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## Equitable Relief for ERISA Benefit Plan Designation Mistakes

Raymond C. O'Brien

*The Catholic University of America, Columbus School of Law*

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### Recommended Citation

Raymond C. O'Brien, Equitable Relief for ERISA Benefit Plan Designation Mistakes, 67 CATH. U. L. REV. 433 (2018).

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# EQUITABLE RELIEF FOR ERISA BENEFIT PLAN DESIGNATION MISTAKES

*Raymond C. O'Brien*<sup>+</sup>

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It is no surprise to professional practitioners of the law that people make mistakes. Indeed, the vast majority of professional practitioners earn a livelihood rectifying individuals' mistakes through litigation, legislation, or leverage. The same practitioners are aware that rectification is best accomplished by proactive measures, vigilance to those issues that engender mistakes, and through active reparation, thus avoiding mistakes themselves. Issues prompting litigation are engendered by change to the law, to the economy, or to the intentionality of individuals in flux. Anticipating the effect of change on individuals is the best way for practitioners to avoid mistakes.

The spate of litigation surrounding federal preemption of state statutes pertaining to wealth transfer, resulting in unanticipated consequences of significant economic import, illustrates many professionals are imprudently advising clients with whom they owe a fiduciary obligation. Two forms of fiduciary irresponsibility occur in this connection. First, professionals engage clients in a fiduciary capacity when serving as estate planners or divorce

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<sup>+</sup> Professor of Law, Columbus School of Law, The Catholic University of America; Visiting Professor of Law, Georgetown University Law Center. The author is grateful for the research and editorial assistance of Samuel Mott and Davis C. Rajtik.

practitioners.<sup>1</sup> Second, benefit plan managers engage in a fiduciary relationship when providing routine forms and guidelines to employees with the knowledge that the benefits involve pension or insurance plans governed by the Employee Retirement Income Security Act (ERISA), a federal program governing assets in excess of \$6.7 trillion as of 2015.<sup>2</sup>

When working with clients, estate planners and plan managers are inattentive to the possibility of change in the client's life, the intricacies of federal preemption, and the interaction of the two. As such, these attorneys and plan managers are not discharging their fiduciary duties in respect to a pension or insurance plan in a manner consistent with the interests of the participants and beneficiaries.<sup>3</sup> Specifically, professionals are acting imprudently when advising clients—or neglecting to advise clients—of the options available when the client commences employment or subsequently, makes a significant status change affecting assets so significant as a pension or insurance contract.

The imprudence of both types of professionals may first arise from inattentiveness to estate planning options surrounding beneficiary designations, and is often augmented by the failure to take adequate account of the inevitability of changing circumstances in the participant's life. Secondly, imprudence may arise from the inattentiveness of ERISA plan managers regarding the forms used, lack of periodic follow-up with clients and employees, and through failure to assist a client with identifying intended beneficiaries. The failure of plan managers to provide plan beneficiary designation forms that are sufficiently comprehensive to capture the vagaries of human lifestyle changes is flagrant. Attorneys and plan managers are somewhat aware of federal preemption, specifically that ERISA explicitly contains a preemption clause, and that there are multiple federal decisions applying that preemption to policy designations covered under ERISA, the Federal Employees' Group Life Insurance Act (FEGLIA), and the Servicemen's Group Life Insurance Act (SGLIA).<sup>4</sup> As a result of these judicial opinions, plan managers and attorneys are aware that federal preemption often contradicts the intent of a client, resulting in the unjust

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1. See John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1319 (2003).

2. S. Burcu Avci, M.P. Narayanan, & H. Nejat Seyhun, *How Should Retirement Plans be Organized?*, 13 N.Y.U. J.L. & BUS. 337, 339 (2017); see Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 168–69 (2014) (noting "Americans currently hold more than \$9 trillion in retirement savings accounts").

3. Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1104(a)(1) (2012).

4. *Id.* § 1144(a); see *Hillman v. Maretta*, 133 S. Ct. 1943, 1951, 1955 (2013) (holding state law is preempted because it conflicts with FEGLIA, an insurance program for federal employees); see, e.g., *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 142 (2001) (holding that contrary state laws are preempted by the plan term's benefit mandate).

enrichment of the designated plan beneficiary.<sup>5</sup> Often, because the individual named on the benefit form does not correspond with a client's intent, the advisers and plan managers are inattentive to the "central matter of plan administration."<sup>6</sup> Divorce is the most likely culprit—the former spouse receives the proceeds of the plan even though this cannot be what was intended by the now deceased client.<sup>7</sup> This inattentiveness to the plan beneficiary designation, either when commencing employment or at divorce, is not a frivolous pursuit because the proceeds of the plan often form a significant component of the client's estate.<sup>8</sup>

To illustrate the dilemma, consider a new employee who, as part of his or her employment, participated in his or her employer's ERISA-sponsored pension plan. The employee designates his spouse as the plan designated beneficiary and then directs that if there is no surviving spouse at his death, distribution is to be made by his estate. After completing the form and filing it with the employer's plan manager, the employee and his spouse subsequently divorce and the divorce decree purportedly divests the employee's spouse of any interest in the plan. The employee's attorney never included a qualified domestic relations order (QDRO) as part of the divorce settlement and thereafter, despite good intentions, the employee never removed the former spouse's name as the plan's designated beneficiary. At the employee's death, the former spouse and the deceased employee's estate vie for the plan's benefits, usually a substantial amount of money. The estate asserts the divorce severed any relationship between the decedent and the former spouse, and also asserts the divorce decree contained a valid waiver of any benefits signed by the former spouse. Additionally, state law provides that a former spouse is treated as predeceased for all inheritance purposes! Nonetheless, the former spouse argues the employee retained the plan designated beneficiary due to residual "good will" between the two parties and also alleges that ERISA, FEGLIA, and SGLIA are federal plans mandating federal preemption, emphasizing that the person named as the plan's designated beneficiary takes despite conflicting state law. The issue becomes who takes the proceeds?

Attorneys and laypersons alike might rationally assume the former spouse is barred from taking because of the valid divorce decree and the signed settlement agreement between the two parties. If this is insufficient, the state's revocation by operation of law statute treats each spouse as predeceased upon divorce, and operationally bars the former spouse from taking. Surprising to many plan participants, that is not the case. ERISA and related programs require the plan to pay benefits strictly in accordance with the plan's designated beneficiary rule

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5. See John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1665 (2014).

6. *Egelhoff*, 532 U.S. at 147–48 (holding that making payment to the designated plan beneficiary is central to administrative efficiency).

7. See Sterk & Leslie, *supra* note 2, at 206–07.

8. See *id.* at 168–69.

based on the argument that this simplifies plan administration.<sup>9</sup> Ease of plan administration, unhindered by various state law, the goal of Congress was to make certain that the employee remained in charge of the designated beneficiary.<sup>10</sup> However, Congress failed to take into account the changes in American society between ERISA's enactment in 1974 and today. These changes often thwart an employee's intent.

Of course, private actions can prevent an unintended plan beneficiary from taking the proceeds but one Supreme Court decision illustrates how such actions routinely fail to materialize.<sup>11</sup> First, if the attorney representing the employee at the divorce hearing provided comprehensive advice, a QDRO could be filed, thus defeating the spouse's ability to take from the pension. As is often the case, this was not done.<sup>12</sup> Second, the plan manager could provide the employee with more options on the plan's enrollment form when the employee began employment with the company. Third, the plan manager could continue to notify the employee in an effort to remain current on the intent of the employee. The employment form, meant to explain the plan and its procedures, can easily illustrate certain changes such as divorce, remarriage, or even the birth of children or nonmarital cohabitation. Neither the plan manager nor the forms provided to the employee offered these options, and there was no periodic follow-up to inquire of the employee's current goals.<sup>13</sup> All the while, assets in the managed account continued to increase. Fourth, should the employee seek assistance in creating an estate plan with an attorney, either before or after the divorce, the estate planning professional can counsel the employee to change the designated beneficiary on the form to correspond with the employee's current estate intentions. This was not done.<sup>14</sup> There was no suggestion made in writing by the plan manager, nor encouragement given, to direct the employee to seek adequate legal advice.<sup>15</sup>

This Article argues there is sufficient evidence available to suggest that private practitioners, involved in divorce litigation or estate planning, are in breach of fiduciary duty to their clients when they fail to consider the impact of federal preemption. Second, plan managers of ERISA, FEGLIA, and SGLIA are imprudently providing pension plan forms to employees by failing to take into account the vagaries of modern lifestyle changes. While this Article focuses

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9. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300–01 (2009) (stating that strict adherence to the plan beneficiary documents allows for a more simplistic and efficient estate administration process). The result occurs if the plan involved life insurance or disability insurance proceeds too. *See, e.g., Egelhoff*, 532 U.S. at 149–50 (holding that state statutes prescribing a constructive knowledge standard for plan administrators are preempted, as they conflict with ERISA's policy of minimizing administrative and financial burdens).

10. *See Kennedy*, 555 U.S. at 303–04 (citing *Egelhoff*, 532 U.S. at 148–50).

11. *See id.* at 288.

12. *Id.* at 296–97.

13. *See id.* at 289–90.

14. *Id.* at 303.

15. *See id.* at 301–02.

on plan managers, the liability of both groups is at issue. ERISA imposes stringent standards on persons acting as ERISA fiduciaries,<sup>16</sup> stipulating that ERISA fiduciaries must “discharge [their] duties with respect to a plan solely in the interest of the participants and the beneficiaries . . . .”<sup>17</sup> An ERISA fiduciary is thus confronted with the duties to prepare and maintain enhanced beneficiary designation forms that consider the evolving intent of the employee/accountholder, necessitating regular employee inquiries that require a fiduciary to act upon the newly received information. This is in the interest of the participants and beneficiaries. Likewise, divorce attorneys and estate planning attorneys, once immune from claims brought by third parties due to the rule of privity, are now increasingly subject to suits for breach of duty, negligence, and malpractice.<sup>18</sup>

Plan managers and attorneys often fail to apprise themselves of changes in the law.<sup>19</sup> One significant change is the evolution of state probate statutes which traditionally accommodated the elusive intent of a decedent within the context of a last will and testament, but now include beneficiary designations on nonprobate transfer contracts, such as with pension funds or life insurance contracts.<sup>20</sup> Illustration of the evolution of these state statutes are the following statutes: revocation by operation of law, antilapse, slayer statutes, elective share computations, constructive trusts, and in a handful of states: substitute gift rules.<sup>21</sup> Despite uniform codes promulgated by the National Conference of Commissioners on Uniform State Laws, and attendant greater uniformity among state rules and laws, state laws continue to lack uniformity, resulting in differences of application. Any lack of uniformity conflicts with ERISA’s mandate of ease of administration. Uniformity, simplicity of application, and

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16. See 29 U.S.C. § 1002(21) (2012); see also 29 C.F.R. § 2509.75-8, D-2, D-3 (2005) (persons whom establish and maintain the framework are engaged in fiduciary acts); *Donovan v. Bierwirth*, 680 F.2d 263, 272–73 n.8 (2d Cir. 1982) (holding the fiduciary duty under ERISA is the “highest known to the law”); see generally Langbein, *supra* note 1, at 1324–25.

17. 29 U.S.C. § 1104(a)(1).

18. See *Fabian v. Lindsay*, 765 S.E.2d 132, 140 (S.C. 2014) (holding that an attorney can be held liable for malpractice); *Tamposi Assocs., Inc. v. Star Mkt. Co.*, 406 A.2d 132, 134 (N.H. 1979) (holding third-parties may seek a remedy in court when the promisor had reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes for the contract); see also Gerry W. Beyer, *Avoid Being a Defendant: Estate Planning Malpractice and Ethical Concerns*, 5 ST. MARY’S J. LEGAL MAL. & ETHICS 224, 231–32 (2015); Stephanie B. Casteel et al., *The Modern Estate Planning Lawyer: Avoiding the Maelstrom of Malpractice Claims*, 22 PROBATE & PROP. 46, 49 (2008).

19. See Casteel et al., *supra* note 18, at 48.

20. Sterk & Leslie, *supra* note 2, at 168–69.

21. See *id.* at 178–81, 196, 199, 205 (discussing the issues and applications of antilapse, elective share computations, constructive trusts, and substitute gift statutes in light of the ERISA beneficiary designation); see also Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-On-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1488–89, 1494–95 (2011) (discussing the rise of revocation-on-divorce and slayer statutes and their subsequent analogous treatment in the lower courts).

ease of administration are terms that federal courts frequently use to preempt application of contrary state laws, all in conformity with the United States Constitution's Supremacy Clause.<sup>22</sup>

The federal preemption cases are both expansive and comprehensive.<sup>23</sup> As illustration, a progression of Supreme Court decisions document that ERISA's integrity relies upon the principle that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument."<sup>24</sup> The written instrument is meant to be simple, containing a designated beneficiary that may not be overridden by extraneous arguments that a designated beneficiary is displaced as result of a divorce,<sup>25</sup> allegation of a federal common law waiver,<sup>26</sup> the imposition of a constructive trust,<sup>27</sup> or because the designated beneficiary signed a marital settlement agreement.<sup>28</sup> Since each of these legal arguments can be addressed differently among the states, any incorporation of state law into plan administration jeopardizes the simplicity intended by Congress, and therefore necessitates the federal preemption of state laws conflicting with ERISA. In addition to the simplicity of the plan's written instrument, there are ample judicial holdings affirming the primacy of the plan's designated beneficiary rule, thereby underpinning the argument that both estate planners and pension fund administrators are in breach of their fiduciary responsibility to

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22. U.S. CONST. art. VI, cl. 2; *see, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 181–83 (1824) (preempting state law that conflicted with federal laws licensing companies engaged in coastal trade).

23. ERISA excludes from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). There is also an exemption for qualified domestic relations orders (QDROs), which create an alternate payee's right to, or assigns to an alternate payee the right to, receive all of or a portion of the benefits payable with respect to a particular plan. *See id.* §§ 1056(d)(3)(B)(i), 1144(b)(7); *see also* *State Farm Life & Accident Assurance Co. v. Goecks*, 184 F. Supp. 3d 701, 708 (W.D. Wis. 2016). Federal decisions depart from the actual words of the federal statute and instead ask whether the state statute is an obstacle to accomplishing the objectives of the federal statute. *See* Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 16 (2013).

24. 29 U.S.C. § 1102(a)(1).

25. *See, e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) (holding that contrary state laws are preempted by the plan term's benefit mandate); *see also* *Hillman v. Maretta*, 133 S. Ct. 1943, 1954–55 (2013) (holding state law is preempted because it conflicts with FEGLIA, an insurance program for federal employees).

26. *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 304 (2009) (holding that any federal common law of waiver signed by a participant's ex-spouse did not invoke ERISA's antialienation provision).

27. *See, e.g.*, *Bostic v. Bostic*, No. 6:14-2130-BHH, 2015 WL 5178163, at \*5 (D.S.C. Sept. 3, 2015) (holding a constructive trust does not avoid the preemptive effect of ERISA); *see also* *Carmona v. Carmona*, 603 F.3d 1041, 1061–62 (9th Cir. 2010) (holding that any constructive trust created by a state court is preempted by ERISA).

28. *See, e.g.*, *Cunningham v. Hebert*, No. 14C9292, 2016 WL 6442180, at \*3–4 (N.D. Ill. Nov. 1, 2016) (holding that because the settlement agreement did not qualify as a qualified domestic relations order (QDRO) it was preempted by ERISA's plan designation rule).

plan holders when failing to provide guidance to clients concerning options pertaining to any plan's beneficiary.<sup>29</sup>

Multiple lawsuits arise because plaintiffs are astounded when insurance or pension benefits are paid to an individual whom the decedent is divorced, and usually divorced for a lengthy period of time. Admittedly, the accountholder failed to update his or her plan's designated beneficiary form even though there was sufficient time to do so.<sup>30</sup> This common mistake flows from the plan manager's responsibility to update the intent of the accountholder.<sup>31</sup> The fiduciary duty of the plan manager includes providing proper forms to capture employee intent, to make consistent periodic inquiry, to anticipate change and the possibility of unintended consequences, and to avoid mistakes as prudently as possible under the prevailing circumstances.<sup>32</sup> Currently, the vast majority of plan managers fail to provide this level of accountability.<sup>33</sup>

To illustrate the failure of fiduciary responsibility, consider divorce—the parallel process of signing a financial settlement agreement that purportedly disclaims any interest in the other party's property, division of all marital property, and any attendant support obligations. Without a valid QDRO, even the most precise settlement agreement is insufficient to revoke an ERISA-governed plan's designated beneficiary.<sup>34</sup> Even the use of a constructive trust, which bars the former spouse from becoming “unjustly” enriched, cannot negate the ERISA-plan's designated beneficiary from taking the proceeds.<sup>35</sup> Similarly, state statutes are ineffective substitutes for attorney and plan manager initiative. To illustrate, the general population is often familiar with revocation by operation of law statutes which occur upon the issuance of a final decree of divorce.<sup>36</sup> The modern approach treats the former spouse as predeceasing the testator for purposes of taking from the testator upon death.<sup>37</sup> These statutes apply to last wills and testaments and increasingly to nonprobate transfers such as the contracts illustrated in ERISA cases.<sup>38</sup> Therefore, in relying upon an understanding of local statutes, common practice, or traditional common sense, practitioners and clients may assume a last will and testament is revoked in whole or in part upon the occurrence of a valid final decree of divorce. This

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29. See Langbein, *supra* note 1, at 1346.

30. See, e.g., *Kennedy*, 555 U.S. at 303–04. Two months had elapsed between divorce and death for decedent to change the beneficiary. *Id.* There were eleven years between divorce and decedent's death to change the beneficiary, but it was not changed. See *Cunningham*, 2016 WL 6442180, at \*4

31. See Beyer, *supra* note 18, at 236.

32. See Sterk & Leslie, *supra* note 2, at 201.

33. See *id.* at 201–02.

34. See *id.* at 197–98.

35. *Carmona v. Carmona*, 603 F.3d 1041, 1061–62 (9th Cir. 2010).

36. See Sterk & Leslie, *supra* note 2, at 195–96.

37. See, e.g., VA. CODE ANN. § 20-111.1 (2017).

38. See *id.*

error, illustrated by a plethora of federal decisions involving ERISA, FEGLIA, and SGLIA, is discussed throughout this Article.<sup>39</sup> These decisions highlight the inapplicability of state statutes and the error of many plan managers and attorney practitioners, who inattentively or negligently assume that local law supplants Congressional mandates.

Plan managers and estate planning attorneys are familiar with the increase in the number and use of nonprobate transfers, a transformation that concurrently unfolded with the enactment of ERISA in 1974, and which now eclipses probate wealth transfers.<sup>40</sup> As a result of historical precedent, states vigilantly enacted statutes to accommodate a testator's intent in the context of probate, intestacy, and last wills and testaments.<sup>41</sup> However, the same attentiveness is not consistently true with nonprobate transfers, insurance contracts, and pension fund accounts within nonprobate transfers. In addition, with nonprobate devices there exists far less uniformity among the states in reference to divorce and revocation of designated beneficiaries through attendant operation of law statutes.<sup>42</sup> Adding to this diversity of state application is that many practitioners consider ERISA's provisions daunting and mistakenly assume ERISA pertains only to federal law—unworthy of proper review.<sup>43</sup> Nonetheless, assets and employees governed by ERISA are increasing with the utilization of ERISA-governed nonprobate benefit plans.<sup>44</sup> This is complicated by the significant probability of divorce among employees/accountholders.<sup>45</sup> The unintended consequences of fiduciary inattention to ERISA's strict adherence to the plan's designated beneficiary rule is economically significant. Many former spouses are unintended beneficiaries of ERISA type plans because they are the plans' designated beneficiaries.<sup>46</sup> This reality precipitated an outcry from renowned commentators railing against federal preemption of traditional state sovereignty

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39. See discussion *infra* Section I.A–C.

40. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1129 (1984); see generally Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 63 (2015) (“For many people planning their estates, the will is now the least important document in their estate plan.”).

41. See Leslie & Sterk, *supra* note 40, at 62–63.

42. See generally Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1905–06 (2014) (describing the lack of uniformity among the states in matters of probate and practice).

43. See *id.* at 1904–07.

44. See Langbein, *supra* note 5, at 1694.

45. See *Marriage and Divorce*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/divorce/> (last visited Feb. 14, 2018) (“[A]bout 40 to 50 percent of married couples in the United States divorce. The divorce rate for subsequent marriages is even higher.”).

