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Congress designed the Employee Retirement Income Security Act of 1974[1] (ERISA) "to promote the interests of employees and their beneficiaries in employee benefit plans."[2] Employee welfare benefit plans are one category of ERISA's benefit plans.[3] Welfare benefit plans comprise a substantial portion of employment benefits subject to ERISA,[4] and include fringe benefits such as medical, disability, and unemployment insurance.[5] These plans are not subject to ERISA's stringent vesting and funding requirements.[6] They are also exempt from state statutory and decisional law which "relate to" such plans.[7] Thus, a gap exists in ERISA's remedial framework which makes it difficult for participants in welfare benefit plans to secure their rights under such plans.[8] Because of the potential for abuse by plan providers[9] and because of the serious consequences that loss of benefits has for current and retired em-

1 Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982).

2 Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). *See also* 29 U.S.C. § 1001(b) (1982).

3 29 U.S.C. § 1002(1)(B) (1982) (distinguishes employee welfare benefit plans from employee benefit plans which include pensions).

4 Note, *ERISA: Preemption of State Health Care Laws and Worker Well-Being*, 1981 U. ILL. L. REV. 825, 831.

5 *See* text accompanying note 22 *infra* for examples of employee welfare benefit plans.

6 29 U.S.C. §§ 1051(1), 1081(a)(1) (1982). *See* Hansen v. White Farm Equip. Co., 42 Bankr. 1005, 1012 (N.D. Ohio 1984).

7 29 U.S.C. § 1144(a) (1982).

8 ERISA preempts state statutory and contract claims. Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983); International Ass'n of Bridge, Structural, and Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211, 1215 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981); Pierce v. NECA-IBEW Welfare Trust Fund, 488 F. Supp. 559 (E.D. Tenn. 1978), *aff'd*, 620 F.2d 589 (6th Cir.), *cert. denied*, 449 U.S. 1015 (1980); Turner v. Local No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1225 (9th Cir. 1979). *See also* cases cited at note 33 *infra*. A practitioner who brings a claim for welfare benefits under state law should anticipate additional challenges based upon failure to exhaust administrative remedies under the plan, removal to federal court, and statute of limitations.

9 *Corporate Retiree Health Benefits: Here Today, Gone Tomorrow?: Hearing Before the Select Comm. on Aging House of Rep.*, 98th Cong., 2d Sess. 3 (1984) (statement of Rep. Oakar) [hereinafter cited as *Hearings on Aging*]; *Oversight Hearing on Employee Welfare Benefit Plans: Hearings Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor on H.R. 5475*, 98th Cong., 2d Sess. 7 (1984) (testimony of John Crawford, Gulf Annuities Ass'n) [hereinafter cited as *Hearings on Labor-Management Relations*]; *id.* at 19 (statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor). *See also* Musto v. American Gen. Corp., 615 F. Supp. 1483, 1497 (M.D. Tenn. 1985), where the court stated: "To permit the enforcement of termination/modification clauses without a showing of good cause has the effect of reducing the status of hard earned welfare benefits to mere gratuities."

ployees,[10] Congress and the federal courts are beginning to protect employee welfare benefits through a variety of legal theories. This note examines each of these theories and determines which best achieves ERISA's goal of promoting employee interests in benefit plans.

Part I of this note examines ERISA's scheme for regulating employee welfare benefit plans. Part II traces the development of the "federal common law"[11] of ERISA with respect to employee welfare benefit plans. Part III examines how employees can secure welfare benefits under ERISA's fiduciary requirements and suggests expanding these duties to better protect employee benefit rights. Part IV evaluates legislative alternatives for promoting employee interests in welfare benefit plans. Finally, Part V concludes that the courts must continue to protect welfare benefit rights through the common law of ERISA until Congress determines how to promote the interests of employees in welfare benefit plans.

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10 Witnesses have testified at congressional hearings about the hardship they suffered because their employer changed their welfare benefit plan. Bessemer Cement Co. employed August Anderson for 33 years. The personnel manager told him that when he retired the company would continue to provide his benefits for life. The company, however, stopped providing his benefits despite an arbitration award requiring them to do so. Mr. Anderson was thus forced to pay $312 per month for insurance coverage. In 1982 he had open heart surgery which cost $17,000. *See Hearings on Aging, supra* note 9, at 6 (statement of August Anderson).

The Crucible Steel Plant, operated by Colt Industries in Midland, Pa. had 4,118 plan beneficiaries. The plan promised lifelong benefits to retirees. Colt made several proposals to provide benefits to their former employees through lump sum payouts and to find a successor to operate its complete facility. These attempts, however, were either unacceptable to employees or failed. Colt closed the mill and later sold it to a successor who employed one-fifteenth of the previous employees. Former employees such as Robert Zielinski were left without medical benefits. In 1983 Zielinski was 82 years old. He suffered from hearing and vision loss as well as severe arthritis. His health problems were attributable to his 38 years of service in the steel-floored hand mill of the plant. Other former employees, such as Mrs. Eleanor Nevish, would pay $200 a month for medical insurance on a pension of $250 a month. *See Hearings on Aging, supra* note 9, at 11-16 (statement of Rev. Mike Garner).

Early retirees also face substantial hardship when their former employer changes the level of their benefits because they do not become eligible for medicare until they reach 65 years of age. If the employer eliminates their medical coverage, the employees could be subject to substantial liability. R.T. Doyle, a retiree of Gulf Oil Co., has cancer and requires extensive medical treatment. In 1983, his medical bills exceeded $60,000. Mr. Doyle was not covered by Medicare. If the terms of the Gulf plan were changed pursuant to a merger, Mr. Doyle would have been required to sell his home and other assets to cover his medical expenses. *See Hearings on Labor-Management Relations, supra* note 9, at 6-7 (testimony of John Crawford, Gulf Annuities Ass'n). *See also Reducing Retiree's Health Benefits: The Courts Develop a Remedy*, 18 CLEARINGHOUSE REV. 1399 (1985) (citing retiree's dependence on health insurance due to fixed incomes, lack of bargaining power with the employer, and lack of union representation); Note, *supra* note 4, at 830-31; Musto v. American Gen. Corp., 615 F. Supp. 1483, 1496 (M.D. Tenn. 1985).

11 While Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny prevented federal courts from creating federal common law, the courts have fashioned a rule of common law in a number of situations. *See* text accompanying notes 39-44 *infra*.

I. ERISA's Scheme For Regulating Employee Welfare Benefit Plans

ERISA does not require employers or employee organizations to establish employee benefit plans.[12] Once an employer elects to establish a benefit plan, it must comply with ERISA's regulations.[13] ERISA divides employee benefit plans into two categories:[14] pension benefit plans[15] and employee welfare benefit plans.[16] Pension benefit plans provide income to retirees.[17] Employee welfare benefit plans apply to both retired and active employees and include all benefits not included in pension plans.[18]

Unlike pension plans, welfare benefit plans are not subject to the full scope of ERISA's requirements.[19] Congress exempted welfare benefit plans from some of the requirements under the Act in an effort to provide meaningful reform and yet keep costs within reasonable limits.[20] This created a gap in the statute's protection of welfare benefit plans.

