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Concluding Remarks

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Anniversaries are often, and should be, times of reflection. That is especially true in an area like pensions and employee benefits, which, as Professor Getman and others have suggested, is an area in the process of change. As we approach the twentieth anniversary of ERISA, there is much to reflect on, both in terms of the magnitude of what the statute has accomplished and the magnitude of what needs to be improved.

ERISA has given us vesting and benefit accrual rules[1] designed to prevent forfeiture of pension benefits (which, as Michael Sirkin pointed out,[2] was one of the driving forces behind the passage of ERISA) and minimum funding standards designed to ensure that when employees retire they receive their promised pension benefit.[3] ERISA has imposed high standards of behavior on fiduciaries of pension plan assets.[4] The statute has also established criteria aimed at insuring that nonhighly compensated employees are not excluded from benefitting from pension arrangements.[5] Finally, and by no means least in importance, ERISA is responsible for instituting a system of termination insurance that insures that even when employers run into financial difficulties, there will be funds available to pay at least some amount of pension benefits to employees.[6] For all of that, we should applaud the lawmakers who enacted ERISA.

Also, as the remarks of several of our panelists have noted, much has been done since the passage of ERISA to improve the protections that ERISA put into place. The Supreme Court has gone far in protecting pension benefits (at least with respect to benefits under plans subject to the anti-alienation provision of ERISA and the Internal Revenue Code) in the case of individual

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1 ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1988 & Supp. IV 1992).

2 *See* Michael Sirkin, *Twenty Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 323 (1994).

3 ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086 (1988 & Supp. IV 1992).

4 ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1988 & Supp. IV 1992).

5 I.R.C. § 401(a)(4) (1992).

6 ERISA § 4047, 29 U.S.C. § 1347 (1988).

bankruptcy, as Ms. Cullinan Ray's discussion of *Patterson v. Shumate*[7] makes clear.[8] On the investment side, the new SEC proxy rules[9] have given tremendously increased power and ability to participate in the proxy process to large institutional investors such as pension plans.[10] Large pension funds are starting to actively flex their muscles in this regard.

Having said that, there is clearly far more that needs to be done. Allow me just to mention a few areas.

Possible PBGC reform remains a very important issue. Despite rules requiring adequate levels of funding, there is now approximately $51 billion in underfunding of pension plans, which could carry potential taxpayer liabilities of $13 billion by virtue of PBGC insurance coverage.[11] While one may quibble about whether the comparisons that have been made to the S&L crisis are warranted, it is hard to disagree with the notion that if something is not done soon, we will be confronting an emergency.

More than one panelist has discussed the administrative complexity and burdensome nature of much of ERISA.[12] The rules and regulations that we have put into place, designed to help and prevent plan discrimination (in benefits and coverage) in favor of highly compensated employees, have become so complex that it is not clear anyone benefits from them, except lawyers who bill endless hours in revising plans to comply with the rules and in attempting to explain the changes to their clients. Compliance is so costly and the rules so difficult to wade through that, rather than improving things for lower compensated employees, there is evidence that a number of employers are shying away from adopting new defined-benefit pension plans and shifting away from defined-benefit plans to defined-contribution plans. Furthermore, as Mr. Bidjarano illustrated,[13] other employers just spend more energy

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7 112 S. Ct. 2242 (1992).

8 *See* Jeanne Cullinan Ray, *Protecting Pension Assets in Personal Bankruptcy*, 68 ST. JOHN'S L. REV. 409, 412-417 (1994).

9 Regulation of Communications Among Shareholders, Exchange Act Release No. 34-31326, 1992 LEXIS 2470 (Oct. 16, 1992); *see* 17 C.F.R. § 240.14a (1992).

10 *See* David George Ball, *Revolution in the Board Room*, 68 ST. JOHN'S L. REV. 329 (1994).

11 *Pension Reform Will Follow Health Reform, Rostenkowski Says*, 20 Pens. Rep. (BNA) No. 40, at 2175 (Oct. 11, 1993).