46. See Jeff Landers, *Divorcing Women—Know the Laws Affecting Your Beneficiary Designations*, FORBES (April 9, 2015, 11:38 AM), <https://www.forbes.com/sites/jefflanders/2015/04/09/divorcing-women-know-the-laws-affecting-your-beneficiary-designations/#685df46045ed>.

over wealth transfer at death.<sup>47</sup> Omnipresent and ever resolute, the fact remains that ERISA requires uniformity, clarity, and simplicity. If an account holder completes a beneficiary designation form, that designated beneficiary will receive the proceeds regardless of any local law or practice. It does not appear that federal preemption will decrease, thus furthering a continuation of unintended consequences.

The Article discusses another option which uses ERISA's provisions prompting plan managers and practitioners to take a fiduciary approach to the plan's participants and designated beneficiaries. Decisions reveal justifications for this approach. First, the scope of ERISA policy applying federal preemption, specifically how ERISA relies upon uniformity of plan application and how even the slightest variation found in state laws would impede the simplicity of that application. Second, the federal refusal to accommodate state laws and practices precipitates mistakes that resulting in a spate of lawsuits and judicial opinions evidencing a pattern of relentless federal preemption. This Article discusses ERISA's preemptory policy and its intransigent application. First, courts are rejecting a theory of unjust enrichment by which the plan's designated beneficiary restoring any payments made under the ERISA-governed plan, if the beneficiary's disqualification is established under the state's revocation by operation of law statute.<sup>48</sup> Second, whether an ERISA-governed designated beneficiary can waive his or her rights to the proceeds of the plan through disclaimer—a valid settlement agreement that references the proceeds and that was voluntarily entered into at the time of the divorce.<sup>49</sup> Third, there may exist a federal common law permitting federal courts to rely upon state law to permit avoidance of the designated plan beneficiary in a manner similar to what state courts allow. It appears such a policy already exists in reference to state slayer statutes, however, the argument is that federal common law should be expanded to include revocation by operation of law upon divorce.<sup>50</sup> The issue is not that these three arguments are unavailing but rather, they solidify ERISA's particular administrative goals and more deeply ensconce federal supremacy as a reality. This reality is difficult for state practitioners to accommodate as they are accustomed to local control over matters pertaining to domestic relations and probate.<sup>51</sup> Federal preemption will not abate. Indeed, as one commentator

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47. See, e.g., Langbein, *supra* note 5, at 1666 (“Egelhoff and Hillman will saddle American wealth transfer law with needlessly contradictory federal and state rules, sometimes applicable to different transfers by the same transferor.”); see also Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1662–63 (2014) (“The Supreme Court’s *Egelhoff* and *Hillman* decisions and the Treasury regulations regarding U.S. government securities in survivorship form have thoughtlessly and needlessly barred the unification effort for federally authorized or regulated nonprobate transfers.”).

48. See, e.g., Langbein, *supra* note 5, at 1678–79.

49. See, e.g., MacInnes v. MacInnes, 677 N.W.2d 889, 889–95 (Mich. Ct. App. 2004) (Murphy, J., concurring).

50. See Langbein, *supra* note 5, at 1690–93.

51. See Hirsch, *supra* note 42, at 1877–78.

writes, “[a]t least within the area of trusts and estates, that giant has slumbered for a long time, and has yet to throw his weight around in a big way, so to speak.”<sup>52</sup>

Faced with trillions of dollars passing under ERISA plans, this Article argues that, despite repeated appeals to the contrary, the designated beneficiary in the ERISA plan document controls and professional practitioners of the law must be attentive to the possibility of status changes applicable to vested or contingent plan beneficiaries.<sup>53</sup> As a response to this fact, it is the responsibility of both the plan managers providing the forms and follow-up inquiry, as well as estate planning attorneys working with clients at divorce and in planning estate plans where there is disposition of assets managed by ERISA. Each of these groups is responsible for providing superior plan beneficiary designation forms and, when employed by a past, current, or future ERISA employee, to raise the issue of status change and provide the proper advice and direction. The mechanism for enforcing this fiduciary responsibility is through 29 U.S.C. § 1132(a)(3)’s accommodation of appropriate equitable relief. Equity demands that plan managers and attorneys developing plans for clients respond in a prudent fashion or risk being held accountable for breach of fiduciary responsibility.

## I. ASSUMPTIONS CONTRIBUTING TO MISTAKES

### A. *Ascendance of Nonprobate Transfers*

Assumptions concerning divorce, waivers, and marital agreements are the subject of mistake due to three significant developments. First, upon death, the manner of testamentary wealth transfer in the United States shifted from passing predominantly through a last will and testament, what is referred to as probate, to more convenient, less expensive, and more prevalent nonprobate transfers such as contracts payable at death, inter vivos trusts, and joint accounts.<sup>54</sup> Professor Langbein provides a good summary of the evolution of wealth transfer devices:

The older probate system of court-supervised transfer has been increasingly displaced by a nonprobate system in which financial intermediaries (including banks, insurers, mutual funds, and pension plans) transfer the owner’s account balance on death. Beneficiary designations on financial accounts tend ever more to do the work of

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52. *Id.* at 1929.

53. *See, e.g., Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001) (holding that ERISA’s preemption mandates that any fiduciary administer benefits in accordance with the documents and instruments governing the plan).

54. Reference to this is made in the Prefatory Note to Article II, Intestacy, Wills, and Donative Transfers, Uniform Probate Code (2014), listing it as one of the four themes prompting a systematic review of the Code. The trend was identified in *Revisiting the Revolution*. Leslie & Sterk, *supra* note 40, at 63; *see also* Langbein, *supra* note 40, at 1129.

family wealth transmission that used to be done in the probate process.<sup>55</sup>

A characteristic of nonprobate plans is that they provide for a standardized form designation by which to identify a designated beneficiary—often a current spouse.<sup>56</sup> This standardization may produce unintended consequences, resulting in a designated beneficiary taking under a nonprobate transfer’s form designation even though this was not intended by the creator of the interest when he or she completed the form.<sup>57</sup> Additionally, many transfer devices, “dramatically increased the dollar volume of assets likely to pass outside the probate system.”<sup>58</sup>

Traditionally, there was scant reference to nonprobate transfers in any state wealth transfer statute that involved revocation of spouses, most statute addressed wills only.<sup>59</sup> Gradually, states adopted revocation by operation of law provisions applicable to nonprobate devices.<sup>60</sup> State statutes typically provide that once a valid final decree of divorce is rendered, the former spouse is treated as predeceasing the testator for purposes of taking under a will, intestate, or through nonprobate device.<sup>61</sup> Without such state statutes, a former spouse receives nonprobate transfers, including insurance or pension benefits, from a decedent who, while happily married, listed the former spouse as the designated beneficiary.<sup>62</sup> Most often, after a final divorce decree ends the marriage, the employee spouse neglects to change the designated beneficiary from the former spouse to a new beneficiary—often a new spouse.<sup>63</sup> The unintended consequences of this are illustrated in the following facts:

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55. Langbein, *supra* note 5, at 1694.

56. *See id.* at 1665.

57. *See id.* at 1694–96.

58. Leslie & Sterk, *supra* note 40, at 63.

59. *See id.* at 67.

60. Refer to *Applying Revocation-on-Divorce Statutes to Will Substitutes*, for a history of revocation by operation of laws statutes. Susan N. Gray, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L. J. 83, 85–100 (2004). As an illustration of states ignoring the impact of divorce on nonprobate transfers, note “both Illinois and New Hampshire law provide that divorce automatically revokes provisions in both wills and revocable trusts that pertain to exspouses. Neither, however, extends this rule to beneficiary designations in contracts, such as life insurance, IRAs or POD provisions.” Leslie & Sterk, *supra* note 40, at 67 (citing 755 ILL. COMP. STAT. 5/4-7(b) (2012); 755 ILL. COMP. STAT. 45/2-6(b); 760 ILL. COMP. STAT. 35/1 (2012); N.H. REV. STAT. ANN. § 551:13(II) (2007)) (footnotes omitted).

61. Gray, *supra* note 60, at 84.

62. *See* Leslie & Sterk, *supra* note 40, at 67.

63. *See* Leslie A. Shaner, *When Clients Fail to Change Beneficiary Designations*, FAMILY LAW MAG. (Sept. 8, 2016), <http://familylawyermagazine.com/articles/beneficiary-designations/> (“The most common situation is that a deceased ex-spouse has failed to change the beneficiary designation/survivorship election for a nonprobate asset to either his/her new spouse or to anyone else, e.g., the parties’ children; and, the living ex-spouse remains as the designated beneficiary on the nonprobate asset.”); *see also* Mary Ellen Signorille et al., *Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans*, DEP’T OF

[S]uppose that soon after her marriage, a testator executes a will naming her husband as her beneficiary. Thereafter, she accumulates a mutual fund account, and, as part of her employee-benefits package, a 401K and a life insurance policy. She names her husband as the death beneficiary of all the nonprobate assets. After the testator and her husband go through an acrimonious divorce, the testator dies unexpectedly before engaging in any post-divorce estate planning. Will the ex-husband be entitled to any of the testator's assets?

If the testator were domiciled in a state with a modern revocation-on-divorce statute, the ex-husband would not be entitled to any of the testator's probate assets or the proceeds of the mutual fund account. Due to the ERISA preemption rule, he would collect the proceeds of the employer-provided retirement account and life insurance policy.<sup>64</sup>

Gradually, modern state statutes, prompted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), included nonprobate transfer devices within their state revocation by operation of law statutes.<sup>65</sup> These statutes still varied among the states, but most treated a former spouse—and sometimes his or her relatives—as predeceasing the policy-holder and thereby excluded from taking as a beneficiary under a last will and testament, as well as under nonprobate transfer devices.<sup>66</sup> Unfortunately, these uniform laws are not uniform among the states, “[u]nlike the Uniform Commercial Code, the Uniform Probate Code and related products have never gained anything close to universal adoption, but they did succeed in stirring things up, encouraging more states to codify and to reexamine and fiddle with statutes already in place.”<sup>67</sup> While most state statutes treat a divorced spouse as deceased when probating the last will and testament of the other spouse, what occurs when that divorced spouse is listed as a designated beneficiary of nonprobate assets remains less than uniform in application.

All ERISA, FEGLIA, and SGLIA plans offer designated beneficiaries, a form of nonprobate device often not addressed in state revocation by operation of law

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LABOR 3 (Dec. 2012), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2012-current-challenges-and-best-practices-concerning-beneficiary-designations-in-retirement-and-life-insurance-plans.pdf> (reporting that “[t]he most common and frequently contentious disputes occur where participants marry or divorce but fail to update their beneficiary designations to reflect this change of status before their death”).

64. Leslie & Sterk, *supra* note 40, at 68.

65. See UNIF. PROBATE CODE § 2-804 cmt. (amended 2010).

66. See, e.g., *id.* § 2-804(d) (“Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.”). See also Gray, *supra* note 60, at 100–02.

67. Hirsch, *supra* note 42, at 1905.

statutes.<sup>68</sup> Thus, to hold state statutes applicable to these federal plans involves the administration of the plan under different state laws. Such a result is anathema to the ease of administration mandated by Congress. Regardless what the state revocation by operation of law statute provides, Congress, in enacting ERISA, “had an implicit interest in ensuring that ‘the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them.’”<sup>69</sup>

Neither the prevalence of nonprobate devices nor the increasing amount of dollars under management will abate. Congress is not incentivized to amend federal legislation to permit revocation by operation of law similar to what is done in the States. Understandably, Congress is willing to permit employees/accountholders to make the decisions necessary to change the designation.<sup>70</sup> Replacing one beneficiary with another is a simple matter. The responsibility lies with plan managers to offer the option of revocation by operation of law on the form at the time of employment.<sup>71</sup> Furthermore, there exists a duty on plan managers to make inquiry of the employees afterward, to better identify the intent of the employee and to incentivize the employee to make the change.<sup>72</sup> This is prudent when planning for the needs of the participants and beneficiaries.

Wealth transfer shifted toward nonprobate transfers and a corresponding accommodation by plan managers is therefore, appropriate. This shift is similar to what occurred with spousal equality law which began in the 1970s, providing equality of ownership and management of marital property.<sup>73</sup> Estate planners and Congressional action developed and implemented procedures by which this shift was accommodated, by enacting provisions accommodating state QDROs.<sup>74</sup> Today, plan managers must accommodate the high incidence of

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68. See Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1852 (2014).

69. See *id.* at 1852 (citing *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013)). ERISA applies to pension plans such as 401(k) plans, welfare plans including life insurance, medical and disability insurance, education programs, child care, and severance. See 29 U.S.C. § 1002(1)–(2); see also JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 175–218 (3d ed. 2000).

70. See Rosenbury, *supra* note 68, at 1852; see also Mary Ellen Signorille et al., *supra* note 63, at 3.

71. See *Avcı et. al.*, *supra* note 2, at 354.

72. See *Varity Corp. v. Howe*, 516 U.S. 489, 502–03 (1996) (“ERISA itself specifically requires administrators to give beneficiaries certain information about the plan . . . . And administrators, as part of their administrative responsibilities, frequently offer beneficiaries more than the minimum information that the statute requires—for example, answering beneficiaries’ questions about the meaning of the terms of a plan so that those beneficiaries can more easily obtain the plan’s benefits. To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity.”) (citations omitted).

73. See Raymond C. O’Brien, *Integrating Marital Property into a Spouse’s Elective Share*, 59 CATH. U. L. REV. 617, 620–23 (2010).

74. See *id.* at 688.

divorce, the mistakes that employees/accountholders make when they fail to update plan beneficiary forms, and that the major estate asset is the ERISA pension fund or insurance policy. To date, few plan managers present clients with comprehensive plan forms, or fail to make inquiry to update designated beneficiaries.<sup>75</sup> Enforcing equitable relief under 29 U.S.C. § 1132(a)(3) will prompt better forms and inquiry.

### B. Equality of Spouses

During the period that nonprobate transfers became increasingly prevalent, the perspective of family law, particularly marriage but also custody and support obligations, shifted from a male-dominated focus to a characterization of the relationship as one of shared economic partnership between two equal partners.<sup>76</sup> Gradually, spouses were, through statute and common law, increasingly considered as co-owners of property acquired during the marital or community period.<sup>77</sup> Even though one spouse might work only in the home, both spouses are now deemed equal owners of wealth acquired during the course of the marriage.<sup>78</sup> This process of equalization proceeded at the federal and state levels. Illustrative of this equality of ownership was the enactment of ERISA,<sup>79</sup> although ERISA's primary goal was to provide security of retirement for employees. Nonetheless, later legislation ensured that spouses are preferred beneficiaries at death, subject to displacement only with consent.<sup>80</sup> ERISA was signed into law on Labor Day of 1974, designed to protect the pension benefits of workers and to safeguard the rights of the workers' beneficiaries properly designated on the pension benefit forms.<sup>81</sup> Ten years later, the Retirement

75. See Sterk & Leslie, *supra* note 2, at 224, 228–30.

76. See O'Brien, *supra* note 73, at 620–23.

77. *Id.*

78. CAL. FAM. CODE § 2550 (West 2016). Specifically, the California code reads:

Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgement of dissolution of the marriage, in its judgement of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally.

*Id.* Equality of spouses was intended to apply at death, not just at divorce, as is illustrated in the Uniform Probate Code elective share provision. See, e.g., UNIF. PROBATE CODE § 2-202 cmt. (“The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage.”).

79. See Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93–406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2012)); see generally PAUL J. SCHNEIDER & BRIAN M. PINHERO, ERISA: A COMPREHENSIVE GUIDE § 1.03 (3d ed. 2008). For an explanation of how the enactment of ERISA made defined-benefit plans less attractive to employers, refer to *Accidental Inheritance*. Sterk & Leslie, *supra* note 2, at 170–75.

80. See Retirement Equity Act of 1984 (REA), Pub. L. No. 98–397, 98 Stat. 1426 (1984).

81. See, e.g., *Boggs v. Boggs*, 520 U.S. 833, 845 (1997). Two other federal statutes likewise protect any beneficiary named in the plan documents. See *Hillman v. Maretta*, 133 S. Ct. 1943,

Equity Act of 1984 (REA) was enacted.<sup>82</sup> The REA strengthened the rights of a surviving spouse by providing the surviving spouse with an income stream after a worker's death. The REA's preface provides that the new legislation is meant to:

[I]mprove the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home, and for other purposes.<sup>83</sup>

Equality of spouses is recognized in the two legislative acts, but "ERISA provides that at the accountholder's death, the accountholder's surviving spouse (if any) shall be the beneficiary of any remaining assets, unless the spouse has properly waived that right."<sup>84</sup> Of further note, "[d]epending on the circumstances, a surviving spouse has a right to a survivor's annuity or to a lump-sum payment on the death of the participant, unless . . . the participant has eliminated the survivor annuity benefit or designated a different beneficiary."<sup>85</sup> To minimize interference from states with conflicting goals and policies, ERISA specifically preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."<sup>86</sup> By enacting the preemption

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1947–55 (2013) (discussing Federal Employees' Group Life Insurance Act of 1954 (FEGIA)) and *Bostic v. Bostic*, No. 6:14-2130-BHH, 2015 WL 5178163, at \*5–6 (D.S.C. Sept. 3, 2015) (discussing the Servicemen's Group Life Insurance Act (SGLIA)).

82. See generally Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426. The REA modified the rules to allow for a surviving spouse to receive benefits when he or she is either married for at least one year prior to the participant's retirement, see 29 U.S.C. § 1055(f)(1) (2012), or if married to the participant—but must be married to the participant at least one year prior to his or her death, see § 1055(f)(2).

83. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426. The Act provided three enhancements to ERISA's protection of spouses of accountholders: (1) more pension plans were covered; (2) pension plans were required to name spouses as beneficiaries of specified survivorship benefits; and (3) any change in such statutory designations requires the written consent of the accountholder's spouse. *Id.* § 103, § 203, § 207.

84. Sterk & Leslie, *supra* note 2, at 172–73 (referencing 26 U.S.C. § 401(a)(11)–(13) (2006)); see generally DAVID A. PRATT & SHARON REECE, *ERISA AND EMPLOYEE BENEFIT LAW* 24–26 (2010).

85. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 293–94 (2009) (citing 29 U.S.C. § 1055(a), (b)(1)(C), (c)(2) and *Boggs*, 520 U.S. at 843).

86. 29 U.S.C. § 1144(a); see *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (discussing the scope of ERISA's preemption). But see 29 U.S.C. § 1144(b)(2)(A) (stating ERISA excludes from preemption any law of any state that regulates insurance, banking, or securities). There is also an exception for qualified domestic relations orders (QDROs), which create or recognize the existence of an alternate payee's right to, or assignment to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the retirement plan. See 29 U.S.C. §§ 1144(b)(7), 1056(d)(3)(B)(i)(I); see also *State Farm Life & Accident Assurance Co. v. Goecks*, 184 F. Supp. 3d 701, 703 (W.D. Wis. 2016) (holding the designated beneficiary must take policy proceeds unless there is a valid QDRO).

provision, Congress wanted to ensure that plans and plan sponsors are subject to a uniform body of benefit law, the goal being to minimize administrative and financial burdens associated with complying with conflicting state directives, or between states and the federal government.<sup>87</sup>

### C. Federal Preemption of State Laws

ERISA and preemption of state laws illustrate another significant development in the law of wealth transfer: the gradual but relentless inroads made by federal law into an area historically dominated by state legislation.<sup>88</sup> Commentators suggest that federal preemption may continue unabated. Professor Adam J. Hirsch observes that: “[a]t least within the arena of trusts and estates, that giant has slumbered for a long time, and he has yet to throw his weight around in a big way, so to speak.”<sup>89</sup> So too, Professor Lawrence W. Waggoner, a Reporter for the Restatement (Third) of Property: Wills and Other Donative Transfers, the Uniform Probate Code, and the Uniform Statutory Rule Against Perpetuities, writes that:

Because of the raw power granted to the federal government by the Constitution, federal law is the elephant in the room, even in a traditional state-law sphere as wealth transfer law. It is distressing indeed that those who produce that elephant often—not always, but often—seem oblivious to the damage they can do and have done to well-considered state law.<sup>90</sup>

Traditionally, state courts and state legislatures were the arbiters of both family law and intergenerational wealth transfers. In 1858, the Supreme Court decision of *Barber v. Barber*<sup>91</sup> established the federal exception to domestic relations jurisdiction. The exception developed to mean that state courts decide matters of divorce, child custody, and visitation.<sup>92</sup> There are of course exceptions, most illustrative are when Congress enacts laws pertaining to

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87. See *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992).

88. See Waggoner, *supra* note 47, at 1637.

89. Hirsch, *supra* note 42, at 1929.

90. Waggoner, *supra* note 47, at 1663 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” (referencing the Supremacy Clause of the United States Constitution Article VI)).

