's position, which had been published in an Internal Bulletin. *See id.* The court held that since an Internal Bulletin is not subjected to notice and comment, no deference was required. *Id.* at 296-97.

99. *Id.* at 298.

100. *Id.*

101. *See, e.g.,* DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 418-19 (4th Cir. 2007).

102. *Bussian*, 223 F.3d at 300. The court held that this type of investigation was required specifically for "vastly overfunded" plans. *See id.* However, the reasoning applies equally well to any pension plan in a standard termination because plan participants are entirely at the mercy of the plan sponsor to select a sound annuity provider; the risk of the annuity's failure is on plan participants once it has been purchased. *See* Rosenburgh & Spieler, *supra* note 4, at 50 (stating that "plan fiduciaries have been afforded a great deal of freedom under ERISA in their choices regarding plan investment technique and strategy").

103. *See id.* at 299.

104. *Id.* at 299-300 (citing 29 C.F.R. 2509.95-1 (1999)).

105. *See In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 897-98 (S.D. Tex. 2004) (stating that a plaintiff must identify a conflict that either benefitted the defendant plan sponsor or caused a specific harm to the plaintiff before the court will find that the plaintiff has stated a conflict of interest cause of action).

factor to judge the fiduciary's conduct was whether it sought outside expert advice.¹⁰⁶ However, the court observed that a fiduciary may not shield itself from liability for ERISA fiduciary violations by merely hiring an expert, while failing to conduct the type of investigation ERISA requires.¹⁰⁷ To properly rely on expert advice, "the fiduciary must (1) investigate the expert's qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances."¹⁰⁸

Applying the standards of review that it had developed for judging a fiduciary's conduct, the *Bussian* court held that summary judgment was inappropriate because a reasonable fact finder could have concluded that RJR had failed to conduct a reasonable and impartial investigation in selecting the annuity provider for its pension plan termination.¹⁰⁹ If the fact finder did so determine, then the court held that the fact finder could have found that RJR breached its duty of loyalty to the plan by considering the low price of Executive Life's annuity, rather than putting the best interests of plan participants and beneficiaries first.¹¹⁰ The court further held that a reasonable fact finder could find a breach of loyalty even if it determined that the investigation was sufficient, because the fact finder could conclude that RJR had placed its own interests ahead of the plan participants and beneficiaries in spite of the investigation.¹¹¹ Finally, the court held that a reasonable fact finder could determine that RJR had breached its duty of care by selecting Executive Life as its annuity provider if the fact finder concluded that Executive Life was not an objectively reasonable choice under the facts that would have been gathered in a proper investigation.¹¹²

Although few other cases have addressed the fiduciary duties that arise specifically in the context of annuity purchases in connection defined benefit plan termination, the general fiduciary principles outlined in *Bussian* have been applied by

106. *Bussian*, 223 F.3d at 300; see generally *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003) (applying the *Bussian* test for determining whether a fiduciary breaches its duty of loyalty by relying on a particular expert's advice in reaching a decision).

107. *Bussian*, 223 F.3d at 300-01.

108. *Id.* at 301 (quoting *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996)).

109. *Id.* at 302.

110. *Id.*

111. *Id.* at 302-03.

112. *Id.* at 303.

many other courts.¹¹³ Plaintiffs with similar claims can look to *Bussian* as an accurate statement of current law in this area.

2. Plan interpretation issues

Participants who dispute the amount of the distribution they receive might also bring ERISA fiduciary liability claims against plan administrators.¹¹⁴ In *Owen v. Wade Lupe Construction Co.*, a plan participant who had received a distribution from a terminated defined benefit pension plan sued the plan administrator alleging a breach of the administrator's ERISA fiduciary duty.¹¹⁵ Specifically, Owen alleged that the plan administrator had improperly interpreted the governing plan document in calculating her benefit, resulting in a lower distribution than she believed she had earned under the plan.¹¹⁶ While the court hinted that it agreed that the administrator's interpretation was not the best one, it granted summary judgment to the defendant plan administrator, stating that "[t]he viability of plaintiff's claim, in this particular case, turns on the proper standard of review to be employed."¹¹⁷

