Estoppel Claims Against ERISA Employee Benefit Plans

TABLE OF CONTENTS

INTRODUCTION

Estoppel[1] claims arise against employee benefit plans[2] when plan agents[3] misinform plan participants[4] about the benefits they can expect to receive under the plan.[5] Plan participants often act

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[1] In this Comment, "estoppel" denotes equitable estoppel unless otherwise specified. For a discussion of equitable estoppel, see *infra* notes 52-69 and accompanying text.

[2] Employee benefit plans are employers' promises to pay monetary benefits to their employees in the future. *See* HENRY H. PERRITT, JR., EMPLOYEE BENEFITS CLAIMS LAW AND PRACTICE § 1.1 (1990). The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §§ 1001-1461 (1988 & Supp. I 1989), regulates private employee benefit plans. Employer-sponsored private plans are distinct from government-sponsored public plans, which ERISA does not govern and this Comment does not address.

[3] For estoppel to apply, either the estopped party or that party's agent must have made the representation on which the party asserting estoppel relied. MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 543 (4th ed. 1886); *see also* Cleary v. Graphic Communications Int'l Union Supplemental Retirement Fund, 841 F.2d 444, 447 (1st Cir. 1988) (to estop ERISA employee benefit plan, plan agent must have made representation); STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 407-08 (1988) (same). The relation between ERISA and agency law is beyond the scope of this Comment. Therefore, this Comment refers to employers, plan trustees, plan representatives, and plan administrators under the presumption that they are plan agents with authority to bind the plan.

[4] A plan participant is an employee who is eligible or may become eligible to receive a benefit from the employer's employee benefit plan. ERISA § 3(7), 29 U.S.C. § 1002(7). In this Comment, "employee" denotes a plan participant unless otherwise specified.

[5] *See, e.g.*, Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir.), *cert. denied*, 111 S. Ct. 232 (1990); *see also* Richard P. Carr & Christine L. Thierfelder, *Talk is Cheap: Oral Misrepresentations as a Basis for Recovery from Employee Benefit Plans*, 3 BENEFITS L.J. 199, 199 (1990) [hereafter Carr & Thierfelder, *Talk is Cheap*] (discussing circumstances under which claims based on misrepresentations arise against employee benefit plans). In *Kane*, a plan agent told plaintiff that plaintiff's welfare plan would pay the medical expenses of a child he wished to adopt. 893 F.2d at 1284. After he adopted the child, plaintiff discovered that the plan's terms did not cover the child's expenses. *Id.* at 1285. Plaintiff sued the plan, arguing that it was estopped to deny that the plan's terms covered the expenses. *Id.* The *Kane* court

irreversibly in reliance on this misinformation.[6] Until the plan rejects their benefit applications, the participants do not discover that under the plan's terms, they are ineligible for the benefits they expected to receive.[7] The disappointed participants sue the plan, arguing that the misrepresentations estop the plan from asserting their ineligibility for benefits.[8]

The Employee Retirement Income Security Act of 1974 (ERISA)[9] governs the participants' estoppel claims.[10] ERISA is a comprehensive statute that Congress enacted to eliminate inequities in the private employee benefit system.[11] Before ERISA, few

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determined, contrary to most decisions, that estoppel may apply against the plan. *Id.*

6 *See, e.g.*, *Kane*, 893 F.2d at 1284-85. In many cases, employees retire in reliance on representations that they are currently eligible for a pension, while under the plan's terms, they need to work several more years to qualify. *See, e.g.*, Sanders v. United Distribs., Inc., 405 So. 2d 536 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982).

7 *See, e.g.*, *Kane*, 893 F.2d at 1285.

8 *See, e.g.*, *id.*

9 29 U.S.C. §§ 1001-1461 (1988 & Supp. I 1989).

10 *See, e.g.*, Torrence v. Chicago Tribune Co., 535 F. Supp. 748 (N.D. Ill. 1982) (deciding estoppel issue under ERISA).

11 Congress set forth its purposes in section two of ERISA:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such 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; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable

plan participants received the benefits their employers promised them.[12] To prevent forfeiture of benefits, plan insolvency, and misuse of plan assets, Congress enacted ERISA's stringent vesting,[13] funding,[14] and fiduciary duties requirements.[15]

ERISA does not specifically address estoppel claims against employee benefit plans.[16] The federal courts supplement ERISA, however, with federal common-law estoppel.[17] The federal courts are divided on whether they may apply federal common-law estoppel against ERISA plans.[18] The trend among the courts

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> in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

ERISA § 2(a), 29 U.S.C. § 1001(a).

[12] *See* H.R. REP. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 [hereafter H.R. REP. No. 533] (noting "defects in private retirement system which limit the effectiveness of the system in providing retirement income security"); *see also infra* notes 204-14 and accompanying text.

[13] ERISA §§ 203-211, 29 U.S.C. §§ 1053-1060. "Vesting" denotes an employee's legal right to receive benefits under the plan's terms. *See* AMERICAN ENTERPRISE INSTITUTE, THE WILLIAMS-JAVITS PENSION REFORM PROPOSAL 7 (1973) [hereafter AEI, WILLIAMS-JAVITS PROPOSAL]; *see also infra* notes 81-85 and accompanying text.

[14] ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086. "Funding" refers to the assets the plan will use to pay all its benefit obligations. AEI, WILLIAMS-JAVITS PROPOSAL, *supra* note 13, at 25; BARBARA J. COLEMAN, PRIMER ON ERISA 44 (3d ed. 1989); *see also infra* notes 86-95 and accompanying text.

[15] ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114. The fiduciary duties ERISA imposes are very stringent, David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 446 n.64 (1987), and beyond the scope of this Comment.

[16] Black v. TIC Inv. Corp, 900 F.2d 112, 114 (7th Cir. 1990); *cf.* Carr & Thierfelder, *Talk is Cheap*, *supra* note 5, at 200 (noting ERISA's preemption, written instrument, and civil enforcement provisions, which are "relevant" to estoppel claims).

[17] *See, e.g.*, *Black*, 900 F.2d 112; Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir.), *cert. denied*, 111 S. Ct. 232 (1990). *But see* Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (declining to create federal common-law estoppel because ERISA specifically addresses estoppel issue).

[18] *See Black*, 900 F.2d at 114-15 (remarking that First, Second, Third, Sixth, Eighth, and Ninth Circuits allow estoppel recovery, while Fourth, Tenth, and Eleventh Circuits do not); Torrence v. Chicago Tribune Co., 535 F. Supp. 748, 750 n.6 (N.D. Ill. 1982) (remarking that Second and Ninth Circuits do not allow estoppel claims, but neither Circuit uniformly applies no-estoppel rule); Leslie L. Wellman & Shari J. Clark, *An Overview of Pension*

is to deny estoppel recovery.[19] In most courts' view, such recovery would either contravene ERISA's written instrument provision,[20] or jeopardize the ERISA plan's "actuarial soundness."[21]

ERISA's written instrument provision requires employers to establish and maintain their employee benefit plans pursuant to a written instrument.[22] Participants base their estoppel claims, however, on representations not contained in the written instrument.[23] Any recovery from the plan based on such representations would amount to recovery beyond the written plan terms.[24] Reasoning that allowing recovery beyond the written terms would, in effect, modify the terms,[25] many courts conclude that allowing such recovery would contravene ERISA's written instrument provision.[26]

Other courts threaten to deny estoppel recovery on policy rather than statutory grounds. Without reference to ERISA's written instrument provision, these courts cite concern for the ERISA plan's "actuarial soundness."[27] Many employee benefit plans hold assets in trust, out of which the plans pay benefits to

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Benefit and Fiduciary Litigation Under ERISA, 26 WILLAMETTE L. REV. 665, 692 (1990) (remarking that Ninth, Tenth, and Eleventh Circuits do not allow estoppel recovery).

19 *See, e.g.*, Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 447 (1st Cir. 1988) (noting that estoppel recovery would jeopardize ERISA plan's "actuarial soundness"); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (holding that estoppel recovery against ERISA plan would contravene ERISA's written instrument provision).

20 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1); *see, e.g.*, *Nachwalter*, 805 F.2d at 960 (holding that estoppel recovery would contravene ERISA's written instrument provision).

21 *See, e.g.*, *Cleary*, 841 F.2d at 447 (pointing out that estoppel recovery could jeopardize ERISA plan's actuarial soundness).

22 The provision reads: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

23 *See, e.g.*, *Nachwalter*, 805 F.2d at 959.

24 *See, e.g., id.* at 957.

25 *See, e.g., id.* at 957-59.

26 *See, e.g., id.* at 959-60.

27 *See, e.g.*, Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 447 (1st Cir. 1988); Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds, 624 F.2d 1132, 1139 (2d Cir. 1980).

eligible employees.[28] Plaintiffs in estoppel cases are ineligible for benefits under the plan's terms, but argue that the plan is estopped from so asserting.[29] The courts reason that paying benefits to ineligible persons would deplete the plan's assets, jeopardizing its ability to pay the eligible participants.[30] The courts conclude that the ERISA plan's actuarial soundness is too important to endanger through estopping the plan.[31]

Although a majority of post-ERISA courts denies estoppel recovery against ERISA plans, pre-ERISA courts readily applied estoppel to enforce misrepresentations about benefits.[32] Estoppel remained important in pre-ERISA benefit cases until Congress enacted the Labor Management Relations Act of 1947 (LMRA),[33] which governs collectively-bargained plans.[34] The LMRA contains a written instrument provision similar to ERISA's,[35] and the first cases in which the courts denied estoppel recovery because of such a provision were LMRA cases.[36] Similarly, the first plans whose actuarial soundness the courts sought to protect by disallowing estoppel recovery were LMRA plans.[37] After Congress enacted ERISA, a majority of courts followed these LMRA cases and disallowed estoppel recovery against ERISA plans.[38]

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28 *See* ERISA § 302, 29 U.S.C. § 1082; *Cleary*, 841 F.2d at 447 & n.5.

29 *See, e.g.*, *Cleary*, 841 F.2d at 445-46.

30 *See, e.g.*, *id.* at 447.

31 *See, e.g.*, *id.*

32 *See, e.g.*, Sessions v. Southern Cal. Edison Co., 118 P.2d 935 (Cal. Ct. App. 1941) (granting relief under promissory estoppel); Sanders v. United Distribs., Inc., 405 So. 2d 536 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982); *see also infra* notes 119-66 and accompanying text.

33 Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1988 & Supp. I 1989)).

34 *See* 29 U.S.C. § 186.

35 29 U.S.C. § 186(c)(5)(B).

36 *See e.g.*, Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968) (leading case in which court denied estoppel recovery against LMRA plan because of LMRA's writing requirement), *cert. denied*, 394 U.S. 919 (1969).

37 *See, e.g.*, Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (leading case in which court refused to estop LMRA plan out of concern for plan's actuarial soundness).

38 *See, e.g.*, Davidian v. Southern Cal. Meat Cutters Union & Food Employees Benefit Fund, 859 F.2d 134, 136 (9th Cir. 1988); Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 447 (1st Cir. 1988); Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922, 928 (9th Cir. 1986); Chambless v. Masters, Mates &

By enacting ERISA, however, Congress did not intend to eliminate theories of recovery, such as estoppel, that pre-ERISA employees successfully asserted in benefit cases.[39] Rather, Congress sought to expand employees' ability to enforce the right to receive benefits.[40] Congress enacted ERISA's written instrument provision to aid employees in understanding and enforcing their rights, not to limit employees' recovery.[41] In addition, Congress enacted ERISA's funding provisions to protect the plans' ability to pay benefits to eligible employees.[42] Because these provisions adequately protect ERISA plans' actuarial soundness, such plans need no further protection from the courts.[43]

This Comment argues that courts should apply federal common-law estoppel against ERISA employee benefit plans in spite of both ERISA's written instrument provision and concerns for the plans' actuarial soundness.[44] In construing ERISA's written instrument provision to prohibit estoppel recovery, the courts ignore the strong policy considerations that favor allowing such recovery.[45] In purporting to protect ERISA plans' actuarial soundness, the courts overlook the basics of plan formation, as well as the ERISA provisions that adequately safeguard ERISA plans' actuarial soundness.[46]

In Part I, this Comment discusses the law of estoppel and outlines some fundamentals of the private employee benefit system.[47] Next, Part II describes estoppel's vital role in pre-ERISA

Pilots Pension Plan, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

39 *Cf.* Powell v. General Am. Life Ins. Co., 271 Cal. Rptr. 16, 20 (Cal. Ct. App. 1990) ("Absent some rationale which furthers ERISA's goals, it makes no sense to deprive an employee of an equitable remedy available before ERISA was enacted."). For a discussion of Congress's intent in enacting ERISA and ERISA's civil enforcement scheme, see *infra* notes 204-25, 294-303 and accompanying text.

40 *See* H.R. REP. No. 533, *supra* note 12, at 4655 (noting that "intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts"); *see also infra* notes 277-303 and accompanying text.

41 *See infra* notes 285-93 and accompanying text.

42 *See infra* notes 204-19 and accompanying text.

43 *See infra* notes 366-442 and accompanying text.

44 *See infra* notes 269-442 and accompanying text.

45 *See infra* notes 277-365 and accompanying text.

46 *See infra* notes 366-442 and accompanying text.

47 *See infra* notes 52-118 and accompanying text.

employee benefit cases.[48] Part III reviews the history and purposes behind ERISA[49] and examines the post-ERISA decisions that disallow estoppel recovery against ERISA plans.[50] Finally, Part IV argues that to further Congress's intent in enacting ERISA, courts should not hesitate to estop ERISA plans when employees detrimentally rely on misrepresentations about benefits.[51]

I. ESTOPPEL CLAIMS AND THE PRIVATE EMPLOYEE BENEFIT SYSTEM

A. Equitable Estoppel

Equitable estoppel[52] originated in the 1837 English case *Pickard*

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48 *See infra* notes 119-99 and accompanying text.

49 *See infra* notes 200-34 and accompanying text.

50 *See infra* notes 235-68 and accompanying text.

51 *See infra* notes 269-442 and accompanying text.

52 Equitable estoppel is also called "estoppel by representation," G. SPENCER BOWER & ALEXANDER K. TURNER, THE LAW RELATING TO ESTOPPEL BY REPRESENTATION vii, 4 (1977), "estoppel by misrepresentation," JOHN S. EWART, AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION 3 (1900), "estoppel by conduct," BIGELOW, *supra* note 3, at 543, and "estoppel in pais." Michael C. Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L.J. 606, 609 (1990). In this Comment, "estoppel" denotes equitable estoppel unless otherwise specified.

Equitable estoppel is distinct from promissory estoppel. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 11-29(b) (3d ed. 1987) (discussing difference between promissory and equitable estoppel). The Restatement of Contracts sets forth the doctrine of promissory estoppel: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

Promissory estoppel derived from equitable estoppel. CALAMARI & PERILLO, *supra*, § 11-29(b). Although the two doctrines are conceptually distinct, the elements of promissory and equitable estoppel are almost identical. Health Scan, Ltd. v. Travelers Ins. Co., 725 F. Supp. 268, 270 (E.D. Pa. 1989); *see also* Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 681 n.18 (1984) (calling difference between equitable and promissory estoppel "illusory"); Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1410 (1983) (calling difference between equitable and promissory estoppel "patently artificial").

While promissory estoppel always involves a promise, equitable estoppel may involve a "representation." BOWER & TURNER, *supra*, at 32. Any act or

v. Sears.[53] In an action in trover, the King's Bench stated:

> [W]here one by his words or conduct willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous position,

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statement that affirms, denies, or describes any existing fact or circumstance is a "representation." *Id.* at 31. Thus, a statement of opinion or law is not a representation. *See* BIGELOW, *supra* note 3, at 554. For estoppel to apply, either the estopped party or that party's agent must have made the representation. *See id.* at 543; *see also supra* note 3. Conduct, speech, and writing may each form a representation, BIGELOW, *supra* note 3, at 553; Philip R. Segrest, Comment, *Waiver and Estoppel*, 20 BAYLOR L. REV. 325, 326-27 (1968), and silence is a representation when the silent person is under a duty to speak. *Id.* at 327; *see* CALAMARI & PERILLO, *supra*, § 11-29(b) n.52; JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 808a (5th ed. 1941).

Traditionally, if an act or statement affirmed, denied, or described a *future* fact or circumstance, the act or statement was a promise. *See* BOWER & TURNER, *supra*, at 32; POMEROY, *supra*, § 808, at 207-08. A promise could not support an equitable estoppel claim. BOWER & TURNER, *supra*, at 32. Thus if an employer told an employee, "Our employee benefit plan covers your claim," the employee could assert equitable estoppel against the employer because the employer made a representation of existing fact. If, however, the employer stated, "Our employee benefit plan will pay your claim," the employee could not assert equitable estoppel because the statement was a promise relating to a future event.

By contrast, promissory estoppel always involves promises. *See id.* Under modern law, however, equitable estoppel may also involve a promise. CALAMARI & PERILLO, *supra*, § 11-29(b). A promise supports an equitable estoppel claim rather than a promissory estoppel claim when the promise qualifies a pre-existing contract. *Id.* For example, suppose an employer told an employee, "Our employee benefit plan will pay your claim." The promise would support the employee's equitable estoppel claim if the employer previously promised to pay benefits, because the new promise qualifies the old one. If the promise does not relate to a pre-existing contract, the promise supports a promissory estoppel claim only. *Id.*; *see also* BIGELOW, *supra* note 3, at 555 (promises sound not in estoppel but in contract); *cf.* BOWER & TURNER, *supra*, at 380 (although promissory estoppel does not require pre-existing contract, special relationship must exist between parties or court will not apply doctrine (English law)). This rule exists because the doctrine of promissory estoppel traditionally related only to a contract's *formation*, while equitable estoppel related only to its *performance*. CALAMARI & PERILLO, *supra*, § 11-29(b). This Comment focuses on equitable estoppel because post-ERISA employee benefit estoppel cases usually involve representations of present fact or promises that qualify pre-existing promises to pay benefits. In this Comment, however, "equitable estoppel" means promissory estoppel if the facts under discussion technically support only a promissory estoppel claim.

[53] 112 Eng. Rep. 179 (1837).

> the former is concluded from averring against the latter a different state of things as existing at the same time.[54]

The *Pickard* formulation still provides the basis of equitable estoppel.[55] Estoppel applies when (1) the estopped person's conduct amounts to a representation of material fact; (2) the estopped person knows the true facts; (3) the person asserting estoppel does not know the true facts; (4) the estopped person intends that the other person rely on the representation, or the circumstances indicate that the other person will probably rely on it; and (5) the person asserting estoppel reasonably and detrimentally relies on the representation.[56]

If these elements are fulfilled, the estopped person may not

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[54] *Id.* at 181 (footnote omitted). In *Pickard*, a third party levied on plaintiff's machinery and sold it to defendants, whom plaintiff sued in trover (conversion). *Id.* Defendants argued that plaintiff had impliedly authorized the third party to levy on and sell the machinery by failing to disclose his ownership when he knew the sale was pending. *Id.* The court determined that plaintiff led the third party to believe that plaintiff did not own the machinery. *Id.* The third party detrimentally changed position by entering into a contract for sale of property that he did not own. *Id.* The court held that the plaintiff was "concluded" from asserting that he owned the property. *Id.*; *cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 735 (5th ed. 1984) [hereafter PROSSER] (estoppel creates duty to speak under penalty of loss of right to assert truth later). *Pickard* was one of the first cases in which an English common-law court invoked equitable estoppel as a legal remedy. *See* EWART, *supra* note 52, at 8 (*Pickard* marks epoch in development of law).

[55] Peter S. Atiyah, *Misrepresentation, Warranty and Estoppel*, 9 ALBERTA L. REV. 347, 376 (1971).

[56] *See* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *31 (6th Cir. Sept. 24, 1991) (listing elements of federal common-law equitable estoppel); Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 149 (3d Cir. 1987) (same), *aff'd in part and rev'd in part on other grounds*, 489 U.S. 101 (1989).

Professor Corbin formulated a contract theory of equitable estoppel. *See* 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 752 (1960). With a contract, a promisor's duty of immediate performance is often conditional on an event's occurrence. *Id.* Normally, when the event occurs, the condition is fulfilled and the promisor's duty to perform becomes immediate. *Id.* If the promisor represents to the promisee that she will not insist on the condition's fulfillment, however, the condition ceases to exist. *Id.* Further, if the promisee reasonably relies on the representation to her detriment, the promisor is estopped to assert failure of the condition. *Id.* The American Law Institute has adopted this theory of estoppel. *See* RESTATEMENT (SECOND) OF CONTRACTS § 84 (1981) (Promise to Perform a Duty in Spite of Non-occurrence of a Condition).

contradict the representation in court.[57] Thus, estoppel often requires the court to depart substantially from well-established rules of contract interpretation.[58] Estoppel also requires the court to apply the law to untrue facts.[59] In *Pickard*, for example, plaintiff argued that defendants had converted his property by buying it from a third party.[60] Because plaintiff failed to disclose that he owned the property when he knew its sale was pending, he was estopped to assert later that the property was his.[61] Thus, the court decided the case for defendants based on an untrue fact: that plaintiff did not own the property.[62] The court tolerated this

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57 *See* Pitou, *supra* note 52, at 610 (estoppel precludes defendant from asserting defenses and rights); Atiyah, *supra* note 55, at 371 (estopped person may not deny truth of facts represented). Because the estopped person may not prove facts contrary to the representation, early commentators viewed estoppel as an exclusionary rule of evidence. *See id.* at 373; EWART, *supra* note 52, at 188-89 (noting that estoppel was rule of evidence, though in practice plaintiffs rarely asserted estoppel through objecting to admissibility of proffered evidence). The *Pickard* court itself called estoppel a "formalit[y] that [threw] technical obstacles in the way of legal evidence." 112 Eng. Rep. at 181.

58 *See* Atiyah, *supra* note 55, at 377 (citing case in which court abandoned rules of contract construction and applied estoppel instead); *cf.* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 470-75 (1987) (estoppel precludes defendants from asserting statute of frauds and parol evidence rule).

59 *See* EWART, *supra* note 52, at 6 (quoting Burkinshaw v. Nicolls, 3 App. Cas. 1026 (1878)); *cf.* PROSSER, *supra* note 54, § 105, at 734 (estoppel creates duty to speak under penalty of losing right to assert truth later).

60 Pickard v. Sears, 112 Eng. Rep. 179, 181 (1837).

61 *Id.* The court pointed out that plaintiff's "title having been once established, the property could only be divested by gift or sale." *Id.*

62 *Id.* The court stated that the same result should obtain whether or not plaintiff actually owned the property. *Id.* Such departures from traditional contract law initially repulsed courts. *See* EWART, *supra* note 52, at 5 (noting that early courts were disinclined to prevent assertion of true facts); POMEROY, *supra* note 52, § 802, at 182 n.6 (noting "old maxim that legal estoppels are odious"). It is well established, however, that when strict application of the law would result in substantial hardship and injustice, courts have the power to advance individual equity. *See* EDGAR BODENHEIMER, JURISPRUDENCE 312 (1967) (maxim that strict application of law can cause hardship recognized since Cicero). Today even tort law incorporates estoppel principles. *See* PROSSER, *supra* note 54, § 105, at 733 (discussing torts grounded in estoppel); Atiyah, *supra* note 55, at 377 (tort law recognizes causes of action for deceit and negligent misrepresentation). For a discussion of the bases of tort liability for misrepresentation, see

result because plaintiff's acts injured those who relied on them.[63] By applying equitable estoppel, courts hope to promote equity and justice and to achieve conscionable results.[64]

Estoppel promotes equity and justice in many ways. It prevents people from taking dishonest advantage of their strict legal rights.[65] Estoppel also furthers the equitable principle that as between two innocent people, the one whose actions cause an injury should suffer from the injury.[66] Allowing people to benefit from their misrepresentations would contravene this principle.[67] Further, people need to rely on others' conduct and representations in their daily business dealings.[68] Applying estoppel

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generally George B. Weisiger, *Bases of Liability for Misrepresentation*, 24 ILL. L. REV. 866 (1930).