91. *Barber v. Barber*, 62 U.S. 582, 584 (1858) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a *vinculo*, or to one from bed and board.”). In 1992, Justice White based the domestic relations exception in the power of Congress to grant jurisdiction under Article III of the Constitution. See *Ankenbrandt v. Richards*, 504 U.S. 689, 697 (1992).

92. See *id.* at 700–07.

domestic violence or child kidnapping and abduction.<sup>93</sup> Ostensibly, there remains a federal exception to domestic relations jurisdiction. This policy is referenced in the 1982 Supreme Court decision of *Santosky v. Kramer*.<sup>94</sup> Justice Rehnquist wrote that domestic relations “has been left to the States from time immemorial, and not without good reason.”<sup>95</sup> Since ERISA’s employment perspective is national, so are an increasing number of domestic relations matters, some involving international consequences, and Congress is reluctant to enact federal legislation forcing states to accommodate their own laws.<sup>96</sup>

Similarly, in reference to intergenerational wealth transfers, state statutes and judicial opinions historically provided the mechanism by which wealth was transferred from one generation to the next through intestacy, last wills and testaments, and now nonprobate transfer.<sup>97</sup> While there is no history of judicial opinions carving out a “wealth transfer exception” to federal jurisdiction, state sovereignty assumed authority because of English precedent and the practical observation that localities are better suited to gauge any inexpertly expressed intent of the locals.<sup>98</sup> A noted teacher and author, Professor Thomas E. Atkinson, captured both the genesis and the rationale behind local control of wealth transfer when observing that, “[c]ourts of probate are close to the people; one can be found in every county, and in Connecticut at practically every crossroad.”<sup>99</sup> States consistently assumed the role of probate, perhaps because the wealth of decedents was local wealth, thus localities are better suited to estimating the intentionalities of their constituents.<sup>100</sup> State intestate law is a good illustration of this process. Each state enacted statutes based on what was perceived to be the decedent’s intent. Then, the intestate statute distributes any of the decedent’s property that does not pass under a valid will or nonprobate device. Unsurprisingly, intestate statutes vary widely among the States.

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93. *See id.* (discussing the progression of the exceptions).

94. *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982).

95. *Id.* at 770 (Rehnquist, J., dissenting).

96. One example was Congress’s enactment of the Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. § 1738A (2000), to address interstate custody jurisdiction problems. By enacting PKPA, the National Conference of Commissioners on Uniform State Laws was forced to revise its Uniform Child Custody Jurisdiction Act to accommodate the federal basis of jurisdiction, enacting the Uniform Child Custody Jurisdiction and Enforcement Act of 1997. *See* William J. Howe & Hugh McIsaac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children Are at Stake*, 46 FAM. CT. REV. 78, 80 (2008).

97. *See* Reid Kress Weisbord, *Federalizing Principles of Donative Intent and Unanticipated Circumstances*, 67 VAND. L. REV. 1931, 1931–32 (2014).

98. *Id.* at 1933–35.

99. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 29 (1953).

100. *See id.*

Commentators debate whether the intentionality of the decedent was captured correctly, and consensus as to intentionalities is rare.<sup>101</sup> The decedent was always able to provide for other intended beneficiaries. Overall:

[M]uch of state wealth transfer law was either created to, or does in fact, effectuate donative intent by filling gaps created by the donor's inability to predict future events. Other examples include the trust law modification doctrines; powers of appointment; the repose of discretion in a trustee; doctrines of ademption, accession, satisfaction, and abatement; rules governing pretermitted spouses and children; the requirement of testamentary capacity; and the slayer rule.<sup>102</sup>

It is understandable that federal preemption of established wealth transfer procedure in each of the states causes commentators, attorneys, and state legislators to strenuously object. For example, a few members of the Supreme Court raise concern over the literal interpretation given to the ERISA's preemption clause.<sup>103</sup>

There are multiple arguments suggesting that federal preemption is unwarranted. Justice Breyer, with whom Justice Stevens joined, wrote a blanket preemption interpretation will produce an "avalanche of litigation," threatening results that Congress could not foresee.<sup>104</sup> Instead, their approach being to "'respect' the 'separate sphere[e]' of state 'authority'"<sup>105</sup> and where "the state statute before us is one regarding family property—a 'fiel[d] of traditional state regulation,' where the interpretative presumption against pre-emption is particularly strong."<sup>106</sup> Similarly, Justice Thomas urges restraint when applying preemption of state laws, "[u]ntil we confront whether Congress had the constitutional authority to pre-empt such a wide array of state laws in the first place, the Court—and lower courts—will continue to struggle to apply § 1144 [preemption]."<sup>107</sup> Justice Thomas also wrote, "[p]re-emption analysis should, therefore, instead hew closely to the text and structure of the provisions at issue, and a court should find pre-emption only when the 'ordinary meaning' of duly enacted federal law 'effectively repeal[s] contrary state law.'"<sup>108</sup>

In an effort to reduce preemption, some justices suggest that federal preemption may be drifting into unconstitutionality,<sup>109</sup> others argue for enforcement of a presumption against preemption.<sup>110</sup> Still, others question

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101. See, e.g., Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 57–58 (2009).

102. Weisbord, *supra* note 97, at 1934–35.

103. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 153–54 (2001) (Breyer, J., dissenting).

104. *Id.* at 153–54.

105. *Id.* at 160.

106. *Id.* at 163.

107. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 949 (2016) (Thomas, J., concurring).

108. *Hillman v. Maretta*, 133 S. Ct. 1943, 1955 (2013) (Thomas, J., concurring).

109. See, e.g., *Gobeille*, 136 S. Ct. at 949 (Thomas, J., concurring).

110. *Id.* at 954 (Ginsburg, J., dissenting).

whether any state law presents an impermissible connection with an ERISA plan.<sup>111</sup> Professors Sterk and Leslie offer the following insight:

Other instruments reflecting the accountholder's intent, including wills, revocable trust instruments, and the terms of divorce decrees, count little in the face of the accountholder's failure to change the beneficiary designation form he or she filled out years earlier. Major life events, such as marriage, the birth of new family members, and the death of others, have little or no effect on distribution of the account unless the accountholder had the presence of mind to change the beneficiary designation.<sup>112</sup>

Increasingly, cases evidence a willingness to preempt state laws, mostly because of what Justice Breyer characterizes as “serious administrative problems.”<sup>113</sup> Justice Breyer explains that “[i]f each State is free to go its own way, each independently determining what information each plan must provide about benefits, the result could well be unnecessary, duplicative, and conflicting reporting requirements, any of which can mean increased confusion and increased cost.”<sup>114</sup> The rationale underlying preemption is ease of administration of an array of ERISA accounts. Justice Kennedy, writing in *Gobeille v. Liberty Mutual Insurance Co.*, summarized the rationale for federal preemption concluding that, “Pre-emption is necessary in order to prevent multiple jurisdictions from imposing differing, or even parallel, regulations, creating wasteful administrative costs and threatening to subject plans to wide-ranging liability.”<sup>115</sup> Even if state law traditionally regulated fields, such as domestic relations, ERISA’s preemption still applies because Congress “certainly contemplated the pre-emption of substantial areas of traditional state regulation.”<sup>116</sup>

Justice Thomas defers to the historical status of state sovereignty, and noted commentators such as Professor John Langbein, while admitting that “under the Supremacy Clause of the Constitution, Congress has the power to forbid the

111. *Id.* (citing *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995)).

112. Sterk & Leslie, *supra* note 2, at 201, 207 (adding also that “[f]orms that lead the accountholder to name a spouse as the primary beneficiary of an ERISA-governed account present the most egregious example of how designation forms take too little account of potential life changes”).

113. *Gobeille*, 136 S. Ct. at 949 (Breyer, J., concurring); *see also* *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987) (holding Congress intended for ERISA to provide a uniform set of administrative procedures).

114. *Gobeille*, 136 S. Ct. at 949.

115. *Id.* at 939; *see also* *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (holding that Congress sought to avoid complexity and administration costs because these would discourage employers from adopting the benefit plans).

116. *Gobeille*, 136 S. Ct. at 946 (citing *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 330 (1997)).

application of state wealth transfer law to a federally authorized account,”<sup>117</sup> this power should not be inferred from silence.<sup>118</sup> Professor Langbein suggests that something more is needed in the text of the federal statute to permit preemption, “[t]he inference that should have been drawn from ERISA’s silence on these matters is that Congress did not intend to displace such state laws, especially in view of the ‘presumption against preemption in areas of traditional state regulations such as family law.’”<sup>119</sup> Additionally, commentators argue that matters traditionally left to the states, such as family law and wealth transfer, should be particularly insulated from federal preemption.<sup>120</sup> Professor Langbein argues the Court long deferred to state domestic relations law, a deference recognized by Congress<sup>121</sup> with codified enforcement of state marital property decrees through QDROs:<sup>122</sup>

Accordingly, the divorce revocation problem . . . did not come into discussion and was not addressed in [the federal] legislation, but the principle embodied in the QDRO regime—deference to state law on marital property matters incident to divorce—invited extension to state divorce revocation statutes, contrary to the Court’s decision [on preemption].<sup>123</sup>

Professor Langbein argues the Court demonstrates “mistaken assumptions” and “unfamiliarity” with basic principles of trust law, suggesting instead that states are better informed as to wealth transfer law.<sup>124</sup> Furthermore, Professor Langbein argues that revocation by operation of law occasioned by divorce “is an issue about which federal law provides no direction and expresses no federal interest.”<sup>125</sup> Instead, by “preventing state law from doing its customary work of interpreting the meaning of beneficiary designations, federal preemption needlessly defeats the core policy of wealth transfer law, to implement the transferor’s intent.”<sup>126</sup>

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117. Langbein, *supra* note 5, at 1671.

118. *Id.* at 1674.

119. *Id.* at 1676 (referencing *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 152 (2001)).

120. *Id.*

121. *Id.* (referencing *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) as support for the proposition that there is no federal law of domestic relations, which is primarily a matter of state concern).

122. Langbein, *supra* note 5, at 1676 (referencing the Retirement Equity Act of 1984, Pub. L. 98-397, 98 Stat. 1426 (1984)).

123. *Id.* at 1677.

124. *Id.* at 1695–96 (referencing *Hillman v. Maretta*, 133 S. Ct. 1943, 1957 (2013) (Alito, J., concurring)). Specifically, Langbein writes: “The Court’s disinterest in the purpose of the divorce revocation rule also meant that the Court had no understanding of the magnitude of the harm that the preemption rule would cause.” *Id.* at 1696.

125. *Id.* at 1677.

126. *Id.* (referencing RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003)).

Professor Lawrence Waggoner, another legal commentator with notable credentials in the area of decedents' estates laments the Court's departure from the "intent-effecting divorce-revocation rule for federally authorized or regulated nonprobate payments" and for the Court's unawareness of the "decades-long movement toward unifying the law of probate and non-probate transfers."<sup>127</sup> Professor Waggoner, a Reporter for the Uniform Probate Code, is not only concerned about federal preemption of state divorce revocation by operation of law statutes, but that federal preemption erodes state advances that permit including nonprobate transfers in what is termed the "augmented estate" of a decedent spouse.<sup>128</sup> Additionally, because federal preemption demands that the plan beneficiary designation controls, "neither a subsequent marriage, the birth of a child, a divorce, nor the death of a beneficiary can affect the beneficiary designation. Any applicable omitted-spouse, omitted-child, or antilapse statutes, as well as state statutes that revoke beneficiary designations on divorce, are preempted by ERISA."<sup>129</sup> The scope of federal preemption is undetermined, but presently Professor Waggoner views it as a direct threat to utilization of augmented estate.

The augmented estate is increasingly utilized among the States as a statutory mechanism to include nonprobate transfers within the estate of a decedent spouse, permitting his or her surviving spouse to claim a portion of nonprobate transfers when a third party is named as the beneficiary and where a disappointed spouse seeks a portion.<sup>130</sup> Currently, "[a]bout thirty-seven percent of the non-community property states . . . extend their elective-share laws to nonprobate transfers."<sup>131</sup> In effect, by augmenting the estate, a surviving spouse is able "to elect" a portion of the marital estate that includes any transfer termed nonprobate, such as joint bank accounts, multiple party accounts, pay on death and transfer on death accounts, joint tenancy in real estate, life insurance, revocable trusts, and pension retirement contracts, annuities with a death benefit, Totten trusts, and any account with a right of survivorship.<sup>132</sup> Since the majority of wealth transfers outside of probate,<sup>133</sup> augmented estate provides a surviving spouse with a significant tool for recapturing marital property after the death of the spouse holding title.

Professor Waggoner is concerned the states permitting use of augmented estate may see the practice preempted by federal courts. He suggests that

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127. Waggoner, *supra* note 47, at 1642.

128. *Id.* at 1643.

129. Sterk & Leslie, *supra* note 2, at 186.

130. See O'Brien, *supra* note 73, at 715–17.

131. Waggoner, *supra* note 47, at 1643. For a complete discussion of augmented estate and its evolution, refer to *Integrating Marital Property into a Spouse's Elective Share*. See generally O'Brien, *supra* note 73.

132. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 (AM. LAW INST. 2003).

133. Waggoner, *supra* note 47, at 1638.

ERISA, amended by the REA, extends federal protection to the surviving spouse of an employee spouse's ERISA-covered pension plan.<sup>134</sup> Nonetheless, the Retirement Equity Act of 1984 does not apply to federal life insurance policies, protected under FEGLIA, nor does it apply to the National Service Life Insurance Act of 1940, or to SGLIA.<sup>135</sup> FEGLIA and SGLIA may preempt any conflicting state statute such as one mandating that a surviving spouse's right to include insurance within a spouse's augmented estate for election purposes. As such, Professor Waggoner concludes that "except for ERISA-covered plans, a decedent's surviving spouse has no protection with respect to federal statutes authorizing or regulating nonprobate transfers."<sup>136</sup> Relying on federal preemption, and in direct contravention to state augmented estate statutes, "[s]pouses who want to disinherit their surviving spouses need only convert as much of their liquid wealth as possible to U.S. government securities in survivorship form with third-party donees, so that as little as possible remains for their surviving spouses."<sup>137</sup> In other words, because federal preemption applies to FEGLIA and SGLIA, state augmented estate statutes are powerless to reach assets held in any policy governed by these federal programs. Federal preemption bars them from inclusion in the augmented estate.

Commentators argue that federal preemption of state law should only occur when Congress specifically provided for such,<sup>138</sup> but as the nation becomes less local, there must arise some instances when national policy is justified. Admittedly, some argue the "federalization of wealth transfer law creates potential for harmful disruptions to settled and well-considered substantive state law policies governing inheritance, property succession, and wealth transfer."<sup>139</sup> Nonetheless, an argument may be made in favor of federal preemption because federal rules, "formulated and applied uniformly throughout the United States by Congress and federal courts, can afford citizens a number of benefits."<sup>140</sup> Among the benefits are fewer expenses associated with different rules and information costs, promotion of uniformity, minimizing uncertainty stemming from conflicts of law, and "a centralized legal system has the capacity to fill gaps in the law more rapidly than a decentralized one, again mitigating

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134. *Id.* at 1643–44.

135. *Id.* at 1644. Professor Waggoner describes the application of the insurance programs with corresponding preemption issues. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1947 (2013); *Ridgeway v. Ridgeway*, 454 U.S. 46, 60 (1981) (involving the Servicemen's Group Life Insurance Act of 1965); *Wissner v. Wissner*, 338 U.S. 655, 660–61 (1950) (involving the National Service Life Insurance Act of 1940).

136. Waggoner, *supra* note 47, at 1644.

137. *Id.* at 1645 (citing *Free v. Bland*, 369 U.S. 663, 670 (1962) (holding contrary state law is preempted) and *In re Estate of Scheiner*, 535 N.Y.S.2d 920, 921–22 (Sur. Ct. 1988) (holding federal law preempts the elective share of the surviving spouse)).

138. *See, e.g., Langbein, supra* note 5, at 1676–77.

139. Weisbord, *supra* note 97, at 1944.

140. Hirsch, *supra* note 42, at 1874.

uncertainty.”<sup>141</sup> Plus, there is a consensus that uniformity provides ease of administration, an argument discussed in regards to ERISA’s policy underpinnings.

There is one last argument in support of state law application and resistance of the uniformity provided by federal preemption. Commentators long associated with the development of state regulation of probate or similar developments in family law share Professor Waggoner’s concern over the all-encompassing impact of federal law on state laws and procedures developed over centuries.<sup>142</sup> The spate of cases involving state revocation by operation of law statutes is only one instance of the conflict.<sup>143</sup> State laws are better equipped to capture the intent of an employee/acountholder, now divorced and deceased, but having amassed assets to be distributed to those intended. Presumptively, the divorced acountholder did not intend for the surviving plan designated beneficiary to receive the plan’s proceeds; since the employee was divorced for some time. The acountholder intended to change the beneficiary but neglected to do so. It was a mistake not to change the beneficiary on the plan. Presumptively, the plan manager who provided the plan designation form to the employee at the commencement of employment knew that ERISA required the designated beneficiary to receive the proceeds, but the manager did not provide a form accommodating divorce or any other change in the acountholder’s life. Likewise, the decedent’s attorney who facilitated the divorce or prepared decedent’s estate plan, was presumptively aware of state revocation by operation of law statutes, but did not advise the client of the need to change the beneficiary designation when representing the acountholder at the divorce, or to prompt a change to the estate plan. Perhaps the attorney thought that the state’s revocation by operation of law statute would apply, or alternatively, that the couple’s divorce decree incorporating a waiver of outstanding financial interest derived from the other party, voided the designation. Both assumptions are a mistake.

Arguably, the decedent made a mistake because of neglect, but at what point should plan managers or the acountholder’s divorce or estate planning attorney be held responsible for negligently failing to prudently advise the client. “The burgeoning case law suggests that far too few lawyers understand the intricacies of estate planning with respect to retirement-plan assets.”<sup>144</sup> Mistakes are common to all people, one White House report concludes many individuals “do not understand the most fundamental concepts and terminology in investing . . . most Americans lack the requisite knowledge to protect them from outright

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141. *Id.* at 1874–75.

142. See, e.g., Gray, *supra* note 60, at 126 (suggesting that federal law, including ERISA, should defer to state law on wealth transfer); Langbein, *supra* note 5, at 1694–96; Rosenbury, *supra* note 68, at 1869 (commenting that understandings of family formation and exit are becoming increasingly federalized).

143. Gray, *supra* note 60, at 100–09.

144. Sterk & Leslie, *supra* note 2, at 211.

financial fraud.”<sup>145</sup> There is growing evidence of increased concern over breaches of fiduciary duty by plan managers—financial breach being the most common allegation:

For example, pension plan beneficiaries have filed several lawsuits accusing fiduciary-executives of breaching their fiduciary duty by failing to sell the company stock held by their pension plans before the stock price dropped. Critics have pointed to evidence of sub-optimal diversification: more than twenty-seven percent of all employees hold at least half of their 401(k) balances in company stock and nearly seven percent have their entire account in company stock. In response to the concern that fiduciary-executives may not always act in the interest of the fund beneficiaries, some corporations have hired independent fiduciaries to handle the trading of company stock in their own employee pension funds.<sup>146</sup>

Very recently, greater fiduciary accountability was invigorated through the Department of Labor’s enforcement of a new rule under which brokers and investment advisers for defined contribution plans, the ERISA model, are to be subjected to higher fiduciary standards.<sup>147</sup> Furthermore, investment advisers are required to recommend investment products with the “best interest” of the beneficiaries in mind.<sup>148</sup> Logically, greater focus must evolve to encompass the fiduciary responsibility of plan managers to provide employees with adequate forms to capture life changes. Additionally, plan managers should be required to make inquiry of employees so as to accommodate the employee’s intent as life events unfold. The issue is whether the plan manager fiduciary duty encompasses providing the accountholder with a form that accommodates his or her intent throughout changing life circumstances. Under 29 U.S.C. § 1132(a)(3), ERISA provides such a duty.

## II. ERISA POLICY PRECIPITATING PREEMPTION

### A. ERISA Policy

Employers often provide their employee with retirement accounts, now taking the form of defined-contribution plans, as opposed to defined-benefit plans.<sup>149</sup> Defined contribution plans grew in popularity because they provide financial incentives to employees to plan for retirement savings with a safe and efficient program to which the employer often contributes funds.<sup>150</sup> For employers, the

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145. Avci et al., *supra* note 2, at 350.

146. *Id.* at 365–66.

147. *Id.* at 340–41.

148. See, e.g., Lisa Beilfuss, *How the Fiduciary-Rule Review is Likely to Play Out*, WALL ST. J. (Feb. 9, 2017), <https://www.wsj.com/articles/how-the-fiduciaryrulereview-is-likely-to-play-out-1486660677>.