Although ERISA does not specify the standard of review to apply in benefit eligibility challenges, the Supreme Court has stated that the appropriate standard of review in such cases is the *de novo* standard unless the plan administrator has been given discretionary authority to construe plan terms, in which case the arbitrary and capricious standard should generally be used.¹¹⁸ In *Owen*, an amendment to the plan document had granted the plan administrator the right to interpret the provisions of the plan.¹¹⁹ Although such language would generally require interpretive challenges to be judged under the arbitrary and capricious standard,¹²⁰ the court noted that an exception to application of this standard exists when the plaintiff can demonstrate an actual conflict of interest.¹²¹ However, the court in *Owen* required the plaintiff to prove both that a conflict

113. See, e.g., *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007).

114. See *Owen v. Wade Lupe Constr. Co.*, 325 F. Supp. 2d 146, 151 (N.D.N.Y. 2004).

115. *Id.*; see 29 U.S.C. § 1104(a) (2006) (defining fiduciary duties under ERISA).

116. *Owen*, 325 F. Supp. 2d at 151. Suits against plan administrators to remedy statutory violations, including lack of compliance with benefit plans, are specifically authorized by ERISA. See *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

117. *Owen*, 325 F. Supp. 2d at 151.

118. *Firestone*, 489 U.S. at 115.

119. *Owen*, 325 F. Supp. 2d at 151.

120. See *id.* at 152.

121. *Id.*

of interest existed and that the conflict actually affected plan interpretation before the court would use a de novo standard of review.¹²² Thus, the court stated that if the plaintiff failed to establish both conditions, then the arbitrary and capricious standard should be employed in reviewing the administrator's decision.¹²³

Although the court found that Owen had shown that the plan administrator had an actual conflict of interest, it held that she failed to meet her burden of proving that the conflict actually affected the administrator's interpretation of how her benefits were to be calculated.¹²⁴ Thus, summary judgment was granted for the plan administrator.¹²⁵

3. Misrepresentations and Disclosure issues

Another case demonstrating the murky distinction between when an employer is acting in his corporate non-fiduciary function or his fiduciary plan administrator role is *Varity Corp. v. Howe*.¹²⁶ In that case, Varity convinced 1,500 of its employees to voluntarily release it from its obligation to provide pension benefits and transfer those obligations to a subsidiary that it had created for the purpose of consolidating the parent company's debt.¹²⁷ While presenting a rosy picture regarding the financial outlook of this subsidiary to these employees, Varity was aware that the subsidiary was insolvent at the time.¹²⁸ After the subsidiary's subsequent failure, the employees who had lost their pension benefits brought suit against Varity, seeking reinstatement of their benefits under the civil enforcement provision of ERISA, 29 U.S.C. § 1132.¹²⁹

The Supreme Court held that Varity was acting as a fiduciary when it induced the employees to transfer their pension obligations to the subsidiary; the employees could have reasonably believed that Varity was implicitly making

122. *Id.* at 152.

123. *See id.*

124. *Id.* at 153.

125. *See id.* at 157.

126. *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

127. *Id.* at 493-94.

128. *Id.* at 494.

129. *See id.*; *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286 (5th Cir. 2000). There are two provisions within ERISA which authorize causes of action against fiduciaries. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2) (2006). It is well-settled that claims against fiduciaries by individuals in defined benefit pension plans may not be brought under § 1109(a). *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008).

statements about the security of its benefit plans.¹³⁰ Further, the Court held that Varity breached its duty of loyalty by intentionally misleading plan participants.¹³¹ Finally, the Supreme Court determined that § 1132(a)(3) authorized it to reinstate the employee's benefits as an equitable remedy for Varity's breach of fiduciary duties.¹³²

Claims that an employer violates its duty of loyalty by misrepresenting facts about plan benefits also sometimes arise in the context of early retirement windows.¹³³

