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CURRENT PUBLIC LAW AND POLICY ISSUE: Safeguarding a Portion of the Retirement Nest Egg: ERISA and the Need for Regulations in Restricting Companies' Ability to Recoup Overpayment of Pension Funds Made to Struggling Retirees

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LEXISNEXIS SUMMARY:

... This article discusses the history of the legislative act that allows companies to recoup overpayments, the mechanics of how overpayments are made, the justifications put forth by companies for recoupment actions, the shortcomings of the legislative act in protecting retirees from harsh company recoupment actions, and proposals for amending the legislative act so that recoupment procedures will be less unfair for retirees. ... While the recoupment provisions of the Act were born from the need to protect all plan participants, the burden on vulnerable retirees is too high. ... Furthermore, companies have posited that if the situation were reversed (if the company had made underpayments to retirees), the retiree would most likely be requesting the additional payments due to him even if the retiree had made the mistake in the first place. ... The first step in improving the recoupment claims process is to require companies give retirees advance notice of their rights under ERISA and the right to appeal the recoupment. ... Providing retirees with the ability to receive damages would entice attorneys to represent retirees in ERISA cases because it would help ensure they are compensated. ... Even with extra funds to spare and retirees begging for better benefits, companies with overfunded pension plans cut benefits and instituted corporate-friendly reforms resulting in plans less generous to the retirees. ... ERISA should be modified so that companies are required to return some or all of the overpayment to the pension plan if the retiree would face extreme hardship from the recoupment.

TEXT:

[*423]

I. Introduction

Ralph Yore retired from his job as an aircraft maintenance worker in 2001. n2 Yore received a pension of \$ 2,937 per month until 2009 when his previous employer notified him that the company had made an accounting mistake in calculating his pension benefits eight years prior. n3 Yore was told that, unbeknownst to him, he had been receiving too much in pension benefits for eight years, \$ 113,490 to be exact, and that he would now have to pay it all back. n4

Ralph Yore is not unique among retirees facing unreasonable pension overpayment recoupment. Sylvia Glaab was overpaid \$ 32,000 over fifteen years and saw her monthly payments cut from \$ 359 to just \$ 70. n5 Charlie Craven was overpaid and forced to pay back \$ 18,363, which he had received over eighteen [*424] years of retirement. n6 Chuck Ackerman was notified that he owed \$ 31,904 in overpayment. n7 The company initially stopped Ackerman's pension payments altogether saying that the benefits would be reinstated when the debt was paid. n8 The company later agreed to let Ackerman pay the company \$ 500 per month; however, when Ackerman died before the debt was repaid, his widow was expected to finish making the payments. n9

These individual stories are exacerbated by the fact that 35 percent of Americans currently have a pension. n10 This means a substantial percentage of our population is at risk of facing a recoupment action at some point during their retirement. This risk of recoupment has the potential to yield devastating financial consequences because pensions are currently the third largest source of income for families with a family member aged 65 or above, n11 and 50 percent of retirees take in less than \$ 16,500 annually, an amount barely greater than minimum wage. n12

Recoupment actions are legal, and commonly pursued by companies in all sectors of the economy. The current legal and [*425] regulatory environment places the burden of administrative mismanagement of employee retirement plans on one of the most economically vulnerable populations: elderly retirees. n13 Reform is needed to reign in recoupment practices like those described above and restore consumer confidence in retirement security.

This article discusses the history of the legislative act that allows companies to recoup overpayments, the mechanics of how overpayments are made, the justifications put forth by companies for recoupment actions, the shortcomings of the legislative act in protecting retirees from harsh company recoupment actions, and proposals for amending the legislative act so that recoupment procedures will be less unfair for retirees.

II. Recoupment: Permissible Under ERISA

Companies are permitted to recoup pension overpayments from retirees under the Employee Retirement Income Security Act (ERISA or the Act). Pension overpayments are often identified when companies are sold, merged, or packaged to another company. During this process, an acquiring company seeks to correct accounting mistakes made by the acquired company that, when corrected, benefit the acquiring company. n14 Because an acquiring company must pay pensions to the previous company's retirees, one of the common mistakes that an acquiring company will try to capitalize on is pension overpayments. n15

Recoupment may seem like a draconian practice, but it was born from the need to protect all plan participants. ERISA was enacted to protect retirees and secure pension benefits during [*426] economic uncertainty following World War II. n16 The country was suffering from numerous recessions, and, in several high-profile cases, pensions were lost. n17 In 1963, Studebaker-Packard closed one of its plants, which resulted in more than 4,000 employees losing their pension plans. n18 Distress was heightened by news that many companies were misusing pension funds. n19 During this time private pensions were governed by a patchwork of state and federal regulations. n20 This pieced-together framework made it difficult to determine what the law actually required, which only added another layer to people's growing uncertainty about pensions. Throughout the 1960s, for the first time in American history, "there was a growing realization that pensions represented a major element of the economic security of American workers and their families." n21

ERISA was thereafter enacted to ensure that retirees were protected and to guarantee that companies were dealing with pension funds in a reliable manner. n22 Proponents of the Act hoped to even out funding, decrease plan terminations, and even grow [*427] benefit plans. n23 Above all, the Act was to "protect the interests of participants and their beneficiaries." n24

The Act sets out regulations establishing fiduciary standards for companies, company disclosure standards, and standards to ensure that plan beneficiaries would receive their benefits. n25 The Act states that a company, acting as a

fiduciary, "shall discharge [its] duties with respect to a [pension] plan solely in the interest of the participants and beneficiaries and ... with the care, skill, prudence, and diligence under the circumstances." n26 That is, companies must act in the interest of all plan participants, not individual retirees. With respect to pension overpayments, this means the company needs to return the overpaid money to the pension plan in order to act in the best interest of all plan participants. Companies have three sources from which to seek recoupment of the overpaid funds: the company that made the miscalculation, the current owner of the pension fund, or the retiree. n27 The Act does not expressly state which of these three should be required to return the overpayments, but most companies read the Act as requiring them to recoup the overpayment from the retiree. n28

[*428] While the recoupment provisions of the Act were born from the need to protect all plan participants, the burden on vulnerable retirees is too high. The burden placed on retirees is both financial and procedural. When companies pursue the retiree (or the retiree's surviving spouse) for the overpayments, the company will either reduce the beneficiary's pension or stop it completely until the overpaid amount is fully returned. n29 Even if a benefit is merely reduced, a beneficiary's monthly payments may decrease by 25 percent or more, devastating retirees with a fixed income. n30

Recouping overpayments is financially overwhelming and the administration of the recoupment action further disenfranchises struggling retirees. The reductions in payment are usually initiated with little or no warning. Retirees may learn a recoupment action will take place within the month, which leaves the retiree very little time to learn and understand their rights and available remedies. n31 To oppose the action, retirees must participate in an extensive claims process that can last for months or years. n32 During this time, the retiree is obligated to acquire crucial records, meet difficult deadlines, and sometimes deal with unresponsive claims representatives. n33 The claims process is "inadequate" because [*429] "participants don't understand their rights, and companies often don't do a good job of telling them." n34 Until the claims process is exhausted, retirees may not litigate a recoupment action. n35 Thus, the retiree is left with no chance to stand up for his rights unless he makes it through the tiresome claims process and then still has enough fight to pursue a lawsuit. n36 These procedures are burdensome and violate retirees' due process rights by imposing onerous administrative requirements and, in some cases, recouping overpayments without allowing retirees to be heard on the matter. n37

III. Mechanics of Overpayment

Pension overpayments are a common occurrence for companies. These overpayments, which occur in the ordinary course of conducting business, can be the result of data entry errors, misunderstandings, or confusion.

