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Maria O'Brien

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BOOK REVIEWS

Insecure Retirement Income, Wrongful Plan Administration and Other Employee Benefits Woes—Evaluating ERISA at Age Thirty

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974—A POLITICAL HISTORY. By James A. Wooten. *Berkeley: The University of California Press*, 2004. Pp. xv, 415. \$65.00 (cloth).

MARIA O'BRIEN HYLTON†

Thirty years after it was enacted, ERISA¹ jurisprudence is, in several important respects, in a sorry state. For example, in the fall of 2004, when James Wooten's book first crossed my desk, the U.S. District Court for the Northern District of California dismissed a complaint in an employee benefits case that garnered depressingly little attention even in ERISA circles. The facts do not appear to have been terribly complicated, although the defendant's course of conduct is a bit hard to fathom.² Louis Goeres was

† Professor of Law, Boston University. E-mail: mhylton@bu.edu.

1. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461 (2000).

2. *Goeres v. Charles Schwab & Co., Inc.*, No. C04-01917 CRB, 2004 WL 2203474, at *1 (N.D. Cal. Sept. 28, 2004) was decided on the defendants' motion to dismiss for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). In evaluating the defendants' motion, the court is obligated

the beneficiary of a Schwab Plan Retirement Savings and Investment Plan. He had been so designated by his deceased domestic partner, Stephen Ward, who had been a Schwab employee and plan participant. Mr. Ward died in December 1999. Goeres informed Schwab's human resources department of Mr. Ward's death in January 2000. Goeres was asked to submit a death certificate, which he did. When Goeres contacted Schwab again in January or February of 2000 he was told that he was not a named beneficiary on Mr. Ward's account. In May 2001, Schwab representatives contacted Goeres and said that he was, in fact, the named beneficiary on Ward's account. Schwab then sent Goeres an application for plan benefits. Goeres claims that the materials he was sent failed to inform him of his distribution options as a non-spouse beneficiary.

The practical problem presented by Schwab's unexplained delay was that Ward's account was valued at about \$1.2 million in December 1999, about the time he died. By the time Goeres collected the contents of the retirement plan in 2004 it was valued at approximately \$565,000—or less than 50% of the account's value at the time of Ward's death. The gist of Goeres' claim was that he received substantially less money than he would have had Schwab promptly notified him of his beneficiary status and his benefit distribution options. His loss, he argued, was in excess of \$500,000 and was the direct result of Schwab's³ breach of the fiduciary duty it owed him as a plan beneficiary.⁴

to accept as true all material allegations in the complaint as well as the reasonable inferences drawn from them. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

3. Plaintiff named three defendants: Charles Schwab & Co., Inc. (employer), Schwab Retirement Plan Services (plan) and the Administrative Committee of the Schwab Plan Retirement Savings and Investment Plan (administrator). *Goeres*, 2004 WL 2203474, at *1.

4. Plaintiff alleged that all three defendants were fiduciaries of the ERISA retirement plan, and all three breached their fiduciary duties by failing to timely notify plaintiff of his plan beneficiary status and distribution options. Plaintiff claimed to seek equitable relief pursuant to 29 U.S.C. § 1132(a)(3) (2005) in seeking a modification of the retirement plan's records to reflect plaintiff's entitlement to a distribution of Ward's retirement account as of a date no later than June 30, 2000.

Following a line of cases that has been troubling from the first,⁵ the district court dismissed Goeres' complaint. Noting that the relief Goeres sought was legal and not equitable and citing the well-known decisions in *Mertens*⁶ and *Great West*,⁷ the court noted that:

[m]oney damages, the [*Knudson*] Court explained, is the classic form of legal relief. . . . A court order modifying the Retirement Plan records to reflect that plaintiff was entitled to a distribution of benefits no later than June 30, 2000 would be meaningless unless it meant that defendants must pay plaintiff the value of the account on that date. Thus, what plaintiff is actually seeking is his monetary damages arising from defendants' failure to timely notify him of his beneficiary status.⁸

And, even though the absence of monetary relief meant there was no adequate remedy for what appeared⁹ to have been a straightforward instance of breach of fiduciary duty, the court reiterated what is fast becoming a sorry mantra in ERISA jurisprudence: legal relief—i.e., money damages—is not available under ERISA section 1132(a)(3) even where there is no other make-whole remedy.

5. See generally *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). These cases demonstrate the Supreme Court's increasingly narrow read of ERISA's civil enforcement provision contained in 29 U.S.C. § 1132(a)(3). The Court has interpreted ERISA's authorization of "appropriate equitable relief" to exclude monetary relief while transplanting the traditional, pre-1938 division between law and equity into ERISA remedy law. The combination of this interpretation with ERISA's broad preemption provision has led the federal courts to preclude remedy in several instances where a fiduciary's wrongful conduct has caused measurable harm. For an excellent critique of the Court's interpretation of "appropriate equitable relief," see John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003).

6. *Mertens*, 508 U.S. at 248.

7. *Knudson*, 534 U.S. at 204.