ERISA pension benefit plans include plans which provide income to retirees and plans which defer an employee's income until termination of employment.[21] All other employee benefits are covered under welfare benefit plans. ERISA enumerates several types of welfare benefit plans including:

> medical, surgical, or hospital care 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.[22]

Welfare benefit plans and employee pension plans are subject to most of the same requirements.[23] All plans are subject to ERISA's reporting and disclosure requirements,[24] fiduciary responsi-

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12 "[T]his subchapter shall apply to any employee benefit plan *if it is established* or maintained." 29 U.S.C. § 1003(a) (1982) (emphasis added). *See* note 65 *infra*.

13 29 U.S.C. § 1003(a) (1982). Section 1003(b) exempts governmental plans, church plans, plans maintained to comply with workman's compensation laws, plans maintained outside of the United States, and excess benefit plans. 29 U.S.C. § 1003(b) (1982).

14 29 U.S.C. § 1002(1)(B) (1982).

15 29 U.S.C. § 1002(2)(A) (1982).

16 29 U.S.C. § 1002(1) (1982).

17 29 U.S.C. § 1002(2)(A)(i) (1982).

18 29 U.S.C. § 1002(1)(B) (1982).

19 *See* note 6 *supra* and accompanying text.

20 *See* text accompanying note 63 *infra*.

21 29 U.S.C. § 1002(2)(A)(i-ii) (1982).

22 29 U.S.C. § 1002(1)(A) (1982).

23 29 U.S.C. § 1003(a) (1982).

24 These requirements include the following: providing each participant with a summary plan description; filing a summary plan description and terminal reports with the Secretary of Labor; and providing participants and the Secretary of Labor with a summary of any material modification of the plan. 29 U.S.C. §§ 1021-1022 (1982). *See generally* B.

bilities,[25] and administration and enforcement provisions.[26] Welfare benefit plans, however, are exempt from ERISA's participation and vesting requirements,[27] and from ERISA's funding requirements.[28] As a result of these exemptions, participants attain only limited statutory rights to welfare benefits.

Employees have difficulty securing rights under welfare benefit plans because ERISA's enforcement provisions are only geared toward enforcement of vested rights.[29] ERISA's preemption of state law compounds this difficulty.[30] ERISA supersedes all state laws which "relate to any employee benefit plan."[31] Because preemption applies to both state statutory and case law,[32] it encompasses

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CREED, ERISA COMPLIANCE REPORTING AND DISCLOSURE (1981); R. BILDERSEE, PENSION REGULATION MANUAL 285-310 (1979) (citing three levels of reporting and disclosure: mandatory disclosure, requested distribution, and examination availability); J. MAMORSKY, EMPLOYEE BENEFITS LAW: ERISA AND BEYOND § 10 (1985). *See also* Blau v. Del Monte Corp., 748 F.2d 1348, 1353-54 (9th Cir. 1984) (procedural violations may cause substantive harm which the court may consider in determining if the fiduciary standards were breached), *cert. denied*, 106 S. Ct. 183 (1985).

25 [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . (D) in accordance with the documents and instruments governing the plan.

29 U.S.C. § 1104(a) (1982). In evaluating a fiduciary's actions under this standard, courts apply the test of whether the action was arbitrary, capricious, or in bad faith. Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied sub nom.* Jampol v. Southern Cal. Retail Clerks Union, 105 S. Ct. 959 (1985). *See generally* G. RAY & H. LAMON, FIDUCIARY RESPONSIBILITIES UNDER THE NEW PENSION REFORM ACT 1-26n (Supp. 1976); R. BILDERSEE, *supra* note 24, at 313-34; J. MAMORSKY, *supra* note 24, § 12.

26 A participant or beneficiary may bring a civil action for the administrator's refusal to supply requested information, 29 U.S.C. § 1132(a)(1)(A) (1982), and "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (1982).

A participant, beneficiary, or fiduciary may bring a civil action to enjoin violations of the act or to obtain equitable relief, 29 U.S.C. § 1132(a)(3) (1982), and along with the Secretary of Labor, may bring a civil action for breach of fiduciary duty, 29 U.S.C. § 1132(a)(2) (1982). The Secretary of Labor is also empowered to bring civil actions in other limited circumstances. 29 U.S.C. § 1132(a)(4) (1982).

Any person who willfully violates any reporting and disclosure requirement is subject to criminal penalties of not more than $5,000 or imprisonment of up to one year, or both. Violations by corporations or other entities are subject to a fine not exceeding $100,000. 29 U.S.C. § 1131 (1982).

27 29 U.S.C. § 1051 (1982).

28 29 U.S.C. § 1081 (1982).

29 The enforcement provisions limit civil actions to actions to recover "benefits due" or to enforce or clarify "rights." But by allowing actions to "enjoin violations" or for "other equitable relief," the enforcement provisions open the door to federal common law claims. *See* note 26 *supra*.

30 29 U.S.C. § 1144(a) (1982).

31 *Id.*

32 Calhoun v. Falstaff Brewing Corp., 478 F. Supp 357, 359 (E.D. Mo. 1979).

contract law.[33] Thus, unless an independent source of federal law, such as the law of collective bargaining agreements,[34] granted employees a contractual right to welfare benefits, they were limited to securing their welfare benefits through ERISA's fiduciary requirements.[35] Actions under ERISA's fiduciary requirements, however, have met with little success.[36]

"ERISA's legislative history indicates that, in light of the act's virtually unique preemption provision, 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.' "[37] Courts have seized upon this language and are beginning to develop a rule of federal common law to fill the gap in ERISA's coverage of welfare benefit plans.[38]

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33 Courts have interpreted ERISA's preemption provision broadly. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983); Holland v. Burlington Indus., 772 F.2d 1140, 1147 (4th Cir. 1985) ("Preemption applies to a state cause of action under common law as well, for the state breach of contract and estoppel claims pose the same potential as the statutory cause of action for conflicting employer obligations and variable standards of recovery."); Gilbert v. Burlington Indus., 765 F.2d 320, 328 (2d Cir. 1985); Musto v. American Gen. Corp., 615 F. Supp. 1483, 1494 (M.D. Tenn. 1985). *See also* cases cited at note 8 *supra*.

34 Participants in employee welfare benefit plans which are embodied in collective bargaining agreements are able to enforce contract rights under § 301 of the Labor Management Relations Act (LMRA), codified at 29 U.S.C. § 185 (1982). Section 301 empowers the federal courts to develop a federal common law of contracts to apply to collective bargaining agreements. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

The development of the federal common law of collective bargaining agreements is analogous to the development of federal common law under ERISA. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983). The two bodies of law, however, are distinct. *See id.* at 24-25. Negotiated changes in a collective bargaining agreement can only be overturned when they violate the law. Music v. Western Conference of Teamsters Pension Trust Fund, 712 F.2d 413, 417 (9th Cir. 1983) (citing United Mine Workers of Am. Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982)). *See* Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2394-95 (1985). But where the changes in the plan are made by a trustee, the action becomes subject to ERISA's fiduciary requirements. *Robinson*, 455 U.S. at 574; NLRB v. Amax Coal Co., 453 U.S. 322, 332-33 (1981).

