The Case For Investment Advice

by

Dana M. Muir

Imagine a nation where the structure of the securities law discourages individuals who are responsible for investing more than a trillion dollars from obtaining necessary investment advice. One would expect the legal regime to cause affected investors to earn lower investment returns than they could if they had access to the needed advice. But, the systemic ramifications would be even more troubling. Economists would abhor the implications for the efficient allocation of capital. Market experts would be concerned about the long term stability of markets where some investors engage in irrational decision-making.

Yet as incredible as it may seem, that is exactly the nature of the regime that governs the investment of more than a trillion dollars of retirement plan assets by individuals in the United States.[1] One reason often offered to explain why the domestic system of retirement support is so heavily reliant on employer-sponsored plans is that specialization will enhance investment returns.[2] As repeat and sophisticated players, employers have the ability and the economies of scale to obtain appropriate investment expertise.[3] However, for most people now, this old model of investing retirement assets is no longer reality. Over the past twenty-five years, employers have been transferring the responsibility for investment decision-making to employees.[4] This change has been praised for giving employees flexibility and control over the ways in which their retirement assets are invested.[5] With flexibility and control, though, comes individualized risk.

As a matter of positive law, in this paper I show that federal law operates to discourage all the relevant parties – employers, plan participants, and investment advisers – from providing individual employees who make investment decisions for their retirement accounts with investment advice. Most narrowly, this is the result of an affirmative decision by the Department of Labor ("DOL") to differentiate investment education from investment advice.[6] More broadly, it is a reflection of inconsistent positions within various layers of DOL regulation on the extent to which individuals can be expected to make reasonable investment decisions on their own behalf. Moreover, because of the division of regulatory authority between the DOL and the Securities and Exchange Commission ("SEC"), the specific legal standards evidence very different views of the appropriate provision of investment advice depending on whether the very same individual investor is investing assets held in a pension plan or in a non-pension investment account. Counterintuitively, the legal regime imposes stronger disincentives for the provision of advice regarding the investment of the pension plan assets, which should be invested for the long-term, than it does for the investment of non-pension assets.

Part I provides some explanatory background on trends in benefit plan sponsorship in general, and 401(k) plans specifically. It also discusses the reasons underlying the increasing popularity of 401(k) plans and the delegation to individual participants of plan investment choices. Part II evaluates empirical data on the ways in which participants currently invest their plan assets. It also considers behavioral economics research, which indicates that participants' actual investment decision-making departs from theoretical economic models of efficient utility-maximizing behavior. Part III analyzes the ways in which the current regulatory regime discourages the provision of investment advice to plan participants. It shows that the negative incentives affect all three of the classes of parties who must be involved in the provision of investment advice – the employers who sponsor plans, the advisers who would provide the advice, and the participants who need the advice. Part IV evaluates one recent legislative proposal intended to address these issues. It concludes that the proposal would not be successful in making investment advice available to benefit plan participants.

I. The Shift of Responsibility to Participants

1. Retirement Plan Typology

In many discussions of employer-sponsored retirement plans, the most basic distinction is between a defined contribution and a defined benefit plan.[7] One primary difference between defined benefit and defined contribution plans is who bears the investment risk. The traditional employer-sponsored retirement plan in the United States is known as a defined benefit (DB) plan.[8] DB plans promise benefits based upon a formula, components of which often are years of service and employee salary.[9] For example, a DB plan might provide for benefits at age 65 of 1.5% per year of service multiplied by the employee's salary averaged over the final five years of employment. At retirement, an employee with 30 years of service and a final average salary of $50,000 per year, would be entitled to an age 65 pension benefit of $22,500

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*Associate Professor, University of Michigan Business School, all rights reserved, © 2001.

per year.[10] Most DB plans pay benefits in the form of an annuity, thus, the retiree receives monthly benefits for her lifetime.[11] Many DB plans also provide early retirement incentives once employees reach an age and service threshold, such as age 55 and 30 years of service.[12] The employer bears the first tier of risk in a DB plan because regardless of the performance of the plan's investments, the employer must fund the plan sufficiently to provide promised benefits.[13] The Pension Benefit Guarantee Corporation (PBGC), which is funded with premiums paid by DB plan sponsors, bears the second tier of risk because it guarantees payment of certain plan benefits in the case of employer defaults.

A second type of plan is known as a defined contribution (DC) plan. A DC plan is made up of individualized plan accounts established on behalf of each participating employee.[14] The employee's ultimate benefit is the value of that employee's account – the sum of all contributions and investment gains and losses.[15] Thus, the investment risk is on the employee. Employers can avoid liability for investment decisions by delegating investment choices to individual participants.[16] Because of the way benefits are calculated, the plan's assets always equal the plan's liabilities. Therefore, DC plans are not insured by the PBGC.[17] DC plans typically provide for payment of benefits in the form of a lump sum.[18] In DB plans, the sponsoring employer must contribute to the plan whatever funds are necessary to pay a promised benefit to the employee.[19] In DC plans, the sponsoring employer contributes a fixed amount to employee accounts.[20]

Since the early 1980s, the number of defined contribution plans has exploded.[21] Perhaps the most significant event in the popularity of DC plans came in late 1981 when Treasury issued regulations establishing the boundaries of what has come to be known as "401(k) plans."[22] The defining quality of a 401 plan is that in such a plan the employee has the right to voluntarily choose to contribute – or not contribute – pretax earnings to the employee's own plan account.[23] In all other types of defined contribution plans, the employer determines the rate of contribution.[24] Typically, the employee's contribution election in a 401(k) plan is an affirmative one.[25] However, in 1998 the Internal Revenue Service (IRS) determined that 401(k) plans may automatically enroll employees for an assumed election so long as the employee has the right to revoke the deemed election at any time.[26]

B. The Increasing Popularity of 401(k) Plans

While provisions for 401(k) plans were added to the Employee Retirement Income Security Act of 1974 (ERISA)[27] and the Internal Revenue Code (IRC) in 1978, the IRS did not issue regulations on the plans until November 1981.[28] Once employers had relatively clear guidance though, the new plan format proved to be extremely popular. Between 1984 and 1993 employer sponsorship of 401(k) plans grew by almost 900 percent.[29] Of course, starting from a base of essentially no plans, some might argue that expressing the early rates of growth in percentages is misleading. Yet, sponsorship, asset growth, and participation in 401(k) plans all continue to expand at a rapid pace. According to the DOL's most recent statistics, the assets held in 401(k) plans grew at an annual rate of twenty-three percent – more quickly than any other type of pension plan.[30] In fact, 401(k) plans now hold approximately thirty-four percent of all assets held by qualified pension plans.[31] Approximately one-third of the existing employer-sponsored pension plans are 401(k) plans, and forty-five percent of the active participants in pension plans are members of 401(k) plans.[32]

A number of reasons have been offered to explain the shift from DB to DC plans, and, in particular, the popularity of 401(k) plans. As a general matter, many commentators believe that younger and more mobile workers prefer DC plans.[33] Another factor affecting plan sponsorship decisions is a business environment that requires employers to compete on an international basis. Because costs of DC plans are more predictable for employers, the increased competitive pressures militate for DC plans.[34] Similarly, DC plans that are structured as profit sharing plans permit employers to align employee and shareholder interests.[35] Another factor is a shift in employment from the manufacturing sector, where defined benefit plans traditionally have been offered, to the service sector, where DC plans are more common.[36]

