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Note

Should Federal Regulation Eliminate Defenses to Criminal Prosecution? The Viability of Implied Authorization and Participant Benefit Defenses When Read in Light of ERISA

Christopher Stall*

William Mett founded Center Art Galleries (CAG) in 1973, serving as the gallery's president and sole shareholder.¹ In 1977, CAG established two employee pension plans, which were funded by company contributions² and were subject to regulation under the Employee Retirement Income Security Act of 1974 (ERISA).³ Mett and CAG's vice president, Marvin Wiseman,⁴ served as trustees for the plans, and both officers met the definition of a plan fiduciary under ERISA.⁵ After CAG suffered several major financial setbacks,⁶ Mett and Wiseman

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1. See *United States v. Mett*, 178 F.3d 1058, 1060 (9th Cir. 1999).

2. See *id.*

3. Both plans were defined benefit plans, subject to the provisions of the ERISA, 29 U.S.C. §§ 1001-1046 (1994 & Supp. III 1997). See *Mett*, 178 F.3d at 1060. Passed in 1974, ERISA created a variety of rights, obligations, and remedies for employers offering employee benefits. See Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541, 546-49 (1998). First, it imposed detailed disclosure requirements meant to notify participants of their rights. See *id.*; 29 U.S.C. §§ 1021-1031. Second, ERISA set standards for plan fiduciaries, who exercise control over the plan. See 29 U.S.C. §§ 1002(21)(A), 1104, 1109 (1998); Brauch, *supra*, at 547. Third, it set vesting, benefit accrual, and funding standards for pension plans. See 29 U.S.C. §§ 1051-1061, 1081-1086; Brauch, *supra*, at 547-48. Fourth, ERISA enumerated federal criminal and civil penalties for violations of its reporting, disclosure, and other fiduciary responsibilities. See Brauch, *supra*, at 547-48.

4. Wiseman served as vice president in charge of staff training and art acquisition. See *Mett*, 178 F.3d at 1060-61.

5. See *id.*

6. In 1990, Mett, Wiseman, and CAG were convicted of felony art fraud

withdrew approximately \$1.6 million from the pension plans and deposited the funds into the business's general operating account.⁷ The company neither informed its employees of this transaction nor made proper disclosures to the Internal Revenue Service or to the Department of Labor.⁸

After a Department of Labor investigation, both Mett and Wiseman were indicted for embezzlement⁹ of funds from an employee benefit plan.¹⁰ A central issue at trial was whether defendants had the requisite intent to be convicted under the federal statute, 18 U.S.C. § 664, which criminalizes theft and embezzlement from an employee benefit plan.¹¹ Both Mett and

due to CAG sales practices. *See id.* at 1061. These convictions, as well as a general downturn in the Hawaiian economy, created significant cash shortfalls for CAG. *See id.*

7. *See id.*

8. *See id.* at 1061-62. Plan fiduciaries are required to file an annual report (an IRS form 5500) with the Internal Revenue Service (IRS) for qualified defined benefit plans. *See* 29 C.F.R. § 2520.103-1 (1999). The IRS shares these reports with the Department of Labor. *See* Charles L. Lerner & Virginia C. Smith, *Department of Labor ERISA Enforcement, in* ALI-ABA COURSE OF STUDY, INVESTMENT ADVISER REGULATION 281, 283-84 (1999). The Department of Labor uses this information, among other uses, to select cases for enforcement investigations. *See id.* at 288. The Department of Labor is empowered to impose civil penalties for the failure to file a Form 5500 pursuant to § 502(c)(2) of ERISA. *See id.* at 285 (noting that penalties may reach up to \$1,000 per day the plan fiduciary fails to file).

9. Embezzlement is a statutory crime and its elements can vary from jurisdiction to jurisdiction. *See* WAYNE LAFAYE & A. SCOTT, CRIMINAL LAW 644-45 (1972). Embezzlement may be generally defined as (1) the fraudulent (2) conversion of (3) the property (4) of another (5) by one who already has lawful possession of it. *See id.*

10. The defendants were charged with sixteen counts. *See Mett*, 178 F.3d at 1061. These included embezzling from a pension benefit plan under 18 U.S.C. § 664 (1994), misappropriating assets of a pension benefit plan under 18 U.S.C. § 371, unlawfully serving as trustee after being convicted of a felony under 29 U.S.C. § 1111 (1994), and filing a false annual report in violation of 18 U.S.C. § 1027. *See Mett*, 178 F.3d at 1061.

11. 18 U.S.C. § 664 consolidates larceny and embezzlement into a single statutory offense. It provides:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan, or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 664. Although embezzlement is stated as an alternative way to violate § 664, the statute does not define what it means to embezzle. *See id.* This is somewhat unusual, as embezzlement was never a common law crime, but only a statutory crime. *See* 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, 400-02, nn.4-8 (14th ed. 1980); LAFAYE & SCOTT, *supra* note 9, at 644-

Wiseman sought to negate the government's showing of the requisite specific intent.¹² They argued that they lacked criminal culpability because they had merely borrowed the money in order to maintain CAG's operations.¹³

Mett and Wiseman attempted to assert a two-prong defense to negate the specific intent requirement. First, the defendants argued they had *implied authorization* from the employees to use the pension money.¹⁴ To support this contention, they argued that since "the CAG employees [were] more concerned with the survival of the company than with illegal uses of their pension funds, [they] implicitly [had] authorized the pension fund withdrawals."¹⁵ Second, Mett and Wiseman argued the withdrawals were made in the best interest of the employees. Under this theory of *participant benefit*, they argued that the withdrawals were made to rescue the employees from impending unemployment.¹⁶ The trial court rejected

45.

Section 664 concludes:

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I [29 U.S.C. §§ 1001-1191 (1994 & Supp. III 1997)] of the Employee Retirement Income Security Act of 1974.

Id. Therefore, this section generally applies to any employee pension plan or employee welfare subject to regulation under ERISA provisions 29 U.S.C. §§ 1001-1191.

12. See *Mett*, 178 F.3d at 1066. When interpreting the embezzlement provisions of 18 U.S.C. § 664, federal courts have held that the defendant must convert property with intent to defraud. See *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980) (holding that the act must be done with a fraudulent intent or a bad purpose or an evil motive); see also *United States v. Busacca*, 936 F.2d 232, 239-40 (6th Cir. 1991).

Generally, a person commits embezzlement when, while lawfully in the possession of the property of another, he appropriates or converts such property to himself or use of another with the intent to permanently deprive the owner of the property. See 2 F. LEE BAILEY & HENRY B. ROTHBLATT, *DEFENDING BUSINESS AND WHITE COLLAR CRIMES FEDERAL AND STATE* § 25.1 (2d ed. 1984); 3 *TORCIA*, *supra* note 11, § 395. The essence of embezzlement is therefore a conversion of property with criminal intent. See 2 *BAILEY & ROTHBLATT*, *supra*, § 25.13; 3 *TORCIA*, *supra* note 11, § 395.

13. See Linda Hosek, *Art Gallery Execs Get Six Years*, HONOLULU STAR BUL., Nov. 11, 1997, at 1, available at <<http://starbulletin.com/97/11/07/news/story3.html>>. This argument may have been undercut by the fact that Mett and Wiseman drew \$378,000 and \$515,000 in salaries in years 1990-92 despite CAG's financial difficulties. See *id.*

14. See *Mett*, 178 F.3d at 1067.

15. *Id.*

16. See *id.*

these arguments, and *Mett* and Wiseman were convicted.¹⁷ On appeal, the Ninth Circuit reversed and remanded the case for a new trial on other grounds,¹⁸ but held that neither the implied authorization nor the participant benefit theory could be presented in the retrial to negate criminal intent.¹⁹

The *Mett* court departed from prior precedent interpreting § 664²⁰ when it foreclosed the implied authorization and participant benefit defenses for § 664 embezzlement prosecutions. Other circuits have been much more liberal in allowing these defenses.²¹ This Note examines the differing judicial treatment of the implied authorization and participant benefit defenses in § 664 prosecutions. Part I examines the criminal provisions of 18 U.S.C. § 664, discusses the recent enforcement efforts of the Department of Justice and Department of Labor, and explores the regulatory structure of ERISA. Part I then examines how judicial interpretations of § 501 of the Labor Management Relations Disclosure Act (LMRDA)²² have influenced the development of the authorization and participant benefit defenses under 18 U.S.C. § 664.

17. See *id.* at 1060; Hosek, *supra* note 13, at 1.

18. The Court of Appeals for the Ninth Circuit held that the trial court had improperly admitted evidence protected by the attorney-client privilege. See *Mett*, 178 F.3d at 1064-67 (holding the trial court had misconstrued the fiduciary exception to the attorney-client privilege).

19. See *id.* at 1067. In dicta, the *Mett* court held that, as a general rule, "facts pertaining to authorization and benefit . . . may be relevant to the question of intent." *Id.* at 1068. However, the *Mett* court held that neither defense was available in this case. See *id.* It held that implied authorization failed because employees lacked the ability to authorize such a diversion of pension funds. See *id.* (holding that the policies of ERISA and its anti-alienation provisions prevent participants from assigning or alienating plan funds). The court also held that ERISA's strict fiduciary standards precluded use of the participant benefit defense since it concluded that plan fiduciaries could not substitute a short-term benefit (continuing employment) for a long-term benefit (retirement income). See *id.*; *infra* notes 146-49, 168-72 and accompanying text.

