Assessing the Viability and Virtues of Respondeat Superior for Nonfiduciary Responsibility in ERISA Actions

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INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974[1] (ERISA) in order to "safeguard the pension expectations of American workers"[2] and to "aid many millions of employees by making more adequate provision for their retirement needs."[3] For each employee benefit plan, the Act requires the designation of a fiduciary whose care must comport with minimum standards in the plan's administration.[4] In short, the Act holds fiduciaries to the objective standard of a "prudent man," below which their performance constitutes a breach of fiduciary duty.[5] ERISA authorizes a private right of action against the fiduciary, who is personally liable for the resulting losses.[6]

ERISA's "governing federal policy" is to make fiduciaries responsible for their breaches.[7] Considering the potential magnitude of such claims, the ability of a fiduciary to compensate fully beneficiaries

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1 Employee Retirement Income Security Act of 1974, Pub L No 93-406, 88 Stat 829, codified at 29 USC § 1001 et seq (2000).

2 Employee Retirement Income Security Act of 1974, S Conf Rep No 93-1090, 93d Cong, 2d Sess (1974), in 120 Cong Rec S 15737 (Aug 22, 1974), reprinted in 1974 USCCAN 5177 (Sen Williams).

3 Employee Retirement Income Security Act of 1974, HR Conf Rep No 93-1280, 93d Cong, 2d Sess (1974), in 120 Cong Rec H 8702 (Aug 20, 1974), reprinted in 1974 USCCAN 5166 (Rep Ullman).

4 29 USC § 1102 (mandating the establishment and maintenance of employee benefit plans that will be controlled and managed jointly and severally by one or more named fiduciaries); 29 USC § 1104 (2000 & Supp 2004). ERISA defines an "employee pension benefit plan" as any plan, fund, or program that provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of employment. See 29 USC § 1002(1). See also Barbara J. Coleman, *Primer on ERISA* 31–35 (BNA 4th ed 1993) (describing the various types of employer-sponsored pension plans).

5 29 USC § 1104.

6 See 29 USCA §§ 1132(a) (2008) (authorizing civil enforcement of the statutory requirements by various parties); 29 USC § 1109(a) (providing for personal liability for breach of fiduciary duty).

7 *Gifford v CALCO, Inc*, 2005 WL 984518, *2 (D Alaska), quoting 29 USC §§ 1104(a), 1105(a), 1109.

of the mismanaged plan is far from assured. For example, in one prominent breach of fiduciary duty claim, plaintiffs sought over $500,000, calculated from losses to their retirement and health plans.[8] The responsible fiduciary may thus be judgment proof. If so, does the Act limit the plaintiff to the damages available from the fiduciary, or may she expand the reach of her claim to related nonfiduciaries?

This Comment analyzes the availability of the common law doctrine of respondeat superior to expand breach of duty claims beyond the fiduciary to reach affiliated nonfiduciaries. The Supreme Court, referring to ERISA as a "comprehensive statute,"[9] has suggested that the Act—by explicitly providing for action against fiduciaries—precludes courts from inferring federal common law theories of liability, which would otherwise permit actions against nonfiduciaries for breach of fiduciary duty. The Court has not, however, addressed the availability of respondeat superior specifically, and lower courts disagree over the extent to which ERISA bars application of federal common law.

The Ninth and Seventh Circuits have read ERISA comprehensively, concluding that Congress intended to supplant actions not explicitly provided for in the statutory scheme. Though no court of appeals has specifically rejected respondeat superior actions against nonfiduciaries, lower courts within the Ninth and Seventh Circuits have generally interpreted these decisions to prohibit it as a theory of liability. The Third, Fourth, Fifth, Sixth, and Tenth Circuits, however, have accepted the federal common law theory of respondeat superior, reading ERISA more narrowly. But their acceptance varies in degree and rationale, and the lack of clarity among these circuits raises questions regarding respondeat superior's scope and desirability. In the absence of circuit direction, lower courts in the First, Second, Eighth, Eleventh, and DC Circuits have come down on both sides of the issue, though have tended more frequently to accept the theory. Where courts permit respondeat superior actions against nonfiduciaries, they generally do not address the common law availability question.[10] Though this is not a circuit split in the strictest sense—no court of appeals has explicitly rejected respondeat superior for nonfiduciaries—lower courts

8 See *American Federation of Unions Local 102 Health & Welfare Fund v Equitable Life Assurance*, 841 F2d 658, 661 (5th Cir 1988).

9 See, for example, *Shaw v Delta Air Lines, Inc*, 463 US 85, 90 (1983).

10 But see *In re AOL Time Warner, Inc Securities and "ERISA" Litigation*, 2005 WL 563166, *4 n 5 (SDNY); *Howell v Motorola*, 337 F Supp 2d 1079, 1093–95 (ND Ill 2004) (acknowledging that the Seventh Circuit "has expressed reluctance to graft common-law causes of action on to the comprehensive ERISA statute" but allowing a claim against a nonfiduciary to proceed under respondeat superior).

have recently referred to it as such, noting acceptance of the theory in some circuits and reluctance to apply theories of liability not expressly provided for by ERISA in others.

Any resolution of this "split" must first ask whether ERISA's statutory scheme permits application of the doctrine at all. If ERISA has in fact precluded all application of federal common law remedies, then it bars respondeat superior claims for breach of fiduciary duty. This Comment argues that the Supreme Court has left considerable ambiguity in its holdings regarding ERISA's scope and that absent a clear pronouncement from the Court or a clarification from Congress, lower courts should not read the statute to forbid a potentially useful theory of liability. Application of the federal common law in other ERISA contexts bolsters the argument for a narrower reading of the Act. Still, courts should not reach too far in application of common law on tenuous grounds. Lingering concerns over the availability of common law doctrines in establishing liability under ERISA should caution courts when fashioning an appropriate resolution.

According to the standard economic rationale, respondeat superior increases welfare—or, in this situation, protects employee pensions—where the likelihood that wrongdoers are judgment proof is high and the costs of monitoring their behavior is low. The likely magnitude of ERISA claims means that the former is high, but the latter is fact-specific.[11] Accordingly, an optimal solution would apply respondeat superior where monitoring costs are low on a case-by-case basis. Unfortunately, without more information, a broadly applied rule would be both over- and underinclusive. As a second-best solution, this Comment recommends a presumption against availability of respondeat superior as a theory of liability, rebuttable upon plaintiff's showing that named fiduciaries are likely insolvent or that agent monitoring is significantly below pension fund management industry standards.

Parts I and II provide a brief background on the relevant sections of ERISA and the doctrine of respondeat superior, respectively. Part III explains the concerns of circuits that have declined to infer common law causes of action under ERISA. Part IV describes the rationale and degree of acceptance of respondeat superior in several other circuits, which are muddied by some doctrinal confusion. Part V addresses common law availability and proposes a moderate solution based on the likelihood that vicarious liability would further the congressional intent behind ERISA.

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11 See notes 28, 196.

I. THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974

ERISA originated as an extension of the common law of trusts,[12] resulting from a decade of congressional study of the nation's private employee benefit system.[13] Rapid growth of employee retirement plans brought them to the attention of Congress, which set out to "assure the equitable character of [these plans] and their financial soundness."[14] To carry out this purpose, ERISA requires employee benefit plans to provide "one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."[15] ERISA civil litigation primarily targets these fiduciaries.

A. Who Is a Fiduciary?

This Comment analyzes a theory to establish liability for nonfiduciaries, as opposed to ordinary fiduciaries; some background is necessary to distinguish between the two.

The distinction is an important one because the provisions of the Act, including the private right of action provided for in § 409, limit civil action to fiduciaries, with no mention of nonfiduciary liability.[16] According to the statutory language, a person is an ERISA fiduciary if so named by a benefit plan and

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation . . . or has any authority or responsibility to do so, or (iii) he has any discretionary responsibility in the administration of such plan.[17]

Nonfiduciaries are simply those who do not fall within the statutory definition. Based on the three subparts of the quoted text above, the Supreme Court has interpreted ERISA to define fiduciary "not in terms of formal trusteeship, but in functional terms of control and authority over the plan."[18] Accordingly, courts have expanded fiduciary

12 See *Central States, Southeast and Southwest Areas Pension Fund v Central Transport, Inc*, 472 US 559, 569–70 (1985).

13 *Nachman Corp v Pension Benefit Guarantee Corp*, 446 US 359, 361 (1980).

14 See *Central States,* 472 US at 570, quoting 29 USC § 1001(a).

15 29 USC § 1102(a)(1).

16 See *Mertens v Hewitt Associates*, 508 US 248, 252–53 (1993). For a broader discussion of nonfiduciary litigation, see generally Susan J. Stabile, *Breach of ERISA Fiduciary Responsibilities: Who's Liable Anyway?*, 5 Empl Rts & Empl Policy J 135 (2001).

17 29 USC § 1002(21)(A).

18 *Mertens*, 508 US at 262.

status to include service providers, such as actuaries and lawyers, if their services take on enough of a fiduciary character.[19] Section 408(c)(3) allows employers to have their own officers serve as fiduciaries,[20] but third-party administrators also commonly carry out this role.[21] Though the ultimate determination of whether a party is a fiduciary is fact-specific, lower courts have offered some guidance.[22] For instance, "the mere exercise of physical control or the performance of mechanical administrative tasks generally is insufficient to confer fiduciary status."[23] Furthermore, simply offering advice does not create a fiduciary relationship; a person must give advice on a regular basis pursuant to a mutual fee-based agreement in order to qualify.[24]

In the litigation relevant to this Comment, plaintiffs almost invariably bring vicarious liability claims in addition to claims against fiduciaries, or attempt, as a matter of first argument, to establish that defendants were, in fact, fiduciaries who breached their duty. Thus, litigants often plead nonfiduciary liability in the alternative in case the court determines that the defendants do not qualify as fiduciaries.[25] This is unsurprising considering courts' hesitance to expand ERISA's express demarcation of the limits of fiduciary liability.[26]

B. The Prudent Man Standard and Penalties for Breach

The language of ERISA's standard of care is sparse. Section 404 requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[27] In addition, the same section imposes an objective standard of care for fiduciaries—they must act "with the care, skill, prudence, and diligence

19 See id.

20 See 29 USC § 1108(c)(3).

21 See, for example, Patricia C. Kuszler, *Financing Clinical Research and Experimental Therapies: Payment Due, But from Whom?*, 3 DePaul J Health Care L 441, 470 n 218 (2000) ("ERISA plans may contract with an insurer, third party administrator, or . . . managed care plan to administer the benefits and process claims.").

