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Caveat Fiduciarius: Unions, Pension Fund Investments, and the Capital-Pre-Recognition Agreement Exchange

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Labor unions have experienced a protracted, gradual decline in membership. There are many reasons for the decline. Employers continue their increasingly aggressive resistance to union organizing drives by taking advantage of both the weak remedies of the National Labor Relations Act (NLRA) and the National Labor Relations Board’s (NLRB) administrative delays. In response to this decline, modern labor unions are developing new strategies, many of which work outside of the traditional labor law framework. These strategies include pre-recognition agreements, which “assist unions in increasing membership without the need for the lengthy, expensive, and ultimately unpredictable
Another strategy is the corporate campaign, a tactic that puts a new spin on traditional picketing. Corporate campaigns use publicity to generate political pressure on employers from the people, entities, and communities that deal with an employer to force the employer into concessions. The labor union of the twenty-first-century has also employed a third strategy: it has taken on an unexpected role as a savvy institutional investor.

This paper focuses on labor unions' use of pre-recognition agreements and the investment strategies available to obtain them. Both pre-recognition agreements and investment strategies are important because of their tremendous potential for expanding union membership and because they differ significantly from traditional union organizing activity. Pre-recognition agreements take effect before a union gains recognition as the bargaining representative for a unit. By using pre-recognition agreements, unions can eliminate the most significant barrier to a union organizing campaign: employer resistance. By using innovative investment strategies, unions have moved from the picket line to the board room to obtain union jobs or union-friendly terms. This paper examines the viability of using both strategies together by exploring whether unions can tap the tremendous investment capital amassed in union pension funds in order to secure pre-recognition agreements from the companies those funds invest in. Section I defines pre-recognition agreements, their application, and their strengths and weaknesses. Section II identifies pension fund capital as a source of leverage for securing pre-recognition agreements. Section III examines the limitations and liabilities that ERISA (Employee Retirement Income Security Act) fiduciary obligations impose on the use of pension assets. In that section, this paper warns that courts have interpreted ERISA more strictly than other non-binding authorities. The result is that ERISA, as courts read it, may prohibit those who manage pension investments from considering benefits to either unions or employers in the pension investment selection process. The reason for such strict interpretation is to avoid abuses by unions and employers alike. Section IV briefly explains the effect that other fiduciary duties have on the pension investment selection process. Section V identifies the narrow financial justification under which pension plans might be able to arrange pre-recognition agreements in exchange for their investment capital, and

7. Strom, supra note 3, at 58.
suggests that negotiating union-friendly pension investment strategies during collective bargaining could expand their use and simultaneously reduce investment managers’ exposure to liability for fiduciary breach. This paper then proposes that courts have interpreted ERISA to prevent pension plan fiduciaries from considering the benefits that investment strategies in general would generate for the union, and more importantly, for the employer. This paper goes on to argue that nonetheless, there are legitimate financial motives for seeking pre-recognition agreements in particular. This paper also suggests that unions should negotiate union-friendly investment strategies for their pension funds during collective bargaining. Finally, this paper concludes that, despite the limitations on fiduciaries and their management of pension plan assets, unions should encourage fiduciaries to use plan assets to leverage pre-recognition agreements in ways that work within the limitations of ERISA and the collective bargaining framework.

I. PRE-RECOGNITION AGREEMENTS ARE AN EFFECTIVE ORGANIZING STRATEGY

The term “pre-recognition agreement” encompasses a broad range of agreements between unions and employers.9 Pre-recognition agreements typically eliminate specified types of employer resistance to union organizing activities as delineated in the terms of the agreement.10 Two types of pre-recognition agreements are neutrality agreements and card-check recognition agreements.11 Neutrality agreements reduce or eliminate aggressive employer anti-union speech during a union organizing.12 Neutrality agreements accomplish this by either completely silencing employer anti-union speech, or by less restrictive means, such as requiring both union and employer to be civil.13 By contrast, card-check agreements may allow the employer to campaign against the union without restraint.14 However, card-check agreements require the employer to recognize the union if a majority of the employees in a bargaining unit sign cards authorizing the union to act as their bargaining representative.15 Pre-recognition agreements can contain other

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9. See Cohen, supra note 5, at 203 (referring specifically to neutrality agreements).
10. See Hartley, supra note 4, at 372.
11. Cohen, supra note 5, at 202-03.
12. Id. at 203.
15. Id.
provisions as well, but a full exposition is beyond the scope of this paper.  

Pre-recognition agreements are not a new or rare strategy, because "some unions employed neutrality agreements as early as the mid-1970s." Their use continues, and as recently as 2004, Kaiser Aluminum and the United Steelworkers of America (USWA) adopted a neutrality agreement after the company emerged from Chapter 11 bankruptcy reorganization. A number of other unions have employed neutrality agreements, including the Communications Workers of America, the International Brotherhood of Electrical Workers, the Bakery, Confectionary and Tobacco Workers, the Hotel Employees and Restaurant Employees, and the IUE.

Pre-recognition agreements significantly increase the likelihood that a union organizing campaign will result in recognition. Evidence of this success can be seen in the fact that "the United Food and Commercial Workers ... claimed to have organized 70,000 new workers in 1996 and almost 74,000 in 1997 by card check alone." Unions gained recognition in sixty-eight percent of organizing campaigns covered by pre-recognition agreements, compared to only forty-six percent that depended solely on the outcome of NLRB elections. In addition to increasing the odds of gaining recognition, pre-recognition agreements increase the likelihood that, once an employer recognizes a union as a
bargaining agent, the union will secure a first contract. In comparison to NLRB elections, pre-recognition agreements effectively double the likelihood that an organizing campaign will conclude in a first contract.

Considering the likelihood of success of organizing under pre-recognition agreements, why would a union attempt to organize without one? One problem is that several legal issues surrounding pre-recognition agreements remain largely untested. It is unclear whether a union may insist on a pre-recognition agreement to impasse during collective bargaining. Also, the NLRB has not yet determined whether or under what circumstances pre-recognition agreements constitute unlawful employer assistance to a labor organization under the NLRA. Finally, pre-recognition agreements may be difficult to enforce.

Another reason unions do not obtain pre-recognition agreements more often is as simple as it is common sense: employers who are resistant to the unionization of their workers are equally resistant to agreements that would enhance that outcome. Consequently, unions typically secure these agreements only from employers over which they have leverage. This leverage can come from a number of sources. Unions that have existing bargaining relationships with employers might incorporate pre-recognition agreements that apply to related companies or divisions as part of renewing their existing collective bargaining agreements.