B. *Distress and Involuntary Plan Terminations and Terminations within Bankruptcy*

First, it should be noted that claims against plan sponsors in connection with distress and involuntary plan terminations, either inside or outside the confines of bankruptcy, are certainly not limited to those for fiduciary breaches.¹³⁴ The PBGC can hold a plan sponsor who terminates a plan with insufficient assets responsible for the difference between the assets held in trust and the obligations assumed by the PBGC.¹³⁵ In fact, outside of the bankruptcy context, the PBGC can create a lien of up to 30% of the employer's net worth for any amount owed following a plan termination.¹³⁶ However, under current law, if the plan sponsor filed for bankruptcy before the lien is perfected, the automatic stay in the Bankruptcy Code prevents the PBGC from recovering unfunded obligations; the PBGC simply becomes an unsecured creditor of the plan sponsor.¹³⁷ The protections provided by the Bankruptcy Code have led to what commentators have called a "race to the bottom," whereby plan sponsors have little incentive to properly fund their plans because they can easily shed pension obligations in bankruptcy.¹³⁸

130. *Varity Corp.*, 516 U.S. at 503.

131. *Id.* at 505.

132. *Id.* at 509-10.

133. *See generally* Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988) (holding that misrepresentations about the existence of a better offer, made to induce early retirement, could constitute a breach of ERISA-imposed fiduciary duties).

134. *See* Daniels, *supra* note 12, at 50.

135. *See id.*; *see also* 29 U.S.C. § 1362 (2006) (defining the liability for single-employer plan terminations under either the distress or involuntary terms of ERISA).

136. *See* 29 U.S.C. § 1368(a). Note that all members of the terminating plan's "controlled group" are jointly and severally liable to the PBGC for unfunded amounts. *Id.* § 1362.

137. *See* Hanss, *supra* note 53, at 517.

138. *See id.* at 517-18.

1. Employer liability for benefits not payable by the PBGC

Once the PBGC assumes responsibility for the administration of a plan terminated through distress or involuntary terminations, it is only required to pay certain types of non-forfeitable benefits up to statutory limits.¹³⁹ This leads to the question of what liability a plan sponsor has when plan participants receive less from the PBGC than they were entitled to under the plan document. Courts have generally upheld language in trust agreements limiting an employer's responsibility to its duty to make contributions to the plan; thus, the plan sponsor does not owe a duty to make payments to individual participants.¹⁴⁰ However, in the absence of language limiting the employer's liability to participants, nothing in ERISA precludes employees from seeking unpaid benefits from the employer.¹⁴¹ These types of suits have mainly been limited to those in which employees were covered by collective bargaining agreements.¹⁴²

2. Employer liability for benefits not payable by the PBGC where fiduciary violations are alleged

As discussed above, employers generally are not liable to participants individually for unpaid benefits following distress or involuntary plan terminations.¹⁴³ However, if plan participants can point to a fiduciary breach by the plan administrator, they

139. See What PBGC Guarantees, <http://www.pbgc.gov/workers-retirees/benefits-information/content/page13181.html> (last visited Feb. 18, 2011) (listing the benefits that the PBGC guarantees as: "pension benefits at normal retirement age, most early retirement benefits, annuity benefits for survivors of plan participants, and disability benefits subject to certain exceptions," and also listing various types of benefits that the PBGC does not guarantee).

140. See, e.g., *In re Johnson Steel & Wire Co., Inc.*, 61 B.R. 203 (Bankr. D. Mass. 1986) (holding that an employer was not liable to participants for the difference between payments under the company's pension plan at the time the company terminated its plan and the maximum benefits payable by the PBGC, where the trust document limited the company's direct liability to participants); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 384-85 (1980) ("Congress plainly did not intend to prevent employers from limiting their potential direct liability to their employees. There is not a word in the statute or its legislative history suggesting that Congress ever intended to outlaw the use of such clauses.").