20. Compare *United States v. Todd*, 108 F.3d 1329, 1329-30 (11th Cir. 1997), with *Mett*, 178 F.3d at 1067.

21. See *United States v. Nolan*, 136 F.3d 265, 269 (2d Cir. 1998) (allowing the authorization and benefit defenses to be used in a § 664 prosecution for embezzlement); *Todd*, 108 F.3d at 1329-30 (allowing the authorization and benefit defenses to be used in a § 664 prosecution for embezzlement); *cf.* *United States v. Dixon*, 609 F.2d 827, 828-29 (5th Cir. 1980) (allowing authorization and participant benefit theories to be offered as defenses in embezzlement prosecution under 29 U.S.C. § 501(c)); *United States v. Ottley*, 509 F.2d 667, 671 (2d Cir. 1975).

22. 29 U.S.C. § 501 (1994).

Part II analyzes the viability of the implied authorization and participant benefit defenses, by examining what role the civil provisions of ERISA should play in interpreting 18 U.S.C. § 664. This Note argues that while civil regulation should not be the basis for criminal liability itself, such regulation has a bearing on the state of mind of the defendant. Accordingly, this Note suggests the circuit split should be resolved by allowing the implied authorization and participant benefits defense to be offered, but limiting the applicability of the defense by requiring the factfinder to judge the reasonableness of the defense though the objective standard of the civil regulations ERISA.

I. CIVIL AND CRIMINAL REGULATION OF EMPLOYEE BENEFITS UNDER ERISA

Congress enacted ERISA to provide a comprehensive regulatory scheme for employee benefit plans.²³ Under ERISA, the federal government exercises exclusive control over the regulation of employee benefit plans.²⁴ The Department of Labor (DOL) and the Department of Justice (DOJ) exercise this control through an interlocking system of civil and criminal enforcement.²⁵

A. THE PENSION ABUSE INITIATIVE: PURSUIT OF CRIMINAL RATHER THAN CIVIL REMEDIES

Federal embezzlement cases such as *Mett* have become increasingly common as the DOL and the DOJ have cracked down on pension and welfare plan abuses. In May 1997, Attorney General Janet Reno and Labor Secretary Alexis Herman jointly announced that their departments had begun a nationwide pension-fraud enforcement initiative.²⁶ Reno stated that the crackdown was designed to preserve the integrity of the estimated \$3.5 trillion private pension plan system.²⁷ The Pension Abuse Initiative has placed great emphasis on criminal

23. See Brauch, *supra* note 3, at 541.

24. See FRANK J. BITZER & NICHOLAS W. FERRIGNO, ERISA FACTS 631-32, 731-33 (1999).

25. See *id.*

26. See John W. Lundquist & Debra J. Linder, *When the Deposit Isn't Made: Abuse of Pension Fund Accounts Is a Crime*, BUS. L. TODAY, Oct. 1998, at 55-56.

27. See *id.* Reno said, "[a]s Americans grow more dependent on retirement income from pensions, it is important that they feel confident that their investments remain safe and secure." *Id.* at 55.

prosecution for misappropriation of pension assets and has attempted to coordinate efforts by federal agencies to curb pension abuses.²⁸

The initiative has also focused on the failure of businesses to make contributions to retirement plans.²⁹ In these cases, the government prosecutes the business for failing to remit money to the plan, rather than for diverting money from the plan account. Because this initiative has focused on plan protection rather than criminal culpability, individuals have been prosecuted for embezzlement even when they received no direct personal benefit.³⁰ In 1998, for instance, the DOJ brought four such prosecutions in Minnesota.³¹ Each of these prosecutions was notable because the pension funds were not directly diverted to the benefit of the business owners.³² Instead, these funds were retained in the businesses' general operating accounts and used for general operating expenses.³³

The government generally targets for prosecution businesses sponsoring qualified plans³⁴ and officers of the busi-

28. See *id.* at 55-56. Within the first eight months of the initiative, 70 criminal cases involving more than \$90 million in losses were initiated. See *Hanover Businessman Guilty of Pension Theft*, PATRIOT LEDGER (Quincy, Mass.), June 9, 1997, at 26; *Pension-Fraud Crackdown*, WASH. TIMES, May 16, 1997, at B8; *U.S. Crackdown on Pension Fraud*, DES MOINES REGISTER, May 16, 1997, at 9; U.S. Dep't of Labor, *Press Release: Labor and Justice Departments Announce Crackdown on Pension Abuse* (visited Oct. 15, 1999) <<http://www.dol.gov/dol/opa/public/media/press/opa/opa97166.htm>>. The government has applied criminal liability broadly to remedy breaches of trust by plan sponsors and fiduciaries, such as by imposing criminal sanctions for even relatively small infractions. For instance, the DOJ has prosecuted employers for failing to remit as little as \$6,100 to a plan. See J. Cheek, *Pension Abuse Initiative Highlights*, (visited Mar. 6, 2000) <<http://www.cpaspan.com/pfraud.htm>> (convicting John E. Flynn, Jr., the president of a Boston-based engineering company, of embezzlement for failing to forward \$6,100 to the company's 401(k) plan).

29. Employers have been held criminally liable for failure to timely remit payroll deductions and employer contributions to the plan. See Lundquist & Linder, *supra* note 26, at 55.

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.* Additionally, the DOJ and DOL have pursued criminal sanctions against business owners even when they have not drawn a salary from the business. See *id.*

34. The term qualified plan refers to employee welfare or pension plans that meet the requirements of § 401(a) of the Internal Revenue Code. See generally STEPHAN R. LEIMBERG & JOHN J. MCFADDEN, *THE TOOLS & TECHNIQUES OF EMPLOYEE BENEFIT AND RETIREMENT PLANNING* 195-205 (5th ed. 1997). Qualified plans, also known as qualified pension trusts, receive

nesses who qualify as ERISA "fiduciaries."³⁵ Prosecutors can bring charges for theft or embezzlement³⁶ and for making false statements in relationship to plan documents.³⁷ "[T]he government's theory is that a fiduciary converts plan assets whenever payroll withholdings are not promptly deposited into the authorized plan account."³⁸ That is, the DOL and DOJ consider earmarked money to be a plan asset prior to its deposit with the plan. Because ERISA prohibits other uses of plan assets or benefits,³⁹ the failure to deposit the funds with the plan in a timely manner constitutes a conversion of plan assets.⁴⁰ Al-

preferential tax treatment under the Internal Revenue Code. *See id.*; I.R.C. § 501(a) (explaining the tax-exempt status of qualified plans). The qualifications for special tax treatment generally include establishment of a plan for the exclusive benefit of employees or their beneficiaries, meeting contribution requirements, and complying with nondiscriminatory, participation and vesting standards. *See* 26 I.R.C. § 401(a) (stating the requirements for qualified plans). *See generally* 47A C.J.S. *Internal Revenue* § 276(1) (2000).

35. *See* Lundquist & Linder, *supra* note 26, at 55-56. ERISA defines "fiduciary" as follows:

[A] person is a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or . . . he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (1994); *see also* 29 C.F.R. § 2510.3-21 (1999) (providing a definition of "fiduciary"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (finding support for the rule that employers who "adopt, modify, or terminate" plans act as settlors, not fiduciaries, in ERISA's definition of a fiduciary (quoting *Curtiss-Wright Corp. v. Schoonegong*, 514 U.S. 73 (1995))).

36. *See* 18 U.S.C. § 664 (1994) (prohibiting theft and embezzlement from employee benefit plans).

37. *See* 18 U.S.C. § 1027 (prohibiting false statements and concealment of facts with regards to ERISA documents).

38. Lundquist & Linder, *supra* note 26, at 56.

39. ERISA provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Treasury regulations also prohibit involuntary transfers from qualified plans by requiring that "benefits provided under the plan may not be anticipated, assigned . . . alienated or subject to attachment, garnishment, levy execution or other legal or equitable process." 26 C.F.R. § 1.401(a)-(13)(b)(1) (1999).

40. *See* Lundquist & Linder, *supra* note 26, at 56. Similarly, the government has argued that any document constitutes a false statement if it indicates contributions were made to the plan but the funds are not actually deposited in the plan account. *See id.*

though civil remedies are available,⁴¹ the DOL and DOJ have chosen to broadly apply the criminal code to deter and punish breaches of fiduciary trust.

B. EMBEZZLEMENT UNDER 18 U.S.C. § 664 AND THE OTHER PROVISIONS OF ERISA

Although the embezzlement provision was added to the criminal code rather than to ERISA provisions,⁴² understanding the provisions of ERISA is critical in interpreting the provisions of 18 U.S.C. § 664. To be convicted under § 664, a defendant must take, abstract, or convert some asset⁴³ from an "employee welfare benefit plan or employee pension benefit plan."⁴⁴ The provision goes on to define this phrase as "any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974."⁴⁵ Some courts extensively rely on the regulatory provisions of ERISA not only to understand the duties of fiduciaries, but also to understand the objective expectations of parties and guide the application of policy in prosecutions under § 664.⁴⁶ Some courts have also taken this language to mean that ERISA should be used as a source of interpretive guidance for § 664 prosecutions.⁴⁷

41. For example, the DOL can pursue collection of delinquent contributions, plus interest and penalties, for breach of fiduciary trust. *See* 29 U.S.C. § 1132 (providing for civil enforcement).