23. Eaton & Kriesky, supra note 21, at 52-53.
24. Id.
25. Hartley, supra note 4, at 396. The General Counsel of the NLRB recently signaled an intention to address some of these unexamined legal issues by revising its casehandling instructions for cases involving certain pre-recognition agreements. Memorandum from Richard A. Siegel, Associate General Counsel of the National Labor Relations Board, to All Regional Directors, Officers-in-Charge, and Resident Officers (July 29, 2004) (on file with the Catholic University Law Review) (directing regional offices of the General Counsel of the NLRB to refer to the Advice Division cases that (1) argue that the recognition bar should apply to recognition granted pursuant to a pre-recognition agreement; (2) complain that organizing campaigns involve unlawful assistance to a union; or (3) complain that an agreement requires an employer to demand that “entities it owns or does business with” enter neutrality agreements). But see Strom, supra note 3, at 65 (arguing that pre-recognition agreements actually further the policies of the NLRA).
27. See id. at 401-02.
28. Strom, supra note 3, at 52. But see UAW v. Dana Corp., 278 F.3d 548, 557-58 (6th Cir. 2002) (enforcing a neutrality agreement that was part of a collective bargaining agreement).
29. See, e.g., NLRB Upholds Promise Not To Unionize Workers, MD. EMP. L. LETTER (Littler Mendelson Corp., San Francisco, Cal.), Sept. 1999, at 6, 6 (“Lexington House’s owner announced his opposition to neutrality because ‘that would be like inviting the union in.’”).
30. See Estlund, supra note 20, at 1604.
31. Hartley, supra note 4, at 387-88.
Employers might also exchange these agreements for a promise to end litigation, picketing, publicity, or other political pressure, to secure union support of political issues, or as part of the settlement of regulatory disputes. However, these forms of leverage are unreliable because their availability varies with the circumstances of employers, unions, and the political landscape.

II. INVESTMENT CAPITAL OFFERS LEVERAGE FOR PRE-RECOGNITION AGREEMENTS

Investment capital is another, less direct source of leverage. Unlike some forms of leverage, investment capital is leverage that is available and effective regardless of the misfortunes, like litigation or political problems, that an employer is experiencing. Thus, investment capital is leverage that applies in a broader range of circumstances. Its effects are also potentially far-reaching. Were an investor to require pre-recognition agreements from all of the companies in which it invests, its effect would be as broad as its investment portfolio.

Unions have two sources of investment capital that they might be able to deploy directly or indirectly to secure pre-recognition agreements. One source is union assets, obtained through initiation fees, dues, and the like. Unions themselves have amassed capital in amounts sufficiently large enough to be able to invest in companies and receive pre-recognition agreements in return. For example, in 2000, the United Auto Workers (UAW) bought stock in Pro Air. Pro Air was not unionized at the time. In return, the UAW managed to obtain a pre-recognition agreement from Pro Air in addition to a number of benefits for UAW members.

Another possible source of investment leverage is union members' pension funds. This source of investment leverage is substantial. Private pension plans subject to federal pension fund regulations

32. Id. at 389-93.
33. See Estlund, supra note 20, at 1604.
34. See Hartley, supra note 4, at 394-96.
35. Cf. id. at 389-94.
36. See id. at 395-96 & 395 n.132.
37. See id.
38. See id.
39. See, e.g., Michigan Memo, DETROIT FREE PRESS, Feb. 5, 2000, at 14B.
40. See Hartley, supra note 4, at 395 n.132.
42. See id.
43. Id.
44. Hartley, supra note 4, at 395.
comprise over $4.4 trillion in assets. Defined benefit plans constitute approximately $2 trillion. Collectively bargained plans constitute almost $1 trillion of those dollars. Those plans have a number of investment vehicles available that might be used to secure pre-recognition agreements. One way of using these assets to obtain pre-recognition agreements is to make the agreement a condition of directly investing in private firms through a private equity security. This type of investment offers the advantage of a privately negotiated transaction, which allows the investor to "demand special covenants requiring union neutrality and card check recognition." Another option would be to invest in pooled funds. For example, the Housing Investment Trust (HIT) is a fund that invests its $2 billion in assets "primarily in mortgages and mortgage-backed securities." Apart from financing housing built entirely by union labor, HIT requires owners and operators of its real estate developments to adopt neutrality and card check agreements. Similarly, the Building Investment Trust (BIT), with assets of $1.5 billion, finances commercial construction projects like hotels, commercial buildings, and retail properties. Like HIT, BIT requires its borrowers to sign neutrality and card check agreements. Yet another example is the Union Labor Life Insurance Company (ULLICO) Separate Account P, with $100 million in assets. Through its private equity placements, ULLICO has required neutrality and card check agreements. Still other examples include the Paladin Capital Partners Fund, LP, with $208


46. EMPLOYEE BENEFITS SEC. ADMIN., supra note 45, at 4; Ghilarducci, supra note 45, at 165.

47. EMPLOYEE BENEFITS SEC. ADMIN., supra note 45, at 12.


49. Id. at 96.

50. See id. at 94.

51. Id. at 109.

52. Id. at 109-10.


54. See, e.g., Calabrese, supra note 48, at 110; Stephen Stuart, Poydras Hotel Project Seeks Labor Funding, NEW ORLEANS CITY BUS., Mar. 19, 2001, at 1.

55. Calabrese, supra note 48, at 100.

56. Id. at 100-02.
million in assets, and SCP Private Equity Partners II, LP, with $513 million.\textsuperscript{57} Union pension funds have invested their assets in all of these funds, and all of these funds require neutrality agreements.\textsuperscript{58}

If only it were as simple as locating investment funds and using them as leverage for union objectives. Unions do not have direct control over the pension funds that employers sponsor or contribute to because the funds' assets are held in trust and controlled by trustees.\textsuperscript{59} Furthermore, employer-sponsored funds are under no obligation to select union members or representatives as trustees.\textsuperscript{60} In fact, employers, like unions, are expressly permitted to select members from within their organization to be trustees for the pension plans they sponsor.\textsuperscript{61} Only plans covered by §302(c)(5) of the Taft-Harley Act, called "Taft-Hartley Funds," have a statutorily mandated equal number of employer and union-appointed trustees.\textsuperscript{62} However, as this paper later explores, even union-selected trustees are not free to implement investment strategies motivated by the benefits they confer on a union or employer.\textsuperscript{63} Pension plans are governed by ERISA, a complex set of rules that limits how pension fund fiduciaries can manage plan assets.\textsuperscript{64} Both ERISA and the equivalent portions of the Taft-Harley Act limit the actions of pension fund trustees, investment managers, and, in very special circumstances, even unions.\textsuperscript{65}

Other articles have discussed the legality of union-friendly investing in general under the broad categories of economically targeted investments (ETIs)\textsuperscript{66} and socially responsible investments (SRIs).\textsuperscript{67} ETI and SRI are


\textsuperscript{58} Id.


\textsuperscript{60} See id. §§ 1102(c), 1108(c)(3).

\textsuperscript{61} Id. § 1108(c)(3).

\textsuperscript{62} Id. § 186(c)(5) (stating that "employees and employers are equally represented").

\textsuperscript{63} See infra text accompanying notes 160-66.


\textsuperscript{65} See id. §§ 1105-06.

terms that broadly apply to investments selected for the benefits they generate apart from mere financial returns. This paper contends that general conclusions about ETIs and SRIs do not apply to pre-recognition agreements. Specific characteristics of investments that incorporate pre-recognition agreements set them apart from the general run of ETIs or SRIs. As this paper will demonstrate, courts interpret ERISA to largely prohibit ETIs or SRIs. However, investment strategies that demand pre-recognition agreements differ from ETIs or SRIs in general. ERISA would not prevent pension plans from demanding pre-recognition agreements as it would ETIs or SRIs because, unlike ETIs or SRIs, a demand for pre-recognition agreements can be motivated by an interest based purely on the security or return of an investment. As this paper explains, the result of this distinction is that ERISA may permit pension plans to seek pre-recognition agreements as part of an investment strategy even though ERISA would prohibit other ETIs or SRIs.