149. Avci et al., *supra* note 2, at 349.

150. *Id.* at 348.

plans are part of a motivation program that entices new employees; they are easy to join, and they provide a mechanism to promote savings among employees.<sup>151</sup> The success of the program is illustrated in a comment by Justice Breyer, concurring in one Supreme Court decision, citing an amicus brief submitted by the American Benefits Council reporting that “ERISA-based health plans provide benefits to 93 million Americans,”<sup>152</sup> a significant portion of the working population.

Before ERISA’s defined contribution plans, many participants or their beneficiaries who qualified for pension or welfare benefits were denied their promised benefits even though they dutifully paid into them.<sup>153</sup> Companies declared bankruptcy or simply defrauded employees because participants were not informed of plan terms or there were issues with the solvency of the plan itself.<sup>154</sup> Public inquiries ensued and government committees formulated a plan to guarantee employees benefits.<sup>155</sup> By 1974, federal policy, and hence ERISA, viewed retirement accounts as beneficial to the nation and Congress concluded “[that it was] desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such [ERISA] plans.”<sup>156</sup> This came about because:

ERISA required the employer to deposit contributions into a common fund and to pay retirement benefits from the fund as they matured to individual employees. The payout amount must be described in the plan documents and usually take the form of an annuity for employee’s life, the joint lives of the employee and a beneficiary, a specified term, or some variation of the three.<sup>157</sup>

The plans are designated as 401(k) or 403(b) accounts, which are governed by ERISA.<sup>158</sup>

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151. Despite the availability of these plans, fifty-six percent of Americans hold less than ten thousand dollars in their retirement accounts, and one in three Americans hold no reported retirement savings. Avci et al., *supra* note 2, at 338–39 (citing Elyssa Kirkham, *1 in 3 Americans Have Saved \$0 for Retirement*, TIME (March 14, 2016), <http://time.com/money/4258451/retirement-savings-survey/>).

152. *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 949 (2016) (Breyer, J., concurring).

153. Albert Feuer, *Who is Entitled to Survivor Benefits from ERISA Plans?*, 40 JOHN MARSHALL L. REV. 919, 923 (2007).

154. *Id.* at 923 (citing EMPLOYEE BENEFITS LAW, INTRODUCTION TO THE FIRST EDITION XCIV-XCV (2000)).

155. *See id.*

156. 29 U.S.C. § 1001(a) (2000).

157. Sterk & Leslie, *supra* note 2, at 172; *see also* DAVID A. PRATT & SHARON REECE, ERISA AND EMPLOYEE BENEFIT LAW 5–7 (2010); JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 271 (2004); Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 953 (2007).

158. These plans allow both employees and employers to make tax-deferred contributions—defined contributions—into retirement savings accounts administered by the employer. *See* Sterk

Overall, ERISA produced a number of revolutionary innovations: (1) The fiduciary burden was shifted to employees because they made investment decisions related to goals, by holding more of the employer's stock than otherwise permitted; (2) Individual Retirement Accounts (IRAs) were permitted, allowing employees to roll over their portfolios after an employment change or retirement; and (3) rollovers prompted a significant increase in assets held in IRAs, so that by the end of 2015 IRA assets totaled \$7.3 trillion.<sup>159</sup>

ERISA was enacted to provide all Americans with assistance in planning for a financially secure retirement. To bolster this goal, and to provide uniformity and ease of administration, Congress mandated that ERISA “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”<sup>160</sup> Preemption of conflicting state laws is necessary because such conflict “interferes with nationally uniform plan administration.”<sup>161</sup> While some employers are exempted from participation, ERISA covered the vast majority of the country's employees. For example, government employment plans are not covered,<sup>162</sup> church plans are exempt unless they choose to be covered,<sup>163</sup> and businesses where the only employees are the owner and the owner's spouse are exempt.<sup>164</sup> Every ERISA plan must be established and maintained pursuant to a written instrument that is easy to understand,<sup>165</sup> and the plan must establish the manner of conducting payment—referencing the plan's designated beneficiary.<sup>166</sup> Vesting of benefits occurs early due to the accrual of benefits

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& Leslie, *supra* note 2, at 172 (citing Harvey B. Wallace II, *Retirement Benefits Planning Update*, 20 PROB. & PROP. 59 (2006)). A 401(k) plan is an employer-sponsored, defined-contribution plan that permits all employees the option to save for retirement as a deduction from their paycheck prior to taxation. See § 401(k) of the Internal Revenue Code, authorizing tax deferral for an employee's contribution to a plan meeting a nondiscrimination test. 26 U.S.C. § 401(k) (2012). As of 2017, the maximum pre-tax contribution is \$18,000. *IRS Announces 2017 Pension Plan Limitations; 401(k) Contribution Limit Remains Unchanges at \$18,000 for 2017*, IRS (Oct. 27, 2016), <https://www.irs.gov/newsroom/irs-announces-2017-pension-plan-limitations-401k-contribution-limit-remains-unchanged-at-18000-for-2017>. 403(b) plans are available to employees of certain tax exempt institutions such as public schools. Avci et al., *supra* note 2, at 348.

159. *Id.* at 349, 383 (“A recent Government Accountability Office (GAO) study has found that there are more than 300 taxpayers who own IRA accounts with an aggregate value of about \$81 billion. Thus, the average balance in these accounts is over \$250 million each.”).

160. 29 U.S.C. § 1144(a) (2012).

161. *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 950 (2016) (Breyer J., concurring) (citing *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001)).

162. 29 U.S.C. § 1003(b)(1).

163. *Id.* § 1003(b)(2).

164. 29 C.F.R. § 2510.3-3(b)–(c) (2017).

165. 29 U.S.C. § 1102(a)(1).

166. *Id.* § 1102(b)(4). All plans must comply with the Plan Terms Benefit Mandate. 29 U.S.C. § 1104(a)(1)(D). See also *Egelhoff*, 532 U.S. at 147 (holding a core feature of ERISA is the Plan Terms Benefit Mandate).

early in employment,<sup>167</sup> and there is a spendthrift provision forbidding assignment or alienation of benefits before payments stipulated by the plan.<sup>168</sup>

“At the end of 2015, U.S. defined contribution plan assets alone totaled \$6.7 trillion,”<sup>169</sup> rising from \$104 billion in 1978.<sup>170</sup> Federal involvement in these plans is extensive too. For the period 2014 through 2018, the estimated foregone federal tax revenue resulting from these plans is \$785.1 billion for health and long-term care insurance plans, and an additional \$700 billion for pension plans.<sup>171</sup> On a personal level but with national implications, ERISA prompted increased savings for retirement when, “[u]nless the retirement savings and investments were managed competently, most Americans could end up in their old age with little savings and at the mercy of various social safety net programs, such as Social Security or Medicaid, which are only meant to be supplementary retirement vehicles.”<sup>172</sup>

Nonetheless, increasing participation by employees does not guarantee investments will provide for maximum return, or even that they will match market returns. Data suggests that “[r]eturns from insider trades of pension funds in which conflict of interest are likely to be present underperform the market by more than 5.5% over a year.”<sup>173</sup> In a comparison with defined-benefit plans, which preceded ERISA defined-contribution plans, three commentators from the University of Michigan School of Business document that:

Evidence shows that defined benefit plans significantly outperform defined contribution plans. By design, defined benefit plans handle inflation risk by computing benefits as a fraction of the beneficiaries’ salaries during the last few years of their working years. In contrast, in defined contribution plans the employees are expected to make financial decisions that help protect against inflation risk. In one study, defined benefit plans outperformed defined contribution plans by 76 basis points annually between 1995 and 2011. Another study found that defined benefit plans outperformed defined contribution plans during 1990-2012 by about 70 points annually. Given that there was over \$6.7 trillion invested in defined contribution plan accounts alone in 2015, underperformance of 70 basis points implies a cost of

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167. 29 U.S.C. § 1054. An employee’s benefits may not be forfeited because of any company policy. *See* 29 U.S.C. §§ 1053, 1081–86.

168. *Id.* §§ 1053(a)(E), 1104(a)(1)(D).

169. Avci et al., *supra* note 2, at 339 (citing *2016 Investment Company Fact Book*, INV. CO. INST. 136 (2016), [https://www.ici.org/pdf/2016\\_factbook.pdf](https://www.ici.org/pdf/2016_factbook.pdf).)

170. *Id.* at 349.

171. Colleen E. Medill, *Regulating ERISA Fiduciary Outsourcing*, 102 IOWA L. REV. 505, 511 (2017) (citing Estimates of Federal Tax Expenditures for Fiscal Years 2014–2018, JOINT COMM. ON TAX’N 31–32 (Aug. 5, 2014), <https://www.jct.gov/publications.html?func=startdown&id=4663>.)

172. Avci et al., *supra* note 2, at 348.

173. *Id.* at 343.

about \$50 billion per year. Once again, the lagging performance of the defined contribution plan adds an additional burden on the American worker to increase her future contributions as well as to take higher levels of risk.<sup>174</sup>

The forms offered to employees by plan managers at the start of employment vary among employers. The form is of particular significance to any discussion of federal preemption because of ERISA's prohibition on accountholders changing a beneficiary designation in any manner other than through the accountholder executing a change in beneficiary form.<sup>175</sup> The forms are typically prepared with little assistance from professionals chosen by the employee and are almost always executed at the start of a new job when the employee is young, many years away from retirement, death, birth of a child, or divorce.<sup>176</sup> One author describes the usual process of executing the forms:

Imagine reporting for your first day of work at a new job. You sit down with the company's human resources manager to complete a two-inch-tall stack of paperwork. After 30 minutes, you reach the bottom of the stack, which consists of a packet labeled "Your Benefits." The human resources manager stands up and says, "Congratulations, you are now officially employed here. I'll show you to your office." Surprised, you respond, "But wait, aren't we going to go through my company benefits?" "No," responds the human resources manager, "the company takes no responsibility whatsoever for your retirement and healthcare benefits. You'll have to call the 800 number inside the packet and they will assist you."<sup>177</sup>

Another author notes:

The formalities necessary to execute a will are designed in part to ensure that the testator appreciates the gravity of the decisions he or she is making. By contrast, the circumstances surrounding execution of [plan] beneficiary designation forms for establishing retirement accounts make it likely that the accountholder will not focus on the importance of the designations.<sup>178</sup>

Indeed, "beneficiary designation forms financial institutions provide for distribution of non-probate assets are often designed not to ensure effectuation of decedent intent, but rather to minimize inconvenience for the financial institution."<sup>179</sup> Since plan managers owe a fiduciary duty to participants and beneficiaries under ERISA plans, failure to provide the employee with similar

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174. *Id.* at 351–52 (citations omitted).

175. *See* 29 U.S.C. §§ 1055(a), 1056(d)(3)(A) (2012). ERISA provides for two plan beneficiary designations. *Id.*

176. *See* Sterk & Leslie, *supra* note 2, at 177, 210.

177. Medill, *supra* note 171, at 507.

178. Sterk & Leslie, *supra* note 2, at 211.

179. Leslie & Sterk, *supra* note 40, at 64.

formalities associated with execution of a last will and testament is a breach of fiduciary duty prompting redress under 29 U.S.C. § 1132(a)(3)'s guarantee of appropriate equitable relief.

Pension and welfare benefits comprise a substantial portion of an employee's estate. ERISA plans track certain characteristics. First, the plans offer attractive savings vehicles because there are tax benefits, they are easily entered into, and they are portable in this mobile workforce. Commentators studying the formation of plans, conclude that an "accountholder does not open [an] account with succession rights in mind. Instead, the accountholder opens the account to obtain tax deferral on savings for retirement—savings most accountholders expect to use, not to pass on to successors."<sup>180</sup> Second, the employer chooses a plan administrator to invest the funds and the employee may contribute or, as an alternative, with an IRA, the employee chooses his or her own plan custodian. Third, there is a contract signed by an employee, which designates a beneficiary, with a default beneficiary provided explicitly, or in the plan documents. ERISA provides that when an accountholder dies, his or her surviving spouse will receive proceeds from the account unless the spouse waived that right.<sup>181</sup> But note that a "plan participant may designate a beneficiary or beneficiaries who will receive the account proceeds if the plan participant dies before distribution of the account."<sup>182</sup>

Any designated beneficiary is subject to the claims of an accountholder's spouse.<sup>183</sup> ERISA requires compliance with a very specific procedure to waive a spouse's statutory rights: the spouse's waiver must be made after marriage, in a writing that names an alternate beneficiary and that is executed in front of a plan representative or notary public.<sup>184</sup> Going forward, the spouse must consent to any change of beneficiary designation.<sup>185</sup> By definition, prenuptial agreements fail to meet these exacting requirements: They are executed before marriage, and thus do not divest a spouse of statutory survivorship rights.<sup>186</sup> "In

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180. Sterk & Leslie, *supra* note 2, at 209.

181. 26 U.S.C. § 401(a)(11)(A)(ii) (2006). QDROs provide an exception. *See id.* § 401(a)(13)(C). In addition, ERISA stipulates that waiver by a spouse must meet the requirements of 26 U.S.C. § 417(a)(2)(A) that:

- (i) the spouse of the participant consents in writing to such election,
- (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and
- (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public[.]

26 U.S.C. § 417(a)(2)(A)(i)–(iii).

182. Sterk & Leslie, *supra* note 2, at 173.

183. *See* 29 U.S.C. § 1055 (2012).

184. *See* 29 U.S.C. § 1055(c)(2)(A)(i)–(iii).

185. *Id.*

186. *See* Leslie & Sterk, *supra* note 40, at 87–88.

addition, couples may have difficulty complying with ERISA's exacting timing requirements."<sup>187</sup>

"[M]any of the 401(k) forms are worded so as to actively encourage the accountholder to write in his or her spouse's name."<sup>188</sup> ERISA does require the plan manager to provide the accountholder with a written explanation of the financial implications of the benefit options, including the various options provided to a spouse, within a specific period of time.<sup>189</sup> A plan participant may not modify or terminate his or her spouse's rights unilaterally, but the spouse may execute a waiver if it is done *after* the marriage, in the presence of a notary or plan representative, and an alternative beneficiary must be named.<sup>190</sup> The effective means by which this may occur is through a QDRO, most often executed as part of a divorce financial settlement. ERISA specifically provides that an accountholder may designate a participant's spouse, former spouse, children, or other dependents with survivor benefits and other plan benefits by means of QDROs.<sup>191</sup> There are cases when the accountholder sought to change the designated beneficiary through a valid last will and testament, but such attempts were held to violate ERISA's plan designated beneficiary rule and hence are unenforceable.<sup>192</sup> Likewise, prenuptial agreements, no matter how well-worded, cannot serve as a valid waiver of ERISA's benefits owed to a spouse.<sup>193</sup> Additionally, ERISA plans may not be altered by provisions in a divorce decree that attempt to modify the designated beneficiary's right to receive proceeds under the plan,<sup>194</sup> the one exception being a QDRO.<sup>195</sup> There are a number of requirements associated with QDROs, failing to match the

187. *See id.* at 72 n.57; *see also* *Greenebaum & McDonald PLLC v. Sandler*, 256 F. Appx 765, 767 (6th Cir. 2007) (holding there is little support for a prenuptial agreement's ability to satisfy ERISA's spousal consent requirement); *Robins v. Geisel*, 666 F. Supp. 2d 463, 467 (D.N.J. 2009) (prenuptial agreement did not waive spouse's right to her husband's pension fund).

188. *Sterk & Leslie*, *supra* note 2, at 187.

189. *See* 29 U.S.C. §§ 1025, 1053(e); I.R.C. § 411(a)(11) (2014); 26 C.F.R. § 1.411(a)(11) (2017).

190. *See* 29 U.S.C. § 1055(b)(1), (c)(1)–(2).

191. *See id.* § 1056(d)(3)(A). Note the domestic relations order (DRO) does not require marriage, only that the accountholder's companion was a dependent of the accountholder. *See id.* § 1056(d)(3)(B)(ii); *Owens v. Auto. Machinists Pension Tr.*, 551 F.3d 1138, 1146–47 (9th Cir. 2012) (holding a non-marital companion for thirty years was entitled to fifty percent of annuity benefits the accountholder was receiving from an ERISA pension plan).

192. *See, e.g., Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009) (holding the plan's documents must be changed or it would otherwise jeopardize plan administration efficiency).

193. *See, e.g., Robins v. Geisel*, 666 F. Supp. 2d 463, 467 (D.N.J. 2009); *Greenebaum Doll & McDonald PLLC v. Sandler*, 256 F. App'x 765, 768–69 (6th Cir. 2007); *Hagwood v. Newton*, 282 F.3d 285, 292 (4th Cir. 2002); *Nat'l Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496, 502 (8th Cir. 1996).

194. *See Kennedy*, 555 U.S. at 300 (holding plan documents control distribution of funds).

195. 29 U.S.C. § 1056(d)(3)(B)(ii) (defining a QDRO as a judgement, decree, or order that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant).

requirements exactly, results in an ineffective transfer of beneficiary status from a spouse to a third party.<sup>196</sup>

### B. *ERISA Preemption*

To date, all controlling judicial decisions hold that the “Plan Terms Benefit Mandate” controls the disposition of ERISA funds, specifying that the mandate provided by the terms of the account holder’s contract designation form cannot be superseded by state rules of construction.<sup>197</sup> Among these state rules are community property rights, antilapse provisions, substitute gift rules, and most often the subject of litigation, state statutes providing for revocation by operation of law upon divorce. State statutes and rules of construction are preempted by force of ERISA and the United States Constitution.<sup>198</sup>

Federal preemption of state laws is not automatic. Over the years, cases evolved to explain that preemption applies whenever Congress attempts to dominate any field of law, or when there is a direct conflict between federal and state law.<sup>199</sup> For example, field preemption applies if courts find there is a state reference to ERISA or that the state statute acts directly upon the ERISA plan.<sup>200</sup>

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196. See, e.g., *Metro. Life Ins. Co. v. Leich-Brannan*, 812 F. Supp. 2d 729, 737 (E.D. Va. 2011) (holding the divorce decree was an ineffective QDRO because the decree lacked sufficient clarity).

197. See, e.g., *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 943 (2016) (holding the need for workable standards led the Court to reject uncritical literalism in applying ERISA’s preemption clause); *Hillman v. Maretta*, 133 S. Ct. 1943, 1949 (2013) (holding that state laws which stand as obstacles to the execution of Congress’s full purpose and objective are preempted); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 150 (2001) (holding that the state statute providing for revocation upon divorce was explicitly preempted by ERISA); *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (holding the designated surviving spouse must take the proceeds and that states cannot freely change ERISA’s structure to balance individual state laws); *Ridgway v. Ridgway*, 454 U.S. 46, 63 (1981) (holding a soldier’s second wife, the designated beneficiary of the soldier’s life insurance, was entitled to the proceeds because of federal preemption and due to the Servicemen’s Group Life Insurance Act of 1955); *Free v. Bland*, 369 U.S. 663, 666 (1962) (holding state law must always yield when in conflict with federal law); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (holding “Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.”).

198. An extensive coverage of federal preemption is beyond the scope of this Article; however, for conflict preemption, consult *Gobeille*, *Hillman*, and *Rice v. Santa Fe Elevator Corp.* *Gobeille*, 136 S. Ct. at 946–50; *Hillman*, 133 S. Ct. at 1949–50; *Egelhoff*, 532 at 147–50; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229–38 (1947) (holding that a federal statute regulating grain storehouses preempted similar state regulations because Congress manifested its intention to preempt state laws that would result in dueling regulations of grain storehouses).

199. See David M. Frankford & Sara Rosenbaum, *Teaching Health Law: A Survivalist Guide to Teaching ERISA*, 61 ST. LOUIS U. L.J. 495, 499–504 (2017).

200. *Gobeille*, 136 S. Ct. at 943; see also 29 U.S.C. § 1144(a), (c)(1) (defining state laws as any “laws, decisions, rules, regulation, or other State action having the effect of law, of any state.”); see also *Preemption—ERISA Preemption—Sixth Circuit Holds That ERISA Does Not Preempt Michigan Medicaid Tax Law—Self-Insurance Institute of America, Inc. v. Snyder*, 827 F.3d 549 (6th Cir. 2016), cert. denied, *No. 16-593*, 2017 WL 69264 (U.S. Jan. 9, 2017), 130 HARV. L. REV. 1512, 1515 (2017) (stating *Gobeille* brought a more stringent approach to federal preemption of

Preemption also applies if any state law presents an “impermissible connection” with an ERISA plan.<sup>201</sup> Congress excluded from federal preemption, two types of state laws, thus permitting them to operate independently of congressional action: state laws regulating insurance and banking<sup>202</sup> and state laws enacted to control criminal activity.<sup>203</sup> There remains a nebulous area of state law that federal courts remain willing to utilize even though application contradicts the plan designated beneficiary mandate embraced by all major decisions applying federal preemption. For example, even though there is no explicit reference to barring “slayers” from taking proceeds under ERISA policies, the “slayers statutes . . . always award the proceeds to someone other than the slayer”<sup>204</sup> and this beneficiary-change is applied consistently. To date, no federal court specifically addresses whether the slayer statutes are preempted by ERISA, thus permitting the possibility of an award of benefits to a slayer,<sup>205</sup> but in fact no slayer received ERISA proceeds. Some courts make mention of federal common law as the basis for utilizing the state slayer statutes,<sup>206</sup> but there remains uncertainty.