[*430] First, overpayment can result from a data entry error. For example, a plan administrator may miscalculate the retiree's benefits or misapply a plan's stipulations, or payments may be calculated based on hours paid (which may include sick pay and vacation pay) rather than hours worked. n38

Second, an overpayment may result from misunderstandings or administrative errors regarding collective bargaining agreements. This can include payments that continue to be made even though an agreement is nullified; payments made according to an outdated agreement; payments made by a new employer not obliged to follow the agreement; and payments made to beneficiaries who are no longer a part of the agreement. n39

Third, an overpayment may occur if pension benefits should have been suspended, reduced or cancelled but were not. For instance, the retiree may go back to work in the same industry which should suspend his benefits, but the suspension never [*431] occurs. n40 The retiree may receive income from another source, such as Social Security, which should decrease the retiree's benefits, but again the reduction never takes place. n41 Further, if the retiree receives a secondary payment and the terms of the pension plan do not allow for such a payment, then the benefit should thereby be cancelled, but for some reason, the cancellation never occurs. n42

Fourth, sometimes overpayment is the result of simple confusion. Commonly, when the retiree's company is

combined with another company, there is uncertainty about which pension benefits the retiree should be getting. n43

Fifth, overpayments may also arise when payments are made to ineligible participants, for example, if payments are made to ineligible employees or to ineligible family members. n44 What is more, a plan may terminate because of inadequate funds and when the Pension Benefit Guaranty Corporation (PBGC) steps in, the terms of the plan are confused and retirees are mistakenly overpaid. n45

Finally, in some instances the overpayment may be due to the retiree's mistake. Overpayments may result from the retiree's failure to inform the company of certain modifications that affect [*432] the retiree's benefits, such as a spouse dying, the divorce of a spouse, or a new marriage. n46

IV. Justifying Recoupment

A. Company Theories

Regardless of the source of the error that led to overpayment, most companies seek recoupment directly from individual retirees. These actions are justified under several theories, none of which are adequate grounds for recouping the overpayment from the retiree.

First, companies assert that if the retiree is not required to return the overpayment, then the retiree is receiving unearned money. Even if the retiree does receive this unwarranted money, the retiree accepted it unknowingly and without any bad intent, so the retiree should not be punished by being forced to return the money. Most retirees are stunned to learn they have been overpaid and were unaware that they had accepted unearned funds. n47 In many cases, even a diligent inquiry into pension benefits may not reveal an error. Pension plans are complicated and difficult to understand. n48 Payment calculations are based on a multitude of variables, such as the current interest rate, the anticipated rate of return on a company's assets, salary paid, inflation, and life [*433] expectancy of the retiree. n49 When recoupment is initiated, retirees often require legal assistance to determine whether the overpayment actually occurred or the company has made a mistake. n50 This is exacerbated by the fact that numerous mergers, takeovers, and corporate sales make precise benefit determination complicated. n51 If accountants specializing in pension payment calculations do not recognize the computation mistake after years of overpayment, it is unreasonable to expect retirees to uncover such an error.

In addition to asserting that retirees have received unearned money, some companies maintain that these overpayments are interest-free loans. n52 However, the PBGC has countered this phrase with the term "unsolicited loans" n53, which seems to be the more appropriate verbiage for these overpayments, as the retiree is forced to pay back a loan that he never wanted and, in fact, never knew that he had.

Furthermore, companies have posited that if the situation were reversed (if the company had made underpayments to retirees), the retiree would most likely be requesting the additional payments due to him even if the retiree had made the mistake in the first place. n54

Finally, companies complain that they must seek to recoup the overpaid money from the retiree because companies do not have [*434] excess money to replenish the plan. n55 However, companies have been reckless with pension funds the last few decades, which has accounted for at least a part of the shortage of pension funds. n56 Many of the top companies in the United States had pension surpluses prior to the 2008 recession, but these pension surpluses were being used to finance benefits for top executives and personnel downsizing. n57 For example, Bell Atlantic, now Verizon Communications, spent upwards of \$ 3 billion of pension assets on incentives for managers. n58 Additionally, during the 1990s and 2000s, companies commonly packaged and carelessly sold their pension assets, along with the retirees attached to those pension [*435] assets, to buyers in return for cash to benefit the company. n59 In fact, it was common for companies to:

Sell a unit and transfer workers and retirees to the buyer, along with more pension money than necessary to cover the benefits owed them. The buyer might pay 70 cents on the dollar for the surplus, leaving the seller with a less well-funded plan - but also with a lot of cash they wouldn't otherwise have received. n60

Therefore, while companies are citing the 2008 recession as the reason they cannot afford to replenish the pension plans, the companies should be the ones held responsible for being irresponsible with the funds in the first place. This irresponsibility is illustrated by the fact that:

Employers siphoned billions from pension plans to pay for restricting costs, often by providing additional payouts in lieu of severance, and by withdrawing money to pay retiree health benefits - and in some cases parachutes for executives. When the market cratered in 2008, there was no surplus to cushion the blow, and today, pensions collectively are underfunded by 20 [percent]. With one big exception: Pensions for top executives continue to [increase], and account for much of the growing pension cost companies complain about. Another reason [why] pension plans might be underfunded: [employers] stopped contributing to [them]. The Government Accountability Office found last year that 10 large companies that hadn't made required contributions to their pension plans paid top [*436] executives \$ 350 million shortly before terminating their underfunded pension plans in bankruptcy. n61

B. Legal Justification

In addition to these theories of why companies should seek repayment from retirees, companies also justify recoupment by pointing to the fact that the law currently approves of this recoupment approach.

Recouping the overpayment from retirees has been favored by the Internal Revenue Service. According to the Internal Revenue Service, a pension plan "may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." n62 However, the Treasury Regulations have carved out an exception for recoupment of overpayments: assignment and alienation do not include the recoupment of certain payments. n63 Therefore, the Internal Revenue [*437] Service has allowed companies to go after the retiree for the return of these overpayments.

In addition to the Internal Revenue Service, some circuit courts have also allowed recoupment of overpayments based on the federal common law. The Supreme Court allowed courts to develop a "federal common law of rights and obligations under ERISA-regulated plans." n64 Subsequently, courts have recognized claims of unjust enrichment and restitution based on federal common law in cases where a pension plan has sought to recoup overpayments from plan participants. n65

V. Current Shortcomings under ERISA

Reform is needed to address how companies administer recoupment actions, to disincentivize employers from bringing claims, and also to make sure retirees have appropriate means to fight against recoupment actions.

