THE MOENCH PRESUMPTION: BUTCHERING ERISA

GEORGE LEE FLINT, JR.†

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I. INTRODUCTION

Those lawyers who advised clients concerning employee benefits during the imposition of the Employee Retirement Income Security Act of 1974 (ERISA)[1] in the 1970s have found subsequent court pronouncements shocking.[2] When Congress enacted ERISA, it sought to impose specific fiduciary duties on plan administrators and trustees of welfare and retirement plans previously absent under state contract law applicable to plans.[3] This shocked lawyers who spent years explaining to

† H. Andy Professor of Commercial Law, St. Mary's University School of Law, San Antonio, Texas. B.A., B.S., 1966, University of Texas at Austin; M.A., 1968, University of Texas at Austin; Nuc. E., 1969, Massachusetts Institute of Technology; Ph. D. (Physics), 1973, University of Texas at Austin; J.D., 1975, University of Texas at Austin.

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

2. The author was one of those lawyers, first as an associate and later as a member of Naman, Howell, Smith & Lee, P.C. in Waco, Texas, from 1975 to 1984, representing all the firm's ERISA clients, drafting plans, obtaining determination letters from the Internal Revenue Service, and handling the annual filings with the Internal Revenue Service and Department of Labor.

3. Congress sought to "codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R. REP. NO. 93-533, at 4649 (1973). *See also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989); Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985).

ERISA specifically states that its purpose is to "establish[] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and to set "minimum standards . . . assuring the equitable character . . . and [the] financial soundness" of such plans. *See* 29 U.S.C. § 1001(a)-(b) (2006).

clients the behaviors required by these imposed fiduciary duties. The main ERISA fiduciary provision[4] imposed five primary fiduciary duties: a duty of loyalty applicable to all the other fiduciary duties, the exclusive benefit rule, the duty of care, the duty to diversify investments, and the duty to adhere to those plan terms consistent with ERISA.[5]

These lawyers expected fiduciary behaviors to be held to the high statutory fiduciary standards. But shortly after the passage of ERISA, the circuit courts began to concoct deference rules to review the decisions of ERISA fiduciaries, allowing fiduciaries essentially to do as they pleased rather than concern themselves with any standard imposed by ERISA. ERISA provides for several types of fiduciaries, primarily the plan administrator who controls and manages the operation and administration of the plan; the trustee who controls and manages the plan funds; and the appointing fiduciary, typically the employer's directors, who selects and retains other plan fiduciaries.[6] A single individual, a committee, or an entity may serve in all or several of the roles.[7] So a plan fiduciary may have the title of a plan administrator or of a trustee or have no title yet have some of the functions of the other types of fiduciaries. This article generally uses the term "plan administrator" for those fiduciaries with plan administration functions and "trustee" for those fiduciaries with trustee functions.

The first such crafted deference rule dealt with those fiduciaries serving as plan administrators, who decide who gets what benefit or interpret plan provisions relating to those benefits.[8] The Supreme Court

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Before ERISA, Congress had subjected plans for labor unions under the Labor Management Relations Act (LMRA) to the exclusive benefit rule of trust law. *See* 29 U.S.C. § 186(c)(5) (2006).

4. 29 U.S.C. §1104(a) (2006).

5. For the explicit language contained in ERISA's fiduciary section, see *infra* notes 91-96 and accompanying text. There are other fiduciary duties, such as the restrictions on prohibited transactions. *See* 29 U.S.C. §1106 (2006).

6. *See* 29 U.S.C. § 1002(21)(A) (providing that the definition of fiduciary includes both the plan administrator functions with authority to control management of the plan and the trustee functions with authority to control management and disposition of plan assets); *id.* § 1102(a)(1) (requiring a plan administrator function, controlling and managing the operation of the plan); *id.* § 1103(a) (requiring a trustee function with exclusive authority and discretion to manage and control the assets of the plan); 29 C.F.R. § 2509.75-8, at D-4 (1974) (making directors responsible for the selection and retention of plan fiduciaries); *id.* at FR-17 (stating that the appointing fiduciary must monitor those fiduciaries selected for compliance with the plan and ERISA).

7. *See generally* George Lee Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133, 137-38 (1989).

8. *See id.* at 158-67 (discussing the origin of the "abuse of discretion" rule in state common law and LMRA trust law with the initial ERISA lawsuits arising with the LMRA plans).

ultimately approved the deferential "abuse of discretion" standard for reviewing the benefit claims decisions and plan interpretations of benefit provisions by these plan administrators, but only if the plan gave those plan administrators discretion to determine eligibility for benefits or to construe the plan's terms.[9] And of course all subsequent plans have such a discretion provision. Without that provision, the plan administrator's decision required a court to apply *de novo* review. The Supreme Court specifically limited this deferential review standard to those ERISA lawsuits for benefits due, leaving open the review standard for other ERISA causes of action, such as the one for breach of fiduciary duty.[10] The deferential review standard operates as a presumption of correctness for the plan administrator's benefit decision that the beneficiary claimant must overcome.[11] The Supreme Court has refused to alter this presumption of correctness of plan administrator decisions merely for the presence of a conflict[12] or for a prior incorrect finding.[13] Some commentators have even suggested that a plan administrator can establish an iron-clad defense concerning the correctness of the benefit denial decision by giving the beneficiary claimant every document requested, accepting any document provided by the beneficiary claimant,

9. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (requiring *de novo* review of benefit claims, unless the plan gives the plan administrator discretion to determine the eligibility for benefits or to construe the terms of the plan, thereby establishing the deferential "abuse of discretion" standard); *see generally* Flint, *supra* note 7.

10. *Accord* LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 258-59 (2008) (describing the "abuse of discretion" review standard as a benefit of an action under 29 U.S.C. §1132(a)(1)(B) and not for one under 29 U.S.C. §1132(a)(2) [for appropriate relief for a breach of fiduciary duty]). *See Firestone Tire & Rubber Co.*, 489 U.S. at 108 ("The discussion which follows is limited to the appropriate standard of review in [29 U.S.C.] § 1132(a)(1)(B) [the benefits due lawsuit] actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA"). *See also* John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan, 26 F.3d 360, 369 (2d Cir. 1994) (refusing to apply the "arbitrary and capricious" standard to breach of fiduciary duty since this post-*Firestone* case did not involve a benefit claim); Struble v. N.J. Brewery Emps. Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984) (limiting the "arbitrary and capricious" rule to claims for benefits, like other pre-*Firestone* cases). *Contra* Hunter v. Caliber Sys., Inc., 220 F.3d 702, 711 (6th Cir. 2000) (applying "arbitrary and capricious" rule to ERISA violations outside of benefit denials, including breach of fiduciary duty).

11. *See, e.g.*, Lipker v. AK Steel Corp., 698 F.3d 923, 928 (6th Cir. 2012); Viera v. Life Ins. Co. of N. Am., 642 F.3d 407, 413-14 (3d Cir. 2011).

12. *See* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 133-34 (2008).

13. *See* Conkright v. Frommert, 559 U.S. 506, 511-12 (2010).

and then stating in the benefit denial that the plan administrator considered "everything."[14]

More recently, a similar situation has arisen concerning those ERISA fiduciaries serving as trustees of eligible individual account plans (EIAPs) or exercising authority over the investments of those plans. An EIAP is a profit-sharing, stock bonus, thrift, or savings plan or an employee stock ownership plan (ESOP) that contains a provision providing for plan acquisition and holding of qualifying employer securities.[15] Under ERISA's definitions, EIAPs serve as a type of retirement device.[16] EIAPs generally possess one of two structures. For ESOPs, a trustee ordinarily holds the employer securities separate and apart from the participant accounts, which only reflect their proportional interest in the ESOP's trust fund.[17] Other EIAPs ordinarily segregate each participant's account, possess several investment options (one of which is for employer securities), and permit the participant to direct the trustee in investing the monies in the participant's segregated account in the various investment options.[18] A further difference among EIAPs

14. *See* Frank Cummings, *Employee Benefits Litigation Overview: Issues to Think About, Worry About, and Maybe do Something About*, 2 A.L.I.-A.B.A. ADVANCED EMP. L. & LITIG. 1337 (2012). The suggestion to provide every document requested follows *Kujanek v. Houston Poly Bar I, Ltd.*, 658 F.3d 483, 490 (5th Cir. 2012) (holding that a plan administrator lost summary judgment as there was a factual issue over what documents were supplied).

15. *See* 29 U.S.C. § 1107(d)(3) (2006) (defining EIAP as a type of individual account plan that has a provision for the acquisition and holding of employer securities); *id.* § 1107(d)(6) (2006) (defining ESOP as "designed to invest primarily" in employer securities). *See also id.* § 1002(34) (2006) (defining an individual account plan as a pension plan); § 1002(2) (defining pension plan as providing retirement benefits or deferral of income until termination of service or beyond).

16. *See* 29 U.S.C. § 1109(d)(9).

17. *See, e.g.*, 26 U.S.C. § 4975(e)(7) (2006) (providing the Internal Revenue Code's (IRC) definition of ESOP as meeting certain requirements, including the pass-through voting for employer securities of public companies). *See id.* § 409(e)(2) (describing the ESOP pass-through voting requirement for participant to direct vote of shares allocated to participant's account). *See also* RIA PENSION & BENEFITS LIBRARY, PRACTITIONER'S PLAN DOCUMENTS & CLAUSES, FORM 4.0 EMPLOYMENT STOCK OWNERSHIP PLAN § 3.05 (2013) ("Company Stock Accounts and Accounts shall not require a segregation of the Trust assets and no Participant shall acquire a specific asset of the Trust as a result of the allocations provided for in the Plan.").

18. *See, e.g.*, 29 U.S.C. § 1104(c) (2006) (exempting from fiduciary status both the participant and the trustee for those segregated participant accounts for which the participant directs the investment); 26 U.S.C. § 401(a)(35)(D) (2006) (providing IRC's requirement for at least three investment options plus the employer securities option); 29 C.F.R. 2550.404c-1(b)(3) (2013) (listing the Department of Labor's (DOL) corresponding three investment options); *see also Money Purchase Pension Plan*, 8A WEST'S LEGAL FORMS *Retirement Plans* § 4:78, at § 8.11 (5th ed.) (noting for

deals with public and nonpublic employer securities, depending on whether the employer is a public corporation.[19] For nonpublic corporations, the ESOP provides a potential buyer for purchasing shareholders' employer securities.

The Securities and Exchange Commission (SEC) long ago delineated the application of the Securities Act to EIAPs.[20] Following the Supreme Court's ruling that interests in employee benefit plans constitute securities for voluntary participant contributions,[21] the SEC divided the plans into participant interests in the plan, which are covered by the ruling, and plan interests in the employer securities. When the plan acquires employer securities through payroll deduction, as would be the case for stock purchase plans and 401(k) plans,[22] a purchase from the employer must be registered or be exempt from registration under the Securities Act, and generally a purchase on the open market does not.[23] The usual exemptions from registration are the intrastate offering, the nonpublic offering, and small offerings.[24] Participant interests in such plans may be securities if the purchase from the plan differs substantially from a brokerage purchase.[25] When the employer awards employer securities to the participants without cost, as would be the case in stock bonus plans and ESOPs, registration is not required since no sale has occurred.[26] Similarly, the participant interests in such plans are not securities.[27] The SEC does not deem a distribution or delivery of

individually directed accounts, "[a]ccounts which have been individually directed will be segregated for the purpose of allocating earnings and expenses").

19. *See, e.g.*, 26 U.S.C. §409(e)(3) (2006) (providing a less lucrative pass-through voting requirement for nonpublic companies, limited to fundamental business transactions [not voting on directors]).

20. *See* Employee Benefit Plans, Securities Act Release No. 33-6188, 45 Fed. Reg. 8960 (1980) [hereinafter Employee Benefit Plans], *available at* http://www.sec.gov/rules/interp/33-6188.pdf (pin cites provided according to the pagination provided by Westlaw located at 1980 WL 29482); *see also* Securities Act of 1933, § 15 U.S.C. § 77a (2006).

21. *See* Int'l Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 570 (1979) ("Securities Acts do not apply to . . . noncontributory, compulsory pension plan").

22. *See* 26 U.S.C. § 401(k) (2006) (describing that employee benefit plans can have a provision under which the employee may participate through salary reduction).

23. Employee Benefit Plans, *supra* note 20, at *13.

24. *See id.* at *3; *see also* 15 U.S.C. § 77c(a)(11) (2006) (intrastate offering); *id.* § 77c(b) (providing Securities and Exchange Commission (SEC) authority to exempt small offerings); *id.* § 77d(a)(2) (2012) (nonpublic offering); 17 C.F.R. § 230.147 (intrastate offering safe harbor); *id.* §§ 230.500-.506 (2013) (small offering and nonpublic offering safe harbor).

25. *See* Employee Benefit Plans, *supra* note 20, at *14.

26. *See id.* at *15.

27. *See id.*

employer securities to the participants a registration event.[28] Sales by the plan, if controlled by the employer,[29] however, would require registration or an exemption even if acquired on the public market.[30] Similarly, resale by participants would require registration or an exemption.[31] All registrations of participant interests and plan interests occur on Form S-8, if the employer qualifies for use of that form, or Form S-1, the default form.[32] For participant interests in the plan, the plan is the registrant, while for plan interests in the employer securities, the corporation is the registrant.[33] Registration under the Securities Act requires annual reporting under the Exchange Act.[34] Employee benefit plans file their annual reports on Form 11-K, consisting primarily of audited financial statements (condition, income, and changes) prepared in accordance with SEC rules or ERISA rules.[35] Form 11-K calls for the signature of the plan trustees or other persons who administer the plan.[36] Alternatively, the corporation may file the plan annual reports on its Form 10-K.[37]

The attraction of an EIAP for a corporation is its use as a corporate financing tool. The corporation can deduct from its current taxable income contributions of its stock to the plan and recognize no gain on the sale (contribution) of its stock to the plan.[38] By contributing stock to the EIAP, the corporation can generate a deduction without expending any

28. *See id.* at *4.

29. *See* 17 C.F.R. § 230.405 (2013) (defining an "affiliate" as directly or indirectly "controls or is controlled by the issuer"). Those EIAPs with employees or an employee committee serving as a fiduciary would be affiliates.

30. *See* Employee Benefit Plans, *supra* note 20.

31. *See id. See also* 15 U.S.C. § 77d(a)(1) (2006) (providing an exemption for not an issuer, underwriter, or dealer); 17 C.F.R. §230.144 (2013) (providing a safe harbor for the exemption).

32. *See* Employee Benefit Plans, *supra* note 20, at *4, *31. *See also* 17 C.F.R. § 239.11 (2005) (Form S-1; when "no other form is authorized"); *id.* § 239.16b(a), (b)(2) (Form S-8; filed timely all Exchange Act filings for 12 months).

33. *See* 17 C.F.R. § 239.16b (2009). See also Instructions A1(a)(4) (plan may be registrant), A1(b) (requiring that plan register participant interests if they are securities), and Signature Instruction 1 (requiring that if registrant is the corporation, form must be signed by chief executive officer, principal financial officer, principal accounting officer, and a majority of board of directors; if registrant is the plan, form must be signed by the plan), which are explained on *Form S-8*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/forms/forms-8.pdf (last visited Feb. 14, 2014).

34. *See* 15 U.S.C. § 78o(d) (2006).

35. *See* 17 C.F.R. § 249.311 (2013).

36. *See* *Form 11-K*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/forms/form11-k.pdf (last visited Feb. 14, 2014).

37. *See* 17 C.F.R. § 240.15d-21 (2013) (allowing an alternative of adding to the corporation's annual report on Form 10-K).

38. *See* 26 U.S.C. §§ 404(a)(1), 1032 (2006).

cash.[39] There are additional tax benefits for EIAPs with respect to deductible dividends on employer securities and ESOP loans, guaranteed by the corporation, to acquire employer securities.[40] Ordinarily, dividends are not deductible.[41] The ESOP employer-guaranteed loan provides for an immediate cash infusion into the corporation when the ESOP uses the employer-guaranteed loan proceeds to purchase employer securities from the employer. The employer-guaranteed loan, however, needs to be paid off or else the lender will foreclose on the corporate assets securing the employer-guaranteed loan. The ESOP can pay off the loan through subsequent employer cash contributions to the ESOP or by selling some of the ESOP's assets, typically employer securities.

ERISA has limits on the amount of employer securities held by defined benefit plans and non-EIAP defined contribution plans, but not by EIAPs.[42] Therefore, ERISA provides one limited exception from the fiduciary duties for investments in employer securities by EIAPs, and that exception is only from the diversification requirement.[43] Congress has recognized the risky nature to participants of plans heavily invested

39. *See* 26 U.S.C. § 409(h) (2006). Stock bonus plans operate similarly. *See id.* § 401(a)(23) (subjecting stock bonus plans to 26 U.S.C. § 409(h)). The cash payment may be delayed for several years. ESOPs generally provide benefits in the form of cash (the delayed payment) or employer securities. If distributed in employer securities for which there is no market, those employer securities are subject to a put back to the corporation (an alternative delayed payment).

40. *See* 26 U.S.C. § 404(a)(9), (k) (2006). In the late twentieth century, ESOPs also received investment tax credits of 1% of the qualified investment to fund the ESOP (in addition to the then current 10% investment tax credit). *See* Tax Reduction Act of 1975, Pub. L. No. 94-12, § 301, 89 Stat. 26, 36-95. Congress increased this tax credit in 1976 to 1.5% (in addition to the 10%), *see* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803, 90 Stat. 1520, 1583-91; replaced it with an investment tax credit of .50 % of payroll in 1981, *see* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 331, 95 Stat. 172, 289-96; scheduled it for termination in 1988, *see* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 14, 98 Stat. 494, 505; and terminated it early in 1986, *see* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1171, 100 Stat. 2085, 2513. The IRC still refers to a "tax credit employee stock ownership plan." *See* 26 U.S.C. § 409(a).

41. *See* 26 C.F.R. §1.162-7(b)(1) (2013) (allowing a deduction for ordinary and necessary business expenses, including salaries but not dividends); *see also* 26 C.F.R. § 1.56(g)-1(d)(3)(ii) (2013) (adding back in the calculation of alternative minimum taxable income dividends from the few deductible dividends); 26 U.S.C. § 243 (2006) (allowing a deduction for corporate receipt of dividend).

42. *See* 29 U.S.C. § 1107(a)(3), (b) (2006) (providing that non-EIAP plans can hold no more than 10% of their assets in employer securities); *id.* § 1107(f) (providing that defined benefit plans can hold no more than 25% of the outstanding stock, provided that at least 50% is held by persons independent of the employer).

43. *See id.* § 1104(a)(2) ("In the case of an eligible individual account plan . . . , the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities . . . .").

in employer securities absent diversification; these participants could lose both their jobs and their retirement savings.[44] Twice Congress has amended ERISA, in 1986 and 2006, to provide instances where even the EIAP must allow diversification if chosen by the participant.[45] The Tax Reform Act of 1986 focused on ESOP participants near retirement, permitting diversification after age fifty-five.[46] The Pension Protection Act of 2006 dealt with publicly traded employer securities, permitting diversification immediately for the participant's own contributions and after three years of service for the employer's contributions.[47] The incidence of participant investment in employer securities, however, had declined prior to the passage of the latter of these ERISA-mandated diversifications.[48]

44. *See* 152 Cong. Rec. S8747, S8762 (daily ed. Aug. 3, 2006). According to Sen. Baucus:

> [L]et me address diversification. . . . [M]any Americans today receive retirement benefits from their defined contribution plans. What a tragedy it was in Enron and other situations when workers had their entire retirement wrapped up in Enron stock. They could not get out even if they wanted to.
>
> The new law will require plans to allow workers to diversity. Workers [will not] have to. It will be their choice. But they will have that choice.

Id.

45. *See* 26 U.S.C. § 401(a) (2006).

46. *See id.* (stating that an ESOP must provide that a participant who has completed 10 years of service and reached age 55 may diversify out of employer securities at the rate of 25% per year or 50% in the plan year during which the participant makes his last election); Pub. L. No. 99-514, § 1175(a)(1), 100 Stat. 2085, 2518 (1989) (adding § 401(a)(28)).

47. *See* 26 U.S.C. § 401(a)(35) (2006) (requiring that a defined contribution plan with employee contributions and employer match invested in publicly traded employer securities must allow the participant to diversify out of the employer securities immediately upon participation for employee contributions and after three years of service for employer contributions); 29 U.S.C. §1054(j) (2006); Pub. L. No. 109-280, § 901(a)(1), 120 Stat. 780, 1026-33 (2006) (adding § 401(a)(35) to the Internal Revenue Code and § 1054(j) [§ 204(j)] to ERISA).

48. For the period 2001 to 2007, see Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1235 n.298 (2010) (reporting a decline of employer match entirely in employer securities from 45% in 2001 to 23% in 2007 due to concerns about fiduciary risk and exposure to litigation). For the impact of the most recent legislation and for the period 2005 to 2011, see STEPHEN P. UTKUS & JEAN A. YOUNG, VANGUARD RESEARCH, THE EVOLUTION OF COMPANY STOCK IN DEFINED CONTRIBUTION PLANS 2, 5 (2012), *available at* https://institutional.vanguard.com/iam/pdf/CRREVO.pdf (suggesting fiduciary risk to litigation as the reason and reporting in the plans operated by Vanguard a further decline of the percentage of participants with concentrations of employer securities greater than 20% from 17% in 2005 to 9% in 2011).

