

# All out of Chewing Gum: A Case for a More Coherent Limitations Period for ERISA Breach-of-Fiduciary-Duty Claims

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## INTRODUCTION

Congress passed the Employee Retirement Income Security Act of 1974<sup>1</sup> (ERISA) with the goal of “promoting increased participation in pension plans by increasing the security of future benefits.”<sup>2</sup> To achieve this goal, ERISA created a complex regulatory system complemented by civil- and criminal-enforcement provisions. Although Congress enacted ERISA to prevent frauds by plan trustees, trustees escape liability because courts narrowly interpret ERISA’s statute of limitations for breaches of fiduciary duty—a limitations period so incoherent that it is “[h]eld together by chewing gum and baling wire.”<sup>3</sup> Normally, a plaintiff has three years from actual knowledge of the breach of fiduciary duty to bring suit, but the claim cannot be brought more than six years after the breach occurred.<sup>4</sup> However, in the case of “fraud or concealment,” plaintiffs receive a separate six-year time period starting from the date of discovery of the fiduciary’s breach, regardless of when the breach actually occurred.<sup>5</sup> Unfortunately, courts have failed to consider the nature of the fiduciary breach or the trust relationship when interpreting the “fraud or concealment” exception. This interpretive error has led courts to apply ERISA’s statute of limitations restrictively. These courts’ interpretations ignore the body of law upon which ERISA is based, the common law of trusts.

In a trust relationship, the fiduciary controls all relevant information, enabling her to easily conceal a wrongdoing from

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<sup>1</sup> Pub L No 93-406, 88 Stat 829, codified as amended at 29 USC § 1001 et seq.

<sup>2</sup> Paul J. Schneider and Brian M. Pinheiro, eds, *ERISA: A Comprehensive Guide* § 1.05 at 1-9 (Wolters Kluwer 4th ed 2012).

<sup>3</sup> *Caputo v Pfizer, Inc*, 267 F3d 181, 188 (2d Cir 2001).

<sup>4</sup> ERISA § 413, 29 USC § 1113.

<sup>5</sup> ERISA § 413, 29 USC § 1113.

beneficiaries.<sup>6</sup> Despite the ease with which a fiduciary can hide her breach, courts fail to apply the law of trusts. Instead they narrowly confine the application of the fraud-or-concealment exception, rendering many claims time barred. This Comment discusses the cases interpreting “fraud or concealment.” The cases follow a simple pattern: First, the fiduciary breaches a duty—such as embezzling the plan’s funds—and stays silent. As a result of this silence, the employer or beneficiaries do not discover the claim until years later. Next, they bring suit, arguing that the fraud-or-concealment exception applies to extend the statute of limitations. However, the claim is dismissed as time barred because the court holds that “fraud or concealment” applies only when the fiduciary *actively* hid the breach. Courts simply ignore that, as recognized at common law, “the trust relationship lends itself to secrecy and concealment on the part of a trustee,” and a fiduciary’s silence effectively hides the breach.<sup>7</sup>

There are currently two interpretations of the fraud-or-concealment exception. The majority rule fuses the exception into the single term “fraudulent concealment,” and the minority rule interprets the phrase as “fraud or [fraudulent] concealment” (alteration in original). The majority rule mistakenly fuses two terms into one, while the minority rule correctly leaves “fraud” in the statute. In other words, under the minority rule, if the breach itself is fraud, active concealment of that breach is not required. However, both rules mistakenly inject “fraudulent concealment,” thereby requiring active concealment of a fiduciary breach.<sup>8</sup> This Comment proposes an alternative interpretation that applies the common law of trusts. This interpretation does not modify the statutory text. Instead, this Comment concludes that regardless of whether the underlying fiduciary breach is fraud,<sup>9</sup> a fiduciary’s material silence concerning the breach should toll the limitations period. No active concealment is required. As the following example illustrates, the fraud-or-concealment exception is critical when plaintiffs seek to bring a claim for breach of fiduciary duty more than six years after the breach occurred.

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<sup>6</sup> See Tamar Frankel, *Fiduciary Law* 29 (Oxford 2011).

<sup>7</sup> George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees* § 543 at 227 (West rev 2d ed 1993). See also Part III.A.

<sup>8</sup> Under the minority rule, no active concealment is required if the breach was fraud. See *Caputo*, 267 F3d at 190.

<sup>9</sup> For example, a fiduciary could mismanage plan funds, which may not constitute fraud. See note 122.

Imagine a company that provides a defined contribution plan to its employees. Employees contribute a portion of their wages to the fund, and the employer matches their contributions. Unfortunately for the employer and employees, the plan's trustee was dishonest. The plan's trustee conspired with a stockbroker to defraud the plan. The stockbroker illegally churned the plan's securities by repeatedly trading them, splitting the brokerage fees with the trustee in exchange for her silence.<sup>10</sup>

The trustee did not have to take any steps to conceal her scheme. She meticulously adhered to ERISA's reporting requirements, providing beneficiaries annual reports with accurate data reflecting the return on the plan's investments. However, the reports hid the scheme in plain sight. Although the trustee accurately reported the stockbroker's investments, the reports lacked information relevant to the kickbacks. In 2005, unhappy with the return on the plan's investments, the employer fired the trustee. Then in 2012, seven years after the last fraudulent transaction, the company considered modifying the benefit plan and uncovered the trustee's wrongdoing. An independent audit discovered the stockbroker's asset churning, and the company discovered the trustee's foul play by scouring its email and phone records. The company brought suit in early 2013, seeking to disgorge the trustee and stockbroker of their profits and restore that money directly to the plan. However, because more than six years had passed since the last breach of fiduciary duty, the district court dismissed the claim.

The company's lawyer argued that ERISA provides any plaintiff six years from the discovery of a claim when fiduciaries engage in fraud or concealment. Even though the last breach occurred in 2005, the attorney contended that the suit was timely because the company did not discover the claim until 2012. However, the district court cited the majority legal rule, which combines the phrase "fraud or concealment" into "fraudulent concealment." For fraudulent concealment to apply, the fiduciary has to take steps to *actively* conceal the breach. Unfortunately for the company, the trustee's mere silence did not constitute an active step to hide the breach, so the district court dismissed the complaint as time barred. Though the trustee did not engage

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<sup>10</sup> For a case involving the fraud-or-concealment exception and asset churning, see generally *Radiology Center, SC v Stifel, Nicolaus & Company*, 919 F2d 1216 (7th Cir 1990).

in fraudulent concealment under either rule, the minority rule could still possibly allow the plaintiff to bring the claim six years from discovery if the trustee's actions constituted fraud.<sup>11</sup>

This Comment proceeds in three Parts. Part I provides a brief overview of relevant ERISA provisions, breaches of fiduciary duty, and the terms "fraud," "concealment," and "fraudulent concealment" as currently used by courts applying ERISA's statute of limitations. Part II describes the fraud-or-concealment circuit split. Part III argues for a broad interpretation of the fraud-or-concealment exception based on the common law of trusts: the exception should apply in cases of fraud and the concealment or nondisclosure of a breach.

## I. ERISA LITIGATION AND FIDUCIARY FRAUD OR CONCEALMENT

This Part proceeds in two Sections. Part I.A provides an overview of ERISA and suits for breaches of fiduciary duty. Next, Part I.B explains the terms "fraud," "concealment," and "fraudulent concealment" as used by the courts when applying ERISA's statute of limitations.

### A. ERISA and Breaches of Fiduciary Duty

Passed almost unanimously,<sup>12</sup> ERISA regulates two types of employee-benefit plans: welfare plans and pension plans.<sup>13</sup> Welfare plans provide enumerated benefits, such as health-care coverage,<sup>14</sup> and pension plans provide employee-retirement benefits.<sup>15</sup> Plan funds must be held in a trust,<sup>16</sup> which is usually tax

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<sup>11</sup> Of course, instead of just pleading a breach, the plaintiff would still need to sufficiently plead fraud for the minority rule to apply. For a conventional definition of the elements of fraud, see Part I.B. See also FRCP 9(b) (fraud's heightened pleading requirements).

<sup>12</sup> Schneider and Pinheiro, *ERISA* § 1.02 at 1-3 (cited in note 2).

<sup>13</sup> See ERISA § 3(1)–(3), 29 USC § 1002(1)–(3) (defining employee welfare and pension plans).

<sup>14</sup> ERISA § 3(1), 29 USC § 1002(1) (enumerating the various nonretirement plans covered by ERISA).

<sup>15</sup> ERISA § 3(2), 29 USC § 1002(2) (defining pension plans as plans that "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").

<sup>16</sup> ERISA § 403(a), 29 USC § 1103(a) ("Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees.").

exempt.<sup>17</sup> ERISA requires minimum funding of pension plans and establishes compliance standards to determine minimum funding levels.<sup>18</sup>

Defined benefit plans are a popular type of plan. These plans define the amount of benefits a person is due upon retirement, regardless of investment performance. The employer contributes funds and assumes the investment's risk.<sup>19</sup> Another popular plan, the defined contribution plan, such as the 401(k), is an investment-performance plan for which an individual participant's final benefit amount depends on plan investment earnings, expenses, and forfeitures. The employer's contribution does not change depending on plan performance.<sup>20</sup> Both welfare and pension plans are subject to many of the same regulations.<sup>21</sup> Fiduciary duties and statutory disclosure requirements safeguard these plans.

Plan fiduciaries play an important role in accomplishing ERISA's goals of protecting pension plans and increasing plan participation.<sup>22</sup> ERISA defines a plan fiduciary as a person who (1) exercises any discretionary authority or control over the plan's management; (2) renders investment advice for compensation, or has the authority or responsibility to do so; or (3) has discretionary authority or responsibility for administration of the plan.<sup>23</sup> An employer is also a fiduciary of the plan with respect to certain actions affecting the trust.<sup>24</sup> ERISA charges fiduciaries with duties drawn from the common law of trusts and also imposes additional statutory obligations. For example, fiduciaries must act solely in the beneficiaries' interest<sup>25</sup> and act

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<sup>17</sup> See Schneider and Pinheiro, *ERISA* § 3.02 at 3-6 (cited in note 2) (explaining tax-exempt availability for ERISA plans). See also IRC § 501(c)(17)–(22), (24)–(25) (providing that trusts are generally, under certain circumstances, tax exempt).

<sup>18</sup> See ERISA §§ 301–04, 29 USC §§ 1081–84 (describing covered pension plans and the method to calculate minimum funding requirements).