63 112 Eng. Rep. at 181. The court stated, "Much doubt has been entertained whether these acts of the plaintiff, however culpable and injurious to the defendant, and however much they might be evidence of the goods not being his, . . . furnished any real proof that they were not his." *Id.*

64 EWART, *supra* note 52, at 7 (quoting Horn v. Cole, 51 N.H. 287, 290 (1868)). Estoppel also gives courts "analytical flexibility" that they do not have when adjudicating traditional contract actions. Case Note, *Public Employee Pension Benefits: A Promissory Estoppel Approach*, 10 WM. MITCHELL L. REV. 287, 292 (1984) (citing Christensen v. Minneapolis Mun. Employees' Retirement Bd., 331 N.W.2d 740, 748 (Minn. 1983)).

65 POMEROY, *supra* note 52, § 802, at 181 n.6 (quoting *Horn*, 51 N.H. at 289); *see* PROSSER, *supra* note 54, § 105, at 733 (estoppel prevents estopped person from taking inequitable advantage of another's situation when estopped person's conduct created situation). For some early courts, estoppel involved fraud. POMEROY, *supra* note 52, § 803. The estopped person may not have intended to deceive anyone through her representations. *Id.* § 803, at 186-87. Repudiating the representations by asserting the original facts, however, was fraudulent. *Id.* § 803, at 185-86; *cf.* Pitou, *supra* note 52, at 611 (promissory estoppel designed to prevent repudiation (quoting James King & Son, Inc. v. DeSantis Constr. No. 2 Corp., 413 N.Y.S.2d 78, 81 (N.Y. App. Div. 1977))). For other early courts, the test for estoppel was whether the estopped person's conduct was "unconscionable." *See* Metzger, *supra* note 52, at 1409 n.212.

66 POMEROY, *supra* note 52, § 803, at 187; *cf.* CAL. CIV. CODE § 3543 (West 1985) (setting forth maxim of jurisprudence: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."). Estoppel also furthers the equitable principle that, to receive equity, a person must do equity. GEORGE L. CLARK, EQUITY § 29 (1954); Robert A. Brazener, Annotation, *Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R.3d 1037, 1040-41 (1974).

67 POMEROY, *supra* note 52, § 803, at 187-88.

68 EWART, *supra* note 52, at 7 (quoting 2 SMITH'S LEADING CASES 840 (10th ed. n.d.)); *see* Scheuer v. Central States Pension Fund, 358 F. Supp.

encourages people to act and speak with care when others are likely to rely on their representations.[69]

These equitable considerations persuaded pre-ERISA courts to apply estoppel when employers refused to pay employees the benefits they promised, and when employees relied on misrepresentations about benefits.[70] Unlike most post-ERISA courts, pre-ERISA courts realized that the employee benefit plan promise should not be immune from equitable principles that govern other promises.[71] To understand estoppel's role in pre- and post-ERISA benefit cases, one must understand some fundamentals of the private employee benefit system. Important fundamentals include the nature of the plan promise,[72] the types of plans,[73] and the mechanics of suing plans.[74]

1332, 1338 (E.D. Wis. 1973) (noting "rising ethical standards in business relations which the estoppel doctrine is designed to enforce"); *cf.* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 148 (1921) (social interest in "security of transactions in a commercial and industrial society" affected development of American jurisprudence).

69 *See* POMEROY, *supra* note 52, § 802, at 180.

70 *See, e.g.*, Van Hook v. Southern Cal. Waiters Alliance, Local 17, 323 P.2d 212 (Cal. Ct. App. 1958) (employee benefit promise, otherwise unenforceable, enforceable under promissory estoppel); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959) (same); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b, illus. 4 (1981) (employer promise to pay retirement benefits binding under promissory estoppel); Barnett & Becker, *supra* note 58, at 469 (courts enforce benefit promises under promissory estoppel when they find no consideration); Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 99 n.14 (1955) [hereafter Comment, *Consideration*] (promissory estoppel of "major importance" in benefit cases with no legal consideration); W.E. Shipley, Annotation, *Rights and Liabilities as Between Employer and Employee with Respect to General Pension or Retirement Plan*, 42 A.L.R.2d 461, 470-71 (1955) (promissory estoppel applied in benefit cases that did not create contractual obligation). *But see* Robert D. Wieck, Comment, *Pension Reform Act of 1974: An Alternative to Contractual Theories of Preserving Retirement Benefits*, 14 J. FAM. L. 97, 112-13 (1975) (promissory estoppel played "insignificant" role in pre-ERISA benefit cases).

71 *See* Scheuer v. Central States Pension Fund, 358 F. Supp. 1332, 1338 (E.D. Wis. 1975) ("sui generis nature" of plan promise should not prevent courts from applying estoppel).

72 *See infra* notes 75-95 and accompanying text.

73 *See infra* notes 96-108 and accompanying text.

74 *See infra* notes 109-18 and accompanying text.

B. Estoppel Claims in Context: The Private Employee Benefit System

1. The Employee Benefit Plan Promise

An employee benefit plan is an employer's promise to pay its employees monetary benefits in the future.[75] The plan promise is usually conditional, and employees are not eligible to receive benefits until they satisfy the conditions.[76] Typical conditions include attaining a specified length of service and reaching a certain age.[77] For example, in 1875 the American Express Company created an employee benefit plan by promising to pay benefits to employees who were sixty years old, had worked for the company for twenty years, and were permanently disabled.[78] Employers such as the American Express Company typically set forth all the plan's conditions in a written document.[79] Indeed, ERISA requires plans to be in writing, so that employees can determine the conditions they must fulfill to qualify for benefits.[80]

Employees who have fulfilled the plan's conditions have a "vested" right to receive benefits in the future.[81] "Vesting" denotes the employee's legal right to benefits under the plan's terms,[82] which vested employees retain even if their employment ends.[83] Employees in the process of fulfilling the conditions have

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[75] PERRITT, supra note 2, § 1.7. Under ERISA, the plan's terms are enforceable as any other contract. Joseph J. Hahn, *Federal Remedies for Pension Benefit Losses*, 47 UMKC L. REV. 321, 335 (1979). An employer may decide to establish a plan on its own initiative, or pursuant to a collective bargaining agreement. *See* EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 64 (4th ed. 1990) [hereafter EBRI]. Collectively-bargained plans must comply with § 302 of the LMRA, 29 U.S.C. § 186(c)(5)(B), as well as with ERISA. For further discussion of the LMRA, see *infra* notes 167-99 and accompanying text.

[76] PERRITT, *supra* note 2, at 2-3.

[77] *Id.* at 3; Stuart N. Alperin et al., Note, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 546 n.48 (1975).

[78] WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 27-28 (1976). This was the first private employee benefit plan in the United States. *Id.* at 27.

[79] *See* Loretta R. Richard, Note, *ERISA: Enforcing Oral Promises to Pay Employee Benefits*, 28 B.C. L. REV. 723, 735-36 (1987).

[80] ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1); *see infra* notes 285-91 and accompanying text.

[81] COLEMAN, *supra* note 14, at 31.

[82] AEI, WILLIAMS-JAVITS PROPOSAL, *supra* note 13, at 7.

[83] *Id.* at 8; *see also* COLEMAN, *supra* note 14, at 31; Alperin et al., Note, *supra* note 77, at 546 n.47.

no vested rights.[84] Vesting is important in estoppel cases because the employee-plaintiffs usually are not vested; they argue, however, that the plan is estopped from so asserting.[85]

While vesting denotes the employee's right to benefits, "funding" denotes the assets the plan will use to pay the benefits.[86] Employee benefit plans are either "funded" or "unfunded,"[87] and most funded plans are funded through trusts.[88] The employer funds the plan by regularly contributing money to the trust, and the plan pays employee benefits out of trust assets as the benefits come due.[89] The plan would also pay other plan expenses, such as estoppel damages awards, out of trust assets.[90]

Instead of contributing money to a trust, some employers fund their plans by purchasing insurance to cover the employees' benefit claims.[91] The insurance company then pays the claims as they

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84 *See* AEI, WILLIAMS-JAVITS PROPOSAL, *supra* note 13, at 13; Alperin et al., Note, *supra* note 77, at 546-47.

85 *See supra* text accompanying notes 1-8.

86 AEI, WILLIAMS-JAVITS PROPOSAL, *supra* note 13, at 25; COLEMAN, *supra* note 14, at 44. Plans are "fully funded" when they have enough assets to pay all plan liabilities. Plans that do not are "underfunded." *Id.*

87 EDWIN W. PATTERSON, LEGAL PROTECTION OF PRIVATE PENSION EXPECTATIONS at xiv (1960)

88 *Id.* Before ERISA, some employers kept an account for the plan in their books and credited amounts to it, but this did not create a trust. PATTERSON, *supra* note 87, at 55. Most plan assets are invested in securities. In 1990, employee benefit plans had assets worth $2 trillion and owned almost 25% of all equity and 50% of all debt security. JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 1 (1990). Because 25% of all American business equity is enough for control, one commentator labels the private employee benefit system "pension fund socialism." *See generally* PETER F. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA (1976). Some commentators argue that wealthy employee benefit plans should invest their assets in a more socially responsible manner. *See generally* LAWRENCE LITVAK, PENSION FUNDS AND ECONOMIC RENEWAL (1981).

89 PATTERSON, *supra* note 87, at xiv. Plans funded entirely by the employer are called noncontributory plans. DENNIS E. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS 38 (1979). When employees also contribute to the plan it is a contributory plan. *Id.* Employees are always 100% vested in their own contributions. Because employees would not need to bring estoppel claims to recover their own contributions, this Comment does not address the contributory portion of any plan.

90 *See* PERRITT, *supra* note 2, at 372.

91 *Id.* at 14; *see* NORMAN B. TURE, THE FUTURE OF PRIVATE PENSION PLANS 26 (1976). With a plan funded through insurance, the insurance company performs the same function as the trustee in trust funded plans. PERRITT,

come due.[92] By contrast, some employers choose not to fund their plans. Employers with unfunded, "pay-as-you-go" plans pay benefits out of their operating capital.[93] Like the trust, the insurance company or the employer pays damages awards against the plan, including estoppel damages awards.[94] Whether the employer will fund the plan often hinges on the plan's type.[95]

2. Types of Employee Benefit Plans

Under ERISA, employers can create two basic types of employee benefit plans: employee pension benefit plans[96] and employee welfare benefit plans.[97] Pension plans provide employ-

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supra note 2, § 1.8. Paying premiums is the equivalent of contributing money to a trust. *Id.*

92 *See* PERRITT, *supra* note 2, at 15.

93 GREENOUGH & KING, *supra* note 78, at 33, 59. Participants in unfunded plans are general creditors of the employer. Susan G. Curtis, *Introduction to ERISA*, *in* LABOR & ERISA LAW IN AND OUT OF THE BANKRUPTCY COURTS 3, 8 (Harvey R. Miller & Robert C. Ordin eds., 1984); *see* LOGUE, *supra* note 89, at 23 (participants have "call options" against employer). When a plan is funded, it is much more likely to meet all benefit obligations than when it is unfunded. PATTERSON, *supra* note 87, at 55-56. *But cf.* GREENOUGH & KING, *supra* note 78, at 33 (even funded plans often could not meet obligations to pay benefits). Funding is so important that in 1950, 90,000 Chrysler Motor Company employees went on strike for 104 days to ensure that their pension plan would be funded and not pay-as-you-go. *Id.* at 46.

94 *See* PERRITT, *supra* note 2, at 15; *see also* HCA Health Servs. of the Midwest, Inc., v. Rosner, 566 N.E.2d 396 (Ill. App. Ct. 1990) (finding estoppel may apply against plan funded through insurance).

95 For example, ERISA requires that most pension plans set money aside to pay their obligations. ERISA §§ 301-306, 29 U.S.C. §§ 1081-1085a. By contrast, ERISA's minimum funding requirements do not apply to welfare plans. ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1).

96 Under ERISA, an employee pension benefit plan is:

> [A]ny plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.

ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

97 Under ERISA, an employee welfare benefit plan is:

> [A]ny plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or

ees with income after they retire,[98] while welfare plans provide employees with sickness, accident, death, and other benefits that promote the employees' well-being.[99] Whereas welfare plans are often funded through insurance,[100] pension plans are almost always funded through a trust.[101] When a single employer establishes a pension plan, that employer is responsible for the plan's funding.[102] By contrast, when several employers decide to establish a single plan for all their employees, all the employers contribute to the plan.[103] Such plans are called multiple employer plans.[104] Multiple employer plans that the employers establish pursuant to a collective bargaining agreement, rather than on their unilateral initiative, are called multiemployer plans.[105]

Many of ERISA's provisions apply differently to different types of plans.[106] ERISA's vesting provisions, for example, apply less strictly to multiemployer plans than to single or multiple employer plans.[107] The rules governing civil suits for payment of benefits, however, apply uniformly to all employee benefit plans.[108] These rules govern employees' estoppel claims against their plans.

3. Suits for Payment of Benefits Against Employee Benefit Plans

Under ERISA, employee benefit plans are distinct legal entities

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> their beneficiaries . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

ERISA § 3(1), 29 U.S.C. § 1002(1).

98 ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

99 ERISA § 3(1), 29 U.S.C. § 1002(1).

100 *See* LANGBEIN & WOLK, *supra* note 88, at 413.

101 Indeed, ERISA requires that most pension plans set money aside to pay their obligations. *See* ERISA §§ 301-306, 29 U.S.C. §§ 1081-1085a.

102 *See* ERISA § 3(41), 29 U.S.C. § 1002(41).

103 *See* LANGBEIN & WOLK, *supra* note 88, at 48.

104 *Id.*

105 ERISA § 3(37)(A), 29 U.S.C. § 1002(37)(A).

106 *See, e.g.*, ERISA §§ 4201-4225, 29 U.S.C. §§ 1381-1405 (special termination rules for multiemployer plans).

107 *See* ERISA § 203, 29 U.S.C. § 1053; *see also infra* note 217.

108 *See* ERISA § 502(a), 29 U.S.C. § 1132(a).

that can sue and be sued.[109] Before ERISA, however, plans had no distinct legal identity unless they were trusts.[110] Pre-ERISA plaintiffs who wished to sue an unfunded plan for payment of benefits generally sued the employer.[111] By contrast, plaintiffs in ERISA suits for payment of benefits may sue the plan itself, as well as the employer, plan trustees, and plan administrators.[112] Plans funded through trusts pay damages awards out of trust assets.[113] If the plan is funded through insurance, plaintiffs may sue the plan through the insurer,[114] and the insurance company pays any damages award.[115] If the plan is unfunded, plaintiffs may sue the plan through the employer, and the employer pays the damages award.[116]

This Comment addresses estoppel claims against the plan itself, under which the plan, through the trust, the insurance company, or the employer, would pay any damages award. Such claims typically arise when unvested employees seek to estop the plan from asserting that they are unvested.[117] To understand why the courts should apply estoppel against ERISA plans under these circumstances, one first must understand equitable estoppel's vital role in pre-ERISA benefit cases.[118]

II. Estoppel Claims Before ERISA

Pre-ERISA courts applied estoppel in benefit cases in two ways. First, the courts applied promissory estoppel[119] to enforce the

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109 ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1); *see* James S. Ray & Samuel W. Halpern, *The Common Law of ERISA*, Trial, June 1985, at 20, 22.

110 *See* Patterson, *supra* note 87, at 29.

111 *Id.* The plaintiff's suit sounded in contract. *Id.*

112 Perritt, *supra* note 2, at 372.

113 *See* Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990) (noting that estoppel damages awards would deplete funded plan's assets).

114 Perritt, *supra* note 2, at 15 (insurance policy defines participants' direct rights against insurance company); *see also* Patterson, *supra* note 87, at 29 (employee has right in contract against insurer who made insurance contract for employee's benefit).

115 *See* Perritt, *supra* note 2, at 15.

116 *See* Curtis, *supra* note 93, at 8.

117 *See supra* text accompanying notes 1-8.

118 *See infra* notes 119-66 and accompanying text.

119 For a discussion of the difference between promissory and equitable estoppel, see *supra* note 52.

plan promise itself.[120] Indeed, promissory estoppel was often the only theory employees could successfully assert to enforce the plan promise.[121] Second, the courts applied equitable estoppel to enforce misrepresentations about employees' benefits under existing plans.[122] Estoppel's role in pre-ERISA benefit cases varied depending on whether the court viewed the employee benefit plan as a gratuity[123] or a unilateral contract,[124] and whether the Labor Management Relations Act of 1947 (LMRA) governed the plan.[125]

A. Estoppel Under the Gratuity Theory

The earliest pre-ERISA courts would not enforce employers' benefit plan promises as contracts because they considered them gifts.[126] Under the gratuity theory, employees had no contractual rights in the benefits and no contractual basis to compel their payment.[127] Courts readily enforced express disclaimers of liability

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120 *See, e.g.*, Hunter v. Sparling, 197 P.2d 807 (Cal. Ct. App. 1948); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959).

121 *See infra* notes 126-46 and accompanying text.

122 *See, e.g.*, Sanders v. United Distribs., Inc., 405 So. 2d 536 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982).

123 *See infra* notes 126-46 and accompanying text.

124 *See infra* notes 147-66 and accompanying text.

125 29 U.S.C. §§ 149-197; *see infra* notes 167-99 and accompanying text.

126 Robert J. Hickey, *The Establishment and Administration of Pension Plans in the Labor Relations Process*, 18 VAND. L. REV. 151, 153 (1964); Timothy J. Heinsz, Note, *A Reappraisal of the Private Pension System*, 57 CORNELL L. REV. 278, 282 (1972); *see, e.g.*, Russell v. Johns-Manville Co., 200 P. 688 (Cal. Ct. App. 1921); Hughes v. Encyclopaedia Britannica, 117 N.E.2d 880 (Ill. App. Ct. 1954); McNevin v. Solvay Process Co., 53 N.Y.S. 98 (N.Y. App. Div. 1898), *aff'd*, 60 N.E. 1115 (N.Y. 1901) (per curiam).

Before ERISA, plaintiffs brought benefit cases in both state and federal court. Pre-ERISA federal courts based their jurisdiction in benefit cases on diversity of citizenship and applied state common law. *See* U.S. CONST. art. III, § 2, cl. 1 (empowering Congress to grant diversity jurisdiction to federal courts); 28 U.S.C. § 1332(a)(1) (granting diversity jurisdiction to federal courts). Thus, Part II of this Comment discusses state common law of employee benefit plans.

127 Heinsz, Note, *supra* note 126, at 282. Under the law of gift, the donee-employee had no contractual rights in the benefits until the donor-employer completed the gift by paying the benefit. Wieck, Comment, *supra* note 70, at 102; *see* Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 17 (1979); Comment, *Consideration*, *supra* note 70, at 103-04. Indeed, early courts were more concerned with the employer's legal ability to make such gifts than with the employee's legal ability to enforce them. Denis R. Sheil,

under which an employer could modify or terminate the benefit plan at will.[128] These courts, however, applied promissory estop-

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Determining the Rights of Pension Claimants: Before and After ERISA, 30 LABOR L.J. 88, 88 (1979).

[128] *See, e.g.*, Kari v. General Motors Corp., 261 N.W.2d 222 (Mich. Ct. App. 1977) (holding that when employer's description of severance pay plan included disclaimers of contractual intent, employer did not have contractual duty to pay separation allowance), *rev'd on other grounds*, 282 N.W.2d 925 (Mich. 1978); Connors v. Howard Stores Corp., 257 N.Y.S.2d 608 (N.Y. App. Div. 1965); *see also* I. David Rosenstein, Note, *Private Enforcement of Employees Retirement Income Security Act*, 47 U. CIN. L. REV. 272, 273 (1978); Comment, *Consideration*, *supra* note 70, at 97; Shipley, Annotation, *supra* note 70, at 464-66 (citing cases).

A typical disclaimer read:

> The allowances are voluntary gifts from the company and constitute no contract and confer no legal rights upon any employee. The continuance of retirement allowance depends upon the earnings of the company and the allowances may at any time be reduced, suspended, or discontinued on that, or any other account, at the option of the Board of Directors.

GREENOUGH & KING, *supra* note 78, at 34 (citing LUTHER CONANT, A CRITICAL ANALYSIS OF INDUSTRIAL PENSION SYSTEMS 50-51 (1922)).

Such a disclaimer was effective even after the employee retired, Heinsz, Note, *supra* note 126, at 282 n.22, and even if the employer acted capriciously or in bad faith. *See, e.g.*, MacCabe v. Consolidated Edison Co., 30 N.Y.S.2d 445 (N.Y. Civ. Ct. 1941) (employee remediless in face of disclaimer even if plan trustees act capriciously or in bad faith). Later courts imposed a duty on employers to administer their plans in good faith, however, and employees could recover from employers who breached this duty. *See* Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944); Hickey, *supra* note 126, at 154. These courts construed disclaimer clauses as allowing the employer to modify or terminate the plan only in good faith and under necessity. *Id.*; Comment, *Consideration*, *supra* note 70, at 98.

Still later courts allowed employers to terminate their plans only to the extent the plans were unfunded. *See, e.g.*, Hughes v. Encyclopaedia Britannica, Inc., 117 N.E.2d 880 (Ill. App. Ct. 1954). Employers could stop making gratuitous contributions to the plan, but could not take back money they had already contributed. In *Hughes*, for example, the employer funded the plan by purchasing annuities. *Id.* at 880. The court determined that under the plan's termination clause, the employer could stop paying premiums, but the premiums the employer had already paid were irrevocable. *Id.* at 882.

Subsequent disclaimer clauses reflected the *Hughes* rule. *See* PATTERSON, *supra* note 87, at 65. One 1956 disclaimer clause reserved the employer's right to terminate or modify the plan "provided such action shall not impair either annuities, or other benefits, or any rights accrued . . . prior to the effective date of such termination [or] modification . . . ." *Id.* Some

pel[129] against employers whose employees detrimentally relied

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employers went so far as to specifically disclaim liability for insurance benefits already purchased and funds already paid to the plan trustee. *Id.* at 66.

After the Revenue Act of 1921, ch. 136, 42 Stat. 227 (1921), holdings similar to *Hughes* were somewhat effective in securing employees the benefits their employers promised. *Cf.* Comment, *Consideration*, *supra* note 70, at 106 (viewing trusts as irrevocable as *Hughes* court did alleviated gratuity theory problems of at-will plan termination and modification). Employers could deduct contributions to employee benefit trusts for income tax purposes beginning in the 1920s. TURE, *supra* note 91, at 34. After 1925, employee benefit trusts were not federally taxed, and employees were not taxed on benefits until they actually received them. GREENOUGH & KING, *supra* note 78, at 59; *see* 26 U.S.C. § 165 (1934) (current version as amended at I.R.C. § 165 (1988)). This special tax treatment encouraged employers to fund their plans with a trust instead of maintaining an unfunded plan. PATTERSON, *supra* note 87, at 87. In creating a trust, however, the employer made payments that under the *Hughes* rule it could not revoke. All money paid into the trust would eventually go to employees. *See* Comment, *Consideration*, *supra* note 70, at 106 (employees' rights vest irrevocably in tax-qualified trusts to extent of contributions already made).