To illustrate the uncertainty over slayer statutes, both the 1981 decision of *Ridgway v. Ridgway* and the 2001 decision of *Egelhoff v. Egelhoff*, declined to draw any inferences from slayer statutes and their utilization to override the proceeds being paid to a designated beneficiary who was adjudicated a murderer.<sup>207</sup> Any implications from the use of slayer statutes to modify ERISA plan designated beneficiaries is premature. Comparing the issue with taxation issues, Professor Adam J. Hirsch suggests that a comparison be made with tax law involving disclaimers. Both issues involve time, evolution, uncertainty, and hence federal common law is a poor basis for concluding that slayers statutes modify ERISA’s terms.

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state policies); Joseph E. Zeis, Jr., *Field Preemption and the Presumption of Federal Action: A Three-Way Supremacy Clause Tug of War*, 41 U. DAYTON L. REV. 157, 178–79 (2016).

201. *Gobeille*, 136 S. Ct. at 943; *see also* 29 U.S.C. § 1144(a) (providing that ERISA “supersedes any and all state laws insofar as they may . . . relate to any [ERISA] plan”).

202. 29 U.S.C. § 1144(b)(2).

203. *Id.* § 1144(b)(4).

204. Langbein, *supra* note 5, at 1689 (suggesting that because slayer cases are virtually indistinguishable from state domestic relations statutes, there should be no preemption of them either); *see also* *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 304 n.14 (2009); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 152 (2001); *Nale v. Ford Motor Co. UAW Ret. Plan*, 703 F. Supp. 2d 714, 722 (E.D. Mich. 2010). The Eight Circuit applied the Arkansas state slayer statute explicitly in *First National Bank & Trust Co. of Mountain Home v. Stonebridge Life Insurance Co.*, 9 F.3d 951, 955 (8th Cir. 2010).

205. Langbein, *supra* note 5, at 1692. “The slayer rule is codified in the Restatements of Property and Restitution, and in the Uniform Probate Code.” *Id.* at 1688.

206. *See, e.g.*, *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453 (4th Cir. 1992) (holding federal common law should be used to further ERISA’s goals). *But see* *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (holding federal common law is not authorized to revise ERISA’s text).

207. *See* *Ridgway v. Ridgway*, 454 U.S. 46, 60 n. 9 (1981); *Egelhoff*, 532 U.S. at 152.

Doubtless, the federal statute governing the validity of disclaimers for tax purposes, as elaborated by federal regulations and case law, would prove influential. But all of this would take time—quite a lot of time, in fact, if splits developed between circuits over what the federal common law should be. In the meantime, plan administrators would face *consolidated uncertainty* . . . . Courts have highlighted the value of certainty in connection with ERISA.<sup>208</sup>

Arguably, the most common form of ERISA preemption involves QDROs, which offer the only form of modification of a plan-designated beneficiary because any other attempted change is preempted.<sup>209</sup> Upon the death of the spouse of an accountholder, that spouse retains no community property right to any pension funds earned by the accountholder.<sup>210</sup> Death is not the same as divorce. As a result of ERISA and REA, if an accountholder divorces his or her spouse, then the federal statutes protect the rights of designate spouses, former spouses, children and dependents of participants as beneficiaries of that pension plan in accordance with any state domestic relations order that met standards outlined in the QDRO.<sup>211</sup> Nonetheless, any state domestic relations order that does not meet the qualifications of a QDRO, and seeks to designate other beneficiaries, is preempted and subject to anti-assignment prohibition.<sup>212</sup> To qualify as a QDRO the following are required: (1) a valid state domestic relations order was issued; (2) the order clearly specified the plan, the beneficiaries, the particular benefits; (3) the order was consistent with the pension plan's terms; (4) there was no increase in the plan's actuarial costs; (5) payments may be made even if the accountholder is not collecting benefits; and (6) former spouses may be treated as spouses under defined circumstances.<sup>213</sup> Once the QDRO is filed correctly, the order must explicitly inform the accountholder of the pension benefits the accountholder will lose, the alternate taker must be identified

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208. Hirsch, *supra* note 42, at 1905–06 (emphasis in original) (footnotes omitted); *see also* Patterson v. Shumate, 504 U.S. 753, 765 (1992); Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, 376–77 (1990).

209. *See* Feuer, *supra* note 153, at 953–54 (“[T]he QDRO exclusion from the ERISA Explicit Exemption appears to have only one purpose: to emphasize that state court orders that purport to assign or create rights to non-pension benefits (welfare benefits, such as garnishment orders or domestic relations orders pertaining to life insurance benefits) are preempted.”).

210. *See* Boggs v. Boggs, 520 U.S. 833, 853–54 (1997) (holding that no community property interest in an accountholder's pension passed upon the death of the accountholder's spouse to any beneficiaries of that deceased spouse); *see also* Meghan A. Dupre, Comment, *There Goes the Community: Federal Preemption of Marriage as the Demise of the State Community Property Regime*, 90 TUL. L. REV. 185, 199–200 (2015).

211. *See* 29 U.S.C. § 1056(d)(3) (2012); *see generally* GARY A. SHULMAN, THE QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK (3d ed. 2006); Employee Benefits Security Administration, *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders*, U.S. DEP'T OF LABOR (2014), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf>.

212. 29 U.S.C. § 1056(d)(3)(A).

213. *See id.* § 1056(d)(3)(B)–(F).

clearly, the number of payments specified, and amount of benefits allocated to each alternate taker.<sup>214</sup>

Attorneys often fail to adequately advise clients as to the requirements for entering into a valid QDRO, as well as failing to assess the benefits accrued under ERISA pension plans when negotiating a divorce agreement between contesting parties. As illustration, in one New York decision, a couple divorced and the attorney for the wife of the employee/accountholder filed a QDRO specifying that his client would receive a stipulated portion of the pension upon the accountholder's retirement.<sup>215</sup> Nothing was mentioned in the QDRO concerning the possibility of the accountholder's *death* prior to retirement and nothing was mentioned in the divorce agreement that was, incorporated but not merged, into the divorce decree. The accountholder died prior to retirement and it was discovered that the QDRO failed to stipulate that the former spouse was not to receive survivorship benefits, only retirement benefits.<sup>216</sup> Based on these facts, the "plan administrator ultimately determined that because there was no QDRO naming plaintiff as the surviving spouse under the plan, she was ineligible under ERISA to receive preretirement death benefits."<sup>217</sup> After divorce, the former spouse was no longer a spouse eligible to receive benefits.<sup>218</sup> Furthermore, "only a QDRO can designate a former spouse to be a 'surviving spouse' for purposes of allocating benefits under ERISA."<sup>219</sup> "This exception to ERISA's anti-assignment rule is not subject to judicial expansion."<sup>220</sup> In addition, the divorce judgement obtained by the attorney for the surviving former spouse, did not stipulate that she would receive survivorship benefits in the spouse's pension upon the spouse's death.<sup>221</sup> This omission, coupled with the failure to provide for survivorship benefits under the QDRO, deprived the surviving spouse of any share in the accountholder's pension retirement after his death.<sup>222</sup> The court wrote: "[w]e therefore conclude that [the attorney's] failure to include preretirement death benefits in either the stipulation or the judgment, and not his negligent failure to obtain a QDRO, was the cause of plaintiff's injury."<sup>223</sup>

Accountholders who are married and covered under an ERISA pension plan must provide spouses with specified benefits if married for more than a year, not separated or abandoned by his or her spouse, or cannot locate his or her

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214. *Id.* § 1056(d)(3)(C). While ERISA mandates disclosure to the accountholder, there is no concomitant requirement that disclosure be made to the accountholder's spouse.

215. *McCoy v. Fineman*, 785 N.E.2d 714, 716–17 (N.Y. 2002).

216. *Id.* at 717.

217. *Id.*

218. *Id.* at 720.

219. *Id.* at 720–21 (citing 29 U.S.C. § 1056(d)(3)(F)).

220. *Id.* at 721.

221. *McCoy v. Fineman*, 785 N.E.2d 714, 721 (N.Y. 2002).

222. *Id.*

223. *Id.*

spouse.<sup>224</sup> Note however, that benefits referenced as welfare benefits, life insurance, and disability payments are exempt from this requirement even though, they form part of ERISA protection.<sup>225</sup> Additionally, certain other types of pension plans are exempt from the spousal protection requirement, permitting accountholders to withdraw or borrow from the plans without the consent of his or her spouse. First, plans that are not characterized as 401(k) plans, or those with minimum funding rules.<sup>226</sup> Second, plans that derive assets from sources such as a defined benefit plan.<sup>227</sup> Lastly, whenever an accountholder chooses to receive the proceeds from the plan in the form of an annuity.<sup>228</sup> Upon divorce, a spouse designated as such in any ERISA plan remains eligible to receive benefits as the plan's designated beneficiary, either as a beneficiary of a welfare plan such as life insurance, or as the beneficiary of a pension plan.<sup>229</sup> However, entitlement to notice and waiver prior to losing benefits is not a universal right guaranteed under all ERISA protected plans.<sup>230</sup> Nonetheless, the Supreme Court holds that state revocation by operation of law statutes are irrelevant to all ERISA covered plans, thus preempting *all* state statutes that interfere with the designated Plan Terms Designated Mandate,<sup>231</sup> regardless of spousal rights in those plans.

### C. ERISA Accommodation

A properly constructed plan designated beneficiary form can accommodate the policy goals of ERISA, avoid the preemption issue, and better ascertain the evolving nature of an accountholder's intent regarding distribution of plan assets. Yet, there is scant evidence that plan managers are taking steps to accommodate the changing future circumstances of employees. Professors Sterk and Leslie examined the beneficiary designation forms used by ten of the largest IRA providers in the United States and also examined a selection of firms

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224. 29 U.S.C. § 1055(c)(2)(B). The plan manager may rely upon the assertion by the accountholder and is not liable as a result of the fiduciary relief statute. *Id.* § 1055(c)(6). Section 1056(d)(3) makes reference to payments by QDRO. *See also* Vilas v. Lyons, 702 F. Supp. 555, 560–61 (D. Md. 1988) (holding fiduciaries are not obligated to look beyond the terms of the form that complies on its face). *But see* Rice v. Rochester Laborers' Annuity Fund, 888 F. Supp. 494, 498–500 (W.D.N.Y. 1995) (holding a plan administrator cannot ignore clear warnings that an accountholder's assertions are false).

225. 29 U.S.C. § 1051(1); *see also* Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 144–46 (2001) (discussing a dispute between a surviving spouse and a former spouse who was named the beneficiary of the decedent's life insurance policy, the Court found that the person to whom the decedent was married at the time of his death takes precedence if payment resulted from an ERISA pension plan).

226. 29 U.S.C. § 1055(b)(1)(B).

227. *Id.* § 1055(b)(1)(C)(iii).

228. *Id.* § 1055(b)(1)(C)(ii).

229. *See Egelhoff*, 532 U.S. at 144–46.

230. *See* 28 U.S.C. § 1055(b)(1)(C), (c)(2).

231. *See, e.g., Egelhoff*, 532 U.S. at 150 (holding divorce did not revoke the life insurance pension fund naming the former spouse as the designated beneficiary of those ERISA plans).

offering 401(k) plans.<sup>232</sup> First, they conclude, the forms themselves provide few options for employees by which an accountholder might survey choices for beneficiaries or to anticipate future changes of status.<sup>233</sup> Second, fewer than half of IRA providers suggest that plan participants consult with an attorney before, or after, commencing employment.<sup>234</sup> Third, the forms “provide absolutely no notice” to the accountholder about exactly what would occur under the plan’s default distribution provision, that is, who would take in the event that the plan’s designated beneficiary does not take his or her share.<sup>235</sup> Fourth:

Seven of the ten 401(k) forms include no discussion of divorce at all. Of the remaining three, one indicates that divorce will not revoke the beneficiary designation, a second indicates that the designation will remain in effect even if “my marital status changes [unless I remarry],” and a third highlights the fact that a remarriage will revoke the designation without saying a word about the effect of divorce.<sup>236</sup>

Lastly, while “[e]mpirical evidence is difficult to gather on this point . . . anecdotal evidence suggests that the accountholder will face a significant bureaucracy problem” if the accountholder creates his or her own designated beneficiary form, rather than choosing the one provided by the plan administrator.<sup>237</sup> They conclude stating, “in any event, the lawyer will be in a better position than a client to persuade the account custodian to accept an alternative designation form.”<sup>238</sup>

The solution to form inattentiveness advocated by Professors Sterk and Leslie is to develop a beneficiary designation form that an accountholder will understand and be able to complete in a manner reflecting his or her present and future intent.<sup>239</sup> To illustrate, wills, intestacy, and nonprobate transfers, unencumbered by ERISA preemption, incorporate state rules of construction, making it easier to accommodate a person’s changing intent.<sup>240</sup> Among these rules of construction, are provisions accommodating antilapse, substitute gift, revocation by operation of law, slayer statutes, constructive trusts, and an elective share mechanism for a surviving spouse.<sup>241</sup> These professors suggest that an approach which guides an accountholder through choices while completing ERISA forms provided by employers is superior; going so far as to

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232. See Sterk & Leslie, *supra* note 2, at 201.

233. *Id.* at 202.

234. *Id.*

235. *Id.* at 203.

236. *Id.* at 203–04.

237. Sterk & Leslie, *supra* note 2, at 208–09.

238. *Id.* at 211–12.

239. *Id.* at 215. The form would “mandate a statutory default designation and prominent disclosure of that designation to the accountholder.” *Id.* The authors provide a model form as an appendix. *Id.* at 231.

240. *Id.* at 207–08.

241. Sterk & Leslie, *supra* note 2, at 207–08.

state rules of construction, which are often unknown to employees.<sup>242</sup> In addition, state rules only guess at what the accountholder intended, they “represent both an incomplete approach to confusing forms and an approach that threatens to distort the intent of many accountholders . . . .”<sup>243</sup>

Professors Sterk and Leslie propose a beneficiary designation form that incorporates the following: First, the form should incorporate rules of construction applicable to wills and nonprobate transfers, unless the accountholder specifically opts out of them.<sup>244</sup> Second, the designated beneficiaries would be identified as a status person, for example, the person to whom I am married at the time of my death, or, in the alternative, to my issue.<sup>245</sup> “These designation are more likely to account for changes in the accountholder’s life circumstances and therefore more likely to effectuate the accountholder’s intent.”<sup>246</sup> Third, the form should contain an explicit warning, consistent with ERISA preemption, that any will or other instrument executed by the accountholder, in the past or in the future, does not revoke or revise the plan’s beneficiary designated on the form.<sup>247</sup> Fourth, the form should adequately advise the accountholder that he or she should consult an attorney prior to establishing an estate plan, which purportedly includes the assets passing under the designated beneficiary form under applicable state rules regarding augmented estate.<sup>248</sup> Fifth, the form should allow the accountholder to provide an executor with the discretionary power to distribute the plan’s proceeds “in such amounts as [beneficiaries] would have received if the account balance had been included in the accountholder’s probate estate.”<sup>249</sup> By providing an executor with what amounts to an inter vivos power of appointment, the conflict between federal preemption of state rules of construction and ERISA’s focus on the designated beneficiary form is avoided. The argument for such a proposal is that it permits the plan’s designated beneficiary to stand as written, or it captures the amount into the accountholder’s estate, permitting the proceeds to pass in accordance with the state’s rules of construction, or in accordance with directions given to an executor.<sup>250</sup> “Depending on which alternative appears to best effectuate the accountholder’s intentions to avoid delays in distribution, the form would require the executor to exercise the power within sixty days after receiving notice of the accountholder’s death.”<sup>251</sup>

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242. *Id.* at 213–14.

243. *Id.* at 215.

244. *Id.* at 220.

245. *Id.* at 220–21.

246. Sterk & Leslie, *supra* note 2, at 221.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

By offering options on the designated form executed by the accountholder, the proposals made by Professors Sterk and Leslie shift the focus from the vagaries of multiple state law to the goal of ERISA itself, which imposes a fiduciary duty to enforce, “the documents and instruments governing the plan . . . .”<sup>252</sup> ERISA specifies that payments be made to a beneficiary who is “designated by a participant, or by the terms of [the] plan . . . .”<sup>253</sup> Since the form is the sole focus of attention when distributing assets governed by ERISA, it makes sense to focus on the form’s provisions<sup>254</sup> and thus any “invalidating circumstances” becomes sufficiently clear so as to be administratively feasible within the confines of ERISA’s national objectives.<sup>255</sup>

An illustration of the pivotal importance of a plan’s beneficiary designation form occurred in the case of *Kennedy v. Plan Administrators for DuPont Savings & Investment Plan*.<sup>256</sup> The facts involved an employee covered under an ERISA pension plan who designated his then current wife as the designated plan beneficiary in accordance with the plan’s forms.<sup>257</sup> He provided no alternate or contingent beneficiary if she disclaimed her interest.<sup>258</sup> The employee/acountholder and his wife later divorced and as part of the financial settlement his former wife signed a divorce decree divesting her of any interest in any pension plan.<sup>259</sup> After the divorce, the employee did not change his pension plan’s designated beneficiary form so that the former spouse remained the plan’s designated beneficiary at the time of his death.<sup>260</sup> At the employee’s death, the decedent’s daughter was responsible for his estate and she sought to receive the pension funds of nearly \$400,000 into the estate’s account, however, the employer, DuPont, instead paid the proceeds to the plan’s designated beneficiary, the former spouse, much to the consternation of the decedent’s daughter.<sup>261</sup>

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252. 29 U.S.C. § 1104(a)(1)(D) (2012); *see also* *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 n.4 (2001); Langbein, *supra* note 5, at 1672–73.

253. *See* 29 U.S.C. §§ 1002(8), 1104(a)(1)(D), 1056(d)(1) (providing that benefits under the plan may not be assigned or alienated); *Egelhoff*, 532 U.S. at 151 (holding ERISA requires that plans be administered, and benefits paid, in accordance with plan documents and not be affected with conflicting state laws).

254. *See, e.g.*, *Bostic v. Bostic*, No. 6:14-2130-BHH, 2015 WL 5178163, at \*5 (D.S.C. Sept. 3, 2015) (holding ERISA requires the plan’s form designated beneficiary to take proceeds from the plan).

255. *See Egelhoff*, 532 U.S. at 155–56 (Breyer, J., dissenting) (“In any event, in this case the plan documents *explicitly* foresee that a beneficiary designation may become ‘invalid,’ but they do not specify the invalidating circumstances”); *see also* *Rosenbury*, *supra* note 68, at 1852 (noting that Congress is implicitly interested “in ensuring that the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them”).

256. 555 U.S. 285 (2009).

257. *Id.* at 288.

258. *Id.* at 289.

259. *Id.*

260. *Id.* at 289–90.

261. *Id.*

Initially, the federal district court ruled in favor of the daughter and ordered the employer to pay the proceeds to her, rather than to the designated former spouse from whom the decedent was divorced at the time of his death.<sup>262</sup> The district court based its ruling on the waiver signed by the former spouse at the time of divorce, following a decision from the Fifth Circuit Court of Appeals in 2000. The district court ruled that a beneficiary may waive his or her right to the proceeds from an ERISA plan if the waiver is “explicit, voluntary, and made in good faith.”<sup>263</sup> The former spouse appealed, and the Fifth Circuit reversed the ruling of the district court, holding the waiver as ineffective to deprive the former spouse of her interest in the pension plan.<sup>264</sup> The appellate court ruled that a QDRO was the *exclusive* means by which a divorcing spouse may waive ERISA benefits and that “mechanism [was] *not* invoked.”<sup>265</sup> Eventually, the Supreme Court granted certiorari to resolve a split among the Courts of Appeals and the various state courts over “a divorced spouse’s ability to waive pension plan benefits through a divorce decree not amounting to a QDRO.”<sup>266</sup> In addition to the specific issue raised, the facts gave the Court an opportunity to revisit the issue of when it is possible for a beneficiary to waive his or her interest arising from the plan documents. In 2009, the Court held a divorce decree did not constitute a valid waiver under the terms of ERISA,<sup>267</sup> instead the waiver by a beneficiary promotes uncertainty, something anathema to ERISA plan policy.