<sup>19</sup> See Schneider and Pinheiro, *ERISA* § 3.03[A] at 3-7 to -8 (cited in note 2) (explaining defined benefit plans).

<sup>20</sup> For a detailed explanation of defined contribution plans, see *id.* at § 3.03[B] at 3-8 to -18.

<sup>21</sup> See *id.* at § 3.02 at 3-6 to -7 (explaining ERISA's plan regulations).

<sup>22</sup> See Part III.A.

<sup>23</sup> ERISA § 3(21)(A), 29 USC § 1002(21)(A).

<sup>24</sup> Employers often “wear[] two hats”—employers act as both the fiduciary of the plan as well as business directors. Schneider and Pinheiro, *ERISA* § 6.03 at 6-6 (cited in note 2).

<sup>25</sup> ERISA § 404(a)(1), 29 USC § 1104(a)(1).

with the “prudent man” standard of care.<sup>26</sup> Additionally, the fiduciary cannot use plan assets in her self-interest<sup>27</sup> or use plan funds for transactions with parties in interest, such as beneficiaries.<sup>28</sup>

To protect “the interests of participants in employee benefit plans and their beneficiaries,” Congress also enacted an elaborate disclosure and reporting scheme.<sup>29</sup> ERISA Title I establishes detailed reporting requirements for covered benefit plans,<sup>30</sup> and it prescribes civil fines for nearly every violation of a reporting requirement.<sup>31</sup> In addition to civil penalties,<sup>32</sup> ERISA criminalizes violations of Title I reporting requirements.<sup>33</sup>

Litigation also plays an important role in protecting benefit plans. ERISA authorizes various civil causes of action relating to benefit plans.<sup>34</sup> In particular, Congress designed a civil-litigation system for breaches of fiduciary duty, including specific remedies and a unique statute of limitations. ERISA § 409 authorizes suits brought on behalf of the plan for breach of fiduciary duty and makes a fiduciary personally liable for any damage to the plan caused by the breach.<sup>35</sup> ERISA § 502(a)(3) authorizes suits brought on behalf of individuals to remedy fiduciary breaches.<sup>36</sup>

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<sup>26</sup> ERISA § 404(a)(1)(B), 29 USC § 1104(a)(1)(B) (defining the standard of care as a “prudent man acting in a like capacity . . . in the conduct of an enterprise of a like character and with like aims”).

<sup>27</sup> ERISA § 406(b)(1), 29 USC § 1106(b)(1).

<sup>28</sup> ERISA § 406(a)(1)(A)–(D), 29 USC § 1106(a)(1)(A)–(D).

<sup>29</sup> ERISA § 2(b), 88 Stat at 833, 29 USC § 1001(b) (stating ERISA’s official policy). Courts have also created a general duty to inform plan participants derived from the core fiduciary duties—loyalty and prudence. See John H. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law* 697 (Foundation 3d ed 2000).

<sup>30</sup> See ERISA §§ 101–07, 109–10, 29 USC §§ 1021–27, 1029–30 (stating plan reporting requirements, both to the Department of Labor and to plan beneficiaries).

<sup>31</sup> See ERISA § 209(b), 29 USC § 1059(b) (authorizing the Secretary of Labor to assess fines for statutory reporting violations).

<sup>32</sup> ERISA § 502(i), 29 USC § 1132(i) (prescribing fines for breaches of fiduciary duty).

<sup>33</sup> ERISA § 501, 29 USC § 1131 (criminalizing ERISA Title I violations); 18 USC § 1027 (prescribing fines and imprisonment for Title I violations).

<sup>34</sup> ERISA enumerates three primary types of lawsuits: First, § 502(a)(1)(B) allows civil actions brought by a participant or beneficiary to recover benefits due or to clarify either future or present rights under the plan. Second, § 502(a)(2) allows suits for breach of fiduciary duty under § 409. Third, the § 502(a)(3) catch-all provision allows suits otherwise not falling under the previous two provisions. ERISA § 502(a), 29 USC § 1132(a). See also Jayne E. Zanglein, Lawrence A. Frolik, and Susan J. Stabile, *ERISA Litigation* 110 (BNA 4th ed 2011) (describing § 502(a)(3) as the “catch all” provision).

<sup>35</sup> ERISA § 409(a), 29 USC § 1109(a) (defining liability for breach of fiduciary duty).

<sup>36</sup> See ERISA § 502(a)(3), 29 USC § 1132(a)(3). Suits brought on behalf of individuals for breaches of fiduciary duty fall under this “catch all” provision. See note 34.

These causes of action also preempt state-law claims.<sup>37</sup> Plan beneficiaries and participants may sue for equitable and remedial relief, which includes restitution, disgorgement, and the fiduciary's removal.<sup>38</sup> Examples of suits for fiduciary breaches include when a fiduciary steals from the plan,<sup>39</sup> when a fiduciary violates securities laws,<sup>40</sup> when a fiduciary self-interestedly amends the plan,<sup>41</sup> or when a fiduciary acts to save the employer money by misleadingly inducing beneficiaries to retire early so that they forfeit large benefit packages.<sup>42</sup>

ERISA contains a statute of limitations applicable to lawsuits for breaches of fiduciary duty.<sup>43</sup> The statute of limitations, ERISA § 413, states:

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

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<sup>37</sup> ERISA broadly preempts most state-law claims. See ERISA § 514, 29 USC § 1144 (preempting “any and all” state laws relating to employee benefit plans).

<sup>38</sup> ERISA § 409(a), 29 USC § 1109(a).

<sup>39</sup> See, for example, *Silverman v Mutual Benefit Life Insurance Co*, 138 F3d 98, 100 (2d Cir 1998) (\$130,000 embezzlement).

<sup>40</sup> See, for example, *Radiology Center, SC v Stifel, Nicolaus & Company*, 919 F2d 1216, 1217–18 (7th Cir 1990).

<sup>41</sup> See, for example, *Schaefer v Arkansas Medical Society*, 853 F2d 1487, 1489 (8th Cir 1988).

<sup>42</sup> See, for example, *Cataldo v United States Steel Corp*, 676 F3d 542, 545 (6th Cir 2012) (fiduciary mislead benefit calculations to induce beneficiaries to retire early); *Larson v Northrop Corp*, 21 F3d 1164, 1174 (DC Cir 1994) (plaintiffs sued because the fiduciary eliminated an early retirement subsidy). Breaches of fiduciary duty are often included as one count in a claim under § 502(a)(1) for wrongful denial of benefits. See Zanglein, Frolik, and Stabile, *ERISA Litigation* at 108–10 (cited in note 34) (explaining the connection between breaches of fiduciary-duty claims and wrongful-denial-of-benefits claims).

<sup>43</sup> This statute of limitations applies to § 409 claims (brought on behalf of the plan), as well as to § 502(a)(3) claims (brought on behalf of individuals). See, for example, *National Security Systems, Inc v Iola*, 700 F3d 65, 99–100 (3d Cir 2012), cert denied, 133 S Ct 1812 (2013). See also notes 34–35 and accompanying text. For other ERISA causes of action, courts apply state statutes of limitations. See Zanglein, Frolik, and Stabile, *ERISA Litigation* at 312 (cited in note 34) (explaining ERISA limitations periods).

*except* that in the case of *fraud or concealment*, such action may be commenced not later than six years after the date of discovery of such breach or violation.<sup>44</sup>

Under § 413(2), a plaintiff has three years to bring suit after she has “actual knowledge” of the claim.<sup>45</sup> However, a plaintiff cannot bring suit if the breach occurred more than six years earlier due to § 413(1). Section 413(1) is a statute of repose: it establishes an outside limit of six years to file suit and applies to the three-year period for actual knowledge of the breach.<sup>46</sup> Consequently, a plaintiff loses her right to file a claim against a fiduciary six years after the breach occurred, even if the plaintiff never has “actual knowledge” of the claim. Thus, if the plaintiff gains actual knowledge of the breach five years after it occurred, she must sue within one year. The final clause of § 413 provides an alternate limitations period. If the fraud-or-concealment exception applies, the plaintiff can file suit within six years from discovery of the breach regardless of when the breach originally occurred. Currently, there are two interpretations of the fraud-or-concealment provision. This Comment addresses the circuit split and provides an alternative interpretation.

## B. Fraud, Concealment, and Fraudulent Concealment

As applied by courts in ERISA cases, the terms “fraud” and “fraudulent concealment” have clear definitions, whereas the term “concealment” does not.

In civil ERISA claims, courts treat fraud and fraudulent concealment as distinct concepts.<sup>47</sup> However, “concealment,” as used in § 413, lacks its own definition. A fraud claim has five elements: “(1) a material false representation or omission of an existing fact; (2) knowledge of falsity; (3) intent to defraud; (4) rea-

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<sup>44</sup> ERISA § 413, 29 USC § 1113 (emphasis added).

<sup>45</sup> The circuits are split on § 413(2)’s actual-knowledge requirement. They are divided three ways: (1) interpreting this provision to require all knowledge of all facts of the fiduciary’s breach, (2) interpreting it to require knowledge of all facts necessary to understand that a claim exists, or (3) interpreting it to require knowledge of either the claim’s illegality or all facts of the breach. See Emily A. Johnson, *Wright v. Heyne: When Does Actual Knowledge Trigger ERISA’s Three-Year Statute of Limitations?*, 27 Am J Trial Advoc 651, 655–56 (2004) (collecting cases summarizing the three-way circuit split over “actual knowledge” of § 413(2)).

<sup>46</sup> See, for example, *Radford v General Dynamics Corp.*, 151 F3d 396, 400 (5th Cir 1998) (holding that as a statute of repose § 413(1) doesn’t toll during administrative exhaustion).

<sup>47</sup> See, for example, *Caputo v Pfizer, Inc.*, 267 F3d 181, 190–91 (2d Cir 2001).



sonable reliance; and (5) damages”<sup>48</sup> For example, a fiduciary may commit fraud when she induces beneficiaries to retire early by misleading them as to how pension benefits are calculated.<sup>49</sup> In contrast to “fraud,” courts do not clearly define “concealment.” This lack of clarity occurs because concealment is merely a type of fraud,<sup>50</sup> and at common law there was no cause of action for concealment.<sup>51</sup> As a consequence, courts applying ERISA’s statute of limitations usually do not treat “concealment” as a distinct concept, but instead interpret it as referring to fraudulent concealment.<sup>52</sup>

Generally, *fraudulent* concealment occurs when a defendant actively conceals the facts that give rise to a plaintiff’s cause of action. When a plaintiff sues a defendant who concealed her wrongdoing, the statute of limitations does not run until the plaintiff discovers the claim.<sup>53</sup> To illustrate, take an example of a limitations period that gives a plaintiff five years to bring suit for breach of contract. If the defendant breached the contract in 2005, the plaintiff would have to sue by 2010. But if the defendant hid the contract breach so that the plaintiff did not discover it until 2008, the plaintiff would have until 2013 to sue. In that case, the plaintiff does not have an independent claim for fraudulent concealment; rather, fraudulent concealment simply tolls the statute of limitations applicable to the contract claim.