Under the 1938 amendments to the Internal Revenue Code, only *irrevocable* trusts qualified for special tax treatment. *See* Revenue Act of 1938, ch. 289, 52 Stat. 447, 518 (1938) (current version as amended at I.R.C. § 401(a) (1988)) (requirements for employee benefit trusts to qualify for special tax treatment); ALICIA H. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 32 (1982); Comment, *Consideration*, *supra* note 70, at 100. This provision encouraged employers not only to create trusts but to make them irrevocable. PATTERSON, *supra* note 87, at 87; *see* Comment, *Consideration*, *supra* note 70, at 105 (noting popularity of irrevocable funded plans that receive special tax treatment). All money the employer paid into an irrevocable trust would eventually go to the employees even if the *Hughes* rule did not exist. *See* Comment, *Consideration*, *supra* note 70, at 105 (employer cannot revoke rights of retired employees under tax-qualified irrevocable trust even though plan as whole is gratuity). Finally, the high tax rates enacted in 1943 encouraged employers to pay as much money into the irrevocable trust as possible, all of which would eventually go to employees. *See* MUNNELL, *supra*, at 32; TURE, *supra* note 91, at 34-35.

The Internal Revenue Code thus bolstered the gratuity theory and protected employees' benefits to the extent of the plan trust fund. *See Hughes*, 117 N.E. at 882. So long as the gratuity theory allowed plan termination, however, the tax laws could not prevent employers from making inadequate payments or from discontinuing payments. *See* PATTERSON, *supra* note 87, at 88; Comment, *Consideration*, *supra* note 70, at 106 (even under tax-qualified trust, no legal theory could require employers to continue contributing to plan). The gratuity theory remained viable until the 1950s. LANGBEIN & WOLK, *supra* note 88, at 87.

[129] For a discussion of the difference between promissory and equitable estoppel, see *supra* note 52.

on gratuitous promises to pay benefits.[130]

The leading case in which the court used promissory estoppel to enforce such a gratuitous promise is *Feinberg v. Pfeiffer Co.*[131] In *Feinberg*, plaintiff's employer promised to pay plaintiff a pension of $200 per month after she retired.[132] Several months after plaintiff's retirement, however, the employer stopped paying the pension.[133] The court found no legal consideration to support the employer's promise, so could not enforce it as a contract.[134] Because plaintiff retired in reliance on the promise, however, promissory estoppel obligated the employer to continue paying plaintiff's pension.[135]

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130 *See* Van Hook v. Southern Cal. Waiters Alliance, Local 17, 323 P.2d 212 (Cal. Ct. App. 1958); West v. Hunt Foods, Inc., 255 P.2d 978 (Cal. Ct. App. 1951) (alternative holding); Hunter v. Sparling, 197 P.2d 807 (Cal. Ct. App. 1948) (alternative holding); Hessler, Inc. v. Farrell, 226 A.2d 708 (Del. 1967) (alternative holding); Wickstrom v. Vern E. Alden Co., 240 N.E.2d 401 (Ill. Ct. App. 1968); Katz v. Danny Dare, Inc., 610 S.W.2d 121 (Mo. Ct. App. 1980); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959); Abelson v. Genesco, Inc., 396 N.Y.S.2d 394 (N.Y. App. Div. 1977); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b, illus. 4 (1981) (employer promise to pay retirement benefits binding under promissory estoppel); Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents* (pts. 1 & 2), 50 MICH. L. REV. 639, 873, 883-86 (1952) (noting recent (1952) tendency to enforce bonus and pension promises against employer under promissory estoppel); Hickey, *supra* note 126, at 154 (noting courts apply promissory estoppel to mitigate gratuity theory's harshness); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 915 n.59 (1987) (noting courts regularly apply promissory estoppel against employers in benefit cases because employers enjoy superior bargaining power); Comment, *Consideration*, *supra* note 70, at 99 n.14 (promissory estoppel of "major importance" in benefit cases with no legal consideration); Shipley, Annotation, *supra* note 70, at 470-71 (promissory estoppel applied in benefit cases not creating contractual obligation). *But see* Kari v. General Motors Corp., 261 N.W.2d 222 (Mich. Ct. App. 1977) (promissory estoppel inapplicable in face of disclaimer, which made reliance on promise to pay benefits unreasonable), *rev'd on other grounds*, 282 N.W.2d 925 (Mich. 1978); Wieck, Comment, *supra* note 70, at 112-13 (promissory estoppel played "insignificant" role in pre-ERISA benefit cases).

131 322 S.W.2d 163 (Mo. Ct. App. 1959).

132 *Id.* at 164-65. The plaintiff in *Feinberg* had worked for the employer for 37 years. *Id.*

133 *Id.* at 165.

134 *Id.* at 167; *see also* Katz v. Danny Dare, Inc., 610 S.W.2d 121, 125 (Mo. Ct. App. 1980) (stating that plaintiff in *Feinberg* could not have proven consideration).

135 322 S.W.2d at 168. In a case with nearly identical facts, the court

While the *Feinberg* court used estoppel to enforce an individual benefit promise, courts also used estoppel to enforce plan promises.[136] In *Hunter v. Sparling*,[137] for example, the court applied promissory estoppel against an employer whose employee benefit plan covered all its employees.[138] Under the plan, employees with ten years of service would receive a lump sum payment when they retired.[139] Because the plaintiff relied on the plan promise by rejecting other offers of employment,[140] the court determined that the employer was estopped from refusing to pay.[141]

Under both *Feinberg* and *Hunter*, promissory estoppel applied to enforce employee benefit promises that, under the gratuity theory, were unenforceable.[142] Indeed, promissory estoppel was essentially the only theory of recovery employees could successfully assert to compel employers to pay benefits the courts viewed as gifts.[143] Once courts began enforcing employee benefit plans

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pointed out that although the plaintiff in neither that case nor in *Feinberg* could show that the employer had a legal obligation to fulfill the promise, it was enforceable under promissory estoppel. *See Katz*, 610 S.W.2d at 125.

136 *See, e.g.*, Hunter v. Sparling, 197 P.2d 807, 815-16 (Cal. Ct. App. 1948). Unlike *Feinberg* and *Katz*, *Hunter* involved an employee benefit plan, not a promise to a single employee. 197 P.2d at 811. Under *Hunter*, promissory estoppel applied to enforce an employee benefit plan in favor of employees who detrimentally relied on the plan promise. *Id.* at 815-16.

137 197 P.2d 807.

138 *Id.* at 811. The court applied promissory estoppel as an alternative theory of recovery. *Id.* at 815-16. The court first found the plan promise contractually enforceable because the employee's continued employment constituted consideration. *Id.* at 813-14. The court stated, however, that even if the promise to pay the pension was gratuitous, it was enforceable under the doctrine of promissory estoppel. *Id.* at 815-16. *But see* Note, *Promissory Estoppel in California*, 5 STAN. L. REV. 783, 789 (1953) (stating that California cases including *Hunter* are weak authority for proposition that promissory estoppel applies in benefit cases because court found promises contractually enforceable).

139 *Hunter*, 197 P.2d at 815. The plaintiff had 49 years of service. *Id.*

140 *Id.* Under the plan, if plaintiff had quit his job to take another offer, he would have forfeited his right to receive a pension. *Id.*

141 *Id.* The court determined that promissory rather than equitable estoppel applied. *Id.* at 815-16.

142 *See id.*; *Feinberg*, 322 S.W.2d at 168.

143 Any hesitancy of early courts to apply promissory estoppel in benefit cases may have stemmed from wariness of the doctrine itself. *Cf.* 1A CORBIN, *supra* note 56, § 204 (disparaging use of phrase "promissory estoppel"). Courts could not apply equitable estoppel in benefit cases because the cases typically involved promises to pay benefits, not

as unilateral contracts,[144] however, promissory estoppel became

representations of existing fact. *See, e.g.*, Sessions v. Southern Cal. Edison Co., 118 P.2d 935, 939 (Cal. Ct. App. 1941) (discussing difference between equitable and promissory estoppel and finding equitable estoppel inapplicable because case involved promise). But in the early twentieth century, when the gratuity theory was at its height, the doctrine of promissory estoppel was in its infancy. *See* Boyer, *supra* note 130, at 640. Professor Williston did not coin the phrase until 1920, *id.* at 640 n.4, and the doctrine did not appear in the Restatement until 1932. *See* RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932). Some courts may have hesitated to apply promissory estoppel because of its immaturity as a theory of recovery, not because they felt it should not apply in benefit cases. *See* PATTERSON, *supra* note 87, at 75-76 (noting promissory estoppel as possible ground for enforcing plan promise, but noting promissory estoppel is recognized substitute for consideration in liberal states, such as California, and severely restricted in other states, such as New York). Many early employee benefit cases discuss consideration issues in great detail, but ignore the unique policy issues benefit cases raised. *See, e.g.*, *Feinberg*, 322 S.W.2d 163; *see also* Boyer, *supra* note 130, at 887 (noting that employee benefit cases raise complex consideration issues); Comment, *Consideration*, *supra* note 70, at 96-97 (stating that courts have analytical difficulty with benefit cases, in which central issue is consideration). Indeed, early benefit cases played a significant role in the development of consideration and theories such as promissory estoppel, which courts accept today without question. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90 reporter's note, cmt. b (1981) (citing *Feinberg* as source of promissory estoppel illustration); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 103 (4th ed. 1988) (using *Feinberg* as principal case on promissory estoppel in major contracts casebook).

[144] *See, e.g.*, Sessions v. Southern Cal. Edison Co., 118 P.2d 935 (Cal. Ct. App. 1941); Bird v. Connecticut Power Co., 133 A.2d 894 (Conn. 1957); Vocke v. Third Nat'l Bank & Trust Co., 267 N.E.2d 606 (Ohio Mun. Ct. 1971); *see also* Hickey, *supra* note 126, at 154; Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 917 [hereafter Note, *Retired Worker*]. As one court noted, "To say that [a pension plan] constituted merely a nebulous inducement, unsupported by an intent to be bound by the provisions mentioned, is to charge the employer with the grossest fraud." Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 443 (Ohio Ct. App. 1934); *see also* Psutka v. Michigan Alkali Co., 264 N.W. 395, 386 (Mich. 1936) ("To disregard the positive promises . . . is to brand the plan as a deceptive gesture of ostensible generosity [and] works a result repugnant to the general purpose of the instrument . . . .").

The tax laws also encouraged the courts to move from the gratuity theory toward the unilateral contract theory. See *supra* note 128 for a discussion of the special tax treatment qualified employee benefit trusts received. In holding an employer bound to pay its pension promises, one court stated:

> [T]he idea that a Pension Trust expressly approved, as was this one, by the Internal Revenue Service as a plan qualified under

less important in suits to enforce the plan promise itself.[145] Equitable estoppel, by contrast, became very important in suits to enforce misrepresentations about benefits.[146]

B. Estoppel Under the Unilateral Contract Theory

Under the unilateral contract theory, courts viewed the employee benefit plan as the employer's offer to pay benefits.[147] Employees accepted the offer by fulfilling the conditions the plan prescribed for payment,[148] or, under some decisions, merely by

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> Section 165, 1939 Code . . . 1954 Code, § 401 . . . is a mere gratuity or charitable enterprise beyond even the barest scrutiny by its sole beneficiaries (the employees) is completely out of keeping with the philosophy and purpose of such plans as the means of paying *additional* compensation to the covered employees in a way to afford substantial and immediate tax advantages to the Employer and substantial tax and monetary advantages to the employees. . . . A pension trust is no will of the wisp.

Ball v. Victor Adding Mach. Co., 236 F.2d 170, 173 (5th Cir. 1956) (emphasis in original) (citations omitted).

[145] *Cf.* Comment, *Consideration*, *supra* note 70, at 99 n.14 (benefit to employer as consideration for promise simpler to prove than detrimental reliance as element of estoppel).

[146] *See, e.g.*, Sessions v. Southern Cal. Edison Co., 118 P.2d 935 (Cal. Ct. App. 1941); Sanders v. United Distribs., Inc., 405 So. 2d 536 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982).

[147] Alperin et al., Note, *supra* note 77, at 630 n.618 (1975).

[148] *See, e.g.*, Sessions v. Southern Cal. Edison Co., 118 P.2d 935 (Cal. Ct. App. 1941); Bird v. Connecticut Power Co., 133 A.2d 894 (Conn. 1957); Vocke v. Third Nat'l Bank & Trust Co., 267 N.E.2d 606 (Ohio Mun. Ct. 1971); *see also* Hickey, *supra* note 126, at 154; Comment, *Consideration*, *supra* note 70, at 100.

At any time before the employee completes acceptance by fulfilling the plan's conditions, the employer can revoke the offer by terminating the plan. *See, e.g.*, *Vocke*, 267 N.E.2d at 613; *see also* Note, *Retired Worker*, *supra* note 144, at 917 & n.39. Once the employees have fulfilled the conditions, however, "the employer may not defeat [their] reasonable expectations of receiving the promised reward." *Bird*, 133 A.2d at 897; *see also* Schofield v. Zion's Coop. Mercantile Inst., 39 P.2d 342, 345 (Utah 1934) (after employee fulfilled all conditions for pension and retired, employer could no longer modify plan without employee's consent because contract was "complete and binding"); *cf.* Hickey, *supra* note 126, at 155 (if employer discharges employee in bad faith, employer still liable to pay benefits). *But see* Note, *Retired Worker*, *supra* note 144, at 917 (employee misconduct may constitute failure of consideration and excuse employer from obligation to pay benefits even to employee with vested rights).

remaining in the employer's service.[149] Other courts found con-

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[149] *See, e.g.*, Chinn v. China Nat'l Aviation Corp., 291 P.2d 91, 92 (Cal. Ct. App. 1955); West v. Hunt Foods, Inc., 225 P.2d 978, 982-83 (Cal. Ct. App. 1951); Mabley & Carew Co. v. Borden, 195 N.E. 697, 698 (Ohio 1935); Dulany Foods, Inc. v. Ayers, 260 S.E.2d 196, 202 (Va. 1979). In *West*, the court stated that if employees with knowledge of the plan remain in the employer's service, they may enforce their right to benefits. 225 P.2d at 982. By continuing in employment, the employees have tendered part performance of their obligations under the unilateral contract. PATTERSON, *supra* note 87, at 75; Wieck, Comment, *supra* note 70, at 106. To become eligible to receive benefits, however, the employee still must fulfill all the plan's conditions. The Restatement of Contracts sets forth the rules governing such unilateral contracts:

> § 45. Option Contract Created by Part Performance or Tender.
>
> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981); *see also id.* cmt. d, illus. 8 (employer who posts notice of bonus to be paid at year's end may not revoke bonus after week-to-week employee reads notice and works for remainder of week).

Closely related to the unilateral contract theory is the deferred wage theory. Hickey, *supra* note 126, at 155. Some courts viewed employer contributions to employee benefit plans as the employees' deferred wages. *See, e.g.*, Inland Steel Co. v. NLRB, 77 NLRB Dec. (CCH) 1 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *cf.* Heinsz, Note, *supra* note 126, at 284 (noting that *Inland Steel* was first case to enunciate deferred wage theory). *But see* PATTERSON, *supra* note 87, at 75 (stating that unilateral contract theory predominated after *Inland Steel*). Applying the deferred wage theory rather than the unilateral contract theory made little practical difference in the decisions. As under the unilateral contract theory, the court found consideration for the promise to pay the deferred wage either in benefits to the employer, or in the employee's continued service. Wieck, Comment, *supra* note 70, at 103. Further, employees who failed to fulfill the conditions would not receive benefits under either theory. Comment, *Consideration*, *supra* note 70, at 99-100. Some commentators, however, urged courts to apply the deferred wage theory because it most accurately reflected economic reality. *See, e.g.*, A. Norman Somers & Louis Schwartz, *Pension and Welfare Plans: Gratuities or Compensation?*, 4 INDUS. & LAB. REL. REV. 77, 83-89 (1950) (arguing employees forego higher compensation for benefits). This argument persuaded Congress, if not the courts. Congress enacted ERISA under the premise that employee benefits are deferred wages. LOGUE, *supra* note 89, at 31, 62.

The final theory of recovery pre-ERISA commentators urged courts to

sideration by reasoning that the plan promise evoked acts or forbearance from the employee-promisee that conferred a benefit on the employer-promisor.[150] Benefits employers received from employees when they created employee benefit plans include less employee turnover[151] and better employer/employee relations.[152] When they could, employees preferred to assert that

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apply in benefit cases is unjust enrichment. Some commentators argued that to receive services without paying promised benefits unjustly enriched the employer, and the employees should recover benefits under *quantum meruit*. *See, e.g.*, Merton Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 HARV. L. REV. 952, 962-81 (1963); Noel A. Levin, *Proposals to Eliminate Inequitable Loss of Pension Benefits*, 15 VILL. L. REV. 527, 560-64 (1970); Heinsz, Note, *supra* note 126, at 285-90. *But see* Note, *Legal Problems of Private Pension Plans*, 70 HARV. L. REV. 490, 496-97 (1957) [hereafter Note, *Private Pension Plans*] (arguing that courts should not allow *quantum meruit* recovery because impossible for employers to controvert evidence that employees worked for employer longer than they otherwise would). Only one court applied *quantum meruit* in a pre-ERISA benefit case. *See* Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Heinsz, Note, *supra* note 126, at 290 & n.61 (noting that *Lucas* was sole *quantum meruit* employee benefit case at least until 1972).

150 *See, e.g.*, Psutka v. Michigan Alkali Co., 264 N.W. 385, 386 (Mich. 1936); Cantor v. Berkshire Life Ins. Co., 171 N.E.2d 518, 522 (Ohio 1960); Note, *Retired Worker*, *supra* note 144, at 917; *see also* McNevin v. Solvay Processing Co., 53 N.Y.S. 98 (N.Y. App. Div. 1898) (Green, J., dissenting) (consideration for plan promise is benefit enuring to employer); LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 52 (1965) (consideration for promise is act, forbearance, or return promise by promisee resulting in benefit to promisor or detriment to promisee). While some employers established employee benefit plans out of humanitarianism or philanthropy, most did so for economic reasons. REPORT OF THE PENNSYLVANIA COMMISSION ON OLD AGE PENSIONS 114 (1919), *quoted in* Somers & Schwartz, *supra* note 149, at 84.

151 Whitley v. Mammoth Life & Accident Ins. Co., 273 S.W.2d 42, 43 (Ky. Ct. App. 1954) (discussing benefits of plan to employer in determining employer could enforce plan trust as third-party beneficiary); Psutka v. Michigan Alkali Corp., 264 N.W. 385, 386 (Mich. 1936). Presumably, employees were less likely to quit because they hoped to qualify for future benefits. *See* PATTERSON, *supra* note 87, at 4; Wieck, Comment, *supra* note 70, at 103 n.15; *see also* Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 442 (Ohio Ct. App. 1934) (plan admonished employees, "It pays to be loyal. A rolling stone gathers no moss!").

152 Somers & Schwartz, *supra* note 149, at 81; *see* Note, *Retired Worker*, *supra* note 144, at 917 (employees have better work attitudes when employer offers benefits). Employee benefit plans benefit employers in many other ways. Offering benefits attracts more competent employees. *Whitley*, 273 S.W.2d at 43; *Psutka*, 264 N.W. at 386; EVERETT T. ALLEN, JR. ET AL., PENSION PLANNING 8 (5th ed. 1984); Wieck, Comment, *supra* note 70, at 103

they conferred a benefit on the employer as consideration for the plan promise, because that was easier to prove than detrimental reliance.[153] Further, courts that recognized the unilateral contract theory and enforced plan promises as contracts had no need

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n.15; Note, *Retired Worker*, *supra* note 144, at 917. These employees then remain with the employer longer, ALLEN ET AL., *supra*, at 8, 11, and those who leave are easier to replace. Note, *Retired Worker*, *supra* note 144, at 917. Employees who receive benefits have better work attitudes and higher morale. ALLEN ET AL., *supra*, at 37; Note, *Retired Worker*, *supra* note 144, at 917; *see* Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 442 (Ohio Ct. App. 1934) (quoting plan, which asked employees to "feel that you are a part of an organization which is doing everything within its power for your success and welfare"). Better attitudes result in greater efficiency and productivity. *See Whitley*, 273 S.W.2d at 43; *Psutka*, 264 N.W. at 386; ALLEN ET AL., *supra*, at 8, 37; Wieck, Comment, *supra* note 70, at 103 n.15; Note, *Retired Worker*, *supra* note 144, at 917. Employees identify more strongly with the employer and its business objectives, ALLEN ET AL., *supra*, at 37, and they are less likely to join unions, *id.* at 11, or go on strike. Comment, *Consideration*, *supra* note 70, at 101 n.18. Further, because employees must remain employed to receive benefits, they have a financial incentive to avoid behavior that would justify the employer in firing them. LOGUE, *supra* note 89, at 26. Thus, employers need not supervise employees as closely. *Id.*

The employer with a pension plan can retire superannuated employees more easily. Somers & Schwartz, *supra* note 149, at 81; *see* ALLEN ET AL., *supra*, at 8 (pension plans allow retirement in a "humanitarian and nondiscriminatory manner"); Comment, *Consideration*, *supra* note 70, at 101 n.18 (pension plans allow retirement "with a minimum of hostility among personnel and throughout the community"). By retiring older workers regularly, the employer keeps promotional channels open. *See* ALLEN ET AL., *supra*, at 8, 23. In theory, by promoting younger workers to retired workers' jobs, the employer can systematically instill new ideas and energy into its operations. Somers & Schwartz, *supra* note 149, at 81. Moreover, the attractiveness of an employer's employee benefit plan affects the employer's image in the industry and the community. ALLEN ET AL., *supra*, at 26. Finally, by creating an employee benefit plan, an employer gains the satisfied feeling of having fulfilled its societal obligation to provide for its workers. *Id.* at 37.

Courts determined early on that these benefits are substantial enough that creating an employee benefit plan is not beyond a corporate employer's power. *See, e.g.*, Gilbert v. Norfolk & W. Ry. Co., 171 S.E.° 814 (W. Va. 1933). *See generally* F. Hodge O'Neal, *Stockholder Attacks on Corporate Pension Systems*, 2 VAND. L. REV. 351 (1949). One commentator goes so far as to argue that when employers create employee benefit plans, they should pass on the economic benefits they gain by raising their employees' wages. *See* LOGUE, *supra* note 89, at 26.

[153] *See* Comment, *Consideration*, *supra* note 70, at 99 n.14 (benefit to employer as consideration for promise simpler to prove than detrimental reliance as element of estoppel).

to invoke promissory estoppel.[154]

While many more employees could enforce the right to benefits under the unilateral contract theory than under the gratuity theory, not all could do so. Enforcing the plan promise only compelled the employer to pay benefits to employees with vested rights under the plan.[155] Neither promissory estoppel nor the unilateral contract theory prevented the employer from terminating the plan,[156] and employees with no vested rights had no contractual basis for compelling payment if the employer did so.[157]

Before ERISA, however, many unvested employees successfully argued that the employer was estopped to deny that they had fulfilled the plan's conditions.[158] In *Sessions v. Southern California Edison Co.*,[159] for example, the employer's assistant manager told plaintiff that he could retire at age fifty-four and receive his pen-

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154 Even courts that found the plan contractually binding, however, often cited promissory estoppel as an alternative ground for enforcing the plan promise. *See, e.g.*, West v. Hunt Foods, Inc., 225 P.2d 978 (Cal. Ct. App. 1951); Hunter v. Sparling, 197 P.2d 807 (Cal. Ct. App. 1948); Hessler, Inc. v. Farrell, 226 A.2d 708 (Del. 1967).

155 *See* PERRITT, *supra* note 2, at 157-58 (terminating plan does not divest vested benefit rights); Note, *Retired Worker*, *supra* note 144, at 917-18 n.39.