The problem for participants occurs when the employer securities, contained in their individual accounts, decline significantly upon the announcement by the employer's management of previously long undisclosed derogatory information about the employer. This problem affects primarily public corporations, since the securities laws do not require nonpublic companies to disclose material information.[49] These reporting requirements place pressure on the public companies to show good reports.[50] Since ERISA anticipates that members of that employer's management will frequently also serve as trustees for the EIAP,[51] such trustees knew or should have known about the derogatory information long before the public disclosure. Those participants—who directed their accounts to invest in employer securities or had their interest in the EIAPs trust fund invested in employer securities by the EIAP trustee during the period of nondisclosure, and whose employer securities later declined in value upon the announcement—claim on behalf of the defrauded plan seeking recovery[52] that these knowledgeable trustees should have taken steps to prevent or reduce the participants' or trust's investments in those employer securities.[53]

Nevertheless, some circuit courts have succumbed to the trustee deferential review disease, which began in 1995 with the *Moench*

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49. *See* 15 U.S.C. § 78m (outlining the Exchange Act's (EA) reporting requirement); *id.* § 78m-1(a) (subjecting companies listed on exchanges to the EA); *id.* § 78(f) (subjecting companies with more than $10,000,000 and 2000 shareholders to the EA); *id.* § 78o(d) (subjecting companies that had initial public offerings under the Securities Act to the EA).

50. *See, e.g.*, *Corporate Governance: The Conflict between Money and Morality*, 32 HONG KONG L.J. 233, 235 (2002) ("The large institutions are driven by competitive pressures in the marketplace to produce enhanced performance in returns on their investors' funds . . . [s]o there is pressure on company managers to perform to ensure that the periodical reports of earnings underpin the expectations of the large institutional investors."). The problem is not absent for private companies, especially those seeking an acquisition buyer, as was one of the author's clients, or if desiring of a larger tax deduction.

51. *See* 29 U.S.C. § 1108(c)(3) (2006) (recognizing that an individual may serve both as a plan fiduciary and an officer or employee of the employer).

52. *See id.* § 1109(a) (1974) (providing that for breach of fiduciary duty, the fiduciary is liable to the plan to make good losses resulting from the breach); *id.* § 1132(a)(2) (allowing DOL, participant, beneficiary, or fiduciary to bring suit to recover for breach of fiduciary duty); *see also* LaRue v. De Wolff, Boberg & Assocs., Inc., 552 U.S. 248, 256 (2008) (holding that participant may bring suit for damage to self-directed account due to fiduciary breach).

53. *See, e.g.*, *In re* Citigroup ERISA Litig., 662 F.3d 128, 133-34 (2d Cir. 2011) (explaining that decline by employer's sub-prime lending business was downplayed by trustees even when company recognized need to reduce its sub-prime lending exposure), *cert. denied sub nom.*, Gray v. Citigroup Inc., 133 S. Ct. 475 (2012).

decision,[54] and presume that trustees of EIAPs investing in employer securities during such periods of nondisclosure of negative material information acted consistently with ERISA by investing in, or permitting the participants to invest in, those overpriced employer securities. As with the plan administrator deference rule, the participant claimant must overcome that trustee presumption by showing an abuse of discretion.[55] Some plans attempt to thwart these rebuttals by mandating investments only in employer securities;[56] however, ERISA clearly directs[57] the EIAP trustees and courts to ignore such provisions as inconsistent with ERISA's fiduciary provision not to violate the securities law. One commentator, failing to recognize a difference between plan administrators and plan trustees, has urged the Supreme Court to adopt a deference review rule for the EIAP trustee.[58] The EIAPs of interest to this article are those with management members serving as the plan trustee and whose employer is a public corporation, so the plan has

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54. *See* Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995), *cert. denied sub nom.*, Mut. Trading Corp. v. Uniroyal Goodrich Tire Corp., 516 U.S. 1115 (1996); *see also* Kenneth Hayes, Note, *Moench v. Robertson: When Must an ESOP Fiduciary Abandon a Sinking Ship?*, 49 RUTGERS L. REV. 1231 (1997) (stating that the court failed to follow ERISA text and principles of trust law in effort to avoid making trustees guarantors of plan success); Meredith L Gray, Note, *A Presumption Without Prudence: Replacing Moench v. Robertson with a Prudent "When in Doubt, Don't" Standard for ESOP and 401(k) Company Stock Fund Fiduciaries*, 2010 WIS. L. REV. 907 (2010) (bemoaning employee losses due to court's abandonment of ERISA's prudence standard).

55. See *infra* notes 120-25 and accompanying text for the rebuttal rules.

56. *See, e.g.*, White v. Marshall & Ilsley Corp., 714 F.3d 980, 984 (7th Cir. 2013).

> [S]ettlor of the Plan and Trust, hereby declares that it is its intent and command that there can be no change in circumstances or event (*no matter how dire*) which would allow the Committee or any other Plan fiduciary to shift investment of the [employer fund] into investments other than [employer securities] (except for liquidity needs)."

Id. (internal quotation marks omitted) (quoting the text of a plan).

57. *See* 29 U.S.C. § 1104(a)(1)(D) (2006).

58. *See* José Martin Jara, *What is the Correct Standard of Prudence in Employer Stock Cases?*, 45 J. MARSHALL L. REV. 541, 593-94 (2012) (putting *Moench* presumption on the same footing as the business judgment rule); *id.* at 595 (applying *Moench* presumption at pleading stage is like the business judgment rule); *id.* at 598 (stating that rebuttal should be dire circumstances). For support of the *Moench* presumption, this author only offers the expense of litigation. *See id.* at 545, 583, 599. For meritless cases involving stock market fluctuation, see *id.* at 545, 599. For overburdened court dockets, see *id.* at 599. These are hardly reasons to butcher the congressional intent for, and specific language of, ERISA. ERISA fiduciary standards are considerably higher than those of the business judgment rule. *See, e.g.*, Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982) ("The fiduciary obligations of the trustees to the participants and beneficiaries of the plan are those of trustees of an express trust—the highest known to the law.").

segregated self-directed participant accounts capable of investing in employer securities and mandated by ERISA's diversification provisions.

II. THE CASE FOR A DEFERENCE STANDARD

Almost all the circuit court cases using the *Moench* presumption involve securities fraud situations. Initially, the trustee deferential review disease only infected the Third and Sixth Circuits. The Third Circuit[59] has dealt with a bank holding company, bankrupt due to undisclosed unsound banking practices;[60] a technology company spewing overly optimistic projections concerning acquisitions;[61] a technology company

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59. *See* Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 917 (1996) (determining ESOP standard of review and remanding to determine rebuttal facts); *see also* Edgar v. Avaya, Inc., 503 F.3d 340, 345-48 (3d Cir. 2007) (involving an EIAP with option to invest in employer stock); Ward v. Avaya, Inc., 299 F. App'x 196, 197 (3d Cir. 2008) (finding pleading for EIAP insufficient to overcome presumption); *cf. In re* Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 238 n.5 (3d Cir. 2005) (involving an EIAP with option to invest in employer stock and stating, in dicta, that *Moench* presumption inapplicable as plan not an ESOP). The Third Circuit limits this trustee deference to EIAPs. *See In re* Unisys Savings Plan Litig., 173 F.3d 145, 155 (3d Cir. 1999) (refusing to apply the *Moench* presumption to investments in guaranteed insurance contracts offered by an insurance company that went into receivership), *cert. denied sub nom.*, Meinhardt v. Unisys Corp., 528 U.S. 950 (1999).

60. *Moench* involved a 76% decline in price over one year (falling from $9.50 to $2.25 during the year 1990) due to a failed bank's failure to disclose the Comptroller of Currency's report about lack of quality management, unsound credit practices, unreliable records, and inadequate loan loss allowances and failure to participate with other shareholders in the ensuing securities lawsuit that resulted in a settlement. *Moench*, 62 F.3d at 557-60 (choosing not to appeal failure to disclose financial condition and its impact on participants' decision claim). *Id.* at 568 (discussing remaining claims related to duty to diversify); *see also* Brief for Appellant at 11, 36, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1994) (No. 94-5637), 1994 WL 16012392, at *11, *36 (suing also for acting in bank's interest rather than solely in the interests of participants and for failure to meet and investigate continuing the investment option).

61. *Edgar* involved a 25% decline in price (falling from $10.60 to $8.01 upon corrective disclosure) due to rosy projections of a technology company's value that were made without a reasonable basis; management knew that the company had incurred greater than anticipated costs for integrating recent acquisitions and that a new delivery system was disrupting sales. *Edgar*, 503 F.3d at 344, 348, 350 (rejecting failure to disclose claim and its impact on participants as a request for investment advice, rather than for material information, supported by insider trading laws); Edgar v. Avaya, Inc., 2006 WL 1084087, at *2-3 (D.N.J. Apr. 25, 2006) (suing also for failure to use reasonable care by continuing to offer the investment option, not monitoring the investment, and failing to divest; failure to monitor fiduciaries; and co-fiduciary liability); *see also* Inst. Investors Grp. v. Avaya, Inc., 564 F.3d 242 (3d Cir. 2009) (dealing with the securities lawsuit concerning the rosy projections).

using fancy accounting to bolster reported income;[62] and a drug company failing to disclose regulatory lapses and misrepresenting the impact of new drugs.[63] The Sixth Circuit[64] has faced a chemical company's concealment of the negative impact of a recapitalization after the sale of a subsidiary,[65] a conservative bank's efforts to disguise the risk of the

62. *Ward* dealt with 60% and 90% declines in price over two years, albeit with a significant recovery afterwards, of a spun-off technology company and of the parent company. *Ward*, 299 F. App'x at 197-98, 200 (suing for overpaying for employer stock, failure to adequately investigate the employer securities, and failure to monitor the other fiduciaries; no disclosure claim); *see also In re* Lucent Techs., Inc., Sec. Litig., 307 F. Supp. 2d 633, 636 (D.N.J. 2004) (dealing with the settlement of the securities lawsuit concerning failure to disclose declining business, misrepresentation of product demand, inflation of revenues by shipping unready products, and use of accounting practices in violation of generally accepted accounting principles).

63. *In re* Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233 (3d Cir. 2005), (treating a 67% decline in price over two years (in a suit for continuing the investment option, failing to disclose negative material information, failing to divest, and failing to resign) due to failure to disclose non-compliance with Food and Drug Administration rules, misrepresentations concerning new drugs, and securities law violations that led to civil penalties). *See In re* Schering-Plough Corp. ERISA Litig., 387 F. Supp. 2d 392, 394-95 (D.N.J. 2004) (suing also for failure to monitor fiduciaries); *see also In re* Schering-Plough Corp. Sec. Litig., No. Civ. A. 01-0829, 2003 WL 25547564 (D.N.J. Oct. 10, 2003) (involving "materially false and misleading" financials and press releases for failing to disclose critical information on new drugs).

64. *See* Kuper v. Ivenko, 66 F.3d 1447, 1459 (6th Cir. 1995) (ESOP); Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 417-18 (6th Cir. 2012) (EIAP with option to invest in employer securities); *cf.* Pfeil v. State St. Bank & Trust Co., 671 F.3d 585, 589, 591 (6th Cir.), *cert. denied*, 133 S. Ct. 758 (2012) (involving EIAP with an option to invest in employer securities described as an ESOP with a provision requiring exclusive investment in employer securities unless bank trustee in its discretion, under an abuse of discretion standard, determines from public information that there is a serious question as to the employer's viability or there is no short-term possibility of recouping losses in bankruptcy).

65. *Kuper* involved an 80% decline in price over 17 months for failure to disclose the impact of increased debt of a recapitalization and the decrease in operations and decline in net sales due to the sale of a subsidiary. *Kuper*, 66 F.3d at 1451-52 (dismissing a concurrent securities lawsuit due to statute of limitations and other grounds; sued for failure to divest or liquidate and for failure to distribute accounts; no claim for failure to disclose).

subprime market,[66] and an independent bank trustee's inaction during the events surrounding a bankrupt automobile manufacturer.[67]

However, more recently, the disease has spread to the Second, Fifth, Seventh, Ninth, and Eleventh Circuits. The Second Circuit[68] has confronted two different bank holding companies' failures to disclose their exposure to the subprime market,[69] a publisher concealing its rating

66. *Dudenhoefer* dealt with a 74% decline in price over a two-year period for failure to disclose risks to a bank in subprime mortgages. *Dudenhoefer*, 692 F.3d at 415 (suing for continuing the investment option in employer securities, failing to disclose risks and misrepresentations, failing to monitor fiduciaries, and co-fiduciary liability); *see also* Local 295/Local 851 IBT Emp'r Grp. Pension Trust & Welfare Funds v. Fifth Third Bancorp, No. 1:08cv00421, 2012 WL 346658 (S.D. Ohio Feb. 2, 2012) (regarding securities class action for fraud in connection with omissions and representations about subprime risks).

67. *Pfeil* did not concern securities fraud but dealt with an outside bank trustee of a bankrupt automotive company's ESOP who, after the company's public announcement of the need to restructure, reduced salaried employees by 20%, suspended dividends, and curtailed large vehicle production due to significant losses; waited until the auditors' opinion on inability to continue as a going concern four months later to suspend new purchases of employer securities; and waited an additional four months to sell employer securities, the date the White House doubted the company's viability, casting doubt on a government bailout of shareholders. *Pfeil*, 671 F.3d at 589. Due to the ESOP provision calling for an abuse of discretion standard, the Sixth Circuit applied the *Moench* presumption. *Id.* at 591. The DOL pointed out to the Sixth Circuit that the ESOP's abuse of discretion provision is void. *See* Brief for Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiffs-Appellants and Requesting Reversal, Pfeil v. State St. Bank & Trust Co., 671 F.3d 585 (2012) (No. 10-2302), 2011 WL 1537433 (2011), at *15-16; *see also* 29 U.S.C. § 1104(a)(1)(D) (2006) (providing that fiduciary may only follow plan terms consistent with ERISA); *id.* § 1110(a) (stating that ERISA forbids plan or other documents to "relieve a fiduciary from responsibility or liability").

68. *See In re* Citigroup ERISA Litig., 662 F.3d 128, 137 (2d Cir. 2011) (describing EIAP with option to invest in employer stock), *cert. denied sub nom.*, Gray v. Citigroup Inc., 133 S. Ct. 475 (2012); *see also* Taveras v. UBS AG, 708 F.3d 436, 441 (2d Cir. 2013) (describing EIAP with option to invest in employer stock); Gearren v. McGraw-Hill Cos., Inc., 660 F.3d 605, 610 (2d Cir. 2011) (involving EIAP with option to invest in employer stock), *cert. denied*, 133 S. Ct. 476 (2012); Fisher v. JP Morgan Chase & Co., 469 F. App'x 57, 60 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 617 (2012) (describing EIAP with option to invest in employer stock); Slaymon v. SLM Corp., 506 F. App'x 61, 63-65 (2d Cir. 2012) (ESOP).

69. *Citigroup* involved a 52% decline in price over a year for a bank's failure to disclose its risk to subprime mortgages. *See Citigroup*, 662 F.3d at 134 (suing also for failure to divest, suspend the ability to invest in employer stock, and diversify; failure to monitor fiduciaries; co-fiduciary liability; and engaging in conflicts of interest); *id.* at 143 (rejecting disclosure claim as a request for investment advice rather than for material information); *id.* at 157-61 (Straub, J., dissenting) (stating that the court should recognize duty to disclose); *see also* Suzanne Kapner, *Citi to Settle Suit for $590 Million*, WALL ST. J. (Aug. 30, 2012, 12:19 PM), http://online.wsj.com/news/articles/SB10000872396390444914904577619410325528148 (outlining securities lawsuit and mentioning $75 million penalty imposed by SEC for same failure to disclose subprime mortgages).

practices for subprime mortgages and its impact on earnings,[70] a bank holding company providing credit disguised as revenue to a soon-to-fail energy company,[71] and a lender failing to disclose exposure to subprime student loans and hiding their default through forbearance.[72] The Fifth Circuit[73] has dealt with an energy company that disguised its energy

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Taveras concerned a 74% decline in price over six months for a bank's failure to disclose its risk to collateralized debt obligations, also the subject of an SEC investigation. *See Taveras*, 708 F.3d at 440-41 (also suing for continuing to offer employer securities, failing to monitor fiduciaries, and engaging in conflicts of interest); Taveras v. UBS AG, 513 F. App'x 19, 25 (2d Cir. 2003) (rejecting disclosure claim because omissions do not require duty to disclose financial information under *Citigroup* and misrepresentations occurred in SEC filings and press releases, not as ERISA fiduciaries); *see also In re* UBS AG Sec. Litig., No. 07 Civ. 11225(RJS), 2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012) (involving a securities class action for failure to disclose risks of collateralized debt obligations among other claims).

70. *Gearren* dealt with a 64% decline in price over two years for a publisher's failure to disclose the publisher's true financial condition and corporate rating practices for collateralized debt obligations. *See Gearren*, 660 F.3d at 609 (suing for continuing to offer employer securities, failing to monitor fiduciaries, and engaging in conflicts of interest); *id.* at 610-11 (rejecting failure to disclose claim for omissions because there is no duty to disclose financial information under *Citigroup* and the misrepresentations occurred in SEC filings, not an ERISA fiduciary function, and there is no evidence that the fiduciary who distributed summary plan descriptions (SPD) incorporating SEC filings knew of the falsity); *see also* Boca Raton Firefighters & Police Pension Fund v. Bahash, 506 Fed. App'x 32 (2d Cir. 2012) (involving a securities class action for failure to disclose publisher's true financial condition and corporate rating practices for collateralized debt obligations).

71. *Fisher* treated a significant decline in price over almost four years for a bank's failure to disclose that it provided an energy company with credit disguised as revenue from prepaid commodity trades, resulting in subsequent damage to the bank's financial condition when the energy company failed. *See Fisher*, 469 F. App'x at 58 (suing for continuing to offer employer securities, failing to monitor fiduciaries, and failing to disclose by making omissions and misrepresentations of material facts). *See id.* at 60 (rejecting failure to disclose claim because for omissions, there is no duty to disclose financial information under *Citigroup* and misrepresentations occurred in SEC filings, not an ERISA fiduciary function, despite incorporating SEC filings in SPDs); *see also In re* JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595 (S.D.N.Y. 2005) (involving securities class action for omissions and misrepresentations concerning transactions with energy company).

72. *Slaymon* involved an 85% decline over three years for a lender's failure to disclose its exposure risk to subprime student loans and concealment of the default rate through forbearances. *See Slaymon*, 506 F. App'x at 63 (suing for failure to diversify and monitor); *see also In re* SLM Corp. Sec. Litig., 740 F. Supp. 2d 542, 554 (S.D.N.Y. 2010) (describing securities class action for misstatements understating loan loss reserves and overstating income and not using generally accepted accounting practices).

73. *See* Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008) (regarding J. Jones, EIAP with option to invest in employer stock). The author served with Edith Jones on the *Texas Law Review* in 1974-75.

trades to bolster earnings.[74] The Seventh Circuit[75] has examined a bank holding company that concealed subprime mortgage losses from two recently acquired banks.[76] The Ninth Circuit[77] has handled a computer company engaged in hiding the backdating of management's incentive

74. *Kirschbaum* involved a 40% decline in price over one week for an energy company's failure to disclose "round trip" energy trades over three years in order to inflate the employer's trading revenues. *Id.* at 247 (suing for continuing the investment option in employer securities and failing to liquidate and for misrepresenting the employer's financial condition in documents supplied to participants from securities filings). *See id.* at 257 (rejecting misrepresentation claim as to SEC filings, which was not an ERISA fiduciary function, despite incorporation in SEC filings related to the plan); *In re* Reliant Energy ERISA Litig., No. Civ. A. H-02-2051, 2006 WL 148898, at *1 (S.D. Tex. Jan. 18, 2006) (class period of two years, nine months). See also SEC v. Hopper, No. Civ. A. H-04-1054, 2006 WL 778640 (S.D. Tex., Mar. 24, 2006), for SEC action against Reliant Energy for failure to disclose the round trip energy trades.