12 *E.g.*, Barry Bidjarano, *Coping with the Reduced Limitation on "Compensation" Used Under Qualified Retirement Plans*, 68 ST. JOHN'S L. REV. 357 (1994).

13 *Id.*

coming up with crafty ways to get their highly compensated employees exactly the benefit they want them to get.

ERISA was passed with a broad preemption provision designed to prevent states from interfering with the protections afforded by the federal statute.[14] Yet not only are interpretations of the preëmption provision all over the lot, causing tremendous confusion about what the outer limits of preemption are, but many state attempts to protect plan beneficiaries generally and to make improvements particularly in the area of medical care have been frustrated. This symposium dealt with two particular examples of preemption difficulties. As Representative Engel discussed,[15] the exception from ERISA preemption for state insurance law[16] has the strange result that state insurance law is able to regulate, to some degree, insured medical plans, whereas there is no regulation—federal or state—of self-insured plans. As was also revealed, there are situations where the preemption provision results in no state remedy for a wrong, even where no remedy is provided by ERISA.

Finally, ERISA imposes the highest of standards on the behavior of pension plan fiduciaries, charging them with acting solely in the interest of plan participants and beneficiaries and prohibiting them from self-dealing and from permitting a variety of transactions between plans and parties and interests to those plans. Yet the *Mertens v. Hewitt*[17] case, decided by the Supreme Court during the summer of 1993, bars the recovery of money damages against nonfiduciaries who knowingly participate in a fiduciary's breach. Dictum in that decision suggests that there may be no liability at all under the statute against parties who are not fiduciaries to pension plans. At least one circuit court has so decided in the wake of *Mertens*.[18]

All of these are problems that require some Congressional action to address. None of them can be solved simply by statutory interpretation. Consider the four areas just mentioned as requiring some reform.

With respect to plan underfunding, the length of time employers are given by statute to amortize liabilities created by giving

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[14] § 514(a), 29 U.S.C. § 1144(a) (1988).

[15] Eliot L. Engel, *Remarks*, 68 St. John's L. Rev. 343, 346-47 (1994).

[16] § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988).

[17] 113 S. Ct. 2063 (1993).

[18] *See* Schloegel v. Boswell, 994 F.2d 266, 271 (5th Cir. 1993).

past service credit[19] (in the case of a new plan) and by amendments to increase benefits or by shortfalls resulting from changes in actuarial assumptions[20] (in the case of an existing plan) contributes to underfunding, as do waivers from applicable funding rules that the statute allows to be granted.[21]

The nondiscrimination rules speak for themselves. Statutory and regulatory interpretation probably could not make the matter any worse, but certainly will not help.

With respect to preemption, no amount of statutory interpretation can fix the fundamental problem of the way section 514 of ERISA is drafted. Wherever one falls in terms of the alternatives for reform that were discussed—whether one favors content based preemption or reform of particular issues—something must be done to the "relate to" standard for preemption.

Finally, although I have had heated arguments with one of my former colleagues at Cleary, Gottlieb on this subject, the better side of the argument is that *Mertens* in its dicta is correct as a matter of statutory interpretation. That is, the remedies set out in the statute are the exclusive ones and the statute on its face provides no cause of action against nonfiduciaries. Yet, it will not always be possible to adequately compensate a plan for its losses without holding a nonfiduciary who participated in the breach to account.[22]

There is some indication, certainly, that reform in certain areas will be forthcoming. Although we are unlikely to see any real pension reform until after the medical care bill is behind us, there is clearly significant support for pension reform. Such reforms may not solve all of the problems in ERISA, but real improvement may be upon us soon. It will be interesting to see how far we have come when we reconvene to celebrate another ERISA anniversary.

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19 *See* 29 U.S.C. § 1082(b) (1985).

20 *Id.*

21 *Id.*

22 This is especially true if the dissent in *Mertens* is correctly reasoned that State law actions against nonfiduciaries are preempted by ERISA. *See* 113 S. Ct. at 2079 n.2 (White, J., dissenting).