The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: “simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what’s coming quickly, without folderol essential under less-certain rules.”<sup>268</sup>

The simplicity of plan administration is often mentioned as one of the preeminent goals of ERISA,<sup>269</sup> “[t]he congressional debates over ERISA suggest

262. *Id.*; see also *Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000) (holding a spouse may waive his or her spousal benefits under federal common law as long as the waiver is explicit, voluntary, and made in good faith).

263. *Kennedy*, 555 U.S. at 290 (quoting *Manning*, 212 F.3d at 874).

264. See *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 497 F.3d 426, 431 (5th Cir. 2007).

265. *Kennedy*, 555 U.S. at 290–91 (emphasis added) (quoting *Kennedy*, 497 F.3d at 431).

266. *Id.*

267. *Id.* at 297 (explaining that under 29 U.S.C. § 1056(d)(1), her waiver was not a QDRO because it “did not constitute an assignment or alienation rendered void”).

268. *Id.* at 301 (Easterbrook, J., dissenting) (quoting *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 283 (7th Cir. 1990)).

269. See, e.g., *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992) (holding Congress wanted to ensure that plans and plan sponsors would be subject to a uniform body of benefit law, the goal being to minimize the administrative and financial burden of complying with conflicting directives).

that its preemption provisions stemmed from a related concern: achieving administrative efficiency.”<sup>270</sup> Efficiency is the motivation underlying the Court’s adherence to the plan document rule mandating that the documents executed by the accountholder, alone, form the basis of payment to designated beneficiaries. In 2010, the Ninth Circuit Court of Appeals, citing Justice Souter’s 2009 decision in *Kennedy*, wrote, “plan administrators must ‘hew[ ] to the directives of the plan documents’ rather than ‘examin[ing] a multitude of external documents that might purport to affect the dispensation of benefits’ and becoming ‘drawn into litigation like this over the meaning and enforceability of waivers.’”<sup>271</sup> Likewise, when preempting a state law mandating disclosure of medical records, the Second Circuit Court of Appeals explained that “one of ERISA’s core functions . . . [cannot] be laden with burdens, subject to incompatible, multiple and variable demands, and freighted with risk of fines, breach of duty, and legal expense.”<sup>272</sup>

Simplicity of administration of ERISA benefits is a consistent theme throughout all the major decisions enforcing ERISA preemption of state laws and private settlement agreements. In 2001, Justice Thomas wrote that mastering the laws of fifty states would “undermine the congressional goal of ‘minimiz[ing] the administrative and financial burden[s]’ on plan administrators—burdens ultimately borne by the beneficiaries.”<sup>273</sup> In 2013, Justice Sotomayor, discussing the preemption by FEGLIA, held the Act preempted a state statute that reassigned proceeds to be paid to a designated beneficiary.<sup>274</sup> FEGLIA, which provides low-cost group life insurance to federal employees,<sup>275</sup> is meant to provide a simple plan of payment to a designated beneficiary, “[r]ather than draw an inference about an employee’s probable intent from a range of sources, Congress established a clear and predictable procedure for an employee to indicate who the intended beneficiary of his life insurance shall be.”<sup>276</sup> Simplicity of administration is implied as essential.<sup>277</sup>

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270. Hirsch, *supra* note 42, at 1903.

271. *Carmona v. Carmona*, 603 F.3d 1041, 1047 (9th Cir. 2010).

272. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 942 (2016) (citing *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497, 510 (2d Cir. 2014)); *State Farm Life & Accident Assurance Co. v. Goecks*, 184 F. Supp. 3d 701, 708–09 (W.D. Wis. 2016) (holding a constructive trust could not be imposed on proceeds paid to a designated beneficiary, opining that “[i]f permitted, this could potentially expose not just beneficiaries, but employers and administrators to the nuances of 50 state laws, rather than federal law governing ERISA, contrary both to the Supreme Court’s *Egelhoff* and the Seventh Circuit’s *Melton* decisions”).

273. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149–50 (2001) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

274. *Hillman v. Maretta*, 133 S. Ct. 1943, 1949 (2013). *But see Gobeille*, 136 S. Ct. at 950 (Ginsburg, J., dissenting) (writing that a state’s efforts to track health care services and “the cost of those services do not impermissible intrude on ERISA’s dominion over employee benefit plans[ ]”).

275. Federal Employees’ Group Life Insurance Act of 1954 (FEGLIA), 5 U.S.C. §§ 8701–8716 (2012).

276. *Hillman*, 133 S. Ct. at 1952.

277. *See id.* at 1953.

Finally, in 2016, Justice Kennedy joined by a majority of the Court, held ERISA preempted a Vermont statute that required all health insurance providers to file reports with the state containing claims data.<sup>278</sup> The Court concluded that ERISA preempted the state reporting requirement so as to prevent the “States from imposing novel, inconsistent, and burdensome reporting requirements on plans.”<sup>279</sup>

Ease of administration is essential to the administration of ERISA, FEGLIA, NSLIA, and SGLIA benefits and this may be accommodated in any comprehensive revision of a plan’s designated beneficiary form. Professors Sterk and Leslie advocate this approach, albeit with the admission that a revised form may require additional burdens, delay in receiving the proceeds, and state influence in implementing the form may be too onerous for federal goals.<sup>280</sup> As to the additional burden of a redesigned form, it would admittedly require “the account custodian to locate the accountholder’s children, to figure out whether the accountholder died married, or to figure out whether any deceased child left surviving issue, would place a new and unwarranted burden on the custodian.”<sup>281</sup> The authors of the proposed form assess this burden as “insubstantial”<sup>282</sup> and this seems logical in this age of computer generated searches. Any delay in receipt of funds would not be excessive compared to receipt of funds associated with other nonprobate or probate transfers at death, “[w]hatever delays remain would be a small price to pay for effectuating the accountholder’s intent.”<sup>283</sup> Additionally, the authors suggest “a statute could dictate the procedures the custodian should follow and insulate the custodian from liability if he follows those procedures.”<sup>284</sup>

All judicial decisions ruling in favor of ERISA preemption reference congressional intent to disengage from state law entanglements.<sup>285</sup> Therefore, a revised designation form incorporating state rules of construction pertaining to

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278. *Gobeille*, 136 S. Ct. at 940.

279. *Id.* at 945.

280. Sterk & Leslie, *supra* note 2, at 222–24.

281. *Id.* at 222.

282. *Id.*

283. *Id.* at 223.

284. *Id.*

285. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 939 (2016) (“Pre-emption is necessary in order to prevent multiple jurisdictions from imposing differing, or even parallel, regulations, creating wasteful administrative costs and threatening to subject plans to wide-ranging liability.”); *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (“If States could make alternative distributions outside the clear procedure Congress established, that would transform this narrow exception into a general license for state law to override FEGLIA.”); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001) (“Uniformity is impossible . . . if plans are subject to different legal obligations in different States.”); *Bostic v. Bostic*, No. 6:14-2130-BHH, 2015 WL 5178163, at \*5 (D.S.C. Sept. 3, 2015) (“Congress wanted ‘to ensure that plans and plan sponsors be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government’”) (citing *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992)).

wills and nonprobate transfers is not likely to significantly detract from federal policies of uniformity and efficiency. It appears the authors conclude that “account custodians have a stake in the forms used, and an overwhelming interest in reducing administrative costs.”<sup>286</sup> The forms themselves still control the distribution of the proceeds, any reference to state rules of construction reflects consensus and the likelihood that the designation reflects the accountholder’s wishes.<sup>287</sup>

In addition to redesigning the form itself, Professors Sterk and Leslie suggest that accountholders be requested to complete periodic updates to their forms, perhaps once every five years.<sup>288</sup> Updates facilitate identification of current beneficiaries and provide a more accurate gauge of the intent of the accountholder.<sup>289</sup> An updated form is also likely to decrease the administrative burden of paying proceeds and accounting for named beneficiaries.<sup>290</sup> It is further suggested accountholders be notified to always consult with an attorney when estate planning, “[i]f the designation form made accountholders aware that consultation with a lawyer would avoid delay at the time for distribution, more accountholders would likely seek advice before completing the forms.”<sup>291</sup>

The development and implementation of enhanced plan beneficiary designation forms seems the appropriate vehicle by which to implement the intent of the accountholder, and hence administer the plan consistent with fiduciary duties. Enhanced forms are administratively simple, making periodic inquiry of accountholders requesting updated forms seems logical, easy to facilitate, and is included within the administrator’s fiduciary responsibility. The lesson to learn from the litigation to date is that: “[n]o statutes or case law preclude use of a more effective beneficiary designation form.”<sup>292</sup>

### III. PRUDENTLY ACCOMMODATING ERISA

#### A. *Appropriate Equitable Relief*

The terms of ERISA are enforced through exclusive federal jurisdiction.<sup>293</sup> Federal courts are tasked with ensuring that plan participants or beneficiaries may recover their benefits due under the plan or, alternatively, to enforce rights

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286. Sterk & Leslie, *supra* note 2, at 224.

287. *Id.*

288. *Id.*

289. *Id.* at 224–25.

290. *Id.* at 225.

291. *Id.* at 227.

292. Sterk & Leslie, *supra* note 2, at 227. Professors Sterk and Leslie do not propose a standardized form, but suggest that there should be incentives to use an “approved” form, neglecting to specify if the incentives should arise because of federal or state legislation. *Id.*

293. 29 U.S.C. § 1132(a), (e)(1) (2012). But a beneficiary may file a claim in state court for benefits provided under § 1132(a)(1)(B), but removal to federal court remains an option. *See, e.g.,* Bartholet v. Reishauer A.G., 953 F.2d 1073, 1075 (7th Cir. 1992).

to present or future benefits under the plan.<sup>294</sup> When Congress enacted ERISA, it was with the purpose of rectifying the inadequacy of past pension plans.<sup>295</sup> In 1963, the automaker Studebaker, defaulted on its own pension plan created to benefit employees prior to ERISA, resulting in the loss of financial security for thousands of its' current and retired workers.<sup>296</sup> This loss prompted hearings and debate, culminating in ERISA's passage in 1974.<sup>297</sup> Congress sought to establish minimum standards of vesting, funding, and prudence to protect the security of pension benefits—ultimately covering a substantial portion of the American workforce.<sup>298</sup> “Substantively, [ERISA] imposes a requirement of mandatory trusteeship on pension and employee benefit plans; it absorbs the core fiduciary duties of loyalty and prudence from trust law and extends them to govern all aspects of plan administration.”<sup>299</sup> By imposing only the core fiduciary duties, the courts modified whatever else might develop as the field took shape.<sup>300</sup> For example, courts fashioned remedies for “the duty to inform beneficiaries about significant aspects of trust administration; the duties to collect, segregate and earmark, and protect trust property; and the duties to enforce and defend claims.”<sup>301</sup>

Undoubtedly, Congress intended to remove employee pension and welfare benefits from the management of corrupt individuals and organizations. Investigations by the Senate's McClellan Committee, “led by its chief counsel, Robert F. Kennedy, found widespread looting of plan funds through sweetheart deals, kickback, and various forms of cronyism.”<sup>302</sup> As a result, ERISA requires plan managers to follow written claims procedures, to give reasons for denials, and to provide an appellate procedure for any denial of benefits by “the appropriate named fiduciary” who is subject to ERISA's duties of loyalty and

294. See 29 U.S.C. § 1132(a); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (holding ERISA protects contractually assigned benefits).

295. LANGBEIN & WOLK, *supra* note 69, at 68–72.

296. For a description of a pre-ERISA plan's default, look at *Pension and Employee Benefit Law*. *Id.*; see also James A. Wooten, “The Most Glorious Story of Failure in the Business”: *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 684 (2001).

297. H.R. REP. NO. 93-533, at 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639; see also 29 U.S.C. § 1001(a) (2000); Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, in U.S. SEN. SPECIAL COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 1, 6–24 (1984).

298. H.R. REP. NO. 93-533, at 1–2.

299. Langbein, *supra* note 1, at 1319. Welfare plans administered by ERISA are also subject to fiduciary law, but these programs are excused from other substantive rules, such as vesting, anti-reduction, and plan funding rules, and the plan termination programs that guarantees payment of other benefits. *Id.* at 1323–24 (citing 29 U.S.C. §§ 1051(1), 1081(a), 1102(a)(1)).

300. *Id.* at 1319–20.

301. *Id.* at 1326–27; *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (holding trust law offers only a starting point whereby the courts will need to examine competing congressional purposes); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (holding courts should be guided by principles of trust law in fashioning judicial review standards).

302. Langbein, *supra* note 1, at 1324 (footnotes omitted).

prudence.<sup>303</sup> ERISA establishes monetary fines to be levied against any plan administrator who fails to provide requested information to a plan participant within thirty days after the receipt of a request.<sup>304</sup> Therefore, Congress enacted ERISA so that if an employee is promised a pension benefit, the employee will actually receive it.<sup>305</sup> Also, the policy goal is to ensure ERISA's plan managers are held to a fiduciary standard of conduct that requires "adequate public disclosure of the plan's administrative and financial affairs."<sup>306</sup>

ERISA provides for an expansive fiduciary definition. There are fiduciaries specified by the plan itself, or fiduciary status can be anyone who exercises "discretionary control or authority" over the plan's management, administration, or assets.<sup>307</sup> Thus, companies or individuals are either named fiduciaries or the functional equivalent, each determined according to the plan documents or by exercising decision-making authority.<sup>308</sup> However, even if a fiduciary permissibly delegates plan management to others, the designated fiduciary is presented with the duty to monitor the performance of the individuals or entity to whom delegation is given.<sup>309</sup> The only restraint upon the status of fiduciary is "fiduciaries must be fiduciaries with respect to the particular activity at issue."<sup>310</sup>

The duty of prudence formulated under ERISA owed by fiduciaries is commensurate with trust law and yet the statute provides few details. Professor Langbein argues the minimalist language in ERISA was intentional, meant to permit ERISA to draw upon the depth of trust law's equity experience.<sup>311</sup> Professor Langbein criticizes the Court's failure to recognize the depth and inclusiveness of, for example: ERISA's loyalty and prudence norms, "as well as the intimate functional connection between those rules and the remedy provisions of ERISA . . . ."<sup>312</sup> The consequence is that "the Court has been treating ordinary applications of traditional fiduciary and remedy law as

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303. 29 U.S.C. § 1133(2).

304. *See id.* § 1132(c) (cataloging penalties).

305. *See* Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

306. H.R. REP. NO. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655.

307. *See* *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993); *see also* *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 238 (2000) ("Section 502(a)(3)'s authorization to a plan 'participant, beneficiary, or fiduciary' to bring a civil action for 'appropriate equitable relief' extends to a suit against a nonfiduciary 'party in interest' to a prohibited transaction barred by § 406(a)."). For a general discussion of who constitutes a fiduciary, look at *Pension and Employee Benefit Law*. LANGBEIN & WOLK, *supra* note 69, at 648–62.

308. *See* 29 U.S.C. § 1002(21)(A); *Finkel v. Romanowicz*, 577 F.3d 79, 85–86 (2d Cir. 2009); STEPHEN J. KRASS, *PENSION ANSWER BOOK Q 23:1* (2018).

309. Delegation authority is granted under 29 U.S.C. § 1103.

310. *Fadely v. Blue Cross & Blue Shield of Ga., Inc.*, No. 1:11-CV-1409-TWT, 2011 WL 4974857, at \*4 (N.D. Ga. Oct. 18, 2011) (citing *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1277 (11th Cir. 2005)).

311. *See* Langbein, *supra* note 1, at 1363.

312. *Id.* at 1329.

impermissible extensions of the statute.”<sup>313</sup> Instead, the Court should draw upon the rich tradition already in existence.<sup>314</sup> Specifically, Professor Langbein suggests courts should not preempt remedies outside the specific text of ERISA, but instead should include preexisting remedies as part of the “equitable relief” specified in ERISA itself.<sup>315</sup> Traditionally, when trustees breach their fiduciary duties, the law of trusts long exhibited a remedial system that “allows for recovery of loss, restitution of profits, and recovery of foregone gains.”<sup>316</sup> Nonetheless, Professor Langbein argues the Court fails to grasp the impact of ERISA’s equitable relief,<sup>317</sup> criticizing a series of Supreme Court decisions, suggesting that the equitable relief promised in 29 U.S.C. § 1132(a)(3), “should have been understood to include make-whole monetary relief for consequential injury as well as specific relief.”<sup>318</sup>

Assuming Professor Langbein’s rationale is correct, what are the limits to the equitable relief granted in § 1132(a)(3)? If ERISA’s procedures and remedies “suffer from major omissions that the courts have had to supply from context,” the argument that traditional trust law provides the “equitable relief” needed is bolstered.<sup>319</sup> In other words, “[w]hen Congress uses . . . conceptual language, Congress necessarily intends for the courts to interpret it—to supply the specifics.”<sup>320</sup> This is commensurate with the argument put forth by Professor Langbein that:

Congress federalized the law of pension and benefit plan administration for the primary purpose of protecting plan participants and beneficiaries through a triple regime of mandatory trusteeship, extensive fiduciary duties, and commensurate remedies. Those

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313. *Id.*

314. *Id.* at 1338.

315. *Id.* at 1332 (citing 29 U.S.C. § 1132(a)(3)). Professor Langbein objects to Justice Scalia’s opinion in *Mertens*, which “construed ‘appropriate equitable relief’ in section [1132(a)(3)] to preclude monetary damages for consequential injury on the ground that such relief was not ‘typical’ of pre-fusion equity.” *Id.* at 1364.

316. *Id.* at 1334. Section 1132(a) permits a civil action to be brought, with § 1132(a)(1) serving as “the workhorse of ERISA remedy law under which routine benefit denial and other ERISA claims proceed.” *Id.*

317. *Id.* at 1335 (citing examples of the Court’s missed opportunity to utilize trust law to provide remedies, such as *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216–17 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260–62 (1993); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)).

Characterizing the damages issue in such cases as contractual (in the sense of ‘extracontractual’) rather than fiduciary further underscores the great failing in the Supreme Court’s handling of ERISA remedy issues in *Russell*, *Mertens*, and *Great-West*: the Court’s neglect of the trust law basis of ERISA remedy law in interpreting the authorizations for equitable relief in section 502(a).

*Id.* at 1346.

318. *Id.* at 1338.

319. *Id.* at 1345.

320. *Id.* at 1363.

remedies, all derived from the make-whole tradition of the law of trusts, sound exclusively in equity and include money damages for consequential injury.<sup>321</sup>

It follows that the law of trusts can view the failure to provide adequate plan forms and subsequent inquiry as breach of fiduciary responsibility, mandating that plan managers comply with the terms of the beneficiary mandate rule, compensating those victimized by the breach.

### B. Plan Managers

Applying statutory provisions to current factual situations is the crux of legal practice. Thus, it is necessary to apply ERISA's statutory civil action entitlement given to individuals to enforce benefits arising thereunder. Logically, cases illustrate that plaintiffs must first exhaust administrative remedies under the ERISA plan before commencing action in courts.<sup>322</sup> Once administrative remedies are exhausted, plaintiffs are free to petition the courts to redress grievances under either § 1132(a)(1)(B) to recover benefits due under the terms of the plan, or to clarify rights to future benefits under the terms of the plan.<sup>323</sup> That particular ERISA provision is not used to "reform" terms of the plan, but rather is only being used to enforce present and prospective rights under the terms as stated.<sup>324</sup> Any change in plan terms, no matter how equitable the claim, should not be "inferred without evidence of a concomitant awareness of its gravity on the part of the Congress . . . ."<sup>325</sup>

Section 1132(a)(3) permits a separate cause of action that arises under § 1132(a)(1)(B). Under § 1132(a)(3), a civil action may be brought by:

[A] participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.<sup>326</sup>

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321. *Id.* at 1365–66. The author criticizes Justice Scalia's opinion for the Court in *Mertens*, which restrained the monetary relief available through equity. *Id.* at 1321.

322. *See Park v. Tr. of 1199 SEIU Health Care Emps. Pension Fund*, 418 F. Supp. 2d 343, 351, 357 (S.D.N.Y. 2005).

323. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 435–37 (2011) (holding the ERISA provision directs enforcement of the plan's terms as stated).

324. *See Soehnen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 580–81 (6th Cir. 2016); *see also Singletary v. UPS*, 828 F.3d 342, 350 (5th Cir. 2016); *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 361–62 (4th Cir. 2015) (holding plaintiffs may not use section 502(a)(1)(B) to seek relief outside the plan's terms); *Ross v. Rail Car Am. Grp. Disability Income Plan*, 285 F.3d 735, 740 (8th Cir. 2002).