75. *See* White v. Marshall & Ilsley Corp., 714 F.3d 980, 983-84 (7th Cir. 2013) (describing EIAP with option to invest in employer stock). The Seventh Circuit long resisted succumbing to the disease. *See* Peabody v. Davis, 636 F.3d 368, 374-75 (7th Cir. 2011) (violating even the *Moench* standard: EIAP paid off former employee through sale on credit, a loan that company could not pay when due); Howell v. Motorola, Inc., 633 F.3d 552, 568-69 (7th Cir.) (Wood, J.) (concerning a business transaction that turned out badly, but with no evidence EIAP trustee knew), *cert. denied sub nom.*, Lingis v. Dorazil, 132 S. Ct. 96 (2011); Pugh v. Tribune Co., 521 F.3d 686, 701 (7th Cir. 2008) (regarding newspaper circulation scandal, no allegations ESOP trustees knew or should have known); Summers v. State St. Bank & Trust Co., 453 F.3d 404, 408-10 (7th Cir. 2006) (providing that for announcement employer hemorrhaging money and ESOP trustee failure to sell off stock, allegations not enough to raise issue of when one needs to begin to diversify), *cert. denied*, 549 U.S. 1245 (2007); Armstrong v. LaSalle Bank, 446 F.3d 728, 733-34 (7th Cir. 2006) (reasoning that although large numbers of departing employee payouts depleted corporation's cash reserves, there was no evidence ESOP trustees investigated, and still directing trial court to use abuse of discretion rule). The author served with Diane Wood on the *Texas Law Review* in 1974-75.

76. *White* involved a 54% decline in price over three and a half years for a risk-averse bank holding company's failure to disclose loan losses from subprime mortgages upon the acquisition of Florida and Arizona banks without triggering a securities fraud lawsuit. *White*, 714 F.3d at 995; *see* Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellants and Requesting Affirmance in Part and Reversal in Part, White v. Marshall & Ilsley Corp., 714 F.3d 980 (7th Cir. 2013) (No. 11-2660), *available at* www.dol.gov/sol/media/briefs/white(A)-05-30-2012.htm; *see also White*, 714 F.3d at 984 (suing for continuing the investment option in employer securities and failing to liquidate); *see also id.* (failing to appeal claims for failure to disclose information on the corporation's financial condition and failure to monitor fiduciaries).

77. *See* Quan v. Computer Scis. Corp., 623 F.3d 870, 881 (9th Cir. 2010) (involving an EIAP with option to invest in employer stock). The Ninth Circuit had earlier resisted succumbing to the disease. *See In re* Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008) (ESOP); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1097 (9th Cir. 2004) (stating that *Moench* is difficult to reconcile with ERISA's statutory language and involving a stock bonus plan).

stock options.[78] The Eleventh Circuit[79] has concerned itself with a home improvement company's undisclosed improper chargebacks to suppliers to bolster earnings[80] and a bank holding company's failure to disclose its exposure to subprime mortgage losses.[81]

In contrast, the First[82] and Eighth[83] Circuits have declined to adopt the trustee deferential rule, and the Fourth[84] Circuit has used the statutory

78. *Quan* involved the failure to disclose backdating of options to benefit management and impacting tax accounting over a ten-year period. *Quan*, 623 F.3d at 874-76 (concerning suit for breach of monitoring fiduciaries, giving false financials to participants, and misexplaining a 12% decline in price when the company made corrections for the backdating pursuant to an informal request for information on stock options made by the Securities and Exchange Commission); *id.* at 883-85 (suing also for continuing the investment option in employer securities, failing to liquidate, and failing to investigate the continuing investment); *id.* at 886 (rejecting misrepresentation claims as not involving material information); *cf.* Verified Amended Shareholder Complaint at para. 18, *In re* Computer Scis. Corp. Derivative Litig., 244 F.R.D. 580 (C.D. Cal. 2007) (Nos. 2:06-CV-5288-MRP(Ex), 06-CV-5356), 2007 WL 1423884 (regarding shareholders suing for breach of corporate fiduciary duty for exposing company to securities class actions over backdating of options).

79. *See* Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1279 (11th Cir. 2012) (involving EIAP with option to invest in employer stock); *see also* Fisch v. Suntrust Banks, Inc., 511 F. App'x 906, 908 (11th Cir. 2013) (per curiam on certified questions) (involving EIAP with option to invest in employer stock and following *Lanfear*).

80. *Lanfear* involved a 16% decline in price for failure to disclose in documents provided to participants over a two-year period due to improper use of return-to-sender chargebacks for items used in store, damaged in store, stolen, or unsold from inventory. *Lanfear*, 679 F.3d at 1271-74 (suing for continuing the investment option in employer securities, failing to liquidate, providing inaccurate information, failing to disclose, and permitting company contribution in known overvalued stock); *id.* at 1283 (rejecting the inaccurate information claim as in SEC filings, not an ERISA fiduciary function, despite incorporation in SEC filings related to the plan); *id.* at 1284-85 (rejecting disclosure claim as a request for investment advice rather than for material information); *see also* Mizzaro v. Home Depot, Inc., 544 F.3d 1230 (11th Cir. 2008) (involving a securities lawsuit over failure to disclose the improper "chargebacks").

81. *Fisch* concerned a 73% decline in price for a bank holding company's failure to disclose its risk to subprime mortgages. *See* Brief of the Secretary of Labor as Amicus Curiae in Support of the Plaintiffs-Appellants, Fisch v. SunTrust Banks, Inc., 511 F. App'x 906 (11th Cir. 2013) (No. 11-11608), *available at* www.dol.gov/sol/media/briefs/fisch(A)-7-15-2011.htm; *In re* SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365, 1368-69 (N.D. Ga. 2010) (suing for continuing to invest in employer securities, giving false information so participants could not make informed decision, and failure to monitor fiduciaries); *Fisch*, 511 F. App'x at 908 (rejecting false information claim as a request for investment advice rather than for material information); *see also* Waterford Twp. Gen. Emps. Retirement Sys. v. SunTrust Banks, Inc., No. 1:09–CV–617–TWT, 2010 WL 3368922 (N.D. Ga. Aug. 19, 2010) (involving a class action securities lawsuit for failure to disclose risk to subprime mortgages).

82. *See* Bunch v. W.R. Grace & Co., 555 F.3d 1, 10 (1st Cir. 2009) (involving an EIAP and declining to adopt a *Moench* presumption); *see also* LaLonde v. Textron, Inc.,

prudence standard, as did the Tenth[85] and District of Columbia[86] Circuits in pre-*Moench* decisions for nonpublic corporations.

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369 F.3d 1, 7 (1st Cir. 2004) (involving an ESOP and declining to adopt a *Moench* presumption).

Bunch did not involve any securities fraud but rather the sale of the employer securities while the chemical company was in bankruptcy due to asbestos litigation. *See Bunch,* 555 F.3d at 3-7 (stating that over a year's time the stock declined 92%, and the corporation appointed an independent bank trustee who hired independent advisors and made investigation of prospects with analysis, and upholding the action under prudence for independence and investigation); *id.* at 10 (adopting *Moench* would controvert the purpose of the presumption and transform the intended shield into a sword to be used against a prudent fiduciary).

LaLonde involved a 70% decline in earnings per share over two years of an aircraft company due to concealing internal problems, the subject of a securities fraud lawsuit, but nothing indicated that the outside bank trustee had any knowledge of the concealment. *See LaLonde,* 369 F.3d at 2-3, 7 (finding that nothing in complaint averred breach of fiduciary duty and that outside bank trustee not averred to have any knowledge of malfeasance in employer).

83. *See* Brown v. Medtronic, Inc., 628 F.3d 451, 460 (8th Cir. 2010) (declining to adopt a *Moench* presumption).

Brown dealt with a 10% decline in price over a few months of a medical device manufacturer that improperly paid physicians for favorable reviews of its products. *See Brown,* 638 F.3d at 454, 460 (stating that nothing in complaint averred imprudence by the fiduciaries of ESOP and that the derogatory report was made public shortly after it was given to employer); Brief of Appellant, Brown v. Medtronic, 628 F.3d 451 (8th Cir. 2010) (No. 09-2524), 2009 WL 2609849 (presenting only disclosure claim for misrepresentation and non-disclosure with regard to fund); *see also* Detroit Gen. Ret. Sys. v. Medtronic, Inc., 621 F.3d 800 (8th Cir. 2010) (the corresponding securities lawsuit for the 9% decline).

84. *See* DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 420-21 (4th Cir. 2007) (finding that failure to withdraw option to invest in employer securities for EIAP was prudent, as it used appropriate methods to investigate the merits of withdrawal); *see also* 29 C.F.R. § 2550.404a-1(b) (2013) (providing DOL's definition of prudence for investments, which includes appropriate investigations and active response).

DiFelice did not involve securities fraud, but it involved a 46% price drop over nine months for a near bankrupt airline with the only alleged breach of fiduciary duty being the offering of the investment in employer securities. *See DiFelice,* 497 F.3d at 415-16 (stating that plan had twelve diversified investment options, so onus on participants to manage their own investments); *see id.* at 416; Brief of Plaintiff-Appellant, DiFelice v. U.S. Airways, Inc., 497 F.3d 410 (4th Cir. 2007) (No. 06-1892), 2006 WL 3005035; *see also* 29 U.S.C. § 1104(c) (2006) (stating that trustee not liable for self-directed account breaches by participant).

85. *See* Eaves v. Penn, 587 F.2d 453, 459-60 (10th Cir. 1978) (finding that trustee's violation of exclusivity rule by using ESOP to gain control of corporation not ameliorated by requirement to invest in employer securities).

Eaves involved a corporate officer using a nonpublic corporation's ESOP to buyout the other shareholders with the effect of the ESOP's contribution and bank loan guaranteed by the corporation, coupled with mismanagement, resulting in a 90% decline in the corporation's value. *See id.* at 455-56.

The case for the *Moench* presumption depends on a perceived conflict within ERISA over whether an ESOP is a retirement plan or a corporate financing tool. After dispensing with an interpretation of a plan provision[87] and noting that the participants did not appeal their claim for fiduciary breach for failure to disclose,[88] the only remaining issue dealt with the fiduciary duty of diversification: whether that duty would disallow investing solely in employer securities.[89] ERISA imposes five principle fiduciary duties,[90] namely a duty of loyalty applicable to all the other fiduciary duties, the exclusive benefit rule, the duty of care, the duty to diversify investments, and the duty to adhere to those plan terms consistent with ERISA:

> (1) Subject to sections 1103(c)[91] and (d),[92] 1342[93] and 1344[94] of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

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86. *See* Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 957-58 (D.C. Cir. 1985) (holding ESOP trustee's violation of statutory duties to investigate and evaluate plan's investments not time-barred as not communicated to participants).

Fink dealt with a nonpublic insurance holding company that lost its major customer and so was unable to contribute to pay off the ESOP loan. *Id.* at 953-54, 956 (finding that claims of acquiring, retaining, continuing to pay the note, and failing to rescind were time-barred).

87. The court found violation of the abuse of discretion standard, which was applicable since the plan granted interpretative discretion, *see* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), and found the plan administrator's interpretation of the plan's parroting of the statute's direction to invest "primarily" in employer securities to mean invest "exclusively" in employer securities, *see* Moench v. Robertson, 62 F.3d 553, 566-67 (3d Cir. 1995), *cert. denied,* 516 U.S. 1115 (1996).

88. *See Moench*, 62 F.3d at 559-60. Appellate precedential rules in the Anglo-American system often come from bizarre, pathological, and atypical facts. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON LAW AND ITS STUDY 62 (1960). The *Moench* disease begins with an appellate effort to save a lost cause.

89. *See Moench,* 62 F.3d at 568.

90. This list is not complete. Omitted, for example, are the prohibited transactions. *See* 29 U.S.C. § 1107 (2006).

91. Providing an exception to the exclusive benefit requirement for return of mistaken contributions, conditional contributions, and over contributions. *See id.* § 1103(c).

92. Providing an exception to the exclusive benefit requirement for return of over funding upon termination. *See id.* § 1103(d).

93. Allowing plan termination for various causes, including inability to pay benefits. *See* 29 U.S.C. § 1342 (2006).

94. Providing for payment priorities upon termination of benefits. *See id.* § 1344.

> (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III[95] of this chapter.[96]

EIAPs have an exception from these imposed fiduciary duties but only from the diversification requirement, not the prudence requirement (other than to the extent it would require diversification):

> (2) In the case of an eligible individual account plan . . . , the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities . . . .[97]

One would have thought that the plain meaning[98] of these provisions clearly states that EIAPs do not have to diversify. If the *Moench* court

95. This subchapter is subchapter I containing all the requirements for plans and their fiduciaries. *See* 29 U.S.C. § 1001 (2006). Subchapter III contains the plan termination insurance provisions. *See* 29 U.S.C. § 1301 (2006).

96. 29 U.S.C. § 1104(a)(1) (2006) (captioned "Fiduciary Duties").

97. *Id.* § 1104(a)(2) (2006); *see also* Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 955 (D.C. Cir. 1985) (closest scrutiny under the prudent standard for EIAP).

98. For statutory construction, the Supreme Court primarily applies the plain meaning rule: in the absence of an ambiguity in a statute's wording, the statute's explicit terms express the legislative intent. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-40 (1990) (applying the plain meaning rule to the ERISA preemption provision); FMC Corp. v. Holliday, 498 U.S. 52, 55 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-50 (1987); Metro.

had permitted the participant's case, however, it believed that it would have had to forge an exception from the diversification exception for EIAPs.[99] And according to the Supreme Court, the burden of an interpretation contrary to the plain meaning of a statute is exceptionally heavy to persuade the Supreme Court that Congress intended a different meaning.[100]

Rather than focusing on a residual duty of prudence as imposed by ERISA, the *Moench* court derived its residual duty to diversify for EIAPs, prohibited by ERISA, by imagining a conflict between ERISA's strict standards for fiduciary conduct and Congressional promotion of ESOPs; that is, it ignored the EIAP fiduciary exception to diversification.[101] This procedure is contra the accepted means of statutory construction. The court must construe the statute as a whole animated by one general purpose to arrive at a harmonious whole.[102] The court focused on a passage from the Tax Reform Act of 1976 appearing in a Fifth Circuit opinion concerning the conflict between administrative action under the Internal Revenue Code that would thwart formation of ESOPs under ERISA.[103] The statutory language expressed concern that

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Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741-42 (1985) (applying the plain meaning rule to the savings clause of the ERISA preemption provision); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

99. One commentator group has referred to this effort as resulting in a "residual duty to diversify" for EIAP trustees. *See* Craig C. Martin, Matthew J. Renaud & Omar R. Akbar, *What's Up on Stock-Drops? Moench Revisited*, 39 J. MARSHALL L. REV. 605, 626 (2006) (asserting that *Moench* misunderstood precedence to craft the rule); *id.* at 627 (asserting that *Moench* redesigned ERISA's balance in crafting the rule); *id.* at 630 (stating that the *Moench* rule complicates EIAP fiduciaries' work as running counter to securities law). These authors advocate removal of the *Moench* rule as contrary to ERISA's diversification exemption but fail to see any comparable fiduciary duty claim. *See id.* at 634 (describing other claims from failure to investigate, to avoid conflicts of interest, and to provide accurate information and other general duties associated with loyalty and prudence; stating that omissions and misrepresentations are left to securities law; stating that without high damages from breach of duty to diversify, no incentive to sue); *id.* at 635-36 (asserting that any residual duty to diversify not matter for courts to decide).

100. *See* Union Bank v. Wolas, 502 U.S. 151, 156 (1991).

101. *Moench*, 62 F.3d at 568-71.

102. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140-41 (1985) (condemning a method of constructing ERISA that omits and renders meaningless other parts of ERISA); *see also* Richards v. United States, 369 U.S. 11 (1962); *see also* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION § 46:5, at 189-90 (7th ed. 2007).

103. *See Moench*, 62 F.3d at 569 (citing Donovan v. Cunningham, 716 F.2d 1455, 1466 n.24 (1983)) ("Congress . . . has warned against judicial and administrative action that would thwart that goal [of encouraging the formation of ESOPs]."), *cert. denied*, 516 U.S. 1115 (1996). In *Donovan v. Cunningham*, the court stated,

regulations and rulings under the Tax Reform Act of 1975 concerning the investment tax credits for ESOPs would treat ESOPs as conventional retirement plans, reducing the incentive for employers to adopt ESOPs and thereby defeating Congressional objectives under ERISA.[104] In other words, the alleged conflict was between an Internal Revenue Service (IRS) regulation and ERISA, not between statutory promotion provisions for ESOPs and fiduciary duties, both contained in ERISA. Furthermore, the expressed conflict never came about. The IRS had only proposed the offending rule. It drafted its final rule in accordance with the Congressional directive.[105] Moreover, Congress repealed the investment tax credit for ESOPs in 1986.[106] The Department of Labor (DOL) has pointed to other circuit courts adopting the *Moench* presumption that they were relying on "snippets of unrelated legislative history,"[107] hardly satisfying the burden to convince the Supreme Court to overrule ERISA's plain meaning. Despite the then-current absence of the suggested conflict, the *Moench* court proceeds to note a dual purpose in

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> The Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs], [including the Tax Reform Act of 1975 and ERISA] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Donovan, 716 F.2d at 1466 n.6 (citing Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590).

104. *See* S. REP. NO. 94-839, Part I, at 180-81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3438, 3612 (describing the problems for the Tax Reform Act of 1976 with employers adopting ESOPs, such as (1) the additional tax credit is only available for one year, so employers do not learn of it soon enough to use it; (2) the cost of establishing ESOPs is unreasonably high in relation to the benefits of the plan; (3) the Internal Revenue Service's recapture rules provide for the employer to bear the cost of repaying an excess credit rather than recover it from the ESOP; and (4) utilities fear that regulatory bodies will pass though the credit to customers).

The recapture rule treated ESOPs as a conventional retirement plan by using ERISA's non-inure rule to conclude that the recapture could not come from the plan. *See* 29 U.S.C. § 1103(c)(1) (2006) ("[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants . . . .").

105. *See* T.D. 7590, 1979-1 C.B. 21 (publishing proposed rules on July 30, 1976, holding hearings on October 19, 1976, inviting comment, and including issues addressed by section 803(h) of the Tax Reform Act of 1976; providing for 26 C.F.R. §1.46-1(f) recapture to be taken from plan if plan segregates the credit amount during the recapture period).

106. *See supra* note 40.

107. Brief of Secretary of Labor, Hilda L. Solis, as Amicus Curiaé in Support of Petition for En Banc Rehearing, Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010) (Nos. 09-56190, 09-56248), 2010 WL 5893430, at *12.

ERISA to encourage the formation of ESOPs and impose fiduciary standards on EIAPs,[108] but unlike the cited Fifth Circuit opinion that applied the prudent person standard to the ESOP fiduciary, the *Moench* court concluded that these two purposes conflict.[109] And as evidence of that conflict, the *Moench* court cited the Tenth Circuit and District of Columbia Circuit's opinions applying ERISA's strict fiduciary standards to ESOP trustees' behaviors.[110]

The *Moench* court ignored ERISA's exemption for EIAP trustees from diversification, probably because the suing participants claimed failure to diversify as one of their trustee's fiduciary breaches.[111] It then proceeded to manufacture some objections to the application of ERISA's strict fiduciary standards, meaning a requirement to diversify. Firstly, to apply the fiduciary standards would render the diversity exemption for EIAPs meaningless.[112] Secondly, application of the fiduciary standards

108. *See Moench*, 62 F.3d at 569 (quoting Russell Long); *see* 129 CONG. REC. S16,629, S16,636 (daily ed. Nov. 7, 1983) (statement of Sen. Long) ("Congress expressly intended that the ESOP would be both an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership.").

109. *See Moench*, 62 F.3d at 569 (quoting Donovan v. Cunningham, 716 F.2d 1455, 1466 (5th Cir. 1983)); *see id.* ("The courts' 'task in interpreting the statute is to balance these concerns so that competent fiduciaries will not be afraid to serve, but without giving unscrupulous ones a license to steal'").

Cunningham involved the interpretation of the ERISA provision for determining the value of employer securities for nonpublic companies pursuant to DOL rules. *Id.*; *see also* 29 U.S.C. § 1002(18) (2013) ("[T]he fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]"). The DOL had no rules, so the court had to find some position between the trustee urging subjective good faith and the DOL urging the use of IRS rules for estate and gift tax purposes. *Cunningham*, 716 F.2d at 1466. The *Cunningham* court then used the statutory prudent person rule and determined that the failure to investigate (get appraisals) constituted a fiduciary breach. *Id.* at 1466-68.

The DOL subsequent to *Cunnigham* proposed the missing rule in 1988, *see* 53 Fed. Reg. 17,632 (May 17, 1988) (proposing 29 C.F.R. § 2510-3(18) with a two part test to find the fair market value and determine good faith from prudent business practices), but the DOL has yet to finalize it. *See* 72 Fed. Reg. 22,850 (Apr. 30, 2007).

110. *See Moench*, 62 F.3d at 570 (citing Eaves v. Penn, 587 F.2d 453, 459-60 (10th Cir. 1978); Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 955-56 (D.C. Cir. 1985)). For brief discussion of *Eaves* and *Fink*, see *supra* notes 85-86.

111. *See* Brief for Appellant, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) (No. 94-5637), 1994 WL 16012392, at *11 (failed to diversify); *id.* at *18 (citing Canale v. Yegen, 782 F. Supp. 963, 967-68 (D.N.J. 1992) (finding failure to diversify a breach of ESOP trustee's fiduciary duty)) (stating that ERISA does not mean failure to diversify can never constitute breach of fiduciary duty).