22 For a general discussion, see Susan P. Serota, *Overview of ERISA Fiduciary Law*, in Susan P. Serota and Frederick A. Brodie, eds, *ERISA Fiduciary Law* 11, 14–21 (BNA 2d ed 2006).

23 See id at 13, quoting *Beddall v State Street Bank & Trust Co*, 137 F3d 12, 18 (1st Cir 1998).

24 See *American Federation of Unions Local 102 Health & Welfare Fund v Equitable Life Assurance*, 841 F2d 658, 664 (5th Cir 1988).

25 See, for example, *Smith v Aon Corp*, 2006 WL 1006052, *7 (ND Ill); *In re Tyco International, Ltd Multidistrict Litigation*, 2004 WL 2903889, *4 (D NH).

26 See Part IV.

27 29 USC § 1104(a). Section 406 of the Act supplements these broad fiduciary obligations with a ban on specific "prohibited transactions." 29 USC § 1106 (2000). These additional provisions are beyond the scope of this Comment.

under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims."[28]

Section 404 subjects any fiduciary who fails to live up to the standard set by this "prudent man" to personal liability under § 409(a),[29] which provides that she "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary."[30] Attempts to apply these penalties to nonfiduciaries have generally failed, even when plaintiffs have demonstrated a nonfiduciary's "knowing participation" in the breach of fiduciary duty.[31] The Supreme Court has held that § 404 limits liability "by [its] terms to fiduciaries," and the Court, noting the comprehensiveness of ERISA, has stated that nonfiduciary liability was meaningfully absent from the Act.[32] But despite the Court's reluctance to recognize liability not expressly provided for in the statute, a theory of liability based on the fiduciary's relationship with her nonfiduciary employer could find more success. The central inquiry for courts would be whether ERISA's complex statutory scheme leaves room for a common law theory of liability.[33]

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28 29 USC § 1104(a). See also *American Federation*, 841 F2d at 662; Paul J. Schneider and Barbara W. Freedman, *ERISA: A Comprehensive Guide* § 6.05 (Aspen 2d ed 2003).

29 29 USC § 1109(a). To make the discussion more concrete, examples of claims of fiduciary breach and application of respondeat superior should be helpful. In *Cannon v MBNA Corp*, 2007 WL 2009672 (D Del), retired former employees of MBNA brought suit against individual MBNA directors and benefit plan administrators as fiduciaries. They also brought suit against MBNA itself alleging that it was liable as a fiduciary or, in the alternative, as a nonfiduciary under respondeat superior for its fiduciary employees' actions. In an MBNA investor conference call, MBNA had announced in 2005 that its earnings were expected to grow at a rate of 10 percent annually for the next several years. Plaintiffs' retirement plan was substantially comprised of MBNA stock. When the stock later experienced a steep decline—resulting in losses of "tens of millions of dollars" to the plan—plaintiffs claimed that MBNA had breached its fiduciary duty, among other things, due to conflict of interest and by failing to take reasonable steps to prevent the plaintiffs' plan accounts from losing value. See id at *1–2.

Somewhat similarly, in *Kling v Fidelity Management Trust Co*, 323 F Supp 2d 132 (D Mass 2004), an employee sued his employer, among other parties, for breach of fiduciary duty for failure to communicate negative information about the company's finances and for failing to protect employees from imprudent investment. The plaintiff claimed that the employer, a corporation, was a fiduciary based on its ability to appoint, remove, and monitor plan administrators. In the alternative, were the court to conclude that the employer was not functionally a fiduciary, plaintiff sought relief based on respondeat superior. See id at 139–42, 145.

30 29 USC § 1109(a).

31 *Mertens*, 508 US at 253–54.

32 Id at 251–54. The Court has held, however, that nonfiduciaries may be liable for violations of § 406. See text accompanying notes 159–61.

33 See Part III.

II. RESPONDEAT SUPERIOR: DOCTRINE AND JUSTIFICATIONS

Respondeat superior—or to "look to the man higher up"[34]—is a strict liability theory based in the common law of agency, which rests on the notion that the principal does for herself what she does through another. Agency relationships exist where one party, the principal, exercises control over another, the agent, for the attainment of the goals of the former.[35] While most of agency law is based on the agent's actual or apparent authority to act on behalf of the principal, respondeat superior is based specifically on the employment relationship between the two.[36]

The doctrine permits injured third-party plaintiffs to seek damages from the employer of the wrongdoer (the agent), though the employer (the principal) has done nothing wrong or negligent. The Seventh Circuit, in *Konradi v United States*,[37] provided the modern paradigmatic statement of the doctrine:

> The liability of an employer for torts committed by its employees—without any fault on his part—when they are acting within the scope of their employment, the liability that the law calls "respondeat superior," is a form of strict liability. It neither requires the plaintiff to

34 See W. Page Keeton, et al, *Prosser and Keeton on Torts* § 69 at 500 (West 5th ed 1984). The doctrine is also referred to as either "vicarious liability" or "imputed negligence." See id at 499. This Comment uses "respondeat superior" and "vicarious liability" interchangeably.

35 Agency, 2A Corpus Juris Secundum § 1 at 306 (West 2003).

36 1 Restatement (Third) of Agency Introduction at 4 (ALI 2006). The concept of "scope of employment" is central to agency law and to the application of respondeat superior. The basic common law distinction is between "agents" and "independent contractors." While employers are generally liable for the activities of their agents, responsibility does not flow from independent contractors. See Richard A. Posner, *Economic Analysis of Law* 189 (Aspen 7th ed 2007) Most generally, an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work. See 2 Restatement (Third) of Agency § 7.07 at 198, 210–11 (ALI 2006) (listing the numerous "factual indicia" that are relevant to whether an agent is an employee). Courts look at several factors in determining the existence of "control":

> [T]he extent to which, by agreement, the employer may determine the details of the work; the kind of occupation and the customs of the community as to whether the work usually is supervised by the employer; whether the one employed is engaged in a distinct business or occupation, and the skill required of him; who supplies the place and instrumentalities of the work; the length of time the employment is to last; the method of payment; and many others.

Keeton, et al, *Prosser and Keeton on Torts* at 501 (cited in note 34). Where courts have accepted respondeat superior, whether the breach occurred through actions within the employee's scope of employment has been a secondary, fact-specific inquiry that is beyond the scope of this Comment. See, for example, *Hamilton v Carell*, 243 F3d 992, 1003 (6th Cir 2001) (holding that the employer could not be held liable under respondeat superior because the employee's function of providing investment services to the trust fund was not within the scope of his employment as comptroller for the employer).

37 919 F2d 1207 (7th Cir 1990).

> prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault.[38]

Negligence still forms the basis of the claim—statutorily defined in the context of ERISA[39]—but respondeat superior broadens liability to the "innocent" principal.

W. Page Keeton explains that there have been "a multitude of ingenious reasons" offered for respondeat superior, both risk allocative and retributivist.[40] T. Baty offered perhaps the most cynical and well-known justification in 1916: "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."[41] Alternatively, courts may hope to deter risky behavior over which the principal has control.[42] Commentators have explained respondeat superior as a "deliberate allocation of risk":[43] as employers can often better absorb and distribute to society at large the costs of liability through price adjustments or insurance, they should bear those costs and adjust their behavior accordingly.[44]

Courts regularly justify the doctrine based on public policy and incentives.[45] According to one rationale, higher likelihood that agents, compared to principals, will be judgment proof because of insolvency means that victims could go undercompensated in an exclusively personal liability regime: "Since tort law seeks, at least in part, to compensate wrongfully injured individuals, the agent's inability to pay weighs heavily against an assignment of liability to him."[46] A corollary to this principle suggests that the insolvent agent has less incentive to take care, as his inability to pay makes private action a small stick; conversely, assigning liability to the principal encourages the appropriate level of care.[47]

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38 Id at 1210.

39 See 29 USC § 1104.

40 Keeton, et al, *Prosser and Keeton on Torts* at 500 (cited in note 34).

41 T. Baty, *Vicarious Liability* 154 (Oxford 1916).

42 See Posner, *Economic Analysis* at 188 (cited in note 36) ("The employer [ ] can induce [employees] to be careful, as by firing or otherwise penalizing them for their carelessness.").

43 See, for example, Keeton, et al, *Prosser and Keeton on Torts* at 500 (cited in note 34).

44 See id at 500–01.

45 See, for example, *Golden v Winjohn Taxi Co*, 311 F3d 513, 524 (2d Cir 2002); *Konradi*, 919 F2d at 1210–11. See also generally Lewis A. Kornhauser, *An Economic Analysis of the Choice between Enterprise and Personal Liability for Accidents*, 70 Cal L Rev 1345 (1982).

46 Kornhauser, 70 Cal L Rev at 1362 (cited in note 45).

47 See id at 1362–63.

III. COMPATIBILITY OF THE FEDERAL COMMON LAW WITH A COMPREHENSIVE STATUTE

A. Statutory and Supreme Court Direction

ERISA does not provide for vicarious liability, and ERISA's preemption provision, § 514(a), states that "the provisions of [the Act] . . . shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title."[48] This provision is "explicit and broad"[49]—one of the broadest in any federal legislation[50]—and it clearly preempts all state law with which it conflicts. Plaintiffs relying on a theory of respondeat superior in actions arising out of a breach of fiduciary duty must therefore find support for their claims in common law.