In 1874, the Supreme Court in *Bailey v Glover*<sup>54</sup> adopted the fraudulent-concealment doctrine into federal common law.<sup>55</sup> *Bailey* defined the fraudulent-concealment doctrine as either (1) concealment of the cause of action by the defendants or (2) a self-concealing act, which is a fraud of such a character that it

<sup>48</sup> Id at 191 (describing the elements of an ERISA fraud claim).

<sup>49</sup> See, for example, *Cataldo*, 676 F3d at 545 (summarizing the plaintiffs’ fraud claim).

<sup>50</sup> See, for example, *Black’s Law Dictionary* 731 (West 9th ed 2009) (defining fraud as “[a] knowing misrepresentation of the truth or *concealment of a material fact* to induce another to act to his or her detriment”) (emphasis added); *AmCAN Enterprises, Inc v Renzi*, 32 F3d 233, 236 (7th Cir 1994) (stating that “fraud is the concealment of *material facts*”). For a general discussion of the traditional common-law relationship between concealment and fraud, see generally W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 Tex L Rev 1 (1936).

<sup>51</sup> See *Caputo*, 267 F3d at 189.

<sup>52</sup> See, for example, id at 190.

<sup>53</sup> For a general overview of fraudulent concealment, see generally Jay A. Stephens, *Proving Fraudulent Concealment to Toll Statutory Limitations Periods*, 32 Am Jur 3d Proof of Facts § 129 (1995).

<sup>54</sup> 88 US 342 (1874).

<sup>55</sup> Id at 349.

concealed itself.<sup>56</sup> For the doctrine to apply, the plaintiff must exercise due diligence in attempting to discover the claim.<sup>57</sup> Later, the Court narrowed fraudulent concealment's application. In *Wood v Carpenter*,<sup>58</sup> the Court held that a self-concealing act required more than silence: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."<sup>59</sup>

When applying ERISA's statute of limitations, courts use a definition of fraudulent concealment based on these two Supreme Court cases. Generally, the courts adopt the DC Circuit's definition from *Hobson v Wilson*,<sup>60</sup> which applied both *Bailey* and *Wood*.<sup>61</sup> Courts have adopted the *Hobson* fraudulent-concealment definition even though *Hobson* did not involve a fiduciary relationship; rather, it involved a plaintiff suing law enforcement for violations of constitutional rights.<sup>62</sup> The *Hobson* version of fraudulent concealment applies when a defendant takes active steps to conceal a cause of action.<sup>63</sup> It may also apply when the defendant commits a "self-concealing" act, which requires an affirmative act of concealment "in the course of committing the wrong."<sup>64</sup>

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<sup>56</sup> *Id.* (holding that "concealing a fraud, or [ ] committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it" tolls the statute of limitations until the fraud is discovered or becomes known to the party injured by it).

<sup>57</sup> *Id.* at 348 (holding that the statute of limitations does not begin to run if the plaintiff "remains in ignorance of [the fraud] without any fault or want of diligence or care on his part").

<sup>58</sup> 101 US 135 (1879).

<sup>59</sup> *Id.* at 143.

<sup>60</sup> 737 F2d 1 (DC Cir 1984).

<sup>61</sup> See *id.* at 33, citing *Bailey*, 88 US at 348–50, and *Wood*, 101 US at 143.

<sup>62</sup> See, for example, *Radiology Center*, 919 F2d at 1220, citing *Schaefer*, 853 F2d at 1491 (adopting the *Hobson* definition).

<sup>63</sup> *Hobson*, 737 F2d at 33. Later, this Comment explores the *Hobson* fraudulent-concealment definition and its inapplicability to ERISA. See Part III.A.

<sup>64</sup> *Id.* To illustrate these concepts, recall the example in the Introduction. The trustee and the stockbroker defrauded the pension plan. The stockbroker churned the plan's securities and gave the trustee kickbacks. However, the trustee did not take any steps to actively conceal the breach because the trustee did not, for example, misrepresent any financial information on the plan reports; nor did she mislead the employee or employer with verbal or written statements otherwise. One might consider at first blush that this is a self-concealing act: because the trustee did not need to hide any information to cover up the breach, it concealed itself. But courts would not deem this a self-concealing act because the trustee did not engage in an actual act of concealment as part of the original scheme. See, for example, *Larson*, 21 F3d at 1174 (holding that the fiduciary's mere elimination of an early retirement subsidy did not constitute self-concealment because it was only "mere silence"). Essentially, the trustee's mere silence on the kickbacks or securities

Although the courts discussed in the next Part mention the term “self-concealment,” none of them found an example of a self-concealing act. Instead, the courts define self-concealment only in the negative, stating that it requires more than a failure to disclose.<sup>65</sup> Simply put, courts hold that an ERISA fiduciary’s silence cannot amount to fraudulent concealment. Instead, the fiduciary must take active steps to hide her breach. Thus, despite the fact that courts have not clearly distinguished active and self-concealment, it suffices to understand that fraudulent concealment applies when the fiduciary actively hides the breach of fiduciary duty.

With fraud and fraudulent concealment explained, this Comment next discusses the majority and minority rules. The majority rule fuses “fraud or concealment,” as it appears in ERISA’s text, into “fraudulent concealment.” In contrast, the minority rule reads the phrase as “fraud or [fraudulent] concealment.” Neither the majority nor minority rules give “concealment” an independent meaning.

## II. CHEWING GUM AND BALING WIRE FAIL TO HOLD TOGETHER ERISA’S STATUTE OF LIMITATIONS

This Part summarizes the fraud-or-concealment circuit split. The First,<sup>66</sup> Third,<sup>67</sup> Seventh,<sup>68</sup> Eighth,<sup>69</sup> DC,<sup>70</sup> and possibly

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churning did not constitute self-concealment; the trustee must have engaged in a “trick or contrivance” as part of the breach to hide it. See *id.* at 1173, quoting *Wood*, 101 US at 143. So actual self-concealment would have required more than the trustee’s failure to disclose—the trustee must have had misrepresented financial statements or taken steps to hide her kickbacks. Of course, if the trustee actually concealed the wrong, then perhaps a court would not have even deemed this a self-concealing act and would just have considered it as active concealment—the general application of fraudulent concealment.

Perhaps the best way to conceptualize the difference is as follows: if the trustee had originally doctored financial statements as part of the fraud, it may have counted as self-concealment. Alternatively, if the trustee never took an actual step to conceal the fraud originally, but if a few years later the trustee deleted incriminating emails and phone records to cover her tracks, then the court would likely deem this active fraudulent concealment. This may still be confusing, and it is not surprising that not a single court ever defines a self-concealing act. As Judge Richard Posner has noted, this distinction has not been helpful for courts when applying ERISA’s limitations period. “I do not think it promotes clear thinking about fraudulent concealment to distinguish between self-concealing wrongs and active concealment.” *Martin v Consultants & Administrators, Inc.*, 966 F2d 1078, 1101 (7th Cir 1992) (Posner concurring) (quotation marks omitted).

<sup>65</sup> See Part II.A.

<sup>66</sup> *J. Geils Band Employee Benefit Plan v Smith Barney Shearson, Inc.*, 76 F3d 1245, 1253 (1st Cir 1996).

<sup>67</sup> *Kurz v Philadelphia Electric Co.*, 96 F3d 1544, 1552 (3d Cir 1996).

the Ninth Circuit<sup>71</sup> adhere to the majority rule, which interprets the fraud-or-concealment exception as “fraudulent concealment.” The minority rule, established by the Second Circuit,<sup>72</sup> interprets “fraud or concealment” as fraud or fraudulent concealment. So, under the majority rule *only* fraudulent concealment would toll ERISA’s limitations period, while under the minority rule the limitations period would toll in cases of fraud even if there were no fraudulent concealment. This Comment discusses the majority and minority rules in turn.

#### A. The Majority Rule: “Fraud or Concealment” Means “Fraudulent Concealment”

The majority rule originated in a district court footnote and shortly became law in multiple circuits. The majority interpretation reads “fraud or concealment” as “fraudulent concealment.” Fraudulent concealment, as defined by the majority rule, applies when (1) the defendants were engaged in a course of conduct to conceal wrongdoing, (2) the plaintiffs were not on actual or constructive notice of the breach, and (3) the plaintiffs exercised due diligence.<sup>73</sup> Self-concealing acts are also included, but in the course of the breach there must be a “trick or contrivance intended to exclude suspicion and prevent inquiry.”<sup>74</sup> Consequent-

<sup>68</sup> *Radiology Center, SC v Stifel, Nicolaus & Company*, 919 F2d 1216, 1220 (7th Cir 1990).

<sup>69</sup> *Schaefer v Arkansas Medical Society*, 853 F2d 1487, 1491–92 (8th Cir 1988).

<sup>70</sup> *Larson v Northrop Corp.*, 21 F3d 1164, 1172–73 (DC Cir 1994).

<sup>71</sup> *Barker v American Mobil Power Corp.*, 64 F3d 1397, 1401–02 (9th Cir 1995). The Ninth Circuit arguably holds that “fraud or concealment” means “fraud or fraudulent concealment.” This Comment includes the Ninth Circuit because it is generally cited as a circuit that adheres to the majority rule. See note 120.

<sup>72</sup> *Caputo v Pfizer, Inc.*, 267 F3d 181, 190 (2d Cir 2001).

<sup>73</sup> See *Larson*, 21 F3d at 1172, quoting *Foltz v United States News & World Report, Inc.*, 663 F Supp 1494, 1537 (DDC 1987); *J. Geils Band Employee Benefit Plan*, 76 F3d at 1255, citing *Larson*, 21 F3d at 1172, quoting *Foltz*, 663 F Supp at 1537; *Radiology Center*, 919 F2d at 1220, citing *Schaefer*, 853 F2d at 1491 (adopting the *Hobson* definition); *Schaefer*, 853 F2d at 1491–92 (holding that the limitations period “incorporates ‘the fraudulent concealment doctrine’” and stating the three requirements as stated in *Foltz*), citing *Foltz*, 663 F Supp at 1537 & n 66.