141. See *Murphy v. Heppenstall Co.*, 653 F.2d 233 (3rd Cir. 1980) (allowing former employees to recover from the sponsoring union the difference between amounts payable from the plan at termination and the maximum PBGC payments).

142. See *Daniels*, *supra* note 12, at 73 n.310 (noting that non-unionized employers might be able to argue that ERISA preempts contract suits and therefore, that no jurisdictional basis for the claim exists).

143. See discussion *supra* Part IV.B.1.

might have some chance of success for recovering these underpayments.¹⁴⁴ Even if a plan participant successfully proves that a plan sponsor has breached a fiduciary duty in connection with a distress or involuntary plan termination, it might be difficult to recover the lost benefits from the plan sponsor.¹⁴⁵ If the plan sponsor has filed for bankruptcy, then the automatic stay would prevent participants from even bringing suits; even outside of bankruptcy, the financial straits of the employer might mean the prospects of recovery would be slim to none.¹⁴⁶

3. Asset reversions in bankruptcy

In the rare case in which a bankrupt employer sponsors an overfunded pension plan, disputes about who is entitled to the surplus are frequent. This was the case in the recent Supreme Court case *Beck v. Pace International Union*.¹⁴⁷ As that case recognized, it is well settled that the excess assets will revert to the employer (and thus to the creditors) following bankruptcy, provided that the plan document allows for such a reversion, and the other ERISA requirements have been met.¹⁴⁸

C. *New Claims on the Horizon?*

As the foregoing discussion suggests, employers are most liable to have future ERISA fiduciary claims brought against them if they intentionally mislead plan participants like the employer in *Varity*.¹⁴⁹ Generally, employers who terminate their

144. *Cf. Morse v. Adams*, 857 F.2d 339, 343 (6th Cir. 1988) (agreeing that employees had standing to bring their claim against the plan sponsor after their pension plan was terminated in connection with the employer's Chapter 11 bankruptcy case, but denying relief because the participants could not point to any particular fiduciary breach that led to the injuries suffered by the participants).

145. *See McMahon v. McDowell*, 794 F.2d 100, 110 (3rd Cir. 1986) (holding that a plan trustee does not breach its fiduciary duty by failing to seek contributions from the employer when the employer's dire financial condition would have made such efforts futile).

146. *See, e.g., Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 472 (7th Cir. 1997) (holding that although employer had breached fiduciary duty by diverting plan funds to pay "the day-to-day expenses that were necessary to keep the business afloat," beneficiary could not recover because employer did not breach duty "for their own personal gain or benefit").

147. *Beck v. Pace Int'l Union*, 551 U.S. 96, 99 (2007) (debtor corporation in Chapter 11 bankruptcy sponsored a fully funded pension plan that qualified for standard termination, and participants sued to have surplus used for their benefit rather than creditors').

148. *See Chait v. Bernstein*, 835 F.2d 1017, 1026-27 (3rd Cir. 1987) (determining that ERISA and policy reasons favored allowing the bankrupt employer to receive the reversion rather than the employees, and further finding that the language in the plan document was sufficient to allow for such a reversion).

149. *See Varity Corp. v. Howe*, 516 U.S. 489, 494 (1996).

defined benefit pension plans are insulated from fiduciary claims as long as they take their duties of loyalty and prudence seriously, and put the interests of plan participants and beneficiaries first when acting on behalf of the plan; basically, as long as they are not stealing from the trust, lying to participants, or failing to conduct reasonable investigations while acting in their fiduciary roles, employers are safe.¹⁵⁰

However, this might change as one of the largest defined benefit pension plan sponsors in the United States has gone bankrupt.¹⁵¹ The PBGC is facing mind-boggling deficits.¹⁵² There have been complaints that it is too easy for employers to pass their pension liabilities to the PBGC through bankruptcy.¹⁵³

Under current law, only plan participants, beneficiaries, and the Secretary of the Department of Labor may bring claims of fiduciary breach against a plan sponsor; further, participants and beneficiaries may only individually bring suits to recover actual losses (i.e., the maximum award is the amount by which the participant or beneficiary's plan benefit was reduced as a result of the fiduciary's breach).¹⁵⁴ This is because courts have refused to consider losses to the defined benefit plan trust as an injury in

150. See *id.* (lying to participants); *LoPresti v. Terwilliger*, 126 F.3d 34 (2nd Cir. 1997) (stealing plan assets); *Donovan v. Bierwirth*, 680 F.2d 263 (2nd Cir. 1982) (failing to conduct reasonable investigations).