42. The embezzlement provision was inserted into 18 U.S.C. § 664 whereas the provisions of ERISA are contained in 29 U.S.C. §§ 1001-1461.

43. Section 664 requires that the defendant expropriate "any of the moneys, funds, securities, premiums, credits, property, or other assets" of the plan or any fund connected with the plan. 18 U.S.C. § 664.

44. *Id.*; *see supra* note 11 (providing the complete text of 18 U.S.C. § 664).

45. 18 U.S.C. § 664.

46. *See, e.g.,* *United States v. Mett*, 178 F.3d 1058, 1067-68 (9th Cir. 1999) (holding that the regulatory policies and provisions of ERISA prevented the defendant from offering either the implied authorization or participant benefit defenses in a prosecution under 18 U.S.C. § 664). *But see* *United States v. Nolan*, 136 F.3d 265, 269 (2d Cir. 1998) (interpreting 18 U.S.C. § 664 without reference to ERISA); *United States v. Todd*, 108 F.3d 1329, 1329-31 (11th Cir. 1997) (interpreting § 664 without reference to ERISA).

47. *See, e.g., Mett*, 178 F.3d at 1067-68; *United States v. Snyder*, 668 F.2d 686, 690-91 (2d Cir. 1982) (holding that the prosecution was allowed to offer evidence that the defendant knew he was violating the civil provision of ERISA when charged with embezzlement under 18 U.S.C. § 664). *But see Nolan*, 136 F.3d at 269-70 (ignoring the civil provisions of ERISA in addressing the applicability of authorization and benefit defenses when the defendant was charged with embezzlement under 18 U.S.C. § 664); *Todd*, 108 F.3d at

1. 18 U.S.C. § 664: Adding Prosecutorial Teeth to ERISA Regulation

Section 664 came into existence as part of the 1962 amendments to the Welfare and Pension Plan Disclosure Act of 1958.⁴⁸ The House Report, supporting the passage of this statute, emphasized that prior to the enactment of criminal sanctions, self-policing through suits by plan beneficiaries had failed to protect the integrity of employee welfare plans.⁴⁹ To cure this frailty, Congress granted the Labor Secretary expansive power to pursue civil actions against plan fiduciaries, promulgate regulations, and issue rules and interpretations to guide plan administrators.⁵⁰ In addition, Congress created three new federal felonies to be added to Title 18 of the United States Code. These new provisions prohibited accepting or giving kickbacks, knowingly making false statements or concealing any fact, and theft or embezzlement of plan assets.⁵¹ The House Report emphasized that these provisions were meant to protect plan beneficiaries by curbing abuses through punishment to deter future violations of the Act.⁵²

The original version of § 664 was nearly identical to the provisions of the Code today.⁵³ It conditioned liability on conversion of assets from any “plan subject to the provisions of the Welfare and Pension Plans Disclosure Act.”⁵⁴ With the passage of ERISA in 1974, this language was changed to “any employee benefit plan subject to any provision of title I” of ERISA.⁵⁵

1329-31.

48. See H.R. REP. NO. 87-998, pt. 1 (1962), reprinted in 1962 U.S.C.C.A.N. 1532, 1532-33.

49. See *id.* pt. 3, reprinted in 1962 U.S.C.C.A.N. 1535-36. Prior to the 1958 amendments, retirement plan participants could file suit against plan fiduciaries for breach of trust. See *id.* The DOL was largely powerless to punish offenders. See *id.*

50. See *id.* pt. 4, reprinted in 1962 U.S.C.C.A.N. 1537-38.

51. See *id.* These provisions were later codified in 18 U.S.C. § 664.

52. See *id.* pt. 3, reprinted in 1962 U.S.C.C.A.N. 1536.

53. Section 664 has been amended twice since its passage. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (prior to 1994 amendment). For the purposes of this discussion, only the 1974 amendment is significant.

54. Welfare and Pension Plans Disclosure Act Amendments of 1962, § 17, Pub. L. No. 87-420, 76 Stat. 35 (1962) (codified at 18 U.S.C. § 664 (1963)).

55. 18 U.S.C. § 664 (1994). This change in language was necessary because ERISA supplanted the Welfare and Pension Plans Disclosure Act. See generally ERISA, Pub. L. No. 93-406, 76 Stat. 829 (1974).

With this amendment, § 664 became subject to the complicated provisions and policies of ERISA.

2. Definition of "Plan Assets" Subject to 18 U.S.C. § 664

To be guilty of embezzlement under 18 U.S.C. § 664, the plan sponsor or a plan fiduciary must take something of value from an "employee welfare benefit plan or employee pension benefit plan" subject to Title I of ERISA.⁵⁶ Funds deposited in a plan account⁵⁷ are considered "plan assets."⁵⁸ However, it is unclear whether funds earmarked to be deposited in an employee benefit plan account are subject to Title I of ERISA, because the statute fails to define the term "plan assets."⁵⁹

In 1997, pursuant to its rule-making authority, the Department of Labor promulgated a new regulation defining "plan assets."⁶⁰ This regulation mandated that moneys become plan assets at the "earliest date on which such contributions can reasonably be segregated from the employer's general assets."⁶¹ This regulation reduced the time period in which plan sponsors must make pension plan deposits.⁶² Deposits must now be made no later than fifteen business days after the month in which the participant contributed amounts received by the employer or such amounts would have otherwise been payable.⁶³

56. 18 U.S.C. § 664. Generally, ERISA applies to any employee benefit plan described in § 1003(a) and not excluded under § 1003(b) of ERISA. *See* 29 U.S.C. § 1101(a) (1994 & Supp. III 1997).

57. This assumes the plan is subject to ERISA, under 29 U.S.C. § 1003(a)-(b) (1994). *See supra* note 56.

58. 29 U.S.C. § 1101(a)-(b) (1994 & Supp. III 1997).

59. *See* John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 90 (1993). Whereas ERISA fails to define "plan assets," Congress exempted "guaranteed benefit polic[ies]" from the definition of plan assets under 29 U.S.C. § 1101(b)(2).

60. *See* 29 C.F.R. § 2510.3-102 (1999). The DOL has rule-making authority under 29 U.S.C. § 1101(c)(1)(A).

61. 29 C.F.R. § 2510.3-102(a). "[Plan assets] include amounts . . . that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets." *Id.*

62. *See* 29 C.F.R. § 2510.3-102(b)(1). Prior to 1997, the employer had 90 days to make such contributions. *See* Lundquist & Linder, *supra* note 26, at 56.

63. *See* Lundquist & Linder, *supra* note 26, at 56. There is one exception to the 15-day general rule. The time frame for making contributions to a SIMPLE plan, defined in I.R.C. § 408(p) (1994), is longer than for other types of retirement plans. *Compare* 29 C.F.R. § 2510.3-102(b)(1) (setting out the

Although this regulation is consistent with DOL's aggressive stance toward pension protection, it has no practical import for prosecutions, because it states that it is "*without any implication for and may not be relied upon to bar criminal prosecutions.*"⁶⁴

Federal courts have also taken an expansive view of what constitutes plan assets. In prosecutions under 18 U.S.C. § 664, courts have been unreceptive to arguments that employee deductions and earmarked employer contributions should not be considered plan assets before they are deposited in a plan account.⁶⁵ Courts have continued to emphasize that the primary policy of ERISA is the preservation of the integrity of employee benefits plans for the financial security of employees.⁶⁶ Such a policy supports a broad interpretation of what constitutes plan assets. The majority of courts that have addressed the issue have held that "plan assets" encompass employee withholdings and employer contributions owed to employee benefit plans.⁶⁷ The United States Supreme Court has also narrowly inter-

general rule), with 29 C.F.R. § 2510.3-102(b)(2) (providing the exception for SIMPLE plans). Sponsors of SIMPLE plans must make their deposits no later than the 30th day following the month in which the participant contribution amounts would otherwise have been payable to the participant. See 29 C.F.R. § 2510.3-102(b)(2). "SIMPLE" is an acronym for savings incentive match plan for employees. See LEIMBERG & MCFADDEN, *supra* note 34, at 159; 47A C.J.S. *Internal Revenue* § 293(1) (2000). Under this type of plan, employees reduce their salaries and the proceeds are deposited into the plan as tax-deferred contributions. See LEIMBERG & MCFADDEN, *supra* note 34, at 159-60; 47A C.J.S. *Internal Revenue* § 293(1) (2000).

64. 29 C.F.R. § 2510.3-102(a) (emphasis added).