A recent survey, summarized in Table 1, enquired into the primary motivations reported by employers who switch from a traditional DB plan to a type of DB plan that, in many ways, mirrors a DC plan. The three top ranked factors all reflect employer frustration based upon the long-held belief that employees tend not to understand and properly value their employee benefit plans, particularly pension plans.[37] According to the survey, employers believe that: (a) lump sum values, which are the typical way of reporting DC, but not DB, assets, are easier than annuity values to communicate to employees; (b) employees understand large lump sum balances better than they understand the value of a future annuity stream; and (c) employees place a higher value on lump sum balances than on annuity streams.[38]

Table 1: Top Four Factors Identified as Important by Employers who have Undertaken Plan Conversions[39]

Factors	Percentage of All Respondents
Improves employees' appreciation of plan	96.0
Facilitates communications	93.0
Ability to show lump sum values	93.0
Aids in recruitment	80.8

Finally, the regulation of DB and DC plans varies tremendously. Commentators have criticized the requirements imposed upon 401(k) plans as being overly complex and burdensome.[40] However, DB plans face much more extensive governmental reporting, insurance, and funding requirements than do 401(k) plans.[41] One economist estimated that in 1981 a DB plan cost approximately 140 percent more than a 401(k) plan to administer.[42] By 1996 the differential in administrative costs grew to approximately 210 percent.[43]

C. Delegation of Investment Selection

Typically, 401(k) plans delegate to participants the choice of investments in those plans.[44] One reason for the delegation may be to provide individual participants with flexibility and to respect their different tolerances for investment risk.[45] However, another reason is that regulations, issued in 1992, permit an employer to avoid liability for poor investment choices if the employer meets specified criteria in delegating decision-making to employees.[46] The regulations were issued under ERISA section 404(c),[47] and, hence, are known as the 404(c) regulations and plans that delegate investment choices in compliance with the regulations are known as 404(c) plans.[48]

In comparison, in the absence of 404(c) compliance, an employer or investment adviser bears the risk of fiduciary liability for inappropriate investment decisions. ERISA's definition of a fiduciary includes any person or entity who has control over asset management,[49] as well as anyone who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, ..."[50] Under the first prong of that definition, any employer who makes decisions about the investment of plan assets will be an ERISA fiduciary.[51] Because of the perceived importance of professional investment advice, though, the statute permits an employer who engages a professional investment manager to delegate investment decisions, and the corresponding fiduciary liability, to the investment manager.[52] In such a case, the employer retains fiduciary liability for the selection and monitoring of the investment manager.[53]

Whether the person or entity with control over plan assets is the employer that sponsors a benefit plan or an appointed investment manager, ERISA imposes a number of specific fiduciary obligations on that person or entity. First, under what has come to be known as ERISA's exclusive benefit rule,[54] investment decisions must be made in the best interest of participants and beneficiaries.[55] One court, in a case where the employer was found to have violated its fiduciary obligation by using employee benefit plan assets to fend off a hostile tender offer, expressed this by stating that "decisions must be made with an eye single to the interests of the participants and beneficiaries."[56] Second, ERISA requires fiduciaries to act 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 . . . ."[57] This language has been construed to set a high standard of prudence – one that looks to the practices of investment professionals.[58] Third, ERISA fiduciaries must diversify plan investments.[59] Exceptions, meant to accommodate incentives, permit plans to hold large percentages of assets in some employer securities.[60]

An employer may avoid the fiduciary obligations associated with plan investments and the selection of an investment manager by delegating investment decision-making to participants in compliance with the 404(c) regulations.[61] Those regulations are so complex that the details are beyond the scope of this paper, and, no doubt, outside the interest of most readers. However, the three basic requirements are worthy of note. First, the plan must provide participants with at least three investment alternatives.[62] Those alternatives must encompass a variety of risk and return characteristics so that each participant can select a portfolio with risk and return characteristics appropriate for that participant.[63] Second, the plan must provide participants with enough information about the alternatives that they are able to make informed investment choices.[64] Third, participants must have the right to change investments with reasonable frequency, which is detailed in the regulations.[65] While compliance with 404(c) is not required by ERISA, plans that do delegate investment decision-making to participants in compliance with the 404(c) requirements protect the sponsoring employer from fiduciary liability associated with poor investment choices.[66]

II. Actual Investment Behavior

The increasing delegation of responsibility for investment choices raises the question of whether participants make appropriate

investment choices. Obviously, the question is a difficult one because, in one sense, "appropriateness" of individual investment choices may be viewed from the perspective of the individual making those investment decisions. As such, it would be reasonable to assume that the individual viewed the choice as appropriate at the point she made the choice. However, this section will consider two other ways of evaluating participant investment choices. The first approach is that of the behavioral economists, and the second considers studies using empirical data on 401(k) plan investment choices.

A. Insights from Behavioral Economics Research

In a famous economics paper by Professor Paul Samuelson, he described a troubling fallacy associated with repetitive gambles. As the story goes, Professor Samuelson asked a colleague whether he would accept the following offer: "flip a coin, heads you win $200, tails you lose $100."[67] As the story goes, the colleague refused to accept the offer, but said that he would accept a series of 100 such bets.[68] Scholarly economists have spent forests of paper and years of research arguing whether Professor Samuelson's colleague acted inconsistently.[69] The latest spin on the arguments has been undertaken by Professors Shlomo Benartzi of the Anderson School at the University of California at Los Angeles and Richard Thaler of the University of Chicago Business School and analyzes benefit plan asset allocation choices.[70]

Professors Thaler and Benartzi conducted a series of experiments with two groups of university employees enrolling in benefit plans. In one instance their study group consisted of staff employees, in another the group consisted of faculty.[71] Members of the study were asked to allocate their retirement contributions between stocks and bonds.[72] All employees were presented with equivalent information on historic equity premiums, but the way in which the information was presented differed. One group received charts showing the distribution of annual rates of return on a 30-year investment.[73] Two other groups received charts showing distributions of historic one-year rates of return over thirty-four increments.[74] The subjects who received the charts with the distribution of one-year rates of return invested less in equity securities than did the subjects who viewed the charts showing the distribution of returns on a 30-year investment.[75] While the difference was less in the faculty group than in the staff group, the results were statistically significant in both groups.[76]

As a result of the study, Professors Thaler and Benartzi argue that the way in which information is provided to benefit plan participants will influence their selection of investment vehicles.[77] This is true even if the different presentations of information reflect equivalent rates of return over time. They theororize that, consistent with Professor Samuelson's study, individuals suffer from what is known as "myopic loss aversion."[78] As such, individuals have an aversion to short-term losses and limited "gambles."[79]

These findings raise serious questions about the actual decision-making of benefit plan participants. If investment selection is affected by the way in which investment returns are presented, are participants truly making informed choices? What is it that is informing those choices? Participants in the study tended to spend less than an hour making asset allocation decisions and few of those participants reviewed any material other than that provided by the investment providers.[80] This alone calls into question the nature of participant decision-making. And, if, as the difference in results between faculty and staff may indicate, the decision-making of more sophisticated investors is less likely to be affected by the format of information than the decision-making of unsophisticated investors, does that militate in favor of increasing the amount of investment advice available to plan participants?

B. General Empirical Data on Plan Investment Choices

Similarly, empirical data based upon a large sample of 401(k) plan participant investment allocations indicates that the availability of specific investment choices affects the percentage of plan assets held in various categories of investments.[81] For example, if a 401(k) plan offers participants the option of investing in company stock, participants will make substantially lower allocations to all other investment choices, particularly to mutual funds that hold equities.[82] Conversely, if a 401(k) plan offers neither employer stock nor guaranteed investment contracts as investment options, then the plan participants will tend to make substantially higher allocations to equity funds.[83] These kinds of behavioral patterns are problematic because, according to financial investment theory, decisions regarding asset categories should not be so heavily dependent on the availability of a specific asset choice.