The degree to which courts may imply federal common law in the place of state law, however, is unclear and requires inquiry into congressional intent.[51] At enactment, Senator Harrison Williams, Jr. wrote that "a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare rights,"[52] and the Court has accepted this language on its face.[53] The House Conference Report provides some insight into Congress's intent and suggests an expansive reading that would preclude actions not explicitly provided for in the Act. Congressman Albert Ullman, ranking majority member of the House Ways and Means Committee, noting ERISA's complex nature, emphasized "that these new requirements have been carefully designed to provide adequate protection for employees."[54] Congressman Ullman did not address application of federal common law remedies explicitly, but one could read this statement to mean that Congress carefully considered alternative forms of liability and chose deliberately to exclude them. Plaintiffs seeking nonfiduciary

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48 29 USC § 1144(a) (2000 & Supp 2004). Section 1003(a)–(b) indicates the types of benefit plans covered by the Act.

49 *McMahon v McDowell*, 794 F2d 100, 106 (3d Cir 1986) ("Congress intended the preemption provision to have a scope as broad as its language suggests.").

50 Stabile, 5 Empl Rts & Empl Policy J at 161 (cited in note 16).

51 See John H. Langbein, Susan J. Stabile, and Bruce A. Wolk, *Pension and Employee Benefit Law* 833 (Foundation 4th ed 2006) (observing that in some cases "preemption suppresses state action without supplying federal law" and that "although courts should not rewrite the statute, they should fill in the gaps needed to implement the statutory purpose").

52 120 Cong Rec S 29942 (cited in note 2).

53 See *Firestone Tire and Rubber Co v Bruch*, 489 US 101, 110–11 (1989).

54 120 Cong Rec H 8702, reprinted in 1974 USCCAN 5167 (cited in note 3).

liability, however, argue that these statements should be weighed against ERISA's broader legislative purpose.

The Supreme Court has sent mixed signals regarding the availability of federal common law under ERISA[55] but has consistently read the Act as a "comprehensive statute" designed to promote the interests of employees and their beneficiaries.[56] In *Shaw v Delta Air Lines, Inc*,[57] drawing heavily from the legislative history, the Court concluded that Congress sought to maintain the "sole power to regulate" employee benefit plans through the Act.[58] The Court later reiterated the Act's broad scope, noting that courts may develop federal common law only where ERISA does not address the issue.[59] Accordingly, to determine whether respondeat superior is available after ERISA, the inquiry becomes whether the Act's explicit provision of fiduciary liability in § 409(a) forbids nonfiduciary liability under other causes of action.

In conducting this analysis, the Court has generally reinforced a broad reading of ERISA that precludes actions not expressly provided for in the Act. In *Massachusetts Mutual Life Insurance Co v Russell*,[60] the Court addressed whether a fiduciary may be held liable for extra-contractual, compensatory, or punitive damages, even though § 409(a) does not provide for such an action.[61] Referring to the "voluminous" legislative history, the Court determined that ERISA alone provides cognizable actions:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted [ ] provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. . . . We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.[62]

Relying on *Russell*, the Court similarly cautioned in *Mertens v Hewitt Associates*[63] against assuming the availability of federal common law

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55 See Part V.A.

56 *Shaw v Delta Air Lines, Inc*, 463 US 85, 90 (1983).

57 463 US 85 (1983).

58 Id at 99.

59 See *Pilot Life Insurance Co v Dedeaux*, 481 US 41, 56 (1987) (holding that plaintiffs' state common law claim for failure to pay benefits on a group insurance policy "related to" ERISA's statutory scheme and was thus preempted).

60 473 US 134 (1985).

61 Id at 136.

62 Id at 145–47.

63 508 US 248 (1993).

after the enactment of ERISA.[64] Plaintiffs sought "appropriate equitable relief" against a nonfiduciary under § 502(a)(3),[65] which authorizes equitable relief, arguing that such relief would have been available at common law before passage of the Act. As ERISA's roots lie in the common law of trusts, plaintiffs argued that the same common law remedies should be available under the current statutory scheme.[66] But the Court rejected their argument, explaining that to permit the same equitable relief available at common law would subsume the statute:

> Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to equitable relief in the sense of whatever relief a common-law court of equity could provide in such a case would limit the relief *not at all*.[67]

Reading ERISA's equitable relief section this broadly, the Court reasoned, would render it superfluous. In its analysis the Court reiterated the authority of courts to develop federal common law after ERISA,[68] but not where doing so contravenes a reasonable interpretation of the statute. *Mertens* was arguably limited to the nature of equitable relief sought under § 502(a)(3). Still, lower courts have relied on both *Russell* and *Mertens* to reject arguments for vicarious liability against nonfiduciaries, expressing reluctance to infer availability of a common law cause of action under a comprehensive statutory scheme.

B. Circuit Rejection of Common Law Actions under ERISA

1. Relative clarity in the Ninth Circuit.

In *Nieto v Ecker*,[69] the Ninth Circuit addressed ERISA's scope in the context of nonfiduciary liability insofar as the nonfiduciaries abetted fiduciaries in their breaches of duty. Noting that ERISA's legislative history is "irrelevant,"[70] the court concluded that the "plain lan-

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64 See Paul J. Schneider and Barbara W. Freedman, *ERISA: A Comprehensive Guide* § 6.13 (Aspen 2d ed 2003).

65 29 USC § 1132(a)(3)(B) (authorizing a civil action "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan").

66 See *Mertens*, 508 US at 255–56.

67 Id at 257 (quotation marks and citations omitted). See also *Great-West Life & Annuity Insurance Co v Knudson*, 534 US 204, 209–10 (2002) (approving of the holding in *Mertens*).

68 See *Mertens*, 508 US at 259.

69 845 F2d 868 (9th Cir 1988).

70 Id at 872 n 2.

guage" of § 409(a) limits liability to fiduciaries: "Absent an explicit directive from Congress, we may not recast [ERISA]."[71] Relying on *Russell*, the court explained that Congress has provided a remedy exclusively against fiduciaries in § 409(a).[72] *Nieto* did not speak specifically to respondeat superior, or to federal common law,[73] but it is a fair assumption that the *Nieto* panel would have ruled similarly if these issues were before it, considering the breadth of the court's language.

Unsurprisingly, at least one lower court within the Ninth Circuit has extended the analysis from *Nieto* to respondeat superior specifically.[74] In *Tool v National Employee Benefit Services, Inc*,[75] the court rejected plaintiffs' claim that respondeat superior made the nonfiduciary principal liable for breach of fiduciary duty,[76] calling the Ninth Circuit's interpretation of ERISA liability provisions "strict construction."[77] The plaintiffs' argument in *Tool* represents a slight variation on the other cases presented here; they claimed that respondeat superior could be used to define the principal as a *fiduciary*, while other cases have alleged nonfiduciary liability through the agency relationship.[78] Accordingly, the court focused on the ability of the doctrine to define the principal, not the availability of extrastatutory remedies.[79]

2. Seventh Circuit confusion.

Before the Seventh Circuit had spoken to either respondeat superior liability for nonfiduciaries or ERISA's preclusion of common law remedies, the Northern District of Illinois concluded in *Stuart Park Associated Limited Partnership v Ameritech Pension Trust*[80] that "it is well-established that an employee's actions within the scope of

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71 Id at 871–72.

72 See id at 872–73 ("[W]e see no basis for reading into [§ 409(a)] a remedy against nonfiduciaries as well.").

73 *Nieto* addressed the issue of inferring from *state* common law of trust a *federal* cause of action under ERISA. See id at 871–72 (holding that ERISA's legislative history "provides no support for the incorporation of state law causes of actions as a supplement to the explicit provisions of ERISA").

74 Even after *Nieto*, however, a magistrate judge within the Ninth Circuit applied respondeat superior in an ERISA action. See *Gifford v CALCO, Inc*, 2005 WL 984518, *2 (D Alaska) (distinguishing *Nieto*).

75 957 F Supp 1114 (ND Cal 1996).

76 See id at 1120–21.

77 Id at 1121.

78 See, for example, *Kling v Fidelity Management Trust Co*, 323 F Supp 2d 132, 145 (D Mass 2004).

79 See *Tool*, 957 F Supp at 1120 n 3.

80 846 F Supp 701 (ND Ill 1994).

employment are imputed to the employer, even in the context of ERISA litigation,"[81] citing cases from the Fifth and Tenth Circuits.[82]

In the same year, however, the Seventh Circuit cast considerable doubt on *Stuart Park*. Though not expressly addressing respondeat superior liability, the court took an approach similar to that of the Ninth Circuit regarding the availability of a common law contract claim under ERISA. In *Buckley Dement, Inc v Travelers Plan Administrators of Illinois, Inc*,[83] plaintiff had contracted with the defendant to perform administrative duties with respect to plaintiff's employees' claims under its benefit plan. After defendant failed to submit the appropriate claims to an insurer, plaintiff brought an ERISA action against the nonfiduciary defendant, arguing that the court may imply a common law right to relief under ERISA.[84] The court recognized its responsibility, imparted by the legislative history, "to deal with issues involving rights and obligations under private welfare and pension plans"[85] but then relied on *Shaw*, *Russell*, and *Mertens* to conclude that it was "without authority to entertain a claim for relief against a nonfiduciary based on our fashioning of a common-law remedy."[86]

After *Buckley*, however, the Northern District of Illinois nevertheless accepted respondeat superior as a theory of nonfiduciary liability after carefully considering common law availability. In *Howell v Motorola*,[87] defendants acknowledged that the Seventh Circuit had not addressed respondeat superior in the ERISA context but cited *Buckley* as analogous and instructive of the court's reluctance to extend remedies not specifically authorized in the text of ERISA.[88] Unlike the *Tool* court interpreting Ninth Circuit precedent, the *Howell* court did not agree with defendants that *Buckley* precluded application of res-

81 Id at 708.

82 For this "well-established" point of law, the court cited *National Football Scouting, Inc v Continental Assurance Co*, 931 F2d 646 (10th Cir 1991), and *American Federation of Unions Local 102 Health & Welfare Fund v Equitable Life Assurance*, 841 F2d 658 (5th Cir 1988), but did not address the "actively and knowingly" requirement from the latter. See *Stuart Park*, 846 F Supp at 708. These cases are discussed in Part IV.