156 *See* Helle v. Landmark, Inc., 472 N.E.2d 765, 777 (Ohio Ct. App. 1984) (modifying plan could not defeat vested unilateral contract rights, but could defeat unvested rights); Comment, *Consideration*, *supra* note 70, at 107 (employer may revoke offer at any time before employee fulfills plan's conditions).

157 *See, e.g.*, Cantor v. Berkshire Life Ins. Co., 171 N.E.2d 518 (Ohio 1960). The *Cantor* court noted that only those employees who have fully complied with the plan's conditions have any contractual right to receive benefits. *Id.* at 521 (citing Shipley, Annotation, *supra* note 70, at 467). If the consideration for the promise was fulfilling all the conditions for payment, the employer could successfully assert failure of consideration against the employee who had not fulfilled them. Note, *Retired Worker*, *supra* note 144, at 917 & n.39. If the consideration for the promise was remaining in the employer's service, the employer's duty to pay under the contract remained conditional until the employees fulfilled all the plan's conditions. *See, e.g.*, Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944). In *Menke*, the court found the plan promise binding on the employer. *Id.* at 791. The plan's years of service requirement, however, conditioned the employer's duty to pay benefits. *Id.* at 791-92. Because the plaintiff had not fulfilled the requirement, the employer had no present duty to pay. *Id.*

158 *See, e.g.*, Scheuer v. Central States Pension Fund, 358 F. Supp. 1332, 1338 (E.D. Wis. 1973); Sessions v. Southern Cal. Edison Co., 118 P.2d 935 (Cal. Ct. App. 1941); Sanders v. United Distribs., Inc., 405 So. 2d 536 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982).

159 118 P.2d 935 (Cal. Ct. App. 1941).

sion.[160] The pension plan provided that employees must work until age sixty to receive a pension,[161] but, the court determined, the employer represented that it would forego that condition.[162] Because plaintiff relied on the representation by retiring six years early, the employer was estopped from asserting that plaintiff was ineligible for a pension under the plan's terms.[163]

No policy considerations prevented the *Sessions* court from applying estoppel to enforce the employer's misrepresentation about plaintiff's eligibility for benefits.[164] Nor did any federal statute govern the *Sessions* pension plan.[165] Estoppel remained an important theory of recovery in cases similar to *Sessions* until Congress intervened by regulating the private employee benefit system.[166]

C. *Estoppel Under the Labor Management Relations Act of 1947*

The federal courts did not specifically disallow estoppel recovery in employee benefit cases until after Congress enacted the Labor Management Relations Act of 1947 (LMRA).[167] The

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160 *Id.* at 938.

161 *Id.*

162 *Id.* at 939.

163 *Id.* at 939-40. The court determined that promissory rather than equitable estoppel applied. *Id.* at 939.

164 *See generally* 118 P.2d 935.

165 *See generally id.*

166 *See* Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-197; ERISA, 29 U.S.C. §§ 1001-1461.

167 29 U.S.C. §§ 141-197; *see, e.g.*, Aitken v. IP & GCU—Employer Retirement Fund, 604 F.2d 1261, 1266-68 (9th Cir. 1979) (holding that estoppel recovery is inconsistent with LMRA); Reiherzer v. Shannon, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978) (dictum) (noting that majority of courts declines to apply estoppel because inconsistent with LMRA's writing requirement); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1108-09 (9th Cir. 1976) (equitable estoppel would contravene LMRA); Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (dictum) (stating that estoppel recovery would jeopardize LMRA plan's "actuarial soundness"); Moglia v. Geoghegan, 403 F.2d 110, 117 (2d Cir. 1968) (noting that estoppel recovery is inconsistent with LMRA), *cert. denied*, 394 U.S. 919 (1969); Oates v. Teamsters Affiliates Pension Plan, 482 F. Supp. 481, 487 (D.D.C. 1979) (same). *But see* Rosen v. Hotel & Restaurant Employees & Bartenders Union, 637 F.2d 592, 598 (3d Cir. 1981) (applying estoppel against LMRA plan); Hodgins v. Central States S.E. & S.W. Areas Pension Fund, 624 F.2d 760, 763-65 (6th Cir. 1980) (Jones, J., dissenting) (same).

After Congress enacted the LMRA, federal courts had federal question

LMRA governs collective bargaining and imposes a duty on employers to bargain with employee representatives over wages, hours, and other conditions of employment.[168] In 1949, the Seventh Circuit ruled that employers must bargain with employees over employee benefit plan terms because they are conditions of employment.[169] Under the LMRA, collectively-bargained employee benefit plans must be in writing.[170] Such plans must also hold their assets in trust,[171] and plan trustees must use plan assets solely for the employees' benefit.[172] The courts that disal-

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jurisdiction if the case involved a collectively-bargained employee benefit plan. *See* 29 U.S.C. § 186(e). The LMRA preempted state employee benefit law as it applied to collectively-bargained plans. PERRITT, *supra* note 2, at 72. The federal courts, however, developed federal common law of collective bargaining to supplement the LMRA, which state and federal courts applied in cases involving collectively-bargained employee benefit plans. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). In 1974, ERISA expressly granted federal and state courts concurrent jurisdiction to hear most plan participants' claims. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Because ERISA expressly preempts all state laws relating to employee benefit plans, however, both state and federal courts apply federal law in ERISA cases. *See* ERISA § 514(a), 29 U.S.C. § 1144(a).

168 *See* 29 U.S.C. § 158(a)(5) (stating that employer refusing to bargain collectively with employees is guilty of unfair labor practice); 29 U.S.C. § 158(b)(3) (stating that labor organization refusing to bargain collectively with employer is guilty of unfair labor practice); 29 U.S.C. § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .").

169 *See* Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

170 29 U.S.C. § 186(c)(5)(B). Congress enacted the LMRA's writing requirement so that employees would know exactly what benefits the plan provided. 2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1311 (1948) [hereafter NLRB].

171 29 U.S.C. § 186(c)(5)(A). Congress required plan funds to be held in trust to retain employees' rights under state trust law. Note, *Regulation of Employee Benefit Plans: Activate the Law of Trusts*, 8 STAN. L. REV. 655, 670 (1956) [hereafter Note, *Regulation*]. Trust law, however, proved ineffective to protect employees' rights. *See* Hahn, *supra* note 75, at 321-22.

172 29 U.S.C. § 186(c)(5). Employers and employee representatives must have an equal say in plan administration. 29 U.S.C. § 186(c)(5)(B). Congress required joint control of employee benefit plan trusts to prevent unions from gaining unilateral control of employer contributions. Note, *Regulation*, *supra* note 171, at 660.

lowed estoppel claims against LMRA plans determined that allowing estoppel recovery would either violate the LMRA's writing requirement[173] or jeopardize the LMRA plan's actuarial soundness.[174]

1. The LMRA's Writing Requirement

The first case in which a federal court denied estoppel recovery against a LMRA plan because of the LMRA's writing requirement is *Moglia v. Geoghegan*.[175] In *Moglia*, plan trustees rejected plaintiff's benefit application because the employer was not a party to the plan's written collective bargaining and pension trust agreements.[176] The employer contributed to the plan on plaintiff's behalf, however, and plan trustees accepted the contributions.[177] The trustees also audited the employer's books annually to assure that its contributions were adequate.[178]

Plaintiff argued that the trustees were equitably estopped from asserting that no written instrument covered the employer's contributions.[179] By accepting the employer's contributions and

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[173] *See, e.g.*, Aitken v. IP & GCU—Employer Retirement Fund, 604 F.2d 1261, 1266-68 (9th Cir. 1979) (estoppel recovery inconsistent with LMRA's writing requirement); Reiherzer v. Shannon, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978) (dictum) (same); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1108-09 (9th Cir. 1976) (same); Moglia v. Geoghegan, 403 F.2d 110, 117 (2d Cir. 1968) (same), *cert. denied*, 394 U.S. 919 (1969). *But see* Rosen v. Hotel & Restaurant Employees & Bartenders Union, 637 F.2d 592, 598 (3d Cir. 1981) (estoppel applied against LMRA plan in spite of LMRA's writing requirement).

[174] *See, e.g.*, Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976).

[175] 403 F.2d 110, 117 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969).

[176] *Id.* at 114. The LMRA prohibits all payments from an employer to employee representatives except those made pursuant to a written employee benefit plan. *See* 29 U.S.C. § 186(c)(5)(B). In *Moglia*, no written agreement between the employer and the union existed. 403 F.2d at 115. The trustees determined that they may have violated the LMRA by accepting the employer's contributions. *Id.* at 114. The trustees further determined that the LMRA prohibited them from paying plaintiff's pension from funds they received illegally. *Id.* The court agreed that the employer and the union violated the LMRA. *Id.* at 116.

[177] *Id.* at 114. After receiving plaintiff's application, the trustees determined that accepting the employer's contributions and paying plaintiff's pension violated the LMRA. *Id.* They refunded the contributions and refused to pay the pension because the employer had not contributed to the plan pursuant to a writing. *Id.*

[178] *Id.*

[179] *Id.* at 117.

auditing the employer annually, plaintiff argued, the trustees represented that a written instrument between the employer and the union existed.[180] The court determined that to estop the trustees from asserting that no written instrument existed would be to dispense with the LMRA's writing requirement.[181] It refused to use estoppel to alter the LMRA's provisions.[182]

The LMRA and its writing requirement only governed *Moglia* because the case involved an estoppel claim against a collectively-bargained plan.[183] Meanwhile, pre-ERISA courts continued to decide estoppel claims against non-collectively-bargained plans under the unilateral contract theory.[184] *Moglia*, however, is the forerunner of the post-ERISA decisions that disallowed estoppel recovery because of ERISA's written instrument provision.[185] ERISA's written instrument provision closely resembles the LMRA's writing requirement,[186] and Congress enacted both provisions so employees could determine their benefit rights by reading the written instrument.[187] Therefore, post-ERISA courts applied the *Moglia* court's reasoning in ERISA estoppel cases, and

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180 *See id.*

181 *Id.*

182 *Id.*

183 *See supra* notes 167-72 and accompanying text.

184 *See, e.g.*, Sanders v. United Distribs., Inc., 405 So. 2d 536 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982) (estoppel case decided under unilateral contract theory).

185 *See, e.g.*, Davidian v. Southern Cal. Meat Cutters Union & Food Employees Benefit Fund, 859 F.2d 134, 136 (9th Cir. 1988) ("ERISA did not change the law. ERISA, like the LMRA, requires that benefits plans [be in writing]."); *see also* Hansen v. Western Greyhound Retirement Plan, 859 F.2d 779 (9th Cir. 1988); Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922 (9th Cir. 1986).

186 *Compare* LMRA § 302(c)(5)(B), 29 U.S.C. § 186(c)(5) (prohibiting employers from making payments to an employee representative, except "with respect to money . . . paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . : *Provided*, That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . .") *with* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument.").

187 *Compare* 2 NLRB, *supra* note 170, at 1311 (discussing congressional purpose in enacting LMRA's writing requirement) *with* H.R. REP. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077-78 [hereafter H.R. REP. No. 1280] (discussing congressional purpose in enacting ERISA's written instrument provision).

refused to estop ERISA plans because of ERISA's written instrument provision.[188]

2. The LMRA Plan's Actuarial Soundness

Post-ERISA courts also took note of the pre-ERISA decisions that disallowed estoppel recovery against LMRA plans out of concern for the plans' actuarial soundness.[189] The Eighth Circuit coined the phrase "actuarial soundness" in *Phillips v. Kennedy*, a LMRA case.[190] In *Phillips*, plan trustees rejected plaintiff's application for survivor's pension benefits because the participant had not satisfied the plan's service requirement.[191] Plan trustees had assured the participant, however, that the plan covered him.[192] They had also accepted contributions the employer made on the participant's behalf and paid benefits to a similarly situated participant.[193] Plaintiff argued that these acts equitably estopped the plan from asserting that the participant had not satisfied the service requirement.[194] The court, however, refused to estop the plan.[195] It stated, "The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."[196]

Courts deciding whether to estop ERISA plans often cite *Phillips*.[197] Although the *Phillips* court did not define "actuarial

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188 *See, e.g.*, *Hansen*, 859 F.2d 779; *Davidian*, 859 F.2d 134; *Moore*, 786 F.2d 922.

189 *See, e.g.*, Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds, 624 F.2d 1132, 1139 (2d Cir. 1985).

190 542 F.2d 52, 55 n.8 (8th Cir. 1976).

191 *Id.* at 54. A break in service occurred when the participant became a supervisor. *Id.* Under the plan, supervisors were not "employees." *Id.* at 53. The participant's years as a supervisor, therefore, did not count as years of service, and the participant did not meet the plan's continuous service requirements. *Id.* at 54.

192 *Id.* at 55 n.8.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *See, e.g.*, Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 447 (1st Cir. 1988); Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds, 624 F.2d

soundness," later courts appear concerned that allowing estoppel recovery would deplete the plan trust, leaving it unable to pay benefits to eligible participants.[198] Post-ERISA courts, however, have not yet applied the *Phillips* court's reasoning in estoppel cases. Though they threaten to do so, thus far they have always denied estoppel recovery against ERISA plans on other grounds.[199]

III. Estoppel Claims After ERISA

The central issue of this Comment is whether federal common-law estoppel should apply against ERISA employee benefit plans. Many federal courts decline to estop ERISA plans because to do so would contravene ERISA's written instrument provision.[200] Other federal courts threaten to deny estoppel recovery out of concern for the ERISA plan's actuarial soundness.[201] Before dis-

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1132, 1139 (2d Cir. 1980); Galvez v. Local 804 Welfare Trust Fund, 543 F. Supp. 316, 317 (E.D.N.Y. 1982). The *Phillips* court's "actuarial soundness" language reverberates through the decisions. Courts often quote it in cases that do not involve estoppel. In Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989), for example, the court cited *Phillips* in refusing to order defendant plan to pay benefits to an ineligible person, though that person regularly contributed to the plan. 879 F.2d at 962-63.

198 *See* Black v. TIC Inv. Corp., 900 F.2d 112, 114 (7th Cir. 1990) (finding actuarial soundness concerns inapplicable in suit against unfunded welfare plan, which has no fund to deplete); Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957, 963 (1st Cir. 1989) (citing *Phillips* and noting "perhaps prosaic (but still powerful) interest in maintaining the Fund's solvency"); *cf.* ERISA § 2(a), 29 U.S.C. § 1001(a) ("[O]wing to the inadequacy of current minimum [funding] standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered.").

199 *See, e.g.*, Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 447 n.5 (1st Cir. 1988) ("By stipulation of the parties, the Fund's actuarial soundness is not in issue."); Galvez v. Local 804 Welfare Trust Fund, 543 F. Supp. 316, 317 (E.D.N.Y. 1982) ("[B]eyond doctrinal barriers, plaintiff has simply failed to state a cognizable claim under fundamental estoppel principles.").

200 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1); *see e.g.*, Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (finding estoppel recovery inconsistent with ERISA's written instrument provision).

201 *See, e.g.*, Cleary v. Graphics Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 448 (1st Cir. 1988) (pointing out that allowing estoppel recovery would jeopardize plan's actuarial soundness).

cussing the decisions that disallow estoppel recovery against ERISA plans,[202] this Comment reviews congressional intent in enacting ERISA as a whole.[203]

A. Congress's Intent in Enacting ERISA

Congress enacted ERISA to ensure that employees actually receive the benefits they expect to receive.[204] Pre-ERISA employee benefit law inadequately protected employee expectations.[205] Before ERISA, employers could impose extremely strin-

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202 *See infra* notes 235-68 and accompanying text.

203 *See infra* notes 204-34 and accompanying text.

204 H.R. REP. No. 533, *supra* note 12, at 4666; Richard, Note, *supra* note 79, at 739. Congress set forth its purposes in ERISA § 2(a), 29 U.S.C. § 1001(a). *See supra* note 11 (quoting provision). One commentator argues, however, that ERISA will actually defeat employees' expectations because it will discourage employers from creating plans and encourage them to reduce their plans' benefits. *See* LOGUE, *supra* note 89, at 108.

205 *See* H.R. REP. No. 533, *supra* note 12, at 4639 (noting "defects in the private retirement system which limit [its] effectiveness in providing retirement income security"); Alicia H. Munnell, *ERISA—The First Decade: Was the Legislation Consistent With Other National Goals?*, 19 U. MICH. J.L. REF. 51, 51 (1985) (Congress enacted ERISA in response to "documented failures of the private pension system"); *cf.* Russell K. Osgood, *Qualified Pension and Profit-Sharing Plan Vesting: Revolution Not Reform*, 59 B.U. L. REV. 452, 474 & nn.105-07 (1979) (noting pre-ERISA holdings that neither LMRA, Securities Act of 1933, nor Securities and Exchange Act of 1934 protected employees' interest in pension benefits). As a former Assistant Secretary of Labor noted:

> In all too many cases the pension promise shrinks to this: "if you remain in good health and stay with the same company until you are 65 years old, and if the company is still in business, and if your department has not been abolished, and if you haven't been laid off for too long a period, and if there's enough money in the fund, and that money has been prudently managed, you will get a pension."

Hearings Before the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1968) (statement of Thomas R. Donahue, Asst. Secy. of Labor), *quoted in* Levin, *supra* note 149, at 527. The most notorious failure of the pre-ERISA private pension system is the "Studebaker incident." Gregory, *supra* note 15, at 444 n.55; *see also* Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement* (1984), *in* LANGBEIN & WOLK, *supra* note 88, at 53. In 1963, the Studebaker Corporation closed its South Bend, Indiana plant and terminated its pension plan. *Id.* Although the plan provided for systematic funding, Gregory, *supra* note 15, at 444 n.55, the plan was underfunded. Alperin et al., Note, *supra* note 77, at 548 n.63. Of 11,000 participating employees, Allen, *supra*, at 53, 4,000 employees with vested rights received only 15% of expected

gent vesting requirements on their employees.[206] Because of such requirements, some employees who worked for their employers for decades failed to qualify for benefits.[207] Employers could prevent employees from vesting by terminating their plans,[208] because only employees with vested rights to benefits could enforce the plan promise under promissory estoppel or the unilateral contract theory.[209] If the plan was funded through a trust, recovery was limited to the assets in the trust.[210] Many plans were inadequately funded,[211] because no law required employers to contribute minimum amounts to plan trusts.[212] Mismanagement, imprudent investing, and theft of plan assets also jeopardized plan solvency.[213] Before ERISA, only ten per-

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benefits, and 2,900 unvested employees received no benefits. Gregory, *supra* note 15, at 444 n.55. Only the 3,600 employees over 60 with 10 years of service received full benefits. Alperin et al., Note, *supra* note 77, at 548 n.63. Overall, the participating employees lost 85% of their expected benefits. Gregory, *supra* note 15, at 444 n.55.

206 MUNNELL, *supra* note 128, at 131; *see also* H.R. REP. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676 [hereafter H.R. REP. No. 807].

207 AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, ISSUES AFFECTING PRIVATE PENSIONS 7 (1971) [hereafter AEI, PRIVATE PENSIONS]. For example, one employee with 36 years of service received no benefits when his employer's factory closed and he was unable to move to the factory's new location. *Id.* at 13. Another employee with 23 years of service applied for a pension at age 65, 13 years after his employer laid him off. He was ineligible to receive a pension because the plan required 20 years of service within the 30 years preceding the application for benefits. RALPH NADER & KATE BLACKWELL, YOU AND YOUR PENSION 4 (1973).

208 *See* AEI, PRIVATE PENSIONS, *supra* note 207, at 27 (noting employer's right to terminate plan); Rosenstein, Note, *supra* note 128, at 273 (noting that plans are terminable without notice at any time).

209 *See supra* notes 147-57 and accompanying text.

210 AEI, PRIVATE PENSIONS, *supra* note 207, at 27 (employers not liable for benefits beyond amounts contributed); Rosenstein, Note, *supra* note 128, at 283 (employer not liable for difference between vested benefit obligations under plan and plan's assets); *see* Jeremy I. Bullow et al., *How Does the Market Value Unfunded Pension Liabilities?*, *in* ISSUES IN PENSION ECONOMICS 81, 83 (Zvi Bodie et al. eds., 1987) (pre-ERISA benefits were nonrecourse claims against plan assets).

211 AEI, WILLIAMS-JAVITS PROPOSAL, *supra* note 13, at 28-29; TURE, *supra* note 91, at 89-90.

212 LANGBEIN & WOLK, *supra* note 88, at 226; Munnell, *supra* note 205, at 51.

213 MUNNELL, *supra* note 128, at 132-33; Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* U.S. SENATE, SPECIAL COMM. ON AGING, THE

cent of all employees received their expected benefits.[214]

Congress's intent in enacting ERISA was to protect the employee rights and expectations that pre-ERISA law failed to protect[215] and to improve the private pension system's effectiveness in providing employees with adequate retirement income.[216] To accomplish these goals, ERISA establishes minimum vesting,[217] funding,[218] and fiduciary duties standards.[219] To comply with ERISA, employers must establish their plans pursuant to a written instrument.[220] In addition, ERISA's termination provisions limit employers' ability to terminate their plans,[221] and its

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EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE (1984), *partially reprinted in* LANGBEIN & WOLK, *supra* note 88, at 58, 65; Levin, *supra* note 149, at 551; Munnell, *supra* note 205, at 51; Alperin et al., Note, *supra* note 77, at 549; Rosenstein, Note, *supra* note 128, at 274. For example, one union gained interest-free use of plan assets by having trustees deposit the money into a no-interest account with a bank that was 74% union-owned. NADER & BLACKWELL, *supra* note 207, at 70-71. One plan trustee established a consulting company and charged the plan exorbitant consulting fees for performing his duties as trustee. Gordon, *supra*, at 62-63. Some companies regularly used plan assets as operating capital, to make company acquisitions, and to purchase blocks of company stock. *See id.* at 65.

214 Rosenstein, Note, *supra* note 128, at 272; *see also* Gordon, *supra* note 213, at 64 (only 5% of employees covered by plans between 1950 and 1971 received any benefits); Gregory, *supra* note 15, at 445 n.57 (study of 1,500 plans showed only 5-20% of participating employees ever received benefits); Alperin et al., Note, *supra* note 77, at 547 (study of 87 plans showed plans with long vesting requirements paid benefits to only 5% of covered employees).

215 H.R. REP. No. 533, *supra* note 12, at 4639; *see also* McKinnon v. Blue Cross—Blue Shield, 691 F. Supp. 1314, 1315-16 (N.D. Ala. 1988) (refusing to estop ERISA plans based on oral promises is inconsistent with ERISA's "primary policy goal" to protect plan participants).

216 H.R. REP. No. 807, *supra* note 206, at 4676.

217 *See* ERISA §§ 203-211, 29 U.S.C. §§ 1053-1060. ERISA provides three alternative vesting schedules. *See* ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2). The most lenient schedules provide for 100% vesting within a maximum of ten years for collectively-bargained multiemployer plans, ERISA § 203(a)(2)(c)(ii), 29 U.S.C. § 1053(a)(2)(C)(ii), and a maximum of seven years for other plans. ERISA § 203(a)(2)(b), 29 U.S.C. § 1053(a)(2)(B). One commentator views such mandatory vesting schedules as an "uncompensated transfer of property rights from shareholders" to employees. LOGUE, *supra* note 89, at 77.

218 *See* ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086.

219 *See* ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114.

220 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

221 *See* ERISA §§ 4041-4048, 29 U.S.C. §§ 1341-1348. Under ERISA, an

federal insurance provisions partially insure terminated plans' benefit obligations.[222] Finally, Congress intended that ERISA regulate the private employee benefit system comprehensively.[223] To prevent inconsistent and nonuniform state regulation, ERISA federalizes employee benefit law[224] by preempting all state laws that relate to employee benefit plans.[225]

The Supreme Court has interpreted ERISA's preemption provision expansively.[226] In addition to preempting state statutes,[227] ERISA preempts state common law as it relates to employee benefit plans.[228] Lower federal courts agree that ERISA preempts

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employer may only terminate certain plans if the plans are fully funded or if the employer is under severe financial hardship. *See* ERISA § 4041(b)-(c), 29 U.S.C. § 1341(b)-(c).