A variety of participant demographic factors are correlated with the extent to which a participant will invest plan assets in equity securities. For example, the higher the family income, the more likely that both 401(k) and IRA assets will be allocated in equities.[84] Similarly, more net worth and greater education both are indicators that a participant will allocate more assets to equity securities.[85] Not surprisingly, the findings of some of the studies appear to be inconsistent with one another. One of the particularly interesting open questions is the extent to which asset allocations in 401(k) plans are dependent upon the age of the participant.[86]

Women face unique challenges in pension asset accumulation. Historically women have accumulated far less pension wealth than men.[87] The same factors of lower compensation, more part-time work, and more breaks in work history that contribute to gendered disparities in private pension plans also cause women, on average, to accumulate fewer personal assets[88] and to have lower Social Security entitlements than do men.[89] But, because women have significantly longer life expectancies than do men,[90] women actually have greater needs for longer streams of retirement income. The longer periods of longevity after normal retirement age also results in greater inflationary pressures on women. As a result of all of these factors, among the aged 65 and over group, women are more than twice as

likely as men to subsist below the poverty level.[91] In fact, the United States allegedly has the greatest percentage of elderly women in poverty of all the major industrialized nations.[92]

But, even if everything else were equal across genders, investment choices risk furthering the problem of low asset accumulation for women. The studies of participant behavior uniformly find that women have a lower tolerance of risk than do male investors.[93] Although there are some indications that women's progress in the workforce is narrowing the differential in retirement assets,[94] women put this progress at risk by choosing overly conservative benefit plan investment strategies.

III. Current Status of Investment Advice under ERISA

This Part begins by examining the difference between investment advice and investment education, and why that distinction is a critical one for liability purposes. It then turns to a specific examination of the potential liability for the primary parties involved in the provision of investment advice: employers, investment advisers, and employees. The broad sweep of possible liability for investment advice acts as a deterrent to the provision of that advice through the medium of employee benefit plans.

A. The Tension Between Investment Advice and Investment Education

Although the relevant data and theoretical research indicate that participants often do not invest their retirement plan assets in ways that are consistent with current financial investment theory, few, if any,[95] participant-directed plans offer investment advice to participants. However, all 404(c) plans offer some level of investment education. The reason for the all-or-nothing dichotomy is attributable to the relevant DOL regulations and a 1996 DOL interpretative bulletin. As explained above, one of the basic requirements under 404(c) is that the plan must provide participants with enough information about the plan's investment options that the participants are able to make informed investment choices.[96] However, ERISA also provides that anyone who, for a fee, provides investment advice regarding plan assets becomes an ERISA fiduciary with respect to that advice.[97] After the 404(c) regulations were first issued in 1992, employers felt as though they were stuck between the proverbial Scylla and Charybdis.

According to Greek mythology, Scylla and Charybdis were both sea monsters that forced sailors into the no-win situation of risking a disastrous encounter with one of the monsters. Between Scylla and Charbydis was a narrow strait. According to one source:

> Scylla was a horrible creature with 12 feet and 6 long necks, each bearing a head with 3 rows of teeth, with which she devoured any prey that came within reach; she lived in a cave on a cliff. Across the strait, opposite her, was a large fig tree under which Charybdis, the whirlpool, dwelt, sucking in and belching forth the waters of the sea three times daily, engulfing anything that came near.[98]

On the one hand, in order to avoid the Scylla, an employee benefit plan must provide a reasonable amount of investment information to participants for the plan to qualify as a 404(c) plan and, thus, protect the employer from fiduciary liability. On the other hand, steering far enough away to safely avoid the Scylla risks a disastrous encounter with the Charybdis. If the plan provides too much information on investments, it will be deemed an investment adviser so that it and the sponsoring employer will have fiduciary liability for the investments.

In response to employers, who were seeking more certainty in this area, in 1996 the DOL issued an interpretative bulletin that attempted to distinguish between investment advice and investment education.[99] The guidance established four safe harbors for participant investment education, and indicated that other activities also might fall within the parameters of education as opposed to advice but that such other activities would not receive safe harbor protection.[100] Activities defined as advice range from basic informational materials about the plan, at one end of the spectrum, to interactive materials that permit participants to estimate retirement income needs and alternative investment routes to meeting those needs, at the other end of the spectrum.[101] If an employer chooses to hire an outside service provider to provide the investment education, then the employer retains liability for the appropriate selection and monitoring of the service provider.[102]

As with most regulatory advice, though, the DOL's guidance on the difference between investment education and investment advice raised at least as many questions as it answered. One commentator argues that the burden imposed upon employers by the guidance is so heavy that "participants are likely to receive less assistance in making investment decisions."[103] Even a member of the investment industry recently admitted that the guidance has left employers "wary" of liability associated with investment communications to participants.[104] Professor John Langbein's view is that "ERISA is terrifying employers from taking part in assisting their workers in getting the most out of their investments."[105]

B. Employers -- Risks and Issues

Of the three relevant categories of actors with an interest in investment advice -- employers, investment advisers, and plan

participants, perhaps the most important category is employers. It typically is the sponsoring employer that establishes the terms of an employee benefit plan.[106] In a trilogy of recent cases, the Supreme Court has made it clear that employers have no fiduciary liability for the choices they make in constituting plans.[107] Rather than being fiduciary decisions, such decisions are the equivalent of those made by trust settlors and are beyond the scope of ERISA regulation.[108] But, there are four ways in which an employer faces potential liability for offering investment advice through an employee benefits plan.

1. Affirmative Decision to Offer Advice or Limit the Plan to Education

As discussed above, if an employer sponsors a benefit plan that does provide investment advice, the employer will become a fiduciary as to the giving of that advice.[109] Fiduciary status means that the employer is subject to ERISA's fiduciary obligations.[110] The possible violations, or alleged violations, of those obligations are almost endless. For example, imprudent advice would violate ERISA's prudence requirement. Investment advice that convinced participants not to tender shares to a hostile tender offeror would violate the exclusive benefit rule if the advice was given for the purpose of entrenching management. Management typically has many reasons, ranging from personal stock options to shareholder oversight, to support the price of the company's securities. One strategy to maximize share price would be for management to convince employees to purchase and hold large quantities of company securities. Such a strategy, though, risks violating both the exclusive purpose rule and the diversification requirement.

An employer that opts to provide only education still may not be entirely safe from the dangers of Scylla and Charybdis. Even after the DOL's 1996 guidance, in order to enjoy the protective benefits of 404(c), plans still must provide participants with information about their investment options. If the plan provides too little information for the participants to make informed choices, then the plan and the sponsoring employer will be liable for the participants' investment selections. And, it remains true that if the plan provides too much information, then the plan will be deemed an investment adviser. Again, the plan and the sponsoring employer will be liable for the participants' investment selections. If an employer provides too much information to plan participants on how to select investments, the employer will cross the line from providing education to giving advice. It, thus, is more than a myth that the employer must steer a perilous and narrow path through this area. The DOL's advice has provided a map for that path, but it is up to the employer to keep the ship on the path through storms that might send the ship crashing into one monster or the other. In this context the storms that might drive the employer's ship off its intended course include employee questions, well-meaning employee benefit counselors, and an increasingly sophisticated set of investment choices.