325. *Laurent v. PricewaterhouseCoopers, LLP*, No. 06-CV-2280 (JPO), 2017 WL 3142067, at \*7 (S.D.N.Y. July 24, 2017).

326. 29 U.S.C. § 1132(a)(3) (2012); *see, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 119 (1989) (holding a participant includes a former employee where there is a reasonable

In one illustration, an employee, under a defined benefit plan, made contributions to her plan throughout her employment with the New York University Medical Center, from 1976 until her death in 1998.<sup>327</sup> Allegedly, two years before her death, the employee contacted the pension fund manager in an attempt to change the beneficiary of her pension from her estranged husband to her two children, but the manager was allegedly unresponsive.<sup>328</sup> Representatives of the fund denied that the employee ever contacted them and further alleged that they employed staff to respond to employee telephone inquiries.<sup>329</sup> Nonetheless, the employee died prior to retirement and her estranged husband remained the beneficiary of her pension fund, even though the two remained married, but were in fact separated.<sup>330</sup>

An attorney representing the employee's estate requested the pension fund proceeds, but the fund manager informed the pension funds are to be paid to the employee's husband since he was the plan's designated beneficiary.<sup>331</sup> Thereafter, the estranged husband purportedly waived his right to the pension, but he never contacted the fund manager, nor did he exhaust the fund's administrative appeals process.<sup>332</sup> The estate of the decedent filed suit against the fund because of the fund's refusal to violate the plan's designated beneficiary rule, alleging that the estate, not the estranged husband, is the rightful intended beneficiary of the fund proceeds. The estate argues the terms of ERISA provide it with standing to pursue civil action,<sup>333</sup> but the plan managers disagreed, asserting that ERISA defines a beneficiary as someone designated by a participant in the plan, or by the terms of the employee's plan who is or may be entitled to a benefit under the plan.<sup>334</sup> In addition to ERISA's definition, the plan's documents define a beneficiary as the "person or persons, including your spouse that you designate to receive payments from the Pension Fund after your death."<sup>335</sup> Despite the apparent definitional disparity, the estate argued it is a bona fide beneficiary under the terms of the plan because it *could become* a beneficiary in the future and that this is sufficient to provide standing.<sup>336</sup>

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expectation of returning to covered employment or where there is colorable claim to vested benefits).

327. *Park*, 418 F. Supp. 2d at 348.

328. *Id.* at 349. An affidavit was submitted from a co-worker of the employee which alleged the employee called the number in the pension plan booklet but no one returned her call. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Park*, 418 F. Supp. 2d at 349.

333. *Id.* at 350 ("Section 1132(a)(1) authorizes suits by a 'participant or beneficiary,' Section 1132(a)(3) authorizes suits by a 'participant, beneficiary, or fiduciary,' and Section 1132(g)(1) authorizes an award of attorney's fees and costs in an action brought by a 'participant, beneficiary, or fiduciary.'").

334. *Id.* (citing 29 U.S.C. § 1002(8)).

335. *Id.*

336. *Id.*

The district court disagreed with the estate's interpretation of who constitutes a beneficiary able to bring suit under ERISA because the decedent employee died before retirement, still validly married, her spouse is the only person eligible to be designated as a beneficiary under her pension plan.<sup>337</sup> The court reasoned:

If [the employee] had submitted an application to receive her pension benefits before she died, as required for her to have been able to designate a beneficiary other than her spouse, she could have named a different beneficiary if she obtained spousal consent or a lost spouse waiver. Because she did not perform either of these acts, the Estate is not and never was eligible to be designated a beneficiary of her benefits.<sup>338</sup>

In defining who is a beneficiary permitted to bring suit, the court held, "mere possibility" that the estate could become the beneficiary is insufficient to establish standing under ERISA § 1132.<sup>339</sup>

By refusing to recognize the "potential beneficiary" status for purposes of granting standing to the employee's estate, the court relies upon a familiar policy expressed throughout many ERISA decisions: the plan's designated beneficiary rule.<sup>340</sup> In addition, the court references established judicial policy holding § 1132(a)(3) strictly limits the plaintiffs who may bring certain civil actions,<sup>341</sup> and that "absent clear Congressional expression, the courts do not have jurisdiction over actions brought by non-enumerated parties."<sup>342</sup> Nonetheless, even though the court held the estate lacked standing to pursue its claims as a beneficiary, the court did discuss whether the employee was "likely prejudiced" because of unawareness to the spousal waiver provisions, the lost spouse exception to a spouse's claim, or that the pension fund managers failed to respond to the employee.<sup>343</sup> In dicta the court recognizes the value of equitable considerations in the processing of ERISA claims. Hence, one interpretation is

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337. *Id.* at 351.

338. *Park*, 418 F. Supp. 2d at 351.

339. *Id.* (citing *Coleman v. Champion Int'l Corp.*, 992 F.2d 530, 533 n.6 (5th Cir. 1993), in which "a pension plan participant's son not designated a beneficiary lacked standing to maintain an ERISA action in both his individual capacity and his capacity as the representative of the deceased participant's estate").

340. *See, e.g.*, *Hillman v. Maretta*, 133 S. Ct. 1943, 1948 (2013) (holding the designated beneficiary form takes precedence unless defined exceptions are followed); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) (holding the fiduciary shall administer the plan in accordance with the documents and instruments governing the plan).

341. *Park*, 418 F. Supp. 2d at 351 (citing *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000)).

342. *Id.* at 352 (citing *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 892 (2d Cir. 1983)); *see also* *American Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 361 (2d Cir. 2016) (holding a group of physicians lacked standing to sue under ERISA on behalf of their patients).

343. *See Park*, 418 F. Supp. 2d at 352-57.

that the plan manager's failure to adequately provide information and inquiry to an employee under the plan resulted in the unjust enrichment of the plan's designated beneficiary, justifying a claim by the estate of the employee for restitution. Was it sufficient that the employee was given a summary plan description, as required by federal regulations, when she commenced employment?<sup>344</sup> Did the plan managers make inquiry of the employee throughout her employment? Admittedly, neither the employee's estranged husband, nor the decedent's estate, exhausted the administrative remedies available under the pension plan.<sup>345</sup> Instead, the estate, with the assistance of the estranged husband, immediately sought a judicial remedy, a remedy only permitted once all administrative remedies are exhausted.<sup>346</sup> The court implies that equity aids the vigilant and that administrative remedies must be exhausted or plaintiff must prove clearly and convincingly that such a pursuit is futile.<sup>347</sup> Otherwise, "plaintiff is seeking a heartier bite at the apple in federal court—one with more teeth."<sup>348</sup>

Do equitable claims require exhaustion of administrative remedies? Despite the holding in *Park v. Trustees of 1199 Seiu Health Care Employees Pension Fund* that under 29 U.S.C. § 1132(a)(1)(B) any plaintiff must exhaust administrative remedies unless excused because of futility, the court concedes that "the Court of Appeals for the Second Circuit has not yet addressed whether these procedures are required for claims under 29 U.S.C. § 1132(a)(3) for alleged breach of fiduciary duty."<sup>349</sup> Section 1132(a)(3) provides that a civil action may be brought, in part, to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]"<sup>350</sup> Also, the court in *Shamoun v. Board of Trustees*, cites to a Second Circuit decision, holding there is no exhaustion requirement for ERISA statutory claims that do not arise under the plan's policy, for example, an employee's right not to be terminated for seeking benefits or breach of

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344. *Id.* at 353–54 (citing 29 U.S.C. § 1022(b) (2000) and 29 C.F.R. § 2520.102-3 (2004)).

345. *See id.* at 351–54.

346. *Id.* at 345, 357.

347. *Id.* at 355–57.

348. *Diamond v. Local 807 Labor-Mgmt. Pension Fund*, No. 12-CV-5559 (RRM)(VVP), 2014 WL 527898, at \*4 (E.D.N.Y. Feb. 7, 2014). *But see* *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 91–92 (6th Cir. 1997) (holding fiduciary claims are subject to administrative exhaustion to prevent nullification of the exhaustion requirement).

349. *Park v. Tr. of 1199 SEIU Health Care Emps. Pension Fund*, 418 F. Supp. 2d 343, 357 (S.D.N.Y. 2005).

350. 29 U.S.C. § 1132(a)(3) (2012). There are multiple Supreme Court decisions that illustrate the Court's perspective on the scope of equitable relief. *See* *Sereboff v. Mid-Atlantic Medical Servs., Inc.*, 547 U.S. 356, 361 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002); *Harris Tr. & Sav. Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 238, 243 (2000); *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261–63 (1993); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148–49 (1985) (Brennan, J., concurring).

fiduciary duty.<sup>351</sup> Claims that do not arise because of the terms of the plan, are appropriately addressed under § 1132(a)(3), the one providing for “other appropriate equitable relief.”<sup>352</sup>

Equitable relief is possible under the following conditions: first, establishment of beneficiary status; second, exhaustion of administrative means or proven futility as applicable; and third, establishment of an equitable claim.<sup>353</sup> The Second Circuit ruled that plan administrators may be sued as defendants under § 1132(a)(3), providing for equitable relief whenever there is inadequate relief provided in other sections of ERISA.<sup>354</sup> The pivotal elements necessary to support liability is that the plan administrators exercised total control over the claims process.<sup>355</sup> The equitable remedies provided by § 1132(a)(3) are meant to supplement remedies that are inadequate to compensate the plaintiff for a defendant’s breach of fiduciary duty.<sup>356</sup> Thus, money awards are available under § 1132(a)(3), but “only in very limited circumstances.”<sup>357</sup> Examples are, equitable restitution for loss resulting from a trustee’s breach of fiduciary duty, or to prevent the trustee’s unjust enrichment.<sup>358</sup> If, as Professor Langbein suggests, ERISA was enacted with minimalist language to permit inclusion of all forms of equitable relief available under the law of trusts, then § 1132(a)(3) should be read inclusively, allowing arguments to retrieve proceeds from persons unjustly enriched through the breach of fiduciary responsibility of plan managers.

The extent of equitable relief under § 1132(a)(3) is the primary issue. It remains uncertain how far courts will go, under the terms of the ERISA, to provide equity to persons clearly intended by the plan participant to receive benefits but who were thwarted by mistake, inadequate information, and the

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351. *Shamoun v. Bd. of Trs.*, 357 F. Supp. 2d 598, 603 (E.D.N.Y. 2005) (citing *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993)); *see also* *Nechis v. Oxford Health Plans*, 421 F.3d 96, 102 (2d Cir. 2005) (holding plaintiffs’ lack of standing prevented *Nechis* from stating a legally cognizable claim, and that therefore the court did not need to decide whether administrative exhaustion was a prerequisite to a statutory ERISA claim); *Wegmann v. Young Adult Institute, Inc.*, No. 15 Civ. 3815 (KPF), 2016 WL 8711557, at \*6 (S.D.N.Y. Aug. 5, 2016) (concurring with the holding of *Shamoun*, but holding that failure to exhaust would frustrate the goals of ERISA).

352. 29 U.S.C. § 1132(a)(3).

353. *See, e.g., Wegmann*, 2016 WL 8711557, at \*2–3 (holding plaintiff must exhaust administrative remedies under ERISA prior to bringing an action under § 1132(a)(1)(B)).

354. *See* *N.Y. State Psychiatric Ass’n, v. UnitedHealth Grp.*, 798 F.3d 125, 133 (2d Cir. 2015).

355. *Id.*

356. *Id.* at 134.

357. *Laurent v. PricewaterhouseCoopers LLP*, No. 06-CV-2280 (JPO), 2017 WL 3142067, at \*7 (S.D.N.Y. July 24, 2017); *see also* *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (holding equitable relief under § 1132(a)(3) is equitable in nature, and therefore injunction, mandamus, and restitution are options). *But see* *Langbein, supra* note 1, at 1320 (arguing that “equitable relief should be correctly interpreted to include money damages”).

358. *See Laurent*, 2017 WL 3142067, at \*9 (citing *CIGNA Corp. v. Amara*, 563 U.S. 421, 441–42 (2011)).

plan's designated beneficiary rule. Several questions naturally follow: Is it possible for the courts to reform the terms of a plan document?<sup>359</sup> What level of proof is required? Who may bring suit to reform the document? In a 2014 decision, the Second Circuit ruled a contract may be reformed due to mistake of both parties, or where one of the parties is mistaken and the other commits fraud or engages in inequitable conduct.<sup>360</sup> These remedies are available under federal common law, justifying reformation under equity principles whenever necessary to rectify fraud or to correct mutual mistake.<sup>361</sup> Also in 2014, the Ninth Circuit ruled on a petition to reform an ERISA plan based on a plaintiff's mistaken belief of the terms of the plan.<sup>362</sup> The plaintiff petitioned based on equitable estoppel or reformation on the basis that the ERISA plan administrator erroneously informed him that he would receive benefits upon retirement, even though he released his claim to benefits several years prior.<sup>363</sup> The plan discovered its error and ceased payment, causing the plaintiff economic hardship.<sup>364</sup> The plaintiff then sought to apply equitable estoppel to prevent the fund from reverting to its corrected understanding of the terms of the plan.<sup>365</sup> The court refused to apply equitable estoppel, ruling against the claimant's petition to reform the terms of the plan, writing:

We next turn to Gabriel's claim that he is entitled to the equitable remedy of reformation. To qualify for reformation of the Plan based on mistake under trust or contract law principles, Gabriel would need to demonstrate that "a mistake of fact or law affected the terms" of the Plan, the relevant trust instrument here, and introduce evidence of the trust settlor's (or contractual parties') true intent. Gabriel cannot meet this standard as a matter of law, because the Plan itself does not contain an error. Gabriel concedes that he was a sole proprietor of Twin Cities from 1975 to 1978 and ineligible to participate in the Plan during that time, and therefore the Fund's current, corrected records accurately reflect the agreement between Gabriel and the Fund. Instead, Gabriel wants to reform the Fund's administrative records to conform to the misinformation provided by the plan representative. But reformation does not extend so far. The administrative records are not part of the Plan, and the Fund's mistaken administrative

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359. See, e.g., *Nechis v. Oxford Health Plans*, 421 F.3d 96, 103 (2d Cir. 2005) (suggesting in dicta that reformation is possible when there is fraud, mutual mistake, or terms in violation of ERISA). But see *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 273 (S.D.N.Y. 1997) (holding that a court may order a defendant to reform a plan in violation of ERISA but may not rule on the court's power to reform an ERISA pension plan).

360. *Amara v. CIGNA Corp.*, 775 F.3d 510, 525–26 (2d Cir. 2014).

361. *Id.* at 525–26.

362. See *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 952 (9th Cir. 2014).

363. *Id.* at 949, 951.

364. *Id.* at 951–52.

365. *Id.* at 952.

records did not reflect the parties' true intent in entering into the Plan. Accordingly, the remedy of reformation due to mistake is not applicable in this context.<sup>366</sup>

Judicial reformation allows courts to accommodate the actual intent of the decedent and is available only in cases of fraud or mistake, not "to impose personal liability . . . for a contractual obligation to pay money—relief that was not typically available in equity."<sup>367</sup> What if a plan administrator failed to advise an employee, or failed to make inquiry to update information from an employee, is the plan manager in breach of his or her fiduciary responsibility? Courts hold that when an employer advises employees to make certain elections related to employee benefits, that the employer acted as a fiduciary in that context because the employer was acting as a plan administrator.<sup>368</sup> Failing to advise or to make inquiry is discretionary, another element of fiduciary responsibility.<sup>369</sup> It may be easier to hold that an employer breaches fiduciary duty when he or she intentionally misrepresents facts resulting in injury to an employee. The more difficult issue is whether the employer breaches his or her fiduciary duty when he or she negligently misrepresents facts that result in employee injury. Negligent misrepresentation is actionable as a breach of fiduciary duty.

Negligent misrepresentation was one of the issues raised in a 2011 district court decision, *Fadely v. Blue Cross & Blue Shield of Georgia, Inc.*<sup>370</sup> The facts involved an employee with substantial health problems who was terminated by his company shortly after his sixty-fifth birthday.<sup>371</sup> Following his termination, the employer advised the employee to enroll in COBRA rather than Medicare Part B, to which he was entitled.<sup>372</sup> Relying upon the employer's advice, the employee enrolled in COBRA and as a result, suffered substantial financial costs.<sup>373</sup> Thereupon the employee sued his employer, alleging breach of the duty owed him under ERISA.<sup>374</sup> Specifically, that his employer owed a fiduciary duty to him as a former employee and that the employer: (1) refused to provide

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366. *See id.* at 961–62 (citations omitted).

367. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002); *see also In re Estate of Duke*, 352 P.3d 863, 867 (Cal. 2015) (holding that "reformation is permissible if clear and convincing evidence establishes an error in the expression of the testator's intent and establishes the testator's actual specific intent at the time the will was drafted").

368. *See Varsity Corp. v. Howe*, 516 U.S. 489, 492, 502–03 (1996) (holding employers engaged in deliberate deception by advising employees to accept a change of plan, which was to the employees' financial detriment).

369. *Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 128–29 (7th Cir. 1992).

370. *Fadely v. Blue Cross & Blue Shield of Ga., Inc.*, No. 1:11-CV-1409-TWT, 2011 WL4974857, at \*1, \*4 (N.D. Ga. 2011); *see also Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1336 (N.D. Ga. 2017) (holding plaintiff must specify how § 1132(a)(3) applies for the court to grant relief).

371. *Fadely*, 2011 WL4974857, at \*1.

372. *Id.*

373. *Id.*

374. *Id.*

him with requested information; (2) made misrepresentations; (3) breached its duty to him based on these misrepresentations; (4) failed to notify him on a timely basis of an adverse benefit determination; (5) failed to provide specific plan provisions that were pertinent to him; and (6) failed to provide a description of the review appeals process.<sup>375</sup>

The court permitted the former employee to proceed with his claim of breach of fiduciary duty through negligent misrepresentation.<sup>376</sup> Similarly, in 2014, another federal district court permitted a plaintiff to proceed with a claim based on negligent misrepresentation and brought under § 1132(a)(3).<sup>377</sup> The court wrote:

Jump plainly has met this standard for pleading purposes as to Northern Tier. He alleges that Northern Tier misled him beginning in December 2010 by providing him with information stating that he would be eligible for subsidized health benefits under the Northern Tier plan. Northern Tier argues that Jump does not allege that he read the presentation materials at issue, but the Complaint clearly alleges otherwise. Jump alleges that he was further misled by Northern Tier's September 2011 presentation, which expressly states that Northern Tier will 'recognize Speedway service for eligibility and vesting in benefit plans [.]' Although the latter presentation did not specifically address the subsidy, Jump alleges that he believed that Northern Tier's failure to address the subsidy meant that the December 2010 statement remained accurate. Jump further alleges that Northern Tier never disclosed that a subsidy would not be available to Jump before he decided to join Northern Tier. Finally, Jump alleges that Northern Tier's misrepresentations and omissions led him to terminate his employment with Speedway and join Northern Tier to his detriment. He claims that he would have simply retired from Speedway had he known that he was not entitled to a subsidy under the Northern Tier Plan.<sup>378</sup>

Both federal court decisions illustrate the possibility of alleging a violation of an employer's duty to provide employees with comprehensive plan information forms and complementary follow-up throughout employment. Arguably, failure to provide these necessary elements results in action under § 1132(a)(3), "to obtain other appropriate equitable relief . . .," permitting recovery under a theory of negligent misrepresentation. Cases also illustrate that the universe of potential defendants in an equitable breach of fiduciary duty lawsuit (§ 1132(a)(3)) is larger than the universe of potential defendants in a claim to

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375. *Id.*

376. *Id.* at \*4–6.

377. *Jump v. Speedway LLC*, 23 F. Supp. 3d 1024, 1030–31 (D. Minn. 2014).

378. *Id.* at 1031 (citations omitted).

recover benefits under the terms of the plan (§ 1132(a)(1)(B))—with plaintiffs to recover losses more easily and with expanded standing.