222 *See* ERISA §§ 4001-4123, 29 U.S.C. §§ 1301-1323.

223 *See* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) (calling ERISA "comprehensive and reticulated statute").

224 Gregory, *supra* note 15, at 363; *see* LANGBEIN & WOLK, *supra* note 88, at 363 (central objective of ERISA to federalize employee benefit law).

225 ERISA § 514(a), 29 U.S.C. § 1144(a). The provision reads: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." *Id.* ERISA § 514(b), 29 U.S.C. § 1144(b), sets forth exceptions to the preemption provision that are not relevant to this Comment.

226 *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (stating that ERISA preemption provision is "conspicuous for its breadth"); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) (noting "expansive sweep" of ERISA preemption provision); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (noting "broad scope" of ERISA preemption provision).

One commentator notes, however, that interpreting ERISA's preemption provision too broadly could frustrate more progressive state legislation, leaving major employee benefit law issues unregulated. Gregory, *supra* note 15, at 457. This commentator concludes that the "sweep of ERISA preemption can be positively harmonized with tangential state legislation." *Id.* at 458. One might make the same argument with regard to tangential state common law. *But see* Steven L. Brown, Note, *ERISA's Preemption of Estoppel Claims Relating to Employee Benefit Plans*, 30 B.C. L. REV. 1391, 1416-17 (1989) (arguing that federal common law adequately fills the gaps state common-law preemption creates).

227 *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 407-11 (1990) (ERISA preempts state anti-subrogation statute); Shaw v. Delta Airlines, Inc. 463 U.S. 85, 98-100 (1983) (ERISA preempts state statute prohibiting discrimination in employee benefits); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525-26 (1981) (ERISA preempts state statute prohibiting offset of pension benefits by workers' compensation awards).

228 Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482-83 (1990)

the state common-law equitable and promissory estoppel claims that employees assert against ERISA employee benefit plans.[229]

In some early decisions, courts simply dismissed all preempted state common-law estoppel claims.[230] More recently, however, the federal courts have developed a body of federal common law to govern estoppel claims.[231] Whether the court will apply fed-

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(ERISA preempts state common-law wrongful discharge when suit's purpose was to enforce ERISA plan's provisions); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987) (ERISA preempts state common-law claims of breach of contract, breach of fiduciary duty, and fraud).

229 *See, e.g.*, Kane v. Aetna Life Ins., 893 F.2d 1283, 1285 (11th Cir.) (noting that ERISA preempts state common-law equitable estoppel claims), *cert. denied*, 111 S. Ct. 232 (1990); Hermann Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286 (5th Cir. 1988) (same); Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir.) (noting that ERISA preempts state common-law promissory estoppel claims), *cert. denied*, 488 U.S. 826 (1988); Nachwalter v. Christie, 805 F.2d 956, 959 (11th Cir. 1986) (equitable estoppel); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1095 (9th Cir. 1985) (promissory estoppel). Neither ERISA nor the legislative history specifically addresses preemption of state common-law estoppel. Brown, Note, *supra* note 226, at 1407.

230 *See, e.g.*, Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988); Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1147 (4th Cir. 1985); Blau v. Del Monte Corp. 748 F.2d 1348, 1356 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); Schwartz v. Newsweek, Inc., 653 F. Supp. 384, 389 n.1 (S.D.N.Y. 1986).

231 *See, e.g.*, Black v. TIC Inv. Corp., 900 F.2d 112 (7th Cir. 1990); Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir.), *cert. denied*, 111 S. Ct. 232 (1990); Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210 (D. Md. 1990); Torrence v. Chicago Tribune Co., 535 F. Supp. 748 (N.D. Ill. 1981). *But see* Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (declining to create federal common-law estoppel because ERISA specifically addresses issue). The courts clearly have the power to develop federal common law to supplement and interpret ERISA. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1982) (noting courts' power to develop federal common law around ERISA); Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1297 (5th Cir. 1989) (federal common law may supplement ERISA); 120 CONG. REC. 29,942 (daily ed. Aug. 22, 1974) (courts have power to develop federal common law around ERISA (statement of Sen. Javits)). This power, however, is limited. *See* Moran v. Aetna Life Ins. Co., 872 F.2d 296, 300 (9th Cir. 1989) (federal courts cannot adopt federal common law that would abrogate ERISA provisions); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989) (power to create federal common law extends only to areas that federal law preempts); Nachwalter v. Christie, 805 F.2d 956, 959 (11th Cir. 1986) (federal courts may create federal common law based on federal preemption only where federal statute does not address issues before court).

Plaintiffs need not plead their estoppel claims in terms of federal law to

eral common-law estoppel against an ERISA employee benefit

escape preemption. *See* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987) (finding plaintiff's ERISA suit, though asserted in terms of state law, "necessarily federal in character"); Klank v. Sears, Roebuck & Co., 735 F. Supp. 260, 262 (N.D. Ill. 1990) (concluding that complete preemption makes all preempted claims federal for purposes of removal); *cf.* Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 971 (5th Cir. 1981) (holding federal court lacked subject matter jurisdiction because ERISA did not preempt plaintiff's state-law claim); Albert Einstein Medical Ctr. v. Action Mfg. Co., 697 F. Supp. 883, 885 (E.D. Pa. 1988) (holding claim not removable to federal court because ERISA did not preempt plaintiff's state-law claim). *But see* Hermann Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1287 (5th Cir. 1988) (holding court lacked subject matter jurisdiction because plaintiff failed to assert estoppel claim in terms of federal law); Vogel v. Independence Fed. Sav. Bank, 692 F. Supp. 587, 594 (D. Md. 1988) (denying motion to dismiss for failure to state claim upon which relief could be granted because plaintiffs asserted estoppel claim in terms of federal law). As the Supreme Court explained:

> Federal pre-emption is ordinarily a federal defense to the plaintiff's [state-law] suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987) (citation omitted). The Court thus created an exception to the well-pleaded complaint rule, *Albert Einstein Medical Ctr.*, 697 F. Supp. at 885 n.3, known as "super-preemption." Professor Bruce A. Wolk, Lecture at University of California, Davis, School of Law (Apr. 11, 1991).

Whether in state or federal court, a plaintiff must state a claim under ERISA's civil enforcement provision. ERISA § 502(a), 29 U.S.C. § 1132(a); *see* Ogden v. Michigan Bell Tel. Co., 595 F. Supp. 961, 969-70 (E.D. Mich. 1984) (estoppel claims sound under § 502(a)(1)(B)), *rev'd on other grounds sub nom.* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988). ERISA also allows a plan participant or beneficiary to bring a civil action to obtain "appropriate equitable relief." ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B); *see also* ERISA § 2(a), (c), 29 U.S.C. § 1001(a), (c) (ERISA enacted to improve "equitable character" of employee benefit plans). Some courts have reasoned that ERISA's equitable relief provision specifically empowers the federal courts to apply estoppel, an equitable doctrine, in ERISA cases. *See* Reid v. Gruntal & Co., Inc., 763 F. Supp. 672, 678-79 (D. Me. 1991) (because ERISA specifically granted equitable powers to federal courts, estoppel was appropriate theory of recovery against ERISA plan); Vogel v. Independence Fed. Sav. Bank, 692 F. Supp. 587, 591 (D. Md. 1988) (same); *see also* Ray & Halpern, *supra* note 109, at 22 (noting "broad range of equitable powers ERISA vests in the courts"). *Contra* Williams v. Caterpil-

plan is the central issue of this Comment.[232] Most federal courts decline to estop ERISA plans; they reason that estopping the plans would either contravene ERISA's written instrument provision[233] or jeopardize the plans' actuarial soundness.[234]

B. Statutory Grounds for Disallowing Estoppel Recovery: ERISA's Written Instrument Provision

ERISA's written instrument provision requires all employers to

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lar, Inc., 720 F. Supp. 148, 151 (N.D. Cal. 1989) (ERISA's equitable relief provision refers to declaratory or injunctive relief only).

232 *See supra* text accompanying notes 1-8. State and federal courts have concurrent jurisdiction in suits for benefits against ERISA plans that arise under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Whether estoppel claims against ERISA plans arise under § 502(a)(1)(B) or § 502(a)(3) is disputed. Because federal courts have exclusive jurisdiction to hear claims under § 502(a)(3), *see* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), some state courts have refused to entertain estoppel claims at all. *See, e.g.*, McMartin v. Central States, S.E. & S.W. Areas Pension Fund, 406 N.W.2d 219, 221 (Mich. Ct. App. 1987) (estoppel claims "fall within the exclusive jurisdiction of the federal courts and may not be entertained in state courts" because such claims sound under § 502(a)(3)). *Contra* Ogden v. Michigan Bell Tel. Co., 595 F. Supp. 961, 969-70 (E.D. Mich. 1984) (estoppel claims sound under § 502(a)(1)(B)), *rev'd on other grounds sub nom.* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988). State as well as federal courts, however, have decided the estoppel issue under federal common law. *See, e.g.*, Powell v. General Am. Life Ins. Co., 217 Cal. Rptr. 16 (Cal. Ct. App. 1990) (estoppel principles applied against plan); HCA Health Servs. of the Midwest, Inc. v. Rosner, 566 N.E.2d 397 (Ill. App. Ct. 1990) (same). This Comment focuses on federal holdings.

233 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1); *see* Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) (finding estoppel recovery inconsistent with ERISA's written instrument provision); *see also, e.g.*, Northwest Adm'rs, Inc. v. B.V. & B.R., Inc., 813 F.2d 223, 226-27 (9th Cir. 1987) (following *Nachwalter*). By contrast, the absence of a written instrument does not prevent an employee benefit plan as a whole from being enforceable under ERISA. *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985) (concluding that ERISA plan exists absent writing if reasonable person could identify plan benefits, beneficiaries, funding source, and claims procedures); Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc) (same).

234 *See, e.g.*, Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444 (1st Cir. 1988) (noting courts' concern for ERISA plan's actuarial soundness but disallowing estoppel recovery on other grounds); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds, 624 F.2d 1132 (2d Cir. 1980) (same).

establish and maintain their employee benefit plans pursuant to a written instrument.[235] The leading case in which the court refused to estop an ERISA plan because of this provision is *Nachwalter v. Christie*.[236] In *Nachwalter*, the trustees of two employee benefit plans filed for declaratory relief to determine valuation dates for calculating benefits.[237] The plans' written provisions provided for one date, and the trustees argued that the provisions governed.[238] The participant alleged that an oral agreement with the trustees fixed an earlier date.[239] She argued that the trustees were estopped from enforcing the plans' written provisions by applying the later date.[240] The parties conceded that ERISA preempted state common-law estoppel,[241] but the participant urged the court to develop and apply federal common-law estoppel.[242]

The court determined that it was powerless to do so because of ERISA's written instrument provision.[243] Any recovery from the plans based on the oral agreement with the trustees, the court reasoned, would amount to recovery beyond the plans' written terms;[244] allowing such recovery would, in effect, modify the written terms.[245] Because ERISA's written instrument provision requires that plans be "maintained" in writing, the parties may

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235 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

236 805 F.2d 956 (11th Cir. 1986).

237 *Id.* at 958. Under the plans, a participant's benefits equalled a percentage of the value of the plans' assets on the valuation date. *Id.*

238 *Id.*

239 *Id.* The value of the plans' assets had decreased significantly between the two dates. *Id.*

240 *Id.*

241 *Id.* at 959.

242 *Id.*

243 *Id.* at 960. The court reasoned that ERISA's written instrument provision "specifically addresses" estoppel by precluding plan modification outside the written instrument's terms. *See id.* Therefore the written instrument provision prohibited the court from creating federal common-law estoppel. *See id.* Later courts that followed *Nachwalter* simply stated that they may not apply federal common-law estoppel in ERISA cases, not that it does not exist. *See, e.g.*, Pizlo v. Bethlehem Steel Corp., 884 F.2d 116, 120 (4th Cir. 1989); Northwest Adm'rs, Inc. v. B.V. & B.R., Inc., 813 F.2d 223, 226-27 (9th Cir. 1987).

244 *See* 805 F.2d at 959-60. The trustees would be estopped from enforcing the written plans' terms. *Id.* at 960.

245 *See id.* at 957-59.

not orally modify their plan.[246] The court concluded that to modify the written plans through estoppel would contravene ERISA's written instrument provision.[247]

Many federal courts have followed the *Nachwalter* holding.[248] Some of these courts have articulated additional rationales for denying estoppel recovery because of ERISA's written instrument provision. Some courts construe the provision conservatively to ensure uniform interpretation of the plan for all participants.[249]

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246 *Id.* at 960. The court also pointed out that under ERISA, plans must contain formal procedures for amending their provisions. *Id.* at 960; *see* ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). The court determined that "[b]y explicitly requiring that each plan specify the amendment procedures, Congress rejected the use of informal written agreements to modify an ERISA plan." 850 F.2d at 960. Although some suggest that the *Nachwalter* holding applies only to oral statements, *see* Richard P. Carr & Christine L. Thierfelder, *Representations and Misrepresentations in Summary Plan Descriptions*, 2 BENEFITS L.J. 179, 184 (1989) [hereafter Carr & Thierfelder, *SPDs*], it clearly extends to informal written statements. *See* National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558, 1572 (11th Cir. 1991).

247 805 F.2d at 959.

248 *See, e.g.*, Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1163-64 (3d Cir. 1990); Alday v. Container Corp. of Am., 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 675 (1991); Pizlo v. Bethlehem Steel Corp., 884 F.2d 116, 120 (4th Cir. 1989); Northwest Adm'rs, Inc. v. B.V. & B.R., Inc., 813 F.2d 223, 226-27 (9th Cir. 1987); Warren v. Health & Welfare Fund, 752 F. Supp. 452, 455 (M.D. Ga. 1990); Whitaker v. Texaco, Inc., 729 F. Supp. 845, 852 (N.D. Ga. 1989); St. Mary Medical Ctr. v. Cristiano, 724 F. Supp. 732, 743-44 (C.D. Cal. 1989); Pruitt v. Westinghouse Elec. Corp., 719 F. Supp. 1061, 1064 (M.D. Fla. 1989); Thomas v. Gulf Health Plan, Inc., 688 F. Supp. 590, 595 (S.D. Ala. 1988). In one case, the Ninth Circuit expanded the *Nachwalter* court's reasoning, holding that it could not apply estoppel when the result would be inconsistent with an ERISA provision, not merely with the written plan provisions. *See* Moran v. Aetna Life Ins. Co., 872 F.2d 296 (9th Cir. 1989). In *Moran*, the court refused to apply estoppel principles against the defendant, *id.* at 300, which had represented to plaintiff that it was the plan administrator. *Id.* at 298. The court determined that, because the defendant was not the plan administrator as defined by ERISA, to permit estoppel recovery would nullify an express ERISA provision. *Id.* at 299 n.1. Such a result would contravene Congress's intent to create a uniform regulatory scheme. *Id. But cf.* Brown, Note, *supra* note 226, at 1422 (arguing that uniformly recognizing and applying federal common-law estoppel would better serve Congress's intent than eliminating estoppel recovery completely).

249 *See, e.g.*, Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (allowing oral modification would undermine predictability of obligations under the plan).

Other courts point out that allowing estoppel recovery would force the court to rely on imprecise oral statements that are difficult to prove.[250] Still other courts conclude that allowing estoppel recovery would foster collusive oral agreements between employers and employees at other plan participants' expense.[251]

Finally, some courts reason that ERISA's written instrument provision protects the plan's financial stability.[252] By disallowing modification through representations external to the written instrument, these courts reason, the provision limits plan agents' ability to bind the plan to pay benefits to ineligible persons.[253] Many courts, however, threaten to disallow estoppel recovery on

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250 Musto v. American Gen. Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *see also* Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1231 (D. Md. 1990). As the court observed in *Musto*,

> It is not always easy to determine exactly what a benefit plan says even when the language of the plan has been reduced to writing. If the terms of these often complex plans could be made to depend upon evidence as to oral statements that may not have been worded very precisely in the first place, that may have been made many years earlier, and that cannot be proved except through the testimony of lay witnesses whose memories will seldom be infallible and who, being human, may have tended to hear what they wanted to hear, the degree of certainty that Congress sought to provide for would be utterly impossible to attain.

861 F.2d at 910.

251 *See* Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296 (5th Cir. 1989) (without ERISA's written instrument requirement, employers could discriminate in favor of certain employees at expense of others); Northwest Adm'rs, Inc. v. B.V. & B.R., Inc., 813 F.2d 223, 227 (9th Cir. 1987) (allowing alteration of written plan would invite " 'collusion and controversy to the detriment of the employee beneficiaries' " (quoting Kemmis v. McGoldrick, 706 F.2d 993, 996 (9th Cir. 1983))); Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1041 (2d Cir. 1985) (allowing oral modification of a written plan would " 'create a loophole that would enable the unscrupulous to divert funds away from the proper parties' " (quoting Chamberlin v. Bakery & Confectionery Union Pension Fund, 99 L.R.R.M. (BNA) 3176, 3180 (N.D. Cal. 1977))), *cert. denied*, 475 U.S. 1012 (1986); Saret v. Triform Corp., 662 F. Supp. 312, 316 (N.D. Ill. 1986) (noting that writing requirement protects ERISA plans against "corruption fostered by private verbal agreements").

252 *See, e.g.*, National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558, 1571 (11th Cir. 1991); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989); *see also* Carr & Thierfelder, *Talk is Cheap*, *supra* note 5, at 204.

253 *See* Carr & Thierfelder, *Talk is Cheap*, *supra* note 5, at 204.

a similar ground without reference to ERISA's written instrument provision.[254] These courts cite *Phillips v. Kennedy* and estoppel's effect on the ERISA plan's actuarial soundness.[255]

C. *Policy Grounds for Disallowing Estoppel Recovery: The ERISA Plan's Actuarial Soundness*

Courts that do not rely on ERISA's written instrument provision in disallowing estoppel recovery often express concern for the ERISA plan's actuarial soundness. In *Cleary v. Graphic Communications International Union Supplemental Retirement and Disability Fund*,[256] for example, defendant plan denied plaintiffs' application for supplemental pension benefits on the ground that plaintiffs' eligibility lapsed when they changed jobs.[257] Union officials and the plan administrator had misinformed plaintiffs that the job change would not affect their eligibility.[258] Further, the plan accepted contributions made on plaintiffs' behalf and disbursed benefits to similarly situated participants.[259] Plaintiffs argued that these acts estopped the plan from asserting their ineligibility for benefits.[260]

The court went out of its way to find the elements of estoppel unfulfilled. First, it determined that the union officials' representations could not bind the plan.[261] Second, it observed that the plan administrator's representations did not bind the plan because the administrator made them informally.[262] Third, it rea-

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254 *Cf.* Black v. TIC Inv. Corp., 900 F.2d 112, 114 (7th Cir. 1990) (noting that whether estoppel may apply against ERISA plan is "not so much a question of statutory interpretation as a question of public policy").

255 *See, e.g.*, Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund, 841 F.2d 444, 447 (1st Cir. 1988); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds, 624 F.2d 1132, 1139 (2d Cir. 1980); Galvez v. Local 804 Welfare Trust Fund, 543 F. Supp 316, 317 (E.D.N.Y. 1982).

256 841 F.2d 444 (1st Cir. 1988).

257 *Id.* at 446. When plaintiffs' employer went out of business, plaintiffs took part-time jobs with their union. *Id.* at 445. Under the plan, however, participants could accrue benefits only while working part-time for sponsoring employers. *Id.* at 445-46.

258 *Id.* at 447.

259 *Id.*

260 *Id.* at 446.

261 *Id.* at 447. The *Cleary* court noted that "[t]he representations relevant to the estoppel theory must be made by someone with authority or apparent authority to bind the Fund." *Id.*; *see also supra* note 3.

262 841 F.2d at 448. The court described the administrator's

soned that plaintiffs' reliance on the plan's acceptance of contributions was unreasonable.[263] Finally, it concluded that, in disbursing benefits to other participants, the plan did not make any "representations."[264]

In dicta, the *Cleary* court noted other courts' reluctance to estop ERISA plans because of concern for the plans' actuarial soundness.[265] It further observed that plans' financial stability is an important consideration in estoppel cases.[266] In refusing to estop the plan, however, it did not directly rely on such considerations.[267] Nor has any federal court deciding the issue under ERISA expressly done so. Indeed, the courts cannot disallow

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representations as "informal" and found them to be against plan rules: "Indeed, the administrator characterized them as 'off-the-record' comments when made. We therefore hold that they were not binding on the Fund. Reliance on the ability to circumvent Fund rules in these circumstances amounted to no more than a gamble—a gamble which appellants lost." *Id.*

263 *Id.* at 448-49. The court pointed out that the plan had over 100,000 participants and over 2,500 total contributing employers. *Id.* At the time of trial, 1,400 employers remitted regular, monthly contributions. *Id.* at 449. Thus, the court concluded, "[t]he court below did not err in finding that the Fund was not estopped from denying supplementary benefits in these circumstances, because any reliance based on the mere fact of acceptance of contributions was not reasonable." *Id.*

264 *Id.* The court stated, "[A]lthough possibly giving the wrong impression to [plaintiffs], we do not believe the Fund may be deemed, by making mistaken payments, to have *represented* to [plaintiffs] that the Fund would also err on their behalf." *Id.* (emphasis in original).

265 *Id.* at 447. It stated, "Courts have frequently refused to apply estoppel principles to require payment of pension funds, usually referring to the basic policy of protecting the actuarial soundness of pension plans." *Id.* (citing Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1108-09 (9th Cir. 1976); Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976)). The court failed to point out, however, that *Phillips* and *Thurber* were not ERISA cases and that the *Chambless* court merely observed in dicta that the plan's actuarial soundness is often a concern in estoppel cases. *See Chambless*, 772 F.2d at 1041 (noting that "courts have been reluctant to apply the estoppel doctrine to require the payment of pension funds"), *aff'g* 571 F. Supp. 1430, 1453 (S.D.N.Y. 1983) (noting that disallowing estoppel recovery is "wise policy").

266 841 F.2d at 447 n.5. The *Cleary* court noted, "[P]ension fund stability is a major concern in cases like the present one, given the strong policy in ERISA of protecting plan funds for the sake of employee-participants." *Id.*; *see also Chambless*, 571 F. Supp. at 1453 (disallowing estoppel recovery will "help preserve the corpus of the pension fund").

267 *See* 841 F.2d at 447 n.5. The court apparently did not so rely because,

estoppel recovery on actuarial soundness grounds without revealing their ignorance of plan formation and ERISA's funding provisions.[268] Courts aware of these provisions, as well as relevant policy considerations and congressional intent, will conclude that estoppel should apply uniformly against ERISA employee benefit plans.

IV. Allowing Estoppel Recovery Against ERISA Plans

By enacting ERISA, Congress intended to ensure that employees actually receive the benefits they expect to receive.[269] Congress did not intend to eliminate viable theories of recovery, such as estoppel, that employees successfully asserted in pre-ERISA benefit cases.[270] Instead, Congress enacted broad civil enforcement provisions to facilitate employee suits for payment of benefits.[271] Nor did Congress intend to eliminate estoppel recovery by enacting ERISA's written instrument provision.[272] Rather, Congress intended to aid employees in understanding and enforcing their rights.[273] Moreover, Congress enacted ERISA's strict funding provisions to protect ERISA plans' ability to pay benefits to eligible employees.[274] Because these provisions adequately protect ERISA plans' actuarial soundness, courts need not attempt to protect plans further by disallowing estoppel recovery.[275] Instead, estopping ERISA plans comports with ERISA policy to protect plan participants' rights and expectations.[276]

"[b]y stipulation of the parties, the Fund's actuarial soundness [was] not in issue." *Id.*

268 *See infra* notes 366-442 and accompanying text.