The enforcement of welfare benefit rights under collectively bargained plans is outside the scope of this note. However, Part III, *infra*, which discusses enforcing welfare benefit rights through ERISA's fiduciary requirements, applies to collectively bargained plans.

35 Ogden v. Michigan Bell Tel. Co., 571 F. Supp. 520, 522 (E.D. Mich. 1983) (court struck allegations which did not state a claim for breach of fiduciary duty from the complaint).

36 It is difficult to prove that the fiduciary breached his duty because the courts give great deference to the fiduciary, similar to appellate review of administrative rulings. *See* note 145 *infra* and accompanying text. Claims are less likely to succeed when the fiduciary eliminated or modified benefits for financial reasons. Elser v. I.A.M. Nat'l Pension Fund, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Reducing Retiree's Health Benefits: The Courts Develop a Remedy*, 18 Clearinghouse Rev. 1399-1400 (1985).

37 Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983) (citation omitted) (quoting 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits)).

38 Amato v. Western Union Int'l, Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 106 S. Ct. 1167 (1986); Holland v. Burlington Indus., 772 F.2d 1140 (4th Cir. 1985); Scott v. Gulf Oil Co., 754 F.2d 1499, 1502 (9th Cir. 1985); Menhorn v. Firestone Tire & Rubber

II. The "Federal Common Law" of Welfare Benefit Plans Under ERISA

The federal courts do not have the power to establish a federal common law.[39] The power to establish law lies solely with Congress.[40] The courts, however, have the power to interpret laws enacted by Congress.[41] The power to interpret laws includes the power to develop rules of decision where Congress has not spoken on an issue or where a conflict exists between a federal interest and state law.[42] The United States Supreme Court has recently adopted rules of common law in deciding pension plan issues under ERISA.[43] Lower courts have followed the Supreme Court's lead by developing a common law of welfare benefit plans.[44] Because the development of federal common law depends upon Congress' inactivity on a particular issue,[45] courts must consult the legislative history of ERISA before determining that they have the power to develop common law with respect to an issue.

A. *The Legislative History of Welfare Benefit Plans*

All of the courts that apply common law to welfare benefit plans find authority to do so in the legislative history of ERISA.[46] They derive this authority from three sources: a statement by Senator Javits,[47] an analogy by the Joint Conference Committee on Pension Reform to section 301 of the Labor Management Relations Act[48] (LMRA), and the underlying policy of ERISA.[49] But courts

Co., 738 F.2d 1496, 1499 (9th Cir. 1984); Terpinas v. Seafarer's Int'l Union, 722 F.2d 1445, 1447 (9th Cir. 1984); Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 973 (5th Cir. 1981); Musto v. American Gen. Corp., 615 F. Supp. 1483 (M.D. Tenn. 1985); Adcock v. Firestone Tire & Rubber Co., 616 F. Supp. 409, 414 (M.D. Tenn. 1985); Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans, 607 F. Supp. 196 (W.D.N.Y. 1985); Hansen v. White Farm Equip. Co., 42 Bankr. 1005 (N.D. Ohio 1984); Wayne Chemical, Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 322 (N.D. Ind.), *aff'd as modified*, 567 F.2d 692 (7th Cir. 1977).

39 City of Milwaukee v. Illinois, 451 U.S. 304, 312-14 (1981).

40 *Id.* at 313.

41 *See id.* at 314.

42 *Id.* at 314.

43 Massachusetts Mutual Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3098 n.18 (1985) (Brennan, J., concurring); Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 105 S. Ct. 2833, 2840-41 (1985) (and cases cited therein).

44 Adcock v. Firestone Tire & Rubber Co., 616 F. Supp. 409, 415 (M.D. Tenn. 1985); Musto v. American Gen. Corp., 615 F. Supp. 1483, 1497 (M.D. Tenn. 1985); Hansen v. White Farm Equip. Co., 42 Bankr. 1005, 1014 (N.D. Ohio 1984).

45 City of Milwaukee v. Illinois, 451 U.S. 304, 313-14 (1981).

46 *See* note 38 *supra* and accompanying text.

47 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 4771 (1976). *See, e.g., Adcock*, 616 F. Supp. at 415; *Hansen*, 42 Bankr. at 1015.

48 JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EMPLOYEE

ignore competing inferences of congressional intent which they could draw from the legislative history and from the Act itself.[50]

The courts primarily rely on a statement of Senator Javits as authority for creating a rule of federal common law with respect to welfare benefit plans. During debate over the Report of the Conference Committee on Pension Reform[51] Senator Javits said, "[I]t is also intended that a body of federal substantive law will be developed by the courts to deal with issues involving rights under private welfare and pension plans."[52] Courts have used this statement as carte blanche for developing a common law of welfare benefit plans.[53] Many courts have not searched beyond this statement to determine Congress' intent.[54]

Some courts have also relied upon a House conference report which provides that courts should regard ERISA claims as arising under the laws of the United States in a similar fashion to claims under section 301 of the LMRA.[55] These courts reason that because federal common law is appropriate for determining claims under section 301, it should also apply to ERISA.[56]

The final source of congressional authority which courts look to when developing common law is the underlying policy of ERISA.[57] These courts cite ERISA's policies to protect employee interests in benefit plans and to provide access to federal courts to conclude that Congress intended the federal courts to protect interests through federal common law.[58]

The legislative history of ERISA can also support the opposite position that Congress did not intend for the courts to fill the gap in ERISA's regulatory scheme. Several courts have refused to apply federal common law to ERISA "[w]here Congress has established an extensive regulatory network and has expressly announced its

RETIREMENT INCOME SECURITY ACT OF 1974, 4277, 4594 (1976) and 1974 U.S. CODE CONG. & AD. NEWS 5038, 5107 [hereinafter cited as CONFERENCE REP.]. *See, e.g., Hansen*, 42 Bankr. at 1015.

49 29 U.S.C. § 1001(b) (1982). *See, e.g., Adcock*, 616 F. Supp. at 414; *Wayne Chemical, Inc.*, 426 F. Supp. at 322.

50 *See* notes 59-68 *infra* and accompanying text.

51 *See* CONFERENCE REP., *supra* note 48.

52 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 4771 (1976).

53 *Adcock*, 616 F. Supp. at 415; *Hansen*, 42 Bankr. at 1015. *See also* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1509 (9th Cir. 1985) (and cases cited therein); *Wayne Chemical, Inc.*, 426 F. Supp. at 321.

54 *Scott*, 754 F.2d at 1501-02; Terpinas v. Seafarer's Int'l Union, 722 F.2d 1445, 1447 (9th Cir. 1984).

55 *See* CONFERENCE REP., *supra* note 48.

56 *See, e.g., Hansen*, 42 Bankr. at 1015.

57 *See* cases cited at note 49 *supra*.