### C. Accountability

ERISA strives for certainty and simplicity.<sup>379</sup> Born from the goals established by Congressional committees meeting during the 1950s and 1960, concurrent with federal departments and presidential commissions, their priority remains to provide employees with secure pension and welfare benefits, and concomitantly to provide employers with tax incentives to incentivize employee stability and security. Certainty underlies federal preemption of contradictory state laws and procedures, guaranteeing income for surviving spouses and children, and reliance upon the ERISA plan manager to administer the plan “solely in the interest of the participants and beneficiaries . . . ,”<sup>380</sup> avoiding self-serving behavior.<sup>381</sup> To ensure certainty and simplicity, plan managers are expected to exercise skill and care and the diligence of a prudent person acting in like capacity.<sup>382</sup> Most pertinently, plan managers owe a duty to inform plan participants and beneficiaries about significant aspects of trust administration,<sup>383</sup> the imprudent response to which is illustrated in the ongoing judicial controversy surrounding revocation by operation of law.<sup>384</sup>

What is the extent of a plan manager’s fiduciary duty to disclose to plan participants the significant aspects of the plan? At a minimum, the plan manager may not intentionally mislead, deceive, or fraudulently induce.<sup>385</sup> In a 2003 decision from the United States Court of Appeals for the Fifth Circuit, the court discussed the responsibility of the plan manager to disclose significant facts to the plan participants.<sup>386</sup> The court considered the opinions of other circuits as well as the pertinent fiduciary decisions from the United States Supreme Court.<sup>387</sup> The facts of the Fifth Circuit case involved company employees who inquired of their employer’s representatives “whether the company planned to implement an enhanced retirement incentive program . . . .”<sup>388</sup> The company managers told the employees that they knew nothing of any plan and, based on

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379. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (“Congress’[s] desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.”).

380. 29 U.S.C. § 1104(a)(1) (2012).

381. *Id.* § 1106(b)(1).

382. *Id.* § 1104(a)(1)(B); see *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 571 (1985).

383. See, e.g., *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 133 (3d Cir. 1993); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163–64 (6th Cir. 1988).

384. See Langbein, *supra* note 1, at 1326–27.

385. *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 415, 430 (5th Cir. 2003).

386. *Id.* at 430–31.

387. *Id.* at 429–30.

388. *Id.* at 409.

this information, the employees took an early retirement rather than wait for an incentive program.<sup>389</sup> One month later, the company announced an incentivized early retirement program that provided an additional year's salary, but the now-retired former employees, missed this opportunity based on the employer's information leading them to retirement.<sup>390</sup> The employees filed suit against the company alleging the employer's representatives breached their fiduciary duty by defrauding them.<sup>391</sup>

The Fifth Circuit ruled the company did not owe an affirmative duty to disclose to the plan participants the status of its internal discussions concerning a change in the retirement program.<sup>392</sup> Hence, the statements made by company managers did not constitute a material misrepresentation and therefore, were not fraudulent.<sup>393</sup> But the decision goes further by outlining the parameters of a plan manager's duty to disclose on a broader scale.<sup>394</sup> The opinion begins its analysis with the acknowledgement that ERISA's fiduciary duties rely upon the common law of trusts.<sup>395</sup> The court then proceeds to review a 1996 Supreme Court decision, *Varity Corporation v. Howe*.<sup>396</sup> While the Court in *Varity* held it was a breach of fiduciary duty for a company employee to intentionally mislead an employee, the decision declined to address "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information . . . in response to employee inquiries."<sup>397</sup> What then is the fiduciary responsibility of a plan administrator to provide employees with information concerning ERISA plans? The Fifth Circuit suggest that the duty to disclose in a neutral fashion under ERISA is vague, writing "that the Supreme Court, while not having spoken on this precise question, has defined in general terms an employer's responsibility to communicate truthfully with its employees regarding the future of benefit plans."<sup>398</sup> But then, "Congress had no need to spell out the details, and considerable reason not to do so when legislating for a new field whose contours were not yet fully known."<sup>399</sup>

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389. *Id.*

390. *Id.*

391. *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 409 (5th Cir. 2003).

392. *Id.* at 432.

393. *Id.* at 431–32. The court specified that it held only that "the lack of serious consideration does not equate to a free zone for lying." *Id.* at 428.

394. *Id.* at 420–21.

395. *Id.* at 411.

396. *Id.* at 413–16 (summarizing *Varity Corp. v. Howe*, 516 U.S. 489 (1996)).

397. *Varity Corp.*, 516 U.S. at 506.

398. *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 413 (5th Cir. 2003).

399. Langbein, *supra* note 1, at 1329. Langbein buttresses his assertions by listing areas where ERISA is silent, noting that equitable powers should be read broadly, and that ERISA's language is not comprehensive as written. *Id.* at 1345. Langbein notes that: (1) there is a lack of specificity as to when there should be jury trials; (2) there is no specified standard of judicial review or plan decision-making; (3) there is a lack of specification for payment of attorney fees; and (4) there is a lack of specificity about when punitive damages should be assessed. *Id.*

Empirical evidence sufficiently indicates that employment forms affecting pension and welfare benefits offer inadequate choices by which employees may express their intent within a continually changing interpersonal milieu.<sup>400</sup> Furthermore, estate planning attorneys consulting with divorcing clients, committed nonmarital clients, or estate planning clients are inexperienced with ERISA's preemption and its consequences.<sup>401</sup> Do these occurrences justify accusing either the plan managers or estate planning attorneys with a breach of fiduciary responsibility to their clients? If failure to provide an employee with adequate means by which he or she may express intent regarding the distribution of fund proceeds, then the answer is certainly yes. This is true regardless if the payment arises from either a pension or a welfare plan administered under ERISA, "Congress deliberately included nonpension plans within ERISA's fiduciary and remedy provisions, and Congress took no distinction within ERISA remedy law between pension and nonpension plans."<sup>402</sup>

Professor Langbein is of the opinion that "courts that interpret ERISA should be hesitant to conclude that remedies routinely available in pre-ERISA trust law fall outside the meaning of Congress' authorization of 'equitable relief' under ERISA."<sup>403</sup> Traditionally, Professor Langbein argues:

An aggrieved trust beneficiary may sue . . . either in his or her own right or on behalf of the trust. He or she may recover (1) for loss incurred, (2) for any profits that the trustee made in breach of trust, and (3) for any gains that would have accrued but for the breach.<sup>404</sup>

The wording used by Congress in § 1132(a)(3), entitling a participant, beneficiary, or fiduciary to obtain "other appropriate equitable relief" was intended to "facilitate adaptation to new problems that might be encountered as ERISA transposed trust remedy law to the novel terrain of pension and benefit plans."<sup>405</sup> Apparently, in support, Supreme Court decisions refer to this ERISA provision as a safety net, offering relief not otherwise adequately met.<sup>406</sup>

Justice Scalia's 2003 decision in *Mertens v. Hewitt Associates*, seemingly restrains the equitable relief available under ERISA.<sup>407</sup> Over the objection of

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400. See, e.g., J. Frank Vespa-Papaleo et al., *The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law*, N.J. CIVIL UNION REVIEW COMM'N 9 (2008), <http://www.nj.gov/lps/der/downloads/CURC-Final-Report-.pdf> (reporting that employees in civil unions often must write in a description of their marital status into employment forms because they do not explicitly enumerate "civil union" as a known marital status, even in states where civil unions are recognized).

401. See Gary Shulman, *QDROs—The Ticking Time Bomb*, 23 FAM. ADVOC. 26, 29 (2001).

402. Langbein, *supra* note 1, at 1331.

403. *Id.* at 1332.

404. *Id.* at 1333 (referencing AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 205, at 237 (4th ed. 1988)).

405. *Id.* at 1335.

406. See *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996); see also *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985).

407. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259–62 (1993).

four dissenting justices, the majority holds monetary awards are not encompassed within the equitable relief referenced in ERISA § 1132(a)(3).<sup>408</sup> The majority opinion separates relief normally given at law and that normally given at equity, a duality long abandoned, “[m]oney damages are, of course, the classic form of *legal* relief.”<sup>409</sup> Since the text of § 1132(a)(3) references equitable relief, Justice Scalia excludes monetary damages as a form of restitution.<sup>410</sup> Contrary to the majority’s construction of equitable relief, Professor Langbein writes, “equity courts have constantly awarded money damages to remedy breach of trust, which is why the Uniform Trust Code of 2000 has recently codified the practice.”<sup>411</sup> While *Mertens* remains good law, it does not alter the issue of whether § 1132(a)(3) may be read to encompass the failure of plan managers to provide employees with adequate plan designation forms that encompass current intent and accommodate changing circumstances. Arguably, “the concept of ‘typically equitable’ has no ascertainable meaning.”<sup>412</sup> As Professor Langbein writes:

Because both the substantive and the remedial provisions of ERISA arise from trust law, the likely meaning of ‘appropriate equitable relief’ in ERISA is the panoply of remedies, specific and monetary, including make-whole damages for consequential injury, which courts of equity have for centuries applied to correct breaches of trust, and which are ‘other’ than the ‘benefits due’ and injunctive relief that the statute expressly authorizes earlier in [other provisions].<sup>413</sup>

One instance of equitable relief applied consistently to ERISA plan designated beneficiaries involves slayer statutes. These statutes apply to designated beneficiaries who receive the benefit because this same individual slayed the person from whom he or she would be taking.<sup>414</sup> Nonetheless, state law provides that if a beneficiary “felonious[ly] and intentional[ly]” kills the person from whom he or she would take then that person is deemed to predecease the transferor and cannot take.<sup>415</sup> The rationale for the slayer rule is that the transferor did not intend the beneficiary to take if the taking were a result of the beneficiary feloniously and intentionally killing the transferor. There is no textual provision made in ERISA for voiding the taking of a beneficiary who

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408. *Id.* at 253 (“We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here.”).

409. *Id.* at 255.

410. *Id.*

411. Langbein, *supra* note 1, at 1352 (citing UNIF. TRUST CODE § 1001(b)(3) (UNIF. LAW COMM’N 2001)).

412. *Id.* at 1353.

413. *Id.* at 1355.

414. *See* Langbein, *supra* note 5, at 1687.

415. UNIF. PROB. CODE § 2-803 (UNIF. LAW COMM’N 2014); *see also* Langbein, *supra* note 5, at 1688 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 (AM. LAW INST. 2011)).

slays the transferor, yet “[n]o reported ERISA or FEGLIA case has ever allowed the slayer to take.”<sup>416</sup> Cases supporting federal preemption for other purposes acknowledge that in the “ERISA context, these ‘slayer’ statutes could revoke the beneficiary status of someone who murdered a plan participant.”<sup>417</sup> Among commentators, there remains mystery as to why federal courts are willing to use slayer statutes to void a taking by “slayer beneficiaries,” but are unwilling to use state statutes permitting revocation by operation of law upon divorce to void a divorced spouse from taking.<sup>418</sup>

The comparison between statutes mandating revocation by operation of law and the equitable voiding of the beneficiary status of slayers focuses on the unjust enrichment of beneficiaries.<sup>419</sup> Even though courts hold that state divorces, and the subsequent financial settlements agreed to by both divorcing parties, are preempted by ERISA’s requirement that proceeds be paid to the plan’s designated beneficiary, the intent of the employee was that the former spouse *not* be the beneficiary.<sup>420</sup> And although federal courts refuse to permit state constructive trusts to alter distribution of ERISA proceeds,<sup>421</sup> there is dicta suggesting not all equity devices are forbidden, only those arising at the state level, thereby suggesting that a federal approach is suitable.<sup>422</sup> The Ninth Circuit, in dicta, speculated in 2010 that:

We conclude that Congress did not intend to permit the reassignment of surviving spouse benefits and, therefore the constructive trust remedy that the state court tried to impose is also preempted by ERISA. It may not be that all constructive trusts instituted by state courts, particularly those that seek to recover ill-gotten gains, will have a sufficient connection with or reference to an ERISA plan to trigger ERISA’s preemption provision.<sup>423</sup>

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416. Langbein, *supra* note 5, at 1692.

417. Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 152 (2001)

418. See, e.g., Langbein, *supra* note 5, at 1689–93 (suggesting slayer statutes arise because of federal common law). One commentator suggests that federal common law would precipitate consolidated uncertainty. See Hirsch, *supra* note 42, at 1905–06.

419. Langbein, *supra* note 5, at 1679 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 48 (AM. LAW INST. 2011)).

420. See, e.g., Hillman v. Maretta, 133 S. Ct. 1943, 1949 (2013) (holding that the former spouse takes proceeds of decedent’s FEGLIA life insurance contract and that spouse cannot waive rights without following procedures mandated by FEGLIA); Carmona v. Carmona, 603 F.3d 1041, 1062 (9th Cir. 2010) (holding the divorce decree was an invalid waiver of the former wife’s right to the surviving spousal benefits and that a constructive trust created by a state court was preempted by ERISA).

421. See, e.g., Carmona, 603 F.3d at 1061 (“We agree that a state law constructive trust cannot be used to contravene the dictates of ERISA.”).

422. Larry J. Pittman, *ERISA’s Preemption Clause: Progress Towards a More Equitable Preemption of State Laws*, 34 IND. L. REV. 207, 271 (2001) (citing Cummings v. Briggs & Stratton Ret. Plan, 797 F. 2d 383, 390 (7th Cir. 1986)).

423. Carmona, 603 F.3d at 1062.

Thus, a constructive trust, a remedy used to provide redress for the unjust enrichment of a beneficiary, may be the proper equitable vehicle under § 1132(a)(3), by which to recover assets passing to a person unjustly enriched because of the plan manager's failure to inform.

Ostensibly, the best approach is to utilize the ERISA statute itself, specifically § 1132(a)(3), which provides for a participant or a beneficiary to obtain other appropriate equitable relief to redress violations of the participant's plan. First, recourse is possible against plan managers for failing to provide employment forms that sufficiently provide participants with knowledgeable options when commencing employment, and then periodic updates to ascertain changes in the participant's intent. As fiduciaries, the plan managers owe a fiduciary duty to the plan participants, a duty that is breached when there is inadequate information disseminated to employees by which employees may make intelligent decisions. Second, it is arguable that when plan proceeds are paid to designated beneficiaries who knowingly waived all claim to those proceeds, that named beneficiary is unjustly enriched by receipt of the proceeds. There exists extensive history of unjust enrichment in state courts, but § 1132(a)(3) provides the appropriate equitable relief justification for voiding the payment of those proceeds to persons who are unjustly enriched.

The catalyst for resorting to the equitable remedy language of ERISA results from a congruence of the following events:

First, federal courts consistently refuse to establish limits to the preemption force of ERISA as applied to the states through the Supremacy Clause.<sup>424</sup> The future extent of federal ERISA preemption remains uncertain,<sup>425</sup> but among the federal circuits and repeatedly in the Supreme Court, efforts to apply state law to ERISA plans, even laws traditionally left to the states for decades, like family law and probate, are preempted to provide ease of plan administration. Arguments suggesting that states can accommodate ERISA's goal of ease of administration because, for the most part, state laws are uniformly similar, are suspicious indeed. As one commentator noted, "the downside of state laws is that they offer administrators no single prototype to follow. What is more, state laws of disclaimer have steadily fragmented over time."<sup>426</sup> Furthermore:

[T]he uniform acts for inheritance and disclaimer law, first promulgated in 1969, have, if anything, exacerbated the tropism toward diversity. Unlike the Uniform Commercial Code, the Uniform Probate Code and related products have never gained anything close to universal adoption, but they did succeed in stirring things up, encouraging more states to codify and to reexamine and fiddle with

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424. Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 915-16 n.14 (2004).

425. See, e.g., *Hillman*, 133 S. Ct. at 1955-58 (Thomas, J., concurring) (implying preemption should be used sparingly).

426. Hirsch, *supra* note 42, at 1904.

statutes already in place . . . . As of today, some seventeen states have enacted the latest version of the Uniform Probate Code's provisions on disclaimer (grafted into that code from a freestanding uniform act)—and these have proliferated into seventeen different variations of state laws.<sup>427</sup>

Second, arguments in favor of restricting federal preemption are consistently rejected.<sup>428</sup> More specifically, the arguments assert that: (1) the designated plan beneficiary rule jeopardizes elective share statutes enacted to promote spousal equality; (2) preemption conflicts with spousal waivers arising as part of divorce decrees incorporated but not merged into divorce judgments; and (3) preemption ignores the perceived intent of the plan participant. These arguments are repeatedly debunked.

Third, because the plan proceeds are paid through nonprobate transfer mechanisms, plan contracts involving pension and welfare benefits, at the federal law level, do not match modern state laws that provide for revocation of named beneficiaries upon divorce. These state statutes were enacted to apply to all mechanisms but remain unexpressed in the plan designation rule of ERISA, “[t]he [state] divorce revocation statutes exemplify the core policy value of state wealth transfer law, which is to implement the transferor’s intent.”<sup>429</sup>

Fourth, plan managers are not providing accountholders with forms that adequately prompt them to foresee and account for significant life changes that might alter their preferences: “an intelligent and careful nonlawyer reading these forms would have difficulty understanding the potential impact they could have on distribution of account assets.”<sup>430</sup> The plethora of lawsuits involving individuals other than designated beneficiaries of ERISA plans, combined with the multiplication of judicial decisions, suggests that plan administrators are negligent in managing plan documents. Specifically, plan managers are negligent in “respecting management or disposition of [plan] assets.”<sup>431</sup> Furthermore, as with investing assets, the plan managers owe a duty to monitor and investigate and then to act in a prudent manner.<sup>432</sup> There is at least a glimmer that the Supreme Court may be willing to adopt a more aggressive posture

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427. *Id.* at 1905.

428. *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (“The QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income. In the case of a predeceased spouse, this concern is not implicated. The fairness of the distinction might be debated, but Congress has decided to favor the living over the dead and we must respect its policy.”).

429. Langbein, *supra* note 5, at 1665.

430. Sterk & Leslie, *supra* note 2, at 202.

431. 29 U.S.C. § 1002(21)(A) (2012); *see also* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

432. *See* *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828–29 (2015).

toward plan managers acting in a fiduciary capacity,<sup>433</sup> certainly when coupled with the reoccurring fact that the pension holder's intended beneficiaries are deprived of plan benefits because of the managers' failure to inform.<sup>434</sup> Section 1132(a)(3) provides a mechanism by which mistakes may be corrected without resorting to state law, preemption analysis, or the unjust enrichment of unintended beneficiaries.

#### IV. CONCLUSION

When ERISA was enacted in 1974 it was the product of public discussion and intense deliberation, all meant to provide American workers with a fiscally sound and administratively simple plan by which to safely plan for retirement. Likewise, it provided employers with tax incentives and a bold initiative to stimulate worker productivity and employment stability. These goals were accomplished. To manage the pension and welfare plans envisioned by ERISA, Congress mandated efficiency, dodging varying state laws through federal preemption, specifying what is now known as the plan beneficiary designation rule. Without anticipation, society evolved. No-fault divorce precipitated a significant rise in the number of divorces and remarriages, gender equality took hold of spouses, and the transfer of wealth shifted from probate devices, such as a last will and testament, to nonprobate contract beneficiaries, common with pension funds and life insurance policies. What remains constant, are the mistakes that individuals make, often planning to update contracts and forms, but mistakenly waiting until it is too late. The road to hell is paved with good intentions.

Sadly, human mistakes became entangled with ERISA's preemption of state laws, the plan beneficiary designation rule, and the frequency of divorce. States enacted laws specifying that if a person divorces, the former spouse is treated as predeceased for purposes of inheritance under last wills and testaments, but also under nonprobate contracts. The public and attorneys practicing estate planning and divorce law became familiar with these state laws and perhaps mistakenly relied upon them to their detriment. ERISA did not accommodate revocation by divorce within its terms and as a result, many former spouses received pension and life insurance benefits from former spouses. This reality precipitated

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433. See, e.g., *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014) (holding the same standard of prudence applies to ERISA fiduciaries, discarding the presumption that Employee Stock Ownership Plan (ESOP) fiduciaries act prudently).

434. See H.R. REP. NO. 93-533, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

*Id.*

multiple cases in state and federal courts arguing for state law's application, that federal common law can accommodate state law, or that former spouses should be equitably estopped from receiving proceeds that were intentionally waived. To date, all of these arguments are to no avail. The cases are legion.

ERISA plan managers are presumptively aware of disconnect between a plan holder's intent and the plan beneficiary designation rule. Nonetheless, very few plan managers provide forms used by plan holders adequately explaining the current and future options that employees may consider when designating a beneficiary. Furthermore, very few plan managers periodically make inquiry of plan holders as to changes in designation intent or current status arrangements. These failures result in the unjust enrichment of unintended beneficiaries, a failure of plan managers to inform, make inquiry, and to assist plan holders express a conscious and informed consent. This Article argues that this breach of fiduciary duty is actionable under 29 U.S.C. § 1132(a)(3) of ERISA, which provides that a participant, beneficiary, or a fiduciary may obtain appropriate equitable relief to redress this breach. Rather than lament encroaching federalism, the failure of Congress to act, or the unintentionality of human mistakes, this Article argues for holding plan managers to the accountability ERISA envisions as the best guarantee to reverse the number of unintended beneficiaries of pension and insurance policies.