269 H.R. Rep. No. 533, *supra* note 12, at 4666.

270 *See* Powell v. General Am. Life Ins. Co., 271 Cal. Rptr. 16, 20 (Cal. Ct. App. 1990) ("Absent some rationale which furthers ERISA's goals, it makes no sense to deprive an employee of an equitable remedy available before ERISA was enacted" by denying estoppel recovery); H.R. Rep. No. 533, *supra* note 12, at 4655 (stating Congress's intention to "provide the full range of legal and equitable remedies available in both state and federal courts").

271 *See* ERISA § 502(a), 29 U.S.C. § 1132(a).

272 McKinnon v. Blue Cross—Blue Shield, 691 F. Supp. 1314, 1321 (N.D. Ala. 1988).

273 H.R. Rep. No. 1280, *supra* note 187, at 5077-78.

274 *See supra* notes 204-19 and accompanying text.

275 *See infra* notes 320-442 and accompanying text.

276 *See infra* notes 328-65 and accompanying text.

A. Paying Benefits Beyond the Plan's Terms: ERISA's Written Instrument Provision

ERISA embodies Congress's intent to ensure that employees receive their expected benefits.[277] Congress enacted ERISA's written instrument provision to further this goal.[278] Part 1 of this Section discusses ERISA's written instrument provision and civil enforcement scheme in terms of congressional intent and points out that Congress intended to expand, not limit, pre-ERISA remedies.[279] To protect employees' expectations, some courts have held that a plan need not be in writing to be enforceable under ERISA.[280] Part 2 of this Section examines the enforceability of unwritten ERISA plans.[281] In addition, courts regularly allow estoppel recovery based on misrepresentations in the summary plan description (SPD).[282] Part 3 of this Section compares the policy considerations that surround estoppel claims based on SPD representations with those that surround estoppel claims based on non-SPD representations.[283] Such policy concerns favor allowing estoppel recovery against ERISA plans in spite of ERISA's written instrument provision.[284]

1. ERISA's Written Instrument Provision and Civil Enforcement Scheme

ERISA's written instrument provision appears in Part Four of ERISA Title I, which delineates employers' fiduciary duties to plan participants.[285] The provision mandates that all employee benefit plans "be established and maintained pursuant to a written instrument."[286] Congress enacted the provision so that employees could determine their rights under the plan by reading the written instrument.[287] Employees who know their rights

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277 *See supra* notes 204-25 and accompanying text.
278 *See infra* notes 285-93 and accompanying text.
279 *See infra* notes 285-316 and accompanying text.
280 *See infra* notes 318-23 and accompanying text.
281 *See infra* notes 317-27 and accompanying text.
282 *See infra* notes 330-42 and accompanying text.
283 *See infra* notes 328-65 and accompanying text.
284 *See infra* notes 343-65 and accompanying text.
285 *See* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).
286 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).
287 H.R. REP. No. 1280, *supra* note 187, at 5077-78. Congress encourages employers to comply with ERISA's written instrument provision by disallowing tax-qualified status to plans that are not in writing or

under the plan can determine exactly what benefits the plan promises.[288] In addition, the written instrument provides employees with the information they need to protect their rights.[289] Finally, employees who know what benefits they are due, and who are adequately apprised of their rights, are more likely to actually receive benefits.[290] The provision thus furthers one of ERISA's foremost goals: to protect employee expectations.[291]

Refusing to estop an ERISA plan because of ERISA's written instrument provision is inconsistent with Congress's goals in enacting the provision.[292] Congress enacted the provision to enhance employees' ability to enforce their rights, not to allow employers to escape responsibility for their representations.[293] Courts should view ERISA's written instrument provision solely

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otherwise fail to comply with ERISA. *See* I.R.C. § 401(a) (listing requirements for tax-qualified status).

288 *See* Richard, Note, *supra* note 79, at 732 (legislative history of written instrument provision indicates that provision's purpose was to aid employees in determining exactly what benefits the plan provides); *see also* Carr & Thierfelder, *Talk is Cheap*, *supra* note 5, at 204 (discussing three purposes of ERISA's written instrument provision).

289 *See* H.R. REP. No. 533, *supra* note 12, at 4649. The House Committee stated that plan participants need the plan in writing so they can find out what benefits the plan promises, what circumstances could prevent the participants from obtaining benefits, what procedures to follow to obtain benefits, and who the plan administrators and trustees are. *Id.* The written instrument would "enable employees to police their plans." *Id.*

290 *See id.* (noting intent that employees "will be armed with enough information to enforce their own rights").

291 *See* Richard, Note, *supra* note 79, at 742. As the author points out:

> [A]n examination of the legislative history and of Congress's purpose in enacting ERISA indicates that the Act's writing requirement is a fiduciary duty and does not preclude enforcement of an oral agreement. Congress enacted ERISA to protect employees' expectations in receiving benefits from employers who, in the past, had not operated their plans in the employees' best interest. To permit lack of a written instrument to preclude coverage would be inconsistent with ERISA's purpose of protecting employees' expectations; it would permit employers to avoid liability upon breaching promises actually made to employees.

Id. (footnote omitted).

292 *See* McKinnon v. Blue Cross—Blue Shield, 691 F. Supp. 1314, 1315 (N.D. Ala. 1988).

293 *See* H.R. REP. No. 533, *supra* note 12, at 4649.

as Congress intended: as a mechanism to aid and protect employees.

ERISA's written instrument provision is not the only mechanism Congress enacted to ensure that employees receive their benefits. ERISA contains broad civil enforcement provisions that Congress enacted to enable employees to enforce their right to benefits.[294] Congress determined that the remedies courts allowed before ERISA inadequately protected employees' rights.[295] By enacting ERISA's civil enforcement provisions, Congress intended to broaden employees' remedies in suits against plans for benefits.[296] Congress also intended, however, to preserve all legal and equitable remedies available to employees under pre-ERISA state and federal law.[297]

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294 *See* ERISA § 502(a), 29 U.S.C. § 1132(a); S. REP. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839 (noting Congress's intent to provide adequate remedies enabling individual employees to recover their benefits).

295 *See* H.R. REP. No. 533, *supra* note 12, at 4655 (noting intent to "remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement . . . [and] recovery of benefits due to participants"); Gregory, *supra* note 15, at 446-48 (noting Congress's intent to provide effective remedies through ERISA); Edward B. Miller & Marc A. Dorenfeld, *ERISA: Adequate Summary Plan Descriptions*, 14 HOUS. L. REV. 835, 840 (1977) (noting Congress's intent to protect plan participants by enacting ERISA's civil enforcement provisions).

296 H.R. REP. No. 533, *supra* note 12, at 4655. The Committee stated, "The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the Act." *Id.*; *cf.* Whitman F. Manley, Note, *Civil Actions Under ERISA § 502(a): When Should Courts Require that Claimants Exhaust Arbitral or Interfund Remedies?*, 71 CORNELL L. REV. 952, 975 (1986) (Congress intended civil suits by participants to be primary means to enforce ERISA); *id.* at 980 (Congress codified individual contract rights at ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)).

297 *See* H.R. REP. No. 533, *supra* note 12, at 4655 ("The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts."); *cf.* Firestone Tire & Rubber Co., v. Bruch, 489 U.S. 101, 112 (1989) (noting that de novo standard of review Court was adopting for ERISA cases was consistent with pre-ERISA employee benefit law); Hillis v. Waukesha Title Co., 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) ("The legislative history indicates that persons such as the plaintiff were to enjoy a full range of legal and equitable powers to redress violations of the statute."); Powell v. General Am. Life Ins. Co., 271 Cal. Rptr. 16, 20 (Cal. Ct. App. 1990) ("Absent some rationale which furthers ERISA's goals, it makes no sense to deprive an employee of an equitable remedy available before ERISA was enacted.").

Before ERISA, courts freely applied estoppel to enforce misrepresentations about plan benefits.[298] Pre-ERISA courts recognized that the employee benefit plan promise should not be immune from equitable principles that govern other promises.[299] Congress did not intend, by enacting ERISA, to eliminate estoppel recovery in benefit cases.[300] Instead, Congress intended to improve the private employee benefit system's equitable nature by expanding employees' rights and remedies.[301]

Indeed, ERISA's civil enforcement provisions expressly authorize courts to grant "appropriate equitable relief."[302] Several courts have held that this provision specifically empowers them to apply estoppel, an equitable doctrine, against ERISA employee benefit plans.[303] To comport with Congress's intent to preserve

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298 *See supra* notes 119-66 and accompanying text.

299 *See* Scheuer v. Central States Pension Fund, 358 F. Supp. 1332, 1338 (E.D. Wis. 1975).

300 *See* Cattin v. General Motors Corp., 612 F. Supp. 948, 950 (E.D. Mich. 1985) (finding that promissory estoppel applied against ERISA plan because Congress did not intend to do away with contract law), *vacated without opinion*, 865 F.2d 257 (6th Cir. 1988); Shaw v. Kruidenier, 470 F. Supp. 1375, 1382 (S.D. Iowa 1979) (stating that Congress did not intend prior law to be irrelevant when consistent with ERISA's purposes and parties' interests); Powell v. General Am. Life Ins. Co., 271 Cal. Rptr. 16, 20 (Cal. Ct. App. 1990) (noting that estoppel should apply against ERISA plan because Congress did not intend to eliminate equitable remedies available before ERISA); *cf.* Holliday v. Xerox Corp., 555 F. Supp. 51, 55 (E.D. Mich.) (nothing in ERISA indicates Congress intended to make contracts unenforceable), *aff'd*, 732 F.2d 548 (6th Cir. 1982); Hahn, *supra* note 75, at 335 (arguing that plans are still enforceable as contracts after ERISA).

301 ERISA § 2(c), 29 U.S.C. § 1101(c) (stating that Congress enacted ERISA to improve private employee benefit system's "equitable character").

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

303 *See* Reid v. Gruntal & Co., 763 F. Supp. 672, 678 (D. Me. 1991); Vogel v. Independence Fed. Sav. Bank, 692 F. Supp. 587, 594 (D. Md. 1988). *Contra* Williams v. Caterpillar, Inc., 720 F. Supp. 148, 151 (N.D. Cal. 1989) (provision refers to injunctive or declaratory relief only). Rather than eliminating available remedies, ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), limits the right to a jury trial in ERISA cases. Miller & Dorenfeld, *supra* note 295, at 843; *see also* Burgher v. Feightner, 722 F.2d 1356 (7th Cir. 1983) (ERISA § 502(a)(3) claims are equitable and plaintiffs have no right to jury trial), *cert. denied*, 469 U.S. 822 (1984); Wardle v. Central States Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980) (ERISA § 502(a)(1) claims are equitable and plaintiffs have no right to jury trial); *cf.* Kann v. Keystone Resources, Inc., 575 F. Supp. 1084, 1089 (W.D. Penn. 1983) (all suits for benefits under ERISA are equitable and not legal because plaintiffs have no right to jury trial).

pre-ERISA remedies, the courts should allow estoppel recovery against ERISA plans under this affirmative ERISA provision.

Several courts have, in fact, declined to follow *Nachwalter v. Christie*, finding that estoppel may apply against an ERISA employee benefit plan.[304] In *Kane v. Aetna Life Insurance*,[305] the leading case, the court applied estoppel against an ERISA plan in spite of *Nachwalter*.[306] In *Kane*, the relevant plan provision was ambiguous,[307] and the court held that the representations to

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304 *See* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *39 (6th Cir. Sept. 24, 1991); National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558, 1572-74 (11th Cir. 1991); Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990); Kane v. Aetna Life Ins., 893 F.2d 1283, 1286 (11th Cir.), *cert. denied*, 111 S. Ct. 232 (1990); Lockrey v. Leavitt Tube Employees' Profit Sharing Plan, 748 F. Supp. 662, 664 (N.D. Ill. 1990); Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1231-32 (D. Md. 1990); McKinnon v. Blue Cross—Blue Shield, 691 F. Supp. 1314, 1321 (N.D. Ala. 1988); Murphy v. Curran Contracting Co., 648 F. Supp. 986, 987 (N.D. Ill. 1986); Ogden v. Michigan Bell Tel. Co., 595 F. Supp. 961, 970 (E.D. Mich. 1984), *rev'd on other grounds sub nom.* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988); Kann v. Keystone Resources, Inc., 575 F. Supp. 1084, 1093-94 (W.D. Penn. 1983); Torrence v. Chicago Tribune Co., 535 F. Supp. 748, 751 (N.D. Ill. 1982); Powell v. General Am. Life Ins. Co., 271 Cal. Rptr. 16, 20 (Cal. Ct. App. 1990); HCA Health Servs. of the Midwest, Inc. v. Rosner, 566 N.E.2d 397, 401-02 (Ill. App. Ct. 1990).

305 893 F.2d 1283 (11th Cir.), *cert. denied*, 111 S. Ct. 232 (1990).

306 *Id.* at 1285. In *Kane*, plaintiff wished to adopt an infant with serious birth defects, but could not afford to unless plaintiff's welfare plan covered the infant's medical expenses. *Id.* at 1284. Plan administrators informed plaintiff that the plan would cover the infant from the date he commenced formal adoption proceedings. *Id.* When plaintiff filed a claim for the infant's medical expenses, however, the administrator rejected the claim. *Id.* at 1285. Plaintiff sued, arguing that the administrators' representations equitably estopped the plan from denying the claim. *Id.*

307 *Id.* In refusing to pay plaintiff's claim for the infant's medical expenses, defendant relied on this plan language: "No benefits are covered for charges incurred during a continuous hospital confinement which commenced prior to the effective date of coverage under this plan." *Id.* at 1286. Defendant argued that "effective date of coverage" referred to the date of the infant's coverage. *Id.* Because the infant's hospital confinement commenced prior to the date of the infant's coverage under the plan, defendant argued, the infant was ineligible under the plan's provisions. *Id.* Plaintiff argued that "effective date of coverage" referred to the date of the employee's coverage. *Id.* Because the infant's hospital confinement commenced after the date of plaintiff's coverage under the plan, plaintiff argued, the infant was eligible under the plan's provisions. *Id.* The court

plaintiff did not modify it.[308] Rather, the representations interpreted the provision by clarifying the ambiguity.[309] The court determined that the *Nachwalter* holding only disallowed estoppel based on representations that modified the plan's written terms, not representations that interpreted them.[310]

Rather than distinguishing between modifications and interpretations, another court deciding whether to estop an ERISA plan distinguished between procedural and substantive plan provisions.[311] In *Powell v. General American Life Insurance Co.*,[312] the plan rejected plaintiff's benefit application because plaintiff had not filled out a required form.[313] Plan agents had represented that the form was unnecessary.[314] The court determined that estoppel may apply against the plan because the plaintiff had failed to satisfy a procedural, rather than a substantive, plan provision.[315]

ERISA's written instrument provision did not prevent the *Kane*

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concluded that because reasonable people could disagree on the meaning of the language, the provision was ambiguous. *Id.* at 1285.

308 *Id.* at 1286. Other courts have interpreted *Nachwalter* similarly. *See* National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558, 1572 (11th Cir. 1991); McKinnon v. Blue Cross—Blue Shield, 691 F. Supp. 1314, 1321 (N.D. Ala. 1988). In *McKinnon*, plaintiff's welfare plan only covered "emergency" treatment. 691 F. Supp. at 1316. Plan agents informed plaintiff that the plan covered his operation. *Id.* at 1317. After plaintiff had the operation, however, plan agents rejected his application for benefits on the ground that the situation was not an emergency. *Id.* at 1318. The court determined that because the word "emergency" was ambiguous, the plan agents' representation interpreted, but did not modify, the plan. *Id.* at 1321. (The court rejected plaintiff's estoppel claim on other grounds. *Id.* at 1321-22.)

309 893 F.2d at 1286. The *Kane* decision is necessary in light of some holdings that the court has no power to interpret ERISA plan provisions. *See* Ray & Halpern, *supra* note 109, at 22 & n.19 (noting "deep split" in circuits on scope of courts' authority to interpret ERISA plans). Without the *Kane* holding, neither plan administrators nor the courts could offer reliable interpretations of plans.

310 893 F.2d at 1286. The court did not specifically address ERISA's written instrument provision, but it noted that *Nachwalter* construed the provision. *Id.* at 1285.

311 *See* Powell v. General Am. Life Ins. Co., 271 Cal. Rptr. 16 (Cal. Ct. App. 1990).

312 *Id.*

313 *Id.* at 17. The court noted that plaintiff was otherwise eligible for benefits and estoppel would merely excuse him from filling out the form. *Id.* at 18.

314 *Id.* at 17.

315 *Id.* Unfortunately, the court did not clarify the difference between

and *Powell* courts from estopping ERISA plans. Indeed, the *Powell* court pointed out that courts should not deprive plaintiffs of equitable remedies, such as estoppel, that were readily available before ERISA.[316] In estopping ERISA plans, however, the courts should not rely on subtle distinctions between modifications and interpretations, or procedural provisions and substantive provisions. Rather, the courts should apply estoppel uniformly against ERISA plans.

2. Enforceability of Unwritten ERISA Plans

Because Congress designed ERISA's written instrument provision to protect employees, the provision does not prevent an unwritten promise to pay benefits from being enforceable as an ERISA employee benefit plan.[317] In *Donovan v. Dillingham*,[318] for example, the Eleventh Circuit determined that by subscribing to a group health insurance policy for their employees, employers established ERISA employee welfare benefit plans.[319] The court

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procedural and substantive plan provisions, but merely held that in the case before it the provision was procedural. *See id.* at 17-19.

316 *See id.* at 20.

317 *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985); Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc); *see* Richard, Note, *supra* note 79, at 739-43 (discussing unwritten ERISA plans in terms of congressional intent and policy). Nor must a single all-inclusive document comprise the written ERISA plan. Myron v. Trust Co. Bank Long Term Disability Benefit Plan, 522 F. Supp. 511, 519 (N.D. Ga. 1981). Conversely, the existence of a writing does not necessarily create an ERISA plan. Richard, Note, *supra* note 79, at 738.

318 688 F.2d 1367 (11th Cir. 1982) (en banc).

319 *Id.* at 1375. In *Dillingham*, the Secretary of Labor sued the trustees of a group insurance trust under ERISA § 502(a), 29 U.S.C. § 1132(a), arguing that they were subject to the fiduciary duties requirements of ERISA §§ 401-414, 29 U.S.C. §§ 1131-1145. 688 F.2d at 1369. The district court held that it lacked subject matter jurisdiction because the suit did not involve an ERISA employee benefit plan. *Id.* at 1370. The appellate court reversed. *Id. Contra* Marshall v. Bankers Life & Casualty Co., 282 Cal. Rptr. 151 (Cal. Ct. App.), *review granted*, 815 P.2d 303 (Cal. 1991). In *Marshall*, a California appellate court held that by purchasing group health insurance, an employer had not established an ERISA plan. *Id.* at 157. It concluded that "[t]he employer's involvement in administering the program was limited and ministerial and therefore did not implicate the purpose of ERISA." *Id.* at 154. Whether ERISA governs the plan should not depend on the degree of an employer's administrative responsibility. Many employers also play a limited role in administering their pension plans, which ERISA obviously governs. Before other courts apply *Marshall*'s faulty reasoning in cases

noted ERISA's written instrument provision, but determined that although a formal, written plan would undoubtedly satisfy the provision, ERISA does not *require* a writing.[320] The court held that compliance with ERISA's written instrument provision is the responsibility of plan fiduciaries, but not a prerequisite to ERISA coverage.[321] Further, allowing employers to circumvent ERISA by failing to create formal written documents in breach of their fiduciary duties would contravene congressional intent to protect employees' rights and expectations.[322] The court concluded that an ERISA plan existed if a reasonable person could identify the intended benefits, the class of beneficiaries, the source of financing, and the procedures for receiving benefits.[323]

Many other courts have followed the Eleventh Circuit's holding in *Dillingham*.[324] These courts reason that enforcing unwritten

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involving pension plans, the California Supreme Court should reverse the decision.

320 688 F.2d at 1372. Under ERISA's coverage provision, ERISA § 4(a), 29 U.S.C. § 1103(a), ERISA governs "any employee benefit plan" of an employer or employee organization whose activities affect interstate commerce. The coverage provision does not require that such a plan be in writing as a prerequisite to ERISA coverage. 688 F.2d at 1372. In addition, ERISA's definitions provision, ERISA § 3(1), 29 U.S.C. § 1002(1), defines an ERISA "plan, fund or program," but also does not require that the plan, fund, or program be in writing. 688 F.2d at 1372. The court also noted that ERISA's reporting and fiduciary duties provisions do require a writing. *Id.*

321 688 F.2d at 1372. Several courts have pointed out that if a plan should be in writing but is not, the issue is compliance with ERISA, not coverage by ERISA. *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985); California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983), *rev'd on other grounds*, 770 F.2d 856 (9th Cir. 1985).

322 688 F.2d at 1372; *cf.* Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir. 1989) ("It would be unreasonable and antithetical to ERISA's purposes to hold that an employer can create an employee benefit plan and then deny benefits on the ground that it never communicated the plan to affected employees.").

323 688 F.2d at 1373. A later court applied the *Dillingham* elements in James v. National Business Sys., 721 F. Supp. 169 (N.D. Ind. 1989), *vacated on other grounds*, 924 F.2d 718 (7th Cir. 1991). In *James*, the court held that an employer had established an ERISA employee benefit plan, 721 F. Supp at 175, even though the employer never committed the plan to writing and the primary evidence of the plan's existence and terms was the alleged participants' testimony. *Id.* at 171 & nn.2-3. Following *Dillingham*, the court determined that an ERISA plan existed because a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and the procedures for receiving benefits. *Id.* at 175.

324 *See, e.g.*, Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 551 (6th

plans is consistent with ERISA's written instrument provision because the provision's purpose is to protect employees.[325] For the same reason, estopping ERISA plans is consistent with the provision.[326] Indeed, important policy considerations require that estoppel apply against ERISA employee benefit plans.[327]

3. Estoppel by Summary Plan Description and Related Policy Considerations

The courts following *Nachwalter* determined that allowing estoppel recovery against an ERISA plan based on representations external to the plan would be inconsistent with ERISA policy.[328] Indeed, courts may not apply federal common law unless it comports with ERISA policy.[329] Many courts find estopping an ERISA plan consistent with ERISA policy, however, when the representation is contained in the summary plan description (SPD).[330]

ERISA requires plans to provide participants with an SPD that explains their rights and obligations under the plan in language understandable to the average participant.[331] Congress enacted ERISA's SPD provision for the same reason it enacted ERISA's

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Cir. 1989); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985); Thomas v. Burlington Indus., Inc., 763 F. Supp. 1570, 1574 (S.D. Fla. 1991); James v. National Business Sys., 721 F. Supp. 169, 175 (N.D. Ind. 1989), *vacated on other grounds*, 924 F.2d 718 (7th Cir. 1991); Bausch & Lomb, Inc. v. Smith, 630 F. Supp. 262, 263 (W.D.N.Y. 1986).

325 *See, e.g.*, *Scott*, 754 F.2d at 1503.

326 *See* McKinnon v. Blue Cross—Blue Shield, 691 F. Supp. 1314, 1321-22 (N.D. Ala. 1988).

327 *See infra* notes 328-65 and accompanying text.

328 *See supra* notes 248-51 and accompanying text.

329 Moran v. Aetna Life Ins. Co., 872 F.2d 296 (9th Cir. 1989) (stating that federal courts cannot adopt federal common law that would abrogate ERISA provisions); Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) (stating that federal common law must be consistent with ERISA's language and policies).