112. *See Moench*, 62 F.3d at 570. This is sheer balderdash. ERISA specifically cuts out of the fiduciary standards for ESOPs both the requirement for diversification and those portions of the prudence standard related to the diversification requirement, namely

would discourage the formation of ESOPs since ESOP trustees would fear judicial second-guessing of their decisions.[113] Thirdly, application of the fiduciary standards ignores the employer's (the settlor's) intent in establishing the ESOP to invest primarily in employer securities.[114] Fourthly, the *Moench* court could not imagine how an ESOP trustee would know when to begin diversifying.[115] Fifthly, the fiduciary standards would convert ESOPs into regular retirement plans by forcing ESOP trustees to guarantee retirement income by maximizing returns through divestment of employer securities rather than bothering with employees' company loyalty through retention of employer securities.[116] None of these objections would be present if the court followed ERISA's plain language and eliminated any requirement to diversify. It is the *Moench* court that has rendered the diversity exemption meaningless, subjected ESOP trustees to second-guessing on diversifying, created the problem of fathoming the settlor's intent, and posed the question of when to diversify by introducing a rebuttable presumption rather than excluding the action altogether as mandated by ERISA.

The *Moench* court then crafted its presumption. Trust law requires trustees to follow the terms of the plan, and if a particular investment is mandated, the trustee must comply unless illegal or impossible, but if a particular investment is permissive, as for the ESOP, the trustee must not abuse its discretion.[117] Never mind that Congress specifically directed

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investigation and monitoring of investments. See *supra* note 97 and accompanying text for ERISA requirements and *infra* notes 262-74 and accompanying text for investigation and monitoring of investments.

113. *See Moench,* 62 F.3d at 570. This is senseless rubbish. Congress struck the balance between its encouragement of ESOPs and the imposition of fiduciary duties reflected in ERISA. It is the *Moench* court that has widened the possibility of judicial review by introducing a rebuttable presumption rather than an exclusion of the matter.

114. *See id.* at 570. See *infra* note 127 and accompanying text for the inapplicability of settlor's intent to ERISA plans.

115. *See Moench,* 62 F.3d at 570. Judge Posner has recognized that if courts create a duty to diversify for ESOP trustees, the courts then will have a problem of determining when diversification should begin. *See also* Summers v. State St. Bank & Trust Co., 453 F.3d 404, 411 (7th Cir. 2006); *see also* Steinman v. Hicks, 352 F.3d 1101, 1106 (7th Cir. 2003) (noting that ESOP trustee might have duty to diversify if participants' assets are entirely in employer's securities).

116. *See Moench,* 62 F.3d at 570. ESOPs are retirement plans, *see supra* note 15 (describing ERISA's definition of an ESOP), and Congress recognizes that they provide retirement income, *see supra* note 44 (providing Sen. Baucus' comments on the Enron collapse).

117. *See Moench,* 62 F.3d at 571 (citing to the 1992 version of the Third Restatement); *see also* RESTATEMENT (THIRD) OF TRUSTS § 91 cmt. e (2007) (stating that if it is a mandatory investment, trustee must do it unless it is against public policy or illegal); *id.*

courts in interpreting ERISA to use trust law only with a recognition that it does not comport well with ERISA,[118] and fiduciaries cannot follow plan provisions contrary to ERISA.[119]

The requirements that the courts have placed on the rebuttal that creates the duty to diversify, contrary to ERISA, reveal another damning aspect of creating this exception from the EIAP diversification exception. The circuit courts at least have made this rebuttal incredibly difficult by imposing an inapplicable[120] rule from the common law of trusts that allows court modification of the terms of the trust.[121] That rebuttal must provide evidence that circumstances unanticipated by the employer as settlor in establishing the EIAP have arisen and would substantially impair the achievement of the purposes of the EIAP.[122] Many circuit courts have made the rebuttal more difficult by requiring the unanticipated circumstances to relate to the impending collapse of the employer.[123] The circuit courts disagree as to whether the presumption and rebuttal apply to the pleading[124] or to the evidence.[125] This rebuttal rule with its court-implied modification of the plan, however, clearly violates Congressional intent for ERISA. Firstly, ERISA requires

at Reporter's Notes on cmt. f (citing cases that reviewed for abuse of discretion if it is a permissive investment).

118. *See infra* note 127.

119. *See supra* note 96 and accompanying text.

120. *See infra* note 127 and accompanying text.

121. *See Moench*, 62 F.3d at 571 (citing the RESTATEMENT (SECOND) OF TRUSTS, § 227 cmt. q (1959)).

The Sixth Circuit has not gone so far, claiming the presumption is rebutted by showing that a prudent fiduciary would have made a different decision. *See* Kuper v. Ivenko, 66 F.3d 1447, 1459 (6th Cir. 1995); Pfeil v. State St. Bank & Trust Co., 671 F.3d 585, 591 (6th Cir. 2012).

122. *See* RESTATEMENT (SECOND) OF TRUSTS § 227 cmt. c (1959) (allowing a deviation from the terms of the trust by a court upon finding circumstances unanticipated by the settlor that would substantially impair purposes of the trust); *see also* RESTATEMENT (THIRD) OF TRUSTS §66 (2007) (similar); *see also* Kirschbaum v. Reliant Energy, 526 F.3d 243, 256 (5th Cir. 2008) (rebut by unforeseen circumstances); *see also* Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1281 (11th Cir. 2012).

123. *See* Quan v. Computer Scis. Corp., 623 F.3d 870, 882 (9th Cir. 2010); *In re* Citigroup ERISA Litig., 662 F.3d 128, 138, 140 (2d Cir. 2011) (dire financial situation), *cert. denied sub nom.*, Gray v. Citigroup Inc., 133 S. Ct. 475 (2012); Edgar v. Avaya, 503 F.3d 340, 345-49 (3d Cir. 2007) (brink of bankruptcy).

124. *See Edgar*, 503 F.3d at 348-49 (finding that pleading failed to allege rebuttal facts); *Lanfear*, 679 F.3d at 1281 (applies to pleading); *Citigroup*, 662 F.3d at 139 (applies to pleading).

125. *See Pfeil*, 671 F.3d at 592 (providing examples of application of the presumption to the fully developed evidentiary record); Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 419 (6th Cir. 2012) (refusing to apply the *Moench* presumption at the pleading stage).

fiduciaries to follow plan provisions to the extent compatible with ERISA, not some after-the-fact, court-imposed plan provision.[126] Secondly, Congress thought by imposing fiduciary duties on plan officials it had eliminated state trust law rules based on deviations from settlor intent.[127]

Not only does the rebuttal rule conflict with Congressional understanding, but it, in the eyes of the circuit courts, violates the securities laws when it successfully requires diversification. That diversification requirement, upon the presence of those successful rebuttal circumstances, would require the EIAP trustee to divest under the fiduciary residual duty to diversify. Trading through divestment when possessing known material nonpublic information will violate the insider trading rules.[128] The *Moench* presumption only encourages such

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126. *See* 29 U.S.C. § 1104(a)(1)(D) (2006) (providing for fiduciary duty to follow plan provisions provided that they comply with ERISA).

127. *See* S. REP. 93-127, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (1973), 1973 WL 12550.

> [R]eliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and *inter vivos* trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.
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> . . . It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act.

Id. Accord Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (quoting Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999)) (stating that "common law of trusts . . . [is] a 'starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes'").

128. *See* Quan v. Computer Scis. Corp., 623 F.3d 870, 881, 882 n.8 (9th Cir. 2010) (stating that divestment violates insider trading laws); Kirschbaum v. Reliant Energy, 526 F.3d 243, 256 (5th Cir. 2008); Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 706 (7th Cir. 2008); *Edgar*, 503 F.3d at 350; Harzewski v. Guidant, 489 F.3d 799, 807 (7th Cir. 2007). See *also infra* note 129 and accompanying text for insider trading laws.

behavior.[129] So the trend is to use the rebuttal requirement of the *Moench* presumption to prevent diversification and its accompanying insider trading violation under the securities laws.[130] The fear of the circuit courts is unfounded, since securities laws require disclosure to accompany the divestment, not divestment only while possessing nonpublic insider information.[131]

III. THE CASE FOR ERISA'S PRUDENCE STANDARD

What rule should the circuit courts have used for these EIAP trustees? Instead of carving out a residual duty to diversify contra ERISA, they should have focused on ERISA's other fiduciary duties, [132] in particular, the residual duty of prudence, which is the duty to use care shorn of any diversification requirement. The Supreme Court expects that exceptions to ERISA's provisions will be narrow.[133] Significant portions of the duty of prudence, therefore, should remain. The case for ERISA's residual prudence standard for EIAPs is simple. Read the statute. The statute specifically states that all ERISA fiduciary duties apply to EIAP trustees except two: (1) diversification and (2) prudence to

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129. *See* Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1098 n.4 (9th Cir. 2004) (involving a stock bonus plan and stating that the *Moench* presumption encourages violation of the insider trading laws); LaLonde v. Textron, Inc., 369 F.3d 1, 6 n.9 (1st Cir. 2004) (ESOP).

130. *See In re* Citigroup ERISA Litig., 662 F.3d 128, 151 (2d Cir. 2011) (Straub, J. dissenting) (arguing that it is a shield to foreclose concurrent imprudence claims), *cert. denied sub nom.*, Gray v. Citigroup Inc., 133 S. Ct. 475 (2012); *Quan*, 623 F.3d at 881-82 (stating that it is to prevent trustee from divesting using insider information); *Kirschbaum*, 526 F.3d at 254 (stating that it is a shield to prevent trustee quandary about divesting or not divesting). *But see* Brief of Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Petition for En Banc Rehearing, Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010) (Nos. 09-56190, 09-56248), 2010 WL 5893430, at *13 (arguing that it subverts ERISA's goal to have access to courts and creates a substantial shield and safe harbor from complying with the minimum fiduciary standards); 29 U.S.C. § 1001(b) (2006) (stating that the purpose is to provide ready access to federal courts for participants).

131. *See supra* note 129 and accompanying text.

132. *See Citigroup*, 662 F.3d at 134; Taveras v. UBS AG, 708 F.3d 436, 440-41 (2d Cir. 2013); Gearren v. McGraw-Hill Companies, 660 F.3d 605, 609 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 476 (2012); Fisher v. JP Morgan Chase & Co., 703 F. Supp. 2d 374, 379-80 (S.D.N.Y. 2010), *aff'd*, 469 F. App'x 57, 60 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 617 (2012); *See* Brief for Appellant, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) (No. 94-5637), 1994 WL 16012392.

133. *See* John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 97 (1993) (excluding certain insurance products from subjecting insurance companies to the fiduciary duty rules); *see also* 29 U.S.C. § 1101(b)(2) (2006).

the extent that it requires diversification.[134] What does the standard of prudence, bereft of its diversification element, require? These courts should be examining illegalities related to the securities laws, failures to disclose information to protect participants, and overpayments for EIAP investments in employer securities. Further, courts should examine improper procedures used in investigating appropriate investments and monitoring their continued suitability, rather than being sidetracked by some imagined residual duty to diversify through delving into which unanticipated circumstances would require diversification when the employer adopted the plan and through determining when an EIAP trustee should commence to diversify.

This residual prudence standard renders useless the deference standard of a presumption of correctness for investing in employer securities by EIAP trustees. The DOL has revealed fragments of this case for the residual prudence standard to the early aberrant circuit courts several times in amicus briefs.[135] More recently, the DOL bolstered the

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134. Several participants in the securities fraud situation found a breach of fiduciary duty for failing to act solely in the interests of participants as required by ERISA. *See* Brief for Appellant, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) (No. 94-5637), 1994 WL 16012392, at *11 (suing also for acting in bank's interest rather than solely in the interests of participants).

135. For the earliest of these circuit court cases, which took place in the Third Circuit, the DOL battled against the lower court's use of the abuse of discretion standard, applicable to plan administrator benefit claim decisions, for the trustee's investment decision. *See* Brief of the Secretary of Labor as Amicus Curiae, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) (No. 94-5637), 1994 WL 16012393, at *17-23 (finding that the arbitrary and capricious standard applies when balancing various participant interests, not to trust decisions, and finding that the prudence standard for procedures of investigating investments applies).

The DOL failed to submit an amicus brief for the Sixth Circuit's pivotal case of *Kuper v. Ivenko*, 66 F.3d 1447 (6th Cir. 1995).

In the Fifth Circuit, the DOL confronted a lower court's acceptance of plan provisions requiring investment in employer securities, which was contrary to the specific language in ERISA that plan terms govern only to the extent compatible with ERISA. *See* Brief of the Secretary of Labor, Elaine L. Chao, as Amicus Curiae in Support of Plaintiffs-Appellants, Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008) (No. 06-20157), 2006 WL 5952409, at *8-13 (stating that the presumption is inconsistent with the plain text of ERISA and that the prudence standard for monitoring continued investment applies); *see also* Brief of Amicus Curiae Hilda L. Solis, Secretary of the United States Department of Labor, in Support of Appellant Requesting Reversal, *In re* Citigroup ERISA Litig., 662 F.3d 128, 137 (2d Cir. 2011) (No. 09-3804-cv), 2009 WL 7768350, at *6-16 (asserting that prudence standard for monitoring continued investment applies and that deviations based on settlor's intent were contrary to ERISA).

In the Second Circuit, the DOL contested a lower court's use of the *Moench* presumption since it is always imprudent to knowingly overpay for stock. *See id.* at *16-19 (stating that it is imprudent to overpay for EIAP assets and that ERISA only alters the duty to diversify for EIAP trustees); *see also* Brief of the Secretary of Labor as Amicus case for the residual prudence standard by pointing out that the presumption of correctness violates court authority to create federal common law contrary to the express provisions of ERISA.[136] The Supreme Court applied this principal to strike down several attempts by litigants and courts to create federal common law contrary to ERISA's enunciated provisions, such as the attempt to include equitable damages within ERISA's "appropriate equitable relief" provision;[137] the attempt to create a new class of ERISA "beneficiaries" for nonparticipant spouses;[138] the attempt to provide greater weight for a treating physician's opinion as part of ERISA's "full and fair review";[139] the attempt to permit a federal common law waiver to operate as an ERISA "qualified domestic relations order";[140] and the attempt to limit the award of attorney fees only to the prevailing party when ERISA gives the court "discretion."[141]

Curiae in Support of the Plaintiff-Appellant, Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012) (No. 10-13002-GG), 2010 WL 5777547, at *22-23 (asserting that it is imprudent to overpay for EIAP assets).

136. In the Ninth and Eleventh Circuits, the DOL challenged the circuit courts' *en banc* rehearing and a lower court's adoption of the alternative *Moench* presumption standard as improper fashioning of federal common law when the statute itself provides the standard. *See* Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Petition for En Banc Rehearing, Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010) (Nos. 09-56190, 09-56248), 2010 WL 5893430, at *2-17; Brief of the Secretary of Labor as Amicus Curiae in Support of the Plaintiff-Appellant, Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012) (No. 10-13002-GG), 2010 WL 5777547, at *18-23.

137. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 260 (1993) (stating that plaintiff sought to expand "appropriate equitable relief" to include equitable damages); *see also* 29 U.S.C. § 1132(a)(3) (2006) (permitting participants and beneficiaries to sue for injunctions and "appropriate equitable relief").

138. *See* Boggs v. Boggs, 520 U.S. 833, 850 (1997) (expanding "beneficiary" to include deceased first spouse so her will could transfer plan benefits to her sons); *see also* 29 U.S.C. § 1002(8) (2006) (defining "beneficiary"); *id.* § 1056(d)(3)(D) (stating the requirements for a qualified domestic relations order).

139. *See* Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831-32 (2003) (stating that circuit court sought to impose the treating physician rule on a plan administrator using its own consultants); *see also* 29 U.S.C. § 1133(2) (2006) (requiring plan procedures to afford a "full and fair review" in accordance with DOL regulations); 29 C.F.R. § 2560.503-1 (2013).

140. *See* Kennedy v. Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 288 (2009) (stating that plaintiff sought to use a common law waiver rather than follow plan procedures and documentation to waive benefits); *see also* 29 U.S.C. § 1056(d)(3)(D) (stating the requirements for a "qualified domestic relations order"); *id.* § 1104(a)(1)(D) (stating that a fiduciary must follow plan documents and instruments).

141. *See* Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149, 2156 (2010) (noting that the words "prevailing party" are absent from ERISA); *see also* 29 U.S.C. § 1132(g)(1) (2006) (allowing court discretion to award attorney fees to either party).

A. Duty to Act Lawfully

The circuit court decisions dealing with the *Moench* presumption all involve situations of securities fraud.[142] None involve adverse company performance caused by current market conditions such as the emergence of more able competitors or the company's outmoded product.[143] The failure to disclose known derogatory information over long periods of time by such EIAP trustees when purchasing employer securities for the participants or facilitating such purchases upon the direction of the participants during those long periods, if material under the securities laws and withheld knowingly, constitutes securities fraud, entitling those suffering losses from purchases or sales to recovery under the securities laws.[144]

The facts surrounding this securities fraud, in addition to providing a cause of action for securities fraud, could also breach the fiduciary duties of the EIAP trustees, thereby providing a second cause of action[145] entitling the plan suffering losses from that fraud-induced fiduciary breach to recover under ERISA.[146] The two causes of action have significant differences. The securities lawsuit, when brought as a class action, is subject to the strict federal pleading rules for fraud, the

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142. *See supra* notes 59-83 for a description of the types of securities fraud involved in the circuit court opinions using the prudence presumption rule.

143. *See* Rogers v. Baxter Int'l Inc., 521 F.3d 702, 705 (7th Cir. 2008) (holding that there is no duty to outsmart the stock market and that participants must show that fiduciaries had knowledge of fraud in Brazilian subsidiary); *see also* Pugh v. Tribune Co., 521 F.3d 686, 699-702 (7th Cir. 2008) (ruling that no duty arises unless there is some reason to suspect imprudence and that fiduciaries lacked knowledge of management's fraudulent boosting of newspaper circulation).

144. *See* 15 U.S.C. § 78j (2006) (stating that it is unlawful in connection with a sale or purchase of a security to use deceptive devices in contravention of Securities and Exchange rules); 17 C.F.R. § 240.10b-5 (2013) (stating that it is unlawful "[t]o make an untrue statement of a material fact or to omit to state a material fact necessary to make the statements made . . . not misleading"); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (stating the elements of the Rule 10b-5 cause of action: (1) material misrepresentation or omission, (2) made with intent to defraud, (3) in connection with a sale or purchase of a security, (4) reasonable reliance, (5) suffered economic loss, and (6) causal connection between the material misrepresentation and the loss).

145. *See* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, 534 U.S. 124, 143-44 (2001) ("'[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"); *accord* Branch v. Smith, 538 U.S. 254, 273 (2003) (implied repeals not favored). *But see* Mark Casciari & Ian Morrison, 39 J. MARSHALL L. REV. 637 (2006) (urging that there should only be the securities law remedy and not an ERISA one).

146. *See* 29 U.S.C. § 1109 (2013) (stating that a fiduciary is personally liable to plan for breach of fiduciary duty); *id.* § 1132(a)(2) (stating that participant, beneficiary, fiduciary, or DOL may bring suit to recover for breach of fiduciary duty).

additional elements of the cause of action, the prohibition of discovery until the participant has satisfied the pleading rules, and a two-in-five-year statute of limitations. Additionally, it only provides a remedy for purchasers and sellers of the employer securities.[147] The ERISA lawsuit lacks the strict pleading requirements,[148] possesses different elements of the cause of action,[149] has no prohibition concerning discovery, has a three-in-six-year statute of limitations,[150] and also provides a remedy for

147. *See* FED. R. CIV. P. 9(b) (requiring the who, what, where, and when for fraud pleadings); 15 U.S.C. § 77p(c) (2006) (stating Securities Act class action securities fraud in federal court only); 15 U.S.C. § 78bb(f) (stating the same for Exchange Act); *id.* § 78u-4(b) (stating that private class actions must plead strong inference of scienter, are subject to a stay of discovery until pleadings are satisfactory, and must prove loss causation); 28 U.S.C. § 1658(b) (2006) (stating that a private action for fraud under the securities laws must be brought within two years of the discovery of the fraud, but no later than five years after such violation); 17 C.F.R. § 240.10b-5 (regarding manipulative and deceptive devices in connection with a purchase or sale of securities); *see generally* Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation under the Guise of ERISA?*, 26 HOFSTRA LAB. & EMP. L.J. 497, 501-10 (2009) (explaining the differences between the two lawsuits); *id.* at 528-31 (concluding that case law for misrepresentations in securities filings carries no duty to correct unless it has been communicated to participants); *id.* at 531-36 (concluding that case law for omissions carries no duty to disclose absent a securities law violation); *id.* at 537-38 (calling for legislative and regulatory action to end perceived abusive ERISA lawsuits, similar to what Congress did for securities fraud lawsuits).

148. Notice pleading is sufficient for breach of ERISA fiduciary duty for material misrepresentations and omissions in the securities fraud situation. *See, e.g.*, *In re* AEP ERISA Litig., 327 F. Supp. 2d 812, 822 (S.D. Ohio 2004); *In re* Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 652 (S.D. Tex. 2003); Rankin v. Rots, 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003); *see also* FED. R. CIV. P. 8(a) (notice pleading).