58 *Id.*

intention to occupy a field."[59] Congress announced its intention to occupy the field of employee benefit plans through ERISA's broad preemption clause[60] and policy of uniform regulation of employee benefit plans.[61] When Congress established ERISA's regulatory network, it expressly announced its intent to create the gap in ERISA's regulation of welfare benefit plans. Yet courts are using common law to fill this gap by vesting contract rights to welfare benefits in employees.[62] Congress considered this alternative, and in striking a balance "between providing meaningful reform and keeping costs within reasonable limits,"[63] it chose to require vesting of pension but not of welfare benefit plans.[64] Congress was concerned that if it placed too onerous of a financial burden on employers, they would refuse to establish benefit plans.[65]

Congress again considered extending vesting requirements to welfare benefit plans in 1984.[66] After considering the complexity of issues regarding which benefits should vest and when they should vest,[67] Congress chose to forgo such a move. Because Congress has considered this issue and has twice refused to create a vesting requirement for welfare benefit plans, courts should not contravene

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59 Van Orman v. American Ins. Co., 680 F.2d 301, 312 (3d Cir. 1982). *See also* Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd sub nom.* Arcudi v. Stone & Webster Engineering Corp., 463 U.S. 1220 (1983); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1215 (8th Cir. 1981).

60 "Congress used the words 'relate to' in § 514(a) in their broad sense." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983).

61 "This broad preemption furthers a major policy of ERISA—*uniformity* in employee benefit laws." Holland v. Burlington Indus., 772 F.2d 1140, 1147 n.5 (4th Cir. 1985) (emphasis in original). *See* 29 U.S.C. § 1001 (1982).

62 *Adcock*, 616 F. Supp. at 419; *Hansen*, 42 Bankr. at 1018.

63 S. REP. No. 383, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4890, 4904.

64 *Id.*; 29 U.S.C. § 1051 (1982). *See also* CONFERENCE REP., *supra* note 48, H.R. 1280 at 273, *reprinted in* 3 LEGISLATIVE HISTORY at 4540 and 1974 U.S. CODE CONG. & AD. NEWS at 5054.

65 [S]ince these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to participate or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.

S. REP. No. 383, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4890, 4904. Employers are beginning to respond to common law vesting as Congress predicted: by seeking ways to avoid liability under welfare benefit plans. *See* Van Olson, *Nonpension Retiree Benefits: Are They For Life? Management Guidelines to the Issue*, 36 LAB. L.J. 402 (1985).

66 Deficit Reduction Act of 1984 § 561, Pub. L. No. 98-369, 98 Stat. 854.

67 *See Hearings on Labor-Management Relations*, *supra* note 9, at 21 (statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor).

Congress' intent by creating a common law vesting requirement in this area.[68]

Despite the diverse conclusions that could be drawn from ERISA's legislative history, courts have begun to create federal common law to regulate welfare benefit plans. The development of the common law of welfare benefit plans has paralleled contract law principles. Although too few reported cases exist to establish a trend, two theories are emerging in recent cases. They are the traditional contract theory and the status theory.

B. *Contract Theory*

In the past, employees could enforce rights to welfare benefits through contract law principles. Employees whose plan was embodied in a collective bargaining agreement could enforce their contract rights under section 301 of the LMRA.[69] Employees covered by other plans could enforce their rights under state law.[70] ERISA's preemption provision, however, eliminated enforcement under state law,[71] thus creating a class of plan participants who did not have a forum to enforce their rights.

Federal courts have begun to restore a mechanism for employees to enforce contractual rights under welfare benefit plans through the development of a rule of common law. In recent cases, courts have relied on state court decisions,[72] and have adopted unilateral contract,[73] bilateral contract,[74] and estoppel[75] theories to secure employees' welfare benefits. Two courts have rejected the quasi-contract theory of unjust enrichment.[76]

In *Adcock v. Firestone Tire & Rubber Co.*,[77] the United States Dis-

68 *See* note 59 *supra* and accompanying text.

69 *See* note 34 *supra.*

70 Rochester Corp. v. Rochester, 450 F.2d 118, 120-21 (4th Cir. 1971) (Va. law); Simmons v. Hitt, 546 S.W.2d 587, 592 (Tenn. 1976); Sheehy v. Seilon, Inc., 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); Cantor v. Berkshire Life Ins. Co., 171 Ohio St. 405, 171 N.E.2d 518 (1960).

71 *See* note 33 *supra* and accompanying text.

72 Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1420 (2d Cir. 1985), *cert. dismissed,* 106 S. Ct. 1167 (1986); *Musto,* 615 F. Supp. at 1500; *Adcock,* 616 F. Supp. at 418; *Hansen,* 42 Bankr. at 1017. *See* Wald & Immerman, *Severance Pay and Sales of Assets,* 2 LAB. LAW. 75, 90-97 (1986).

73 *Adcock,* 616 F. Supp. at 418-19.

74 *Musto,* 615 F. Supp. at 1499.

75 *Id.* at 1500 (court refused to give effect to a termination/modification clause where employees relied on the fact that the company would not exercise its right under the clause in the past without good and sufficient cause). In *Amato,* 773 F.2d at 1419-20, the court held that the employees could present evidence that they relied on a clause in the plant sale agreement to estop the employer from asserting that they were not intended beneficiaries of the agreement.

76 *Amato,* 773 F.2d at 1419; Van Orman v. American Ins. Co., 680 F.2d 301, 310-13 (3d Cir. 1982).

77 616 F. Supp. 409 (M.D. Tenn. 1985).

trict Court for the Middle District of Tennessee applied unilateral contract theory in holding that the plaintiffs had a binding contractual right to severance benefits.[78] To form a unilateral contract, the employer must communicate an offer to the employee and the employee must accept the offer by performing an act specified by the employer.[79] The court found an offer of severance pay benefits in the employee handbook.[80] The court ruled that the employees accepted the offer by continuing service with the company, and thus had a contractual right to severance pay.[81]

In *Musto v. American General Corp.*,[82] the same court applied bilateral contract theory to prevent an employer from changing medical insurance benefits.[83] Parties form a bilateral contract by exchanging mutual promises.[84] The court found that the employer's security program, which the employer used as a recruitment device, was a promise to pay retirees medical insurance premiums for life if the employee stayed with the company until retirement.[85] In return, the employee promised quality service until retirement.[86] Upon retirement, the employee discharged his duty of quality service, thus entitling the employee to the earned benefits which were deferred until retirement.[87]

Finally, in *Amato v. Western Union International, Inc.*,[88] the United States Court of Appeals for the Second Circuit recognized the plaintiffs' estoppel argument. In *Amato*, the employer contracted to sell WUI, Inc., a holding company whose subsidiaries included Western Union. Plaintiffs claimed they were third party beneficiaries of this contract,[89] which stated that the purchaser agreed not to take any action to reduce the employees' benefits.[90] The employer claimed that the clause was intended to apply only to employees of WUI, Inc., and not to the employees of Western Union itself.[91] The court held that the employees could present evidence that they relied upon the agreement to estop the company from asserting that the employees were not third party beneficiaries of

78 *Id.* at 418-19.

79 *Id.* at 418.

80 *Id.*

81 *Id.*

82 615 F. Supp. 1483 (M.D. Tenn. 1985).