2. Investment Advice Through an Outside Service Provider

One reasonable way for an employer to provide investment advice to participants would be to hire an outside service provider to provide the advice. According to ERISA, such an adviser is an ERISA fiduciary as to the provision of investment advice.[111] It would seem intuitive, then, that an employer that hires an outside expert and establishes that person as a potentially liable fiduciary should receive some protection from liability. However, if the adviser breaches its fiduciary duty, the employer could face three potential types of liability.

First, the employer remains a fiduciary as to the selection and monitoring of the investment adviser.[112] If the employer does not engage in adequate selection or monitoring procedures, then the employer may remain liable for the fiduciary violations of the investment adviser. Monitoring of the advisers may impose more risk to employers than selection of those advisers. In monitoring the performance of other plan service providers, emp loyers typically can compare the service providers' performance against objective criteria.[113] For example, returns from investment funds can be compared against market averages, the performance of other funds in that sector, and so forth. However, investment advice is far more subjective and must be tailored to the unique goals and risk tolerances of individual employees. Therefore, it is unclear how employers could adequately monitor the ongoing provision of investment advice.

Second, the employer may have co-fiduciary liability for fiduciary breaches committed by the investment adviser. It is true as a general principle of ERISA fiduciary law that a fiduciary remains liable for delegated fiduciary duties if the delegating fiduciary knowingly participates in or conceals a breach by the lower-tier fiduciary.[114] According to the DOL, in the context of a delegation of responsibility for investment advice, co-fiduciary liability might arise in either of two ways. First, the employer might fail "to act prudently and solely in the interest of plan participants"[115] in its designation of the investment adviser. Alternatively, the employer might "knowingly participate[] in, conceal[] or fail[] to make reasonable efforts to correct a known breach by the investment adviser."[116]

3. Loss of the 404(c) Protection Due to Bad Investment Advice

Among other things, the 404(c) guidance requires that the employees receive sufficient information from their plans to exercise informed investment control.[117] But, assume that an investment adviser breaches its fiduciary duty to the employee, and the employee suffers investment losses as a result. This raises the question of whether the adviser's breach means that the employee did not exercise the informed investment control required under 404(c). If there was a failure to comply with the 404(c) standards, then, arguably, the employer could be liable for the inappropriate investment decision.

4. Erroneous Provision of Investment Advice

Assume that an employer intends to engage a service provider just for educational purposes, but the provider actually gives investment advice instead. The employer may be surprised to realize that it has potential fiduciary liability, as outlined above, for selection and monitoring of the provider – because that provider is actually acting as an investment adviser – as well as for 404(c) noncompliance. Thus, in addition to monitoring the service provider to ensure that it is providing appropriate investment education, the employer will want to monitor the provider to ensure it is not straying into the forbidden territory of investment advice. Given the lack of clarity in that distinction as well as the stakes, it becomes easy to see why employers would be conservative in the direct and indirect provision of investment education.

On a separate note, employers also should be expected to consider the costs associated with offering investment advice. Even if offering advice does not increase an employer's fiduciary risk, there still will be some costs associated with the provision of advice. While survey data is not available, it is reasonable to assume that employers would prefer that participants have the ability to pay investment advisers out of plan assets or that cafeteria plans be permitted to offer investment advice. Currently, investment advice is not one of the types of benefits that can be offered under a cafeteria plan. Paying investment advisers out of plan assets is possible, but causes the advisers to become ERISA fiduciaries. That, in turn, raises the problems of potential fiduciary liability for employers and the advisers, as well as the prohibited transactions issues, which are discussed below.

C. Investment Advisers -- Risks and Issues

The second category of benefit plan actor affected by the existing dichotomy between investment advice and investment education is that of professional investment advisers. This section evaluates the incentives for investment advisers to provide services to a plan by looking at the potential liability to advisers who would provide that advice.

1. The Provision of Inappropriate Advice

When investment advice is provided for a fee, the adviser becomes an ERISA fiduciary as to the giving of that advice.[118] Thus, the adviser becomes subject to liability for breach of ERISA's fiduciary standards. Breach of those standards would subject the investment adviser to ERISA's civil enforcement scheme. Statutory provisions establish remedies to address fiduciary breaches in the investment and administration of plan assets. As a general matter, those provisions have permitted damage awards that flow to plans,[119] removal of fiduciaries who violate their duties,[120] and even injunctions barring wanton fiduciaries from providing any further fiduciary services to benefit plans.[121]

On the other hand, ERISA also limits the remedies that may be obtained against a breaching fiduciary. The limitations on remedial jurisprudence can be traced to *Massachusetts Mutual Life Ins. v. Russell*.[122] In that case the Supreme Court first addressed the scope of ERISA remedies. The plaintiff, Doris Russell, was a participant in disability plans sponsored by her employer, Massachusetts Mutual.[123] After the company suspended her disability benefits for 132 days, Russell sought compensatory and punitive damages from Massachusetts Mutual.[124] She grounded her claim in ERISA sections 502(a)(2) and 409, which, read together, explicitly permit a participant or beneficiary to sue for fiduciary violations.[125] The Court granted certiorari on the interpretative question of whether section 409 authorizes a participant to personally recover "extracontractual compensatory or punitive damages."[126] Although the Court did not carefully distinguish between them, for analytical purposes this question subsumes two separate issues.

The first constituent question is whether recovery under section 409 for breach of fiduciary obligation may flow only to a benefit plan or whether recovery may flow directly to others, such as participants and beneficiaries. On this issue, the Supreme Court determined that, based upon an integrated reading of the entire statutory provision, only a benefit plan may recover.[127] Because Russell's claim was for direct, individual relief, the *Russell* Court could have ended its analysis with its determination that any recovery under section 409 must inure to a benefit plan, not to an individual participant or beneficiary. Instead, though, the Court also discussed the second constituent issue embedded in its grant of certiorari -- the scope of damages provided for by section 409. Massachusetts Mutual had made full, retroactive payment of Russell's disability benefits before she even filed her legal claim, so she had no claim for additional benefits under the terms of the plans.[128] Instead, she requested compensatory and punitive damages flowing from what she alleged to be unreasonable delay by Massachusetts Mutual in the payment of her benefits.[129] The compensatory damages claim alleged that the termination of her benefits caused her husband to cash out his retirement benefit and aggravated the psychiatric condition that caused her original disability.[130] The Supreme Court characterized her damages claim as one seeking "extracontractual" damages[131] and determined that section 409 does not provide for such damages to individuals.[132] But, the Court explicitly reserved two related questions. First, does section 409 permit a plan to recover extracontractual damages for breach of fiduciary duty?[133] Second, do any of ERISA's other remedial provisions permit awards of extracontractual damages to aggrieved participants or beneficiaries?[134]

On the first sub-issue, a number of lower courts extended the *Russell* opinion's holding and barred individual recovery for fiduciary breach under the more general remedial provisions of section 502, which sets forth ERISA's civil enforcement scheme.[135] In

1996, the Supreme Court finally reversed that particular extension of *Russell* and confirmed the right of plan participants and beneficiaries to bring individual actions on their own behalf in cases of fiduciary breach, at least where no other available relief exists.[136] The bottom line for investment advisers is that they may be sued by plan participants for breach of fiduciary duty. Damage awards may flow either to plan accounts or directly to the harmed participant.