330 *See, e.g.*, Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134, 136 (6th Cir. 1988); McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985); Zittrouer v. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471, 1475 (N.D. Ga. 1984); *see also* BRUCE, *supra* note 3, at 390 (stating that when SPD estops plan from applying plan provisions, SPD "effectively become[s] the terms of the plan" (quoting Miller & Dorenfeld, *supra* note 295, at 848)).

331 ERISA § 102(a)(1), 29 U.S.C. § 1021(a)(1); *see also* 29 C.F.R. § 2520.102-1 to .102-5 (1991) (detailed rules for compliance with SPD requirements).

written instrument provision: to provide plan participants with accurate information about their rights under the plan.[332] In deference to congressional intent, several courts refuse to hold that the plan prevails when the SPD conflicts with plan provisions.[333] Instead, SPD statements or provisions estop the plan from applying contrary provisions.[334] In effect, the SPD becomes the plan.[335] In *Edwards v. State Farm Mutual Automobile Insurance Co.*,[336] for example, a service requirement conditioned plaintiff's right to retirement benefits, but the SPD stated that the requirement did not apply in plaintiff's situation.[337] The court determined that the SPD contained materially misleading misrepresentations,[338] and that plan administrators should have realized that participants would rely on the SPD.[339] For these reasons, the court

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[332] BRUCE, *supra* note 3, at 397; *see* H.R. REP. No. 533, *supra* note 12, at 4649; James F. Stratman, *Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice?*, 10 INDUS. REL. L.J. 350, 351-52 (1988); Walter C. Welsh, *Employee Communications Under ERISA: Summary Plan Descriptions*, *in* NEW YORK UNIVERSITY THIRTY-FIFTH ANNUAL INSTITUTE ON FEDERAL TAXATION: ANNUAL CONFERENCE ON ERISA 115, 116 (Nicolas Liakas ed., Supp. 1977).

[333] *See* Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134, 136 (6th Cir. 1988); McKnight v. Southern Life & Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985); Zittrouer v. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471, 1475 (N.D. Ga. 1984).

[334] BRUCE, *supra* note 3, at 390; *see* Carr & Thierfelder, *SPDs*, *supra* note 246, at 184, 186 (noting courts' "promissory estoppel" approach).

[335] BRUCE, *supra* note 3, at 390; *see also* Miller & Dorenfeld, *supra* note 295, at 847-49 (discussing contract theories under which SPD "may effectively become the terms of the plan," and procedural and substantive consequences); Welsh, *supra* note 332, at 116 (noting possibility that SPD will bind plan regardless of contrary warnings in SPD).

[336] 851 F.2d 134 (6th Cir. 1988).

[337] *Id.* at 135. Plaintiff failed to meet the service requirement because he became disabled before retiring, and under the plan, only service prior to disablement counted. *Id.* The SPD, however, stated that "[t]ime while on sick leave counts as service for plan membership and vesting." *Id.*

[338] *Id.* at 136.

[339] *Id.* Employees are likely to form stronger expectations around oral exchanges than around language in "a long and legalistic employee benefits plan." PERRITT, *supra* note 2, at 148. Under such circumstances enforcing the plan's provisions would be " 'grossly unfair' " to the employee. 851 F.2d at 136 (quoting H.R. REP. No. 533, *supra* note 12, at 4646). The *Edwards* court, however, went so far as to hold that the SPD prevails over the plan even if the participant did not detrimentally rely on the SPD's provisions. 851 F.2d at 137; *accord* BRUCE, *supra* note 3, at 393; *see* Zittrouer v. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471, 1475 (N.D. Ga. 1984).

enforced the SPD's provisions.[340] Additionally, the court held that the SPD prevails even if it contains a disclaimer stating that, in the event of a contradiction, the plan's provisions control.[341]

Contra Risch v. Waukesha Title Co., 588 F. Supp. 69, 72 (E.D. Wis. 1984); Hillis v. Waukesha Title Co., 576 F. Supp. 1103, 1109 (E.D. Wis. 1983).

340 851 F.2d at 136.

341 *Id.*; *see* McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985); Zittrouer v. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471, 1475 (N.D. Ga. 1984); BRUCE, *supra* note 3, at 397 (noting courts hold disclaimers invalid to extent they contravene ERISA's reporting and disclosure requirements); Welsh, *supra* note 332, at 116 (noting possibility that SPD will be "as binding on the employer as the plan itself"). *Contra* Kolentus v. Avco Corp., 798 F.2d 949, 958 (7th Cir. 1986) (stating that if SPD contains disclaimer, employees cannot rely on SPD but must look to plan itself), *cert. denied*, 479 U.S. 1032 (1987); Carver v. Westinghouse Hanford Co., No. C-88-582-AAM, 1990 U.S. Dist. LEXIS 15865, at *87 (E.D. Wash. July 18, 1990) (stating that to ignore disclaimer in SPD would be "myopic" reading of SPD).

A boilerplate disclaimer may read:

> This booklet is not a part of and does not modify or constitute any provisions of the plan described herein, nor does it alter or affect in any way the rights of any participant under the plan. The plan and all descriptions and outlines thereof are governed by the formal plan document. A copy of this plan is on file at the office of the company and may be inspected, upon request, during normal business hours of any regular working day.

Trombly v. Marshall, 502 F. Supp. 29, 30 (D.D.C. 1980).

In one study, subjects read an SPD ending with a disclaimer in smaller type. Stratman, *supra* note 332, at 363. When questioned about the benefits the plan provided, over 85% of the subjects gave no indication that they noticed the disclaimer. *Id.* at 364-65. Only 7.5% stated that they needed to see the actual plan to determine what benefits it provided. *Id.* at 369. The author suggested that lay readers of SPDs fail to notice disclaimers because, given the detail SPDs typically contain, the readers assume they are reading official, contractual provisions and do not expect to see a disclaimer. *Id.* at 375. The few readers who see and understand a disclaimer, conversely, are doubly burdened and confused because then they must compare the SPD with the actual plan for inconsistencies. *Id.* Enforcing disclaimers would thus increase the confusion Congress sought to eliminate by enacting ERISA's SPD provision. BRUCE, *supra* note 3, at 397. In addition, enforcing disclaimers would " 'encourage sloppiness by plans in preparing plan descriptions' " and ultimately deprive employees of their expected benefits. Alan B. Shidler, *Are Disclaimers in SPDs Valid?*, 6 J. PENSION PLAN. & COMPLIANCE 119, 120 (1980) (quoting remarks of Ian D. Lanoff, Administrator of the Department of Labor Pension and Welfare Benefit Programs, Midwest Pension Conference (Sept. 28, 1977)).

Instead of a disclaimer, some SPDs include the entire plan in an appendix, so that to enforce the SPD the court would have to enforce the plan. *See*

The *Edwards* and other courts allow estoppel recovery based on SPD representations to protect the expectations that employees form around such representations.[342] Courts should allow estoppel recovery based on non-SPD representations because of even more compelling policy considerations. As between the plan documents, the SPD, and an oral exchange with a plan administrator, an employee is likely to form the strongest expectations around the oral exchange.[343] Refusing to estop the plan based on an oral exchange would frustrate both the employee's enhanced expectations and Congress's intent to protect such expectations. Further, few employees receive copies of the written plan itself;[344] most must rely solely on what the SPD says and what plan administrators tell them.[345] Although the courts may enforce SPD representations, the SPDs themselves often instruct employees to consult the plan administrator with questions about the plan.[346] These employees have no plan to consult, but only an SPD that instructs them to consult the plan administrator with questions.[347] By refusing to enforce administrators' representations through estoppel, the courts have left employees with no repre-

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Carr & Thierfelder, *SPDs*, *supra* note 246, at 191. Courts often refuse to enforce the plan over inconsistent SPDs, however, even when the SPD contains the plan in an appendix. *See, e.g.*, Johnson v. Central States S.E. & S.W. Areas Pension Fund, 513 F.2d 1173, 1175-76 (10th Cir. 1975) (pre-ERISA); Hurd v. Hutnik, 419 F. Supp. 630, 656-57 (D.N.J. 1976).

342 *See* 851 F.2d at 136.

343 Scheuer v. Central States Pension Fund, 358 F. Supp. 1332, 1338 (E.D. Wis. 1975) (pre-ERISA); PERRITT, *supra* note 2, at 148. The *Scheuer* court stated, "The complexity of the typical fund agreement . . . make[s] it unlikely that workers will disregard promises made to them." 358 F. Supp. at 1338.

344 Wellman & Clark, *supra* note 18, at 687 (noting that SPD provides basis for employees' understanding of plan because they almost never see plan itself).

345 *See id.*; *cf.* John P. Carsten, *The Administrator—Hub of the Wheel*, 8 J. PENSION PLAN. & COMPLIANCE 134, 140 (1982) ("It is unfortunate that documents such as [SPDs] are not well read. [SPDs] usually do not make it to the garbage can but . . . end up in the kitchen cabinet along with the can opener warranty.").

346 *See* Welsh, *supra* note 332, at 126. At a minimum, the SPD usually refers the employee back to the complicated, incomprehensible formal plan. *See* BRUCE, *supra* note 3, at 396 (quoting SPD containing such provision).

347 *Cf.* Lockrey v. Leavitt Tube Employees' Profit Sharing Plan, 766 F. Supp. 1510, 1517 (N.D. Ill. 1991) (holding plaintiff's reliance on assurances of one "who had been held up to plan participants as someone to whom they could direct their questions" reasonable).

sentations to rely on about their benefits.[348]

Even employees who do receive copies of the plan often need to consult plan administrators with questions. Most employee benefit plans are extraordinarily complex.[349] They contain legalese[350] and complicated technical jargon[351] that make their provisions incomprehensible to laypersons.[352] This complexity alone encourages participants who do not understand the plan document to ask plan administrators to clarify it.[353] Indeed, Congress requires plan administrators to provide employees with SPDs because most plans are incomprehensible to lay employees.[354]

Employees who do not understand the written plan document, yet who may not rely on representations about it, can never become adequately apprised of their rights under the plan.[355] Such a result would contravene Congress's intent in enacting

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348 *Cf.* Lockrey v. Leavitt Tube Employees' Profit Sharing Plan, 748 F. Supp. 662, 665 (N.D. Ill. 1990) ("[A] complete prohibition on estoppel claims altogether would appear rather draconian.").

349 Musto v. American Gen. Corp., 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1231 (D. Md. 1990); *see* 29 C.F.R. § 2520.102-2(a) (1991) (instructing plan administrators to eliminate "technical jargon" and "long, complex sentences" from SPDs).

350 *See* Stratman, *supra* note 332, at 371; BRUCE, *supra* note 3, at 397 (plans contain " 'cold legal phrasing' " (quoting 3 ERISA LEGISLATIVE HISTORY 4750 (remarks of Sen. Javits))).

351 Welsh, *supra* note 332, at 125 (plans contain technical jargon in long complex sentences); *see* H.R. REP. No. 553, *supra* note 12, at 4646 (plans contain "technicalities and complexities").

352 Miller & Dorenfeld, *supra* note 295, at 839; *accord* H.R. REP. No. 533, *supra* note 12, at 4646; *see also* Welsh, *supra* note 332, at 124 ("[I]t would be difficult to make a pension plan understandable to average plan participants even if they were all accountants and attorneys."). The Department of Labor regulations instruct plan administrators to "tak[e] into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan" when preparing an SPD. 29 C.F.R. § 2520.102-2(a) (1991).

353 One court specifically held that asking questions of plan administrators is the only reasonable course of action for an employee about to rely on a plan provision. *See* Stenke v. Quanex Corp., 759 F. Supp. 1244 (E.D. Mich 1991). In *Stenke*, the court pointed out that "[a] reasonable person would have sought out someone who was involved in administering the pension plan and asked specifically about the plan's vesting provisions before deciding to resign." *Id.* at 1246.

354 *See* H.R. REP. No. 533, *supra* note 12, at 4649.

355 *Cf.* Carr & Thierfelder, *Talk is Cheap*, *supra* note 5, at 207 ("Occasional

ERISA and ERISA's written instrument provision: to enable employees to enforce their rights under the plan. To prevent such a result, courts should estop ERISA plans when employees reasonably and detrimentally rely on misrepresentations.

Allowing estoppel recovery can also prevent employers from misleading their employees.[356] Knowing that employees are especially likely to rely on and form expectations around oral representations, unscrupulous employers may willfully make misleading representations about the plan.[357] Similarly, unscrupulous employers may emphasize the plan's more attractive aspects in the SPD, while de-emphasizing or omitting less attractive aspects.[358] In reliance on misleading representations, employees may take action that prevents their benefits from vesting under the plan.[359] Under current law, the employee who relied on the SPD representation could recover under estoppel,[360] while the employee who relied on the non-SPD representation could not.[361] Allowing estoppel recovery based on non-SPD representations would provide employees with a remedy and discourage employers from misleading their employees.

Finally, some courts refuse to allow oral modification of ERISA plans because oral statements are imprecise and difficult to

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oral misrepresentations concerning an employee's entitlement to benefits are inevitable.").

356 *See* PERRITT, *supra* note 2, at 148.

357 *See id.*; *see also* Stratman, *supra* note 332, at 353, 375 (employers may use evasive linguistic devices in SPDs to mislead employees).

358 BARBARA B. CREED, ERISA COMPLIANCE: REPORTING AND DISCLOSURE 28-29 (1981).

359 For example, "an employer might tell . . . employee[s] that [they] must make an election now between two benefits options, knowing that another option will be made available, or that the relative attractiveness of the two options will change when a plan modification is announced and takes effect later." PERRITT, *supra* note 2, at 148. If the employees elect the less attractive option, they will have no vested right to receive benefits under the other option. *Id.*

360 *See* Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134 (6th Cir. 1988); McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566 (11th Cir. 1985); Zittrouer v. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471 (N.D. Ga. 1984).

361 *See* PERRITT, *supra* note 2, at 148. *But cf.* Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (suggesting that *Nachwalter* rule against estoppel would not apply when misrepresentation amounted to fraud).

prove.[362] In enforcing oral plans under ERISA, however, courts determine all of the plan's provisions from oral testimony of believable witnesses.[363] The courts allow such proof to protect employees' expectations and to prevent employers from profiting from their failure to memorialize the plan in writing.[364] These considerations are no less compelling when a plan agent misrepresents existing written plan provisions. A single statement about a single benefit will often be easier to prove than a series of oral statements that contain all the provisions of an ERISA plan.[365] Congress's intent to protect plan participants through ERISA and its written instrument provision should override concerns of complicated proof in cases involving estoppel as well as cases involving unwritten plans.

B. Paying Benefits Within the Plan's Terms: The Actuarial Effect of Estopping ERISA Plans

Congress's intent to protect plan participants should also override concerns for ERISA plans' actuarial soundness. The courts cannot deny estoppel recovery against ERISA plans because of such concerns without ignoring fundamentals of plan formation and funding under ERISA.[366] This Section examines the actuarial effect of estopping the different types of ERISA plans.[367] Though estoppel recovery affects welfare plans,[368] defined contribution pension plans,[369] and defined benefit pension plans differently,[370] estoppel recovery does not jeopardize any of these plans' actuarial soundness.[371] Instead, ERISA's funding provisions ade-

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362 *See* Musto v. American Gen. Corp., 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1231 (D. Md. 1990).

363 *See, e.g.*, James v. National Business Sys., 721 F. Supp. 169, 171 n.3, 175 (N.D. Ind. 1989), *vacated on other grounds*, 924 F.2d 718 (7th Cir. 1991).

364 *See* Donovan v. Dillingham, 688 F.2d 1369, 1372 (11th Cir. 1982) (en banc).

365 Yet courts readily hear lengthy testimony concerning an oral plan's terms. In *James*, for example, the court made detailed findings of fact about plan provisions over which the employer and employees had orally negotiated for five months. 721 F. Supp. at 170-74.

366 *See infra* notes 372-442 and accompanying text.

367 *See infra* notes 372-442 and accompanying text.

368 *See infra* notes 372-405 and accompanying text.

369 *See infra* notes 406-27 and accompanying text.

370 *See infra* notes 428-42 and accompanying text.

371 *See infra* notes 372-442 and accompanying text.

quately protect ERISA plans' actuarial soundness.

1. Welfare Plans

As discussed above, employee welfare benefit plans provide employees with health, disability, and other benefits that promote the employees' well-being.[372] ERISA does not require employers to fund their welfare plans.[373] Because unfunded plans have no fund to deplete and no actuarial soundness to jeopardize, protecting actuarial soundness is not a valid reason for disallowing estoppel recovery against these plans.[374]

The court recognized this in *Black v. TIC Investment Corp.*[375] In *Black*, plaintiff's employer had filed for bankruptcy and notified its employees that it would terminate its severance pay plan.[376] Although plaintiff was discharged after the plan terminated, his discharge notice stated that he was eligible for severance benefits.[377] Plaintiff sought declaratory relief in federal court, arguing that estoppel obligated the employer to pay the benefits.[378]

The court began its analysis by noting the general reluctance to estop ERISA plans, which stems from concern for the plans' actu-

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372 *See supra* notes 96-99 and accompanying text.

373 ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1).

374 Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990). The *Black* court is one of the few to consider the details of the plan's formation in deciding whether estoppel recovery would affect its actuarial soundness. Other courts have pointed out that estoppel recovery would affect the plan's actuarial soundness only if the plaintiff has sued the fund itself. *See* Davidian v. Southern Cal. Meat Cutters Union & Food Employees Benefit Fund, 859 F.2d 134, 136 (9th Cir. 1988). By contrast, estoppel recovery against the employer, plan administrators, or plan trustees individually would not diminish the fund. *Id.*

375 900 F.2d 112. The employee brought the benefit claim against the employer, and not the plan as a distinct entity, because the plan was unfunded. *See id.* at 113.

376 *Id.* The employer filed for protection under chapter 11 of the Bankruptcy Act. *Id.*; *see* 11 U.S.C. §§ 1101-1174.

377 900 F.2d at 113. A severance pay plan is one type of unfunded welfare plan, and typically provides for a single lump sum payment upon a participant's termination of employment. LANGBEIN & WOLK, *supra* note 88, at 602.

378 900 F.2d at 113. Plaintiff initially filed a claim with the bankruptcy court. *Id.* The employer objected to the claim on the ground that it discharged plaintiff after the plan had terminated. *Id.* The employer apparently acted in its capacity as debtor in possession under chapter 11. *See id.*; *see also* 11 U.S.C. § 1107.

arial soundness.[379] It observed, however, that ERISA does not require employers to fund their welfare plans.[380] Recognizing that unfunded plans have no fund to deplete,[381] the court concluded that actuarial soundness concerns do not arise in suits against such plans.[382] The *Black* court therefore allowed estoppel recovery against the unfunded welfare plan.[383]

The *Black* court's reasoning should apply in all cases against unfunded welfare plans. The rationale behind the actuarial soundness concern is that paying benefits to ineligible persons would deplete plan assets, leaving the plan unable to fulfill its obligations to eligible participants.[384] If the plan is not funded, however, it has no assets to deplete.[385] Paying an estoppel damages award would not affect an unfunded plan's ability to pay promised benefits because the employer pays the award directly.[386]

Like unfunded plans, plans funded through insurance have no assets to deplete and no actuarial soundness to jeopardize.[387] In

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379 900 F.2d at 115. The court further noted that to disallow estoppel recovery is an exception to the general rule that estoppel principles apply in all legal actions. *Id.*

380 *Id.* (citing Young v. Standard Oil, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988)). The court also noted that ERISA's vesting and accrual requirements do not apply to welfare plans. *Id.*

381 *Id.*

382 *Id.*

383 *Id.*

384 *Cf.* ERISA § 2(a), 29 U.S.C. § 1001(a) ("[O]wing to the inadequacy of current minimum [funding] standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered."); Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990) (finding actuarial soundness concerns inapplicable in suit against unfunded welfare plan, which has no fund to deplete); Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957, 963 (1st Cir. 1989) (citing Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976) and noting "perhaps prosaic (but still powerful) interest in maintaining the Fund's solvency").

385 *See Black*, 900 F.2d at 115; *cf.* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *37 (6th Cir. Sept. 24, 1991).

386 *See* Curtis, *supra* note 93, at 8.

387 *See* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS, at *37 (6th Cir. Sept. 24, 1991); HCA Health Servs. of the Midwest, Inc. v. Rosner, 566 N.E.2d 387, 401-02 (Ill. App. Ct. 1990); *see also supra* notes 86-92 and accompanying text.

Armistead v. Vernitron Corp.,[388] the court held that estoppel may apply against such a plan.[389] In *Armistead*, plaintiffs retired in reliance on representations that they were entitled to retiree insurance benefits.[390] After they retired, however, plan agents informed them that they would not receive the benefits.[391] Plaintiffs sued the plan, arguing that it was estopped from refusing to provide insurance coverage.[392] Citing *Black*, the court determined that because employers pay the insurance premiums out of their operating capital, allowing estoppel recovery against insurance plans would not jeopardize the plans' actuarial soundness.[393]

In similar cases, plaintiffs argue that the plan is estopped from denying their eligibility for a specific benefit, rather than for any benefits.[394] In these cases, plaintiffs typically sue the plan by

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388 Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399 (6th Cir. Sept. 24, 1991).

389 *Id.* at *39-*40. The court's discussion of estoppel is dicta. It had already determined that the employer violated the plan and the collective bargaining agreement by denying the plaintiffs' eligibility for benefits. *See id.* at *36.

390 *Id.* at *3-*4, *11-*12.

391 *Id.* at *3-*4. The plan agents informed plaintiffs that under the plan and the collective-bargaining agreement, the employer could unilaterally terminate plaintiffs' eligibility for benefits. *Id.* at *4.

392 *Id.* at *2. The plan was a collectively-bargained single-employer welfare plan funded through insurance. *See id.* at *3-*4. Thus the LMRA also governed. *See id.* at *2.

393 *Id.* at *37. The court also cited Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986), which disallowed estoppel recovery against an ERISA plan because of ERISA's written instrument provision. Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *33-*35 (6th Cir. Sept. 24, 1991); *see supra* notes 235-47 and accompanying text. The *Armistead* court noted, however, that the *Nachwalter* court's reasoning would not apply in cases involving welfare plans. Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *36 (6th Cir. Sept. 24, 1991). *Armistead* is noteworthy for its attempt to reconcile *Nachwalter* and *Black*, and for its discussion of both ERISA's written instrument provision and the ERISA plan's actuarial soundness. No other court has addressed both issues in deciding whether to estop an ERISA plan.

394 *See, e.g.*, HCA Health Servs. of the Midwest, Inc. v. Rosner, 566 N.E.2d 397 (Ill. App. Ct. 1990). In *HCA*, plaintiff health-care provider sued defendant insurance company for payment of the medical expenses of a welfare plan participant. *Id.* at 398. The insurance company had contracted to cover the plan. *Id.* at 398-99. It had also represented to the health-care provider that the plan covered the participant's particular medical expenses. *Id.*

suing the insurance company itself.[395] Because the insurance company would pay the estoppel damages award in such a suit, the award would not affect the plan's ability to pay benefits to other participants.[396]

Although the plan is a distinct legal entity,[397] the insurance company is the effective defendant in estoppel suits against welfare plans funded through insurance.[398] Similarly, the employer is the effective defendant in estoppel suits against unfunded welfare plans.[399] Even if the plaintiff names the plan as the defendant, the court may view the employer or the insurance company as the "actual" defendant.[400] As some courts have pointed out, actuarial soundness concerns arise only if the plan itself is the defendant.[401] Courts should allow estoppel recovery in cases involving welfare plans on the basis that the plan is not the defen-

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395 *See, e.g.,* Coleman v. Nationwide Life Ins. Co., 748 F. Supp. 429 (E.D. Va. 1990); *see also* PERRITT, *supra* note 2, at 15 (discussing plans funded through insurance).