[*438]

A. Recoupment Action Procedures

There has been a significant increase in recoupment cases in the last few years. n66 Given that pension funds are currently underfunded, actions are likely to affect more and more retirees. n67 This problem is aggravated by the fact that there is inadequate regulation of recoupment actions: companies may cancel payments altogether, decrease monthly

payments to trifling amounts, or recoup overpayments that span back decades.

If the company decides to recoup overpayments through reduction in monthly payments, there is no limit to the amount the company can recoup: some companies reduce monthly payments by 25 percent or more. n68 What is more, companies may cut off the retiree's pension payments completely until the overpaid amount is fully returned. n69 Janet Connor, who retired in 1997, experienced this recoupment practice. n70 She was notified a few years after retiring that she had been overpaid \$ 2,500. n71 Connor's pension payments were stopped immediately and did not resume until a year later. n72 Furthermore, there is no maximum amount a company can seek in a recoupment action, and, as evidenced by Ralph Yore's situation, recoupment can top \$ 100,000. n73 There is also no limitation for how far back companies can go to seek overpayments. Retiree Charlie Craven was required to return overpayments that spanned eighteen years. n74

[*439] These recoupment practices have devastating financial consequences because by the time that the retirees are notified that their pension payments will be reduced, the retiree has already reasonably planned his expenses around the set amount he has been receiving. n75 Retirees can face extreme hardship from seeing not only their customary pension payment reduced to correct the overpayment but also reduced or stopped to recoup the overpayment. Without any limitations on the total amount that can be recouped or how far back the company can seek to recoup overpayments, the retiree could face paying back the overpayments for the rest of his life.

B. Recoupment Claims and Litigation

Reform is also needed to make the recoupment claims process less antagonistic towards retirees. Under ERISA, if the retiree wants to bring legal action against a company for its recoupment action, the retiree first must go through a perplexing claim process. n76 This claims process is unfriendly to retirees because companies do not give retirees adequate notice of the claims process, companies have no reason to quickly resolve the retiree's claim, and companies are not discouraged from denying claims. Companies may start reductions in payment with little or no warning to retirees, n77 and they are not obligated to advise retirees [*440] of the claims process. n78 Therefore, many retirees do not understand that they have rights under ERISA, the sole avenue to assert their legal rights.

In addition to not adequately notifying retirees of the claims process, companies also have no motivation to have a speedy claims process. According to *Massachusetts Mutual Life Insurance Company v. Russell*, there is nothing to support the contention that punitive damages should be available as a remedy under ERISA. n79 Therefore, companies are playing with very little risk by cutting benefits "since they can pay their lawyers with pension assets and drag out the cases until the retirees give up or die." n80 Moreover, retirees often times see their claim denied. Companies have no reason not to deny claims because:

the worst that can happen [if an employer denies the retiree's claim] is that the plans can later be ordered to provide the benefit. Basically, under federal benefits law, if you mug an old man and steal his wallet, the worst that can happen is that you'll have to give the wallet back. If the old guy dies from injuries, you won't have to do even that. n81

[*441] In addition to facing a hostile claims process, the poor prospect for significant damages makes it difficult for retirees to find legal representation. n82 Punitive damages are not available under ERISA, and state-law tort claims (and thus damages from torts) are preempted. n83 Under ERISA, plaintiffs are only able to recover their lost benefit, and they will not receive any other damages to incentivize an attorney to work on contingency. n84 Therefore, because retirees do not have the funds to bring a court case and have a difficult time finding representation, it is not surprising that recoupment actions are hardly ever litigated. n85

Even if retirees are able to afford to challenge the recoupment in court, there are few available causes of action: equitable estoppel, due process violations, laches, and breach of fiduciary duty. Retirees rarely prevail on these claims.

The claim of equitable estoppel is often invoked. ERISA jurisprudence has cited the law of trusts as persuasive when evaluating such claims. n86 Therefore, the Restatement of Trusts, which addresses change of position, may provide a starting point to the equitable estoppel issue in pension overpayment recoupment actions. n87 The Restatement of Trusts explains:

[*442]

If the trustee by mistake or otherwise makes an overpayment to the beneficiary, he cannot recover the amount of the overpayment from the beneficiary personally or out of the beneficiary's interest in the trust estate, if the beneficiary had no notice that he was overpaid and has so changed his position that under all the circumstances it is inequitable to the beneficiary to permit such recovery. Among the circumstances which may be of importance in determining whether it is inequitable to allow the trustee indemnity are the following: (1) what disposition has been made by the beneficiary; (2) the amount of the overpayment; (3) the nature of the mistake made by the trustee, whether he was negligent or not; (4) the time which has elapsed since the overpayment was made. n88

While a claim of equitable estoppel, especially in terms of the Restatement (First) of Trusts, seems to provide that a company should not be able to recoup overpayments if it would cause harm to the retiree, most equitable estoppel arguments brought forth by retirees in recoupment actions fail. n89 The Sixth Circuit Court of Appeals has held that estoppel can be invoked only when pension plan specifications are ambiguous. n90 The court reasoned that the [*443] retiree's reliance on an incorrect payment is not reasonable when the retiree was furnished with the clear terms of the plan. n91

When rejecting a claim of equitable estoppel, judges reasoned that in the absence of extraordinary circumstances, the company must act in the best interest of all plan participants, not individual retirees. n92 This means demanding recoupment when overpayments have been made so that the rest of the plan participants will not be harmed. n93 An overpayment is simply perceived as being an advance payment to the retiree. n94

Equitable estoppel has been successful in limited cases with facts constituting "extraordinary circumstances." n95 Extraordinary circumstances have only been found in a few contexts such as where the company made repeated misrepresentations to the retiree and the retiree was unrelenting and assiduous in trying to get answers regarding the pension plan n96; and where the retiree was given written statements outlining her benefits, called to see if the statements were accurate, and obtained a form which also outlined what her benefits would be. n97

[*444] In addition to arguing a claim of equitable estoppel, some retirees have tried to argue violation of due process. In *Szydlowski v. Pension Benefit Guaranty Corporation*, the PBGC took over the retiree's pension fund and then sought to recoup overpaid benefits that had been made to the retiree. n98 The retiree alleged that he had been deprived of his due process rights because he was denied an in-person hearing regarding his appeal. n99 The court held that due process does not require a pension fund to hold an in-person hearing prior to recouping benefits unless the facts of the case are in dispute. n100

Additionally, retirees have attempted to invoke the doctrine of laches. n101 In the context of recoupment actions, the question to be asked is whether the company unreasonably delayed the assertion of its right to the overpayments such that it resulted in prejudice to the retiree. n102 In *Wells v. United States Steel & Carnegie Pension Fund*, the pension plan called for a deduction of pension benefits if the beneficiary was also receiving benefits under workers' compensation or a similar benefits program that was financed by the employer. n103 The pension fund administrator reduced the retirees' pension payments and sought recoupment when he learned that the retirees were receiving benefits from a fund that the company had paid into. n104 The court found that the doctrine of laches did not bar recoupment, as the company did not [*445] delay in starting the recoupment process once it discovered the overpayment. n105 As long as the fund administrator acts quickly to start the recoupment process, the doctrine of laches is inapplicable. n106

Finally, some retirees have asserted that the company has breached its fiduciary duty. n107 In order to succeed on a

breach of fiduciary claim, a retiree must prove that the employer or plan administrator has fiduciary status, that there was a misrepresentation, that the fiduciary knew about the misrepresentation, and that the retiree was harmed. n108 This issue most often revolves around the fiduciary's knowledge of the misrepresentation, as the fiduciary's performance must be evaluated in terms of what he discerned at the time, not from what he gathered from hindsight. n109 Therefore, even though recouping benefits may cause a hardship to the retiree and therefore could be described as harming the retiree, the retiree must be able to prove that the company knew that an overpayment was made and did nothing to fix it. n110 This is a significant burden, given most companies would not continue to overpay the retiree once a mistake is discovered.