149. The elements of the cause of action for breach of fiduciary duty under ERISA are (1) fiduciary status, (2) breach of a fiduciary duty, and (3) a cognizable loss. *See* Herdich v. Pegram, 154 F.3d 362, 369 (7th Cir. 1998), *rev'd on other grounds*, 530 U.S. 211 (2000) (finding that the HMO was not a fiduciary). The breach itself adds additional elements. *See, e.g.*, Daniels v. Thomas & Betts Corp., 263 F.3d 66, 73 (3d Cir. 2001) (explaining that a misrepresentation under the duty of loyalty adds (1) fiduciary misrepresentation, (2) materiality, and (3) reliance). A claim under ERISA's breach of fiduciary duty through an omission or misrepresentation lacks any scienter requirement similar to a securities fraud lawsuit. *See, e.g.*, Adams v. Brink's Co., 261 F. App'x 583, 595 (4th Cir. 2008); Krohn v. Huron Memorial Hosp., 173 F.3d 542, 547 (6th Cir. 1999). Damages are also different. *Compare* 29 U.S.C. §§ 1109, 1132(a)(2) (2006) (stating all losses caused by the breach, disgorgement of profits, and other equitable remedies), *with* 15 U.S.C. § 78u-4(e)(1) (2006) (limiting loss to difference between purchase or sale price paid and the mean trading price during the 90-day period beginning when the disclosure was made).

150. *See* 29 U.S.C. § 1113 (2006) (providing for the earlier of (1) six years since the last act constituting the breach of fiduciary duty or, for an omission, the latest date when the fiduciary could have cured the violation or (2) three years from knowledge of the

the plan holding employer securities without any requirement to purchase or sell.[151] A concern of some defendant issuers is possible use of the ERISA discovery to circumvent the anti-discovery rule of securities litigation imposed by the Private Securities Litigation Reform Act of 1995 (PSLRA),[152] passed by Congress after the issuance of the *Moench* opinion. The ERISA cause of action, however, is not one for securities fraud covered by the PSLRA but for breach of fiduciary duty.

Regardless of the meaning of "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," certainly the law excludes unlawful conduct. [153] Trust law that the circuit courts want to apply so provides.[154] And under securities law, securities fraud is unlawful. Although in the nineteenth century securities fraud remedies may have started out as a civil tort action,[155] one function of the securities laws was to eliminate the difficult elements of the cause of the civil common law action, such as scienter, reliance, and privity,[156] and the omission or misrepresentation of a material fact in connection with a

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breach or, in the case of fraud and concealment, not later than six years after the discovery of the breach).

151. *See id.* § 1109 (stating that remedy goes to make good the plan and restore any profits).

152. *See* 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3) (2006); *see also* Bravo, *supra* note 147, at 508 (stating that filing ERISA lawsuit may allow circumvention of the securities law discovery safeguards); *id.* at 537-38 (calling for legislative and regulatory action to end perceived abusive ERISA lawsuits, similar to what Congress did for the securities fraud lawsuits using class action status to impose a lucrative settlement).

153. *See* 11 U.S.C. § 1104.

154. *See* RESTATEMENT (THIRD) OF TRUSTS § 72 (2007) ("A trustee has a duty not to comply with a provision of the trust that the trustee knows or should know is invalid because the provision is unlawful or contrary to public policy."); *id.* at § 72 cmt. c (stating that the exercise of the duty of prudence determines what a trustee should know); *see also* RESTATEMENT (SECOND) OF TRUSTS § 166 (2) (1959).

> The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such compliance would be a serious criminal offense or would be injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.

Id.

155. *See* Harry Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227, 229 (1933) (law of warranty); *id. at* 231 (law of rescission); *id.* at 233-35 (law of deceit with its difficult elements of scienter); *id.* at 234-38 (same for reliance); *id.* at 239-40 (same for privity).

156. *See* Shulman, *supra* note 155, at 247 (no reliance); *id* at 248 (no scienter); *id.* at 249 (no privity); *id* at 251 (new defenses).

sale or purchase of securities is now made "unlawful." Rule 10b-5[157] of the SEC so states, and the federal securities statute makes violation of SEC rules "unlawful."[158] And if done "willfully," the securities laws criminalize the violation.[159] But more importantly, no prudent person would knowingly violate that law.

That aside, how would a prudent person behave when confronted with the undisclosed material information and with the option or directive to trade employer securities? The courts solved this problem decades ago for securities lawyers: disclose to the public or abstain from trading.[160] An ERISA fiduciary, possessed of material nonpublic information concerning the employer, is under a duty imposed by securities law to abstain from buying or selling employer securities or disclosing that information to the buyer or seller (the public for public corporations) when the fiduciary purchases or sells the employer securities or when so acting on behalf of a participant direction. The DOL's three-part solution to the problem is either (1) disclose the correct information to the general public, (2) discontinue employer securities as an investment option and the employer match in employer securities, or (3) alert the SEC or DOL of the incorrect information.[161] To do otherwise would violate securities law.

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157. *See* 17 C.F.R. § 240.10b-5(b) (2013).

> It shall be unlawful for any person, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . .

Id.

158. *See* 15 U.S.C. § 78j(b) (2006).

> It shall be unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . .

Id.

159. *See* 15 U.S.C. § 78ff (2006) ("Any person who willfully violates any provision of this [Act], or any rule or regulation thereunder the violation of which is made unlawful[,] . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both . . . .").

160. *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968); *In re* Cady, Roberts & Co., 40 S.E.C. 907 (Nov. 8, 1961) (showing that insider failure to disclose material nonpublic information when trading constitutes a violation of the anti-fraud provisions, and if disclosure is unrealistic, the alternative is to forego the transaction). The Supreme Court has recognized this duty on the part of insiders to abstain or disclose. *See* United States v. O'Hagan, 521 U.S. 642, 661 (1997) ("[D]uty to disclose or abstain from trading 'arises from a specific relationship between two parties.'").

161. *See* Amended Brief of the Secretary of Labor as Amicus Curiae Opposing Motions to Dismiss at Part IV.C., *In re* Enron Corp. Sec., Derivative & ERISA Litig.,

To abide by their ERISA fiduciary duty not to violate the securities laws in effect when the Third Circuit decided *Moench*, the EIAP trustee with material nonpublic information must either have that material nonpublic information disclosed by the corporation or prevent further investment or divestment by the EIAP in employer securities. Consequently, for EIAPs with self-directed accounts, one commentator has advocated suspension of the ability to invest in employer securities by amending the EIAP plan to foreclose the investment option in employer securities, but he avoids the divestment issue for untimely fiduciary action.[162] Such a proposal ignores the ERISA policy to foster

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284 F. Supp. 2d 511 (S.D. Tex. 2003) (No. H-01-3913), 2002 WL 32157092 (outlining the options for fiduciary behavior with material inside information under the securities laws); *see also Enron Corp.*, 284 F. Supp. 2d at 566 (adopting the DOL's solution); *In re* Ferro Corp. ERISA Litig., 422 F. Supp. 2d 850, 862-63 (N.D. Ohio 2006).

The DOL has continued with this three-part solution as late as 2010, omitting any needed adjustments due to Sarbanes-Oxley Act of 2002. *See* Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Petition for En Banc Rehearing, Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010) (Nos. 09-56190, 09-56248), 2010 WL 5893430, at *9-10 (citing *In re* Enron Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 566 (S.D. Tex. 2003), only for the two disclosure options and another pre-*Moench* opinion for abstention); Brief of the Secretary of Labor as Amicus Curiae in Support of the Plaintiff-Appellant, Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012) (No. 10-13002-GG), 2010 WL 5777547, at *293 (citing *Enron* for the entire three-part solution); *see also infra* notes 172-83 (discussing the impact on the abstention option of Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745).

162. *See* Andrew S. Hartley, *Making the Case for Mandatory Removal of Imprudent Investment Vehicles: Inside Information Can Make Employer Securities a Bad 401(k) Option*, 5 APPALACHIAN J.L. 99, 100 (2006) (viewing ERISA as conflicting with securities laws); *id.* at 101 (refuse divestment); *id.* at 113-117 (amendment proposal); *id.* at 123 (discussing that money already invested is due because of company fraud but not for breach of fiduciary duty). The author focuses on the inapplicability of ERISA anti-amendment provisions for reducing optional benefits and benefit accruals to individual account plans and the ERISA requirement for notice of the amendment to the participants 210 days after the end of the plan year. *See* 29 U.S.C. § 1054(g) (2006) (optional benefits); *id.* § 1054(h) (benefit accrual); *id.* § 1024(b)(1) (ERISA notice); 26 U.S.C. § 411(d) (2006) (IRC corresponding provision); 26 C.F.R. § 1.411(d), Q&A(1)(d)(6)-(7) (2013) (stating that the section does not apply to right to direct investments or a particular form of investment); I.R.S., Notice of Significant Reduction in the Rate of Future Benefit Accrual, 63 Fed. Reg. 68,678, 68,680 (1998) (stating in Q-2 that ERISA provision only applies to defined benefit plans). This focus overlooks the need to immediately notify participants not to provide investment directions for employer securities; the time delay in amending caused by most plans' reservation of the right to amend the plan with the employer, namely, its board; and the possibility that the board will not amend. This author also lacks any awareness of Sarbanes-Oxley Act of 2002 and its requirements for real time disclosure and blackout periods, in particular whether a suspension of the investment option in employer securities while awaiting the amendment triggers the blackout period and its corresponding public notice. *See infra* notes 172-83 and accompanying text.

formation of EIAPs to engender employee loyalty as well as the innovation in the securities laws since *Moench.* The securities laws now would mandate the disclosure option for public corporations with EIAPs with self-directed accounts by requiring compliance with the periodic reporting requirements when the material nonpublic information affects the accuracy of those reports.[163]

Since the DOL initially proposed its three-part solution, Congress amended the securities laws through the Sarbanes-Oxley Act of 2002 to require the SEC to make rules for real time disclosure on a rapid and current basis of material changes in financial condition or operations.[164] One Congresswoman indicated that those disclosures would occur before the next quarterly report and that it would benefit both employees (plan participants) and investors.[165] In response to the congressional directive, the SEC made revisions to its Form 8-K, the form that the SEC specified for reporting these material financial changes, to add numerous, and make definitive the, triggering events that would mandate the public disclosure.[166] The revised Form 8-K lists as triggering events, among others, entry into a material definitive agreement for both obligations and rights, creation of a material direct financial obligation, events that accelerate or increase direct financial obligations, material charges for impairment to the corporation's assets (if determined by certain specified directors and officers), non-reliance on previously issued financial statements due to an error in such financial statements (if determined by

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The proposed amendment procedure would run afoul of the blackout rules since it leaves the investment in existing employer securities intact. The amendment would not remove the entire investment option and so would be a temporary suspension coming within the blackout rules. See *infra* note 173 discussing the DOL's interpretation of investment option removal as triggering a blackout.

163. *See* 15 U.S.C. § 78m (2006) (requiring periodic reports); *id.* § 78r (providing liability for false and misleading reports).

164. *See* 15 U.S.C. § 78m(l) (requiring public companies to disclose to the public rapidly and currently, as the SEC determines by rule, under § 409 of the Sarbanes-Oxley Act of 2002); *see also* H.R. REP. NO. 107-414, at 39 (2002) (regarding House Bill 3763 for Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 [Sarbanes-Oxley Act]; requiring the SEC to adopt rules requiring issuers to make public disclosure, on a rapid and essentially contemporaneous basis, of information concerning the issuer's financial condition and operations).

165. *See* 148 Cong. Rec. H1544, H1547 (daily ed. Apr. 24, 2002) (statement of Mrs. Sue W. Kelly of New York). The Sarbanes-Oxley Act "requires real-time disclosures of significant financial information to ensure that employees and investors know about important events as they happen, instead of when the quarterly report comes out." *Id.*

166. *See* Additional Form 8-K Disclosure Requirements & Acceleration of Filing Date, Release No. 49,424, 82 SEC Docket 1480 (Mar. 16, 2004), 2004 WL 536851, at *1.

certain specified directors and officers), and temporary suspension of trading under the corporation's EIAPs with self-directed accounts.[167]

The Sarbanes-Oxley Act also imposed corporate responsibilities on those directors and officers to ensure accurate financial statements.[168] The registrant will file the real time report on Form 8-K within four business days after the triggering event.[169] Failure to file Form 8-K for the above items, except for the temporary suspension of trading under the corporation's EIAP with self-directed accounts, does not violate the securities fraud Rule 10b-5.[170] Litigants will not thereby have a private action for violation of Rule 10b-5 for failure to file a Form 8-K for these triggering events, other than the one for temporary suspension of EIAP trading in employer securities. It is clear that the securities laws now favor rapid disclosure rather than abstention and hiding the nonpublic material information over long periods of time to the detriment of both participants and investors as issuers did in the past.[171]

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167. *See* 17 C.F.R. § 249.308 (2013); *Form 8-K*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/forms/form8-k.pdf. In Form 8-K, see items 1.01 (entry into a material agreement), 2.03 (creation of financial obligations), 2.04 (acceleration or increase in financial obligation), 2.06 (material impairments), 4.02 (non-reliance on previously issued financial statements), 5.04 (blackout periods for self-directed EIAPs).

168. *See* 15 U.S.C. § 78j-1 (2006) (establishing, under § 10A of the Exchange Act, an independent audit committee to hire auditors, resolve disputes between auditors and management, and create procedures for receiving employee concerns about auditing); 15 U.S.C. § 7241 (requiring certain officers to certify the accuracy of financial statements); *id.* § 7242 (forbidding undue influence on auditors); *id.* § 7243 (discussing forfeiture of bonus and profits from sales of employer securities for noncompliance with financial reporting requirements).

169. *See* 17 C.F.R. § 249.308; *Form 8-K*, *supra* note 167, at Instruction B1.

170. *See* 17 C.F.R. §§ 240.13A-11(c), .15d-11(c) (2013).

171. *See* Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, 67 Fed. Reg. 42914 (June 25, 2002) (showing that the old form was filed in 15 calendar days, but only for change in control, acquisition or disposition of significant amount of assets, bankruptcy, change of accountant, resignation of director, and change of fiscal year).

The New York Stock Exchange and the National Association of Securities Dealers Automated Quote System (NASDAQ) also require rapid disclosure of material developments, but without a definitive list or timing of the SEC rules. *See* N.Y. STOCK EXCHANGE, NYSE LISTED CO. MANUAL § 202.05 (2006) (expecting companies to quickly disclose news developments expected to materially affect the market and act promptly to dispel rumors causing unusual market activity or price variations); *id.* § 202.06 (by press release); NASDAQ MARKETPLACE RULES 4310(c)(16), 4320(e)(14), IM-4120-1, *available at* http://www.sec.gov/rules/other/nasdaqllcf1a4_5/nasdaqllcamendrules4000.pdf (Disclosure of Material Information). Unfortunately, violation of self-regulatory organization rules does not provide a private cause of action. *See* Jablon v. Dean Witter & Co., 614 F.2d 677, 679-80 (9th Cir. 1980) (the NYSE "know your customer" rule); *id.* at 681 (the NASD "suitability" rule).

Moreover, the abstention option and its non-disclosure will no longer work well for EIAPs with self-directed accounts. The Sarbanes-Oxley Act of 2002 also added the blackout rules for any temporary trading suspension in EIAPs with self-directed accounts lasting more than three business days to ERISA, providing for thirty days' advance notice with a reason for the suspension, and to the securities laws, prohibiting executive officers and directors from trading employer securities during suspension periods upon penalty of disgorgement of profits made thereby, with rule-making authority in the SEC.[172] The blackout rules apply only to temporary suspensions, not permanent ones.[173] ERISA's blackout rules cover all investment directions, not just those relating to employer securities, and exempt temporary suspensions occurring through application of the securities laws as well as regularly scheduled suspensions disclosed to participants in the summary plan description or summary of material modification and qualified domestic relations orders.[174] The DOL interprets application of the securities laws to mean items specifically mentioned in the securities statutes; consequently, the DOL has determined that quarterly freezes on trading involving

172. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 306, 116 Stat. 745, 779-84 (2002) (adding to ERISA 29 U.S.C. § 1021(i)(2) (outlining the plan administrator notice to participants of blackout periods) and to the securities laws 15 U.S.C. § 7244(a)(1) (prohibiting officers and directors from trading during pension fund blackout periods)); 15 U.S.C. § 7244(a)(2) (2006) (disgorgement of profits); *id.* at § 7244(a)(3) (rule making authority of SEC to make exceptions); *see also* 29 C.F.R. § 2520.101-3 (2013). The statute defines a blackout period as when participants are unable to direct or diversify assets otherwise available. *See* 15 U.S.C. § 7244(a)(4)(A); 29 U.S.C. § 1021(i)(7)(A)(2006).

173. *See* Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries, 68 Fed. Reg. 3716, 3721-22 (Jan. 24, 2003) (stating that blackout periods do not include permanent elimination such as a permanent restriction on new contributions to an investment option, replacement of one investment option with another of a similar type, or termination of the plan, since these restrictions are not temporary as required by the statute unless some right is temporarily suspended, such as while replacing option A with option B, there is a restriction on option B while transferring funds from option A to option B).

174. *See* 29 U.S.C. § 1021(i)(7)(B) (2006) (exempting trading suspensions from the blackout rules of ERISA that occur by reason of the application of the securities laws, regularly scheduled suspensions in plan documents disclosed to participants through summary plan descriptions or summary of material modifications for amendments, and qualified domestic relations orders); *id.* § 1104(c)(1)(A)(ii) (exempting blackout periods from the self-directed exemption for fiduciary liability); *see also* 29 C.F.R. § 2520.101-3(d)(1)(ii)(A)-(C) (2013) (same three exemptions); Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries, 68 Fed. Reg. 3716, 3720 (Jan. 24, 2003) (explaining the extension of the statutory exemption for plan amendments to include the plan on the basis of the statute's "which is otherwise available" language, making it consistent with the SEC's version).

employer stock, timed to coincide with earnings reports intended to prevent insider trading, do not constitute blackout periods, not because they deal with securities laws, but because they are regularly scheduled (if disclosed in plan documents).[175] The securities laws' blackout rules are narrower, covering only employer securities and temporary trading restrictions on at least fifty percent of the participants.[176] These securities laws only add one additional exemption from the blackout rules for mergers and acquisitions involving the plan.[177]

The directed EIAP fiduciary duty suspension for an indefinite time (until the corporation made the necessary disclosures) supposedly mandated by the abstention option under the securities laws to prevent insider trading by the EIAP trustee following participant directions would constitute a blackout, triggering ERISA's notice to participants by the EIAP's plan administrator rather than the EIAP trustee.[178] That notice to participants must include, among other items, the reasons for the blackout (to prevent insider trading on undisclosed material nonpublic information), the length of the expected blackout period (indefinite, but the EIAP must provide definite dates and later prepare amended notices), and the reasons why the EIAP's plan administrator could not give the notice within the thirty to sixty day period before the blackout.[179] Since the blackout involves employer securities, ERISA also requires notice to the corporation with the reasons and length and within the same timeframes as the notice given to the participants,[180] thereby triggering an obligation to notify the executive officers, the directors, and the

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175. *See id. See also "Blackout Period" Defined for Blackout-Period Notice Requirements for Individual Account Plans, in* RIA PENSION & BENEFITS LIBRARY 54,243.5 (2013) (demonstrating fixed dates or on a quarter by quarter basis).

176. *See* 15 U.S.C. § 7244 (a)(4)(A) (2006) (defining blackout period as any suspension period of more than three business days for at least 50% of the participants); 17 C.F.R. § 245.100(b)(1) (2013).

177. *See* 15 U.S.C. § 7244 (a)(4)(B) (providing two exceptions from the blackout period definition for regularly scheduled periods included in plan documents and disclosed to participants before participation and for mergers and acquisitions involving the plan); 17 C.F.R. § 245.102 (2013) (same).

178. *See* 29 U.S.C. § 1021(i)(2)(B) (notice to participants).

179. *See* 29 C.F.R. § 2520.101-3(b)(1)(i) (reason for blackout); *id.* § 2520.101-3(b)(1)(iii) (length by dates); *id.* § 2520.101-3(b)(1)(2) (reason for untimely notice); *id.* §§ 2520.101-3(b)(2), -3(b)(4) (re-notice for changes in the length); *id.* (notice 30 to 60 days before blackout, unless it would violate the fiduciary duties of exclusivity or prudence, or it was due to unforeseeable events).

180. *See* 29 U.S.C. § 1021(i)(2)(E) (2006) (notice to issuer); 15 U.S.C. § 7244(a)(6) (2006) (discussing notice to executive officers, directors, and SEC); *see also* 29 C.F.R. § 2520.101-3(c)(1) (requiring also reason for blackout and length); *id.* § 2520.101-3(c)(3) (stating that if the plan administrator is designated as the person for service of notice, the notice is deemed given when furnished to participants).

SEC.[181] The notice to the SEC includes the reason for the blackout[182] on the revised Form 8-K filed within four business days of receipt of the blackout notice from the plan or simultaneously with the notice sent to the officers and directors,[183] thereby notifying the public about the suspension and the reason thereof. It is clear that Congress intended the blackout rules to expedite rapid disclosure of the presence of material previously nonpublic information to the public, rather than encourage abstention and concealment of the material nonpublic information over long periods of time to the detriment of both participants and investors as was done in the past. So the abstention itself by the EIAP trustee would cause notification to the trading public for EIAPs with self-directed accounts by the corporation within days.