However, the scope of any recovery that flows directly to a participant will be limited to what the statute terms "other appropriate equitable relief."[137] According to the Court, "other appropriate equitable relief" means only traditional equitable relief – injunction, mandamus, and restitution.[138] Restitution is the only one of these that might afford the wronged participant any monetary relief. The Court has been very clear, though, that restitution does not include monetary damages. In recent years the lower courts have struggled with what remedies are included in the Supreme Court's definition of traditional equitable relief.[139] The Supreme Court has granted certiorari on the issue, and guidance is expected next term in the case of *Great-West Life & Annuity Ins. Co. v. Knudson*.[140] The current prohibition on monetary damage awards dramatically limits the liability of investment advisers under ERISA.

In theory, investment advisers also have civil liability under the federal Investment Advisers Act of 1940.[141] However, the Supreme Court has interpreted that Act to provide only very limited remedies for individuals who are defrauded by an investment adviser. According to the Court, advisory clients have a private cause of action under the Act's general fraud provision. Their remedies, however, are limited to recission and restitution, and do not include damages.[142]

By way of comparison, state law does provide for substantial liability for the giving of inappropriate investment advice. While the specifics vary substantially from state to state, investors who receive fraudulent, incompetent, or self-interested investment advice may pursue claims based in state law concepts of fraud, professional malpractice, and fiduciary duty.[143] Recoveries may include punitive damages.[144] ERISA, however, contains a broad preemption provision that would almost certainly preempt all state law causes of action for investment advice provided regarding benefit plan assets.[145]

1. Prohibited Transactions Complications

Most entities that provide services, other than investment advice, to an ERISA plan do not become ERISA fiduciaries.[146] Their non-fiduciary status permits those providers to be paid reasonable fees from plan assets for their services. However, ERISA specifically defines investment advisers to be ERISA fiduciaries.[147] This, in turn, subjects any entity that provides investment advice as part of its package of services to the stringent prohibited transactions provisions that apply to ERISA fiduciaries.[148]

In effect, for example, the prohibited transactions provisions will preclude an entity that provides mutual funds from also providing investment advice to plan participants unless the entity obtains an exemption from the DOL. The expenses of seeking such an exemption can be significant. One company has cited costs of $60,000 to $100,000 per exemption, and a wait of between twelve and eighteen months for DOL approval.[149] Furthermore, to date, the DOL appears only willing to grant exemptions when the financial terms are structured to eliminate any potential conflict of interest.[150] This limits the fees an adviser can charge, and precludes service providers from structuring services in innovative ways.

D. Participants – Issues & Risks

Like employers and investment advisers, participants also face risks associated with the provision of investment advice. Historically, the investment advisory industry has not had an effective record of self-enforcement.[151] During the 1980s and 1990s the number of advisers rapidly outgrew the SEC's ability to oversee the industry.[152] Eventually, regulatory authority was divided between the SEC and the states, depending upon the size of the adviser.[153] The state and federal registration and substantive law provisions provide some protections for plan participants. Specifically, though, investment advice in benefit plans raises two unique concerns under current law.

2. Viability of Disclosure as a Cure for Self-Interested Investment Advice

All interested observers, from the DOL[154] to academics[155] to participants themselves,[156] appear to agree that many participants both need and want investment advice. Testimony before the House Employer-Employee Relations Subcommittee of the Committee on Education and the Workforce in 2000 indicated strong support for increasing benefit plan participants' access to investment advice.[157] Both the complexity of investment choices and the importance of those choices to participants' retirement security, reinforce the need for increased investment advice.[158] And, because substantial private retirement programs relieve the pressure on the Social Security system, congress has yet another reason to address the barriers that currently discourage employers from providing investment advice in their benefit programs.[159]

While there is extensive agreement on the need for increased advice though, one major area of disagreement continues to divide those with an interest in this topic. Most investment advisers have some level of self-interest that inheres in the advice they provide. For example, if the adviser also is a member of the firm whose mutual funds are offered as plan investments, there may be explicit or implicit pressure to steer participants to funds that generate high fees for that mutual fund company. The remaining battle that will be

fought in the legislative arena is whether disclosure can suffice to offset potential conflicts of interest on the part of advisers.

Specifically, the DOL believes that participants who lack the financial sophistication to make their own investment decisions also lack the ability to properly evaluate and react to disclosures of conflicts of interest.[160] As a result, the Department opposed the most recent proposed legislation addressing investment advice.[161] That legislation would have provided for an automatic exemption from the prohibited transaction standards for investment advice so long as the adviser complied with specific disclosure requirements. In contrast, the SEC traditionally has taken the position that appropriate disclosure suffices to offset the conflict of interest, and its concern is with the necessary scope of disclosure.[162]

3. Availability of Sufficient Remedies to Protect Against Inappropriate Investment Advice

The argument for providing benefit plan participants with investment advice largely rests on the notion that increased access to advice will aid participants in accumulating assets for retirement. To the extent that professional investment advice increases the returns participants receive on account assets, it is easy to see the direct contribution the advice would make to enhanced retirement security. But, another possible scenario is that professional advice would simply add costs but fail to increase returns. Even more problematic, investment advice might be rendered in such an unprofessional, fraudulent, or self-interested way that it causes significant losses to retirement plan participants.

Typically, state law provides significant causes of action for investors who suffer losses at the hands of incompetent or fraudulent investment advisers.[163] But, that is not the case when the advice relates to benefit plan assets. The section above, which evaluates the liability of investment advisers, explains that ERISA preempts state law advisory liability for services rendered under benefit plans.[164] While federal remedies are available under ERISA and the Investment Advisers Act, those remedies are limited.[165] Thus, as the law currently stands, plan participants may not have appropriate remedies available to ensure that they do not suffer losses in their retirement plan accounts due to inappropriate investment advice. Nor may there be a sufficient threat of liability to discourage incompetent or fraudulent advisers from providing advice under benefit plans.

IV. Evaluation of H.R. 4747

One recent piece of legislation, H.R. 4747,[166] proposed a statutory exemption from ERISA's prohibited transaction provisions for: (a) the provision of investment advice, (b) transactions in plan assets as a result of that advice, and (c) fees received for that advice. In order to qualify for the exemption, the adviser would have been required to comply with significant disclosure and document retention requirements.[167] However, H.R. 4747 expressly provided that employers would retain fiduciary responsibility for the selection and monitoring of investment advisers.[168]

H.R. 4747 attempted to achieve a balance between encouraging employers and advisers to provide investment advice, on the one hand, and ensuring that participants receive sufficient disclosure to evaluate the advice in the context of who is providing it, on the other hand. H.R. 4747 would have achieved its disclosure goals, though, by making them a part of ERISA where, presumably, they would be interpreted by the DOL. It also explicitly provided that ERISA's fiduciary standards would continue to apply to an employer's selection and monitoring of investment advisers.

This approach is unlikely to be effective in addressing the roadblocks that currently discourage employers from offering investment advice to employees. As with disclosure, a balance needs to be achieved between protecting employees from investment advisers, who are subject only to limited oversight, and protecting employers from the fear of liability under monitoring standards that are too onerous or too vague. Exempting employers from all monitoring obligations so long as the employer has no actual knowledge of wrongdoing would inappropriately provide employers with an incentive to avoid any oversight, investigation, or involvement that might lead to knowledge of wrongdoing.[169] On the other hand, H.R. 4747 failed to provide any protection at all for employers. Unless employers can become comfortable that they are able, with reasonable efforts, to meet their fiduciary obligations in monitoring the provision of investment advice, they are almost certainly going to be unwilling to retain entities to provide that advice. And, if employers remain unwilling to provide, or arrange for the provision, of investment advice, then such advice will remain unavailable to the vast majority of benefit plan participants.