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VI. Reforming ERISA

All of these shortcomings under ERISA (the procedural practices, the notification system, the ability for companies to hastily deny claims with no consequences, the lack of legal representation, and the ineffective claims and litigation processes) are allowing for the continuation of a miscarriage of justice. ERISA needs to be reformed in order to address these ominous issues currently plaguing vulnerable retirees.

There have been several proposals to reform recoupment actions. For example, in 2007, Iowa Senator Tom Harkin proposed a bill that would have limited companies from seeking recoupment in certain circumstances. n111 Incorporating ideas from Senator Harkin's bill as well as from other reform proposals, this article outlines proposed ideas for instituting standard recoupment guidelines, initiating a better claims process, and allowing punitive damages under ERISA.

Without many guidelines for companies' to follow in recouping overpayments from retirees, ERISA empowers companies to recoup overpayments with little oversight. Companies can take advantage of this control in the procedural process by establishing unduly harsh recoupment practices. Instituting standard recoupment guidelines through ERISA for companies to follow would help to make sure retirees are not suffering financially. To insure fairness, first, companies must be prohibited from cancelling pension payments altogether. Cancelling the retiree's pension plan altogether can leave the retiree with no source of income. This makes repayment of the overpayment nearly impossible and leaves the retiree with few financial resources. ERISA requires a company act in the best interest of the plan participants and beneficiaries. n112 [*447] Cutting off the entirety of the retiree's income is certainly not acting in the best interest of the retiree. Prohibiting a company from cancelling the retiree's pension payments would ensure that the retiree still has income to survive.

A second recoupment procedural reform limits the amount a company can recoup in a month. Because payments are already being reduced to the correct amount, it is unfair to the retiree for companies to also reduce pension payments without restriction in order to recoup the overpayment. n113 This solution is consistent with Department of Labor (which ensures ERISA compliance) practices. The Department of Labor has intervened to limit monthly recoupment amounts to 25 percent of the retiree's future benefits. n114

The PBGC has proposed similar monthly limitations on recoupment. The PBGC once proposed that recoupment of overpayments should be decided by:

Computing the ratio of the net overpayments to be recouped to the total value of the participant's benefit... The percentage reduction [would be] computed by dividing the total overpayment subject to recoupment by the present value of the ... benefits and multiplying by 100 percent... Because recoupment under [this] proposed method is spread over the entire term of the benefit payments to the participant or beneficiary, the monthly reduction in benefits [would] generally be less than ... a flat 10 percent reduction. n115

Limiting a company's recoupment practices, by either requiring it to utilize a methodical calculation like the one proposed [*448] by the PBGC or by establishing that monthly reductions cannot exceed 10 percent of the retiree's monthly pension payment, would free resources in order to fight the recoupment action and also ease the retiree's financial burden of paying back the recoupment.

An additional reform can either establish a statute of limitations for recoupment actions or can limit how far back overpayments can be recouped. Senator Harkin's bill prohibited recoupment if the company failed to commence the action within 3-years of the initial overpayment. n116 The statute of limitations would ensure retirees would only have to pay back a maximum of three years worth of overpayments. Similarly, ERISA could require that companies only recoup overpayments that were made over a limited number of years. For example, if the retiree was overpaid for ten years, the company would only be able to recoup two, three, or five years of overpayments. While both of these resolutions would help limit the amount that retirees would be expected to pay back and thus relieve the financial burden of having to pay back many years of overpayments, the second solution, limiting how far back overpayments can be recouped, would better benefit both parties. Establishing a statute of limitations on companies would likely mean that companies would not be able to acquire any overpayments since some companies do not recognize the overpayment error until years after the initial mistake had been made.

A final recoupment procedural reform idea focuses on requiring a company to determine if the recoupment would create a financial hardship for the retiree before proceeding with the recoupment. This solution is in line with the Restatement of Trusts, Senator Harkin's bill, and a Department of Labor Advisory Letter. First, the Restatement of Trusts states that if compelling the retiree to repay the money would create a hardship for the retiree, then the pension plan would be refused indemnity. n117 Likewise, Senator [*449] Harkin's bill stated that a plan would not be able to recoup the overpayments if the recoupment "would be against equity and good conscience" by creating a hardship on the retiree. n118 Finally, a Department of Labor Advisory Opinion stated that if a hardship results from recoupment, "it would be prudent ... for the Fund not to seek" recoupment from that retiree. n119

The Department of Labor should publish the content of this Advisory Opinion in a field advisory bulletin because this Advisory Opinion is not generally known. n120 Spreading the word of this Advisory Opinion would enlighten companies to the fact that they would not be breaching their fiduciary duty by not enforcing recoupment by the retiree. n121 This bulletin would be most beneficial if it outlined what level of hardship would have to be proven by the retiree in order to prevent recoupment. The current Advisory Opinion lacks broad utility because it does not adequately define what amounts to a hardship. n122

While this hardship factor has been generally unknown in the United States, the United Kingdom's use of this factor is prevalent. Under the United Kingdom's pension laws, overpayments do not have to be paid back if the retiree has a "change of position." n123 This reform recognizes the vulnerable position of retirees and shifts the risk of overpayments to the company. If companies were required to return the entirety of the overpayment, companies would be more cognizant of their pension calculations so as to not make the mistake in the first place.

[*450] While any one of these recoupment procedural reforms would help alleviate the financial burden the retiree would encounter in having to deal with a recoupment action, an aggregate of these solutions would make recoupment actions more manageable for retirees.

In addition to recoupment procedural reforms, initiating a better claims process under ERISA would help make sure retirees are aware of their legal rights and are better able to assert those rights. The first step in improving the recoupment claims process is to require companies give retirees advance notice of their rights under ERISA and the right to appeal the recoupment. n124 This notice requirement could be taken a step further by requiring companies to inform retirees of the recoupment action well ahead of time and give the retiree a 90 day petition period in which the company could only reduce the retiree's pension payment to the corrected amount but could not reduce the payment to recoup the overpaid amounts. n125 This 90 days appeal period would give retirees the chance to either fight the

recoupment action or find another source of income before benefits are reduced.