83 39 F3d 784 (7th Cir 1994).

84 See id at 788–89.

85 Id at 789, quoting 1290 Cong Rec 29942 (1974) (Sen Javits) ("Therefore, for example, in interpreting ERISA plans, we have utilized a federal common law of contract interpretation rather than relegating such interpretive matters to the law of individual states."). See also *Hammond v Fidelity and Guaranty Life Insurance Co*, 965 F2d 428, 430 (7th Cir 1992) (holding that any ambiguity in an ERISA plan and insurance policy must be resolved by referring to federal common law rules of contract interpretation).

86 *Buckley*, 39 F3d at 789–90.

87 337 F Supp 2d 1079 (ND Ill 2004).

88 See id at 1094.

pondeat superior. Judge Rebecca Pallmeyer noted that the issue is "not free from doubt" but ultimately permitted the claim to survive.[89] She wrote that *Buckley*, which addressed whether a common law *remedy* is available in a statutory scheme, did not apply to respondeat superior: "In contrast, Defendants here challenge the application of a common law theory *for determining liability*."[90] To bolster this distinction, the court relied on cases from, among others, the Third, Sixth, and Tenth Circuits.[91] Understanding of the law in these circuits will be helpful in evaluating respondeat superior's availability in claims brought under ERISA.

IV. Circuit Acceptance of Respondeat Superior for Nonfiduciaries in ERISA Litigation

The cases presented thus far have generally concluded that Congress restricted application of at least some of the federal common law to ERISA's statutory scheme. But other courts have reached different conclusions over nonfiduciary vicarious liability. While the Seventh and Ninth Circuits have read ERISA's scope broadly, the Fifth, Sixth, Fourth, Third, and Tenth Circuits have been open to respondeat superior as a theory of nonfiduciary liability.

Instead of falling clearly into a single camp, however, these circuits have defined the doctrine differently and accepted it to greater and lesser degrees, creating confusion for lower courts. Where courts accept respondeat superior liability, they generally do not address the availability of extrastatutory actions, presumably finding room for the federal common law theory of respondeat superior after passage of ERISA. And while some circuit courts accepted respondeat superior before the Supreme Court pronouncements in *Russell* and *Mertens*[92]—making the chronology of decisions a complicating factor for this analysis—lower courts within each circuit have continued to recognize respondeat superior as a viable theory of liability after those cases in the absence of further direction from their court of appeals.

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89 Id at 1095 (noting that while the Seventh Circuit "has expressed reluctance to graft common-law causes of action on to the comprehensive ERISA statute[,] [i]t has not [ ] held that doctrines of *respondeat superior* are inapplicable to claims brought under the Act").

90 Id at 1094 (emphasis added).

91 See *Howell*, 337 F Supp 2d at 1094–95, citing *Hamilton v Carell*, 243 F3d 992, 1000 (6th Cir 2001); *National Football Scouting*, 931 F2d 646; *McMahon*, 794 F2d at 109. The court also cited *American Federation*, noting that the Fifth Circuit imposed the "actively and knowingly" requirement. See *Howell*, 337 F Supp 2d at 1095. See also Part IV.A.

92 See Part III.A.

A. The Fifth Circuit's Strange Acceptance

One of the earliest endorsements of nonfiduciary liability based on respondeat superior came from the Fifth Circuit in *American Federation of Unions Local 102 Health & Welfare Fund v Equitable Life Assurance*.[93] Plaintiffs brought an action against the administrator of their employee benefit fund and the administrator's insurer for breach of fiduciary duty under ERISA.[94] The district court dismissed the claims against the insurer, finding that it was not an ERISA fiduciary,[95] but plaintiffs persisted in their claim against the insurer, resting it on respondeat superior.[96]

Though the court ultimately dismissed the plaintiffs' claim based on its particular facts,[97] the opinion treated the matter of respondeat superior in detail. The court acknowledged, quite plainly, that "[t]he doctrine of respondeat superior can be a source of liability in ERISA cases."[98] More interestingly, it added another requirement to the doctrine: the principal must "actively and knowingly" participate in the agent's breach of duty to be liable under respondeat superior.[99] Though respondeat superior has traditionally been a doctrine of strict liability, the court's analysis hinged on an evaluation of the insurer's culpability: "[The insurer] never actively participated in [the employee's] breach of duty . . . as is required for a finding of respondeat superior liability."[100] In holding that respondeat superior against nonfiduciaries is viable, *American Federation* recreated the doctrine in an unorthodox form of direct liability.[101]

Its questionable origins notwithstanding, respondeat superior liability for nonfiduciaries as characterized in *American Federation* continues to be good law in the Fifth Circuit, and courts have applied it to determine vicarious liability for nonfiduciary principals.[102] Most recent-

93 841 F2d 658 (5th Cir 1988).

94 See id at 661.

95 See id at 662.

96 See id at 665.

97 See *American Federation*, 841 F2d at 665 (holding that the agent did not breach his fiduciary duties while acting in the scope of his employment for the principal).

98 Id, citing *Stanton v Shearson Lehman/American Express, Inc*, 631 F Supp 100, 105 (ND Ga 1986).

99 *American Federation*, 841 F2d at 665.

100 Id.

101 Id. The court also explained that the principal was not responsible for placing the agent in a position where he could defraud the fund, or for failure to train and supervise the agent properly. See id.

102 See, for example, *Kral, Inc v Southwestern Life Insurance Co*, 999 F2d 101, 104 (5th Cir 1993).

ly, post–*Russell* and *Mertens*, the court reiterated its commitment to the "actively and knowingly" requirement in *Bannistor v Ullman*.[103] There, the Fifth Circuit elaborated on *American Federation*: "In the context of respondeat superior liability, the issue is whether the principal, by virtue of its de facto control over the agent, had control over the disposition of plan assets."[104] This conception of respondeat superior is strikingly close to ERISA's functional definition of a fiduciary,[105] making the Fifth Circuit's interpretation and application of respondeat superior almost certainly wrong as a doctrinal matter.[106] Still, aspects of the "actively and knowingly" requirement could be useful in crafting a solution to the current split, as will be discussed in Part V.

B. The Sixth Circuit's Approval in Dicta

After the Supreme Court's narrow reading of available remedies in *Russell* and *Mertens*, the Sixth Circuit also opined on whether vicarious liability can extend to ERISA nonfiduciaries, noting that the question is "not easily answered."[107] In *Hamilton v Carell*,[108] another claim against a third-party fund administrator, plaintiffs appealed the district court's finding that the administrator's corporation was not liable under a theory of respondeat superior.[109] Though the court noted that the question of whether plaintiffs may seek damages based on respondeat superior under § 409(a) was a matter of first impression, it did not clearly provide an answer: "[Were we] to recognize the doctrine in this context, which we decline to do today, in order for respondeat superior liability to attach, we must find that [the agent] was in fact a fiduciary who breached his fiduciary duties while acting in the course and scope of his employment."[110]

The court addressed respondeat superior in lengthy dicta, however, in which it criticized other courts for having "muddled" the application of the doctrine in this context by confusing it with direct liability.[111] Using the Fifth Circuit as the principal example, the court expressed disapproval of *American Federation*'s addition of the "actively and

103 287 F3d 394 (5th Cir 2002).
104 Id at 408.
105 See Part I.A.
106 See the discussion of *Bannistor* in Part IV.C.
107 *Hamilton v Carell*, 243 F3d 992, 1001 (6th Cir 2001).
108 243 F3d 992 (6th Cir 2001).
109 Id at 994.
110 Id at 1001.
111 See id at 1001–02.

knowingly" requirement.[112] Agreeing with the Seventh Circuit's articulation of the doctrine in *Konradi* as a strict liability theory,[113] the Sixth Circuit acknowledged the possible application of a more traditional theory of respondeat superior. Instead of rejecting respondeat superior, the court dismissed the claim on its particular facts.[114] The district court had already found that the agent's function of providing investment services—the activity that constituted the breach of duty—was outside the scope of employment.[115]

But while respondeat superior did not apply in *Hamilton* specifically, courts both within and without the circuit have taken its dicta as support for this type of nonfiduciary liability.[116] Most recently, the Southern District of Ohio weighed in, also accepting vicarious nonfiduciary liability.[117] Acknowledging that the Sixth Circuit had yet to rule on this issue directly, the court went on to find respondeat superior applicable to an ERISA claim alleging violations of fiduciary duty by the nonfiduciary defendant's employees.[118] It may be too early to count the Sixth Circuit as having firmly endorsed this theory of nonfiduciary liability, but it has yet to signal any reluctance.

C. The Fourth Circuit's Implicit Affirmation

The Fourth Circuit has not expressly adopted nonfiduciary liability based on respondeat superior, but it has affirmed a ruling from one of its lower courts in which the judge discussed nonfiduciary respondeat superior approvingly and extensively. In *Meyer v Berkshire Life Insurance Co*,[119] after acknowledging that the Fourth Circuit had not yet addressed the issue,[120] the district court discussed both the Fifth and Sixth Circuit responses:[121] "[*American Federation* and *Hamilton*]

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112 See *Hamilton*, 243 F3d at 1002.

113 See id at 1001–02. See also Part II.

114 *Hamilton*, 243 F3d at 1003 ("*Here*, [the corporation] cannot be held liable under the doctrine of respondeat superior.") (emphasis added).