III. ERISA PLACES LIMITS ON HOW TO INVEST PLAN ASSETS

Generally, the use of assets in private pension plans is governed by ERISA. ERISA categorizes both defined contribution plans, such as 401(k) plans, and defined benefit plans, which promise a certain level of


68. See Zanglein, High Performance Investing, supra note 66, at 60.

69. See Schwab & Thomas, supra note 66, at 1030 ("The empirical evidence shows that, overall, unions reduce profits that can be distributed to shareholders.").

70. See infra text accompanying notes 101-23.

71. See infra text accompanying notes 222-32.

72. E.g., Zanglein, Protecting Retirees, supra note 66, at 47-48.

73. See infra text accompanying notes 210-11.

74. Susan J. Stabile, Pension Plan Investments in Employer Securities: More Is Not Always Better, 15 YALE J. ON REG. 61, 63 (1998). Note that ERISA applies to welfare benefit plans as well as pension plans. See 29 U.S.C. §§ 1002(1)-(2) (2000). This paper is concerned solely with pension plan funds. Courts have examined the separate issue of what constitutes a plan, see, e.g., Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-13 (1987), but that issue is outside of the scope of this paper.

income after retirement, as “pension plans.” In either case, pension plan assets generally must be held in trust.

The portion of ERISA that is most relevant to pension plan investment is the section that outlines the duties of plan fiduciaries. ERISA imposes certain duties on plan fiduciaries, which broadly includes anyone who has discretion over, controls, or administers the plan or its assets, or receives compensation for investment advice. First among these duties is that fiduciaries must use plan assets only for the benefit of plan participants and for reasonable expenses of administering the plan (the “exclusive benefit rule”). Second, in fulfilling this obligation, fiduciaries must do so with the care and skill of a prudent person in a like capacity under circumstances similar to those present at the time (the “prudent expert standard”). Third, fiduciaries must generally diversify the investment of plan assets to minimize the risk of large losses to the plan (the “diversification rule”). Finally, fiduciaries must act in accordance with plan documents.

Collectively bargained pension funds sponsored by a union but funded by employers are subject to additional requirements. Although § 302 of the Labor Management Relations Act (LMRA) generally prohibits employers from giving unions money, it also creates exceptions, including one for pensions or other benefits for employees. Thus, an employer is not prohibited from contributing to a fund established by the union if, among other things, the assets are held in trust. Like the sole interest rule in ERISA, the LMRA requires the plan to use its assets for the exclusive purpose of participants and beneficiaries. However,

77. Id. § 1103(a)(1).
78. Id. § 1002(21)(A). A person can become a fiduciary through various means, even unintentionally. The agreement creating the plan must name a fiduciary. Id. § 1102(a)(1). Also, someone who has or exercises discretionary authority or control over the plan, its assets, or its administration is a fiduciary to the extent they exercise that authority or control. Id. § 1002(21)(A). Finally, anyone who renders investment advice to the plan for direct or indirect compensation is a fiduciary. Id.
79. Id. § 1104(a)(1)(A).
80. Id. § 1104(a)(1)(B).
81. Id. § 1104(a)(1)(C).
82. Id. § 1104(a)(1)(D).
83. Id. § 186(a).
84. Id. § 186(c).
85. Id. § 186(c)(5).
86. Id. In actuality, the pertinent LMRA and ERISA language differs. The LMRA states that Taft-Hartley plans must use their assets “for the sole and exclusive benefit of the employees.” Id. Similarly, ERISA § 404 requires that fund assets be used “solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable
Unlike ERISA, the LMRA requires an equal number of employer representatives and employee representatives as trustees.\(^{87}\) This last requirement is significant because these employee representatives are often a union-friendly voice in the management of a Taft-Hartley fund.\(^{88}\) Fiduciaries contemplating the use of plan assets to leverage pre-recognition agreements must satisfy the above requirements lest they violate Federal law and, in some cases, become personally liable to the plan for losses.\(^{89}\)

Courts and commentators disagree on how strictly fiduciaries must abide by these duties.\(^{90}\) This disagreement arises primarily out of varying interpretations of the sole interest rule, the exclusive benefit rule, and the rules governing who is a beneficiary.\(^{91}\) Proponents of alternative investment strategies claim that Congress intended ERISA to be flexible enough to allow secondary or incidental interests—such as placing capital only in union-friendly investments or actively negotiating pre-recognition agreements with their investments—to play a role in deciding how to invest plan assets.\(^{92}\) However, a close reading of the statutory text and related court decisions strongly suggest the contrary.\(^{93}\) To the extent that a fiduciary factors the benefits that an investment would generate for third parties into his decision to pursue an investment, he is in breach.\(^{94}\) Nonetheless, this strict duty does not preclude the fiduciary from choosing or being motivated by the presence of a pre-recognition agreement as part of an investment.\(^{95}\) In fact, as this paper will explain, it would in some cases be consonant with the fiduciary's duty to seek a pre-

\(^{87}\) 29 U.S.C. § 186(c)(5).

\(^{88}\) Cf. Schwab & Thomas, supra note 66, at 1077. Indeed, some employee representatives are so adamantly union-friendly that Taft-Hartley plans have been described as "union dominated." Id. ("Despite the balanced board membership, unions have tended to dominate these jointly managed funds.").

\(^{89}\) 29 U.S.C. § 1109(a).

\(^{90}\) Compare Zanglein, Protecting Retirees, supra note 66, at 47, with Zelinsky, Economically Targeted Investments, supra note 66, at 39.

\(^{91}\) See Zanglein, Protecting Retirees, supra note 66, at 47-48; see also 29 U.S.C. §§ 1002(8), 1104(a)(1). But see Zelinsky, Economically Targeted Investments, supra note 66, at 41-42.

\(^{92}\) See, e.g., Boyle v. Anderson, 68 F.3d 1093, 1102 (8th Cir. 1995).

\(^{93}\) See 29 U.S.C. § 1104(a)(1).

\(^{94}\) Id.

\(^{95}\) See supra notes 72-73 and accompanying text.
recognition agreement when the investee-employer's opposition to unionization may affect the return on an investment directly or indirectly. At the same time, this narrow interpretation of fiduciary duties would prevent an employer from abusing the ability to consider incidental benefits to make improper investments. For example, fiduciary duties might prevent an employer from investing plan assets in itself or related companies, because such an investment could be seen as motivated only by incidental considerations. Under a strict interpretation of fiduciary duties, incidental considerations are not permissible motives.

A. The Duty of Loyalty and the Sole Interest Rule Limit Those Parties a Fiduciary May Intend to Benefit

The first limit on a fiduciary's discretion in selecting investments is the duty of loyalty, also known as the "sole interest rule." As stated in 29 U.S.C. § 1104(a)(1), "a fiduciary shall discharge his duties solely in the interest of the participants and beneficiaries." This statutory language limits a fiduciary's motives for taking action. It allows a fiduciary to act only if the intent behind the action is to benefit plan participants and beneficiaries. It does not permit an intent to benefit other parties. Whether a fiduciary satisfies the duty of loyalty depends entirely on who the intended beneficiary is.