Furthermore, improving the fairness and efficiency of the claims process would empower retirees to challenge recoupment actions without relying on, or requiring, burdensome litigation. Not having to utilize litigation as a means of fighting the recoupment action would mean that retirees would not have to rely on the unfruitful claims discussed in section E(ii), such as equitable estoppel, due process violations, laches, and breach of fiduciary duty.

Finally, allowing punitive damages under ERISA is a possible reform with great potential implications. The availability of punitive damages would deter companies from rejecting claims or from not taking their duty as a fiduciary seriously enough. The [*451] effect of deterrence in regards to punitive damages is explained by the following:

The need for punitive damages and the effect of deterrence is most acute in the situation where the defendant tacitly determines that he will engage in wrongful conduct with the expectation of greater profits and run the risk of later paying compensation for the conduct. In this situation, the defendant finds it cheaper to pay damages, if necessary, than to proceed lawfully. If the wrongdoer is assessed compensatory damages, the maximum penalty will merely restore him to the status quo and he is likely to resort to wrongful conduct again. On the other hand, if punitive damages exist, the risk of a substantial penalty may deter his wrongful conduct. n126

By making punitive damages available, employers would risk more if they recklessly reduced benefits or unnecessarily extended the claims process because they would be forced to pay more than just the benefit to the retiree. Providing punitive damages and thus deterring wrongful conduct of companies would ensure that retirees would be treated fairly and would have a better recourse if they were treated unfairly.

This reform would also incentivize attorneys to represent retirees in ERISA cases. Providing retirees with the ability to receive damages would entice attorneys to represent retirees in ERISA cases because it would help ensure they are compensated. Legal representation is an important part of our society: it ensures that a person's rights are being asserted. This idea is even more imperative when it comes to providing legal representation for a vulnerable population. Retirees need representation advocating on [*452] their behalf in order to effectively stand against a powerful company.

VII. Conclusion

Pensions are a precious asset to retirees. Because such valuable assets are involved, companies are obligated under ERISA to discharge their duties with respect to pension plans with care and prudence; n127 however, that has not often happened. Prior to the 2008 recession, many of the top companies in the United States had pension surpluses, n128 but retirees, largely, did not benefit as a result of these surpluses. Instead, because pension surpluses can be used to enhance income statements and augment earnings, companies strived for larger pension surpluses to help their bottom line. n129 Even with extra funds to spare and retirees begging for better benefits, companies with overfunded pension plans cut benefits and instituted corporate-friendly reforms resulting in plans less generous to the retirees. n130

[*453] In addition to seeing their "fiduciary" acting unfavorably with their pension assets, retirees who are confronted with pension overpayment recoupment actions also see their primary source of livelihood eliminated or drastically reduced. Reform needs to occur so that companies can still recoup some overpayments but retirees will not be forced to struggle financially in the process. ERISA should be modified so that companies are required to return some or all of the overpayment to the pension plan if the retiree would face extreme hardship from the recoupment. This modification would ensure that retirees like Ralph Yore, Sylvia Glaab, Charlie Craven, and Chuck Ackerman would not face financial ruin when faced with a recoupment action. Retirees should not have to pay the price for a company's reckless spending of pension surpluses, fiscal mismanagement, or accounting errors.

The United States Department of Labor states that "ERISA has been amended to meet the changing retirement and health care needs of employees and their families,"ⁿ¹³¹ but the Department of Labor is wrong. ERISA has not been amended enough to meet the needs of retirees. Modifications must be made to ERISA to adequately protect the interests of a vulnerable population.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Pensions & Benefits Law Employee Retirement Income Security Act (ERISA) Civil Claims & Remedies Equitable Relief Restitution Tax Law Federal Income Tax Computation Retirement Plans Rollovers, Vesting & Mergers (IRC secs. 401, 408-409, 411)

FOOTNOTES:

n1. Candidate for Juris Doctor, Hamline University School of Law, May 2013. I would like to thank my primary editor, Analee Heath Leach, for her invaluable insight and encouraging guidance. I would also like to thank my family for their love and support.

n2. Teryl Zarnow, That Pension? You Might Have to Pay it Back, Orange County Reg., Aug. 27, 2010, available at <http://www.ocregister.com/articles/pension-264021-plan-yore.html>.

n3. Id.

n4. Id. After the reductions hit Yore's monthly pension payments, he was left with \$ 967.53 a month. This leaves Yore "in the hole about \$ 100 per month." Id.

n5. Id.

n6. Ellen E. Schultz, Retirement Heist: How Companies Plunder and Profit from the Nest Eggs of American Workers 85 (2011) [hereinafter Retirement Heist].

n7. Id. at 81.

n8. Id.

n9. Id. at 84.

n10. Pension Rights Ctr., Why Pensions are Important, <http://www.pensionrights.org/publications/statistic/why-pensions-are-important> (last visited Feb. 4, 2012).

n11. U.S. Gov't Accountability Office, GAO-10-632, Retirement Income: Challenges for Ensuring Income Throughout Retirement 5 (2010), available at <http://www.gao.gov/new.items/d10632r.pdf>. Social Security is the largest source of retirement income at 37 percent; employment earnings are the second largest source of retirement income at 30 percent; and pension income is the third largest source of retirement income at 19 percent. Id.

n12. Pension Rights Ctr., Remarks by Karen Ferguson at Retirement Heist: Overlooked Causes of the Retirement Crises (Nov. 7, 2011) <http://www.pensionrights.org/newsroom/speeches-statements/remarks-karen-ferguson-retirement-heist-overlooked-causes-retirement>

n13. Retirees are currently "more worried about running out of money in retirement than death. Anxiety is high. Consumer confidence in retirement security is plummeting. [Somebody] needs to do something." Id.

n14. See Retirement Heist, *supra* note 6, at 82.

n15. Id. (acquiring companies will hire consultants to hunt through the intricate pension calculations in order to find a way to save the acquiring company some money).

n16. Alan K. Ragan, Balancing ERISA's Anti-Alienation Provisions Against Garnishment of a Convicted Criminal's Retirement Funds: Unscrambling the Approaches to Protecting the Retirement Nest Egg, 39 U. Balt. L. Rev. 63, 66 (2009) (referencing Economic Report of the President, 1962 Econ. Rep. Pres. 3, 23 (Jan. 1962)).

n17. Id.

n18. Id. at 67 (referencing S. Rep. No. 93-383, at 78-79 (1973); Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm., 89th Cong., 103-106, 123 (1966)).

n19. Ragan, *supra* note 16 at 67.

n20. William G. Gale et al., ERISA After 25 Years: A Framework for Evaluating Pension Reform, 15 *Benefits Q.* 73, 75 (1999).

n21. Id.

n22. Jonathan B. Stone, Comment, A Path of no Return: Employer Overpayments into Employee Benefit Plans, 8 *Indus. Rel. L.J.* 68, 68-69 (1986).

n23. Id.

n24. U.S. Dep't of Labor, History of EBSA and ERISA, <http://www.dol.gov/ebsa/aboutebsa/history.html> (last visited Jan. 6, 2012) [hereinafter History of EBSA and ERISA].