The securities laws' policy for disclosure also eliminates the standard ERISA fiduciary defense to a breach of fiduciary duty involving self-directed accounts. ERISA provides that a fiduciary is not liable for investment losses caused by the participant's exercise of control in directing investments in the participant's own account.[184] Following the House Conference Report[185] to require independent exercise of control, DOL regulations indicate that the fiduciary remains liable for those situations in which the fiduciary conceals material nonpublic facts about the investment from the participant, unless that disclosure would violate federal law or state law not preempted by ERISA.[186] Disclosure under the

181. *See* 15 U.S.C. § 7244(a)(6) (requiring timely notice to executive officers, directors, and SEC); 17 C.F.R. § 245.104(b)(2) (2013) (stating that notice is timely within five days of receiving ERISA notice, unless beyond the control of the issuer, in which case also give officer/director copy of beyond control determination).

182. *See* 17 C.F.R. § 245.104(a).

183. *See* 17 C.F.R. § 249.308 (2013); *see also Form 8-K*, *supra* note 167, at item 5.04. SEC's Regulation BTR also envisions issuer-imposed blackouts on the executive officers and directors, in which case timely notice is at least 15 days before the beginning of the blackout period. *See* 17 C.F.R. § 245.100 (b)(1) (issuer imposed); *id.* § 245.104(b)(2)(i)(B) (requiring 15 days before beginning of the blackout period).

184. *See* 29 U.S.C. § 1104(c) (2006); *see also* 29 C.F.R. § 2550.404c-1(d)(2)(i) (2013) (stating that fiduciary is not liable for participant's independent exercise of control).

185. *See* H.R. REP. NO. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5085-86.

186. *See* 29 C.F.R. § 2550.404c-1(c)(2)(ii); *see also* 57 Fed. Reg. 46,906, 46,923 (Oct. 13, 1992).

As modified, paragraph (c)(2)(ii) provides that a plan fiduciary must reveal material nonpublic information regarding the investment unless such disclosure to the directing participant or beneficiary would violate any provision of federal law or any provision of state law that is not preempted by the Act. The only exceptions to this disclosure requirement under the proposal were violations of securities or banking laws. The Department also notes that the regulation is not intended to require a plan fiduciary to disclose information to the general public. 57 Fed. Reg. 46,906, 46,923. With respect insider-trading rule would not violate the pre-*Moench* federal securities law since it required either that same disclosure or abstention[187] from trading, and it most certainly would not violate the more recent real time disclosure rules and blackout rules requiring that disclosure.

Inaction, the failure to disclose to the public or abstain from trading by the EIAP, leads to damages to the participant accounts in the amount of their overpayment[188] for the employer securities purchased less the overpayment for the employer securities sold, all during the period of nondisclosure, and all recoverable by the plan for a fiduciary breach by those EIAP trustees.[189] Evidence of the breach of this ERISA fiduciary duty to act lawfully should merely involve the omitted information, the materiality of the information, the knowledge of the information by the fiduciary at a particular time, and the failure to timely disclose the information to the public or abstain from trading.

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to employer securities, the federal law, of course, requires disclosure also. *See supra* notes 165-71 and accompanying text. ERISA does not preempt state securities laws. *See* 29 U.S.C. § 1144(b)(2) (2006).

Some circuit courts have adopted the DOL position. *See* Howell v. Motorola, Inc., 633 F.3d 552, 567 (7th Cir. 2011) (adopting DOL position), *cert. denied sub nom.*, Lingis v. Dorazil, 132 S. Ct. 96 (2011); *id.* at 568 (stating that stock drop over time was insufficient evidence for breach of the monitoring of investment duty); *id.* at 573 (stating that there was no evidence of breach of the monitoring of fiduciaries duty when plan called for annual reappointment, reports to board, and outside audits); *accord* DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 417 (4th Cir. 2007) (stating that investigative and monitoring duties were conceded by party); *id.* at 421 (stating that the duties were satisfied by holding regular meetings to consider the continued investment option for employer securities, obtaining outside legal opinions concerning the continued investment, and appointing independent fiduciaries upon reorganization of the corporation); *see also* Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiffs-Appellants, Lingis v. Motorola, Inc., 633 F.3d 552 (7th Cir. 2011) (No. 09-2796), *available at* http://www.dol.gov/sol/media/briefs/lingis(A)-05-14-2010.htm.

The *Howell* court erred in finding no breach of the duty to disclose material nonpublic information, which is out of the control of the directing participant and so not covered by the fiduciary exception. *See Howell*, 633 F.3d at 571 (observing that the disclosure of nonpublic information to participants, not the public, is the problem with insider trading); *see also* 29 U.S.C. § 1104(c).

187. The DOL regulations also provided that a fiduciary does not lose its independent control defense if the fiduciary had power not to comply with the participant's direction in the case of the failure to disclose material nonpublic facts regarding the investment. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(A).

188. See *infra* notes 250-61 for a discussion of overpayment.

189. *See* 29 U.S.C. § 1109 (2006) (remedy for breach); 29 U.S.C. § 1132(2) (providing cause of action for breach); LaRue v. De Wolff, Boberg & Assocs., Inc., 552 U.S. 248, 256 (2008) (stating that participant may bring suit on behalf of plan for damage to self-directed account due to fiduciary breach).

B. Duty to Disclose

Rather than focus on the obvious, how a prudent person would behave, one can derive the same fiduciary duty to disclose to the public from trust law and its interplay with the securities laws. Congress indicated that it grafted the fiduciary duties onto ERISA from the common law of trusts and directed the courts, in interpreting ERISA's fiduciary duties, to use trust law, bearing in mind how ERISA differs from testamentary trusts.[190] The Supreme Court has recognized this charge, treating trust law as a starting point and then considering the congressional purposes to enhance protection for participant benefits and to encourage plan formation.[191] That trust law provides for a duty, under both the duties of loyalty and prudence, on the part of trustee to provide information to trust beneficiaries needed by those beneficiaries to protect their interests.[192] Congress specifically indicated that it passed ERISA to force disclosure so that participants could police their own plans.[193] The circuit courts have recognized this basic trust law principle for ERISA.[194]

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190. See *supra* note 127 for the congressional instructions.

191. *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

192. *See* RESTATEMENT (THIRD) OF TRUSTS § 82(1)(c) (2007) ("[A] trustee has a duty . . . to keep . . . beneficiaries reasonably informed . . . about other significant developments concerning the trust . . . particularly material information needed by beneficiaries for the protection of their interests."); *id.* § 82 cmt. d (indicating this as a part of the duties of prudence and loyalty); *see also* RESTATEMENT (SECOND) OF TRUSTS §173 cmt. c (1959) ("[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.").

193. *See* S. REP. NO. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863:

> Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended. It was expected that the information disclosed would enable employees to police their plans. But experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information . . . .

Id.

194. *See* Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (reversing summary judgment to determine whether fiduciary employer informed widow of continued COBRA coverage after employer withdrew from plan); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001) (affirming breach of fiduciary duty by fiduciary employer in failing to inform employee that general information concerning rollovers did not apply to this employee); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009) (discussing failure to inform of fee sharing arrangement among various investment options); Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995) (discussing former trustee who failed to inform participants of suspicions he had concerning mismanagement of plan funds); Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750-51 (D.C. Cir. 1990) (discussing failure to inform of inapplicability of continuation provisions, the availability of conversion

One of the examples of that trust law's requirement to disclose information known by the trustee and not known by the beneficiary concerns the reverse of the purchase of overvalued employer securities, namely the sale of an undervalued interest in the trust by the beneficiary.[195] So ERISA requires selective disclosure[196] to EIAP participants of that nonpublic material information needed by the participants to protect themselves from the securities fraud perpetrated by their employer's management and EIAP fiduciaries.

The EIAPs possess two main features involving employer securities for which participants need information from the plan administrator, rather than the trustee, to protect their rights under those features. ESOP participants have the right to diversify their investments from employer securities upon reaching age fifty-five, and participants in EIAPs with participant contributions or earnings allowing investment in public employer securities have the right to diversify immediately for their own contributions and after three years of service for their portion of

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options, and procedures for conversion of health and life insurance coverage); *see also* Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 115 (1st Cir. 2002) (discussing failure to inform disabled former employee of eligibility for long-term disability benefits when there was no evidence fiduciary knew employee did not know); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) (discussing failure of trustee to inform prohibitive increases in premiums following a single catastrophic loss, but plaintiffs failed to prove loss to plan); Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993) (discussing failure to inform participant that reimbursement agreement was revocable and need not be signed, but participant's widow could not recover under ERISA); *cf.* Krohn v. Huron Mem. Hosp., 173 F.3d 542, 548 (6th Cir. 1999) (discussing failure to provide female participant information of eligibility for long-term disability benefits when requested by husband).

195. *See* RESTATEMENT (SECOND) OF TRUSTS §173 cmt. d (1959):

> [The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts.

Id.

196. The circuit court objection to selectively disclosing information to participants for divestment is that the information will become available to the general public before the participants can take advantage of it and therefore is a wasted effort. *See* Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1285 (11th Cir. 2012); *see also* Edgar v. Avaya, Inc., 503 F.3d 340, 350 (3d Cir. 2007) (discussing public disclosure causing the downturn). The traditional method of protecting against an expected price decline without selling the employer securities is to purchase off puts to protect the funds already invested in employer securities. But this constitutes the same insider trading that a sale of the employer securities would involve.

employer contributions.[197] Participants in ESOPs and stock bonus EIAPs have the right to demand that the plan distribute their benefits in the form of employer securities when they terminate after reaching retirement age or, if the plan permits, when they terminate service or become disabled.[198] Participants cannot exercise these two rights intelligently without the same sort of information as is required under the securities laws to avoid insider trading proscriptions. In addition to this omission concerning financial and operational information, the EIAP plan administrator has obfuscated the value of the employer securities in ERISA documents supplied to the participants. Among the information that an EIAP plan administrator must provide the participants annually are the plan's statement of assets and liabilities in comparative form with the previous plan year—which is also submitted to the DOL on Form 5500, a public document—and a quarterly statement reporting the total benefits accrued and the vested portion.[199] The EIAP plan administrator in the securities fraud situation supplied knowingly false information concerning the value of the employer securities to both the participants and the public.

The fact that the public market similarly assigned this false value to the publicly traded employer securities will not provide a defense for the failure of the EIAP plan administrator to properly value the employer securities for purposes of the EIAP's annual financial statements and quarterly participant statements. Such a distorted public market price would only prevent the EIAP plan administrator from committing a

197. *See* 26 U.S.C. § 401(a)(28) (2006) (stating that an ESOP must provide that a participant who has completed ten years of service and reached age fifty-five may diversify out of employer securities at the rate of 25% per year or 50% in the plan year in which the participant makes his last election); 26 U.S.C. § 401(a)(35) (stating that a defined contribution plan with employee contributions and employer match invested in publicly traded employer securities must allow the participant to diversify out of the employer securities immediately upon participation for employee contributions and after three years of service for employer contributions); *see also* 29 U.S.C. § 1054(j) (2006) (ERISA version).

198. *See* 26 U.S.C. § 409(h) (2006) (discussing, with respect to ESOPs, the right to demand employer securities (with exceptions), and if distributed in employer securities for which there is no market, those employer securities are subject to a put back to the corporation); *see* 26 U.S.C. § 401(a)(23) (subjecting stock bonus plans to 26 U.S.C. §409(h)).

199. *See* 29 U.S.C. § 1021(a) (2006) (stating that the administrator must provide annually to participants the information described in 29 U.S.C. §§ 1024(b)(3), 1025(a)); *id.* § 1024(b)(3)(A) (requiring a statement of plan assets and liabilities, also filed with DOL); *id.* § 1025(a) (requiring the provision of an individual statement of benefits accrued and vested on a quarterly basis); *id.* § 1026(a) (requiring a statement of plan assets and liabilities filed with DOL, a public document); 29 C.F.R. § 2520.103-1 (2013) (requiring an annual report to DOL filed on Form 5500).

prohibited transaction. ERISA provides that an ERISA fiduciary may not knowingly permit a transaction between the plan and a party in interest, including the sale or acquisition of employer securities.[200] A party in interest includes a plan fiduciary, the employer, and employees (participants), officers, and directors of the employer.[201] ERISA ordinarily exempts EIAPs from this prohibition provided that the transaction occurs for adequate consideration,[202] which for publicly traded employer securities is the prevailing price on the exchange on which the shares are registered.[203] So the inclusion in the documents supplied to the participants by the EIAP plan administrator of the distorted market price permitted by the EIAP plan administrator contains misrepresentations as to the value of the plan's assets and the participants' benefits accrued; these misrepresentations hinder the participants' ability to protect their own interests and give rise to the EIAP plan administrator's fiduciary duty to correct.

With respect to misrepresentations, EIAP participants have tried to impose ERISA fiduciary duty liability on plan administrators, unfortunately, for securities law misrepresentations rather than ERISA misrepresentations. Their misrepresentation claim, or duty of candor claim, founded on a Supreme Court opinion finding liability for plan fiduciaries who lie to participants in the exercise of their rights under ERISA,[204] springs from the duty of loyalty rather than the duty of prudence.[205] The misrepresentation usually appears in corporate filings with the SEC that EIAP plan administrators incorporate into, or make reference to in, the summary plan description that ERISA requires them

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200. *See* 29 U.S.C. § 1106(a)(1)(A) (2006) (discussing the sale of plan property to party in interest [ERISA §406]); *id.* § 1106(a)(1)(E) (discussing acquisition by employer securities in violation of ERISA § 407(a)); *id.* § 1107(a)(1) (discussing not acquiring or holding employer securities [ERISA § 407(a)]); *see also* 29 C.F.R. § 2550.408e(b) (2013) (stating that acquisition includes by employer contribution).

201. *See* 29 U.S.C. § 1002(14) (2006).

202. *See* 29 U.S.C. § 1107(b)(1) (stating that ERISA § 407(a) does not apply to EIAPs); *id.* § 1108(e) (stating that ERISA §§ 406-407 do not apply to EIAP if sale or acquisition is for adequate consideration).

203. *See* 29 U.S.C. § 1002(18) (ERISA § 3(18)); *see also* 29 C.F.R. § 2550.408e(d)(2) (defining adequate consideration under ERISA § 3(18)).

204. *See* Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) (holding that lying in order to save the employer money is inconsistent with ERISA's duty of loyalty to act solely in the interests of the participants, which requires fiduciaries to deal fairly and honestly with beneficiaries).

205. *See* RESTATEMENT (THIRD) OF TRUSTS § 78(3) (2007) ("Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly."); RESTATEMENT (SECOND) OF TRUSTS § 170(2) (1959) ("The trustee in dealing with the beneficiary . . . is under a duty to the beneficiary to deal fairly with him . . . .").

to deliver to the participants.[206] Since 1992, ERISA has required disclosure of certain additional information to participants for self-directed individual account plans holding employer securities, including some information from the SEC filings.[207] The SEC documents required by ERISA concern items sent by public corporations to shareholders,[208] and that concerns only the proxy information.[209] EIAP participants generally litigated over misrepresentations in the periodic reports filed with the SEC under the securities laws rather than the documents sent to shareholders as required by ERISA.

This claim generally failed because of the failure to plead that the plan administrator knew of the falsity,[210] because of the failure to plead the presence of "warning flags" that would trigger the plan administrator's investigation into the accuracy of the SEC filings,[211] or because the preparation of the SEC filings is a corporate duty, not an

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206. *See* 29 U.S.C. §§ 1021, 1022.

207. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(3) (regarding employer securities: description of procedures for purchase, holding, and sale and exercise of voting, and similar rights); *id* § 2550.404c-1(d)(2)(ii)(E)(4)(v) (regarding employer securities: if publicly traded and participant account has some shares, information given to shareholders); *see also* Final Regulation Regarding Participant Directed Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,906, 46,935 (1992) (adding rule 404c-1). In 2010, the DOL extended many of these same rights to all self-directed accounts, even those without employer securities. *See* 29 C.F.R. § 2550.404a-5(c)(1) (explaining how to give instruction, voting and tender, investment alternatives); *id.* § 2550.404a-5(c)(2) (administrative expenses); *id.* § 2550.404a-5(c)(3) (individual expenses); *id.* § 2550.404a-5(d) (discussing annual performance data over years, benchmarks, fees and expenses; special for employer securities); *id.* § 2550.404a-5(i)(1) (2013) (regarding employer securities: explains the importance of diversification and, if publicly traded, the return over years).

208. *See* 29 C.F.R. § 2550. 404c-1(d)(2)(ii)(E)(4)(v).

209. The proxy rules require public companies to provide shareholders with information. *See* 17 C.F.R. § 240.14a-3. (2013).

210. *See* Taveras v. UBS AG, 708 F.3d 436, 442 (2d Cir. 2013); Slaymon v. SLM Corp., 506 F. App'x 61, 63–64 (2d Cir. 2012); *In re* Citigroup ERISA Litig., 662 F.3d 128, 144-45 (2d Cir. 2011) (stating also that oral communications by non-fiduciaries are not actionable); Gearren v. McGraw-Hill Cos., 660 F.3d 605, 610 (2d Cir. 2011); Howell v. Motorola, Inc., 633 F.3d 552, 571 (7th Cir. 2011) (stating that negligently misrepresenting material in SEC filings does not breach ERISA's fiduciary responsibilities, as negligently performing duties is not actionable; not incorporated in summary plan description).

211. *See Citigroup*, 662 F.3d at 144-45 (stating also that independent investigations of SEC filings too burdensome); *accord* Quan v. Computer Scis. Corp., 623 F.3d 870, 886-87 (9th Cir. 2010) (finding that the alleged misrepresentations were not material, as there was not a substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to invest in the fund).

ERISA fiduciary duty.[212] The Sixth Circuit, in contrast, reasoned that a plan administrator, who is not required to incorporate SEC filings in the summary plan description, that nevertheless opts to incorporate that material into the summary plan description is serving in an ERISA fiduciary capacity through that incorporation.[213] One would assume that the significance of the SEC filings in an ERISA fiduciary breach lawsuit would have been as a defense to the breach of the fiduciary duty to disclose, by providing the counter that the fiduciaries did disclose the requisite information to the public, if they had. Perhaps these EIAP participants would have fared better if they had concentrated on the obvious misrepresentation with respect to the overvaluation of the employer securities in the documents that ERISA requires the plan administrator to deliver to the participants under the prudence duty for disclosure of information needed to protect participants' interests.

Post-*Moench* securities law development also reveals a Congressional desire similarly to correct incorrect financial data publicly dispersed by managements of public companies. The Sarbanes-Oxley Act established a whistle-blowing procedure. [214] Congress charged the audit committee of public companies to establish procedures to receive, retain, and treat complaints concerning accounting, internal accounting controls, or auditing matters and to permit employees to submit these

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212. *See Taveras*, 708 F.3d at 442; *Slaymon*, 506 F. App'x at 65; Fisher v. JP Morgan Chase & Co., 469 F. App'x 57, 60 (2d Cir. 2012); *Gearren*, 660 F.3d at 610; *accord* Kirschbaum v. Reliant Energy, 526 F.3d 243, 257 (5th Cir. 2008) (waiving claim that Form S-8 and section 10 prospectus provided participants to satisfy disclosure required for self-directed accounts); Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1287 (11th Cir. 2012) (discussing claim that Form S-8 and section 10 prospectus, with incorporation of the annual Form 10-K and quarterly Form 10-Q, were ERISA "fiduciary communications").

The Securities Act requires registration of securities. *See* 15 U.S.C. § 77e (2006). Corporations offering employer securities to their employees under an ERISA plan may use Form S-8 for that registration. *See* 17 C.F.R. §239.16b(a)(1) (2013). The Securities Act also requires a prospectus to accompany the sale, normally the first part of the registration statement. *See* 15 U.S.C. § 77j (2006); 17 C.F.R. § 230.428 (describing documents constituting the prospectus for Form S-8); *id.* § 239.16b (2013) (regarding Form S-8: the prospectus information requirements). The Exchange Act requires annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K within 4 days of the event, none of which need be delivered to shareholders. *See* 15 U.S.C. § 78m; 17 C.F.R. § 240.13a-1 (annual report); *id.* § 240.13a-13 (quarterly reports); *id.* § 240.13a-11 (current reports). Information from one form may be incorporated by reference in any other form. *See* 17 C.F.R. § 240.12b-23.

213. *See* Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 421-22 (6th Cir. 2012).

214. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301(4), 116 Stat. 745, 776 (adding 15 U.S.C. § 78j-1(m)(4) as section 10A to the Exchange Act).

complaints confidentially and anonymously.[215] The Sarbanes-Oxley Act also provided protection to whistle-blowers by preventing the discharge, demotion, suspension, threatening, and harassing of those who report to the federal regulatory bodies any violation of the SEC's rules.[216] Because of the lack of a payment incentive[217] and the narrowing of those protected by the DOL and the courts,[218] Congress added an incentive of ten to thirty percent of the recovered amount by the federal regulatory bodies in a successful prosecution payable to the whistle-blower and to cover employees of private subsidiaries of public companies.[219] So both ERISA, through fiduciary duty liability for failing to correctly disclose financial data to participants and the public, and the securities laws, through whistle-blowing, aim to ensure that the public has accurate financial information.