Courts have interpreted this rule strictly. As a result, the duty of loyalty prevents fiduciaries from making decisions based on competing interests or loyalties divided between, for example, themselves and
participants.\textsuperscript{106} For example, in \textit{Donovan v. Bierwirth},\textsuperscript{107} the employer’s officers functioned as plan trustees.\textsuperscript{108} They managed the plan’s investments, so they were fiduciaries liable for their investment decisions.\textsuperscript{109} The officers used plan assets to purchase stock in the employer to avert a threatened takeover of the employer corporation.\textsuperscript{110} They acted without considering the plan at all.\textsuperscript{111} Consequently, both the trial and appellate courts determined that they did not act in the interest of the plan because they did not separate the employer’s interest from the plan’s interest.\textsuperscript{112}

The duty of loyalty operates similarly in Taft-Hartley plans.\textsuperscript{113} Although the dual-appointment structure of Taft-Hartley plans appears to pit the conflicting interests of the employer against the union through their appointment of an equal number of trustees, the trustees do not represent the interests of either union or employer.\textsuperscript{114} The Court explained that “Congress intended . . . to prevent trustees ‘from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund.’”\textsuperscript{115} The duty of loyalty in the common law of trusts, from which ERISA draws its fiduciary duties, further bolsters the concept that trustees must be impartial to both union and employer interests.\textsuperscript{116} As one court described, “all consideration of the interests of third parties must be excluded. His must be an undivided loyalty.”\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{106} NLRB v. Amax Coal Co., 453 U.S. 322, 334 (1981) (“The language and legislative history of § 302(c)(5) and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.”); see also Concrete Pipe and Prods., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 616 (1993).
  \item \textsuperscript{107} 680 F.2d 263 (2d Cir. 1982).
  \item \textsuperscript{108} \textit{Id.} at 267.
  \item \textsuperscript{109} \textit{See} 29 U.S.C. §§ 1002(21)(A), 1105(b) (2000).
  \item \textsuperscript{110} \textit{Bierwirth}, 680 F.2d at 269.
  \item \textsuperscript{111} \textit{Id.} at 275.
  \item \textsuperscript{112} \textit{Id.} at 276 (“[T]heir judgment on this score could scarcely be unbiased . . . .”). The district court also found the officers’ actions to breach their duty to the plan beneficiaries. \textit{See} Donovan v. Bierwirth, 538 F. Supp. 463, 476 (E.D.N.Y. 1981) (“They have manifested an inability to separate their corporate loyalty and their loyalty to the Pension Plan.”).
  \item \textsuperscript{113} \textit{See} 29 U.S.C. § 186(c)(5) (referring to “a trust fund established . . . for the sole and exclusive benefit of the employees”).
  \item \textsuperscript{114} \textit{See} NLRB v. Amax Coal Co., 453 U.S. 322, 334 (1981).
  \item \textsuperscript{115} \textit{Id.} at 333-34 (quoting S. REP. NO. 93-383, at 31-32 (1973)).
  \item \textsuperscript{116} Pegram v. Herdrich, 530 U.S. 211, 224-25 (2000).
\end{itemize}
Generally, this duty of loyalty, along with the other fiduciary duties discussed in Part IV of this paper, requires fiduciaries to choose investments largely on the basis of their financial characteristics. Under this interpretation of the duty of loyalty, a fiduciary may not consider factors that do not have a bearing on financial return. The rationale behind this interpretation is that the purpose of the plan is to accumulate sufficient assets to be able to provide retirement benefits as they become due. This goal is purely financial, so a fiduciary should be motivated by purely financial considerations.

In contrast, proponents of ETIs and SRIs contend that the duty of loyalty allows plan fiduciaries to consider other variables, especially ones that do not affect the financial attributes of an investment. Indeed, the non-financial benefits, or collateral benefits, to non-participants are the motivation behind the ETI and SRI strategies. For example, a general collateral benefit of investing in unionized companies is the jobs it creates for members of any union. Alternatively, a collateral benefit might be direct, such as when a union’s investment creates jobs for its own members. In either case, the continued income for working union members is clearly in the present interest of participants, because many of them are also employees. Furthermore, the continuation of employer contributions to the plan, which depends on members being employed, is in the interest of all participants because any income to the plan, including increased contributions, increases the plan’s ability to provide participants with benefits. ETI and SRI supporters justify the pursuit of these collateral benefits on the grounds that the interest in jobs

118. See discussion infra Part IV (discussing other duties of a fiduciary in selecting an investment).
119. See Zelinsky, Economically Targeted Investments, supra note 66, at 43.
120. See id.
121. Zanglein, Protecting Retirees, supra note 66, at 49 (noting that “[t]o introduce other social objectives may be to dilute this primary objective [of protecting retirement income]” (alterations in original) (quoting Ian D. Lanhoff, The Social Investment of Private Pension Assets: May It Be Done Lawfully Under ERISA?, 31 LAB. L. J. 387, 389 (1980)).
122. See id. at 48.
123. See, e.g., Zanglein, High Performance Investing, supra note 66, at 90.
124. Griffin, supra note 66, at 17.
125. See Calabrese, supra note 48, at 95.
126. Id.
127. Id.
128. See id. However, ERISA does not allow the plan or participants to exchange future retirement benefits for current interests, like contributions in the present. See Zelinsky, Economically Targeted Investments, supra note 66, at 342 (“[T]he ‘benefits’ to which section 404(a)(1)(A)(i) refers are retirement, disability and death payments and not pre-retirement economic advantages like employment.”).
or contributions remains secondary to the primary purpose of the investment, to gain a return to be able to provide retirement benefits, which the investment also achieves. Commentators claim that, so long as the motivation to benefit the union is subordinate to the motivation to obtain an investment return that is comparable to other investments, the secondary interest is ostensibly permissible.

The Department of Labor has interpreted the duty of loyalty to allow fiduciaries to consider collateral benefits under very strict circumstances. So long as the fiduciary complies with the other fiduciary duties, discussed below in Part IV of this paper, and the particular investment does not compromise the fund by increasing risk or reducing the return available from comparable investments, the fiduciary is not in breach. However, the standard that the Department of Labor sets for a permissible collateral benefit is high because the investment must anticipate returns equal to or greater than that of similar investments. The Department acknowledges that because every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

In theory, ETIs or SRIs could satisfy this standard; in reality, however, ETIs or SRIs might involve a compromise in financial performance that would render them impermissible by Department of Labor standards.

129. See Zanglein, Protecting Retirees, supra note 66, at 52.
130. See, e.g., id.
131. 29 C.F.R. § 2509.94-1 (1994).
132. See discussion infra Part IV.
133. See, e.g., Op. Employee Benefits Security Administration 98-04A (1998), http://www.dol.gov/ebsa/programs/ori/advisory98/98-04a.htm. The opinion explains that if the above requirements [of considering the role of a particular investment course of action in the plan's investment portfolio, taking into account such factors as diversification, liquidity, and risk/return characteristics] are met, the selection of a "socially-responsible" mutual fund as either a plan investment or a designated investment alternative for an ERISA section 404(c) plan would not, in itself, be inconsistent with the fiduciary standards set forth in sections 403(c) and 404(a)(1) of ERISA.