n25. Ragan, *supra* note 16, at 68 (referencing 29 U.S.C. §§1021, 1082, 1103, 1104 (2006)). ERISA also created the Pension Benefit Guaranty Corporation (PBGC) to manage a program that provided benefit insurance for pension plans. Gale et al., *supra* note 20, at 76. The PBGC's job was to ensure that retirees received their benefits regardless of the financial status of the retiree's pension plan. Id.

n26. Employee Retirement Income Security Act, 29 U.S.C. § 1104 (2006).

n27. Retirement Heist, *supra* note 6, at 83.

n28. Eric Loi & Rebecca Davis, Pension Rights Ctr., Unfair Pension Takebacks: What Can be Done to Protect Retirees 3 (Aug. 31, 2011), available at http://www.pensionrights.org/sites/default/files/docs/pdf/unfair_pension_takebacks.pdf.

n29. Ellen E. Schultz, "Overpaid" Pensions Being Seized, Wall St. J., Aug. 13, 2010, available at <http://online.wsj.com/article/SB10001424052748703723504575425421188456544.html> [hereinafter "Overpaid Pensions Being Seized"]. Some companies may seek interest payments on the overpaid amount. Loi & Davis, *supra* note 28, at 1.

n30. "Overpaid" Pensions Being Seized, *supra* note 29.

n31. Loi & Davis, *supra* note 28, at 1.

n32. Retirement Heist, *supra* note 6, at 190.

n33. *Id.* Fred Loewy's story with his benefits plan administrator exemplifies this situation. Loewy mailed numerous letters to his plan administrator asking for an explanation of how his benefits were calculated. After Loewy sent his letter for the fifth time, the administrator finally acknowledged that they had gotten the letter and promptly responded by sending Loewy the pension plan rules, not the documents explaining how his pension was calculated. Loewy then wrote to the appeal center saying that he was being ignored. They, too, failed to write him back. Subsequently, Loewy spent five months calling and writing to the appeals center again asking for the explanation of how his benefits were calculated. The appeals center eventually responded, but it too mailed him the wrong documents. In his quest to find out how his benefits were being calculated, Loewy was able to speak with a representative a few times on the phone; the representative promised him that she would write him back regarding the pension calculation. Loewy never received anything. Finally, Loewy drove to appeals center office, but the representative he had been speaking with on the phone previously was "leaving the building for a meeting." *Id.* at 191-92.

n34. E-mail from Ellen Schultz, Wall Street Journal Journalist and Author of Retirement Heist: How Companies Plunder and Profit from the Nest Egg of American Workers, to Samantha Valerius, Associate Editor, Hamline Journal of Public Law and Policy (Jan. 12, 2012, 21:16 CST) (on file with author) [hereinafter E-mail from Ellen Schulz].

n35. Retirement Heist, *supra* note 6, at 190.

n36. Maxine Bernstein, City Pensions Spur Lawsuit, *The Oregonian*, Sept. 8, 2011 (quoting attorney Henry J. Kaplan, who is representing retirees fighting a pension overpayment recoupment action).

n37. Brief of Amicus Curiae Int'l Ass'n of Fire Fighters at 13, *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165 (Minn. Ct. App. 2011) (Nos. A10-1244, A10-1331).

n38. *Loi & Davis*, *supra* note 28, at 2; *Stone*, *supra* note 22, at 73 (referencing *Serv. Emp. Int'l Union v. Baucom Janitorial Serv., Inc.*, 504 F. Supp. 197, 198 (D.D.C. 1980) (describing how the contribution amount was calculated based on "the total number of productive hours worked by ... employees" when the amount should have been calculated based on "the total number of compensated hours, which included nonproductive hours (e.g., holidays, vacations, and sick leave)").

n39. *Stone*, *supra* note 22, at 73 (referencing *R. V. Cloud Co. v. Teamsters Pension Trust Fund*, 566 F. Supp. 1426 (N.D. Cal. 1983) (describing how a collective bargaining agreement expired, and the company and the trust fund did not mutually assent to the terms of the new collective bargaining agreement); *E. M. Trucks, Inc. v. Cent. States Pension Plan*, 517 F. Supp. 1122 (D. Minn. 1981) (describing how employees entered into a new collective bargaining agreement with their union, which thereby terminated their participation in their old pension plan); *Carter v. CMTA Molders & Allied Health & Welfare Trust*, 736 F.2d 1310 (9th Cir. 1984) (describing how an employer made contributions to a pension fund during a period in which he had not signed a collective bargaining agreement); *Shallcross Express, Inc. v. Local 478 Trucking & Allied Indus. Pension Fund*, 290 A.2d 744 (N.J. Super. Ct. Law Div. 1972) (describing how an employer made contributions to a pension fund on behalf of his employees, who were ineligible for pension benefits under the terms of the union collective bargaining agreement)).

n40. *Loi & Davis*, *supra* note 28, at 2.

n41. Id.

n42. Id.

n43. U.S. Dep't of Labor, 10 Common Causes of Errors in Pension Calculation, <http://www.dol.gov/ebsa/Publications/10common.html> [hereinafter 10 Common Causes].

n44. Stone, *supra* note 22, at 73 (referencing Cent. States Pension Fund v. Wholesale Produce Supply Co., 611 F.2d 694 (8th Cir. 1979) (describing how an employer made erroneous contributions to a pension fund on behalf of an ineligible employee); Bacon v. Wong, 445 F. Supp. 1189 (N.D. Cal. 1978) (describing how employers made contributions to a pension trust fund on behalf of ineligible employees); Martin v. Hamil, 608 F.2d 725 (7th Cir. 1979) (describing how defendants made contributions to a pension fund on their own behalf before finding out that they were ineligible under the terms of the pension fund to receive benefits)).

n45. Loi & Davis, *supra* note 28, at 2. The PBGC, created by ERISA, provides benefit insurance for pension plans. Gale et al., *supra* note 20, at 76.

n46. 10 Common Causes, *supra* note 43.

n47. Retirement Heist, *supra* note 6, at 83 (quoting Justin Freeborn, a legal-aid lawyer with the Western States Pension Assistance Project). In many cases involving overpayment of pension benefits, the retiree had no idea that an error had been made. Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief under ERISA Section 502(A)(3), 39 J. Marshall L. Rev. 827, 905-06 (2006).

n48. Legal Services of N. Cal., 2010 Fall News: Resolving Pension Puzzles, http://development.lsnr.net/?page_id=658 (last visited Jan. 10, 2012) (quoting Justin Freeborn, director of the Western States Pension Assistance Project).

n49. Am. Acad. of Actuaries, Fundamentals of Current Pension Funding and Accounting for Private Sector Pension Plans: An Analysis by the Pension Committee of the American Academy of Actuaries, (July 2004), available at http://www.actuary.org/pdf/pension/fundamentals_0704.pdf.

n50. "Overpaid" Pensions Being Seized, *supra* note 29.

n51. Legal Services of N. Cal., *supra* note 48.