65. See *United States v. Grizzle*, 933 F.2d 943, 946-47 (11th Cir. 1991) (holding that the special duties imposed by ERISA, federal regulations, and the parties' agreements indicate that funds withheld from employees are plan assets); *United States v. Panepinto*, 818 F. Supp. 48, 50 (E.D.N.Y. 1993), *aff'd*, 28 F.3d 103 (2d Cir. 1994) (holding that § 664 "plainly evinces an intent broadly to protect the wealth of employee welfare benefit plans . . . the language of the statute, by its terms, does not limit its reach to protecting only wealth already transferred to a welfare benefit plan or its administrators"); *cf.* *United States v. Lasky*, 967 F. Supp. 749, 753 (E.D.N.Y. 1997) (holding that once employee payments are collected they are plan assets for the purposes of applicability of Title I of ERISA for an 18 U.S.C. § 661 embezzlement prosecution). *But see* *Young v. West Coast Indus. Relations Ass'n*, 763 F. Supp. 64, 74-76 (D. Del. 1991), *aff'd*, 961 F.2d 1570 (3rd Cir. 1992) (holding that an employer's failure to contribute did not constitute embezzlement where such failure rendered the employer liable for "all arrears in payment . . . attorney fees, court costs," liquidated damages, and other costs and where no contractual provision existed indicating when money paid became vested).

66. See generally cases cited *supra* note 65.

67. See cases cited *supra* note 65.

preted a statutory exclusion from "plan asset" in *John Hancock Mutual Life Insurance v. Harris Trust & Savings Bank*.⁶⁸ In *Hancock*, the Court rejected an insurance company's claim that its products were not subject to regulation under ERISA, holding that the exclusions to regulation should be narrowly tailored to protect workers.⁶⁹

3. Duties of Plan Fiduciaries Under ERISA

Once it has been determined that funds qualify as plan assets, ERISA regulates the duties of fiduciaries and plan sponsors who manage and distribute plan assets. In addition to providing a comprehensive regulatory scheme for employee benefit plans and establishing detailed disclosure requirements meant to notify participants of their rights,⁷⁰ ERISA also sets standards for plan fiduciaries, who exercise control over the plan.⁷¹ It sets "vesting, benefit accrual, and funding standards" for pension plans that plan fiduciaries and sponsors must follow.⁷² Finally, ERISA enumerates federal criminal and civil penalties for violations of its reporting, disclosure, and various other fiduciary responsibilities.⁷³ Of primary importance to § 664 cases are fiduciary duties, notification requirements, and anti-alienation provisions of the statute.

Fiduciaries⁷⁴ and plan sponsors must act "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries."⁷⁵ ERISA prohibits self-dealing and conflict of interest transactions.⁷⁶ For example, the statute forbids the sale or ex-

68. 510 U.S. 86, 90, 97-101 (1993). Congress prescribed an exception from ERISA for "guaranteed benefit polic[ies]" under 29 U.S.C. § 1101(b)(2). See *John Hancock*, 510 U.S. at 90, 98-99.

69. Consistent with the policy to protect employees, the Court rejected an insurance company's claim that its policy was not subject to ERISA. See *John Hancock*, 510 U.S. at 90, 98-99.

70. See Brauch, *supra* note 3, at 547-48 (citing 29 U.S.C.A. §§ 1021-1031 (1994 & West Supp. 1998)).

71. See *id.* at 547-48 (citing 29 U.S.C.A. §§ 1002(21)(A), 1109 (1994); 29 U.S.C.A. § 1104 (1994 & West Supp. 1998)).

72. See *id.* (citing 29 U.S.C.A. §§ 1051-1061, 1081-1086 (1994 & West Supp. 1998)).

73. See *id.*

74. See *supra* note 35 (quoting the definition of a plan fiduciary under 29 U.S.C. § 1002(21)(A)). The obligations of an ERISA fiduciary are described in 29 U.S.C. § 1104(a)(1) (1994).

75. 29 U.S.C. § 1104 (a)(1).

76. See *id.* § 1106.

change, or leasing of property; the lending of money or extension of credit; and the furnishing of goods or services between a plan and a party of interest.⁷⁷ A party of interest is broadly defined to include plan fiduciaries, persons providing services to the plan, the employer, its owner, or any relative or affiliated business entity of any the above parties.⁷⁸ Generally, such a party must petition the Secretary of Labor to be allowed an exemption from prohibited transactions.⁷⁹ Before an exemption may be granted, the Secretary must publish a notice in the Federal Register and allow interested parties adequate time to respond.⁸⁰

ERISA places a premium on the duty of plan fiduciaries to report and disclose information to both the government and plan beneficiaries.⁸¹ Accordingly, ERISA devotes ten sections to reporting and disclosure requirements,⁸² requiring over twenty-seven different types of reports and disclosures to be made to the DOL, the IRS, and plan participants.⁸³ These disclosure and notice requirements help to:

[1] Make sure that sure plan participants and beneficiaries know their rights under ERISA; [2] Ensure that plan participants and beneficiaries are provided the information necessary to make informed decisions concerning their benefit options; [3] Encourage employers to comply with ERISA by making public the transactions of plans and their fiduciaries and administrators; and [4] Assist government agencies in meeting their enforcement obligations under ERISA.⁸⁴

Each of the basic reporting requirements furthers one or more of these goals.⁸⁵

77. *See id.* § 1106(a)(1).

78. *See id.* § 1002(14).

79. *See id.* § 1108(a).

80. *See id.* There is also a narrow class of enumerated exemptions from prohibited transactions in section 408(b) of ERISA. *See id.* § 1108(b). Generally, these transactions have a low risk for breach of trust. One of the most commonly exercised exemptions is an employee borrowing from a defined contribution plan.

81. *See* Janae L. Schaeffer et al., *Reporting and Disclosure, in ERISA BASICS: A PRIMER ON ERISA ISSUES* 3 (1998). During the hearing process prior to the enactment of ERISA, it became clear that plan participants generally lacked accurate information sufficient to make informed decisions about their plans. *See* S. REP. NO. 92-634, at 101 (1971).

82. *See* 29 U.S.C. §§ 1021-1031 (1994).

83. *See generally* Schaeffer et al., *supra* note 81 (outlining the primary notice requirements of ERISA).

84. *Id.* at 4.

85. *See id.*

4. Restrictions on Assignment or Alienation of Plan Assets

ERISA also restricts how plan assets and benefits may be distributed to plan participants.⁸⁶ Generally, plan participants may not access plan funds prior to the date of distribution.⁸⁷ However, in some instances, plan participants may be eligible for loans from the plan.⁸⁸ Section 206(d)(1) of ERISA, which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated,"⁸⁹ prevents any plan participant (or anyone else) from assigning or alienating an interest in the plan.⁹⁰ This prohibition is fortified by a corresponding section of the Internal Revenue Code.⁹¹ Section 401(a)(13) of the Code states as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."⁹² In interpreting these provisions, the Supreme Court consistently has rejected attempts to allow assignment or alienation of plan assets.⁹³ Courts have examined implied authorization and participant benefit defense against this regulatory backdrop.

C. AUTHORIZATION AND BENEFIT THEORIES AS PROGENY OF § 501(C) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

In the absence of clear guidance from § 664 case law, federal courts have turned to § 501(c) of the Labor-Management

86. See 29 U.S.C. § 1056(d) (1994).

87. See *id.*

88. See *id.* § 1108(b). Plan participants may obtain interest-bearing loans from the plan if certain conditions are met. See *id.* Generally, the plan documents must allow such loans and the loan must meet the requirements of 29 U.S.C. § 1108(b).

89. *Id.* § 1056(d)(1). Note, however, that certain marital debt settlements may be satisfied through alienation of an employee's share of plan funds. See *id.*

90. See *Patterson v. Shumate*, 504 U.S. 753, 759 (1992).

91. See I.R.C. § 401(a)(13) (1994).

92. *Id.*; see also 26 C.F.R. § 1.401(a)-1413(b)(1) (1999).

93. See, e.g., *Patterson*, 504 U.S. at 760 (rejecting an attempt to include plan assets in a bankruptcy estate). For a critique of the anti-alienation provisions, see generally Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355 (1999). Professor Dilley criticizes the application of the anti-alienation provisions of ERISA. See *id.* at 356-58 (suggesting the application of the anti-alienation provisions has led to inequitable results).

Reporting and Disclosure Act (LMRDA) to interpret § 664,⁹⁴ because both statutes have very similar language and purposes.⁹⁵ Section 501(c) of LMRDA prohibits theft and embezzlement from unions by union officials and those employed by a labor union.⁹⁶ In *United States v. Andreen*,⁹⁷ the Ninth Circuit held that § 501(c) could be used to interpret § 664 for two reasons.⁹⁸ First, both provisions use parallel language to prohibit theft and embezzlement from entities designed to serve labor.⁹⁹ Second, Congress had similar purposes in mind when passing both statutes.¹⁰⁰ Since the *Andreen* decision in 1980, both the Second¹⁰¹ and Eleventh¹⁰² Circuits have recognized that § 501 case law can be used to construe § 664.¹⁰³

Like § 664, § 501(c) created a new statutory offense that went beyond common law larceny and previous embezzlement

94. See, e.g., *United States v. Andreen*, 628 F.2d 1236, 1242 (9th Cir. 1980); see also Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, 29 U.S.C. § 501(c) (1994).