Id.
135. Id.
136. Compare Zelinsky, Economically Targeted Investments, supra note 66, at 46 ("Insofar as ventures marketed as economically targeted investments are being shunned in the marketplace, that suggests that such investments are not competitive . . . ."), with Calabrese, supra note 48, at 110-11 ("Although a 15-percent interest rate of return over 12
Also, a standard that allows fiduciaries to consider secondary interests, like collateral benefits, to motivate fiduciaries, even if those interests are subordinate to the goal of providing retirement benefits, interprets other ERISA definitions too loosely. The sole interest rule prevents fiduciaries from acting in the interest of anyone but participants and beneficiaries. Unions are not participants because ERISA does not define them as participants. ERISA defines participants solely in terms of their eligibility to receive plan benefits. A participant is "any employee or former employee of an employer, or any member . . . of an employee organization who is or may become eligible to receive a benefit" from a plan. Employees or union members, not unions or employers, become eligible for benefits. The distinction between participants and the union in which they were members was the subject of a case that preceded ERISA but is often cited to clarify the duty of loyalty. Blankenship v. Boyle noted how the United Mine Workers of America (UMWA) used assets from its members' pension funds to purchase shares in power companies. The UMWA intended to use its position as a shareholder to influence the companies to buy coal from unionized suppliers. However, even though the UMWA pension plan might have obtained additional pension contributions as a result of increased union coal production, the court distinguished between benefits to participants and benefits to the union. Based on this distinction, the court found that the UMWA breached its duty to act solely in the interest of its participants and beneficiaries. A plan's action would violate the duty of loyalty if it were actually an effort by plan trustees to ... advance

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137. See Zelinsky, Economically Targeted Investments, supra note 66, at 41.
139. See id. § 1002(7).
140. See id.
141. Id. (emphasis added).
142. See id. § 1053(a) ("Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable ....") (emphasis added).
145. Id. at 1105.
146. Id. at 1106.
147. Id.
148. Id. Although the court decided Blankenship before ERISA took effect, it is often cited for its application of the analogous pre-ERISA duty of loyalty. See, e.g., Paul J. Wessel, Comment, Job Creation for Union Members Through Pension Fund Investment, 35 Buff. L. Rev. 323, 343 (1986).
Unions and their membership, whether related to the plan or not, are third parties to the relationship between the fund and participants as employees or retirees. Thus, the sole interest rule prevents fiduciaries from being motivated by any benefit to unions or union members as such, as opposed to union members as employees or retirees. In short, it would be impermissible for any union to leverage pension funds to secure a pre-recognition agreement as part of an investment if doing so was motivated by an interest in benefiting the union or its members in their capacity as anything other than employees or current or future retirees.

Despite these distinctions, commentators have argued that courts nonetheless permit a secondary purpose so long as there is a legitimate primary purpose. These decisions import the primary purpose test from other areas of the law. They understand investments that, by statute, must be chosen solely in the interest of participants and beneficiaries to permit investments that have the primary purpose of acting on behalf of participants and beneficiaries. However, the primary purpose test bypasses the bright-line test iterated in ERISA. The primary purpose test has been described as “[t]hat uncertain and difficult test” in other contexts because it is difficult for courts to weigh facts and circumstances to discover a single subjective motive, and even more difficult to determine the priority of multiple motives. Moreover, even courts that have interpreted ERISA to permit some incidental benefits do not legitimize fiduciaries who base their decision on incidental benefits, even if only in part. In fact, even these courts require fiduciaries to act in the sole interest of participants as retirees: “[Trustee’s] decisions must be made with an eye single to the interests of the participants and beneficiaries.” In other words, a fiduciary's

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150. See 29 U.S.C. § 1002(14)(D) (2000) (“The term 'party in interest' means, as to an employee benefit plan . . . an employee organization any of whose members are covered by such plan . . .”).
151. Of course, this raises the separate question: if the failure to obtain a neutrality agreement is adverse to the interest of participants and beneficiaries, would seeking them become permissible or even mandatory?
152. See Zanglein, Protecting Retirees, supra note 66, at 48.
156. Woodward, 397 U.S. at 577-78.
158. Id. (emphasis added).
decision can result in a benefit to third parties, but the incidental benefit must not have motivated the decision. The only permissible fiduciary motive is that which is on behalf of only participants and beneficiaries.

Commentators have also argued that, despite the express language in section 404(a), ERISA actually contemplates dual loyalty. For example, "employers and employees are both settlors and beneficiaries, [so] [d]ual loyalty is simply a recognition of this basic point." However, neither the statute nor binding authority supports this argument. First, the explicit statutory language contradicts their conclusion. Courts have found that fiduciaries must act in the sole interest of participants, not the sole interest of participants and employers. Second, ERISA's definition does not incorporate employers of either participants or beneficiaries: ""[P]articipant' means any employee or former employee . . . or any member . . . of an employee organization [and] 'beneficiary' means a person designated by a participant." Third, ERISA explicitly states that the "assets of a plan [will not] inure to the benefit of [the] employer." Thus, insofar as binding court authority has interpreted ERISA duties to derive from the common law of trusts, ERISA must also sever employers' and employees' interests as settlors from beneficiaries' interests. Moreover, adhering to the common law of trusts and thereby forbidding ERISA participants and beneficiaries from exchanging future retirement benefits for current ones better accomplishes the explicit goal of pension plans covered by ERISA, which is to "provide[] retirement income to employees, or . . . result[] in a deferral of income by employees for periods extending to the termination of covered employment or beyond." The fact that neither unions nor employers can use pension plan assets to their benefit, even if

159. See, e.g., Fischel & Langbein, supra note 67, at 1126.
160. Id.
161. See 29 U.S.C. § 1104(a)(1) (2000) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ."). The statute does allow exceptions for refund of certain payments and in the event of plan termination. Id.
162. See, e.g., Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets," (quoting Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986))); Trenton v. Scott Paper Co., 832 F.2d 806, 809 (3d Cir. 1987).
163. 29 U.S.C. §§ 1002(7)-(8).
164. Id. § 1103(c)(1).
only incidentally, is crucial to the viability of employee pensions.\textsuperscript{167} Allowing collateral benefits to either party in the fiduciary decision-making process could open the door to legal justifications for abuse by both.\textsuperscript{168}

B. The Exclusive Benefit Rule Limits the Kind of Benefit a Fiduciary May Provide, and Further Limits Who the Fiduciary May Intend to Receive It

Another limitation on fiduciary conduct is the exclusive benefit rule. The exclusive benefit rule limits the outcome of fiduciary acts by specifying the kind of benefit that a fiduciary may provide, and, by implication, to whom the fiduciary may provide it.\textsuperscript{169} Section 406(a) of ERISA further bolsters this rule by prohibiting specific kinds of transactions between the plan and statutorily defined parties in interest: "A fiduciary . . . shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . use . . . for the benefit of a party in interest, of any assets of the plan."\textsuperscript{170} A union is a party in interest to a plan whose participants are members of that union.\textsuperscript{171} As a result, ERISA expressly bars a plan from transactions that use plan assets to benefit unions that represent its employees.

The paradox for fiduciaries is that any investment of plan assets indirectly benefits third parties.\textsuperscript{172} The entity in which a plan invests will benefit merely by having use of the plan's capital. In other cases, the employer may benefit indirectly, because an investment return that exceeds the plan's actuarial assumptions would permit the employer to reduce the amount of its contributions as long as it maintained the same level of benefits for participants.\textsuperscript{173} Still a third outcome is a collateral


\textsuperscript{170} Id. § 1106(a)(1).

\textsuperscript{171} Id. § 1002(14)(D).

\textsuperscript{172} See Fischel & Langbein, \textit{supra} note 67, at 1118.