With respect to the omissions and the fiduciary duty to disclose, the Supreme Court has yet to make a pronouncement. In its one opinion concerning a duty to disclose under ERISA for misrepresentations under the duty of loyalty,[220] the Supreme Court specifically reserved for a future time the decision on whether ERISA's duty to disclose imposes a duty to inform, *sua sponte*, the omission situation.[221] Securities law, however, broadens this disclosure requirement under ERISA to the public for public corporations. The Supreme Court once authorized insider disclosure of negative information, when regulatory bodies had failed to act on such information, to selected members of the public, who are primarily analysts, to force the corporation's compliance with the securities laws and make a public disclosure of the material nonpublic information through the adverse impact on the incorrect securities price

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215. *See* 15 U.S.C. § 78j-1(m)(4) (2006).

216. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-04 (adding 18 U.S.C. § 1514A (2006)).

217. *See* S. REP. NO. 111-176, 2010 WL 1796592, at *110 (2010) (regarding the Dodd-Frank Act: testimony that bounty whistleblower systems are much more efficient that internal audits by regulatory bodies at detecting fraud, 54% versus 4% of detected fraud).

218. *See id.* (regarding the Dodd-Frank Act: clarifying subsidiaries and affiliates may not retaliate against whistleblowers); *see also In re* Johnson v. Siemens Bldg. Techs, Inc., Docket No. 2005-50x-015 (DOL Admin. Rev. Bd. Mar. 31, 2011), 2011 WL 1247202, at *8-9 (listing the various opinions covering employees of private subsidiaries of public companies and opinions rejecting such coverage); Dodd-Frank Act of 2010, Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (2010) (extending whistleblower protection to employees of privately held subsidiaries).

219. *See* Dodd-Frank Act of 2010, 15 U.S.C. §78u-6.

220. See *supra* note 204 for definitions of the duty of loyalty.

221. *See* Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) (reserving whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative or in response to employee inquiries).

by the trading of those selected members' clients, provided that the person disclosing received no pecuniary or personal benefit.[222] Based on this Supreme Court opinion, one commentator has advocated that EIAPs with self-directed accounts disclose only that further investment in employer securities is suspended without supplying a reason (which violates the blackout rules)[223] and that future company matches will be in cash as a solution to the directed EIAP trustee's choice to disclose or abstain, without public disclosure and permitting participant sales.[224]

Since 2000, the SEC has obviated most of these selective disclosure situations through Regulation F-D for fair disclosure.[225] The SEC disclosed its position on selective disclosure by directed EIAP trustees to participants, as would be mandated by ERISA's fiduciary duty to disclose to participants, when it simultaneously passed a regulation permitting a safe harbor from insider trading for pre-programmed trading. The SEC described situations for which the SEC designed the rule, including participants in stock bonus plans and 401(k) plans allowing purchase of employer securities (both a type of directed EIAP)[226] selling employer securities on a regular basis under oral or

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222. *See* Dirks v. SEC, 463 U.S. 646, 657–67, 667 n.27 (1983) (stating that selective disclosure is permitted when motivated to disclose the fraud through others' trading, as other disclosure efforts had failed); *see also* United States v. Chestman, 947 F.2d 551, 572 (2d Cir. 1991) (Winter, J., concurring and dissenting) (stating that case law establishes that some insider trading is legal).

223. *See supra* notes 172-83 and accompanying text. More likely, a suspension without the reason, effective immediately, would tip the participants and their friends to sell their other employer securities and possibly short borrowed employer securities. Such activity would force disclosure under the self-regulatory bodies' rules for disclosure on unusual market activity and price changes. *See supra* note 171.

224. *See* Shelby D. Green, *To Disclose or Not to Disclose? That is the Question for the Corporate Fiduciary Who Is Also a Pension Plan Fiduciary under ERISA: Resolving the Conflict of Duty*, 9 U. PA. J. LAB. & EMP. L. 831, 846 (2007) (considering only self-directed EIAPs); *id.* at 854 (treating the duty to disclose as matter of when rather than a matter of what facts); *id.* at 876–77 (discussing the partial selective disclosure to participants solution). This author mentions SEC's Regulation F-D but has no awareness of its application to the situation. *See id.* at 839 n.53, 876-77 (raising as a question whether his solution requires a public announcement of a change of investment policy and whether participants can sell their existing holdings); *see* 17 C.F.R. §§ 243.100-.103 (2013) (Regulation F-D). This author also mentions the Sarbanes-Oxley Act of 2002, but only the accounting board, financial certifications, and loan prohibitions parts, and not real time disclosure rules, blackout rules, or whistle-blowing aspects and their impact on EIAP trustee fiduciary duties. *See id.* at 832 n.7.

225. *See* Selective Disclosure and Insider Trading, Exchange Act Rel. No. 7787, 1999 WL 1217849, at *5–6 (Dec. 20, 1999) (explaining the approach of eliminating the fraud approach to the problem of Dirks and requiring full and fair disclosure from issuers as a matter of disclosure under the Exchange Act).

226. *See supra* notes 15–16, 22 and accompanying text.

written instructions or alternatively with plan administrators without insider knowledge determining the sale dates for such trades.[227] This comment of the SEC indicates that without this safe harbor, the SEC regards these transactions as violating the insider trading rules.[228]

To handle these EIAP situations, the SEC also adopted its fair disclosure rule concerning selective disclosure, providing for simultaneous disclosure to the public for intentional disclosure and prompt disclosure, within twenty-four hours or the commencement of the next day's trading on the New York Stock Exchange, for inadvertent disclosure.[229] The issuer need not make this disclosure to the public unless an issuer employee who regularly communicates with the media, analysts, or shareholders makes the selective disclosure.[230] The EIAP trustees for stock bonus plans and 401(k) plans regularly communicate with the participants, who are shareholders, through their investment instructions. This rule also applies to selective disclosures to persons holding the corporation's securities when it is reasonably foreseeable that that person will trade the employer securities on the basis of that selective disclosure.[231] Such would be the case for participants fearing collapse in the price of their employer securities. The fair disclosure rule also provides that its violation cannot be the basis of a Rule 10b-5 securities fraud action.[232] In drafting the rule, however, the SEC specifically left intact the Supreme Court's rule for disallowing insider selective disclosure of negative information to selected members of the public to force the corporation's public disclosure through the adverse impact on the incorrect securities price by the trading of those selected

227. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,729 (Aug. 24, 2000) (discussing the pre-programmed safe harbor under Rule 10b5-1(c)(1)(i)(A)(2) to (3), -1(c)(1)(i)(B)(3), and explaining that an employee could acquire employer securities through payroll deductions by providing oral instructions or by a written plan; alternatively, the date of the transaction could be controlled by the plan administrator, assuming that they are not aware of the material nonpublic information at the time of executing the transaction and the employee does not exercise influence over the timing of the transaction); *see also* 29 C.F.R. § 240.10b5-1(c)(i) (2013).

228. One commentator has so concluded. *See* Dana M. Muir & Cindy A. Schipani, *New Standards of Director Loyalty and Care in the Post-Enron Era: Are Some Shareholders More Equal than Others?*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 279, 285 (2005); *see also* Selective Disclosure and Insider Trading, 1999 WL 1217849, at *8 n.42 (stating that classical insiders, the issuer's officers, directors, and employees, are subject to the duties of trust and confidence and to insider trading liability if they trade or tip).

229. *See* 17 C.F.R. §§ 243.100, .101.

230. *See* 17 C.F.R. §§ 243.100(a), .101(c).

231. *See* 17 C.F.R. § 243.100(b)(1)(iv).

232. *See* 17 C.F.R. § 243.102.

members when the discloser received a pecuniary or personal benefit.[233] Since courts should interpret statutes to enforce both rather than use one to annihilate the other,[234] the obvious resolution requires disclosure to the public, a goal that serves both the securities laws to disclose material information to the trading public and ERISA's requirement to disclose to participants material information needed to protect participant benefits.

Unlike ERISA's fiduciary duty to act lawfully, the circuit courts have dealt with the duty to disclose to participants. Unfortunately, those circuit courts considering ERISA's *sua sponte* duty for disclosure to participants of information needed to protect their interests in the plans have yet to see the wisdom imposed by both ERISA and the securities laws. Instead, these circuit courts prefer to use securities law to destroy any obligations under ERISA. Most of the circuit courts[235] considering this duty to disclose[236] failed to discern the key distinction concerning the EIAP disclosure: whether the information disclosed relates to an outside investment about which the EIAP trustee possesses little information and little ability to gain anything more than public information or to the employer securities for which the EIAP trustee also serves in a management capacity and is likely to possess the requisite information needed for participants to protect their plan accounts but unknown to those participants. Seizing an opinion on guaranteed insurance contracts dealing with that outside investment unrelated to the employer[237] as

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233. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 ("[Liability] under rule 10b-5 may still exist if a selective disclosure is made in circumstances that meet the Dirks 'personal benefit' test . . . ."); *see also* SEC v. Stevens, Litigation Release No. 12813, 48 SEC Docket 739 (Mar. 19, 1991) (including consent decree of $126,455 for chief executive officer's disclosure to analysts provided to protect and enhance his professional reputation with those analysts after a quarter of negative earnings resulted in one analyst dropping coverage of the company and challenging the officer's presentation of financials).

234. *See* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143-44 (2001) (stating that where "two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); *accord* Branch v. Smith, 538 U.S. 254, 273 (2003).

235. One circuit court judge showed some discernment and found for ERISA's duty to disclose information needed for participants to protect themselves. *See In re* Citigroup ERISA Litig., 662 F.3d 128, 157-61 (2d Cir. 2011).

236. The early cases presented the issue as part of the duty of loyalty rather than prudence. *See Citigroup*, 662 F.3d at 142.

237. The opinion dealt with one of six investment options and not the investment option for employer securities. *See In re* Unisys Sav. Plan Litig., 173 F.3d 145, 146 (3d Cir. 1999), *cert. denied sub nom.*, Meinhardt v. Unisys Corp., 528 U.S. 950 (1999) (discussing EIAP with one investment option in guaranteed insurance contract backed by an insurance company unrelated to the employer); *id.* at 431 (discussing failure to provide disclosure about status of insurance company's condition and effect on investment

precedence, these circuit courts assumed that it also applied to cases in which the EIAP trustee has personal knowledge of the employer. They wrongly determined that there is no duty to disclose nonpublic information pertaining to a specific investment, namely employer securities,[238] because that is investment advice[239] and advising about the risk that comes from an undiversified investment subject to volatility is sufficient disclosure,[240] the two items that an EIAP trustee would disclose about an outside investment option. These participants did not sue their EIAP trustee for failure to provide investment advice and general risks, but for failing to disclose material nonpublic information they knew, and knew that the participants did not know, that would indicate the market price of the employer's securities did not reflect the correct price a fully informed market would place on the employer securities, which was information required by ERISA to be disclosed to participants.

To bolster their erroneous opinions, the circuit courts have raised several red herrings objecting to selective disclosure mandated by ERISA's duty to disclose: the placement of a requirement on trustees to guess whether adverse nonpublic information will affect the price;[241] the inability to contain the information, which would immediately become available to the market and destroy the benefit to the participants of that information;[242] and the exposure of ESOP trustees and EIAP participants to securities fraud violations as insiders and tippees.[243] These objections

option); *In re* Unisys Sav. Plan Litig., 74 F.3d 420, 441 (3d Cir.) (applying RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959)), *cert. denied*, 519 U.S. 810 (1996); *id.* at 442 (remanding to determine if what was said was sufficient or material to disclose risks attendant on investment option); *id.* at 443 ("[Unisys was not] obligated to give investment advice, to opine on [insurance company's] financial condition or to predict [insurance company's] eventual demise."); *id.* at 426 (listing the six investment options, only one of which was the employer securities option).

238. *See* Taveras v. UBS AG, 513 F. App'x 19, 23 (2d Cir. 2013); Slaymon v. SLM Corp., 506 F. App'x 61, 63–64 (2nd Cir. 2012); Fisher v. JP Morgan Chase & Co., 469 F. App'x. 57, 60 (2d Cir. 2012); *Citigroup*, 662 F.3d at 142-43; Gearren v. McGraw-Hill Cos., Inc., 660 F.3d 605, 610 (2d Cir. 2011).

239. ERISA's rules do provide that for self-directed individual accounts the trustee has no obligation to provide investment advice. *See* 29 C.F.R. § 2550.404c-1(c)(4) (2013).

240. *See* Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1284-85 (11th Cir. 2012); *Citigroup*, 662 F.3d at 142; Edgar v. Avaya, Inc., 503 F.3d 340, 350 (3d Cir. 2007).

241. *See Lanfear*, 679 F.3d at 1285.

242. *Edgar*, 503 F.3d at 350.

243. *See* White v. Marshall & Ilsley Corp., 714 F.3d 980, 982-83 (7th Cir. 2013); Quan v. Computer Scis. Corp., 623 F.3d 870, 881, 882 n.8 (9th Cir. 2010) (stating that divestment violates insider trading laws); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 256 (5th Cir. 2008); Rogers v. Baxter Int'l Inc., 521 F.3d 702, 706 (7th Cir. 2008); *Edgar*, 503 F.3d at 350. *But see* Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1098

are nonsense under the securities laws. Firstly, the timing of the disclosure would be the same as under the securities laws, if obeyed by management, for the corporation's timely SEC-required periodic reports, including the irregular Form 8-K for material developments. That timing would be known to the EIAP trustees as management employees along with the material nonpublic information. So the disclosure required by ERISA would be of the same material information and timing as that required by the securities laws. Secondly, the impact of the disclosure is the purpose of the disclosure to the participants and the public. Any absence of a benefit to the participants caused by the decline in their employer securities before they are able to unload those securities would have been caused by the EIAP trustees' breach of ERISA's fiduciary duty through their unlawful delay in releasing the disclosure to the public as required by the securities laws for which the EIAP trustee should be liable. Thirdly, tippee liability will not arise. Under the fair disclosure rules, the SEC requires simultaneous public disclosure.[244] The SEC's rules obligate the EIAP trustees, when complying with ERISA's duty to disclose information needed for participants to protect themselves, also to disclose that material nonpublic information to the public. Failure to comply will violate both ERISA and the securities laws, for which the EIAP trustees should be liable. Evidence of the breach of this ERISA fiduciary duty to disclose protective information should consist of the omitted information, its materiality, knowledge of it by the fiduciary, and the failure to timely disclose it to the participants.

C. Duty to Manage Risks (Not to Overpay)

Another aspect of the duty of prudence concerns managing the risks involved in the investment in employer securities by the EIAP. This duty to manage risk derives both from the trust law that the circuit courts favor and ERISA. Prudent investment requires exercise of caution to achieve preservation of capital and to secure a reasonable return.[245] Accomplishing this dual goal involves risks. Trust law divides these risks into two categories: one dealing with nonmarket risk, individual company risks, handled through diversification, and the other dealing

n.4 (9th Cir. 2004) (discussing a stock bonus plan and suggesting that the *Moench* presumption encourages such behavior). *See also* LaLonde v. Textron, Inc., 369 F.3d 1, 6 n.9 (1st Cir. 2004) (ESOP).

244. *See supra* notes 229-33 and accompanying text.

245. *See* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. e (2007) ("[T]his requirement of caution requires the trustee to invest with a view both to safety of the capital and to securing a reasonable return.").

with market risk, systemic risks compensated for by pricing in the marketplace.[246] The first category clearly does not apply to EIAPs since they have no requirement to diversify.[247] This category constitutes one of the items that ERISA shears from the duty of prudence as related to diversification.[248] The second category is part of the duty of prudence shorn of its diversification requirement. It requires addressing the appropriate degree of risk needed to achieve a specified level of return.[249] For EIAPs, that risky market consists solely of one stock, the employer securities. For the EIAP trustee in possession of material nonpublic derogatory information, it should be quite clear that the systemic risk for the market for the employer's securities is great, leading to the disaster to be avoided, collapse of the chosen market, upon any disclosure of that nonpublic information, including through leaks by other insiders or the congressionally encouraged whistle-blowers. In this situation, the EIAP trustee must not purchase employer securities for the EIAP or under any participant direction. The risk of systemic collapse is far greater than the potential for a return on that purchase. To do so would subject the EIAP trustee to liability for the loss, the amount of the overpayment, being the difference between the monies expended for that purchase and the true value of the employer securities when purchased.[250] Instead, the EIAP trustee must retain the funds to be invested in the short-term debt instruments as provided by most EIAPs while awaiting longer-term investment in employer securities.

Congress expressed similar concerns when it passed ERISA. It feared that ESOP trustees for public companies would time their purchases and sales to benefit the employer's efforts to improve the

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246. *See id.* at § 90 cmt. e(1) ("[I]t is useful to distinguish between diversifiable (or 'uncompensated') risk and market (or non-diversifiable) risk that is, in effect, compensated through pricing in the marketplace.").

247. *See supra* note 97 and accompanying text.

248. *See* 29 U.S.C. § 1104(a)(2) (2006) (stating that the diversification requirement and the prudence requirement (only to the extent that it requires diversification) do not apply to EIAPs purchasing employer securities).

249. *See* RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. e(1) (stating that systemic risk involves "addressing the appropriate degree of risk to be undertaken in pursuit of a higher or lower level of expected return from the trust portfolio").

250. *See id.* § 100 cmt. b (stating that the loss determination for imprudent investments under the standards of prudent investment is "the difference between (1) the value of those investments . . . at the time of surcharge and (2) the amount of funds expended in making the improper investments . . . ."); *see also id.* § 92 cmt. b (stating that trustee is liable for accepting an inadequate price when selling at a time that it is imprudent to do so); RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. e (1959) (regarding damages for purchase for more than value: "chargeable with the amount he paid in excess of its value").

public market, not the participants' interests to establish retirement monies through investment in the company.[251] By making sure the fiduciary duties, other than diversification, remained applicable to EIAP trustees, even when trading employer securities, Congress intended to prevent purchases to finance the employer to the detriment of participants.[252] When creating exceptions to the prohibited transaction rules for loans to purchase employer securities,[253] its dread dealt with overly high stock prices to siphon plan assets from participants to the employer's affiliates.[254]

Circuit court opinions dealing with overvalued employer securities generally involve nonpublic corporations intermingled with breaches of the duty of loyalty.[255] However, a few deal with public companies.[256] The

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251. S. REP. NO. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4983 (discussing exclusive benefit rule).

> [I]f the trust is permitted to invest in securities of the employer, the fiduciary may well be subject to great pressure to time the purchases and sales so as to improve the market in those securities, whether or not the interest of protecting retirement benefits of plan participants may be adversely affected.

Id.

252. *See* H.R. REP. NO. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5100.

> [W]hile a plan may be able to acquire employer securities or real property under the employer securities rules, the acquisition must be for the exclusive benefit of participants and beneficiaries. Consequently, if the real property is acquired primarily to finance the employer, this would not meet the exclusive benefit requirements.

Id.

253. *See* 29 U.S.C. § 1106(a) (prohibiting a transaction between the plan and a party-in-interest); *id.* § 1108(b)(3) (stating the statutory exceptions to the prohibited transaction rules for loans to purchase employer securities).

254. *See* H.R. REP. NO. 93-1280 (discussing exemption from prohibited transactions for loans: "[T]he purchase price of the stock from the party-in-interest should not be too high, so that plan assets might be drained off.").

255. *See* Chao v. Hall Holding Co., Inc., 285 F.3d 415, 431 (6th Cir. 2002) (holding that ESOP trustees breached prudence duty by not providing appraiser necessary information and assuming that subsidiary had same value as parent, resulting in overpayment for employer securities); Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992) (finding no prohibited transaction); *id.* at 671 (finding that ESOP trustees breached exclusive benefit rule and prudence when paying too much for acquisition of employer securities, sold for less than its price in contemporaneous transactions and sold before substantial dividends paid); Donovan v. Cunningham, 716 F.2d 1455, 1460 (5th Cir. 1983) (finding that ESOP trustees breached fiduciary duties by failing to follow procedures to determine the fair market value of the shares and causing the plan to pay more than adequate consideration); Eaves v. Penn, 587 F.2d 453, 456, 462 (10th Cir. 1978) (finding that trustee used converted profit-sharing plan's assets in ESOP to purchase stock at over fair value and take over company, breaching exclusive benefit and prudence duties); *see also* Sommers Drug Stores Co. Emp. Profit Sharing Trust v.

circuit courts generally stumble on the issue for public companies by an inability to fathom the correct behavior for the EIAP trustee to disclose. They focus either on divestment, concluding that the divestment itself is insider trading prohibited by the securities laws and so no breach of duty occurred by refusing to divest,[257] or on suspension of the option for individually directed accounts, determining that the suspension is inappropriate since the participants can observe an efficient public market and act upon it themselves.[258] The Department of Labor is under no such illusions.[259] These courts should have focused on the securities laws' requirements to disclose timely material nonpublic information to the public.[260] Without that disclosure the "efficient market" is distorted. The fiduciary liability arises from the imprudent practice of knowingly paying more for employer securities than the fiduciary would have, had it or the employer timely disclosed the material nonpublic information. Evidence of the breach of this ERISA fiduciary duty to manage risks should deal with the presence of "red flags" [261] indicating the risk that was either known or should have been known, the failure to analyze

Corrigan, 883 F.2d 345, 350, 352 (5th Cir. 1989) (regarding plan that had 20% of assets in employer securities: breached fiduciary duty by selling employer shares at less than fair market value).