95. See Brian H. Redmond, Annotation, *Validity, Construction and Application of § 501(c) of Labor-Management Reporting and Disclosure Act*, 29 U.S.C.S. § 501(c), *Prohibiting Embezzlement of Union Assets*, 85 A.L.R. FED. 803, 809 (1987). Section 501(c) was originally enacted as § 109 of LMRDA. See S. REP. NO. 187, at 42-43 (1959), reprinted in 1959 U.S.C.C.A.N. 2329, 2359. LMRDA created a comprehensive regulatory scheme to curb perceived corruption and abuses in labor unions. See *id.*

96. See 29 U.S.C. § 501(c) (1994). Section 501(c) provides:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

Id.

97. 628 F.2d 1236.

98. The court stated the "prohibitory language of both statutes," referring to 18 U.S.C. § 664, which makes it a federal crime to embezzle assets of an employee welfare or pension benefit plan, and to 29 U.S.C. § 501(c), a statute making it a crime to embezzle assets of a labor organization of which the accused is an officer or employee, "should be given similar interpretation and be applied to similar types of conduct." *Id.* at 1242 (citations omitted).

99. See *id.* Compare the language of § 664, *supra* note 11, and § 501(c), *supra* note 96.

100. In the passage of both statutes, Congress sought to preserve funds set aside to benefit workers. See *Andreen*, 628 F.2d at 1242 (comparing the legislative history of § 664 and the legislative history of § 501(c) of LMRDA).

101. See *United States v. Nolan*, 136 F.3d 265, 269 (2d Cir. 1998).

102. See *United States v. Todd*, 108 F.3d 1329, 1332 (11th Cir. 1997).

103. Accord Redmond, *supra* note 95, at 809-10.

statutes "to encompass nearly every kind of taking."¹⁰⁴ To establish a violation of § 501(c), a party must (1) have an appropriate relationship to the union,¹⁰⁵ (2) convert property belonging to the union,¹⁰⁶ and (3) with specific intent to appropriate the property. Most circuits have taken the position that to prove criminal intent, the government must establish that the defendant voluntarily and knowingly defrauded a union of its funds.¹⁰⁷

Fraudulent intent may be negated in several ways. Some courts have held that there are two types of offenses under § 501(c): "those involving the authorized use of funds and those involving the unauthorized use of funds."¹⁰⁸ Under the *United States v. Dixon* rule,¹⁰⁹ when the expenditure is authorized,¹¹⁰ the prosecution must also prove that a union official lacked a good faith belief that the expenditure or use was for the legitimate benefit of the union.¹¹¹ In another formulation, criminal

104. *Id.* at 811; see also *United States v. Silverman*, 430 F.2d 106, 114-15 (2d Cir. 1970) (holding that the passage of 29 U.S.C. § 501(c) went beyond the common law offense of larceny and the statutory crime of embezzlement by eliminating the gaps in the prior law); *Colella v. United States*, 360 F.2d 792, 799 (1st Cir. 1966) (holding that 29 U.S.C. § 501(c) created a new statutory crime which may be violated in any number of ways); *United States v. Harmon*, 339 F.2d 354, 357 (6th Cir. 1964) (holding that 29 U.S.C. § 501(c) covered almost every kind of taking, whether by larceny, theft, embezzlement or conversion).

105. Generally, one must be an officer or employee of a labor union. See *United States v. Sullivan*, 498 F.2d 146, 151-52 (1st Cir. 1974) (holding an elected union official liable for embezzlement). However, an independent contractor hired by the union may be held liable for embezzlement. See *United States v. Capanegro*, 576 F.2d 973, 976-79 (2d Cir. 1978) (holding an attorney who had a retainer agreement with a union liable for embezzlement).

106. See *United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986). Section 501(c) broadly defines what is property as "moneys, funds, securities, property, or other assets of a labor organization." 29 U.S.C. § 501(c) (1994). The defendant may violate § 501(c) by converting the property to his or her own use or the use of another. See *id.* To convert property a person must exert "dominion or control dominion over the property that seriously interferes with the owner's rights." *Stockton*, 788 F.2d at 216.

107. See *Redmond*, *supra* note 95, at 827.

108. *United States v. Dixon*, 609 F.2d 827, 829 (5th Cir. 1980).

109. See *id.*

110. Generally, for the purposes of § 501(c), "the union itself—its collective membership" has the power to authorize expenditures. *Stockton*, 788 F.2d at 217. For the purposes of § 501(c), the union official giving permission must act within the scope of his or her fiduciary's powers. See *id.* (holding a defendant liable under § 501(c) when the union official authorizing expenditures acted outside the scope of his official duties).

111. See *Dixon*, 609 F.2d at 829; see also *United States v. Lavergne*, 805

intent may be negated if the union official had a good faith belief that the union had authorized his actions and that his actions would benefit the union membership.¹¹²

However, the federal circuits have been far from uniform in applying theories of authorization and union benefit. At least one court has held that union authorization is not a defense.¹¹³ Other courts have held that when a union official spends funds on a legitimate union purpose, but without authorization, the prosecution cannot establish criminal intent.¹¹⁴ One court even stated that the prosecution must prove both fraudulent intent and either a lack of benefit to the union or a lack of authorization to establish a violation of § 501(c).¹¹⁵ However, a more prevalent view is that the prosecution is not required to show the absence of authorization or benefit.¹¹⁶ Therefore, in most

F.2d 517, 522-23 (5th Cir. 1986) (noting the *Dixon* rule and holding that a lack of good faith defense is not an essential element in the prosecution's case for misuse of unauthorized funds); *United States v. Gibson* 675 F.2d 825, 828-29 (6th Cir. 1982) (following the *Dixon* rule); *United States v. Tham*, 665 F.2d 855, 858 (9th Cir. 1981) (following the *Dixon* rule); *United States v. Bane*, 583 F.2d 832, 835-36 (6th Cir. 1978) (holding in a § 501(c) case that where an expenditure is authorized, the prosecution must prove the defendant's lack of a good faith belief that the expenditure was for a legitimate benefit of the union). *See generally* Redmond, *supra* note 95, at 833-34.

112. *See United States v. Butler*, 954 F.2d 114, 118-19 (2d Cir. 1992); *United States v. Santiago*, 528 F.2d 1130, 1133-34 (2d Cir. 1976) (holding that the proper test of a § 501(c) violation is whether defendant had a good faith belief that funds were being used for union business and that the union would authorize the expenditures); *United States v. Ottley*, 509 F.2d 667, 671-72 (2d Cir. 1975) (holding that the defendant believed his actions benefited the union and that the union would authorize such actions, thus no violation of § 501(c) occurred); *cf. United States v. Durnin*, 632 F.2d 1297, 1300 (5th Cir. 1980) (holding no criminal intent existed where a union official had a good faith belief that the funds were expended for the union's benefit and that the expenditures were authorized). *See generally* Redmond, *supra* note 95, at 833-34.

113. *See United States v. Dibrizzi*, 393 F.2d 642, 645 (2d Cir. 1968) (holding that criminal liability should attach even if the union ratified his actions).

114. *See United States v. Silva*, 517 F. Supp 727, 738-39 (D.R.I. 1980) (holding that when the expenditure is for a bona fide union purpose, the defendant is entitled to an acquittal), *aff'd*, 644 F.2d 68 (1st Cir. 1981).

115. *See United States v. Silverman*, 430 F.2d 106, 117 (2d Cir. 1970).

116. *See United States v. Cantrell*, 999 F.2d 1290, 1292 (8th Cir. 1993) (holding that a lack of union authorization is not an essential element of a § 501(c) violation); *United States v. Thordarson*, 646 F.2d 1323, 1332 (9th Cir. 1981) (holding that neither a lack of union authorization or benefit are essential elements of a § 501(c) violation); *United States v. Boyle*, 482 F.2d 755, 764 (D.C. Cir. 1973) (distinguishing *Silverman* and holding that the knowing, unlawful use of converted union funds constitutes a violation of § 501(c) regardless of union authorization or benefit). *See generally* Redmond, *supra* note 95, at 841-42.

jurisdictions, the defense may use authorization and union benefit to negate a criminal intent;¹¹⁷ however, the prosecution does not bear the burden of establishing lack of authorization or union benefit.¹¹⁸

D. *UNITED STATES V. TODD* AND *UNITED STATES V. NOLAN*: THE RISE OF THE IMPLIED AUTHORIZATION AND PARTICIPANT BENEFIT DEFENSES IN ERISA PROSECUTIONS IN THE ELEVENTH AND SECOND CIRCUITS

*United States v. Todd*¹¹⁹ and *United States v. Nolan*¹²⁰ adopted the rationale of the LMRDA decisions and allowed evidence of authorization and participant benefit to be used to negate specific intent for prosecutions under 18 U.S.C. § 664. In *Todd*, the Eleventh Circuit Court of Appeals reversed the conviction of James Todd and remanded the case for a new trial because the trial court had barred the introduction of evidence that supported the contention that the defendant had a good faith belief that his employees had authorized the diversion of plan assets.¹²¹ Specifically, Todd was not allowed to offer evidence that his employees were compensated and treated so well that he had a good faith belief that they had implicitly authorized him to use the plan's funds to save his medical equipment company.¹²² In reversing and remanding the case for retrial, a

117. See Redmond, *supra* note 95, at 836-42.

118. See *id.* at 841-42.

119. 108 F.3d 1329 (11th Cir. 1997).