\textsuperscript{173} See \textit{LANGBEIN \& WOLK}, \textit{supra} note 86, at 45-46. If a plan's investment experience sufficiently exceeds the return anticipated by its actuarial assumptions, the sponsoring employer may opt to reduce or cease contributions as long as the plan remains sufficiently funded. \textit{Id.} In effect, the employer is using plan assets to secure benefits, but also effectively reduces his own contributions. See Regina T. Jefferson, \textit{Striking a Balance in the Cash Balance Plan Debate}, 49 BUFF. L. REV. 513, 551 (2001). However, the employer may not reduce vested benefits. See 29 U.S.C. § 1054(g). Alternatively, the employer could terminate the plan, capture the reversion of assets, and establish a new plan. Fischel & Langbein, \textit{supra} note 67, at 1150-52.
benefit, which occurs when a party outside of the transaction benefits from the transaction.\textsuperscript{174} That third party may be either a known or unknown beneficiary of the transaction.\textsuperscript{175} For example, when any investor buys stock in a unionized company based solely on its market performance, the union would be an unknown beneficiary to the transaction through the continued employment and related benefits to its members and associated dues.

Commentators have argued that neither the sole interest rule nor the exclusive benefit rule prohibits collateral benefits.\textsuperscript{176} As the argument goes, a pension plan that benefits union members by either creating jobs for them or increasing pension contributions is within ERISA's limitations.\textsuperscript{177} However, this line of reasoning fails to recognize a key distinction: the only exclusive benefit that a plan may deliver to participants is retirement or other deferred compensation benefits.\textsuperscript{178} This distinction has been described as "evaluating the best interests of beneficiaries in the abstract as beneficiaries."\textsuperscript{179} Supreme Court precedent supports this distinction.\textsuperscript{180} In \textit{Local 144 Nursing Home Pension Fund v. Demisay},\textsuperscript{181} the Supreme Court briefly enunciated its position that Taft-Harley plan fiduciaries must both discharge their statutory obligation of loyalty \textit{and} act in accordance with the statutory purpose of the plan in order to avoid breach of fiduciary duty.\textsuperscript{182} The sole interest and exclusive benefit rule combination relates, not to the purpose for which the trust fund is in fact used (an unrestricted fund that happens to be used "for the sole and exclusive benefit of employees" does not qualify); but rather to the purpose for which the trust fund is "established,".

\begin{enumerate}
\item \textsuperscript{174} See Calabrese, \textit{supra} note 48, at 107 (noting that the ProLoan Builders Fixed Income finances "new home construction and complete renovations built with 100-percent union labor").
\item \textsuperscript{175} See \textit{id.} at 108.
\item \textsuperscript{176} \textit{E.g.}, Zanglein, \textit{High Performance Investing, supra} note 66, at 89-90.
\item \textsuperscript{177} See Calabrese, \textit{supra} note 48, at 95 (noting benefits such as hours of work and increased contributions to the plan); Zanglein, \textit{High Performance Investing, supra} note 66, at 89-90 ("The exclusive benefit rule does not prohibit economically targeted investments as long as the primary objective of the investment is to make a prudent investment . . . .")
\item \textsuperscript{178} See 29 U.S.C. § 1002(2)(A). In actuality, ERISA expressly permits plans to provide other limited benefits to its members, such as loans. See \textit{id.} § 1108(b).
\item \textsuperscript{179} Fischel & Langbein, \textit{supra} note 67, at 1141 (quoting Danaher Corp. v. Chi. Pneumatic Tool Co., 635 F. Supp. 246, 250 (S.D.N.Y. 1986)); see also \textit{id.} at 1147 ("[Former] administrator of ERISA, Ian D. Lanhoff expressed the view that investing must be done 'to protect the retirement income of the plan's participants' . . . ." (quoting Lanhoff, \textit{supra} note 121, at 389)).
\item \textsuperscript{180} See \textit{Local 144 Nursing Home Pension Fund v. Demisay}, 508 U.S. 581 (1993).
\item \textsuperscript{181} 508 U.S. 581 (1993).
\item \textsuperscript{182} \textit{id.} at 588-89.
\end{enumerate}
The trustees' failure to comply with these latter purposes may be a breach of their fiduciary obligations.

The Supreme Court's holding in *Local 144* applies to ERISA plans generally. Under ERISA, pension plans have the express statutory purpose of "providing retirement income to employees" or "result[ing] in a deferral of income by employees for periods extending to the termination of covered employment or beyond." Thus, fiduciaries whose purpose is to provide participants with benefits other than retirement income or deferred income beyond termination are in breach.

The apparent effect of the Supreme Court's conclusion is that ERISA prohibits pension fund trustees from even considering leveraging their pension fund assets to secure pre-recognition agreements unless their purpose is to provide retirement or other deferred compensation benefits to participants. Such a financially-based motive does not seem to support the pursuit of pre-recognition agreements. However, as this paper will discuss, fiduciaries may find that an entirely different set of circumstances might motivate them and thereby render the pursuit permissible. Consequently, investments that appear to be impermissible for one set of motives are permissible for other legitimate motives.

The prohibited transactions section of ERISA supports the conclusion that certain transactions that on their face appear to stem from improper motives can, in actuality, be driven by the resulting financial benefits to the plan. The prohibited transaction section is related to the exclusive benefit rule. Like the exclusive benefit rule, it prohibits transactions that are motivated by a benefit to parties other than participants. Unlike the exclusive benefit rule, it explicitly defines the transactions that it renders impermissible. Because of the specificity, § 406 of ERISA seems to be the most restrictive to transactions that fall under its coverage because it explicitly forbids them.

However, even prohibited transactions are not entirely impermissible. They are merely presumed to be not solely in the

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183. *Id.* (citations omitted) (emphasis omitted) (footnote omitted).
185. *Id.* § 1002(2)(A)(ii).
186. *See id.*
187. *See infra* notes 221-35 and accompanying text.
188. *See 29 U.S.C.* § 1106; *see also infra* text accompanying notes 192-98.
191. *Id.*
192. *See* Fischel & Langbein, *supra* note 67, at 1108-09, 1153 (suggesting that the "prohibited transactions" rule in ERISA § 406 is a variant of the exclusive benefit rule of
interest of beneficiaries and presumed not to be for their exclusive benefit. 193 Parties may seek an exemption from the Secretary of Labor. 194 An exemption allows fiduciaries to proceed with an otherwise prohibited transaction. 195 Through presumptive prohibition, ERISA acknowledges that certain types of transactions between parties closely related to the plan are so likely to be in the interest of third parties that they are presumed not to be for the exclusive benefit of participants. 196 Through the exception mechanism, those transactions are scrutinized to determine whether the financial interests of participants are in fact the motive. 197 Similarly, pre-recognition agreements generate benefits for third parties that would constitute a prohibited motivation under the exclusive benefit rule, but are driven in fact by permissible financial motives. 198

IV. OTHER FIDUCIARY DUTIES AFFECT THE ABILITY TO LEVERAGE PRE-RECOGNITION AGREEMENTS

The remaining duties of plan fiduciaries are to act prudently, diversify plan assets, and administer the plan according to plan documents. Under the “prudent expert” standard, a fiduciary must act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use” to conduct a similar enterprise. 199 This standard is largely fact-based. 200 Nonetheless, the Department of Labor published regulations outlining the prudent investor. 201 The fiduciary-as-investor must consider an investment’s risk, return, and liquidity in light of the type of plan in question. 202 The diligence prong of the prudent expert standard also requires a fiduciary to scrutinize the investment, using “the proper methods to investigate, evaluate and structure the investment.” 203 A fiduciary’s prudence is not measured by his returns, but by the

ERISA § 404(a)(1), which allows employers to recapture overpayments to a pension plan without violating ERISA prohibition against assets inuring to the benefit of the employer by simply terminating the plan).