<sup>74</sup> *Larson*, 21 F3d at 1173 (quotation marks omitted), quoting *Martin v Consultants & Administrators, Inc.*, 966 F2d 1078, 1095 (7th Cir 1992) (“Concealment by mere silence is not enough.”); *J. Geils Band Employee Benefit Plan*, 76 F3d at 1253–54 n 9 (approving the inclusion of self-concealing acts in dicta); *In re Unisys Corp Retiree Medical Benefit “ERISA” Litigation*, 242 F3d 497, 503 (3d Cir 2001) (explaining that fraudulent concealment applies when a defendant has “taken affirmative steps, either as a part of the original breach of duty or thereafter, to cover up its breach”). See also *Ranke v Sanofi-*

ly, even if the fiduciary's silence amounts to fraud, a plaintiff still cannot gain the fraud-or-concealment limitations period.<sup>75</sup> The First, Seventh, and DC Circuits also require that the plaintiff's pleading conform to the heightened pleading standard of FRCP 9(b).<sup>76</sup>

The United States District Court for the District of Columbia introduced the theory that ERISA's statute of limitations adopted fraudulent concealment. In *Foltz v US News & World Report, Inc.*,<sup>77</sup> plaintiffs sued for breach of fiduciary duty, seeking to recover retirement benefits.<sup>78</sup> The court applied the doctrine of fraudulent concealment as defined in *Hobson*.<sup>79</sup> It dismissed the claim as time barred because the defendant did not take affirmative steps to conceal the underlying breach.<sup>80</sup> To support its application of *Hobson*, the court simply wrote in a footnote that the ERISA limitations period adopted the fraudulent-concealment doctrine: "[A]ny claim [for breach of fiduciary duty] may only be tolled under the fraudulent concealment doctrine incorporated in section 413."<sup>81</sup> Although the *Foltz* court did not explain its rationale for reading "fraud or concealment" as "fraudulent concealment," this interpretation and its definition of the fraudulent-concealment doctrine gained traction.

In *Schaefer v Arkansas Medical Society*,<sup>82</sup> the Eighth Circuit became the first court to adopt *Foltz's* footnote.<sup>83</sup> The ERISA plan's former fiduciary sued the company for pension benefits,

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*Synthelabo Inc.*, 436 F3d 197, 204 (3d Cir 2006) (summarizing prior Third Circuit ERISA precedent on affirmative acts to conceal a breach).

<sup>75</sup> *Larson*, 21 F3d at 1174 ("While a fiduciary's mere silence could, in some circumstances, amount to fraud, it would still fall short of the fraudulent concealment that courts have required for purposes of [§ 413]."); *Radiology Center*, 919 F2d at 1221 (holding that fraud claims do not fall into the fraud-or-concealment exception).

<sup>76</sup> *J. Geils Band Employee Benefit Plan*, 76 F3d at 1255; *Larson*, 21 F3d at 1173; *Wolin v Smith Barney Inc.*, 83 F3d 847, 854 (7th Cir 1996), citing *Larson*, 21 F3d at 1173. See also FRCP 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.")

<sup>77</sup> 663 F Supp 1494 (DDC 1987), affd 865 F2d 364 (DC Cir 1989).

<sup>78</sup> *Foltz*, 663 F Supp at 1510 (summarizing the plaintiffs' claim).

<sup>79</sup> *Id* at 1537 & n 66, citing *Hobson*, 737 F2d at 33 & n 102.

<sup>80</sup> *Foltz*, 663 F Supp at 1537 ("[T]he record reveals no evidence of fraudulent conduct, either in connection with the alleged underlying wrongs, or subsequent thereto. Hence, the doctrine of fraudulent concealment simply does not come into play, and any claim accruing outside the limitations period would be time-barred.") (citation omitted).

<sup>81</sup> See *id* at 1537 n 66 (fusing "fraud or concealment" into fraudulent concealment).

<sup>82</sup> 853 F2d 1487 (8th Cir 1988).

<sup>83</sup> *Id* at 1491-92, citing *Foltz*, 663 F Supp at 1537 & n 66.

and the company counterclaimed for breach of fiduciary duty.<sup>84</sup> Years earlier, the fiduciary, who was also a plan beneficiary, had suggested a plan amendment to the employer that included generous supplemental benefits to retirees. However, he did not inform the employer that a consultant had expressed serious concerns that the plan as amended would not be financially solvent or legal. The employer implemented the amendment without knowledge of the consultant's misgivings.<sup>85</sup> The fiduciary then retired and quickly gained the generous financial benefits of the plan amendment, until the employer eventually refused to continue payments.<sup>86</sup> Despite the fiduciary's "substantial self-dealing,"<sup>87</sup> the employer's counterclaim failed. The Eighth Circuit held that the fiduciary's actions did not constitute "active concealment," which required "more than merely a failure to disclose" the consultant's worries.<sup>88</sup> The *Schaefer* court then expressly adopted *Foltz's* interpretation and the *Hobson* fraudulent-concealment definition.<sup>89</sup> The court did not consider the *Foltz* interpretation's merits. It simply stated that "[§ 413] incorporates the fraudulent concealment doctrine."<sup>90</sup>

In *Larson v Northrop Corp.*,<sup>91</sup> the DC Circuit also expressly adopted the holding in *Foltz*.<sup>92</sup> The court gave precedential weight to *Foltz* because it was a decision from a district court in the same jurisdiction and other circuit courts had followed its interpretation. As the court explained, "In [*Foltz*], the United States District Court for the District of Columbia held that 'fraud or concealment' in [§ 413] incorporates the fraudulent concealment doctrine . . . . This conclusion comports with deci-

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<sup>84</sup> *Schaefer*, 853 F2d at 1488.

<sup>85</sup> *Id.* at 1489 (discussing the fiduciary's failure to relay a consultant's concerns about the legality and financial soundness of the plan amendments).

<sup>86</sup> *Id.* (noting that the cost of the plan amendment quickly rose after the fiduciary retired).

<sup>87</sup> *Id.* at 1490–91 (stating the district court's findings of fact).

<sup>88</sup> *Schaefer*, 853 F2d at 1491 (explaining that the plaintiff did not actively conceal his wrongdoing because of his "failure to investigate adequately and relay warnings about the feasibility and legality" of the plan's provisions), citing *Hobson*, 737 F2d at 33–34 & nn 102–03.

<sup>89</sup> *Schaefer*, 853 F2d at 1491–92 (holding that the limitations period "incorporates 'the fraudulent concealment doctrine'" and stating the three requirements as stated in *Foltz*), citing *Foltz*, 664 F Supp at 1537 & n 66.

<sup>90</sup> *Schaefer*, 853 F2d at 1491 (quotation marks omitted).

<sup>91</sup> 21 F3d 1164 (DC Cir 1994).

<sup>92</sup> *Id.* at 1172–73, citing *Foltz*, 663 F Supp at 1537 (stating the three fraudulent-concealment requirements from *Hobson*).

sions of courts of appeals that have addressed the issue.”<sup>93</sup> The court then applied the *Hobson* fraudulent-concealment definition, holding the claim time barred because the fiduciary did not actively conceal the elimination of an early retirement subsidy.<sup>94</sup>

The Third Circuit in *Kurz v Philadelphia Electric Co*<sup>95</sup> also followed the *Foltz* interpretation.<sup>96</sup> The company kept secret the planned implementation of an early retirement plan, announcing the plan only after it had been adopted.<sup>97</sup> The Third Circuit held that the plaintiffs’ breach-of-fiduciary-duty claim was time barred because the fiduciary did not take affirmative steps to conceal the breach.<sup>98</sup> To reach its holding, the *Kurz* court applied fraudulent concealment because “[w]ith rare exceptions, the courts of appeals have interpreted the final clause of § 413[ ] as incorporating the federal doctrine of fraudulent concealment . . . . We now join our sister courts.”<sup>99</sup>

Only the First and Seventh Circuits considered the merits of adopting *Foltz*’s interpretation. In *J. Geils Band Employee Benefit Plan v Smith Barney Shearson, Inc.*,<sup>100</sup> the First Circuit adopted the majority rule, holding that the plaintiffs should have discovered the breach through reasonable due diligence.<sup>101</sup> In interpreting § 413, the court did not look to the phrase “fraud or concealment.” Instead the court analyzed § 413’s inclusion of the phrase, “discovery of [the] breach or violation.”<sup>102</sup> The court compared ERISA’s statute of limitations to the Securities Act of 1933’s statute of limitations. The First Circuit had previously adopted fraudulent concealment to interpret the “discovery standard” in the Securities Act.<sup>103</sup> Thus, because the court viewed the discovery standard in the Securities Act as “almost

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<sup>93</sup> *Larson*, 21 F3d at 1172–73 (collecting cases).

<sup>94</sup> *Id.* at 1174.

<sup>95</sup> 96 F3d 1544 (3d Cir 1996).

<sup>96</sup> *Id.* at 1552 (disagreeing with the district court’s tolling of the limitations period for an action based on “concealment”).

<sup>97</sup> *Id.* at 1548.

<sup>98</sup> *Id.* at 1552 (applying the fraudulent-concealment doctrine to the facts of the case).

<sup>99</sup> *Kurz*, 96 F3d at 1552.

<sup>100</sup> 76 F3d 1245 (1st Cir 1996).

<sup>101</sup> *Id.* at 1260 (affirming the district court’s grant of summary judgment for the defendants because “nothing on the record [ ] support[s] an inference that Appellants were reasonably diligent”).

<sup>102</sup> *Id.* at 1253 (examining the “relevant statutory language” of § 413).