115 See id.

116 See, for example, *Kling v Fidelity Management Trust Co*, 323 F Supp 2d 132, 146–47 (D Mass 2004), citing *Hamilton*, 243 F3d at 1000, and cases from other circuits and ascribing "little weight" to authority cited by defendants.

117 See *In re Cardinal Health Litigation, Inc ERISA Litigation*, 424 F Supp 2d 1002, 1048–49 (SD Ohio 2006) (discussing approvingly case law from other courts adopting respondeat superior liability for nonfiduciaries).

118 See id.

119 250 F Supp 2d 544 (D Md 2003), affirmed on other grounds, 372 F3d 261 (4th Cir 2004).

120 See *Meyer*, 250 F Supp 2d at 563 n 27.

121 See id at 563–64, citing, among others, *Hamilton*, 243 F3d at 1001, *Bannistor*, 287 F3d at 408, and *American Federation*, 841 F2d at 665.

make clear that the doctrine of vicarious liability may serve to impose ERISA liability on a *non-fiduciary* principal by virtue of the breaches of its *fiduciary* agent."[122] The court suggested that, though the defendant was a fiduciary, a theory of nonfiduciary respondeat superior would also suffice in the alternative.[123]

Hamilton provided the principal support for the court's position: "The Sixth Circuit test, albeit announced as dictum . . . imposes ERISA liability when the fiduciary agent breaches a duty 'while acting in the course and scope of employment.'"[124] As for *American Federation*'s "actively and knowingly" requirement, the court maneuvered around it by relying, somewhat speciously, on *Bannistor*.[125] Though in that decision, the Fifth Circuit declined to comment on whether there was an agent-principal relationship and accordingly did not rest defendants' liability on respondeat superior, it found the "actively and knowingly" requirement "instructive" and applied it to the case at hand.[126] *Bannistor* arguably added another requirement to the "actively and knowingly" test—de facto control. The court stated: "In the context of respondeat superior liability, the issue is whether the principal, by virtue of its de facto control over the agent, had control over the disposition of plan assets."[127] The *Bannistor* court then went on to require both de facto control *and* "active and knowing" participation.[128] The *Meyer* court, however, interpreted "de facto control" as a replacement for "actively and knowingly," not an addition.[129]

Regardless of its reasoning, *Meyer* represents an expansion of respondeat superior for nonfiduciary liability beyond the Fifth and Sixth Circuits. But this sign of approval cannot go unqualified. In its affirmation of *Meyer*, the Fourth Circuit did not reach the question of

122 *Meyer*, 250 F Supp 2d at 563.

123 See id ("In addition, [the nonfiduciary principal] would be derivatively liable under a vicarious liability theory if the Fourth Circuit were to adopt one of the various tests advanced [by] the [Fifth and Sixth Circuits].").

124 Id, quoting *Hamilton*, 243 F3d at 1002–03.

125 See *Meyer*, 250 F Supp 2d at 563–64. See also Part IV.A.

126 *Bannistor*, 287 F3d at 408 (calling "non-fiduciary respondeat superior . . . liability [ ] virtually identical to a case in which liability is directly predicated upon breach of the fiduciary duty to exercise proper control over plaintiff assets").

127 Id.

128 Id.

129 See *Meyer*, 250 F Supp 2d at 563–64 (observing that *Bannistor* "clarified" *American Federation*'s "actively and knowingly" requirement).

nonfiduciary liability,[130] and the opinion offers some clues that the lower court may have overreached in its decision.[131]

D. The Third and Tenth Circuits' Straightforward Application

Other circuits have imposed respondeat superior liability more straightforwardly. The Third Circuit, in *McMahon v McDowell*,[132] dealt with the matter in a single statement: "[I]f a beneficiary or participant can show that the plan fiduciaries breached their duties, he may also be able to recover damages, for the benefit of the plan, directly from the employer."[133] For support, the court cited another Third Circuit case, *Struble v New Jersey Brewery Employees' Welfare Trust Fund*,[134] in which the court answered a theoretical question not before them "so that parties may avoid the time and expense of further proceedings."[135] Notably, the situation in *Struble* was not exactly analogous to *McMahon*, as it was based on a trustee relationship, not an agent-principal relationship.[136] The court concluded that if the trustees had breached their fiduciary duty (which had not yet been established in the case), employees would be entitled to a remedy from trustees, who had been appointed by their employer to administer their pension plan.[137] By requiring trustees to have breached their fiduciary duty, *Struble* seems to have imposed a type of *American Federation* "actively and knowingly" requirement for trustees, though *McMahon* did not extend that requirement to the agent-principal context. *Struble* has since been overturned on other grounds, but *McMahon* remains good law in the Third Circuit.[138] Similarly, in *National Football Scouting, Inc v Continental Assurance Company*,[139] the Tenth Circuit acknowledged the *American Fed-*

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130 See *Meyer*, 372 F3d at 263 ("The only claim that we address in detail [ ] is [the principal's] assertion that the district court erred in finding that [it] conceded that it was an ERISA fiduciary.").

131 See id (referring to the district court opinion as "lengthy" and characterizing it as "rest[ing] heavily, though not exclusively" on the principal's *fiduciary* status).

132 794 F2d 100 (3d Cir 1986).

133 Id at 109.

134 732 F2d 325 (3d Cir 1984).

135 Id at 336 n 11.

136 See id at 337 ("[T]he beneficiary may recover trust property transferred to a third party if the transfer were a breach of the trustee's fiduciary duty and also a breach of the contract between the trustee and the third party.").

137 See id at 336.

138 See, for example, *Cannon v MBNA*, 2007 WL 2009672, *3 (D Del) (noting a circuit split, with a majority favoring availability of respondeat superior and citing *McMahon* for recognition of the theory within the Third Circuit).

139 931 F2d 646 (10th Cir 1991).

eration strand of the doctrine and affirmed a lower court's application of the approach without any discussion of its underlying value.[140]

Notably, both of these circuits adopted respondeat superior as a theory of nonfiduciary liability before the Supreme Court's decision in *Mertens*, though after *Russell*. It is possible that the circuits would have decided differently given the Court's hesitance to permit remedies not expressly provided for in ERISA. This is pure speculation, however, and lower courts have continued to apply *McMahon* and *National Football* after *Mertens*.[141] In the absence of further direction from the Supreme Court, respondeat superior liability for nonfiduciaries seems alive and well in these circuits.

E. Lower Courts without Circuit Direction

Considerable confusion surrounds the use of respondeat superior as a theory of nonfiduciary liability, and the First, Second, Eight, Eleventh, and DC Circuits have yet to address this question. Where lower courts within these circuits have faced respondeat superior claims against nonfiduciaries, they have come down on both sides before and after *Mertens* and *Russell*.[142] For example, in *Kling v Fidelity Management Trust Co*,[143] the District of Massachusetts held that respondeat superior applied within the ERISA framework. Defendants claimed that a theory of respondeat superior was inconsistent with ERISA's "functional concept of fiduciary responsibility,"[144] but the court rejected this argument, citing, among other cases, the Sixth Circuit in *Hamilton* and the Tenth Circuit in *National Football*.[145]

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140 See id at 648.

141 See, for example, *In re Cardinal Health*, 424 F Supp 2d at 1049.

142 See, for example, *In re Coca-Cola Enterprises Inc, ERISA Litigation*, 2007 WL 1810211, *13 (ND Ga) (refusing to recognize an implied ERISA cause of action for respondeat superior claims on the premise that Congress did not intend to implicitly authorize remedies not included in the statute); *In re AOL Time Warner, Inc Securities and "ERISA" Litigation*, 2005 WL 563166, *4 n 5 (SDNY) (relying on *Mertens* for the proposition that Congress did not intend to authorize other remedies, such as respondeat superior, not expressly included in ERISA); *Crowley v Corning, Inc*, 234 F Supp 2d 222, 228–29 (WDNY 2002) (implicitly accepting respondeat superior as a theory of liability by rejecting the claim for failure to meet the "de facto control" requirement enunciated in *Bannistor*); *Stanton*, 631 F Supp at 104 (basing respondeat superior liability for nonfiduciaries on ERISA's "broad protective purpose").

143 323 F Supp 2d 132 (D Mass 2004).

144 Id at 145.

145 See id at 146–47. Notably, the court cited *American Federation* as a "see also" for the Fifth Circuit's acceptance of respondeat superior but also highlighted the additional "actively and knowingly" requirement there. See id at 146.

Conversely, in one of the few lower court cases that have addressed the availability of common law remedies under ERISA,[146] the Southern District of New York, in an unpublished opinion, refused to accept respondeat superior in light of the Supreme Court's pronouncements.[147] Faced with an argument for vicarious liability for a nonfiduciary, the court noted:

> ERISA imposes liability *only* upon named fiduciaries and *de facto* fiduciaries .... [T]here is no reason to recognize an implied ERISA cause of action under the doctrine of *respondeat superior*, in light of the Supreme Court's "unwillingness to infer causes of action in the ERISA context, since the statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."[148]

This view is the minority, however, as most lower courts have either accepted respondeat superior based on the circuit precedent discussed earlier in this Part[149] or have not reached the question. At least two recent decisions have explicitly recognized the split, highlighting the continuing importance of this issue.[150]

V. TOWARD A RESOLUTION

The approaches outlined in Parts III and IV present two conflicting visions of ERISA, and outcome variation in recent district court opinions demonstrates the timeliness of the issue and the importance of a resolution. This Part identifies a modest solution that furthers the congressional intent behind ERISA—to protect employee benefit plans—without running afoul of the Supreme Court's reluctance to infer common law causes of action. According to the standard economic account, respondeat superior's desirability depends upon the likelihood of agent insolvency and the cost of monitoring agent behavior. As these factors are likely unique to particular agent-principal relationships, even more so today than when Congress enacted ERISA, this Comment suggests that courts engage in a case-by-case inquiry as

146 See also the discussion of *Howell* in Part III.B.2.

147 See *In re AOL Time Warner*, 2005 WL 563166 at *4 n 5.

148 Id, quoting *Mertens*, 508 US at 254.

149 See, for example, *In re Cardinal Health*, 424 F Supp 2d at 1049 (citing *Kling* for the proposition that "more courts have argued *for* [respondeat superior] than against it").