83 *Id.* at 1499. The court's labeling of the contract as unilateral was erroneous because it involved an exchange of promises.

84 1 S. WILLISTON, WILLISTON ON CONTRACTS § 13 (3d ed. 1957).

85 *Musto*, 615 F. Supp. at 1486, 1499.

86 *Id.*

87 *Id.*

88 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 106 S. Ct. 1167 (1986).

89 *Id.* at 1419.

90 *Id.*

91 *Id.*

the agreement.[92] The court implied that, if upon remand the employees proved that they relied upon the sales agreement, they would obtain a contractual right to early retirement benefits.

Courts are thus using contract law as a vehicle to create rights under ERISA welfare benefit plans where the statute fails to do so. These courts, however, have strained to find terms from which they can imply a contract. For example, in *Adcock*, the court found that the employee accepted the employer's offer of severance pay by continuing employment with the company.[93] To form a unilateral contract, the offeree must perform an act specified by the offeror.[94] The court implied that continued employment was the act the employer requested, although no evidence was introduced to show this was the act requested by the employer.[95] Moreover, in *Musto*, the court implied a promise on behalf of the employees to provide quality service until retirement.[96] This finding was not supported by the evidence, yet the court relied on it to establish a contract.[97] Finally, in *Amato*, the court allowed employees to base an estoppel argument on an agreement to sell the company.[98] One would not normally consider sales agreements as controlling the employment relationship.

Other courts have inferred contracts for welfare benefits from employee handbooks, summary plan descriptions, policy manuals, oral statements made in exit interviews, and oral statements made by plan administrators.[99] The trend toward implying contractual rights to welfare benefits is part of a growing trend to imply contractual rights in employment relationships in general.[100] As such, it may be seen as part of a growing movement toward affording employees common law rights based upon their employment status.[101]

C. *Status Theory*

A benefit which one acquires upon attaining a specified status is a status benefit. The status most often referred to with respect to

92 *Id.* at 1420.
93 *Adcock*, 616 F. Supp. at 418.
94 *See* text accompanying note 79 *supra*.
95 *Adcock*, 616 F. Supp. at 418.
96 *Musto*, 615 F. Supp. at 1499.
97 *Id.*
98 *Amato*, 773 F.2d at 1419.
99 *See* Van Olson, *supra* note 65. *See also* Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans, 607 F. Supp. 196 (W.D.N.Y. 1985).
100 Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196.
101 Wald & Wolf, *Recent Developments In the Law of Employment at Will*, 1 LAB. LAW. 533 (1985).

welfare benefit plans is retirement. The question arises whether an employer may change welfare benefits of employees after they retire. Two courts have recently refused to allow any changes in the level of retirees' welfare benefits.[102] Commentators suggest that these courts have gone beyond contract theory and have vested welfare benefit rights in retirees based on their status alone.[103] In doing so, however, the courts continue to rely on contract principles adopted under the federal common law of ERISA.

In *UAW v. Yard-Man, Inc.*,[104] the union brought suit under section 301 of the LMRA[105] to enforce retirees' rights to life and health insurance under a collective bargaining agreement. The agreement stated that the "Company will provide insurance benefits equal to the *active group*."[106] The company argued that because the active group was not entitled to any benefits due to plant closure, the retirees were not entitled to benefits under the contract.[107]

The United States Court of Appeals for the Sixth Circuit held that because the context of the agreement manifested an intent that the retirees' benefits last for life,[108] the benefits vested in the employees upon reaching the status of retirement.[109] The court emphasized that the nature of the benefit alone was not sufficient to find the intent that the benefits last for life.[110] The court found that retirement was a condition precedent to obtaining a contractual right to the welfare benefits.[111] Once the employee fulfilled the condition by reaching retirement, he discharged his duty to his em-

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102 UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); Hansen v. White Farm Equip. Co., 42 Bankr. 1005 (N.D. Ohio 1984).

103 Shultz & Langan, *Current Developments in Employee Benefits*, 10 EMPLOYEE REL. L.J. 732 (1985); *see* Van Olson, *supra* note 65; *Reducing Retiree's Health Benefits: The Courts Develop a Remedy*, 18 CLEARINGHOUSE REV. 1399 (1985).

104 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

105 29 U.S.C. § 185 (1982).

106 716 F.2d at 1480 (emphasis added) (The court held that, when read in the context of the agreement, the words "active group" manifested an intent to vest insurance benefits in retirees for life.).

107 *Id.*

108 The court found this intent in: (1) the criteria for terminating benefits applied only to active employees; (2) the fact that only spousal benefits were limited to the duration of the collective bargaining agreement; (3) the company's promise to allow early retirees to pay the cost of their insurance until reaching 65 (a 10 year period which outlasted the term of the agreement); (4) the limit, in the agreement, of pension and savings plans to the term of the agreement, while retiree benefits were not so limited; and (5) the nature of the benefits. *Id.* at 1480-82.

109 *Id.* at 1482. *See also* Allied Chemical & Alkali Workers of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971) (the union may not bargain away rights which vest upon retirement; such rights are interminable and the employer's failure to provide them is actionable under § 301 of the LMRA, 29 U.S.C. § 185 (1982)).

110 *Yard-Man*, 716 F.2d at 1482.

111 *Id.*

ployer, thereby obtaining a vested contractual right which the employer could not terminate.[112] While some commentators claim that this court granted benefits based on status alone,[113] it did not abandon established contract principles.[114] Rather, it implied the existence of a contract for lifetime benefits from the terms of the agreement.[115]

This issue has also arisen under ERISA. In *Hansen v. White Farm Equipment Co.*,[116] the District Court for the Northern District of Ohio nearly abandoned contract theory and almost recognized a pure status right in retirees to welfare benefits. The court held that an "employer may not invoke a termination clause to cut off the benefits of a former employee who has properly retired pursuant to the employer's requirements."[117] Although the court relied on contract theory to establish a right to benefits in the retirees,[118] it went beyond the terms of the contract by refusing to recognize its modification/termination clause.[119] Thus, the court needed only to find that a welfare benefit plan existed at the time of retirement and that the employee properly retired to hold that the welfare benefit rights vested in the retiree.

While courts have found authority in the legislative history of ERISA to develop a federal common law of welfare benefit plans,[120] they have no authority to vest rights to welfare benefits based solely on status.[121] ERISA specifically exempts welfare benefit plans from vesting.[122] Because employees do not accrue rights to welfare benefits, courts cannot grant these rights solely on the basis of the employees' status. Therefore, status theory will probably not develop as a means to secure welfare benefits.

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112 *Id.*

113 *See* note 103 *supra.*

114 *Yard-Man*, 716 F.2d at 1479 (citing rules developed to interpret collective bargaining agreements).

115 *See* note 108 *supra.*

116 42 Bankr. 1005 (N.D. Ohio 1984).

117 *Id.* at 1019.

118 *Id.* at 1017.

119 *Id.* at 1019.

120 *See* notes 46-58 *supra* and accompanying text. *But see* notes 59-68 *supra* and accompanying text.