<sup>103</sup> *Id.* (quotation marks omitted), citing *Cook v Avien, Inc.*, 573 F2d 685, 695 (1st Cir 1978).

identical” to ERISA’s discovery rule,<sup>104</sup> the court held that ERISA’s limitations period incorporated fraudulent concealment.<sup>105</sup> Additionally, the First Circuit stated that it found no reason to disagree with the other circuits that followed *Foltz*,<sup>106</sup> and it therefore adopted the *Hobson* definition of fraudulent concealment.<sup>107</sup>

The Seventh Circuit supported the majority rule through both statutory interpretation and functional arguments. In *Radiology Center, SC v Stifel, Nicolaus & Company*,<sup>108</sup> the Seventh Circuit joined the other circuits and held that “fraud or concealment” meant “fraudulent concealment.”<sup>109</sup> Plaintiffs sued a stockbroker for misusing the plan’s accounts in violation of securities law.<sup>110</sup> First, the court applied the statutory-construction principle “that words grouped in a list should be given a related meaning.”<sup>111</sup> Applying this canon, if the statute dictated that a cause of action based on fraud receives a six-year limitations period, then the statute would mean that a suit based on concealment would also receive six years.<sup>112</sup> However, because “there is no recognized legal cause of action for ‘concealment,’” the court concluded that it was illogical to read “fraud or concealment” as separate terms.<sup>113</sup> Instead, the court reasoned that these two

<sup>104</sup> The discovery rule “postpones the beginning of the limitation period from the date when the plaintiff is injured to the date the injury is discovered.” *J. Geils Band Employee Benefit Plan*, 76 F3d at 1253.

<sup>105</sup> Id (“We find that [§ 413]’s discovery rule is almost identical to that of [15 USC § 77m] and perceive no reason why we should not follow *Cook*’s approach.”). Consider 15 USC § 77m (mentioning the term “discovery of” as does ERISA § 413, but unlike ERISA, omitting the phrase “fraud or concealment”).

<sup>106</sup> *J. Geils Band Employee Benefit Plan*, 76 F3d at 1253 (finding no convincing reason to “part company” from the other circuits to have addressed the issue).

<sup>107</sup> Id at 1255, citing *Larson*, 21 F3d at 1172, quoting *Foltz*, 663 F Supp at 1537.

<sup>108</sup> 919 F2d 1216 (7th Cir 1990).

<sup>109</sup> Id at 1220 (holding that “fraud or concealment” “refers to [the] steps taken [to] hide [a] breach rather than [ ] the underlying nature of [a] plaintiffs’ claim”). Although *Radiology Center* adopted “fraudulent concealment,” it did not state that self-concealing acts were included. In a later decision, the Seventh Circuit made clear that self-concealing acts are included. See *Wolin*, 83 F3d at 851–52 (defining active concealment and self-concealing wrongs).

<sup>110</sup> See *Radiology Center*, 919 F2d at 1217–18 (summarizing the plaintiffs’ complaint of asset churning).

<sup>111</sup> Id at 1220, quoting *Schreiber v Burlington Northern, Inc*, 472 US 1, 8 (1985).

<sup>112</sup> *Radiology Center*, 919 F2d at 1220 (“If, as plaintiffs argue, the term ‘fraud’ in the phrase ‘fraud or concealment’ referred to the legal claim creating the breach of fiduciary duty, one would also expect that the six-year limitations period would be applicable to an action for breaches of fiduciary duty caused by ‘concealment.’”).

<sup>113</sup> Id (explaining that there was no cause of action for concealment when Congress enacted ERISA, nor is there a cause of action for concealment presently).



terms had the related meaning of fraudulent concealment, explaining that “[a]n ERISA fiduciary can delay . . . discovery of his claim either by misrepresenting the significance of facts the beneficiary is aware of (fraud) or by hiding facts so that the beneficiary never becomes aware of them (concealment).”<sup>114</sup> The court then expressly agreed with the Eighth Circuit that “fraud or concealment” incorporates the fraudulent concealment doctrine,<sup>115</sup> while still claiming that its interpretation “gives both terms meaning.”<sup>116</sup>

The *Radiology Center* court further supported the incorporation of “fraudulent concealment” with a functional argument. If “fraud or concealment” were to be read in the disjunctive then the statute of limitations would incentivize plaintiffs to wait longer to bring a claim. Instead of alleging a simple breach of the plan contract, the plaintiffs would instead allege fraud to gain a more generous time period.<sup>117</sup> The court also noted that six years for fraud would be a longer time period than most state limitations periods for contract claims.<sup>118</sup>

The Seventh Circuit’s *Radiology Center* decision influenced another circuit’s interpretation. The Ninth Circuit in *Barker v American Mobil Power Corp*<sup>119</sup> is usually cited as following the majority rule.<sup>120</sup> However, *Barker* seems to have adopted a more literal reading of “fraud or concealment.” The court treated “fraud” and “concealment” as distinct concepts, but noted that the “plaintiffs’ claim does not fall within the ‘fraud or concealment’ exception to the statute of limitations, because the plain-

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (“We share the conclusion reached by the Eighth Circuit . . .”), citing *Schaefer*, 853 F2d at 1491.

<sup>116</sup> *Radiology Center*, 919 F2d at 1220.

<sup>117</sup> *Id.* at 1220–21 (recognizing that plaintiffs often engage in this practice, but expressing reluctance to read ERISA’s limitations period “as encouraging this practice”).

<sup>118</sup> *Id.* at 1221 & n 2 (comparing state statute of limitations periods for written-contract claims). In a later decision, the Seventh Circuit added one more functional argument, noting that the victim should sue as soon as she discovers the breach in order to prevent future injury to the plan. As a consequence, there should not be an additional three-year delay for a cause of action based simply on fraud. See *Wolin*, 83 F3d at 855 (explaining that an ERISA victim can, and should, sue for a breach of fiduciary duty even before being injured by the breach).

<sup>119</sup> 64 F3d 1397 (9th Cir 1995).

<sup>120</sup> The Ninth Circuit is usually cited by other courts as reading the phrase “fraud or concealment” as “fraudulent concealment,” although this may be an inaccurate reading of the *Barker* opinion. See, for example, *Kurz*, 96 F3d at 1552, citing *Barker*, 64 F3d at 1401–02; *J. Geils Band Employee Benefit Plan*, 76 F3d at 1253, citing *Barker*, 64 F3d at 1401–02; *Caputo*, 267 F3d at 188, citing *Barker*, 64 F3d at 1401–02.

tiffs have not produced specific evidence of fraudulent activity or concealment on the part of [the defendants].”<sup>121</sup> Although it would seem that this holding does not follow the rule established by the other circuits, confusion arises because the court relied on *Radiology Center* and the other decisions that established the majority rule. The *Barker* court relied on the majority rule to define “concealment” as active concealment of a breach, but unlike the majority courts, the *Barker* court did not eliminate “fraud” as a distinct concept.

First, the *Barker* court held that the defendants’ alleged breach—fund mismanagement that bankrupted the plan—did not “establish fraud.”<sup>122</sup> Next, the court held that the fiduciary did not engage in “concealment” because concealment requires affirmative steps to conceal the breach.<sup>123</sup> To support the affirmative-act requirement, the court cited *Radiology Center*.<sup>124</sup> Later in the *Barker* opinion, the Ninth Circuit again cited to the other circuits’ decisions following the majority rule. The plaintiffs argued that the fraud-or-concealment exception applied because successor fiduciaries had concealed the defendant’s breach. However, the *Barker* court rejected this because “[s]ubstantial authority indicates [ ] that the exception applies *only when the defendant himself* has taken steps to hide his breach of fiduciary duty.”<sup>125</sup> “Other circuits have held that the ‘fraud or concealment’ exception in the statute incorporates the common law doctrine of ‘fraudulent concealment.’”<sup>126</sup> The *Barker* court simply cited these circuits for a definition of “concealment,” but not for the proposition that “fraud or concealment” is one term. Thus, a fair reading of *Barker* seems to indicate that the fraud-or-concealment exception applies if the underlying act was fraud or if the fiduciary actively concealed the underlying breach. Although the Ninth Circuit is usually cited as following the majority rule,<sup>127</sup> its reasoning may more closely resemble the minority rule this Comment discusses next.

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<sup>121</sup> *Barker*, 64 F3d at 1401 (emphasis added).

<sup>122</sup> *Id.* (explaining that a fiduciary’s loan of plan funds that was never repaid counted as fund mismanagement, but not as fraud).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, citing *Radiology Center*, 919 F2d at 1220.

<sup>125</sup> *Barker*, 64 F3d at 1402 (emphasis added).

<sup>126</sup> *Id.* (collecting cases).

<sup>127</sup> See note 120 and accompanying text.

B. The Minority Rule: “Fraud or Concealment” Means “Fraud or [Fraudulent] Concealment”

The minority rule interprets the fraud-or-concealment exception as “fraud or [fraudulent] concealment.”<sup>128</sup> The Second Circuit established the minority interpretation, and the Sixth Circuit recently suggested that it prefers this interpretation over the majority rule. Under the minority rule, the fraud-or-concealment exception applies when the fiduciary “(1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; *or* (2) engaged in acts to hinder the discovery of a breach of fiduciary duty.”<sup>129</sup> Additionally, allegations of fraud or fraudulent concealment must conform to FRCP 9(b)’s heightened pleading requirements.<sup>130</sup> Therefore, if the fiduciary breach amounts to fraud, no acts of concealment are required to toll the limitations period. However, if the fiduciary breach itself is not fraud, then *active* concealment of that breach is required to toll the statute of limitations. Consequently, a fiduciary’s mere silence regarding nonfraud breaches does not toll the limitations period.

The Second Circuit established the minority rule in *Caputo v Pfizer, Inc.*<sup>131</sup> The *Caputo* court rejected the majority rule for three reasons. First, the court noted that the rule originated in a footnote in *Foltz*, which “cite[d] no legal support.”<sup>132</sup> Second, the court stated that the fraud-or-concealment exception functions as a separate limitations period from § 413(1)’s six-year period and § 413(2)’s three-year period.<sup>133</sup> Third, the court applied principles of statutory interpretation that counseled against the other circuits’ decisions. The court rejected *Radiology Center’s* application of the canon of construction that “words grouped in a

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<sup>128</sup> See *Caputo*, 267 F3d at 190.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 191, citing FRCP 9(b) (“[P]laintiffs must plead fraud with the requisite particularity.”). The Second Circuit recently reaffirmed its holding in *Caputo* without even referencing the term “fraudulent concealment” by name. See *Janese v Fay*, 692 F3d 221, 227–29 (2d Cir 2012) (summarizing *Caputo* and remanding for the lower court to determine when the six-year period began to run).

<sup>131</sup> 267 F3d 181 (2d Cir 2001).

<sup>132</sup> *Id.* at 189 & n 2 (stating that the First, Third, Seventh, Ninth, and DC Circuits all relied on *Schaefer*, which relied on *Foltz’s* footnote).