151. See Barry Burr, *GM Bankruptcy Would Expose \$13.5 billion Pension Liability*, 1853 CHAIRMAN, Apr. 7, 2009, <http://www.1853chairman.com/2009/04/07/gm-bankruptcy-would-expose-135-billion-pension-liability> (noting that the termination of GM's pension plans would be the largest termination from a single company in PBGC history).

152. See, e.g., *Rosenburgh & Spieler*, *supra* note 4, at 45 n.2 (noting that as of January 20, 2009, the PBGC's deficit was \$11.2 billion); Douglas J. Elliott, *The Tripling of the PBGC's Deficit: What Does it Tell Us?*, BROOKINGS, June 4, 2009, available at http://www.brookings.edu/papers/2009/0604_pbgc_elliott.aspx (revealing that by the middle of 2009, the deficit had soared to over \$33 billion); Doug Halonen, *PBGC Can't Handle Deficit Alone, Nominee Says*, PENSIONS & INVESTMENTS, Jan. 20, 2010, available at <http://www.pionline.com/article/20100120/DAILYREG/100129987> (noting that while the deficit had been reduced to about \$22 billion as of the beginning of 2010, the Presidential nominee to head the organization expressed fears that it could not handle the deficit without a bail-out from Congress).

153. See generally Jonathan Jarrell, Note, *LaRue v. DeWolff, Boberg & Associates, Inc.: Investing More ERISA Fiduciary Breach Protection for Individuals' Retirement Plans*, 60 MERCER L. REV. 1043, 1043-44 (2008) (examining past Supreme Court cases and the ERISA provisions covering when a pension plan participant may recover for a fiduciary's breach).

154. See Hanss, *supra* note 53, at 510-11 (arguing that the current pension crisis is largely due to inadequate laws governing plan maintenance, and that regulating pensions under the competing aims of ERISA and the Bankruptcy Code, which have vastly differing policy aims, has serious shortcomings). Note that participants are only entitled to benefits which are characterized as "vested" or "nonforfeitable." See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 370-74 (1980) (examining the point at which a benefit is subject to forfeiture, as described in ERISA).

fact sufficient to provide constitutional standing.¹⁵⁵ Thus, many times, even if the plan sponsor has not acted in accordance with its ERISA fiduciary duties, individuals have little incentive to sue because the prospects of recovery are minimal, especially since the PBGC insures defined benefit plan benefits.¹⁵⁶

1. Suits by Government Agencies for breach of fiduciary duties might actually start happening

Given the limitations on the ability of participants to police the fiduciary breaches of their plan sponsors, the role for bringing suits against plan sponsors for breaches of fiduciary duty is primarily left to the Department of Labor.¹⁵⁷ One particular area where there have been surprisingly few suits brought by the Secretary is in the context of plan investment diversification.¹⁵⁸

The way the PBGC is currently funded is completely inadequate.¹⁵⁹ The PBGC will have to find its money somewhere, and it will likely have to look to Congress for funds.¹⁶⁰ In that event, Congress might decide that it is time for the DOL to start attacking the poor investment strategies that have led to the underfunding problems defined benefit pension plans are currently facing.¹⁶¹

155. See Rosenburgh & Spieler, *supra* note 4, at 52-53; see also Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 440 (1999) ("Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool.").