Furthermore, H.R. 4747's specific requirements for disclosure by investment advisers is in inappropriate conflict with the existing federal and state laws that regulate investment advisers. H.R. 4747 recognized the need for investment advisers to disclose fee arrangements, affiliations, and so forth to employees who would receive advice. But, the legislation would have set the standards for that disclosure under ERISA and delegated the interpretation and enforcement to the DOL.

As a general matter of federal law under the Investment Advisers Act, investment advisers with twenty-five million dollars or more under management[170] must register with the SEC.[171] Part 2 of Form ADV, the investment adviser registration form, is currently being revised to require disclosure to advisory clients of information such as conflicts of interest and advisory fees as well as to address updating.[172] The exact nature of this disclosure is the subject of considerable and continuing controversy.[173] The mere fact, though, that the SEC is struggling with the details of the investment adviser disclosure requirements indicates the complexities inherent in this type of

disclosure. As the agency with expertise on topics of investment advice and industry conflicts of interest, the SEC is the most logical agency to confront these intransigent problems.

Once the SEC finally resolves the issues with the content and form of investment adviser reporting outside of the benefit plan context, it seems inefficient for Congress to write and the DOL to interpret and enforce separate standards for disclosure when advice is provided regarding benefit plan assets. It is hard to see why benefit plan participants would be so different from the population of investors that the SEC normally seeks to protect that the benefit plan participants would require a different level of disclosure. It also seems likely that investors would find it confusing to receive multiple disclosure statements from their investment adviser -- one disclosure designed to meet the SEC standards and another to meet the DOL standards. In sum, there would be significant economies in regulatory effort, in investment adviser compliance, and in investor understanding if compliance with SEC standards also fulfilled the requirements for an ERISA prohibited transaction exemption.

Finally, H.R. 4747 failed to address the issue of appropriate remedies for benefit plan participants who receive inappropriate investment advice. It is inadequate to impose a net assets or bonding requirement on investment advisers without also addressing the scope of remedies available to benefit plan participants who suffer losses as a result of an investment adviser's breach of its fiduciary obligations. The scope of participants' remedies should be addressed as part of the legislative package that encourages the provision of investment advice. If, instead, this issue is ignored, participants will be left with inadequate remedies against fraudulent or negligent advisers. The end result will be a failure to establish proper economic incentives for investment advisers to provide appropriate advice, participants who experience investment losses due to inappropriate advice but who are unable to recover for those losses, and pressure on the courts, the relevant administrative agencies, and the legislature to provide some measure of relief from the horror stories that are sure to occur.

In sum, ERISA needs to clearly provide make-whole relief for participants who experience losses as a result of an investment adviser's breach of its fiduciary duties. That relief should not be contingent upon the continuing existence of a benefit plan, the status of a former participant's plan account, or any other artificial limitations. The availability of exemplary damages is a much more difficult question, but some level of capped exemplary damages may be appropriate in cases of egregious wrongdoing. In order to protect employers who choose to make investment advice available through the services of a professional provider of that advice, the statutory liability should be clearly limited to the direct provider of the advice and should not extend to the employer.

V. Conclusion

Benefit plan participants need investment advice, and legislative changes must be made to remove the current roadblocks that discourage employers from providing that advice. At the same time, it is important to ensure that participants are well-informed not only about the their investment choices, but also about the provider of investment advice. Any legislative changes that are made need to consider the issues from the perspective of all three relevant parties: employers, investment advisers, and plan participants. Unless employers are protected sufficiently from liability, they will refuse to offer investment advice directly or indirectly through the benefit plans they sponsor. Unless investment advisers receive sufficient relief from ERISA's prohibited transactions requirements, many advisers will be precluded from offering advice through benefit plans even if employers wish to engage advisers to provide such advice. But, while both advisers and employers require reasonable protections, those protections must be balanced with the needs of benefit plan participants. After all, accessibility to investment advice may simply exacerbate the challenge of retirement asset accumulation if investment advisers are able to give incompetent, self-interested, or fraudulent advice with impunity and without liability.

Footnotes

1. Approximately $1.7 trillion in assets are held in 401(k) plans. Sarah Holden & Jack VanDerhei, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 1999,* EBRI Issue Brief, No. 20, Feb. 2001, at 4, *available at* http://www.ebri.org/0201ib.pdf.

2. Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans,* 4 FLA. TAX REV. 607, 636 (2000).

3. *Id.*

4. In part this is a result of the trend from defined benefit to defined contribution plans. By 1998 57.3 percent of all households with a pension plan reported participating only in a defined contribution plan. Jack VanDerhei & Craig Copeland, *The Changing Face of Private Retirement Plans,* EBRI Issue Brief, No. 232, Apr. 2001, at 5, *available at* http://www.ebri.org/ 0401ib.pdf. The delegation to individual participants of responsibility for investment choices also is a result of 1992 regulatory changes that offered protections to employers whose plans provided for such delegation. Pamela Perun & C. Eugene Steuerle, *From Fiduciary to Facilitator: Rethinking the Role of Employers in Defined Contribution Plans,* The Urban Institute 13-16 (Dec. 5, 2000) (unpublished manuscript, on file with this author), available at http://www.planetnow.com/pamelawork/facilitator.pdf.

5. Jefferson, *supra* note 2, at 627.

6. *See infra* Part II.

7. John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 45 (2000).

8. Pension Benefit Guaranty Corporation, Pension Insurance Data Book 1998 8, fig. 7 (1999) [hereinafter Data Book] (showing TDB plans as main provider of primary pension coverage).

9. Michael J. Canan, Qualified Retirement Plans § 3.51 (1998).

10. (1.5% x 30 years of service) x $50,000 final average salary = $22,500.

11. Canan, *supra* note 9, at § 3.52. Spouses also have rights in determining the form of payment of DB plan benefits. *Id.* at § 7.16.

12. Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 131 (1989).

13. IRC § 412 (1994). For a thorough review of minimum funding standards, see Canan, *supra* note 9, at §§ 12.1 - 12.9.

14. Canan, *supra* note 9, at § 3.11.

15. *Id.*

16. KPMG, Retirement Benefits in the 1990s: 1997 Survey Data 35-36 (1997).

17. *But, see generally,* Jefferson, *supra* note 2, at 617 (advocating protection of a minimum investment return in DC plan accounts).

18. American Academy of Actuaries, Financing the Retirement of Future Generations 14 (1998).

19. 1 G. Boren, Qualified Deferred Compensation Plans at § 1.07 (1983); VanDerhei & Copeland, *supra* note 4, at 3-4.

20. Boren, *supra* note 19, at § 1.16; VanDerhei & Copeland, *supra* note 4, at 3-4.

21. ERISA Advisory Counsel, Pension & Welfare Benefit Administration, Department of Labor, Working Group on the Merits of Defined Contribution vs. Defined Benefit Plans With an Emphasis on Small Business Concerns (Nov. 13, 1997), *available at* http://www.dol.gov/dol/pwba/public/adcoun/dbvsdc.htm [hereinafter Advisory Counsel Study].

22. Langbein & Wolk, *supra* note 7, at 50.

23. *Id.*; Colleen Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality,* 49 Emory L.J. 1, 86 n.23 (2000).