<sup>133</sup> *Id.* at 189 (stating that the fraud-or-concealment provision prescribed a separate statute of limitations of six years from the date of discovery). No other circuits disagree with *Caputo* on this point. “Fraud or concealment” is an exception to the normal limitations period, not a modification. See Part II.A.

list should be given a related meaning.”<sup>134</sup> Instead, the court applied a plain-language canon.<sup>135</sup> It then gave the terms separate, independent meanings because they are listed in the disjunctive.<sup>136</sup> The court then relied on *Black’s Law Dictionary’s* definitions of “fraud,” “concealment,” and “concealment of a cause of action” to interpret the statute.<sup>137</sup> To give each term independent significance, the court concluded that “fraud” referred to fraud alone.<sup>138</sup> It then held that “concealment” meant fraudulent concealment because, in the court’s view, the term at common law generally referred to concealment of a cause of action.<sup>139</sup>

No other circuit has conclusively adopted the interpretation in *Caputo*, but the Sixth Circuit recently expressed support. In *Cataldo v United States Steel Corp.*,<sup>140</sup> the plaintiffs alleged that the fiduciary used misleading statements about retirement benefits in order to induce them to retire early.<sup>141</sup> The district court dismissed the ERISA claims as time barred,<sup>142</sup> and the Sixth Circuit affirmed because the plaintiffs did not plead fraud with the requisite particularity under FRCP 9(b).<sup>143</sup> Although not necessary for the case’s disposition, the *Cataldo* court made clear that the interpretation of “fraud or concealment” was not settled in the Sixth Circuit.<sup>144</sup> The Sixth Circuit noted the circuit

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<sup>134</sup> Id, quoting *Radiology Center*, 919 F2d at 1220.

<sup>135</sup> *Caputo*, 267 F3d at 189, quoting *Connecticut National Bank v Germain*, 503 US 249, 253–54 (1992) (“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

<sup>136</sup> *Caputo*, 267 F3d at 190.

<sup>137</sup> Id at 189–90 (comparing *Black’s Law Dictionary* definitions from 1968 and 1999).

<sup>138</sup> Id at 190, citing *Reiter v Sonotone Corp.*, 442 US 330, 339 (1979) (stating that each term should be given independent significance if the terms appear in the disjunctive, unless a contrary statutory purpose dictates otherwise).

<sup>139</sup> *Caputo*, 267 F3d at 190 (“The term ‘concealment’ would thus be superfluous unless it be given its common, independent meaning with respect to causes of action.”). The court did not cite a source for this proposition. Ultimately, the court granted plaintiffs’ leave to amend their complaint in order to plead fraud under FRCP 9(b). Id at 191 (stating that to satisfy the requirement, “a plaintiff should specify the time, place, speaker, and content of the alleged misrepresentations”).

<sup>140</sup> 676 F3d 542 (6th Cir 2012).

<sup>141</sup> Id at 545 (summarizing the allegations).

<sup>142</sup> Id (stating the district court’s disposition).

<sup>143</sup> Id at 551 (stating that “[p]laintiffs’ allegations fall well short of this pleading requirement”).

<sup>144</sup> *Cataldo*, 676 F3d at 549–50 (distinguishing cases defendants’ cited as indicating that the Sixth Circuit had previously agreed with the other circuits).

split, and stated that the Second Circuit's decision in *Caputo* was more "persuasive."<sup>145</sup>

The Supreme Court recently denied a petition for certiorari to the plaintiffs in *Cataldo*,<sup>146</sup> so it appears that the majority and minority rules will remain law for the near future.

In the next Part, this Comment proposes an alternative interpretation of "fraud or concealment" by drawing on the common law of trusts. This interpretation of "fraud or concealment" is the most compelling and coherent because the Supreme Court has repeatedly instructed that the common law of trusts should guide courts' interpretations of ERISA.<sup>147</sup>

### III. APPLYING THE COMMON LAW OF TRUSTS TO INTERPRET THE FRAUD-OR-CONCEALMENT EXCEPTION

This Part argues for a broad interpretation of the fraud-or-concealment exception informed by the nature of the fiduciary relationship. Congress stated that ERISA's fiduciary duties are based on the common law of trusts: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."<sup>148</sup> Therefore, "fraud or concealment" refers to these terms as used in the common law of trusts. Applying trust law complemented by the "associated words" canon of statutory construction<sup>149</sup> to interpret § 413, this Comment concludes that the fraud-or-concealment exception includes fraud, fraudulent concealment that does not require active concealment, and concealment of a material fact whose disclosure is required.

To support this interpretation, this Part describes the role of the common law of trusts in ERISA, demonstrates that courts adopting fraudulent concealment ignored this common law, and

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<sup>145</sup> Id at 550 ("[T]he Second Circuit has provided a persuasive contrary interpretation."), citing *Caputo*, 267 F3d at 188–90.

<sup>146</sup> *Cataldo*, 676 F3d 550, cert denied, 133 S Ct 1239 (2013).

<sup>147</sup> See notes 158–60 and accompanying text.

<sup>148</sup> *Employee Benefit Security Act of 1973*, HR Rep No 93–533, 93d Cong, 1st Sess 11–13 (1973) (explaining the function and purpose of the fiduciary-responsibility provisions). See also George Lee Flint Jr, *ERISA: Fumbling the Limitations Period*, 84 Neb L Rev 313, 353 (2005) ("ERISA's legislative history indicates that Congress incorporated traditional trust law principles into ERISA, slightly modified."). Professor George Flint Jr also provides a compelling argument for applying § 413 to many more ERISA claims that are currently brought under state limitations periods. See generally id.

<sup>149</sup> This canon is also commonly known as *noscitur a sociis*. See Norman J. Singer and J.D. Shambie Singer, 2A *Sutherland Statutory Construction* § 47:16 at 347–49 (West 7th ed 2007).

explains that fiduciary fraud alone amounts to fraudulent concealment. This Part applies the common law of trusts to define “fraud or concealment” broadly in accord with congressional intent to use trust law to govern fiduciary behavior. The limitations period should toll whenever a fiduciary breaches a duty and remains silent; no active steps to conceal the breach are required.

#### A. ERISA’s Fiduciary Provisions Are Based on the Common Law of Trusts

ERISA’s drafters adopted the common law of trusts in order to “institute a familiar fiduciary regime to protect pension funds against internal defalcation.”<sup>150</sup> In particular, ERISA adopted “[t]wo grand principles” from the common law—the duties of prudence and loyalty.<sup>151</sup> In enacting ERISA, Congress had a “special mission” for the duty of loyalty<sup>152</sup> because “the confidential nature of the trust relationship lends itself to secrecy and concealment on the part of a trustee who may be tempted to exploit the trust.”<sup>153</sup> The fiduciary, as the more powerful party in the relationship, controls all information pertinent to the plan, so she can easily conceal wrongdoing from the beneficiaries.<sup>154</sup> ERISA plans heavily rely on the duty of loyalty to govern fiduciary behavior because the existence of a large number of beneficiaries weakens any beneficiary’s individual control of fiduciary behavior.<sup>155</sup> In addition, ERISA’s adoption of trust law was a crucial reform to the pension system. Previous federal regulations of benefit plans were deemed failures largely because of the lack of fiduciary standards governing the plan trustees.<sup>156</sup>

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<sup>150</sup> Langbein and Volk, *Pension and Employee Benefit Law* at 678–79 (cited in note 29) (examining the role the common law of trusts played in ERISA’s development).

<sup>151</sup> *Id.* at 678 (explaining that ERISA carries forward both of these common-law trust principles).

<sup>152</sup> *Id.* at 679 (explaining that the adoption of the duty of loyalty was in part a response to congressional recognition of corruption and looting of pension funds).

<sup>153</sup> Bogert and Bogert, *Trusts and Trustees* § 543 at 227 (cited in note 7).

<sup>154</sup> See Frankel, *Fiduciary Law* at 29 (cited in note 6).

<sup>155</sup> ERISA plans involve multiple employees. The greater the number of employee-participants, the larger the plan’s funds are, and the lesser degree of control an individual employee has on the employer. A fiduciary who controls a large amount of wealth and who serves many individuals has much more power than a fiduciary serving one individual. Trust law should therefore be strictly applied to control the fiduciary’s actions. See Frankel, *Fiduciary Law* at 8–11 (cited in note 6) (explaining that the greater a fiduciary’s power, the stricter fiduciary law should control the fiduciary).

<sup>156</sup> ERISA was not Congress’s first attempt at regulating employer pension plans. Congress first passed the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).

Recognizing the necessity of applying the common law of trusts, Congress does not permit the terms of an ERISA plan to allow trustees to opt out of their fiduciary duties.<sup>157</sup>

The Supreme Court requires application of the common law of trusts when interpreting the statute. Courts must analogize the ERISA fiduciary to a common-law trustee<sup>158</sup> because “Congress invoked the common law of trusts to define the general scope of [ERISA fiduciaries’] authority and responsibility.”<sup>159</sup> For example, the Supreme Court used the common law of trusts to interpret ERISA’s duty-of-loyalty and duty-of-care provisions to empower fiduciaries to conduct routine audits.<sup>160</sup> In addition, the Court has looked to trusts law to determine whether an individual should count as an ERISA fiduciary,<sup>161</sup> to decide the proper amount of deference accorded to a plan fiduciary’s fund management,<sup>162</sup> and to determine the permitted behaviors a fiduciary

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Pub L No 85-836, 72 Stat 997, repealed by ERISA § 111, 29 USC § 1031. After it became apparent that WPPDA insufficiently protected plans, Congress endeavored to pass a bill focused on protecting employee benefits by increasing disclosure requirements and adopting fiduciary standards. See generally Michael S. Gordon, *Overview: Why Was ERISA Enacted?* (US Senate Information Paper 1984) (collecting the legislative history of ERISA), excerpted in Langbein and Wolk, *Pension and Employee Benefit Law* at 73–83 (cited in note 29). Fiduciary standards began appearing in pension-reform bills in the years leading up to ERISA, and ERISA incorporated these important reforms. See Gordon, *Overview: Why Was ERISA Enacted?* at 80–83. This history demonstrates the importance of the fiduciary duties to ERISA’s function, thus in interpreting the limitations period, the common law dictating fiduciary roles should not have been ignored.

<sup>157</sup> See ERISA § 404(a)(1)(D), 29 USC § 1104(a)(1)(D) (requiring a fiduciary to execute the provisions of the plan so long as the plan is consistent with ERISA Title I). See also Langbein and Wolk, *Pension and Employee Benefit Law* at 682 (cited in note 29) (explaining that ERISA § 404(a)(1)(D) “transforms default law into mandatory law”).