121 Rights to welfare benefits do not accrue when an employee reaches a given status. "[T]he term 'accrued benefit' refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payments of medical expenses." *See* CONFERENCE REP., *supra* note 48, H.R. 1280 at 273, *reprinted in* 3 LEGISLATIVE HISTORY at 4540 and 1974 U.S. CODE CONG. & AD. NEWS at 5054.

122 29 U.S.C. § 1051 (1982).

D. *The Common Law's Likelihood of Success in Protecting Employees' Welfare Benefit Rights*

Employees are likely to continue to succeed in securing welfare benefits through federal common law contract theory. Despite the conflicting authority in the legislative history of ERISA,[123] courts are accepting this approach.[124] The United States Supreme Court has noted it favorably.[125] The approach offers flexibility by allowing the court to balance the equities of each case. Through this approach, courts may avoid the harsh consequences to employees which can result from the gap in ERISA's regulatory framework,[126] and also address Congress' concern about the cost to employers.[127]

Employees may also, in effect, obtain status rights to benefits under contract theory. If an employer changes the plan language to avoid possible liability under contract theory, a court could construe such a change as an admission by the employer that a contract for benefits once existed. If the employer later terminates benefits, he may face significant liability because ERISA allows for retroactive reinstatement of benefits.[128] Because the exposure to liability discourages employers from changing welfare benefit plans, the effect will be the same as if the employees accrued rights to those benefits by their status alone.

The federal common law is a useful tool to secure enforceable rights to welfare benefits. But once rights are secured, no mechanism guarantees that the employer can provide the benefits to the employees. Unlike pension plans, ERISA does not require a welfare benefit plan to have sufficient assets (funding requirements)[129] or insurance[130] to meet its obligations. The company often bears

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123 *See* notes 46-68 *supra* and accompanying text.

124 Prior to 1981, no court had enforced contractual rights to welfare benefits based on the common law of ERISA. Several courts have recently adopted this approach. *See* note 38 *supra*.

125 *See* note 37 *supra* and accompanying text.

126 *See* note 10 *supra*.

127 *See* text accompanying note 63 *supra*. Courts have rejected severance pay claims in several instances where the employer sold the facility and the successor retained the employees without any lost time. *See* Holland v. Burlington Indus., 772 F.2d 1140, 1146 (4th Cir. 1985); Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983); Adcock v. Firestone Tire & Rubber Co., 616 F.2d 409 (M.D. Tenn. 1985). In these cases, the employees were terminated within the meaning of their plan. The courts refused to grant severance pay to the employees where the harm to the employees was minimal and the cost to the employer would be substantial. *Adcock*, 616 F. Supp. at 421.

128 *See* Van Olson, *supra* note 65, at 406.

129 29 U.S.C. § 1081 (1982). The states may, however, regulate the reserve levels of fully insured multiple employer welfare arrangements. 29 U.S.C. §§ 1144(b)(6)(A) through (D) (1982).

130 The insurance of plan benefits through the Pension Benefit Guaranty Corp., 29 U.S.C. § 1302 (1982), applies only to "nonforfeitable benefits." 29 U.S.C. §§ 1322(a),

the cost of providing welfare benefits out of its operating expenses.[131] If the company ceases doing business or goes bankrupt, it may not have sufficient assets to cover the expenses of the plan.[132] The courts have not addressed this problem through the federal common law. The fiduciary duties of ERISA, however, may provide a vehicle for the courts to require minimum funding of welfare benefit plans through federal common law.

III. Securing Welfare Benefits Under ERISA's Fiduciary Requirements

Participants and beneficiaries of employee welfare benefit plans may enforce their rights to receive benefits through ERISA's fiduciary requirements.[133] To enforce rights under the fiduciary requirements, a plaintiff must show that the employer established a welfare benefit plan and that the fiduciary breached its duty to the plan. The plaintiff may show the existence of a welfare benefit plan through the following elements:

> (1) a "plan, fund, or program" (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing [welfare benefits], (5) to participants or their beneficiaries.[134]

Courts generally weigh these elements together to determine whether the claims made against a welfare benefit plan are covered by ERISA.[135]

Once the court determines that the employer established a welfare benefit plan, the inquiry shifts to determine whether the fiduciary breached its duty by denying benefits to the claimant.[136] The

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1322a(a) (1982). Nonforfeitable benefits are only those to which ERISA's vesting requirements apply and do not include welfare benefit plans. Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 953 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

131 *See Hearings on Aging, supra* note 9, at 45 (statement of Anthony J. Gajda, economist).

132 *In re* Erie Lackawanna Ry. Co., 548 F.2d 621, 627 (6th Cir. 1977) (dire financial position of company in bankruptcy may preclude recovery of insurance benefit right).

133 *See* note 25 *supra*.

134 Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc).

> In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, sources of financing, and procedures for receiving benefits.

Id. at 1373.

135 Holland v. Burlington Indus., 772 F.2d 1140, 1144-45 (4th Cir. 1985); Jung v. FMC Corp., 755 F.2d 708, 710 n.2 (9th Cir. 1985); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503-04 (9th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985).

136 *Holland*, 772 F.2d at 1148; Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985); Anderson v. Ciba-Geigy Corp., 759 F.2d 1518, 1520-21 (11th Cir.), *cert. denied*, 106 S. Ct. 410 (1985); *Jung*, 755 F.2d at 710-11; *Blau*, 748 F.2d at 1353; Sutton v. Weirton Steel

fiduciary's conduct must not be arbitrary or capricious.[137] Damages available for breach of fiduciary duty include the enforcement of future rights and compensatory damages, especially retroactive reinstatement of benefits and return of out of pocket expenses.[138] Damages for emotional distress and punitive damages have been awarded as well.[139]

Courts are becoming increasingly liberal in determining that the employer established a welfare benefit plan.[140] The courts' inquiry into the existence of a welfare benefit plan is similar to its search for contract rights. Courts have implied welfare benefit plans from the terms of employee handbooks,[141] policy manuals,[142] oral representations,[143] and previous conduct of the defendant.[144] It is relatively easy for claimants to prove that the employer established a welfare benefit plan. Courts, however, have not been so liberal in finding that a fiduciary breached his duty to the plan. Courts pay great deference to the fiduciary's decision. Their review is similar to an appellate review of administrative findings.[145] The court must consider only the record before the fiduciary,[146] and may only reverse the decision where the fiduciary acted arbitrarily, capriciously, or in bad faith.[147] The court may consider whether the fiduciary's decision conformed with the plan documents,[148] uniformly construed the plan document,[149] and was calculated to avoid substantial cost to the employer.[150]

This last factor favors the employer where the fiduciary carries

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Div. of Nat'l Steel Corp., 724 F.2d 406, 410-11 (4th Cir. 1983), *cert denied*, 467 U.S. 1205 (1984); Sly v. P.R. Mallory & Co., 712 F.2d 1209, 1211-12 (7th Cir. 1983).

137 *See* cases cited at note 136 *supra*. Some courts suggest that this standard does not apply to changes in the plan which deny benefits where the change was negotiated for in a collective bargaining agreement. *Sutton*, 724 F.2d at 411. *But see* note 109 *supra*.