120. 136 F.3d 265 (2d Cir. 1998).

121. See *Todd*, 108 F.3d at 1334. In 1980, James Todd founded Clinical Medical Equipment, Inc. (CME). See *id.* at 1329. In 1987, CME adopted a 401(k) pension plan with Todd as sole trustee. See *id.* at 1330. One of the reasons CME adopted the plan was to attract qualified employees. See *id.* Under the terms of the plan, employees could contribute to the plan through payroll deductions and CME would match a percentage of the employees' contributions. See *id.* CME remitted its employees' and CME's matching contributions in a timely manner until it ran into a financial crisis caused by the negligence of a CME employee. See *id.* CME employee Mary Rupert failed to file Dorns 940 ("Employer's Annual Federal Unemployment Tax Return") and 941 ("Employer's Quarterly Federal Tax Return") with the IRS. See *id.* This oversight resulted in CME owing more than \$680,000 to the IRS. See *id.* at 1330 & n.2. At this point, Todd stopped forwarding plan contributions, and instead he left the funds in CME's general operating account. See *id.* at 1330. Todd then used this money to pay off CME's tax liability. See *id.* From September 1989 to January 1992, Todd withheld more than \$100,000 from plan employees' paychecks, but failed to deposit this money with the plan. See *id.* Todd was convicted of embezzlement under 18 U.S.C. § 664. See *id.* at 1331.

122. See *id.* at 1333.

divided panel held that paying high salaries and treating employees well could tend to demonstrate an employee would have authorized the diversion of funds.¹²³ The *Todd* court supported this position by drawing an analogy to the *Dixon* rule for embezzlement cases prosecuted under § 501(c) of LMRDA.¹²⁴

In the following year, the Court of Appeals for the Second Circuit drew a similar analogy to a different line of LMRDA cases in *United States v. Nolan*.¹²⁵ Although the court affirmed Nolan's conviction for embezzlement under 18 U.S.C. § 644, it noted in dicta that criminal intent could be negated in two ways.¹²⁶ First, a good faith belief that the diversion of funds was authorized or would be authorized could negate intent.¹²⁷ Second, a good faith belief that the diversion of funds would benefit plan participants could negate intent.¹²⁸

II. SHOULD THE IMPLIED AUTHORIZATION AND PARTICIPANT BENEFIT DEFENSES BE ALLOWED IN 18 U.S.C. § 664 CASES?

The similarities of 18 U.S.C. § 664 and 29 U.S.C. § 501(c) warrant treating embezzlement prosecutions under the respective statutes similarly. Both statutes have similar language¹²⁹ and both consolidate theft-related offenses into a single statutory violation, through the use of common statutory language.¹³⁰ Although the primary purpose of the consolidation of

123. *See id.* at 1333-34. The court noted that *Todd* sought to introduce evidence establishing that CME's employees were well compensated (in terms of salaries and benefits) as compared to others in the relevant labor market. *See id.* at 1331, 1333.

124. *See id.* at 1333. The *Todd* court would not allow a challenge to the defendant's *Dixon* defense because the prosecution apparently failed to raise the issue at the trial court level. *See id.*; *see also supra* notes 109-11 and accompanying text.

125. 136 F.3d 265, 270 (2d Cir. 1998). The Second Circuit followed two other Second Circuit cases interpreting 29 U.S.C. § 501(c). *See id.* These cases were *United States v. Ottley*, 509 F.2d 667 (2d Cir. 1975), and *United States v. Butler*, 954 F.2d 114 (2d Cir. 1992). *See Nolan*, 136 F.3d at 270.

126. *See Nolan*, 136 F.3d at 270.

127. *See id.*

128. *See id.*

129. *Compare supra* note 11 (quoting the language of 18 U.S.C. § 664 (1994)), *with supra* note 96 (quoting the language of 29 U.S.C. § 501(c) (1994)).

130. Both statutes use the following language, "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another" *Compare supra* note 11 (quoting the language of 18 U.S.C. § 664), *with supra* note 96 (quoting the language of 29 U.S.C. § 501(c)).

these offenses is for administrative convenience,¹³¹ the substantive elements of the specific offenses remain the same.¹³² The only difference between these statutes is that the assets¹³³ and the parties subject to prosecution under the statute differ.¹³⁴ The congressional purposes of both statutes are closely related¹³⁵ since both provisions are meant to deter the abuses found within the respective arenas and to preserve designated funds for their entitled beneficiaries.¹³⁶

Given this similarity, it would be reasonable to expect that the LMRDA authorization and benefit theories should also apply to § 664 prosecutions. Although *Nolan* and *Todd* courts followed the LMRDA rules closely, the *Mett* court rejected this approach. The *Todd* and *Nolan* courts mechanically applied authorization and benefit rules from the LMRDA cases without reference to ERISA.¹³⁷ In contrast, the *Mett* court applied the authorization and benefit rules from the LMRDA cases with an additional interpretive layer. The *Mett* decision rejected these defenses by using the strict regulatory framework of ERISA to bar their application.¹³⁸ This contrast calls into question what role a civil statute should play in interpreting the application of the criminal code.

131. See 3 TORCIA, *supra* note 11, at 443 (stating that the purpose of statutory consolidation is to simplify the pleading of this type of offense and avoid technicalities in pleading).

132. See *id.* at 443-44.

133. Compare *supra* note 11 (quoting 18 U.S.C. § 664), with *supra* note 96 (quoting 29 U.S.C. § 501(c)). 29 U.S.C. § 501 provides, "any of the moneys, funds, securities, property, or other assets of a labor organization," 29 U.S.C. § 501(c) (1994) (emphasis added), while 18 U.S.C. § 664 adds some additional terms: "any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith . . ." 18 U.S.C. § 664 (1994) (emphasis added).

134. See *supra* note 133. To violate § 501(c), the asset must be taken from a labor union. See 29 U.S.C. § 501(c). To violate § 664, the asset must be taken from an employee pension plan or an employee welfare benefit plan or any fund connected with any such plans. See 18 U.S.C. § 664.

135. Both statutes were enacted as part of a comprehensive regulatory scheme to curb perceived abuse in unions and employee pension plans respectively. See *supra* notes 3, 95.

136. See Redmond, *supra* note 95, at 808-09.

137. See *United States v. Nolan*, 136 F.3d 265, 270 (2d Cir. 1998); *United States v. Todd*, 108 F.3d 1329, 1333 (11th Cir. 1997); see also text accompanying *supra* notes 123, 127.

138. See generally *supra* notes 1-20 and accompanying text (discussing the *Mett* case).

A. THE CULPABILITY OF METT MAY EXPLAIN THE DIFFERENCE IN ANALYTICAL APPROACH

In many respects, William Mett was much more culpable than James Todd.¹³⁹ CAG's financial difficulties occurred due to the criminal activities of Mett and Wiseman,¹⁴⁰ while Todd's financial crisis was created by an employee oversight.¹⁴¹ Further, Mett and Wiseman drew such exorbitant salaries (\$378,000 and \$500,000 respectively) that over one-half of the money taken from the pension plan found its way into Mett and Wiseman's pockets.¹⁴² In contrast, Todd applied the funds to pay an outstanding business tax liability.¹⁴³ Todd also appropriated the funds in a *different* manner than Mett. Todd withheld money from his employee's paychecks but failed to forward the funds to the pension plan.¹⁴⁴ Mett withdrew the money from the employee's pension fund itself.¹⁴⁵ While Mett clearly took from the employee pension plan, the money involved in *Todd* was never segregated from the company's operating capital. Mett simply appeared much more culpable than Todd and therefore, presented a poor factual setting in which to support the implied authorization and participant benefit defenses. Had Mett been allowed to present these defenses at trial, the attempt would have been largely misled the jury, given his level of culpability. Accordingly, it was not surprising that the *Mett* court strictly construed the civil regulations of ERISA to eliminate these defenses.

B. THE NINTH CIRCUIT APPROACH: STRICT APPLICATION OF ERISA EXCLUDES THE DEFENSES

1. Authorization Defense

The *Mett* decision rejected the authorization defense because it found the defense was contrary to the civil regulations

139. The *Nolan* decision is not addressed in this section because the authorization and benefits defenses were not applied to the facts of that case. See *Nolan*, 136 F.3d at 270 (stating that the jury was properly instructed, and thus the district court did not err).