24. Langbein & Wolk, *supra* note 7, at 47-50.

25. Canan, *supra* at note 9, at § 221.

26. Rev. Rule. 98-30, 1998-1 C.B. 1273.

27. Employee Retirement Income Security Act of 1974 (ERISA) §§ 1-4402, 29 U.S.C. §§ 1001-1461 (1994).

28. Langbein & Wolk, *supra* note 7, at 50.

29. *Id.*

30. Office of Policy & Research, Pension & Welfare Benefit Administration, Department of Labor, Private Pension Plan Bulletin: Form 5500 Annual Reports, Sec. A (Winter 1999-2000), *available at* http://wwww.dol.gov/dol/pwba/public/programs/opr/bullet1996/hilites.htm.

31. *Id.*

32. *Id.*

33. *See VanDerhei & Copeland, supra* note 4, at 5-6.

34. *Id.* at 6.

35. *Id.*

36. Advisory Counsel Study, *supra* note 21.

37. Kyle N. Brown et al., *The Unfolding of a Predictable Surprise: A Comprehensive Analysis of the Shift from*

Traditional Pensions to Hybrid Plans, Watson Wyatt Worldwide, 44 (2000).

38. *See id.*

39. *Id.*

40. Richard J. Kovach, *Tax Complexity, Regulatory Ambivalence, and Disparate Benefits and Burdens in Deferred Compensation Planning for Small Business,* 11 ST. THOMAS L. REV. 141 (1998); Allen Friedland, Comment, *Cash or Deferred Plans: A Case of Overregulation?,* 8 DEL. J. CORP. L. 297 (1984).

41. *See* Advisory Counsel Study, *supra* note 21.

42. VanDerhei & Copeland, *supra* note 4, at 6.

43. *Id*.

44. *See* Medill, *supra* note 23, at 11.

45. *See* Jefferson, *supra* note 2, at 627.

46. Perin & Steuerle, *supra* note 4, at 13.

47. Treas. Reg. § 2550.404c-1 (1992).

48. *See* Perin & Steuerle, *supra* note 4, at 13-14.

49. ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) (1998).

50. ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii) (1998).

51. *See, e.g.,* Jane K. Stanley, *The Definition of a Fiduciary Under ERISA: Particular Persons and Entities,* 27 REAL PROP. PROB. & TR. J. 711 (1993) (discussing fiduciary status of plan sponsors, plan administrators, and many others).

52. ERISA § 405(d), 29 U.S.C. § 1105(d) (1998).

53. Lee H. Robinson, *Investment Management by Fiduciaries, in* ERISA FIDUCIARY LAW 122-23 (Susan P. Serota ed. 1995).

54. Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1108 (1988) ("ERISA's exclusive benefit rule, . . . imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty.").

55. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (1998).

56. Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982).

57. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (1998).

58. Robinson, *supra* note 53, at 122.

59. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C) (1998).

60. Robinson, *supra* note 53, at 133.

61. Nell Hennessy & Frank Daniele, *Participant-Directed Retirement Plans Under Section 404(c), in* ERISA FIDUCIARY LAW 175-77 (Susan P. Serota ed. 1995).

62. 29 C.F.R. § 2550.404(c)-1(b)(3) (1992).

63. *Id.*

64. 29 C.F.R. § 2550.404(c)-1(b) (1992).

65. 29 C.F.R. § 2550.404(c)-1(b)(2)(ii) (1992).

66. Hennessy & Daniele, *supra* note 61, at 176.

67. Shlomo Benartzi & Richard H. Thaler, *Risk Aversion or Myopia? Choices in Repeated Gambles and Retirement Investments,* 45 MGMT SCI. 364 (1999).

68. *Id.*

69. *See id.* at 367.

70. *Id.*

71. *Id.* at 374, 377.

72. *Id.*

73. *Id.* at 375.

74. *Id.*

75. *Id.* at 377, 380.

76. *Id*. at 378.

77. *Id.* at 378-80.

78. *Id.* at 380.

79. *Id.*

80. *Id.* at 375.

81. Holden & VanDerhei, *supra* note 1, at 4.

82. *Id.* at 11.

83. *Id.*

84. Craig Copeland, *Asset Allocation: IRAs and 401(k)-Type Plans*, EBRI Notes, Oct. 2000, at 7.

85. *Id.*

86. *Compare* Copeland, *supra* note 84, at 7 (finding allocations to be relatively consistent across age groups), *with* Lori Lucas, *Under the Microscope: A Closer Look at the Diversification and Risk Taking Behavior of 401(k) Participants and How Plan Sponsors Can Address Key Investing Issues,* BENEFITS QTLY, Fourth Qtr 2000, at 29 (finding that, if company stock holdings are excluded, younger participants appear to choose riskier portfolios than do older participants).

87. Richard W. Johnson, *The Gender Gap in Pension Wealth: Is Women's Progress in the Labor Market Equalizing Retirement Benefits?* The Urban Institute 1 (Mar. 1999).

88. T.J. ELHER & WALLACE FRASER, ASSET OWNERSHIP OF HOUSEHOLDS: 1993 U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS 29, table B-9 (1995).

89. Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209, 1217-18 (1997).

90. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law,* 42 HASTINGS L.J. 683, 689 (1991) (discussing gendered differences in life expectancies); *see also* Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification,* 71 VA. L. REV. 403, 434-37 (1985) (discussing some of the challenges to using life expectancies for risk classification); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law,* 146 U. PA. L. REV. 463, 481 (1998) (comparing work-life expectancies and life expectancies).

91. *Hearings on Pension Issues Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 105th Cong. (1998) (statement of Gail S. Shaffer, Executive Director, Business and Professional Women/USA).

92. 144 CONG. REC. H1419 (daily ed. March 24, 1998) (statement of Rep. Maloney).

93. Lucas, *supra* note 86, at 27.

94. Johnson, *supra* note 87*,* at 5-6.

95. Actual numbers of plans offering investment advice are impossible to obtain. However, even after extensive conversations with benefit plan lawyers, sponsors, and members of the investment community, I have not been able to identify any plans that offer investment advice. The proposed legislation and other commentary on this problem also indicate that investment advice is rarely, if ever, offered through a benefit plan. *See infra* text accompanying Part IV; Medill, *supra* note 23.

96. *See supra* text accompanying note 64.

97. *See supra* text accompanying note 50.

98. "Scylla and Charybdis," Microsoft® Encarta® Online Encyclopedia 2001, *available at* http://encarta.msn.com.

99. DOL I.B. 96-1; Participant Investment Education, 29 C.F.R. § 2509 (1996).

100. *Id.* at § 2509.96-1(d).

101. *Id.*

102. *Id.* at § 2509.96-1(d).

103. Medill, *supra* note 23, at 66.

104. John M. Kimpel, *Education and Advice Under ERISA for Employee-Directed 401(k) Plans,* BENEFITS QTLY, Fourth Qtr. 2000, at 12.

105. Elizabeth A. White, *House Panel Hears Suggestions For Improving ERISA in Changing World,* Pension & Ben. Daily (BNA), Feb. 16. 2000.

106. In theory, an employer's choice of a benefit plan and its terms will be affected by the value employees place upon the offered benefits. But, in the end, for single employer plans, the choice is the employer's to make.

107. *See* Dana M. Muir, *The Plan Amendment Trilogy: Settling the Scope of the Settlor Doctrine,* 15 THE LABOR LAWYER 205 (1999).

108. *Id*. at 210-11.

109. *See supra* text accompanying notes 49-53.

110. *See supra* text accompanying notes 54-60.

111. 29 C.F.R. § 2510.3-21(c).

112. Robinson, *supra* note 53, at 133.

113. Mark A. Vogel, *Named Fiduciaries, IN* ERISA FIDUCIARY LAW 112-114 (Susan P. Serota ed. 1995).

114. *Id*. at 115.