138 *See* Van Olson, *supra* note 65, at 405-06.

139 *Id.*

140 This trend is similar to the courts' liberal search for benefit contracts. *See* notes 93-101 *supra* and accompanying text.

141 *Holland*, 772 F.2d at 1143.

142 *Id.*; *Jung*, 755 F.2d at 710-11; *Sly*, 712 F.2d at 1210-12.

143 *Scott*, 754 F.2d at 1503 n.1.

144 *Id.*; *Sly*, 712 F.2d at 1213; Adcock v. Firestone Tire & Rubber Co., 616 F. Supp. 409, 422 (M.D. Tenn. 1985).

145 *Holland*, 772 F.2d at 1148; *Berry*, 761 F.2d at 1006; *Jung*, 755 F.2d at 711; *Blau*, 748 F.2d at 1352; *Adcock*, 616 F. Supp. at 421. Congress refused to amend ERISA to provide for de novo review of the administrator's denial of benefits without a presumption of correctness. H.R. 6226, 97th Cong., 2d Sess. (1982).

146 *Berry*, 761 F.2d at 1007.

147 Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied sub nom.* Jampol v. Southern Cal. Retail Clerks Union, 105 S. Ct. 959 (1985).

148 *Blau*, 748 F.2d at 1353; *Sly*, 712 F.2d at 1212; Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982).

149 *Dennard*, 681 F.2d at 314.

150 *Id.*; *Adcock*, 616 F. Supp. at 421. *See also Jung*, 755 F.2d at 711.

out his duty to defray reasonable expenses of the plan.[151] Yet, a fiduciary breaches his duty when he acts in the interest of the employer to avoid liability under the plan.[152] Flagrant violations of the reporting and disclosure requirements are also "highly probative of whether a particular decision to deny benefits was infected by its having been made in conformity with an objectionable scheme."[153] The fiduciary standards apply to the fiduciary as well as anyone acting as a fiduciary.[154] Nevertheless, because of the great deference courts give to the decisionmaker, it is difficult to prevail under this theory.

The fiduciary requirements, however, may provide a mechanism through which the courts could require a fiduciary to establish a fund to cover future liability under the plan.[155] A fiduciary has a duty of "providing benefits to participants"[156] under a welfare benefit plan. It is foreseeable that the assets of a plan may not be sufficient to cover its liabilities,[157] especially where retirees retain benefits for life.[158] It would be reasonable to require a fiduciary, consistent with his duty to provide benefits, to establish a fund to insure future benefits for participants. If a court found, pursuant to its power to develop federal common law, that a fiduciary breached its duty by not establishing such a fund, other fiduciaries would be required to establish similar funds or risk being liable for breach of their duties.[159] In this way, the courts could insure that employers would be able to live up to their obligations under the plan.[160] This

151 29 U.S.C. § 1104(a)(A)(ii) (1982).

152 Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 163-64 (3d Cir. 1985); Calhoun v. Falstaff Brewing Corp., 478 F. Supp. 357, 361 (E.D. Mo. 1979).

153 *Blau*, 748 F.2d at 1354.

154 Anderson v. Ciba-Geigy Corp., 759 F.2d 1518, 1521-22 (11th Cir.), *cert. denied*, 106 S. Ct. 410 (1985).

155 *See Hearings on Aging, supra* note 9, at 86 (testimony of Donald E. Fuerst, actuary).

156 29 U.S.C. § 1104(a)(1)(a)(i) (1982).

157 *In re* Erie Lackawanna Ry. Co., 548 F.2d 621, 627 (6th Cir. 1977) (dire financial position of company in bankruptcy may preclude recovery of insurance benefits); *Adcock*, 616 F. Supp. at 423-24 (employer's liability for severance pay to continue in the event successor terminates employees). *But see Hearings on Aging, supra* note 9, at 74 (testimony of Leon Lynch, Int'l Vice President, United Steel Workers of Am.) (union did not foresee downturn in steel industry or seek a funding requirement for welfare benefit plans during collective bargaining).

158 *See* note 108 *supra* and accompanying text.

159 Such a requirement may, however, conflict with other duties of the fiduciary such as administering the plan to defray reasonable expenses, 29 U.S.C. § 1104(a)(1)(a)(ii) (1982), and administering the plan in accordance with the plan document (where the document calls for an unfunded plan), 29 U.S.C. § 1104 (a)(1)(D) (1982). Moreover, this would conflict with ERISA's exclusion of welfare benefit plans from funding requirements. 29 U.S.C. § 1081 (1982).

160 *See* notes 129-32 *supra* and accompanying text. The Financial Standards Accounting Board recently required companies to post on their balance sheet unfunded liability for post-retirement health care.

solution, however, may be impractical because the cost of funding currently unfunded post-retirement liability was estimated at two trillion dollars.[161]

Required funding of welfare benefit plans would obviously advance ERISA's goal of "promoting the interests of employees and their beneficiaries in employee benefit plans."[162] Yet, in a recent re-evaluation of welfare benefit regulation, Congress chose to reduce the tax incentives previously given to employers who voluntarily funded welfare benefit plans.[163] This action was not, however, the final result of Congress' evaluation of welfare benefit plans—rather, it was the beginning of the inquiry.[164]

IV. Legislative Alternatives For Securing Welfare Benefit Rights

Congress is once again considering whether it should subject welfare benefit plans to vesting and funding requirements. Legislation is currently pending before Congress which would extend these requirements to welfare benefit plans in the limited context of mergers and consolidations of plans or transfers of plan assets.[165] Congress has also charged the Department of the Treasury with studying the broader alternative of applying vesting and funding requirements to welfare benefit plans under all circumstances.[166]

The pending legislation applies ERISA's vesting and funding requirements to welfare benefit plans when plans are merged.[167] It is designed to prevent cutbacks in benefits upon such mergers.[168] Congress targeted the bill at plan mergers associated with corporate mergers.[169] In these cases, the successor employer would be

161 *See Hearings on Aging, supra* note 9, at 79 (testimony of Willis Goldbeck, President, Washington Business Group on Health).

162 29 U.S.C. § 1001 (1982). *See Hearings on Aging, supra* note 9, at 69 (testimony of Anthony J. Gajda, economist).

163 The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified in scattered sections of 26 U.S.C.), limited an employer's annual deduction from taxable income for contributions to welfare benefit plans and eliminated the tax exempt growth of welfare benefit funds. 26 U.S.C.A. § 419 (West Supp. 1985) (an exception was provided for welfare benefit funds established to provide post-retirement life insurance). This resulted in a shifting of a significant portion of the cost of welfare benefit plans from the government back to employers. *See Hearings on Labor-Management Relations, supra* note 9, at 33, 39 (statement of Dennis E. Ross, Acting Deputy Tax Legislative Counsel, Dep't of the Treasury).

164 *See Hearings on Labor-Management Relations, supra* note 9, at 30 (statement of Dennis E. Ross, Acting Deputy Tax Legislative Counsel, Dep't of the Treasury).