140. See *supra* note 6.

141. See *supra* note 121 and accompanying text.

142. See *supra* note 13.

143. See *supra* note 121 and accompanying text.

144. The funds in question never left the general operating account of CME. See *supra* note 121 and accompanying text.

145. See *supra* text accompanying note 7.

of ERISA. The court's primary line of argument posited that a diversion of funds from a pension plan could never be authorized as a matter of law. According to the court, plan beneficiaries lack the power to authorize taking money from the plan because ERISA's regulatory provisions prohibit employees from alienating or assigning their interests in the plan.¹⁴⁶ Thus, ERISA fiduciaries can never have a good faith belief that taking money from the plan is authorized, because plan beneficiaries do not have the power to authorize the transfer. Under the *Mett* rationale, neither an *express* nor an *implied authorization* defense can be established when the source of the authorization is an employee.¹⁴⁷

Essentially, the *Mett* court tied the mental state of the defendant to the ERISA regulatory environment. Under the *Mett* court's reasoning, the defendant can never negate criminal intent with the implied authorization defense because it is a mistake of law to believe that employees can authorize a loan from the plan to operate the business.¹⁴⁸ The *Mett* court premised its ruling on the idea that a defendant's mental state cannot negate criminal intent when that belief violates the provisions or policies of ERISA.¹⁴⁹ Restated, under this rationale, a court would disallow any defense that implicated a violation of a civil regulatory scheme.

If such a theory is valid, the implied authorization defense should apply only in very limited circumstances in 18 U.S.C. § 664 prosecutions. To understand this result, it is first necessary to briefly revisit the LMRDA cases to gain a better understanding of the tenets of the authorization defense. LMRDA cases hold that the authorization must come from the proper source to establish a good faith belief that expenditure is authorized.¹⁵⁰ Under § 501(c), individual union members generally cannot authorize the expenditure.¹⁵¹ Rather, only the collective membership or a union official acting within the

146. See *United States v. Mett*, 178 F.3d 1058, 1068 (9th Cir. 1999) (stating that ERISA plans must "contain an 'anti-alienation' provision").

147. See *id.*; see also *supra* note 19 and accompanying text.

148. See *Mett*, 178 F.3d at 1068.

149. See *id.*

150. See *supra* note 110 (noting that an expenditure cannot be authorized under § 501(c) of LMRDA unless the authorization came from the collective union membership or from a union official acting within the scope of his/her fiduciary duty).

151. See *supra* notes 104-07 and accompanying text; see also *supra* note 10 and accompanying text.

scope of his fiduciary duties can make a valid authorization for the purposes of § 501(c).¹⁵² Accordingly, proper sources of authorization must be found under ERISA to set up a valid authorization defense under § 664.

Unfortunately for defendants such as *Mett*, sources of authorization in the ERISA regulatory environment are few and far between. Generally, plan participants do not have the power to authorize loans from the plan to the employer.¹⁵³ Plan participants are extremely limited in their ability to access funds, due to ERISA restrictions.¹⁵⁴ Plan participants are banned from assigning or alienating their interests by both the terms of the retirement plan documents¹⁵⁵ and the provisions of ERISA.¹⁵⁶ Generally, ERISA bans loans to an employer as a conflict of interest transaction.¹⁵⁷ The only methods by which a "loan" could be "authorized" is either through a grant of an exemption by the Secretary of Labor under section 408(a) of ERISA or a qualified exemption under section 408(b).¹⁵⁸ A fiduciary or plan sponsor in *Mett's* position could not have claimed an administrative exemption from the Secretary of Labor because he failed to follow the administrative procedures. However, in very narrow circumstances,¹⁵⁹ a fiduciary could argue that the transaction was authorized if it were exempt under section 408(b)(1).¹⁶⁰

To argue for a section 408(b)(1) exemption, the defendant must establish that he believed his employees would have borrowed from the pension plan and then transferred those funds

152. See *supra* notes 104-07 and accompanying text; see also *supra* note 10 and accompanying text.

153. See *supra* text accompanying notes 77-79.

154. See *supra* text accompanying notes 86-90.

155. See *supra* text accompanying notes 91-92.

156. See *supra* notes 89-90 and accompanying text.

157. See *supra* text accompanying notes 76-78.

158. See ERISA § 408(a)-(b), 29 U.S.C. § 1108(a)-(b) (1994) (discussing grants of exemptions by the Secretary and enumerated exemptions); see also *supra* notes 79-80 and accompanying text.

159. This argument will have a very limited applicability to only defined contribution plans.

160. See ERISA § 408(b)(1), 29 U.S.C. § 1108(b)(1) (discussing an enumerated exemption for certain loans to parties in interest). This exemption only applies to defined contribution plans. See *id.* Accordingly, defined benefit plans are excluded from the following discussion. Note that this argument had no applicability to the *Mett* case because *Mett* converted funds from a defined benefit plan. See *supra* note 3.

to the employer.¹⁶¹ Three elements need to be established to make this argument. First, the plan documents must authorize loans from the pension plan to its participants.¹⁶² Second, the defendant must establish that he had a good faith belief that each employee would have obtained such a loan and transferred those funds to the employer.¹⁶³ Third, the loans must not otherwise violate the provisions of section 408(b)(1).¹⁶⁴ While this argument is a theoretical possibility, there has been no case law applying it, and the elements appear difficult to prove in most situations. Therefore, the authorization defense will apply only under limited circumstances when § 664 is read in light of the provisions of ERISA.

Implied authorization also is difficult to sustain under the *Mett* rationale because the substance of implied authorization means that the defendant fails to disclose the diversion of plan assets. In contrast, ERISA obligates fiduciaries and plan sponsors to promptly disclose information about plan transactions to their employees and the government.¹⁶⁵ In *Mett*, *Todd* and *Nolan*, the defendants did not disclose the diversion of funds and subsequently argued that the employees would have acquiesced to the diversion had they been notified.¹⁶⁶ Therefore, the implied authorization defense offered in these cases violated the ERISA regulations that require disclosure.¹⁶⁷ In sum, the validity of the implied authorization is doubtful if ERISA's policies and provisions are strictly applied.

161. See 29 U.S.C. § 1108(b)(1).

162. See *id.* § 1108(b)(1)(C).

163. To have proper belief in authorization by his or her employees, the fiduciary or plan sponsor must believe that each employee, if asked, would have completed all the steps necessary to have a proper section 408(b) loan. Without this, the government could establish that the defendant converted funds attributable to an employee unwilling to authorize the diversion of funds by the defendant. Therefore, the defendant must first establish that each employee would have properly taken out the loans, then retransferred the funds to the employer.

164. See 29 U.S.C. § 1108(b)(1). In addition, the loans from defined contribution plans must bear a reasonable rate of interest and be adequately secured. See *id.*

165. See *supra* notes 81-85 and accompanying text (describing disclosure requirements, identifying the sections of ERISA requiring disclosure, and outlining the policies served by ERISA's disclosure requirements).

166. See *supra* notes 8, 14-15, 121 and accompanying text; see also *United States v. Nolan*, 136 F.3d 265, 268 (2d Cir. 1998).

167. *But see United States v. Dixon*, 609 F.2d 827, 829 (5th Cir. 1980) (allowing a good faith belief in authorization even though LMRDA has disclosure requirements similar to that of ERISA).

2. Participant Benefit Theory

While *Mett's* authorization argument may be consistent with provisions of ERISA, the opinion is more vulnerable to attack in its rejection of the participant benefit defense. *Mett* held that the participant benefit defense could not be made when embezzlement involves an employee pension plan subject to ERISA.¹⁶⁸ According to the court, once funds enter an ERISA pension plan, they are "committed to securing a particular *long-term* benefit—the payment of pension benefits."¹⁶⁹ They may not be used for any other purpose than to secure long-term retirement benefits.¹⁷⁰ The court argued that continued employment is only a short-term benefit that cannot be pursued with plan funds.¹⁷¹ The *Mett* court premised this argument on the following language, "We are confident that Congress, by imposing strict fiduciary responsibilities on ERISA trustees and enacting 18 U.S.C. § 664, meant to impose criminal liability on employers who willfully arrogate to themselves the authority to sacrifice an employee's pension in favor of short-term benefits of their own devising."¹⁷²

Although the *Mett* court's analysis of the participant benefit theory is abridged compared to the implied authorization theory, the rationale is the same. For the *Mett* court, a federal law (ERISA) provided the objective standard to judge the reasonableness of the defendant's state of mind. If a defendant's state of mind implicates a violation of the regulatory rules of ERISA (no matter how insubstantial), the defense cannot be sustained.

The *Mett* court's long-term benefit versus short-term benefit argument is tenuous, at best. Although ERISA sets strict fiduciary standards, the statutory framework only requires that the fiduciary have a good faith belief that he or she is acting in the best interest of the employees. Plan fiduciaries are mandated to act "solely in the interest of" plan participants and beneficiaries.¹⁷³ While the fiduciary has an undivided duty of loyalty, nothing in the statutory framework suggests that a fiduciary cannot have a good faith belief that she is acting in the

168. *United States v. Mett*, 178 F.3d 1058, 1068 (9th Cir. 1999).

169. *Id.*

170. *See id.*

171. *See id.*

172. *Id.*

173. 29 U.S.C. § 1104(a)(1) (1994); *see supra* note 75 and accompanying text.

best interest of the plan beneficiaries when procuring short-term employment benefits rather than retirement benefits.