150 See *In re Xerox Corp ERISA Litigation*, 483 F Supp 2d 206, 222 n 5 (D Conn 2007); *In re Tyco International, Ltd Multidistrict Litigation*, 2004 WL 2903889, *4 (D NH).

to respondeat superior's availability. But any discussion of benefits and costs should be tempered by the Court's refusal to engage in policy analysis. The Court, in *Mertens*, noted that "a tension [exists] between the primary goal of benefiting employees and the subsidiary goal of containing [ERISA] pension costs" but then concluded that it would not "attempt to adjust the balance between those competing goals that the text adopted by Congress has struck."[151]

As a cautious middle ground, this Comment suggests that, in light of the Supreme Court's broad reading of ERISA, courts should have a presumption against application of respondeat superior in light of doubts about its common law availability. This presumption should be rebuttable, however, where plaintiffs can establish either substandard agent-principal monitoring or agent-principal collusion—in other words, where the magnitude of respondeat superior's benefits is large. This modification of the federal common law arguably imports the requirement articulated by the Fifth Circuit. When principals "actively and knowingly" structure the agent-principal relationship inadequately, below ERISA's "prudent man" standard of care, nonfiduciary liability through respondeat superior will further ERISA's broad protective purpose.

A. Federal Common Law Should "Fill the Interstices" Left in the Wake of ERISA's Broad Preemption Provision

Discussion of respondeat superior's benefits and costs is a nonstarter without first determining whether ERISA, as a comprehensive statute, leaves room for common law remedies or whether the Act precludes actions that it does not expressly provide for. Circuit opinion varies, but the Supreme Court has made clear that if Congress intended to forbid nonstatutory theories of liability, courts may not apply one in the face of the Act.[152]

As discussed in Part III, the Supreme Court has emphasized the breadth of ERISA's statutory scheme. But despite its strong statements, it has left some room for the insertion of federal common law. In *Franchise Tax Board of California v Construction Laborers Vacation Trust for Southern California*,[153] the Court highlighted the remarks of Senator Williams in his committee report: "ERISA's legislative history indicates that, in light of the Act's virtually unique preemption

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151 *Mertens*, 508 US at 262–63 (alteration in original), quoting *Alessi v Raybestos-Manhattan, Inc*, 451 US 504, 515 (1981).

152 See *Mertens*, 508 US at 261 ("[V]ague notions of a statute's 'basic purpose' are [ ] inadequate to overcome the words of its text regarding the *specific* issue under consideration.").

153 463 US 1 (1983).

provision, 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.'"[154] Senator Williams's remarks and the Court's statement in *Franchise Tax* suggest there is some ambiguity regarding the availability of common law remedies.

Application of federal common law in other ERISA actions suggests a narrow reading of the Act. In controversies over claims procedure, a considerable body of case law has developed from judicial review of plan benefit denials, but ERISA does not specify the appropriate standard of review that courts should apply when reviewing these decisions.[155] Daniel Fischel and John Langbein explained:

> Because ERISA preempts state law on matters relating to pension and employee benefit plans, yet is silent about the standard of review to apply in these cases, courts have had to construct the standard as a matter of federal common law. Here as elsewhere in the development of ERISA jurisprudence, two older bodies of law have proven influential: the law of private trusts . . . and the law generated by prior federal regulation of pension trusts under the Taft-Hartley Act.[156]

Under the same statutory scheme, courts have developed federal common law where the Act does not specifically address issues raised by plaintiffs.[157] This practice comports with other courts' statements that federal common law should "fill the interstices" of federal statutes.[158]

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154 Id at 24 n 26, quoting 120 Cong Rec S 29942 (1974) (cited in note 2) (Sen Williams, erroneously attributed to Sen Javits in the opinion).

155 See Daniel Fischel and John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U Chi L Rev 1105, 1129–30, 1133–37 (1988).

156 Id at 1129–30, citing Restatement (Second) of Trusts § 187 (1959), and John A. McCreary, Comment, *The Arbitrary and Capricious Standard under ERISA: Its Origins and Application*, 23 Duquesne L Rev 1033, 1035–41 (1985).

157 See, for example, *Cooperative Benefit Administrators, Inc v Ogden*, 367 F3d 323, 329 (5th Cir 2004) ("[T]he ability of a plaintiff to state a federal common law cause of action depends on the existence of a 'gap' in the text of the legislation that allows for the creation of the federal common law remedy sought."); *Trustmark Life Insurance Co v University of Chicago Hospitals*, 207 F3d 876, 881 (7th Cir 2000) ("Courts may develop a federal common law where ERISA itself 'does not expressly address the issue . . . .' State common law may be used as a basis in constructing a federal common law that implements the policies underlying ERISA where it is not inconsistent with congressional policy concerns."); *United McGill Corp v Stinnett*, 154 F3d 168, 171 (4th Cir 1998) ("In enacting ERISA, Congress intended for the judiciary to develop a body of federal common law to supplement the statute's express provisions."), citing *Pilot Life Insurance Co v Dedeaux*, 481 US 41, 56 (1987).

158 See *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F2d 1020, 1027 (2d Cir 1992) ("We believe that Congress intended us to fill the interstices of ERISA's statutory scheme . . . . Therefore, federal common law governs our decision today."). See also *Itar-Tass*

Moreover, despite the holdings in *Russell* and *Mertens*, the Supreme Court has more recently suggested that ERISA may leave considerable room for federal common law actions. In *Harris Trust v Salomon Smith Barney*,[159] plaintiffs brought an action for nonfiduciary participation in transactions prohibited by the Act, as opposed to a breach of fiduciary duty, and the Court held that § 502(a)(3) extends to actions against nonfiduciary parties.[160] While the prohibition of participation in certain transactions, such as self-dealing, falls under § 406, not § 404, the ruling is surprising given *Mertens*; the Court did not explain how the two are compatible.[161] *Harris* could indicate a shift in the Court's jurisprudence with regard to nonfiduciary duty in the context of § 404 as well.[162] Susan Stabile argues that *Harris* does not represent a shift, so much as an unjustifiable distinction between the two sections of the statute.[163] Regardless, the disaccord belies some uncertainty about the Court's willingness to accept theories of liability not expressly provided for in the Act.

Similarly, in *Meyer v Holley*[164]—decided a decade after *Mertens*—the Court was unwilling to assume variation from common law background rules. Though *Holley* addressed respondeat superior in the context of the Fair Housing Act, rather than ERISA, the Court stated that abrogation of the doctrine of respondeat superior liability should not be inferred from a federal statute in the absence of an express contrary intent: "[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and

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Russian News Agency v Russian Kurier, Inc, 153 F3d 82, 90–91 (2d Cir 1998) (developing federal common law to fill ambiguities in the Copyrights Act); *United States v Walter Dunlap & Sons, Inc*, 800 F2d 1232, 1241 (3d Cir 1986) (stating that the judicial branch may "fill the void" left by relevant legislation but "only if there is a void to be filled"); Note, *The Federal Common Law*, 82 Harv L Rev 1512, 1522 (1969) (arguing that where state law is preempted and no specific provision governs, a "court is forced to make law or leave a void where neither state nor federal law applies" and that "[i]n such a situation it is a reasonable inference that Congress intended some law, and therefore federal law, to apply").

159 530 US 238 (2000).

160 See id at 245 ("We reject [the assertion] that, absent a substantive provision of ERISA expressly imposing a duty upon a nonfiduciary party in interest, the nonfiduciary party may not be held liable under § 502(a)(3), one of ERISA's remedial provisions.").

161 The Supreme Court did not distinguish between § 404 and § 406, as both sections refer exclusively to fiduciaries. See Stabile, 5 Empl Rts & Empl Policy J at 149 (cited in note 16) ("[I]t is difficult to reconcile [*Harris*] with the Supreme Court's position in *Mertens* that non-fiduciaries may not be held liable for participating in a breach of Section 404 fiduciary duties.").

162 For a discussion of § 404, see Part I.A.

163 See Stabile, 5 Empl Rts & Empl Policy J at 166–67 (cited in note 16).

164 537 US 280 (2003).

consequently intends its legislation to incorporate those rules."[165] These statements are somewhat at odds with *Mertens*, in which the Court indicated that an action was only available if expressly provided for in ERISA.[166] Instead, they suggest that courts should not interpret the Act to preempt federal common law without specific direction from Congress to do so.

Considering this ambiguity, the Seventh and Ninth Circuits seem to have overreached in their common law analysis as it relates to respondeat superior. In the absence of explicit direction from the Supreme Court, the availability of respondeat superior should depend in part on the logic and policy underlying it. As Melvin Aron Eisenberg argues, "[I]t is not uncommon for a court to prefer a given reading of a statutory . . . text . . . [if] it makes the text more congruent with some relevant moral norm or policy."[167] If the doctrine's likely benefits are high, costs are low, and the statutory language is ambiguous, courts should not interpret § 409(a) to close off a potentially useful theory of liability, especially where Congress could amend the relevant statutory language were respondeat superior somehow offensive to its conception of ERISA liability.

But this analysis does not dismiss out of hand Supreme Court and circuit direction for a broad reading of ERISA's statutory scheme. Even if ERISA does not clearly prohibit application of respondeat superior, courts should be mindful of the statute's breadth and complexity. Concern over respondeat superior's availability should remain in the background, perhaps bleeding over into the larger analysis of the doctrine's ability to protect employee benefit plans as a cost-benefit tiebreaker, or manifesting itself as a presumption against nonfiduciary liability.[168]

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165 Id at 285. But see *Great-West Life & Annuity Insurance Co v Knudson*, 534 US 204, 209 (2002) (reiterating the Court's reluctance in *Mertens* and *Russell* to "extend[] remedies not specifically authorized by [ERISA's] text").