<sup>158</sup> See *Metropolitan Life Insurance Co v Glenn*, 554 US 105, 111 (2008) (applying the common law of trusts to determine an appropriate standard of review).

<sup>159</sup> *Central States, Southeast & Southwest Areas Pension Fund v Central Transport, Inc*, 472 US 559, 567–70 (1985) (holding that a trustee may conduct random audits to verify a participant’s eligibility based on “[a]n examination of the duties of plan trustees under ERISA, and under the common law of trusts upon which ERISA’s duties are based”); *Pegram v Herdrich*, 530 US 211, 224 (2000) (stating that fiduciary “responsibilities imposed by ERISA have the familiar ring of their source in the common law of trusts”); *Conkright v Frommert*, 130 S Ct 1640, 1648–49 (2010) (interpreting ERISA under the “principles of trust law” and the statutory language); *Massachusetts Mutual Life Insurance Co v Russell*, 473 US 134, 152–53 & n 6 (1985) (Brennan concurring) (stating that the legislative history indicates that Congress intended that fiduciary standards from the common law of trusts would govern ERISA fiduciaries) (collecting legislative history, treatises, and cases).

<sup>160</sup> See *Central States*, 472 US at 567–70, citing ERISA § 404(a)(1)(A)–(B), 29 USC § 1104(a)(1)(A)–(B).

<sup>161</sup> See *Pegram*, 530 US at 231.

<sup>162</sup> See *Conkright*, 559 US at 521.

can take on behalf of the employer.<sup>163</sup> Just as courts use trusts law to interpret ERISA's provisions that govern fiduciary responsibilities, so too should trusts law be used to interpret the consequences of a fiduciary's breach of those responsibilities.

When Congress expressly provided for the fiduciary-duty limitations period, it contemplated a *fiduciary's* fraud or concealment. Thus, when interpreting "fraud or concealment," courts must look to trusts law's treatment of fiduciary fraud and fiduciary concealment. As the Supreme Court stated when applying the common law of trusts to a lawsuit involving a union pension plan, "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."<sup>164</sup> ERISA uses terms from the common law of trusts in order to protect benefit plans,<sup>165</sup> so their collected meaning guides the statute. In applying the statute's limitations period for a fiduciary's breach, courts must assess whether a fiduciary committed "fraud" or committed "concealment" based on what those terms mean in a fiduciary relationship. Even if courts were correct to inject "fraudulent concealment" into the statute, trusts law's understanding of that doctrine should guide the interpretation. Despite these instructions to apply trusts law from the Supreme Court, none of the cases discussed in Part II even mention the common law of trusts, let alone provide a reason to depart from it.

The cases applying the majority rule interpreted "fraud or concealment" as fraudulent concealment as defined in *Hobson*.<sup>166</sup> In *Hobson*, plaintiffs sued the FBI for violation of constitutional rights.<sup>167</sup> This situation—private citizens opposed to a federal law-enforcement agency—is different from the trust relationship between ERISA beneficiaries and fiduciaries. *Hobson* defined fraudulent concealment to require that the defendant take af-

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<sup>163</sup> See *Varity Corp v Howe*, 516 US 489, 506 (1996).

<sup>164</sup> *National Labor Relations Board v Amax Coal Co, a Division of Amax, Inc*, 453 US 322, 329 (1981) (applying the common law of trusts in a case involving union welfare funds).

<sup>165</sup> See note 156 and accompanying text (detailing the importance of trusts law and the history of its incorporation into pension regulation). "Fraud" and "concealment" are both terms developed at the common law. For a summary of fraud and concealment from 1937, see generally Keeton, 15 Tex L Rev 1 (cited in note 50).

<sup>166</sup> Courts of appeals relied on this definition, citing its appearance in *Foltz*, *Schaefer*, *Barker*, or *Hobson* directly. See note 73.

<sup>167</sup> *Hobson*, 737 F2d at 13 (stating the plaintiffs' allegations).



firmative steps to conceal the cause of action.<sup>168</sup> However, *Hobson's* fraudulent-concealment definition does not exist in the common law of trusts and is therefore inapplicable to ERISA.

*Hobson's* definition relied on two Supreme Court cases, *Bailey* and *Wood*.<sup>169</sup> However, neither of those cases applied fraudulent concealment in a trust relationship.<sup>170</sup> The *Hobson* definition accords with the ordinary understanding of fraudulent concealment, which requires more than a defendant's silence.<sup>171</sup>

However, the common law of trusts recognizes an important exception. There is no active-concealment requirement for fraudulent concealment in the common law of trusts.<sup>172</sup> Consequently, the phrase "fraud or concealment" already contains fraudulent concealment. In the law of trusts, when a fiduciary commits fraud or does not disclose a material fact, she has also committed fraudulent concealment. No additional fiduciary action is required. In *Bates v Preble*,<sup>173</sup> the Supreme Court held that no affirmative act of concealment is required for fraudulent concealment when the parties are in a fiduciary relationship: "[I]f there be fiduciary relations between the parties, there need be no evidence of a fraudulent concealment other than that implied from the transaction itself."<sup>174</sup> Other federal courts have also recognized the special application of fraudulent concealment in fiduciary relationships.<sup>175</sup> This exception to the active-

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<sup>168</sup> Id at 33 (defining fraudulent concealment).

<sup>169</sup> See Part I.B.

<sup>170</sup> See *Bailey*, 88 US at 342–43 (summarizing the facts of a bankruptcy-law violation); *Wood*, 101 US at 136–37 (summarizing the facts of a dispute over a transfer of a real-estate title).

<sup>171</sup> See Stephens, 32 Am Jur Proof of Facts at § 129 (cited in note 53) ("As a general rule, a defendant's mere silence does not constitute [fraudulent] concealment.").

<sup>172</sup> See note 174 and accompanying text.

<sup>173</sup> 151 US 149 (1894).

<sup>174</sup> Id at 160–61 (explaining that if the defendants had been in a confidential relationship with the plaintiff, then the silence would constitute fraud and toll the statute of limitations). See also *Loring v Palmer*, 118 US 321, 345–46 (1886) (not faulting plaintiff for delaying bringing claim against trustee because the trustee failed to disclose the true nature of the plaintiff's accounts).

<sup>175</sup> See, for example, *Berkson v Del Monte Corp*, 743 F2d 53, 56 (1st Cir 1984) ("Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure."), quoting *Rutledge v Boston Woven Hose & Rubber Co*, 576 F2d 248, 250 (9th Cir 1978); *Lenz v Associated Inns & Restaurants Co of America*, 833 F Supp 362, 372 (SDNY 1993) ("[F]raudulent concealment occurs if the party under the fiduciary duty fails to meet its obligations to inform the other party of facts underlying the claim.") (quotation marks and alterations omitted); *Mest v Cabot Corp*, 449 F3d 502, 517 (3d Cir 2006) (holding that the plaintiffs could not use fraudulent concealment to toll the limitations period because the defendant was not a fiduciary, and thus a failure to disclose could not consti-

concealment requirement is standard in the common law of trusts. More than one treatise has explained that “[i]t is the prevailing rule that, as between persons sustaining a fiduciary or trust or other confidential relationship . . . mere silence on [the fiduciary’s] part as to a cause of action . . . amounts to a fraudulent concealment.”<sup>176</sup>

This exception—in which fraudulent concealment can include material silence or omissions when a fiduciary relationship exists—has been overlooked by courts applying ERISA’s fiduciary statute of limitations. Although the Supreme Court does allow for departures from the common law of trusts if ERISA’s text or a congressional purpose warrants it,<sup>177</sup> none of these circuits mentioned or considered trust law. One district court recognized the existence of the doctrine of “passive concealment” in fiduciary relationships.<sup>178</sup> Nevertheless, the court rejected the passive-concealment argument, concluding that it was bound by other courts’ refusal to apply the doctrine to ERISA cases.<sup>179</sup> However, the district court was mistaken. The circuit courts never rejected passive concealment; they simply ignored it. The circuit courts adopted *Hobson*’s fraudulent-concealment definition without considering whether it should be applied to a fiduciary relationship. These courts ignored the possibility that the

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tute fraudulent concealment); *Brown v Neuberger, Quinn, Gielen, Rubin & Gibber, PA*, 731 F Supp 2d 443, 453 (D Md 2010), affd 495 Fed Appx 350 (4th Cir 2012) (“[A]bsent a fiduciary relationship, to establish fraudulent concealment a plaintiff must demonstrate that the defendant took an affirmative action to conceal the cause of action.”) (citing Maryland law); *Texas v Allan Construction Co*, 851 F2d 1526, 1532 (5th Cir 1988) (“[G]enerally speaking, denial of wrongdoing is no more an act of concealment than is silence. Nevertheless, many courts have recognized, and so now do we, that a denial may constitute concealment where the parties are in a fiduciary relationship.”) (citation omitted); *Bryan v United States*, 99 F2d 549, 553 & n 11 (10th Cir 1938) (“[U]nless there is a fiduciary or other relation imposing a duty to make disclosure, some affirmative act of concealment is necessary and mere silence is not sufficient.”) (collecting Supreme Court and state-law cases).

<sup>176</sup> *Comment Note.—What Constitutes Concealment Which Will Prevent Running of Statute of Limitations*, 173 ALR 576, § 13 at 588 (1948) (collecting cases). See also Calvin W. Corman, 2 *Limitation of Actions* § 9.7.2 at 71 (Brown 1991) (“An exception to the requirement of a showing of defendant’s affirmative statement or action occurs with a fiduciary relationship between the parties.”).

<sup>177</sup> The common law of trusts is only a starting point for ERISA interpretation. It will inform the nature of the fiduciary duties, but courts must ask whether the statute or competing congressional policies require a departure from the common law. *Varity*, 516 US at 497 (collecting legislative history and cases).

<sup>178</sup> *DeFazio v Hollister, Inc*, 636 F Supp 2d 1045, 1057 (ED Cal 2009) (explaining that under the common law, passive concealment may toll the statute of limitations if the defendant had a duty to disclose material information).

<sup>179</sup> *Id.*

fraudulent-concealment doctrine may apply differently in a trust relationship than in a constitutional-rights claim against law enforcement—the claim in *Hobson*. As a consequence, these circuits erred in their interpretations.

This Comment proposes an alternative interpretation by applying the common law of trusts. In the next Section, this Comment defines fraud and fraudulent concealment as used in trust law. When applying ERISA’s limitations period, courts should recognize that fiduciary fraud alone constitutes fraudulent concealment. Therefore, when a fiduciary commits fraud, the silence in the face of a duty to disclose operates to invoke the fraudulent-concealment doctrine.