3. What Are the Implications of the *Mett* Rationale?

Under a strict application of the *Mett* rationale, the implied authorization defense should fail, but the participant benefit defense should remain theoretically viable, because *Mett's* legal analysis is subject to credible attack. However, the ability of a defendant to establish a valid defense will vary from circuit to circuit depending on what variation of the authorization-benefit rule a court adopts.¹⁷⁴ If a court adopts the *Dixon* rule or a similar rule requiring the defendant to establish both authorization and benefit, the defendant will have no argument.¹⁷⁵ However, if courts adopt a LMRDA rule where either authorization or benefit may be used to negate specific intent, defendants have at least a tenable avenue of defense under a participant benefit theory.¹⁷⁶

The application of the *Mett* rationale is problematic in several ways. Ultimately, it is disconcerting to note that § 501(c) of LMRDA and § 664 of the criminal code punish nearly identical behavior and contain the same substantive elements; yet, in § 501(c) cases, defendants are allowed a greater opportunity to negate specific intent, as compared to § 664 prosecutions under *Mett*. This is an incongruous result given the similarity of the regulatory framework of LMRDA and ERISA.¹⁷⁷ Because both statutes are similar in language, structure and purpose, it is difficult to reconcile this difference in the ability of a defendant to negate specific intent.

174. Compare *supra* note 111 and accompanying text (outlining the requirements for the *Dixon* formulation of the authorization-benefit defense), with *supra* note 112 and accompanying text (outlining the *Ottley* formulation of the authorization-benefit), and *supra* note 113 and accompanying text (stating the *Dibrizzi* rule that union authorization does not negate intent).

175. See *supra* text accompanying note 111 (stating the rule of *United States v. Dixon*).

176. See *supra* note 114 and accompanying text (noting that the *Silva* court held that when the expenditure is for a bona fide union purpose, the defendant is entitled to an acquittal).

177. See *supra* text accompanying notes 129-30 (noting that both statutes have similar language and consolidate theft-related offenses into a single statutory violation); *supra* text accompanying note 132 (stating that the elements to establish a violation of each statute are substantively the same); *supra* note 135 and accompanying text (noting that both statutes were enacted as part of comprehensive regulatory schemes to curb perceived abuses against workers).

While the *Mett* methodology may have been an intellectual shortcut to the right result, the conviction of *Mett* and *Wiseman*, its rigid form ignores the actual culpability of the defendant. The *Mett* decision has reduced the scienter requirement from a standard of conversion with *fraudulent intent*¹⁷⁸ to merely *willfully* diverting plan assets. Once it is established the defendant willfully converted plan assets, any further evidence of intent is irrelevant, because the *Mett* methodology applies a civil regulation to eliminate any further inquiry.

C. AN ALTERNATIVE APPROACH: THE *TODD-NOLAN* RULE

In many respects, the *Todd* and *Nolan* decisions implicitly reject the *Mett* method of statutory interpretation. *Todd* and *Nolan* suggest that the authorization and participant benefit defenses should be applied by direct analogy to the LMRDA cases without reference to the regulations and underlying policies of ERISA. *Todd* accepted the validity of the *Dixon* defense without allowing the prosecution to challenge the validity of the defense in the context of § 664.¹⁷⁹ Similarly, *Nolan* incorporated the Second Circuit's LMDRA authorization benefit rule in a § 664 prosecution without reference to ERISA. *Todd* and *Nolan* seem to suggest that civil regulations under ERISA have no place in determining criminal culpability under § 664. The only limitations placed on negating intent are the good faith belief of the defendant and the formulation of the authorization-benefit rule chosen by the federal jurisdiction in question. A strict application of the *Todd-Nolan* approach would remove the ERISA regulatory framework from the analysis. Such an approach also seems unwise, because a defendant's knowledge that he is violating a civil provision bears on his actual intent.

D. A COMPROMISE POSITION: ERISA REGULATION AS A FACTOR IN DETERMINING REASONABLENESS OF THE AUTHORIZATION-BENEFIT DEFENSE.

In many respects, the *Mett* and *Todd* approaches each appear to be too absolute. The factfinder's job is to discern the state of mind of a reasonable employer caught in a financial bind. The *Mett* approach, on the one hand, seems too hard on the well-meaning defendant, while the *Todd* approach seems

178. See *supra* note 12 and accompanying text (discussing the intent requirement).

179. See *supra* note 124 and accompanying text.

too liberal for individuals with the culpability of William Mett. Although it is true that mere ignorance of a criminal statute is not a defense, an unintentional violation of the provisions of a complex, civil regulatory scheme should not by itself establish criminal intent. Such logic is little more than bootstrapping. On the other hand, employers should not be able to negate criminal intent when they willfully violate the provisions of a civil statute. Accordingly, a compromise between the *Mett* and *Todd* positions may be the best solution.

This compromise alternative was implied in *United States v. Snyder*.¹⁸⁰ In that case, the Second Circuit endorsed the proposition that standards of civil liability may bear on establishing criminal intent.¹⁸¹ The *Snyder* court cautioned that a defendant should not be convicted merely because he breached his fiduciary duties.¹⁸² Rather, the *Snyder* court recognized that regulatory schemes set objective standards of conduct, which could help the factfinder to discern the defendant's intent.¹⁸³ According to the court, Snyder's duties as a fiduciary¹⁸⁴ and his knowledge of his responsibilities were relevant to establishing his state of mind.¹⁸⁵ This approach eliminates the frailty of the *Mett* rule by allowing the regulatory framework to inform the fact-finding process, without acting as an absolute bar to recognized defenses. In embezzlement cases, civil duties under ERISA could be used as another factor to determine the specific intent of the defendant.

Using the regulatory context to inform the fact-finding process also cures *Nolan* and *Todd's* failure to examine how the regulatory environment bears on a defendant's intent. This

180. *United States v. Snyder*, 668 F.2d 686 (2d Cir. 1982). Jacob Snyder was convicted under 18 U.S.C. § 664 of embezzling over \$1 million from union pension and welfare benefit funds. *See id.* at 687-89.

181. *See id.* at 690-91. Snyder appealed his criminal conviction by maintaining that the government had used the standard of civil liability as a basis of imposing criminal liability. *See id.* at 690. The prosecution introduced evidence that Snyder had known about his fiduciary duties under 29 U.S.C. §§ 1104, 1106, 1108, and consciously violated those duties. *See id.* The Second Circuit rejected Snyder's arguments. *See id.* at 691. The *Snyder* court held that the defendant's knowledge of his responsibilities under ERISA was relevant to establishing his state of mind. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* The court pointed out that Snyder had a duty as an ERISA fiduciary to act "solely in the interest of the participants and beneficiaries." *See id.* (quoting 29 U.S.C. § 1104(a)(1)).

185. *See id.*

approach has the advantage (or disadvantage) of eliminating the absolute bar on the authorization-benefit rule for less culpable employers who never gain any personal benefit from the diversion of funds. This would also tend to mitigate the DOJ's policy of prosecuting business owners and fiduciaries irrespective of whether they garner any personal gain from the diversion of funds.¹⁸⁶

An example of this compromise approach might work as follows: Suppose a small business owner has a sudden cash flow crisis. The business maintains a retirement plan subject to ERISA. The plan is funded exclusively by monthly employer contributions. The current owner has little experience in business because she inherited the business from her deceased husband after she had previously been a homemaker. Due to the owner's inexperience, the business is unable to meet its expenses and cannot obtain credit advances from the bank. Instead, the bank calls the company's note. If a payment is not made immediately, the business will fold. In desperation, the owner stops making monthly pension contributions. She plans to repay the contribution in ninety days, because she believes cash flow will improve. The owner also believes that her employees need their jobs due to a local recession. Because of the loyalty of her staff during past cash flow problems, she also believes they would authorize the loan from the pension but does not ask permission. Unfortunately, the business fails sixty days later after the bank repossesses its equipment. Two months later, the Department of Justice convenes a grand jury and the business owner is indicted for embezzlement under 18 U.S.C. § 664.

If *Mett* controlled, the business owner would be convicted of a federal felony. With the compromise position, however, the defendant would be much less likely to be convicted. She could use her lack of knowledge of the ERISA standards to help establish her good faith belief that her employees would have authorized the diversion. She could also argue that her employees benefited through continued employment. While extensive civil penalties may be appropriate for her error, it seems inequitable to criminally penalize the hypothetical business owner in the same manner as William *Mett*.

186. See *id.*

CONCLUSION

Currently the federal courts are divided over how to properly address implied authorization and participant benefits defenses under § 664 prosecutions. The Ninth Circuit's approach, as evidenced in *Mett*, is in many respects too conservative because it does not allow a good faith belief to negate criminal intent no matter how favorable the facts. Under *Mett*, ERISA's regulatory framework is an absolute bar to negating intent through authorization or participant benefit. On the other hand, the approaches adopted in the Eleventh and Second Circuits in *Todd* and *Nolan* ignore the regulatory responsibilities placed on ERISA fiduciaries. The circuits should resolve the two lines of cases through a compromise solution in which the ERISA regulatory framework becomes a factor to be considered in the fact-finding process. Although civil regulation should not be the basis for criminal liability itself, such regulation has a bearing on the state of mind of the defendant.