156. See Rosenburgh & Spieler, *supra* note 4, at 45.

157. See 29 U.S.C. § 1132(a)(2) (2006) ("A civil action may be brought . . . by the Secretary.").

158. See Rosenburgh & Spieler, *supra* note 4, at 52-53 (noting that the Secretary of Labor has not brought many suits "where the investment course of action arising in an alleged breach of duty was the adherence to a 'tried and true' or traditional portfolio allocation approach (unless there was some other visible failure in the investment decision-making process)"); see also 29 U.S.C. § 1104(a)(1)(C) (defining the fiduciary duty to diversify investments of the plan).

159. See Adam E. Cearley, *The PBGC: Why the Retiree's Traditional Life Raft is Sinking and How to Bail it Out*, 23 EMORY BANKR. DEV. J. 181, 189 (2006) ("[T]he PBGC is funded from the insurance premiums it charges companies, the investment income from PBGC assts, its recoveries in bankruptcy, and from the remaining assets within a company's trust when its pension plan is terminated."); Brickner & Ozawa, *supra* note 1, at 199.

160. See Cearley, *supra* note 159, at 183 (suggesting a bailout funded by taxpayers may be necessary).

161. See Brickner & Ozawa, *supra* note 1, at 199.

2. More Cases by plan participants might be brought

As current and future retirees get more concerned about their pension security, they are more likely to look for ways to ensure that their plans stay funded, and one of those ways might be to sue plan fiduciaries for pension losses.¹⁶² It has been noted that the current economic environment might allow more participants to bring suits of this nature against plan sponsors because they will be able to demonstrate the injury in fact necessary to have constitutional standing.¹⁶³

V. MINIMIZING THE RISK OF ERISA FIDUCIARY CLAIMS AGAINST EMPLOYERS TERMINATING DEFINED BENEFIT PENSION PLANS

A. *Investigate and Document Thoroughly*

As amply demonstrated in *Bussian*, if an annuity purchase is chosen for final distribution of assets in connection with a plan termination, a plan sponsor can be exposed to a surprisingly broad array of ERISA fiduciary claims if the company from whom the annuity is purchased later defaults on its obligation to pay plan participants and beneficiaries.¹⁶⁴ Obviously, it is in the employer's best interest to conduct a thorough and impartial investigation of a variety of insurers to determine which entity is most stable and which offers products that are most likely to meet the needs of plan participants and beneficiaries. The intent of a standard plan termination is often to simply rid the employer of the responsibility to pay for and maintain all of the risks that come with funding, disclosure, and accounting requirements associated with a defined benefit pension plan.¹⁶⁵ Therefore, the process of termination is not an appropriate time to cut corners and expose the plan sponsor to fiduciary liability claims.

B. *Ensure all Documents are in Order*

Most plan documents include language, as the document in *Owen* did,¹⁶⁶ granting discretionary authority to the plan

162. See Rosenburgh & Spieler, *supra* note 4, at 53.

163. *Id.* at 53.

164. See 29 U.S.C. § 1362 (defining the liability for single-employer plan terminations under either the distress or involuntary terms of ERISA); *Bussian v. RJR Nabisco, Inc.*, 233 F.3d 286 (5th Cir. 2000).

165. See discussion *supra* Part II.B.1.

166. *Owen v. Wade Lupe Constr. Co., Inc.*, 325 F. Supp. 2d 146, 150 (N.D.N.Y. 2004) ("The Plan Administrator was given 'the power and discretion to construe the terms of the

administrator to construe the terms of the plan and resolve conflicts.¹⁶⁷ This language was likely added to documents in response to the *Firestone* case¹⁶⁸ because plan administrators want a deferential standard of review in the event of litigation.¹⁶⁹