256. *See* White v. Marshall & Ilsley Corp., 740 F.3d 980, 987-90 (7th Cir. 2013) (finding it imprudent not to remove option and using *Moench* presumption to dismiss lawsuit); Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1278 (11th Cir. 2012) (holding that it is imprudent to continue to offer overpriced employer securities); *id.* at 1282 (using *Moench* presumption to dismiss lawsuit); Harzewski v. Guidant Corp., 489 F.3d 799, 807 (7th Cir. 2007) (allowing breach of duty of loyalty action to continue when ESOP trustee knew employer securities were overvalued but took no steps to protect participants; hinting that if divestment violates insider trading rules, there is no breach of duty of loyalty).

257. *See Harzewski*, 489 F.3d at 807.

258. *See White*, 740 F.3d at 992; *Lanfear*, 679 F.3d at 1282 (holding stock fluctuations insufficient to establish *Moench* abuse of discretion). It is ludicrous to expect participants to discern errors in the inefficient, distorted market when the Wall Street professional investors cannot and to also use *Moench* to protect the perpetrators of that distorting fraud.

259. *See* Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellants and Requesting Affirmance in Part and Reversal in Part, White v. Marshall & Isley Corp., 714 F.3d 980 (7th Cir. 2013) (No. 11-2660), 2012 WL 2330411, at *13 ("[E]very time the plan expended contributions or other assets on the stock, it received less in exchange than it should have for what it expended. The purchase of even a single share in such circumstances is imprudent.").

260. *See supra* notes 164-71 (real time disclosure), 172-83 (blackout rules), 225-34 (fair disclosure) and accompanying text.

261. *See* Quan v. Computer Scis. Corp., 623 F.3d 870, 885 (9th Cir. 2010); Pugh v. Tribune Co., 521 F.3d 686, 700 (7th Cir. 2008).

them properly, and the failure to respond appropriately, namely, by disclosing the situation to the public.

D. Duty to Investigate and Monitor Investments

In addition to the duties to disclose and manage risks, the prudence rule of trust law also encompasses the duty to investigate the soundness of investments in employer securities and to monitor those investments.[262] The Department of Labor has concluded similarly for ERISA. Besides the enumerated statutory duties, Congress directed the DOL to prescribe rules it finds necessary or appropriate to carry out the provisions of ERISA.[263] For those fiduciaries charged with investing employee plan funds, the plan trustee, the DOL's rule establishes a prudence standard requiring the plan trustee to give appropriate consideration to the facts and circumstances that the plan trustee knows or should know are relevant to the particular investment course of action and act accordingly:

> (1) With regard to an investment...the requirements of section 404(a)(1)(B) [the prudence standard]...are satisfied if the fiduciary:
>
> > (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role other investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
> >
> > (ii) Has acted accordingly.

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262. *See* RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b (2007). The text states the following on the duty of prudence:

> The duty of *care* requires the trustee to exercise reasonable effort . . . in monitoring the trust situation . . . . This will ordinarily involve investigation appropriate to the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries.

Id.

263. *See* 29 U.S.C. § 1135 (2006).

(2)..."[A]ppropriate consideration" shall include...

> (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio...to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain...associated with the investment or investment course of action, and
>
> (ii) Consideration of the following factors as they relate to such portion of the portfolio:
>
> > (A) The composition of the portfolio with regard to diversification;
> >
> > (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> >
> > (C) The projected return of the portfolio relative to the funding objectives of the plan.[264]

The DOL indicated in the preamble to its rule on self-directed investments that ERISA trustees remain liable for the duty to monitor on an on-going basis the advisability of the selected investment options.[265]

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264. 29 C.F.R. § 2550.404a-1(b)(1) to (2) (2013). The DOL does have another rule for participant-beneficiary investment directed accounts, requiring disclosure of fees, investment options, and past performance. *See* 29 C.F.R. § 2550.404a-5.

265. *See* Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,906, 44,922 (Oct. 13, 1992).

> [T]he act of designating investment alternatives . . . is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives . . . and the ongoing determination that such alternatives . . . remain suitable and prudent investment alternatives for the plan.

Id. See also id. at 46,924 n.27, stating,

> [T]he act of limiting or designating investment options which are intended to constitute all or part of the investment universe . . . is a fiduciary function . . . . [T]he plan fiduciary has a fiduciary obligation to prudently select such vehicles, as well as a residual fiduciary obligation to periodically evaluate the performance of such vehicles to determine, based on that evaluation, whether the vehicles should continue to be available as participant investment options.

See also 29 C.F.R. § 2550.404c-1(b)(2) (stating the rule for the preamble and delineating what constitutes participant control). *But see* Langbecker v. Elec. Data Sys. Corp., 476

Consequently, participants in the ERISA lawsuit for breach of fiduciary duty for securities fraud by EIAP trustees have alleged as the fiduciary breach the failure to investigate.[266]

But the real issue lies with whether ERISA has relieved EIAP trustees from this duty to investigate and monitor investments in employer securities since ERISA exempts them from ERISA's diversification requirement.[267] The purpose of the investigation and monitoring should determine the issue. Trust law suggests the purpose is for diversification.[268] Similarly, the DOL's opinion letters suggest the purpose is for diversification.[269] The Supreme Court has long followed a policy of according considerable weight to an executive department's rules construing a statute that it is entrusted to administer provided that they are reasonable,[270] but for rulings, interpretations, opinions, and amicus briefs, only if they are thorough, possess a valid reasoning, and are consistent with earlier rulings.[271] And the DOL's opinion letters do not satisfy this standard since they are contrary to ERISA's diversification exemption. But the DOL suggests in its field manual that an ERISA-directed trustee has a duty to question an investment direction if it has material nonpublic information relating to the public company, not necessarily the employer, that is the subject of the investment

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F.3d 299, 310 (5th Cir. 2007) (considering a class certification and refusing to recognize the residual duty of prudence of the preamble).

266. *See* Brief for Appellant at 36, Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) (No. 94-5637), 1994 WL 16012392; Ward v. Avaya, 299 F. App'x 196, 197, 200 (3d Cir. 2008); Edgar v. Avaya, Inc., 503 F.3d 340 (3d Cir. 2007); DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 420-21 (4th Cir. 2007); Fisch v. Suntrust Banks, Inc., 511 F. App'x 906 (11th Cir. 2013); Quan v. Computer Scis. Corp., 623 F.3d 870, 885 (9th Cir. 2010); *In re* Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 563 n.64 (S.D. Tex. 2003); *In re* WorldCom, Inc., 263 F. Supp. 2d 745, 762 (S.D.N.Y. 2003).

267. *See* 29 U.S.C. § 1107(d)(6) (2006).

268. *See* RESTATEMENT (THIRD) OF TRUSTS §90 cmt. e (1) (2007) (stating that for investment risk management, "[c]hanges in a company's circumstances . . . justify the selling and buying of properties as an aspect of a prudent plan of asset allocation and diversification . . . . This is consistent with the trustee's ongoing duty to monitor investments and to make portfolio adjustments if and as appropriate").

269. *See* Dep't of Labor, Op. Ltr. No. 90-05A, 1990 WL 172964, at *3 (Mar. 29, 1990) (finding ESOP fiduciaries subject to loyalty and prudence duties when determining the portion of assets devoted to employer securities); Dep't of Labor, Op. Ltr. No. 83-6A, 1983 WL 22495, at *2 (Jan. 24, 1983) (finding ESOP fiduciaries subject to loyalty and prudence duties, which may require a smaller holding of employer securities than required by plan provision for at least 50%).

270. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

271. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

direction.[272] And some circuit courts have hinted at a duty to investigate the prudence of a continued investment in employer securities in the presence of "red flags" of misconduct.[273] One circuit court judge, now a Justice on the Supreme Court, sees this fiduciary duty as so intertwined with the duty to manage risks, providing merely what the fiduciary should have known, that the only damages from breach of this duty would be recovery of any investigative fees paid for services not rendered to the plan.[274] Presumably, the plan could recover the investment loss as resulting from the overpayment for failing to envision the systemic risk, a breach of the fiduciary duty not to overpay.

Just as ERISA's diversification exemption shears ERISA's duty of prudence of the duty to manage risk related to market risks cured by diversification (but retains systemic risks related to employer securities), the duty to investigate and monitor is similarly sheared of its diversification aspects, leaving only the impetus to uncover fraud with respect to the valuation of the employer securities. Evidence of the breach of this ERISA fiduciary duty to investigate and monitor

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272. *See* DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., FIELD ASSISTANCE BULLETIN 2004-03 (Dep't of Labor Dec. 17, 2004), *available at* http://www.dol.gov/ebsa/regs/fab_2004-3.html.

> For example, if a directed trustee has nonpublic information indicating that a company's public financial statements contain material misrepresentations that significantly inflate the company's earnings, the trustee could not simply follow a direction to purchase that company's stock at an artificially inflated price.
>
> . . . [If] the individuals responsible for the directed trustee services have actual knowledge of material nonpublic information, the directed trustee, prior to following a direction that would be affected by such information, has a duty . . . to inquire about the named fiduciary's knowledge and consideration of the information with respect to the direction. Similarly, if the directed trustee performs an internal analysis in which it concludes that the company's current financial statements are materially inaccurate, the directed trustee would have an obligation to disclose this analysis to the named fiduciary before making a determination whether to follow a direction to purchase the company's security.

Id. 29 U.S.C. §1103(a)(1) (2006) (directed trustee under direction of non-trustee fiduciary).

273. *See* Quan v. Computer Scis. Corp., 623 F.3d 870, 885 (9th Cir. 2010); Pugh v. Tribune Co., 521 F.3d 686, 700 (7th Cir. 2008). For directed trustees, see *In re* Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 601 (S.D. Tex. 2003). *But see* Summers v. State St. Bank & Trust Co., 453 F.3d 404, 408 (7th Cir. 2006) (Posner, J.) (stating that it is hubris for directed trustee to think it could predict the future more accurately than the market and preposterous for the named fiduciary to challenge the market's valuation).

274. *See* Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 961-62 (D.C. Cir. 1985) (Scalia, J., concurring & dissenting).

investments in employer securities should resemble the ERISA fiduciary duty to manage risks, except on an ongoing basis, leading to liability in the presence of "red flags" indicating changed circumstances either known or should have known, the failure to analyze them properly, and the failure to respond appropriately, namely, disclose the situation to the public.

E. Aiders and Abettors

ERISA has two methods to find aiders and abettors of the fiduciary breach liable. Both require a primary violator. ERISA specifically provides for co-fiduciary liability, meaning liability for the fiduciary that participates in or conceals a breach of fiduciary duty committed by another fiduciary, facilitates that breach by its own breach, or fails to take appropriate steps to correct that breach.[275] Consequently, participants have sued the wealthier fiduciaries in the securities fraud situation for co-fiduciary liability.[276] Besides this statutory aiding and abetting liability, the DOL by rule has provided another liability by establishing a duty, on the part of those appointing other fiduciaries, to monitor the performance of those appointees.[277] Participant-beneficiaries have used this monitoring duty to charge the wealthier fiduciaries, typically the employer's directors and officers, with liability.[278]

IV. CONCLUSION

ERISA imposes a review rule for courts to use in reviewing EIAP trustee actions when those trustees possess material nonpublic information about the value of employer securities. That statutory review rule calls for a duty of prudence shorn of traditional trust law's diversification requirement. That duty of prudence clearly includes the duty to obey the securities laws. In the twentieth century, that would

275. *See* 29 U.S.C. § 1105(b)(1)(B).

276. *See In re* Citigroup ERISA Litig., 662 F.3d 128, 134 (2d Cir. 2011); Edgar v. Avaya, Inc., 503 F.3d 340 (3d Cir. 2007); Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 419 (6th Cir. 2012).

277. *See* 29 C.F.R. § 2509.75-8, at D-4 (2013).

278. *See Citigroup*, 662 F.3d at 134; Taveras v. UBS AG, 708 F.3d 436, 440-441 (2d Cir. 2013); Gearren v. McGraw-Hill Cos., 660 F.3d 605, 609 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 476 (2012); Fisher v. JP Morgan Chase & Co., 469 F. App'x 57, 60 (2d Cir. 2012); *In re* Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233 (3d Cir. 2005); Ward v. Avaya, 299 F. App'x 196, 197 (3d Cir. 2008); *Edgar*, 503 F.3d 340; *Dudenhoefer*, 692 F.3d at 419; White v. Marshall & Isley Corp., 714 F.3d 980 994–98 (7th Cir. 2013); *Quan*, 623 F.3d 874-76 (9th Cir. 2010); *In re* SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365, 1368-69 (N.D. Ga. 2010).

have meant disclosing that known material nonpublic information to the public or abstaining from acquiring or selling employer securities. But due to a few notorious securities fraud situations impacting EIAPs at the turn of the century,[279] Congress changed the securities law to (1) provide for real time disclosure to the public of key events, namely those events likely involved in a securities fraud, and (2) blackout rules, similarly requiring disclosure to the public for an EIAP trading suspension. Twenty-first century securities law now essentially provides for disclosure and forecloses the abstention option. That duty of prudence also requires disclosure of known material nonpublic information to participants needed for them to protect their EIAP plan interests. Twentieth century securities law may have permitted this selective disclosure of this material nonpublic information and its resulting adverse, but correcting, impact on the pricing of the employer securities. However, the SEC, through its fair disclosure rules, now requires disclosure to the public for any selective disclosure. Similarly, Congress has encouraged the disclosure of this same information by providing the SEC with an employee whistle-blowing program, including bounties for the whistle-blowers. The clear trend is to disclose the known material nonpublic information, not abstain from trading. This has the added benefit of protecting the public as well as participants.

ERISA treats the duty of prudence and the duty of diversification as two separate duties, unlike traditional trust law that subsumes diversification within the duty of prudence. ERISA exempts EIAP trustees from the duty to diversify. Consequently, EIAP trustees need not concern themselves with those parts of the duty of prudence under traditional trust law dealing with diversification. This duty of prudence shorn of its diversification aspect includes the systemic risk portion of the duty to manage risks. EIAP trustees, desirous of non-disclosure, still need to concern themselves with the potential for a return on the employer securities and thereby not overpay for these employer securities. Potential damages stemming from the overpayment, the difference between the overpayment and the true value,[280] should spur the EIAP trustees to advocate for disclosure, either under the real time disclosure rules or the blackout rules, to bring the open market price down to its true level. Similarly, the duty of prudence shorn of its

279. *See, e.g.*, *In re* Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511 (S.D. Tex. 2003); *In re* WorldCom, Inc., 263 F. Supp. 2d 745 (S.D.N.Y. 2003).

280. Securities law handles this measure as the difference between "the purchase price . . . and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." *See* 15 U.S.C. § 78u-4(e)(1) (2006).

diversification aspect also deals with the ongoing duty to investigate and monitor, not for the purpose of diversification, but to determine the systemic risk of investing in employer securities so as not to overpay.

The review standard imposed by this shorn duty of prudence is not one of deference. There is no presumption of correctness for the EIAP trustee since there is no offsetting ERISA policy as is the case for the plan administrator when determining participant benefit claims, such as the ERISA apparatus for plan administrator review of benefit denials.[281] The method to minimize the standard's impact is to appoint outside, independent EIAP trustees that lack knowledge of the securities fraud.[282] ERISA permits employee fiduciaries not to encourage inside fiduciaries, but because Congress was aware that companies had this practice[283] and company support was needed for passage. Consequently, there is no reason to impose[284] the *Moench* presumption as a judicial version for ERISA of the securities laws' congressionally imposed Private Securities Litigation Reform Act of 1995[285] with its anti-discovery rule and strong inference of scienter and loss causation requirements to deter class action extortion.[286]

The offense for EIAP trustees is paying too much for acquired employer securities, not failing to diversify. This is where the *Moench* presumption errs. It has resurrected a duty to diversify for EIAP trustees.

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281. *See, e.g.*, Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985).

> While the [arbitrary and capricious] standard is perhaps more commonly associated with appellate court review of administrative findings, deference is likewise due when a district court reviews the action of a private plan trustee. Here, as in other contexts, the standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional.

Id. See also 29 U.S.C. § 1133 (2006) (providing ERISA's provision setting up plan administrator review of claims and denials); 29 C.F.R. §2560.503-1 (2013) (providing DOL's corresponding rule on plan administrator review).

282. *See* DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 413 (4th Cir. 2007)).

283. *See* S. REP. NO. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4985; *see also* 29 U.S.C. § 1138(c)(3) (2006) (exempting from the prohibited transactions rules dual service by the employer's employees).

284. *See* Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?*, 26 HOFSTRA LAB. & EMP. L.J. 497, 508 (2009) (arguing that filing ERISA lawsuit may allow circumvention of the securities law discovery safeguards); *id.* at 537-38 (calling for legislative and regulatory action to end perceived abusive ERISA lawsuits, much as Congress did for the securities fraud lawsuits using class action status to impose a lucrative settlement).

285. *See* Pub. L. No. 104-67, 109 Stat 737 (1995).

286. *See generally* George Lee Flint, Jr., *Securities Regulation: Annual Survey of Texas Law*, 64 SMU L. REV. 535, 550, 550 n.105 (2011).

And to the extent that *Moench* diversification calls for divestment,[287] it would violate the securities laws. ERISA has no requirement for EIAPs to diversify—ever. Even in bankruptcy, the dire circumstances of the *Moench* rebuttal, the employer securities have some value, especially in a reorganization, albeit not much. It is the ability of some employer securities to recover in price even after suffering securities fraud by management, called price fluctuations by some circuit court judges, that leaves them uneasy about permitting a breach of fiduciary lawsuit for overpayment.[288] But in the twenty-first century when the DOL concerns itself with the long-term negative impact on retirement monies of excessive small percentage annual fees charged by investment advisors;[289] perhaps the circuit courts should give more attention to the far greater impact on those retirement monies caused by management securities fraud resulting in acquisition of far fewer employer securities for the participant than would have occurred had the pricing reflected the true value of those employer securities. Similarly, perhaps the DOL, through its rule-making power, should make clear the requirements of the duty of prudence shorn of any diversification requirement rather than confine its efforts to writing amicus briefs ignored by the circuit courts. The battle is between American citizens desirous of a retirement sometime before they die and the securities fraudsters. The SEC has proven inefficient to stop such fraud;[290] consequently, courts should

287. *See* Gearren v. McGraw-Hill Cos., 660 F.3d 605, 610 (2d Cir. 2011).

288. *See* White v. Marshall & Ilsley Corp., 714 F.3d 980, 992 (7th Cir. 2013); Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1282 (11th Cir. 2012). Securities law is not so squeamish concerning the damage calculation. *See* 15 U.S.C. § 78u-4(e)(1) (2006) (stating that damages are the difference between the purchase price "and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market").

289. *See* Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910 (Dep't of Labor Oct. 20, 2012) (adding disclosure regulation for fee and expense structures of service providers to individually directed accounts); *see also* 29 C.F.R. § 2550.404a-5 (2013) (the rule).

290. The author once represented and did the securities law work (private placements, registrations under the Securities Act, and periodic reports under the Exchange Act) for a company controlled by one of these fraudsters. *See* Fine v. Am. Solar King Corp., 919 F.2d 290, 293-95 (5th Cir. 1990) (demonstrating a securities fraud claim against corporation, corporate officers (including Brian D. Pardo), and accounting firm for inflating earnings); *see also* Final Judgment of Permanent Injunction Against ASK Corporation and Brian Pardo, SEC News Digest 91-14, 1991 WL 77075 (Jan. 22, 1991). This fraudster did not stop with this corporation. *See* SEC v. Life Partners, Inc., 87 F.3d 536, 537-38 (5th Cir. 1996) (discussing Brian D. Pardo's scheme of selling interests in insurance contracts of AIDS victims with unfavorable discounts); Rob Wells, *House GOP Candidate Questioned about $3 Million FDIC Claim*, ASSOCIATED PRESS (Feb. 15,

recognize the ERISA action for breach of fiduciary duty. The EIAP fiduciary that allows the purchase of employer securities by or for participants at prices that the EIAP fiduciary knew or should have known were far greater than the true value should be liable under ERISA for the loss ultimately caused by that overpayment.

1996), http://www.apnewsarchive.com/1996/House-GOP-Candidate-Questioned-About-$3-Million-FDIC-Claim/id-fc696c06d79a3ec3543fc3e36a9e9b02; SEC v. Life Partners Holdings, Inc., Brian D. Pardo, R. Scott Peden and David M. Martin, SEC News Digest 2012-2, 2012 WL 12723 (Jan. 4, 2012).