#### B. “Fraud or Concealment” as Defined by the Common Law of Trusts

Simply put, a fiduciary’s fraud alone is also fraudulent concealment. The same facts that give rise to a claim for fraud also operate at the common law to toll the statute of limitations under the fraudulent-concealment doctrine.<sup>180</sup> Therefore, the term “fraud” in ERISA’s statute of limitations already includes fraudulent concealment. Consequently, courts adopting the majority rule did not need to fuse “fraud or concealment” into one term in order to incorporate the doctrine. The minority rule also did not need to interpret “concealment” as fraudulent concealment to incorporate it into the statute. Although fraudulent concealment generally requires an affirmative statement or action, this requirement does not apply in fiduciary relationships.<sup>181</sup> A fiduciary has an affirmative duty to disclose a breach because of the trust relationship, and the mere failure to do so constitutes fraudulent concealment.<sup>182</sup>

Thus, in the case of an ERISA fiduciary’s fraud, the fiduciary’s silence establishes fraudulent concealment. Because the fiduciary is under a duty to reveal harmful facts to the other par-

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<sup>180</sup> See notes 174–76.

<sup>181</sup> See note 176.

<sup>182</sup> See Stephens, 32 Am Jur Proof of Facts at § 129 (cited in note 53) (“[A] fiduciary . . . occupies a position of trust [and] has an affirmative duty to disclose facts to the plaintiff, and the failure to do so may constitute a concealment even though the defendant has committed no other acts of concealment.”); H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity: With an Appendix, Containing the American and English Statutes of Limitations* 708–09 (Boston Book 1893) (“Mere silence or passiveness, there being no fiduciary relation or act of the party calculated to deceive or lull inquiry, is not a fraudulent concealment.”).

ty, silence or failure to disclose a cause of action invokes application of the fraudulent-concealment doctrine.<sup>183</sup> Consequently, when a fiduciary engages in fraud but takes no steps to conceal it, the plaintiff gains six years to bring suit from discovery of the breach irrespective of when the breach actually occurred.

Moreover, concealing a material fact required to be disclosed is a breach of fiduciary duty.<sup>184</sup> This concealment is fraud, since under the common law of trusts fraud includes concealing a material fact either by misstatement or silence when a fiduciary has a duty to disclose.<sup>185</sup> Accordingly, the term “concealment” in § 413 refers to acts of concealment that amount to fiduciary fraud. As concealment is simply a type of fraud,<sup>186</sup> the associated-words canon, *noscitur a sociis*, guides its definition. This canon applies to words “grouped together [that] ordinarily have a similar meaning.”<sup>187</sup> Thus, “a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense.”<sup>188</sup> Fraud and concealment appear next to one another in the statute, have a similar meaning,<sup>189</sup> and both refer to a fidu-

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<sup>183</sup> See *Bixler v Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F3d 1292, 1300 (3d Cir 1993) (“This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.”). See also 173 ALR § 13 at 588 (cited in note 176) (collecting cases).

<sup>184</sup> See Restatement (Second) of Trusts § 173, comment d (1959) (stating that a trustee has a duty to disclose information per the beneficiary’s request, or has a duty to disclose information the beneficiary needs to know for the beneficiary’s protection).

<sup>185</sup> See *Chiarella v United States*, 445 US 222, 227–29 (1980) (stating that fraud can occur when a party fails to make a legally required fact disclosure); *Bates*, 151 US at 149 (stating that a fiduciary’s silence is fraud). See also *Black’s Law Dictionary* at 731 (cited in note 50) (defining fraud as “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”) (emphasis added). The term “constructive fraud” is sometimes used for fraud involving nondisclosure in face of the duty to disclose. See Keeton, 15 Tex L Rev at 1–2 (cited in note 50) (discussing the use of “constructive fraud”).

<sup>186</sup> See note 50 and accompanying text.

<sup>187</sup> Singer and Singer, 2A *Sutherland Statutory Construction* § 47:16 at 348–49 (cited in note 149).

<sup>188</sup> *Id.* at § 47:16 at 352–53 (citation omitted).

<sup>189</sup> Even though this Comment’s interpretation of the terms “fraud” and “concealment” substantially overlap, when the *noscitur a sociis* canon applies in interpretation, the canon against surplusage only favors an interpretation that avoids surplusage. This Comment’s interpretation gives effect to both terms in § 413. See, for example, *Freeman v Quicken Loans, Inc.*, 132 S Ct 2034, 2042–43 (2012) (applying the “commonsense canon of *noscitur a sociis*” and explaining that although courts are generally reluctant “to treat statutory terms as surplusage[,] . . . the canon against surplusage merely favors that interpretation which *avoids* surplusage”).

ciary's conduct, since § 413 applies only to fiduciary breaches. Hence, the term "concealment" simply refers to the type of concealment that constitutes fiduciary fraud.<sup>190</sup>

To illustrate this interpretation of "concealment," recall that in *Caputo*, the court characterized the claim as fraud—the fiduciaries *concealed* the amendments to the retirement-benefit plan in order to induce the plaintiffs to retire early.<sup>191</sup> As this example shows, an ERISA fiduciary's concealment, either by breaching the duty to disclose or by misrepresenting material facts, is fiduciary fraud.<sup>192</sup>

Therefore, courts have erred in requiring an affirmative act of concealment before applying the fraud-or-concealment exception. Mere silence is sufficient to toll the statute, regardless of whether the underlying breach was fraud. If *Foltz*, the case that initially adopted *Hobson's* fraudulent-concealment definition, had recognized this common law of trusts definition, the claim would likely not have been held time barred. There, the fiduciary misrepresented the value of the stock and benefits to which the company's former employees were entitled.<sup>193</sup> The fiduciary's silence of this deception would have tolled the statute until the plaintiffs discovered the cause of action. Or, recall that in *Schaefer* the court held that fraudulent concealment did not ap-

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<sup>190</sup> A Florida Supreme Court case provides an excellent example of a court engaging in very similar interpretation. See *Nehme v Smithkline Beecham Clinical Laboratories, Inc.*, 863 S2d 201, 205 (Fla 2003) (applying the doctrine of *noscitur a sociis* to "examine[ ] the other words used within" a group of words "to derive the legislature's overall intent" and interpreting "the string of concepts in the statute[ ] 'fraud, concealment, or intentional misrepresentation of fact'"). The court noted that *Black's Law Dictionary's* definition of fraud included concealment and intentional misrepresentation, so it concluded that "concealment" should be interpreted as a type of fraud. *Id.* See also *Reynolds v Riverside Healthcare Association*, 60 Va Cir 322, 325–26 (2002) (applying the *noscitur a sociis* canon to interpret "concealment" from a statute of limitations period that reads: "In cases in which fraud, concealment, or intentional misrepresentation . . ."); *Schreiber v Burlington Northern, Inc.*, 472 US 1, 7–8, 10 (1985) (applying the *noscitur a sociis* canon to interpret terms of a "broad antifraud prohibition" in the Securities Act, which listed the terms "fraudulent, deceptive, or manipulative" and were "directed at failures to disclose"); *Bath v Blue Shield of California*, 2011 WL 3840543, \*4 (Cal App) (noting the applicability of the *noscitur a sociis* canon to interpret "false representation," "concealment," and "fraud" because they appeared in an insurance policy "in close proximity and deal[t] with the same concept"); *Harshaw v Bethany Christian Services*, 714 F Supp 2d 771, 795–96 (WD Mich 2010), citing *Reynolds*, 60 Va Cir at 325–26.

<sup>191</sup> See *Caputo*, 267 F3d at 184.

<sup>192</sup> This argument should not be read to state that a breach of the duty to disclose and fraudulent concealment are the same; rather they share the same facts. The breach of fiduciary duty is the plaintiff's cause of action while fraudulent concealment is a doctrine to toll the limitations period applicable to the plaintiff's claim.

<sup>193</sup> *Foltz*, 663 F Supp at 1497.

ply because the fiduciary failed to disclose a consultant's reservations about the plan.<sup>194</sup> However, if the *Schaefer* court had recognized trust law's version of fraudulent concealment, the fiduciary's failure to disclose his self-dealing would also constitute concealment of the cause of action. As a consequence, the same facts that gave rise to the breach of fiduciary duty should have also applied the fraud-or-concealment limitations period. And *Barker* illustrates that what may or may not technically constitute "fraud" could still be "concealment."<sup>195</sup> There the fiduciaries' mismanagement bankrupted the fund and the beneficiaries did not find out until well after the limitations period expired.<sup>196</sup> The fiduciaries' material silence of a rapidly bankrupting fund could have amounted to "concealment" and the limitations period would have tolled.

#### CONCLUSION

Although ERISA litigation is complex, there is a large body of judicial precedent to inform the statute's interpretation. Congress adopted the common law of trusts, and this body of law should be the guide for ERISA's interpretation. This Comment interprets the fraud-or-concealment exception to apply in three situations: (1) fraud, (2) fraudulent concealment, or (3) concealment or nondisclosure of a material fact. Accordingly, whenever a plaintiff brings suit for breach of fiduciary duty, if the fiduciary breach involves any of these circumstances the fiduciary will never get the benefit of the six-year statute of repose contained in § 413(1). Instead, the plaintiff can bring suit within six years after discovering the breach.

To illustrate, if a fiduciary engaged in a series of transactions that violated the prudent-man standard of care,<sup>197</sup> a plaintiff would have a maximum of six years to bring a claim even if the plaintiff never discovered the breach in time. However, if the fiduciary engaged in fraud, the plaintiff has six years to bring suit after discovering the breach, *even if* the claim is brought more than six years after the breach's occurrence. Although the damage to the plan from fraud may be the same as the damage

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<sup>194</sup> *Schaefer*, 853 F2d at 1490–91.

<sup>195</sup> Of course, concealment of a material fact is fiduciary fraud. See note 185 and accompanying text. So, one could argue that the silence of the fiduciaries' mistake itself was fraud even though the mismanagement of the plans was not.

<sup>196</sup> See *Barker*, 64 F3d at 1401.

<sup>197</sup> See note 26.

from the failure to meet the prudent-man standard of care, a plaintiff could still bring suit because of the fraud-or-concealment exception. And because ERISA makes fiduciaries personally liable for losses to the plan, a broad fraud-or-concealment exception will deter any fiduciary from engaging in the type of behavior Congress designed ERISA to prevent.