193. See Donovan v. Cunningham, 716 F.2d 1455, 1464-65 (5th Cir. 1983).
195. Id.
196. See id.
197. See id.
200. See Zanglein, Protecting Retirees, supra note 66, at 54.
201. 29 C.F.R. § 2550.404a-1 (2004).
202. Id.
procedures he employs. Thus, there is no duty to maximize plan returns. Moreover, where the intent behind a fiduciary's action is in question, prudent and diligent investigation will clarify whether the fiduciary intended to benefit participants. The Fifth Circuit noted that "conducting an investigation that is structured to remove the taint associated with conflicting interests goes a long way toward satisfying the duty of loyalty." Related to the prudence standard is the duty to diversify plan assets. Like the prudence requirement, particular applications of it are fact-specific. In general, the duty to diversify requires a fiduciary to spread assets over a number of investments with varying degrees of risk and varying levels of return.

The combined effect of these requirements on the ability to leverage pre-recognition agreements is that, generally speaking, fiduciaries would not be able to sacrifice investment performance for an incidental benefit. However, one of the advantages of pre-recognition agreements, unlike ETIs or SRIs, is that evidence suggests that terms of pre-recognition agreements, such as neutrality, might actually improve investment returns.

Another product of the duties of prudence and diversification is to dilute the potential effect of any one investor. A plan is unable to leverage the full impact of its assets because a plan is prohibited from allocating a large portion of its capital to one investment. This limit on the comparative size of a single investment in turn limits the size of the company over which the plan could exercise its leverage. Smaller amounts of capital available for any one transaction translate into less leverage against any single company. On the other hand, diversified capital placement means the plan assets will spread over a larger number of investments.
of companies.\textsuperscript{215} Thus, the diversification requirement could have the effect of broadening the number of companies covered by pre-recognition agreements.\textsuperscript{216} In sum, the prudence and diversification requirements would limit pension funds to investing only a portion of their assets in a number of relatively small, well-researched companies that involve no compromised risk or return, and that fit reasonably within the plans' investment portfolio.\textsuperscript{217}

Lastly, fiduciaries have a duty to administer plan assets according to plan documents.\textsuperscript{218} However, fiduciaries are not completely insulated when they act according to plan documents. Each of the fiduciary duties imposed by ERISA preempts even the directions given to trustees, investment managers, or other fiduciaries in investment guidelines or investment policies.\textsuperscript{219} Courts have held that, where plan documents and the duties imposed by ERISA conflict, ERISA controls.\textsuperscript{220} Thus, if investment guidelines require an investment manager to invest a portion of assets in one type of investment, but doing so would be imprudent, the fiduciary is obligated to forego compliance with that portion of the investment guidelines.\textsuperscript{221} In conclusion, fiduciaries must exercise the duties of loyalty, exclusive benefit, prudence, and diversification regardless of the requirements imposed upon them by investment policies or guidelines.

V. UNDER CERTAIN CIRCUMSTANCES, PENSION PLAN FIDUCIARIES MAY BE ABLE TO SEEK PRE-RECOGNITION AGREEMENTS FROM COMPANIES IN WHICH THEY INVEST

Given that plan fiduciaries may not act with the intent to benefit third parties and may not contemplate benefits which are not within the plan's statutory purpose, it might appear that ERISA completely eliminates the possibility that fiduciaries could require pre-recognition agreements from

\begin{itemize}
\item \textsuperscript{215} See Zanglein, \textit{High Performance Investing}, supra note 66, at 94, 116.
\item \textsuperscript{216} See id. at 115-16. For the inverse argument, see Schwab & Thomas, \textit{supra} note 66, at 1078 (suggesting that union investment in unionized companies reduces their ability to put pressure on non-union companies).
\item \textsuperscript{217} Zanglein, \textit{High Performance Investing}, \textit{supra} note 66, at 113 (discussing the "whole portfolio approach").
\item \textsuperscript{218} 29 U.S.C. § 1104(a)(1)(D) (2000).
\item \textsuperscript{219} See id.
\item \textsuperscript{220} See, e.g., Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995). The court stated "we will assume that a fiduciary's decision to remain invested in employer securities was reasonable. A plaintiff may then rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision" involving an Employer Stock Ownership Plan (ESOP), which is exempt from the duty to diversify. \textit{Id}.
\item \textsuperscript{221} See id.
\end{itemize}
their employers. However, this conclusion is erroneous. First, an employer's neutrality may have a direct positive impact on company profitability. Employers expend significant amounts of human and financial capital to resist unionization: "'[M]any businesses support this goal [of resisting unionization] and are prepared to expend substantial resources to achieve it.'"\(^{222}\) There is no indication that companies are reducing their expenditures on anti-union activities. For example, Avondale Industries spent an estimated $5.4 million to resist union organizing, excluding costs arising out of violations of the NLRA.\(^{223}\) Avondale paid out another $2.15 million to settle its violations of federal labor law.\(^{224}\) More recently, EnerSys paid a labor consultant $39,000 to help combat unionization at its plant in South Carolina.\(^{225}\) As early as the mid-1980s, "management annually spend[t] an estimated $100 to $500 million to secure" labor consultants to counter union organizing campaigns.\(^{226}\) Moreover, these figures do not quantify the consequential effects on investment returns caused by share volatility, decreased productivity, or negative publicity.\(^{227}\)

As with any other factor that a prudent investor takes into account when assessing an investment, evidence may demonstrate a correlation between employer neutrality, or other resistance to unionization, and the desirability of a particular investment or category of investments.\(^{228}\) Fiduciaries averse to the financial risks associated with vigorous employer resistance to unionization would be justified in exacting pre-recognition agreements from the companies in which they invest plan

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\(^{223}\) See Bruce Alpert, *Navy To Pay Avondale's Union Fight Fees*, NEW ORLEANS TIMES PICAYUNE, June 17, 1999, at C1.


\(^{227}\) Cf. Zanglein, *Protecting Retirees, supra* note 66, at 52 (hypothesizing that picketing affects investment risk).

\(^{228}\) See supra text accompanying notes 222-27. Such a determination would likely depend on investigation and/or expert advice as an extension of the duty to exercise prudence. Cf. 29 U.S.C. § 1104(a) (2000).
Also, while fiduciaries are not obligated to maximize investment returns, they must, in exercising the duty of prudence, avoid exposing plan assets to unnecessary risk. From this obligation, there may be a duty to "'screen' or 'filter' . . . companies experiencing 'significant adverse financial developments.'"