As demonstrated in *Owen*, the standard of review in an ERISA plan interpretation case can mean the difference between a plaintiff's success and summary judgment for the defendant plan administrator.¹⁷⁰ While the discretionary authority language will make deferential review by courts more likely, there is a substantial caveat to the *Firestone* proposition that the arbitrary and capricious standard will be used if such language is present.¹⁷¹ Under the *Firestone* test, if the plan administrator acts under a conflict of interest, that conflict has to be considered in determining whether there was an abuse of discretion by the plan administrator.¹⁷² That caveat is especially important in the context of single-employer defined benefit pension plan terminations because a conflict of interest will almost always exist by the very nature of the competing loyalties that an employer has in its dual roles of plan sponsor and plan administrator.¹⁷³ Although Ms. Owen failed to carry her burden of proving that the plan administrator's conflict of interest affected his interpretation of her benefit calculation, it is not hard to imagine fact situations in which such questions would at least survive summary judgment.¹⁷⁴ Additionally, plan sponsors in jurisdictions applying a less deferential standard than the Second Circuit are at particular risk if their benefit interpretations are unreasonable.¹⁷⁵ Thus, to avoid ERISA fiduciary liability, when calculating benefits in connection with a plan termination, administrators should at least consider

Plan and to determine all questions arising in connection with the administration, interpretation, and application of the Plan,' as well as the authority to 'reconcile any inconsistency' in the Plan.").

167. Jayne Zanglein & Janet Ford, *Déjà Vu All Over Again: Will the Supreme Court's ERISA Decisions Prompt the Fifth Circuit to Revise its Standards?*, 41 TEX. TECH L. REV. 897, 904 (2009).

168. See *Firestone Tire & Rubber Co v. Bruch*, 489 U.S. 101, 111 (1989) (concluding that Firestone was not entitled to deferential treatment under principles of trust law because "there is no evidence that under Firestone's termination pay plan the administrator has the power to construe uncertain terms or that eligibility determination are to be given deference").

169. See Zanglein & Ford, *supra* note 167, at 904.

170. See *Owen*, 325 F. Supp. 2d at 151.

171. See *Firestone Tire & Rubber Co.*, 489 U.S. at 115.

172. *Id.*

173. See *Beck v. Pace Int'l Union*, 551 U.S. 96, 101 (2007).

174. See *Owen*, 325 F. Supp. 2d at 152.

175. See *id.* at 154.

whether their interpretations of plan provisions could be viewed as unreasonably biased against plan participants and beneficiaries.¹⁷⁶

A related issue has to do with situations in which plan documents conflict with summary plan descriptions (SPDs). SPDs can be thought of as the layman's version of the official legal document that defines the provisions of the pension plan.¹⁷⁷ When the provisions of the SPD are in direct conflict with the official plan document, most courts hold that the provisions in the SPD should control the issue.¹⁷⁸ Thus, employers risk exposing themselves to ERISA fiduciary liability by having plan documents that conflict with the corresponding SPDs.¹⁷⁹ If the plan is terminated while the documents are in conflict, plan participants and beneficiaries could bring these ERISA claims after benefits have been distributed.¹⁸⁰ Care should be taken to ensure that no conflicts exist between the plan documents and SPDs.

VI. CONCLUSION

When an employer decides to terminate a defined benefit pension plan, the process can be long and complex. Adding to this complexity is the realization that current and future retirees are becoming more concerned about the financial security of their retirement benefits. ERISA fiduciary litigation has been on the rise, and the more that benefit systems fail, the more likely suits by current and former employees are. Once an employer has decided to terminate a defined benefit pension plan through a standard termination, it should minimize its exposure to future ERISA fiduciary claims by conducting diligent investigations before making any decisions regarding the implementation of the termination. Furthermore, the employer should make sure that all plan documents are consistent and in order. Finally, the employer should seriously consider its fiduciary duties, especially of loyalty and prudence, and act for the sole benefit of plan participants and beneficiaries when acting in its fiduciary role.

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176. See, e.g., *id.* at 152 (finding a conflict of interest where Administrator's interpretation of the plan allowed him to obtain more money while cutting off the plaintiff's benefits).

177. See *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 456 (5th Cir. 2007).

178. See, e.g., *id.* at 457.

179. See *id.* at 457-59.

180. See *id.* at 455.