n52. Appellees' Brief at 40, *Burns v. Corning Inc.*, 178 F.3d 1278 (3d Cir. 1999) (No. 98-3527).

n53. PBGC Recoupment and Reimbursement of Benefit Overpayments and Underpayments, 62 Fed. Reg. 66319-01 (proposed Dec. 18, 1997) (to be codified at 29 C.F.R. pt. 4022) (describing the overpayments as "unsolicited loans" because "recipients are generally unaware that they are receiving amounts in excess of their entitlements").

n54. Bernstein, *supra* note 36.

n55. Ellen E. Schultz, How Employers Raid Pension Plans, *Wall St. J.*, Oct. 2, 2011, available at <http://online.wsj.com/article/SB10001424052970204138204576605482876191482.html> [hereinafter How Employers Raid Pension Plans] (stating that companies are claiming that "they're victims of a 'perfect storm' of an aging work force and market turmoil").

n56. *Id.*

n57. Ellen E. Schultz, Overfunded Pension Plans Fatten Companies' Earnings, *Wall St. J.*, June 15, 1999, available at <http://cyber.law.harvard.edu/rfi/press/surplus.htm> [hereinafter Overfunded Pension Plans Fatten Companies' Earnings]. Current policy not only allows pension funds to be used in this manner, but such uses are incentivized by favorable tax treatment as companies do not have to pay Social Security or Medicare payroll taxes on these pension surplus funds. *Id.* The 1926 Revenue Act of 1926 allowed all income made from pension trusts to be excluded from taxation. Joanna Short, Economic History of Retirement in the United States, *Econ. History Ass'n.* (Feb. 1, 2010, 6:21 PM), <http://eh.net/encyclopedia/article/short.retirement.history.us>. The Revenue Acts of 1938 and 1942 provided that companies are exempt from paying taxes on the income made from pension trusts until the benefits are distributed. Patrick Purcell & Jennifer Staman, Cong. Research Serv., RL 34443, Summary of the Employee Retirement Income Security Act (ERISA) 2 (2009), available at

<http://aging.senate.gov/crs/pension7.pdf>.

n58. Ellen E. Schultz, *Who Killed Private Pensions?*, Wall St. J., Sept. 17, 2011, available at <http://online.wsj.com/article/SB10001424053111903532804576566862041674794.html> [hereinafter *Who Killed Private Pensions?*].

n59. *Id.*

n60. *Id.*

n61. *How Employers Raid Pension Plans*, supra note 55. Thus, even if a company is being irresponsible with pension funds and, as a result, the pension fund becomes underfunded, the company does have an out: filing bankruptcy. Because the PBGC provides insurance to companies in that it will step in to provide benefits to retirees if the company becomes ill-equipped to do so, it makes sense that some companies will use this insurance as an enticement to redirect assets from pension funds, fail to make required payments, and then seek bankruptcy as a safeguard. See Nicholas J. Brannick, Note, *At the Crossroads of Three Codes: How Employers are using ERISA, the Tax Code, and Bankruptcy to Evade their Pension Obligations*, 65 Ohio St. L.J. 1577, 1596 (2004).

n62. Treas. Reg. § 1.401(a)-13(b) (1988). Assignment and alienation include (1) any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan, and (2) any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary. Treas. Reg. § 1.401(a)-13(c) (1988).

n63. Treas. Reg. § 1.401(a)-13(c)(2)(i) (1988).

n64. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (reasoning that the language and history of ERISA support such a conclusion).

n65. Brief for Appellee at 21, *Coop. Benefit Adm'rs, Inc. v. Ogden*, 367 F.3d 323 (5th Cir. 2004) (No.

03-30518) (referencing Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 990 (4th Cir. 1990) (holding that a plan participant's failure to pay back a plan administrator was unjust enrichment under the federal common law); Heller v. Fortis Benefits Ins. Co., 142 F.3d 487, 495 (D.C. Cir. 1998) (holding that the federal common law claim of restitution demanded that a plan beneficiary pay back mistaken payments to the plan administrator); Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1058 (3rd Cir. 1989) (holding that the federal common law claim of restitution demanded that an employer be able to recoup mistaken payments from a multiemployer pension plan); Whitworth Bros. Storage Co. v. Cent. States, Se. & Sw. Areas Pension Fund, 794 F.2d 221, 233-236 (6th Cir. 1986) (holding that the common law claim of restitution demanded that a pension fund pay back mistaken payments to an employer); Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 303-305 (5th Cir. 1992) (holding that a federal common law right of restitution is available for an employer to recover mistakenly made payments to a pension fund)).

n66. "Overpaid" Pensions Being Seized, *supra* note 29 (referencing an interview with Justin Freeborn, a lawyer with the Western States Pension Assistance Project). There are no statistics covering pension overpayment cases. *Id.*

n67. *Id.*

n68. *Id.*

n69. *Id.*

n70. Telephone Interview with Susan Hanchett (Jan. 27, 2012). Susan Hanchett is the niece-in-law of Janet Connor. *Id.* Janet Connor passed away in 2003. *Id.*

n71. *Id.*

n72. *Id.*

n73. "Overpaid" Pensions Being Seized, *supra* note 29.

n74. Retirement Heist, *supra* note 6, at 85.

n75. Brief and Addendum of Amici Curiae Allen Berryman and Ronald Kastner at 16, *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165 (Minn. Ct. App. 2011) (Nos. A10-1244, A10-1331). For example, in *Phillips v. Brink's Company*, the court determined that the retiree had already rationally based his life around the amount he had been receiving every month for seven years. *Phillips v. Brink's Co.*, 632 F. Supp. 2d 563, 574 (W.D. Va. 2009) (explaining that the retiree had "changed his position" in reliance on the pension payments because he had been overpaid for seven years and had no way of knowing that he was being overpaid).

n76. Retirement Heist, *supra* note 6, at 190.

n77. *Loi & Davis*, *supra* note 28, at 1.

n78. *Id.* at 4.

n79. John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in *Russell, Mertens*, and *Great-West*, 103 Colum. L. Rev. 1317, 1346-47 (2003) (referencing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (reasoning that "Congress did not intend to authorize any relief except for the plan itself").

n80. Retirement Heist, *supra* note 6, at 5 (explaining how "with the help of well-connected Washington lobbyists and leading law firms, over the past two decades employers have steadily used legislation and the courts to undermine protections under federal law, making it almost impossible for employees and retirees to challenge their employers' maneuvers").

n81. *Id.* at 186. The story of an ex-NFL player, Mike Webster, exemplifies this situation. Webster applied for disability benefits in 1998. *Id.* The NFL plan trustees denied Webster's claim and Webster appealed. *Id.* Webster "died in 2002, at age fifty, while his appeal was [still] pending." *Id.*

n82. See *id.* at 189.

n83. Respondents' Brief in Opposition at 15, *Ramsey v. Formica Corp.*, 546 U.S. 815 (2005) (No. 04-1510) (stating that the court of appeals are unanimous in holding that "state-law tort claims for negligent misrepresentation and promissory estoppel ... are preempted by ERISA").