Plan trustees, fiduciaries, investment managers, and union agents should all exercise caution as they explore new investment strategies such as capital-pre-recognition agreement exchanges. Failing to investigate these agreements, giving advice on their value, or exerting influence on fiduciaries to pursue them could, among other things, make any one of them personally liable for any plan losses. Generally, a fiduciary is a person who either exercises discretionary authority or control over plan management or assets or gives investment advice for a fee. Under ERISA, a "person" can include an employer or a union. A person is a fiduciary only to the extent that he has discretionary authority over, or gives advice to the plan. In addition, even a person who is not assigned fiduciary responsibilities can become a functional fiduciary by exerting influence on fiduciaries to make certain decisions. Although a person's exercise of influence alone does not endow them fiduciary status in every case, influence so great that a fiduciary effectively abdicates his own discretion to the influential person does. For example, in Brock v. Hendershott, an area director of an

229. See infra notes 233-42 and accompanying text.
230. See supra note 205 and accompanying text.
231. See Zanglein, High Performance Investing, supra note 66, at 91.
232. BEVIS LONGSTRETH, MODERN INVESTMENT AND THE PRUDENT MAN RULE 35 (1986) (quoting Pension and Welfare Benefit Programs, 44 Fed. Reg. 37,221, 37,224 n.7 (June 26, 1979)).
233. Cf. Calabrese, supra note 48, at 123 (listing negative aspects of some investment funds).
235. Id. § 1002(21).
236. Id. § 1002(9).
238. See Monson v. Century Mfg. Co., 739 F.2d 1293, 1303 (8th Cir. 1984) (finding an employee who exercised discretion over the plan's management to be a fiduciary); Eaves v. Penn, 587 F.2d 453, 457-59 (10th Cir. 1978) (holding a corporate officer and director who gave investment advice to be fiduciaries).
239. See Reich v. Lancaster, 55 F.3d 1034, 1048 (5th Cir. 1995) (stating that "[n]ot all persons who have an influential role in plan decisions are transmuted into fiduciaries").
240. 840 F.2d 339 (6th Cir. 1988).
international union influenced plans to choose a particular service provider. Because of this influence, he was a fiduciary who was potentially liable for plan losses. Thus, union officials should exercise caution when encouraging certain types of investment to avoid fiduciary status and the concomitant liability.

Fiduciaries who fail to act prudently in response to a breach by co-fiduciaries are liable for that breach. Thus, in Taft-Hartley plans, employer trustees who fail to act on their fellow trustees' imprudent investment decisions could be held liable and vice versa. Finally, although fiduciaries who properly appoint an investment manager may thereby insulate themselves from liability, they still have a duty to monitor his performance.

VI. UNIONS HAVE OTHER AVENUES OF DEPLOYING PENSION ASSETS TO SECURE PRE-RECOGNITION AGREEMENTS

Although only fiduciaries have control of plan assets, unions may use their role as either plan sponsor or bargaining representative to influence a plan's investment decisions. Unions might bargain with employers to create new plans or amend existing trust agreements or plan documents with pre-recognition agreement provisions. These provisions would establish investment strategies that direct the plan either to invest in companies with existing pre-recognition agreements, to actively seek pre-recognition agreements from direct investments, or to investigate the costs of each investment's non-neutral labor positions.

The principle enunciated in a recent Supreme Court decision supports such extra-financial motivations for bargaining for such provisions. This principle is that a goal of ERISA is not only to increase the security of anticipated retirement benefits, but also to provide incentives for

241. Id. at 342 (finding that a union official who influenced local unions to select certain dental plans in order to gain a personal profit was a fiduciary). But see Wolin v. Smith Barney, Inc., 83 F.3d 847, 849 (7th Cir. 1996) (“Not everyone who provides investment advice to an ERISA plan is [a fiduciary]. A stock broker who merely touts stocks to the plan is not.”).

242. Brock, 840 F.2d at 342.


245. Leigh v. Engle, 727 F.2d 113, 134-35 (7th Cir. 1984), aff'd, 858 F.2d 361 (7th Cir. 1988).

246. See Wessel, supra note 148, at 329.


248. See infra text accompanying notes 249-64.

sponsors to create pension plans and to bargain for measures that control plan losses.\textsuperscript{250} In \textit{Hughes Aircraft Co. v. Jacobson},\textsuperscript{251} the Supreme Court reviewed, inter alia, an amendment to a pension plan that, in effect, used surplus plan assets to increase benefits for some employees but prevented new employees from contributing to the plan.\textsuperscript{252} The plaintiff claimed that the amendment reduced the employer's labor costs, because, rather than the employer paying employees directly through their regular compensation, the plan would pay the increase via pension benefits, which the plan would eventually pay through its own assets.\textsuperscript{253}

The Court affirmed two principles. First, ERISA is designed to foster pension plan creation.\textsuperscript{254} Second, a plan sponsor may use plan assets to leverage agreements for the purpose of controlling costs, so "among the "incidental" and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees[, ... settling or avoiding strikes[, ... and reducing the likelihood of lawsuits."	extsuperscript{255} The Court determined that disallowing sponsors to bargain for this kind of incidental benefit is contrary to ERISA's goal of encouraging plan creation.\textsuperscript{256} While the \textit{Hughes Aircraft} plan involved an agreement between participants and a plan sponsor that was also the employer, the principles—encouraging plan creation and bargaining for loss control measures—apply equally when the settlor is the union and when unions act as representatives of participants.\textsuperscript{257} Thus, unions have legal justification for incorporating investment strategies that implement pre-recognition agreements into plan documents, because pre-recognition agreements might control plan losses by limiting the negative effects of labor disputes or resistance to unionization on plan investments.\textsuperscript{258} In doing so, they also insulate fiduciaries who are obligated to discharge their duties in accordance with plan documents,

\textsuperscript{250} Donovan v. Walton, 609 F. Supp. 1221, 1231 (S.D. Fla. 1985), \textit{aff'd sub nom.} Brock v. Walton, 794 F.2d 586 (11th Cir. 1986) ("[T]he court is mindful that it must reach a result that safeguards the interests of fund participants and beneficiaries yet preserves the institutional incentives for union's [sic] to establish pension funds." (emphasis added)).

\textsuperscript{251} 525 U.S. 432 (1999).

\textsuperscript{252} \textit{Id.} at 436.

\textsuperscript{253} \textit{Id.} at 445.

\textsuperscript{254} \textit{See id.} at 446.

\textsuperscript{255} \textit{Id.} at 445 (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 893-94 (1996)).


\textsuperscript{257} \textit{Hughes Aircraft}, 525 U.S. at 435-36; \textit{see also supra} note 61 and accompanying text.

\textsuperscript{258} \textit{See supra} text accompanying notes 222-32.
because the goal of limiting plan losses is consonant with the duties of plan fiduciaries.  

As unions look to the future, they have two options. First, through collective bargaining, they could demand that current investment guidelines or investment policies be amended to include a requirement that companies in which the plan invests adopt pre-recognition agreements in exchange for the plan's investment in the company. This kind of bargaining demand easily fits into the "quid pro quo" of bargaining that Hughes Aircraft envisioned. This approach would be especially effective in single employer plans with employer-appointed trustees, because employers that fail to honor the agreement to amend would be subject to a claim for breach of the collective bargaining agreement. Also, plan documents that incorporate pre-recognition agreements must comply with the requirements of ERISA. See 29 U.S.C. § 1104(a)(1)(D).
failure to act in accordance with plan documents, a fiduciary breach under ERISA. See 29 U.S.C. § 1104(a)(1)(D). Compare Carpenters Welfare Fund, 326 F.3d at 922 (reasoning that unions have no self-interest in suits against plans, so unions have standing), with N.J. State AFL-CIO v. New Jersey, 747 F.2d 891, 892-93 (3d Cir. 1984) (holding that unions do not have standing), and Sys. Council EM-3, Int'l Bhd. of Elec. Workers v. AT & T Corp., 972 F. Supp. 21, 27-28 (D.D.C. 1997) (same), aff'd, 159 F.3d 1376 (D.C. Cir. 1998). Thus, this approach raises two issues: the remedies that would be available against the employer, and the extent to which such terms are enforceable against the trustees.

263. Varity Corp., 516 U.S. at 527-28 (Thomas, J., dissenting). However, when plan documents conflict with fiduciary duties, such as prudence, fiduciary duties take precedence. See supra note 259 and accompanying text.

264. See supra text accompanying notes 222-28.