166 See *Mertens*, 508 US at 255 n 5.

167 Melvin Aron Eisenberg, *The Nature of the Common Law* 196 n 35 (Harvard 1988) (discussing application of common law principles to statutory schemes).

168 The Fourth Circuit did something similar with regard to application of the doctrine of unjust enrichment. Concluding that the common law was appropriate in the circumstances of the case, the court discussed the need to proceed carefully in the face of ERISA's statutory scheme:

> [W]e must respect the fact that Congress in creating ERISA has established an extensive regulatory network and has expressly announced its intention to occupy the field. Accordingly, we must proceed cautiously in creating additional rights under the rubric of federal common law, and remember that we do not possess *carte blanche* authority to use state common law to re-write a federal statute.

Provident Life and Accident Insurance Company v Waller, 906 F2d 985, 992 (4th Cir 1990).

B. Evaluating Respondeat Superior's Likely Benefits and Costs

Courts that have accepted respondeat superior as a theory of liability generally have not addressed whether ERISA precludes it as a common law action; the inquiry for these courts has been whether it is applicable on the particular facts of the case. But even if the Act does not foreclose the application of respondeat superior, considering the ambiguity over the availability of common law after ERISA, courts should fashion a rule that limits its applicability to instances where it best protects employee benefit plans. A limited form of respondeat superior, with a presumption against its availability, could usefully blend traditional vicarious liability with the doctrine developed by the Fifth Circuit.[169] In the absence of more information about inherently fact-specific questions, modification of the common law version of respondeat superior is a second-best approach that should protect employee plans by deterring fiduciary breach and reducing costs to employers.

An early case from the Northern District of Georgia noted ERISA's "broad protective purpose" and justified its application of common law agency principles based on Congress's intent to protect retirement plans.[170] This analysis was incomplete, however, because it did not assess respondeat superior's potential costs. Assuming the court was correct that the congressional intent was in fact to protect employees, respondeat superior would be desirable only to the degree that it furthers that purpose in light of any costs created by vicarious liability.

Respondeat superior is useful to address two potential problems. First, if agents are judgment proof—meaning they lack sufficient personal funds to cover the full cost of judgments against them—they will lack incentives to take the proper level of care, as they will not be responsible for the full cost of the harm they cause.[171] Second, the agents' insolvency creates opportunities for collusion between agents and principals: "[I]f an agent's activities create the risk of a judgment that exceeds the agent's net worth and the agent can obtain a discharge in bankruptcy, then the principal and the agent can use the agent's po-

169 See Part IV.A.

170 See *Stanton v Shearson Lehman/American Express, Inc*, 631 F Supp 100, 104–05 (ND Ga 1986) ("Applying common law agency principles in ERISA actions would further Congress's intent to protect retirement plans from self-dealing, imprudent investing and misappropriation of plan funds.").

171 See Richard A. Epstein and Alan O. Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 J Legal Stud 625, 636 (2001) (noting that vicarious liability, by placing the employers' assets at risk, provides an incentive for the employers "to exercise whatever control they have over their employees to induce them to behave more carefully").

tential insolvency to their advantage under a rule of personal liability."[172] The agents' insolvency makes the principals' enterprises more profitable "by the value of the judgment less the agent's ability to pay, multiplied by the probability of the judgment."[173] Also, "if employees lack the assets to pay judgments, their wage demands may not reflect the full extent of their expected liability."[174] As a result, businesses will avoid paying for the injuries they have caused, and "the full scale of risky activity may become inefficiently large."[175] Vicarious liability forces principals to internalize the cost of the injuries they inflict on others, pressuring them to reduce the level of the risky behavior.[176] This is, briskly, the modern economic justification for the common law development of respondeat superior.

There is no such thing as a free lunch, however. The benefits of respondeat superior come at potentially high costs. In his seminal economic analysis of vicarious liability, Alan Sykes identified an important condition for respondeat superior to function properly: the ability of the principal to observe the behavior of the agent.[177] In order to influence the agent's behavior or properly adjust the activity level, the principal must be able to monitor the agent's actions. If these monitoring costs are very high, they could outweigh the benefits from the more efficient liability allocation.[178]

Accordingly, respondeat superior is most useful where agents are likely judgment proof and when principals have reasonably good and inexpensive monitoring techniques to keep their employees behaving carefully.[179] If the cost of monitoring employees is high, the gain from vicarious liability will vanish, perhaps with a concomitant rise in litigation and administrative costs, which will be passed on to the pension plan beneficiary. In a separate article, Sykes, writing with Richard Epstein, explained that "if there is no potential insolvency on the part of employees, little reason to think that employers are the superior risk bearer, and no causal uncertainties, vicarious liability is likely undesirable."[180]

Applied to the issue at hand, the potential benefits are obvious: employees wronged by a breach of fiduciary duty receive compensation

172 Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L J 1231, 1241 (1984).
173 Id.
174 Epstein and Sykes, 30 J Legal Stud at 636 (cited in note 171).
175 Id.
176 See R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 6–8, 15–16 (1960).
177 See Sykes, 93 Yale L J at 1247 (cited in note 172).
178 See id.
179 See Epstein and Sykes, 30 J Legal Stud at 637–38 (cited in note 171).
180 Id at 637.

through the solvent nonfiduciary, and there is a lower likelihood of an initial breach because of better agent-principal monitoring. If monitoring is costly and ineffectual, however, principals will be unable to control their agents. The increased liability on the principal will result in reduced activity level (meaning fewer options among third-party administrators) and higher prices for administration of employee benefit plans. The desirability of nonfiduciary liability based on respondeat superior—measured by its ability to effectuate the congressional intent behind ERISA—probably depends on how we weigh these two factors and may be fact-specific to the agent-principal relationship.[181] In order to evaluate the magnitude of these two factors, it will be helpful to know more about the current regime of administration of employee benefit plans.

1. Sea change: the shift from defined benefit to defined contribution plans.

Assumptions—or educated guesses—regarding the benefits and costs of vicarious liability should take into account the radical changes that have taken place in the private pension system since ERISA's enactment in 1974.[182] At that time, a vast majority (80 percent or more) of individuals who participated in a private retirement plan were in a traditional defined benefit plan.[183] Under these plans, employers promise to pay, as part of their employees' compensation, a certain ("defined") annual pension benefit upon retirement, usually determined by a formula that depends on years of service and average salary. The employer funds these plans by making contributions into an employee

181 Plaintiffs bringing a claim of vicarious liability must also demonstrate that agent-fiduciaries breached their duty within the scope of their employment with the nonfiduciary-principals. Whether investment managers qualify as agents or independent contractors for the purposes of respondeat superior would be a fact-specific, case-by-case inquiry. See note 36. Courts that have addressed respondeat superior have left scope of employment as a secondary question of application of the doctrine to specific facts. To the extent that the scope of employment determination will protect principals from erratic or undetectable behavior on the part of investment managers, principal liability will be limited.

182 In a recent decision, the Supreme Court recognized the shift in employee retirement investment structure as a relevant consideration in fulfilling ERISA's protective purpose. See *LaRue v DeWolff, Boberg & Associates, Inc*, 128 S Ct 1020, 1025 (2008) (noting that language from an earlier decision "accurately reflect[ed] the operation of § 409 in the defined benefit context, [but is] beside the point in the defined contribution context").

183 See James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* 277–80 (California 2004) (describing the evolution of the private pension system and the shift toward defined contribution benefit plans).

pension fund; the employer owns the assets, directs the investments, and bears the risk of depreciation.[184]

By the mid-1990s, however, a dramatic shift in employee benefit structure had taken place; more than half of all private sector workers held defined contribution plans, and contributions to these plans greatly exceeded those to defined benefit plans.[185] Today, defined contribution plans "dominate the retirement plan scene"[186] and come in a variety of forms, the most common of which is the 401(k). Employers generally make annual contributions as a form of compensation, and balances accrue in their employees' personal accounts. Employees often manage these investments and always bear the risk associated with their investment.[187] In this arrangement, employees have significantly more control over their investments;[188] and while employers may have an "intangible interest in the goodwill of its employees," the sponsoring corporation has no direct financial interest in defined contribution plans.[189] The employer corporation's interest in and association with these types of plans are limited to the initial contribution.[190]

Under this more common plan, the employer's role in administration is greatly diminished as well. Whereas defined benefit pensions were often managed by their sponsoring corporation, "many employers today do not operate or manage their own defined contribution plans";[191] employers are much more likely to offer a bundle of services provided by a third party investment service. As employers become less involved, employees have begun to self-direct these plans, and the financial services industry has begun to offer employees more and more plan options from which to choose.[192]

184 See William G. Gale, Leslie E. Papke, and Jack VanDerhei, *The Shifting Structure of Private Pensions*, in William G. Gale, John G. Shoven, and Mark J. Warshawsky, eds, *The Evolving Pension System: Trends, Effects and Proposals for Reform* 51, 52 (Brookings 2005).

185 See Wooten, *The Employee Retirement Income Security Act* at 278 (cited in note 183). For a possible explanation for this dramatic change, see id at 278–79.

186 *LaRue*, 128 S Ct at 1025.

187 See Gale, Papke, and VanDerhei, *The Shifting Structure of Private Pensions* at 52–53 (cited in note 184).

188 See Marleen A. O'Connor, *Organized Labor As Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U Richmond L Rev 1345, 1386 n 174 (1997).

189 William M. O'Barr and John M. Conley, *Fortune and Folly: The Wealth and Power of Institutional Investing* 103–04 (Business One Irwin 1992) (discussing different approaches to the question of who owns the assets in the benefit plans).