n84. *Retirement Heist*, *supra* note 6, at 189. Also, attorneys are only awarded fees at the discretion of the court. *Id.* at 190.

n85. E-mail from Ellen Schultz, *supra* note 34.

n86. Equitable estoppel arises when one party misleads another party with a faulty promise, and as a consequence, the misled party relies on the promise to his or her detriment. Robert E. Hoskins, *Equitable Estoppel as a Remedy Under ERISA*, 56 S.D. L. Rev. 456, 469 (2011) (quoting *Black's Law Dictionary* 538-39 (6th ed. 1990)).

n87. The Supreme Court has held that "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties. In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purpose requiring departing from the common-law trust requirements." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (finding that an employer, acting as the plan's administrator, breached its fiduciary duty to plan beneficiaries when it tricked the beneficiaries into withdrawing from the plan and forfeiting their benefits).

n88. *Restatement (First) of Trusts* § 254 cmt. d (1935).

n89. *Loi & Davis*, *supra* note 28, at 3.

n90. *Stark v. Mars, Inc.*, 790 F. Supp. 2d 658, 670 (S.D. Ohio 2011) (citing *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 404 (6th Cir. 1998) (examining whether equitable estoppel occurs when a company tells a beneficiary how much her monthly payments will be and then later states that the amount would be far less)).

n91. Id.

n92. *Loi & Davis*, supra note 28, at 3 (quoting *Philips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (reasoning that "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"))).

n93. Id.

n94. Id.

n95. Id. (referencing *Bloemker v. Laborer's Local 265 Pension Fund*, 605 F.3d 436 (6th Cir. 2010) (examining whether equitable estoppel occurs when an employee was told by his pension plan that he had been receiving the wrong amount of pension benefits for two years and would have to pay back the overpayments)).

n96. *Stark v. Mars, Inc.*, 790 F. Supp. 2d 658, 671 (S.D. Ohio 2011) (citing *Pell v. E.I DuPont de Nemours & Co.*, 539 F.3d 292, 304 (3rd Cir. 2008) (explaining that "extraordinary circumstances can arise where there are 'affirmative acts of fraud,' where there is a 'network of misrepresentations ... over an extended course of dealing,' or where particular plaintiffs are especially vulnerable")).

n97. *Stark v. Mars, Inc.* 790 F. Supp. 2d at 671.

n98. *Szydlowski v. Pension Benefit Guar. Corp.*, No. 4:05CV498-DJS, 2006 WL 903246 (E.D. Mo. Apr. 7, 2006).

n99. Id.

n100. Id.

n101. The doctrine of laches precludes a party who lacked diligence in asserting a right from recovering at the detriment of a party "who has been prejudiced by the delay." Brief and Addendum of Respondent at 34-35, *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165 (Minn. Ct. App. 2011) (Nos. A10-1244, A10-1331) (quoting *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002)).

n102. *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1250 (6th Cir. 1991).

n103. Id.

n104. Id.

n105. Id.

n106. Id.

n107. A company's pension plan administrator, acting as a fiduciary, must exercise reasonable care so as not to injure the beneficiary. *Phillips v. Mar. Ass'n - I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549, 556 (E.D. Tex. 2001) (reasoning that a plan administrator did not exercise reasonable care when he failed to submit qualified domestic relations orders to the pension plan actuary).

n108. Appellees' Brief, *supra* note 52, at 25 (quoting *In re Unisys Corp.*, 57 F.3d 1255, 1265 (3d Cir. 1995) (holding that an employer had breached his fiduciary duty by knowingly giving false information to retirees)).

n109. Id. at 30 (quoting *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 738 F. Supp. 937, 491 (W.D. Pa. 1989) (holding that it was not a breach of fiduciary duty to invest pension funds in investments that yielded poor returns because the fiduciary was acting reasonably during the investment period)).

n110. Id. at 29-30.

n111. Press Release, Tom Harkin, Harkin Introduces Legislation to Ensure Retirement Security for American Workers (June 28, 2007), available at <http://harkin.senate.gov/press/release.cfm?i=277983>. Senator Harkin's bill was not passed and has not since been reintroduced. Loi & Davis, *supra* note 28, at 4.

n112. Employee Retirement Income Security Act, 29 U.S.C. § 1104 (2006).

n113. Loi & Davis, *supra* note 28, at 4.

n114. Id. (referencing 29 C.F.R. § 2530.203-3).

n115. Benefit Reductions in Terminated Single-Employer Pension Plans and Recoupment of Benefit Overpayments, 48 Fed. Reg. 50111-01, 50116 (proposed Oct. 31, 1983) (to be codified at 29 C.F.R. pt. 2623).

n116. Restoring Pension Promises to Workers Act, S. 1725, 110th Cong. § 102(a)(2) (2007).

n117. Restatement (First) of Trusts § 254 cmt. d (1935).

n118. S. 1725.

n119. Dep't of Labor Opinion Ltr. 77-08, 1977 WL 5394 (Apr. 4, 1977).

n120. Loi & Davis, *supra* note 28 at 4.

n121. *Id.*

n122. *Id.* (referencing Dep't of Labor Opinion Ltr. 77-08, 1977 WL 5394 (Apr. 4, 1977)).

n123. The Pensions Advisory Serv., *Mistakes and Overpayments* (2007), available at <http://www.pensionsadvisoryservice.org.uk/media/82768/mistakesandoverpayments.pdf>. A "change of position" means that the retiree has changed his or her position in reliance on the amount of the original payment. *Id.*

n124. Senator Harkin's bill required that notice be given to the retiree of his or her ability to appeal a recoupment action. *Restoring Pension Promises to Workers Act*, S. 1725, 110th Cong. § 102(a)(3) (2007).

n125. Loi & Davis, *supra* note 28, at 4.

n126. Deborah A. Geier, Note, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 Case W. Res. L. Rev. 743, 755 (1985).

n127. *Employee Retirement Income Security Act*, 29 U.S.C. § 1104 (2006).

n128. *Overfunded Pension Plans Fatten Companies' Earnings*, *supra* note 57. A few of the companies with large pension surpluses included General Electric with a pension surplus of \$ 15,875 million; IBM with a pension surplus of \$ 8,278 million; Boeing with a pension surplus of \$ 3,722 million; Lockheed Martin with a pension surplus of \$ 4,665 million; and AT&T with a pension surplus of \$ 6,032 million. *Id.*

n129. *Id.*

n130. Id. For example, in 2004 Halliburton, an oil services company, decreased their pension benefits by tens of thousands of dollars notwithstanding the fact that their pension funds were doing very well. Mary Williams Walsh, A Hard-to-Swallow Lesson on Pensions, N.Y. Times, Oct. 14, 2004, available at <http://www.nytimes.com/2004/10/14/business/14pension.html>. In addition to changing pension plans in ways that favored the company, companies did not provide regular cost-of-living increases for retirees: in the 1980s, 60 percent of companies supplied their retirees with cost-of-living adjustments while in the late 1990s less than 4 percent did. Overfunded Pension Plans Fatten Companies' Earnings, *supra* note 57.

n131. History of EBSA and ERISA, *supra* note 24.