396 *See* Joan Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 INDUS. REL. L.J. 183, 219 n.234 (1987) (noting that actuarial soundness concerns do not arise in suits against welfare plans funded through insurance).

397 ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1).

398 PERRITT, *supra* note 2, at 15 ("[P]lan participants have direct rights against the insurance company . . . as defined by the insurance policy or contract.").

399 *See* Curtis, *supra* note 93, at 8.

400 Indeed, determining whether the plaintiff has sued the plan itself is often difficult. In Coleman v. Nationwide Ins. Co., 748 F. Supp. 429 (E.D. Va. 1990), for example, plaintiff named the insurance company, which represented that it would pay plaintiff's medical expenses under the plan, as defendant. *Id.* at 430. In its discussion of estoppel, the court addressed whether estoppel can "be a basis for recovery under [ERISA]," but not whether, under ERISA, estoppel would apply against the insurance company or against the plan. *Id.* at 433. We cannot tell whether the plaintiff sued the plan itself, because she could do so only by suing the insurance company. Whether a plaintiff has sued the insurance company, or the welfare plan funded through insurance, is thus an illusory distinction.

401 *See, e.g.*, Davidian v. Southern Cal. Meat Cutters Union & Food Employees Benefit Fund, 859 F.2d 134, 136 (9th Cir. 1988) (estoppel applied against plan administrators and plan trustees, but not against plan, because "recovery against individual fiduciaries would not directly diminish the fund" (footnote omitted)); Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986) (estoppel would apply against employer if elements fulfilled); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985) (same); Bogue v. Ampex Corp., 750 F. Supp. 424, 430 (N.D. Cal. 1990) (estoppel applied against employer); Coleman v. National Life Ins.

dant, as well as on the basis that such plans have no fund to deplete.[402]

ERISA specifically exempts welfare plans from its strict funding requirements.[403] If Congress considered welfare plans' actuarial soundness to be important, it would have enacted funding provisions for such plans.[404] Instead, Congress left the governance of these plans to common-law contract principles and equitable doctrines such as estoppel.[405] For this reason, and because applying estoppel would not affect welfare plans' actuarial soundness, courts should allow estoppel recovery against such plans.

2. Defined Contribution Pension Plans

Courts should also allow estoppel recovery against defined contribution employee pension benefit plans. As discussed above,

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Co., 748 F. Supp. 429, 433-34 (E.D. Va. 1990) (estoppel applied against insurer).

402 Although employers may fund their welfare plans through trusts, they almost never do so. *See* Vogel, *supra* note 396, at 233 & n.317, 238 & n.331 (noting that only 5% of surveyed employers funded their welfare plans through trusts). Employers may be reluctant because Congress has not accorded such funds the same favorable tax treatment as funded pension plans. *See* I.R.C. § 401(a)(9); *see also* Vogel, *supra* note 396, at 237-38 (noting that I.R.C. limits accumulation of nontaxable assets in welfare plans).

403 ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1).

404 *See* Gregory P. Rogers, Comment, *Rethinking* Yard-Man*: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 EMORY L.J. 1033, 1038 (1988) ("Had Congress wished to protect welfare plans in the same way as pension plans, it could easily have done so by specifically including them within the Act's stringent protection."). This reasoning should also apply in cases involving estoppel claims against unfunded pension plans. For a discussion of unfunded pension plans, see generally LOUIS R. RICKEY & LAWRENCE BRODY, COMPREHENSIVE DEFERRED COMPENSATION: A COMPLETE GUIDE TO NONQUALIFIED DEFERRED COMPENSATION (1989); A. Richard Susko, *Selected Current Issues in Unfunded Deferred Compensation*, *in* NEW YORK UNIVERSITY FORTY-THIRD ANNUAL INSTITUTE ON FEDERAL TAXATION: ANNUAL CONFERENCE ON EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION 3-1 (Melvin Cornfield ed., 1985).

405 Vogel, *supra* note 396, at 186; John T. McNeil, Note, *The Failure of Free Contract in the Context of Employer-Sponsored Retiree Welfare Benefits: Moving Towards a Solution*, 25 HARV. J. LEGIS. 213, 214 (1988); Rogers, Comment, *supra* note 404, at 1033-34. As several courts have noted, to disallow estoppel recovery is to deviate from the general rule that estoppel principles apply in all legal actions. *See* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *37 (6th Cir. Sept. 24, 1991); Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990).

pension plans provide employees with income after they retire.[406] Under ERISA, employers can create two types of funded pension plans: defined contribution pension plans[407] and defined benefit pension plans.[408] Defined contribution pension plans hold their assets in individual accounts for each participant,[409] and the amount of a participant's pension benefit depends on how much the assets have earned or lost by the time the participant retires.[410] The most common defined contribution pension plan, the money purchase plan, is an employer's promise to contribute defined amounts to the plan trust on its employees' behalf.[411] Another common type of defined contribution plan, the deferred profit sharing plan, is an employer's promise to contribute

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406 *See supra* notes 96-98 and accompanying text.

407 Under ERISA, a defined contribution pension plan is:

> a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

ERISA § 3(34), 29 U.S.C. § 1002(34). ERISA refers to defined contribution pension plans as "individual account" plans. *See generally* Daniel E. Feld, Annotation, *What is "Individual Account Plan" or "Defined Contribution Plan" Under 29 USCS § 1002(34) Which Defines Such Terms for Purposes of Labor Law Provisions of Employee Retirement Income Security Act of 1974*, 51 A.L.R. FED. 552 (1981).

408 Under ERISA, a defined benefit pension plan is "a pension plan other than [a defined contribution plan]." ERISA § 3(35), 29 U.S.C. § 1002(35). Under the Internal Revenue Code, by contrast, the definition of "pension plan" is different and quite technical. *See* 29 C.F.R. § 1.401-1(b) (1991); Anthony L. Scialabba & Melissa K. Scialabba, *Retirement Plan Planning in Recessionary Times*, 17 J. PENSION PLAN. & COMPLIANCE 34, 35 (1991). Because the Code's definition turns on whether the contributions are determinable through a formula, some defined contribution plans are not "pension plans" for tax purposes. *See* 29 C.F.R. § 1.401-1(b)(1)(i).

409 *See* ERISA § 3(34), 29 U.S.C. § 1002(34); Peter T. Scott, *A National Retirement Income Policy*, 44 TAX NOTES 913, 919-20 (1989), *quoted in* LANGBEIN & WOLK, *supra* note 88, at 39, 40.

410 *See* Donald S. Grubbs, Jr., *Defined Benefit Plans vs. Defined Contribution Plans: A Reassessment*, 16 J. PENSION PLAN. & COMPLIANCE 97, 109 (1990) (noting that "the accrued benefit is expressed as an account balance"); *see also* MUNNELL, *supra* note 128, app. b at 214; Scott, *supra* note 409, at 40.

411 *See* LANGBEIN & WOLK, *supra* note 88, at 44 (calling money purchase plans "[t]he plain vanilla of [defined contribution] plans"). The defined amount is often a percentage of the employee's salary. *Id.*

unspecified amounts to the plan trust.[412]

The court applied estoppel against a deferred profit sharing plan in *Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*.[413] In *Lockrey*, plan representatives had told plaintiff that, when he withdrew from the plan, his benefit distribution would be calculated using a particular valuation date.[414] When plaintiff withdrew, however, plan representatives informed him that his benefit distribution would be calculated using a later date, thus lowering the distribution.[415] Plaintiff sued the plan, arguing that it was estopped from using the later valuation date.[416]

In its analysis, the court examined the plan's type and discussed whether estoppel recovery would affect the actuarial soundness of a defined contribution plan.[417] Because defined contribution plans have individual accounts for each participant, the court concluded that estopping such plans would not jeopardize the plans' actuarial soundness.[418] Actuarial soundness concerns, the court observed, arise primarily in suits against defined benefit pension plans.[419] For these reasons, the court determined that estoppel may apply against a single-employer defined contribution pension

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412 *Id.*; *see also* 29 C.F.R. § 1.401-1(b)(ii) (1991). Other defined contribution pension plans against which an estoppel claim may arise include target benefit plans, stock bonus plans, and employee stock ownership plans (ESOPs). For a discussion of these plans, see generally EBRI, *supra* note 75; LANGBEIN & WOLK, *supra* note 88, at 44-48.

413 748 F. Supp. 662 (N.D. Ill. 1990).

414 *Id.* at 663.

415 *Id.* The stock market crashed in October, 1987, between the two dates, lowering plaintiff's benefit distribution. *Id.*

416 *Id.*

417 *Id.* at 664. The court felt that the *Black* court's reasoning controlled even though *Lockrey* involved a pension plan instead of a welfare plan. *Id.* at 665.

418 *Id.* The court stated:

> When a fund of a certain size and growth rate must be maintained in order to deliver benefits which have previously been promised, the stability of the plan is more threatened by unforeseen liabilities, such as those resulting from estoppel claims, than is a plan which defines benefits based on the amounts in individual accounts.

Id. The court further pointed out that "a successful estoppel claim would have an effect on the accounts of other participants. The effect would not, however, be an actuarial effect serving to threaten established definitions of the amount of future benefits." *Id.*

419 *Id.* The court also noted that defined benefit pension plans are commonly multiemployer plans. *Id.*; *see infra* notes 425, 437.

plan.[420]

Allowing estoppel recovery cannot affect the actuarial soundness of a defined contribution pension plan because, by definition, such plans are always fully funded.[421] The participants never expect to receive more than their account balance, because the employer never promised more. Further, because defined contribution plans have no general pool of assets, an individual participant's estoppel claim would not affect any other participant's benefit.[422] Instead, an estoppel damages award would deplete the plaintiff participant's individual account.[423] If the plaintiff has no individual account, the plan can persuasively argue that plaintiff's reliance on representations that the plan would provide benefits was not reasonable.[424] Thus, the elements of estoppel combine with the defined contribution plan's structure to protect the plan's actuarial soundness.[425]

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420 748 F. Supp at 665.

421 EBRI, *supra* note 75, at 59 ("Defined contribution plans are by nature fully funded; therefore, they do not present the risks of defined benefit plans and are not subject to the pension insurance program."); Jeremy I. Bulow et al., *Economic Implications of ERISA, in* FINANCIAL ASPECTS OF THE UNITED STATES PENSION SYSTEM 37, 43 (Zvi Bodie & John B. Shoven eds., 1983) ("A defined-contribution plan is always funded fully—never overfunded or underfunded."). Further, if the misrepresentation amounts to a breach of fiduciary duty, a damages award against the breaching fiduciary would replenish the plan's assets. *See* ERISA §§ 404, 409, 29 U.S.C. §§ 1104, 1109.

422 *See* 748 F. Supp. at 665.

423 *See id.*

424 Because participants in defined contribution plans receive regular statements of their account balances, employees who never receive such statements can have no reason to suppose the plan covers them. *See* Grubbs, *supra* note 410, at 109. As the *Lockrey* court noted:

> [T]he dangers of large reductions in benefits to other participants posed by the allowance of estoppel claims may be controlled by the application of the traditional elements of estoppel. The cases in which liability seems to be the most unreasonable will be the same cases in which it will be the most difficult for a plaintiff to prove the reasonable reliance necessary to state an estoppel claim.

748 F. Supp. at 665.

425 This reasoning applies in estoppel actions against multiemployer as well as single-employer defined contribution plans. In Black v. TIC Inv. Corp., 900 F.2d 112 (7th Cir. 1990), the court noted:

> [W]here estoppel is disallowed, the pension plan involved is ordinarily a multiemployer plan. The reason for reluctance in such cases is the fact that the Plan has multiple fiduciaries with

Further, ERISA's funding provisions apply to money purchase plans, but not to other types of defined contribution plans.[426] If Congress viewed the actuarial soundness of such plans as important, it could easily have enacted funding provisions to apply to them.[427] Courts, therefore, should not hesitate to apply estoppel against defined contribution pension plans.

3. Defined Benefit Pension Plans

For similar reasons, courts should allow estoppel recovery against defined benefit pension plans. A defined benefit pension plan is an employer's promise to pay a defined level of benefits to its employees when they retire.[428] This level is arrived at by a formula, such as years of service multiplied by a percentage of average salary.[429] The court applied estoppel against a multiemployer defined benefit pension plan in *Torrence v. Chicago Tribune Company*.[430]

> control over a common fund. To allow one employer to bind the fund to pay benefits outside the strict terms of the Plan would make all the employers pay for one employer's misrepresentations, and to the extent that such payments damage the actuarial soundness of the Plan, it hurts all the employees as well. It could even encourage employers to make intentional misrepresentations so as to bind the Plan to make improper payments in favor of their own employees.

Id. at 115 (citing BRUCE, *supra* note 3, at 404); *see also* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 22399, at *38 (6th Cir. Sept. 24, 1991) (citing *Black*); *infra* note 437. Because a defined contribution plan has an individual account for each participant, depleting one participant's account through estoppel would not affect the other participants' accounts. Further, although other employers may have helped fund a given participant's account, when the employers entered into the collective-bargaining agreement and agreed to contribute to the plan, they accepted the risk that other employers would misrepresent an employee's entitlement to benefits. *Cf.* Carr & Thierfelder, *Talk is Cheap*, *supra* note 5, at 207 (noting inevitability of occasional misrepresentations regarding benefits). Finally, the risk that an employer may intentionally mislead employees to prevent their benefits from vesting is heightened if the court disallows estoppel recovery against multiemployer plans. *See supra* notes 356-61 and accompanying text.

426 *See* ERISA § 301(a)(9), 29 U.S.C. § 1081(a)(9).

427 *Cf. supra* notes 403-05 and accompanying text.

428 Scott, *supra* note 409, at 39.

429 *Id.*

430 535 F. Supp. 748 (N.D. Ill. 1982). Although the court did not specify whether the defendant pension plan was a defined contribution pension

In *Torrence*, plan agents informed plaintiff that a job change would not affect his eligibility for benefits.[431] After plaintiff retired, however, he discovered that his job change constituted a break in service, and that he was ineligible for a pension under the plan's terms.[432] Plaintiff sued the plan, arguing that it was estopped to deny his eligibility to receive a pension.[433] The plan argued that allowing estoppel recovery would jeopardize its actuarial soundness.[434] The court noted, however, that because plaintiff's employer had continued to contribute to the plan on plaintiff's behalf, an estoppel damages award would simply draw upon the contributed funds.[435] Thus, the court concluded, allowing estoppel recovery would not affect the defined benefit pension plan's actuarial soundness.[436]

The *Torrence* court's reasoning should apply in all cases against defined benefit pension plans. Moreover, because ERISA's funding provisions adequately protect defined benefit pension plans' actuarial soundness, the *Torrence* court's reasoning should apply regardless of whether the employer continues to make contributions on the plaintiff's behalf.[437] Unless the employer violates

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plan or a defined benefit pension plan, it was probably a defined benefit pension plan. Interview with Bruce A. Wolk, Professor of Law, University of California, Davis, School of Law (Oct. 2, 1991) (reviewing case and pointing out that most multiemployer pension plans are defined benefit pension plans).

431 *Id.* at 748-49.

432 *Id.* at 749.

433 *Id.* at 749-50.

434 *Id.* at 749.

435 *Id.* at 750. The court stated:

> Although the actuarial soundness of this pension fund no doubt depends in part upon contributions on behalf of employees who will never receive benefits, those same actuarial calculations cannot justify the denial of benefits to employees who will never receive benefits solely because of the affirmative misconduct of union officials and [Pension Administrative] Board members. To deny plaintiff a possible remedy in this case would, in effect, elevate the alleged misconduct of defendants to the level of a legitimate actuarial risk.

Id. at 750-51.

436 *Id.* *But see* Saret v. Triform Corp., 662 F. Supp. 312, 316-17 & n.4 (N.D. Ill. 1986) (specifically departing from *Torrence* court's holding).

437 These provisions apply to both single- and multiemployer plans. *See* ERISA § 301(a), 29 U.S.C. § 1081(a). Several opinions have noted the courts' supposed reluctance to apply estoppel against multiemployer plans. *See* Armistead v. Vernitron Corp., Nos. 89-6405, 89-6406, 1991 U.S. App.

ERISA's funding provisions, an estoppel damages award would not permanently affect the plan's actuarial soundness.[438]

LEXIS 22399, at *38 (6th Cir. Sept. 24, 1991); Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990). The *Armistead* and *Black* courts both cite BRUCE, *supra* note 3, at 404. The courts' reliance on this authority is unfortunate. To support the proposition that estoppel does not apply against multiemployer plans, Mr. Bruce cites Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 (9th Cir. 1976); and Moglia v. Geoghegan, 402 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969). In determining that estoppel would not apply against employee benefit plans, however, none of these courts specifically addressed the plans' formation. In *Moglia* and *Thurber*, the court declined to apply estoppel against LMRA plans because to do so would violate the LMRA's writing requirement. 542 F.2d at 1108-09; 403 F.2d at 117. Indeed, the *Thurber* court never mentioned whether the defendant plan was a single- or multiemployer plan. The *Thurber* plan was collectively-bargained, but the LMRA's writing requirement applies to collectively-bargained single- as well as multiemployer plans. *See* 29 U.S.C. § 186 (c)(5)(B). Nor should we conclude that under *Moglia*, estoppel does not apply against multiemployer plans. Though the LMRA's writing requirement applied because the *Moglia* plan was collectively-bargained, ERISA's written instrument provision governs collectively-bargained single-employer plans, as well as non-collectively-bargained plans. *See* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). To conclude based on *Thurber* and *Moglia* that as a general rule estoppel does not apply against multiemployer plans is to misread the cases. *See also supra* notes 175-88 and accompanying text (discussing *Moglia*).

Mr. Bruce has also misread *Chambless*. The *Chambless* court determined that the elements of estoppel were not fulfilled. 772 F.2d at 1041. Whether the plan was a single- or multiemployer plan was not an issue for the court, which merely held that a union official's misrepresentation regarding benefits could not bind the plan. *Id.* (citing Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976)). Because ERISA's funding provisions protect multiemployer plans as well as single-employer plans, courts should allow estoppel recovery against such plans, rather than follow a misguided commentator's lead. *Cf.* BRUCE, *supra* note 3, at 402-03 & nn. 50-53, 55-58 (erroneously citing pre-ERISA cases for proposition that estoppel currently applies against employee benefit plans).

[438] *See* ERISA § 302(b)(2)(B)(iv), 29 U.S.C. § 1082(b)(2)(B)(iv); *see also* Jeremy I. Bulow & Myron S. Scholes, *Who Owns the Assets in a Defined-Benefit Pension Plan?*, *in* FINANCIAL ASPECTS OF THE UNITED STATES PENSION SYSTEM, *supra* note 421, at 17, 19 (noting that defined benefit pension plans are "almost always well funded"). The actual financial health of the country's pension plans is the subject of some dispute. A 1983 source noted that the majority of major American pension plans is adequately funded. *See* Zvi Bodie & John B. Shoven, *Introduction*, *in* FINANCIAL ASPECTS OF THE UNITED STATES PENSION SYSTEM, *supra* note 421, at 1, 6. A 1989 survey showed that

ERISA requires employers to contribute minimum amounts to defined benefit pension plans.[439] If the plan's assets drop because of an experience loss, the employer must contribute enough money, amortized over five years, to make up for the loss.[440] An estoppel damages award is one experience loss the employer would have to re-fund.[441] Thus, unless the employer violates ERISA by failing to contribute additional amounts, the defined benefit pension plan will always be adequately funded.[442] Courts should therefore allow estoppel recovery against defined

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of 392 large companies' plans, 94% were fully or overfunded. *See* Gene Koretz, *Where Retirees' Nest Eggs Aren't About to Crack*, BUS. WK., January 28, 1991, at 22. A 1990 survey showed, however, that 50 large companies' plans are underfunded by a total of $14 billion. *See Shortfall in Pension Funds Cited*, N.Y. TIMES, May 9, 1990, at D4. *See generally* Scialabba & Scialabba, *supra* note 408 (discussing ways employers can reduce employee benefit plan costs in response to current recession). The courts may wish to examine the defendant pension plan's actual financial stability in determining whether estoppel recovery would jeopardize the plan's actuarial soundness. *See* Ronald L. Haneberg, *The Actuarial Process*, *in* NEW YORK UNIVERSITY THIRTY-SIXTH ANNUAL INSTITUTE ON FEDERAL TAXATION: ANNUAL CONFERENCE ON ERISA 225, 227 (Nicolas Liakas ed., Supp. 1978) (noting importance of actual investment experience in gauging plan's financial stability); *Don't Push the Underfunding Panic Button, Says APPWP*, Pens. Plan Guide (CCH) No. 799, at 4 (June 15, 1990) ("The fact that a plan is not fully funded at a particular point in time does not mean that the benefit security of participants is threatened.").

439 *See* ERISA § 302, 29 U.S.C. § 1081.

440 *See* ERISA § 302(b)(2)(B)(iv), 29 U.S.C. § 1082(b)(2)(B)(iv). Multiemployer plan sponsors must amortize their contributions over 15 years. *Id.*

441 Interview with Bruce A. Wolk, Professor of Law, University of California, Davis, School of Law (Mar. 1991); *see also* BRUCE, *supra* note 3, at 405.

442 *See* ERISA § 302(b)(2)(B)(iv), 29 U.S.C. § 1082(b)(2)(B)(iv). Depending on the size of the estoppel damages award, the employer may decide to terminate the plan rather than make additional contributions. Under ERISA, however, an employer may terminate its defined benefit pension plan only if the employer *and its entire controlled group* are under severe financial hardship, or if the plan is fully funded. *See* ERISA § 4041(b)-(c), 29 U.S.C. § 1341(b)-(c). If the damages award is so large that making additional contributions would threaten the solvency of the employer and its controlled group, the Pension Benefit Guaranty Corporation will assume responsibility for paying a large portion of the promised benefits. *See* ERISA § 4022, 29 U.S.C. § 1322. Therefore, awarding estoppel damages against a defined benefit pension plan would not affect the other participants even if the award threatens the employer's solvency.

benefit pension plans in spite of concerns for the plans' actuarial soundness.

CONCLUSION

Contrary to policy and congressional intent, a majority of federal courts disallows estoppel recovery against ERISA employee benefit plans. By enacting ERISA, however, Congress did not intend to eliminate viable theories of recovery, such as estoppel, that employees successfully asserted in pre-ERISA benefit cases. Instead, Congress enacted ERISA to protect employees and to enhance their ability to enforce their rights.

Congress did not intend to eliminate estoppel recovery by enacting ERISA's written instrument provision. Instead, Congress enacted the provision to aid employees in understanding and enforcing their rights. Congress requires employers to establish their plans pursuant to a written instrument so that employees can obtain the information they need to understand their rights. Because the written instrument is very complex, however, Congress also requires an SPD that explains it in understandable, clear terms. Employees need the further protection of being able to consult plan agents about their benefits, to rely on agents' representations, and, if necessary, to enforce the representations against the plan through equitable estoppel.

Further, the courts' concern for ERISA plans' actuarial soundness is misplaced. Fortunately, no precedent directly relying on such concerns under ERISA exists to bind future courts. The *Black*, *Armistead*, and *Lockrey* courts considered the plan's type before deciding whether estoppel could affect its actuarial soundness. This is a step in the right direction. At a minimum, courts should consider whether allowing estoppel recovery would actually affect the defendant plan's actuarial soundness. In all but the most unusual of circumstances, however, ERISA protects plans' assets from depletion through estoppel damages awards. These considerations favor allowing estoppel recovery against ERISA plans when employees detrimentally rely on misrepresentations about benefits.

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