190 See id.

191 See Pamela Perun and C. Eugene Steuerle, *From Fiduciary to Facilitator: Employers and Defined Contribution Plans*, in Gale, Shoven, and Warshawsky, eds, *The Evolving Pension System* 191, 200 (cited in note 184).

192 See id at 200–01.

2. Monitoring costs.

The shift to defined contribution probably means that it is more costly for principals to monitor their agents than it was when Congress enacted ERISA. John Coffee, Jr. has explained that monitoring costs increase as investments are transferred from corporate control (as is common in a defined benefit plan) to institutional investment (which is more common for defined contribution plans).[193] This is in part because, in defined benefit plans, corporate employers have incentives to remove substandard investment managers in order to reduce the future contributions they must make to meet their obligations.[194]

Also, under a defined benefit plan, corporate employers are well positioned and incentivized to monitor the fiduciaries for their employees' retirement plans. But in the absence of employer involvement, monitoring costs increase for nonfiduciary principals (third-party investment managers, for example), as fiduciary-principals must now take the place of the corporate investor to ensure the appropriate level of care among their agents:

> [T]he problem of collective action is potentially more severe at the institutional investor level . . . . Not only are the beneficiaries of a pension fund (to use the example of the largest, most important institutional investor) as dispersed as the shareholders in a large corporation, but there is no analogue in the pension fund context to the large shareholder in the public corporation who may be willing to undertake monitoring and similar expenditures that benefit other shareholders.[195]

Coffee also suggests that corporate investors can reduce monitoring costs through interest alignment in a way that institutional investors cannot:

> [O]ne of the basic techniques in corporate governance for aligning managerial and shareholder preferences is the use of executive compensation devices, such as the stock option, that give managers an incentive to maximize value for shareholders. . . . [S]uch

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193 See John C. Coffee, Jr., *Liquidity versus Control: The Institutional Investor as a Corporate Monitor*, 91 Colum L Rev 1277, 1283–84 n 21 (1991) (arguing that the usual mechanisms of corporate accountability are unavailable or compromised at the institutional investor level).

194 See id at 1284.

195 Id at 1283 n 21. James Wooten also highlights the large stake that corporate executives had in their firm's defined benefit plans at ERISA's enactment. See Wooten, *The Employee Retirement Income Security Act* at 278 (cited in note 183).

executive compensation formulas are less used and more difficult to design for institutional investors.[196]

When employee benefit plan fiduciaries operate within the same corporate framework as the plan beneficiaries—common under a defined benefit regime—monitoring plan managers is less pressing, as the corporate sponsor can align manager-beneficiary interests. Under a defined contribution plan, however, where employees have the flexibility to remove their plan from the corporate structure, principals can less reliably count on their agents' interests to align with the employee plan. Moreover, active, intrusive monitoring may damage the principal's reputation, raising its cost in terms of lost business. Institutional investors express fear of being labeled as "activist" managers by investors, who presumably would punish heavy-handed monitoring through a reduction in business.[197] This effect is likely more powerful under a defined contribution regime, in which employee-investors control the flow of their contributions. According to this rationale, the shift away from defined benefit plans suggests that monitoring has become less effective and more costly over the last three decades.

3. Fiduciary insolvency and agent-principal collusion.

Of course, monitoring is only half of the analysis. Insolvency of the fiduciary is also a concern. In the absence of vicarious liability, if agents are unable to pay for the full cost of the harm they cause, their behavior will not reflect the full cost of their actions. The seriousness of this concern is debatable, however. Sykes notes that agent-fiduciaries are likely risk averse themselves and will take their own precautions in the form of insurance to avoid financial ruin.[198] But risk aversion alone is not enough to completely remove the need for respondeat superior. When personal liability is large, as it may be for ERISA breaches, the cost of full insurance could be prohibitive. The availability of private insurance should offset fears about agent insolvency, but it does not provide a complete solution.

The shift from defined benefit to defined contribution—relevant in the discussion of monitoring costs above—is also important to questions regarding agent-principal collusion.[199] Coffee argues that corporate

196 Coffee, 91 Colum L Rev at 1284 n 21 (cited in note 193).

197 See id at 1284 n 21, 1321.

198 See Sykes, 93 Yale L J at 1242 (cited in note 172).

199 Consider Note, *An Efficiency Analysis of Vicarious Liability under the Law of Agency*, 91 Yale L J 168, 176–84 (1981) (detailing how agent-principals can allocate enterprise income between

investors, who were common under defined benefit plans, can reduce monitoring costs and incentivize good behavior.[200] It is likely corporate investors could also monitor collusive agent-principal arrangements for similar reasons. Corporate investors, as a function of their clout and more effective monitoring, can likely detect and disrupt agent-principal shenanigans better than employees acting independently.

Given the conclusions above, there is probably a greater degree of variation between institutional investors—or at least less accountability to employees—than when ERISA was initially enacted. Principals are less able to control their agents; and, in the absence of corporate oversight, agent-principal collusion is more likely.

C. "Actively and Knowingly" Lite—A Modified Fifth Circuit Approach

Should courts accept a theory of respondeat superior as a basis for nonfiduciary liability? The simplest answer is a frustrating one: it depends. In its broadest terms, this Comment recommends—in the absence of explicit congressional direction—a modification of the common law so that courts would apply respondeat superior liability where the likelihood of insolvent fiduciaries is high and the monitoring costs of the principal is low.[201] Without better empirics regarding these costs and benefits, however, the previous statement is so general as to be almost completely unhelpful.

Fortunately, informed assumptions and trends provide some direction. The broad shift over the last three decades from defined benefit to defined contribution plans suggests that monitoring costs are higher than at the time of ERISA's enactment. Moreover, lingering concerns regarding the applicability of the common law under the ERISA statutory scheme should make courts wary of reaching too far with a common law theory not explicitly provided for in ERISA. Considering the fact-specific nature of respondeat superior's costs and benefits, a blan-

them in the absence of vicarious liability to execute an "optimal judgment-proof contract, which leaves the agent insolvent . . . and which partially evades the tort victim's rights to compensation").

200 See Coffee, 91 Colum L Rev at 1283–84 (cited in note 193). See also Part V.B.1.

201 Modification of the common law based on policy is controversial but common. Frederick Schauer notes: "In ways that Holmes identified more than a century ago, the path of the common law is a path consisting of empirical assessment, behavioral speculation, and normative analysis far more than it is a path of logical deduction or any other form of distinctly legal reasoning." Frederick Schauer, *The Dilemma of Ignorance:* PGA Tour, Inc. v. Casey Martin, 2001 S Ct Rev 267, 286–87, citing generally Eisenberg, *The Nature of the Common Law* (cited in note 167). See also Ronald Dworkin, *Law's Empire* 313 (Harvard 1986) ("[Judge Hercules] will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began.").

ket rule for respondeat superior would be overinclusive where agents are likely solvent and monitoring costs are prohibitively high.

As a cautious proxy for better empirical evidence, courts could employ a modified version of the Fifth Circuit's "actively and knowingly" requirement. While the Fifth Circuit requires active and knowing participation of the nonfiduciary in the breach of duty—making it more a theory of direct, rather than vicarious, liability—courts could instead require plaintiffs to plead a larger, and perhaps even purposeful, deficiency in the agent-principal relationship. Thus, principals need not be directly liable for the actual breach of fiduciary duty as required by the Fifth Circuit. Instead, by exercising insufficient monitoring of their employees—as compared to a market standard, for example—the breach would be "active and knowing" in that principals have structured relationships with their agents, either purposefully or constructively, in a manner the "prudent man" would find lacking.[202] Moreover, considering the opportunity for collusion between agents and principals to avoid liability through agent insolvency, plaintiffs could meet their burden by demonstrating any sort of strategic hiring or allocation of assets between the agent and principal,[203] distinguishing the failure to monitor from pure negligence. If principals and agents have ordered their relationship so that the agent is insolvent at the time of the breach, the nonfiduciary-principal should be liable under a theory of respondeat superior.

CONCLUSION

Congress enacted ERISA in an effort to provide sufficiently for employee retirement needs, establishing a private right of action against fiduciaries whose care falls below an objective standard. While courts

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202 The Seventh Circuit provided a useful analogy in another indirect liability context:

> A retailer of slinky dresses is not guilty of aiding and abetting prostitution even if he knows that some of his customers are prostitutes. . . . But the owner of a massage parlor who employs women who are capable of giving massages, but in fact as he knows sell only sex and never massages to their customers, is an aider and abettor of prostitution (as well as being guilty of pimping or operating a brothel).

In re Aimster Copyright Litigation, 334 F3d 643, 651 (7th Cir 2003). This is in part because the massage parlor owner has structured his business in a way that permits him to benefit from wrongdoing, whereas slinky dress retail is only loosely correlated with prostitution and is not actively organized to promote illegal behavior. See also Daryl J. Levinson, Aimster *and Optimal Targeting*, 120 Harv L Rev 1148, 1149–52 (2007) (discussing the principal's capacity to control the agent at reasonable cost as a condition for the vicarious liability rule to be efficient). The case-by-case inquiry for courts will be whether defendants in respondeat superior actions more closely resemble dress retailers or massage parlors.

203 See Part V.B.

have consistently denied plaintiffs' attempts to impose direct liability on nonfiduciaries, they have reached different conclusions over the availability of respondeat superior as a theory of nonfiduciary liability. Whereas some see respondeat superior as a tool to protect employee benefit plans, others have read ERISA comprehensively, leaving no room for theories of liability not expressly provided for in the statutory scheme.

To reduce this tension, courts should adopt a moderate compromise position. Though recent Supreme Court statements and application of the federal common law in other contexts suggest that courts should not assume the unavailability of respondeat superior in the absence of explicit congressional direction, lingering ambiguity recommends a presumption against it. Where plaintiffs can demonstrate that principals are inadequately monitoring their agents, however, or that the likelihood of agent insolvency is high, especially as a result of agent-principal collusion, courts should accept vicarious liability as a useful means to further ERISA's protective purpose.