165 H.R. 503, 99th Cong., 1st Sess. (1985); 131 CONG. REC. H81 (daily ed. Jan. 7, 1985).

166 Deficit Reduction Act of 1984, § 561, Pub. L. No. 98-369, 98 Stat. 494, 901; *see Hearings on Aging, supra* note 9, at 4 (statement of Rep. Daub).

167 H.R. 503, 99th Cong., 1st Sess. (1985); 131 CONG. REC. H81 (daily ed. Jan. 7, 1985).

168 *Id.*

169 *See Hearings on Labor-Management Relations, supra* note 9, at 3 (testimony of Rep. Brooks) (H.R. 5475 was reintroduced in the 99th Cong., 1st Sess. as H.R. 503.). The particular merger which prompted this legislation is the merger between Gulf Oil Co. and Standard Oil of Cal. (Chevron).

required to maintain the same level of benefits as his predecessor.[170] Presumably, this requirement would not burden the employer because his costs would be the same as the predecessor's.[171] Thus, this bill addresses the concern about cost to the employer, which Congress expressed when it initially exempted welfare benefit plans from vesting and funding.[172] This proposal also avoids the problems employees face when trying to enforce benefits against successors because of the doctrines of privity and successorship.[173] On the other hand, mergers often take place when a company is financially burdened.[174] These circumstances necessitate cutting costs to keep the company in business. Unfortunately, the current proposal does not address this problem.

The legislation presents further problems. It does not prevent changes in benefits prior to a merger because its provisions only become effective upon a merger.[175] It grants some employees preferred rights simply because their plan was merged with another.[176] Finally, it presents the more difficult problem of determining to which benefits employees will obtain a vested right.[177]

The question of which benefits should vest prompted Congress to commission the Department of the Treasury to study this problem. The array of welfare benefits is more diverse than pension benefits.[178] A pension is only concerned with providing income in the future.[179] Welfare benefits encompass benefits ranging from medical care to prepaid legal services.[180] Within each category of welfare benefits lies a wide range of alternative benefits.[181] Therefore, the current vesting requirements may not be appropriate for welfare benefit plans.

ERISA contains two types of vested benefits: defined contribution and defined benefits.[182] Under a defined contribution plan, an employee obtains a vested right to a stream of income attributable

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170 *Id.*

171 *See id.* at 7-19 (statement and testimony of M. Diane Dwight).

172 *See* text accompanying note 63 *supra.*

173 *See Hearings on Labor-Management Relations, supra* note 9, at 8 (statement of M. Diane Dwight).

174 Sell, *A Critical Analysis of a New Approach to State Takeover Legislation After* MITE, 23 WASHBURN L.J. 473 (1984).

175 *See Hearings on Labor-Management Relations, supra* note 9, at 13 (testimony of Congressman Erlenborn).

176 *Id.* at 14-15.

177 *Id.* at 21 (statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor).

178 *Id.*

179 29 U.S.C. § 1002(2)(A)(i-ii) (1982).

180 29 U.S.C. § 1002(1) (1982).

181 For example, medical benefits can include surgical care, hospital or extended care, vision, dental, diagnostic services, prescription drugs, etc.

182 *See* R. BILDERSEE, *supra* note 24, at 67-69.

to the contributions.[183] If Congress applied this type of vesting to welfare benefit plans, an employee would obtain a right to a dollar value of benefits.[184] This alternative would eliminate the problem of determining which particular benefits vest.[185] The stream of income, however, may be insufficient to purchase the anticipated benefits.[186] This is especially true given recent increases in medical benefit costs.[187]

Employees may also obtain a vested right in a defined benefit program.[188] Under a defined benefit plan the employee obtains a vested right to the actual mix of welfare benefits.[189] These plans are funded by contributing an actuarially determined amount to the plan which is predicted to yield the prescribed benefits at a future date.[190] Because of the diverse array of welfare benefits,[191] and changing benefit needs,[192] the vested benefit may become obsolete. The task of defining comparable benefits "would create an administrative nightmare."[193] Because benefits are likely to change, one must first determine when welfare benefits vest before they can ascertain which benefits were vested.

Determining when a welfare benefit vests is more complex than the vesting of pension benefits.[194] Unlike pension benefits, employees rely on welfare benefits during their working years. This factor alone suggests that welfare benefits should vest immediately upon hiring. But this would not be practical because, given today's mobile workforce, employees may accrue welfare benefits from several sources.[195] The duplication of benefits would needlessly increase the cost to employers and operate as a disincentive for establishing welfare benefit plans.[196] The alternative of vesting upon retirement

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183 *Id.* at 67-68.

184 *See Hearings on Labor-Management Relations*, *supra* note 9, at 21 (Statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor).

185 *Id.*

186 *Id.*

187 *Id.*

188 *See* R. BILDERSEE, *supra* note 24, at 68-75.

189 *See Hearings on Labor-Management Relations*, *supra* note 9, at 21 (Statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor).

190 *See* R. BILDERSEE, *supra* note 24, at 68-75.

191 *See* text accompanying note 22 *supra*.

192 Benefits such as day care, prepaid legal services, and cafeteria style benefits are relative newcomers to welfare benefit plans.

193 *See Hearings on Labor-Management Relations*, *supra* note 9, at 21 (Statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor).

194 *Id.*

195 *Id.*

196 S. REP. No. 383, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4890, 4905.

would operate as a disincentive to hire older workers.[197] Congress, after some study, could likely balance these concerns and arrive at alternative vesting schedules similar to those which apply to pension plans whereby welfare benefits would vest at some point during the employment relationship.[198]

Congress must answer several questions before it can extend vesting and funding requirements to welfare benefit plans. Congress studied pension plans for ten years before enacting ERISA.[199] Although Congress answered many questions about employee benefits in that time, welfare benefit reform is expected to take several years.[200] In the meantime, employees must rely on the judiciary to secure welfare benefit rights.

V. Conclusion

Welfare benefit plans are not subject to all of the requirements of ERISA. Because of this gap in ERISA, employees have difficulty securing rights to welfare benefits. The federal courts are developing a rule of common law to provide a vehicle to extend ERISA's protection to welfare benefit plans. The court's authority for developing a rule of common law of welfare benefits plans is questionable in view of the legislative history of ERISA. Nevertheless, courts have used the common law to enforce contract rights to welfare benefits and to vest rights to benefits in employees when they attain retirement status. They have also used the common law to enforce welfare benefit rights through ERISA's fiduciary requirements.

Congress is currently considering extending ERISA's funding and vesting requirements to welfare benefit plans. This would eliminate any question of the courts' authority to enforce welfare benefit rights. But this is a complex issue which is expected to take several years to resolve. Because of the potential for abuse by plan providers and the serious consequences that a loss of benefits has for retirees, courts should continue to apply the common law to welfare benefit plans. Courts have the flexibility to take into account Congress' initial concern of reaching a balance between meaningful reform and reasonable cost to employers. By doing so they will continue to forward ERISA's policy of promoting the interests of employees in benefit plans.

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197 *Id.*

198 *See Hearings on Labor-Management Relations, supra* note 9, at 21 (Statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor).

199 *Id.* at 22.

200 *Id.*