115. 29 C.F.R. § 2509(e) (1996).

116. *Id.*

117. *See supra* text accompanying note 64.

118. *See supra* text accompanying notes 49-53.

119. Donovan v. Robbins, 752 F.2d 1170, 1185 (7th Cir. 1985); Katsaros v. Cody, 744 F.2d 270 (2d Cir. 1984).

120. Marshall v. Snyder, 572 F.2d 894 (2d Cir. 1978).

121. Beck v. Levering, 947 F.2d 639 (2d Cir. 1991).

122. 473 U.S. 134 (1985).

123. *Id.* at 136.

124. *Id*. at 136-37. The regulations in effect at the time required resolution of disputed claims within 120 days from a request for review. 29 C.F.R. § 2560.503-1(h)(1)(i) (1984).

125. 473 U.S. at 139 n.5.

126. Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482 (9th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3203 (U.S. Oct. 2, 1984) (No. 84-9).

127. 473 U.S. at 140.

128. *Id.* at 136.

129. *Id*.

130. Response to Petition for Writ of Certiorari, Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (No. 84-9).

131. 473 U.S. at 136.

132. *Id*. at 144.

133. *Id*. at 144 n.12.

134. *Id*. at 139 n.5.

135. McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956 (9th Cir. 1995); Simmons v. Southern Bell Telephone and Telegraph Co., 940 F.2d 614 (11th Cir. 1991).

136. Varity Corp. v. Howe, 516 U.S. 489, 507-15 (1996).

137. ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (1998).

138. Mertens v. Hewitt Associates, 508 U.S. 248 (1993).

139. *Compare* In re Unisys Corporation Retiree Medical Benefit "ERISA" Litigation, 57 F.3d 1265 (3d Cir. 1995) (denying monetary damages but granting an injunction ordering specific performance of lifetime benefits and restitutionary reimbursement for past benefits); *Varity Corp. v. Howe,* 36 F.3d 746 (8th Cir. 1994) (denying compensatory damage, but awarding"restitution" for benefits that participants had lost), *with* Buckley Dement, Inc. v. Travelers Plan Administrators, 39 F.3d 784 (7th Cir. 1994) (denying recovery of the participant's medical bills because such relief would constitute "damages", not "appropriate equitable relief."); McLeod v. Oregon Lithoprint Inc., 102 F.3d 376 (9th Cir. 1996) (denying award of the amount of benefits that plaintiff would have been paid had she elected coverage under a cancer policy).

140. 2000 U.S. App. LEXIS 1771 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 876 (2001) (addressing the question of whether a plan's recovery of benefits from a participant under the plan's subrogation agreement constitutes equitable relief under ERISA § 502(a)(3)(B)).

141. 15 U.S.C. §§ 80b-1 - 80b-18a (1998).

142. Transamerica Mortgage Advisers v. Lewis, 444 U.S. 11 (1979).

143. *See e.g.* Community Hosp., Inc. v. Kidder, Peabody & Co., 81 F. Supp. 2d 863 (S.D. Ohio 1999) (upholding arbitration award of $10.8 million due to breach of duty of security professional and fraud); Martin v. Shearson Lehman Hutton, Inc., 986 F.2d 242 (8th Cir. 1993) (upholding award of $28,795 in compensatory damages, $500,000 in punitive damages, and attorneys fees for common law fraud, negligence, and breach of fiduciary duty); Dean Witter Reynolds, Inc. v. Bork, No. 91-0392, 1991 U.S. Dist. LEXIS 11907 (E.D. Pa. Aug. 21, 1991) (upholding award of $50,000 in punitive damages, $176,000 in rescissory damages, $57,000 in attorney's fees, $39,000 in compensatory damages, and $16,000 in interest).

144. Medill, *supra* note 23, at 77-78.

145. ERISA § 514, 29 U.S.C. § 1144 (1998). A discussion of ERISA preemption is beyond the scope of this paper. For relatively recent commentary on the scope of ERISA preemption, see Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption,* 52 FLA. L. REV. 1 (2000).

146. *See* Stanley, *supra* note 51, at 722.

147. *See supra* text accompanying notes 50-53.

148. For a discussion of ERISA's complex prohibited transactions requirements and individual exemptions, see William P. Wade & Richard I. Loebl, *Individual Prohibited Transaction Exemptions, in* ERISA FIDUCIARY LAW (Susan P. Serota ed. 1995).

149. Elizabeth A. White, *Retirement Policy: Subcommittee Members Cite Accord on ERISA Retirement Security Issues,* Pension & Ben. Daily (BNA), Mar. 13, 2000.

150. *See* Medill, *supra* note 23, at 57-63.

151. John H. Walsh, *Federal Regulation of Financial Planners After the Investment Advisers Supervision Coordination Act,* 10 DEPAUL BUS. L.J. 259, 273-78 (1998).

152. *Id.* at 276-77.

153. *Id.* at 282-85.

154. *See e.g.* Tom Gilroy, *Labor Department Official Opposes Easing Restrictions on Pension Financial Advice,* Pension & Ben. Daily (BNA), Sept. 18, 2000.

155. White, *supra* note 105 (discussing Professor John Shoven's support of investment advice for benefit plan participants).

156. *See* Elizabeth A. White, *Boehner Subcommittee Plans Hearings for March 9-10 on ERISA Modernization,* Pension & Ben. Daily (BNA), Mar. 6, 2000 ("As defined contribution plans gain popularity and participants are afforded more options, they are asking for more specific information . . . .").

157. *Retirement Security Hearings Continue in House Employer-Employee Relations Subcommittee,* Committee on Education and the Workforce, Mar. 10, 2000, *available at* http://edworkforce.house.gov/press/press106/erisa31000.htm.

158. *Id.*

159. *See id.*

160. Gilroy, *supra* note 154.

161. *Id.*

162. *See infra* text accompanying notes 171-73.

163. *See supra* text accompanying note 143-44.

164. *See supra* text accompanying note 145.

165. *See supra* text accompanying notes 122-42.

166. H.R. 4747, 106th Cong. (2000).

167. H.R. 4747, 106th Cong. § 2 (2000).

168. *Id.*

169. *See* Medill*, supra* note 23, at 82-83 (offering such a drastic proposal for protection of employers).

170. It is true that investment advisers who manage assets of less than $25 million typically would be precluded from registering with the SEC. However, the SEC permits pension consultants who provide investment advice to pension plans to register so long as they provide advice on at least $50 million worth of plan assets.

171. Investment advisers with less than $25 million must register at the state level. Amendments to the prohibited transactions requirements could make either of two provisions for them and for others who meet ERISA's definition of providing investment advice but are not required to register with the SEC. One alternative is to preclude from the statutory exemption any investment advisers who do not meet the SEC's standards for federal registration. A second possibility is to provide a prohibited transaction exemption to any investment adviser registered with the appropriate state or federal authority. However, becoming comfortable with the level of disclosure required at the state level would require substantial effort in evaluating and continuing to track the requirements of each state.

172. *Advisers Group Finds Proposed Form ADV too Extensive, Cumbersome, Burdensome,* Sec. L. Dly. (BNA), June 15, 2000.

173. *ICAA Recommends Major Modifications to SEC's Proposed Adviser Registration Form,* Sec. L. Dly. (BNA), May 30, 2001; *SEC Staff to Recommend Revised Versions of Two Proposals Regulating Adviser Industry,* Sec. L. Dly. (BNA), Oct. 6, 2000.