8. *Goeres*, 2004 WL 2203474, at *3 (citation omitted).

9. Since the case was decided on a Rule 12(b)(6) motion, the court accepted as true all material allegations in the complaint. *Id.* at *2.

Goeres and the many other recent cases like it¹⁰ are remarkable after *Mertens* and *Great West*, both for the persistence of the ERISA plaintiff's bar in trying to find ways to obtain make-whole relief in egregious cases and for the continued refusal of Congress to amend ERISA to provide adequate make-whole remedies.¹¹ A patently unjust

10. See *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1076 (9th Cir. 2005) (declaring reliance damages unavailable to injured plaintiff left uninformed that company's long-term disability benefits had been discontinued shortly before automobile accident); *Calhoun v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir. 2005) (declaring restitution of medical bills for injured wife and children unavailable to plaintiff unaware that health coverage was cancelled, because employer sent payment coupons to plaintiff's former address); *Ramsey v. Formica Corp.*, 398 F.3d 421, 425 (6th Cir. 2005) (denying plaintiffs' request for temporary restraining order to enjoin employer from reducing pension plan payments after years of overpayment); *Callery v. U.S. Life Ins. Co. in City of N.Y.*, 392 F.3d 401, 405-06 (10th Cir. 2004) (declaring reliance damages unavailable to plaintiff whose employer failed to notify her that spouse's life insurance was terminated upon divorce); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004) (declaring backpay unavailable for plaintiffs terminated by employer to prevent plaintiffs from attaining eligibility in employee benefit plans); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 480 (6th Cir. 2001) (barring plaintiff from recouping "significant economic loss" as a result of plan administrator's failure to rollover plaintiff's 401(k) assets into mutual funds plaintiff had specified); *Bast v. Prudential Ins. Corp. of Am.*, 150 F.3d 1003 (9th Cir. 1998) (barring recovery where plan administrator's delay in authorizing particular medical treatment allowed cancer to metastasize from lung to brain, killing participant); *Forbes v. Cemex, No. Civ.A. 1:03CV67-R*, 2005 WL 1801923 (W.D. Ky. July 28, 2005) (barring plaintiff's recovery of insurance proceeds left unpaid due to prior discontinuation of group life insurance plan and failure to notify plaintiff's husband of opportunity to convert to individual life insurance plan); *Kyro v. Gen. Prods. Corp.*, No. 04-74145, 2005 WL 1802088, at *1 (E.D. Mich. July 28, 2005) (declaring reliance damages unavailable to plaintiff whose husband did not convert life insurance plan as required, but whose employer had been paying premiums for years due to "clerical error"); *Gonzalez Villanueva v. Warner Lambert*, 339 F. Supp. 2d 351 (D.P.R. 2004) (denying recovery of lost salaries resulting from employer's denial of long term disability benefits and eventual termination of sick plaintiff); *Estate of Mattern v. Honeywell Int'l, Inc.*, 241 F. Supp. 2d 540 (D. Md. 2003) (barring plaintiffs from recouping \$41,000 in capital gains taxes that could have been avoided had employer rolled over plan funds to deceased participant's husband before husband also died).

11. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (supporting the "rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime") (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003)); *Cicio v. Does*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part) ("[T]he injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under the

and inefficient legal regime continues to replicate itself again and again. Conduct that clearly constitutes breach of fiduciary duty, negligent plan administration or worse, and which causes significant financial loss, pain and suffering, or other harm often cannot be remedied under ERISA. (And, ERISA's broad preemption provisions preclude relief in the state courts.)¹²

How, thirty years after the statute's enactment, did we end up in this situation? This question was one I hoped James Wooten's well-written and thorough political history could help answer. The book does not disappoint, although it leaves the careful reader less than sanguine about the prospects for reforming ERISA. Wooten's political history is extremely valuable for its detail and description of the long process that culminated in ERISA. It offers few clues, however, to how ERISA plaintiffs (like Goeres) might extricate themselves from this present state of affairs.

I. THE MODEST ROLE OF "SPECIAL INTERESTS"

Wooten's project is an ambitious one—to make the counterintuitive argument about the non-dominant role of "special interests" in the development of major social

statute, or Congress revisits the law to the same end."), *vacated sub nom.* *Vytra Healthcare v. Cicio*, 124 S. Ct. 2902 (2004); L. Darnell Weeden, *ERISA's Preemption Ruling Prevents a Patient from Suing an HMO Under State Malpractice Law: After Aetna Health, Inc. v. Davila Who Will Grant the Working Middle Class a Meaningful Right to Be Heard?*, 7 U. PA. J. LAB. & EMP. L. 715, 745 (2005) (urging passage of Patients' Bill of Rights Law to "wipe out the vast regulatory vacuum created by ERISA's . . . preemption rationales"); Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH U. L. REV. 1039, 1070-75 (2005) (urging passage of federal legislation providing patients with right to independent medical review). The Patients' Bill of Rights Act of 2004, introduced in June 2004, was intended to strengthen claims review procedures and amend ERISA by introducing a cause of action against health plan fiduciaries for "fail[ure] to exercise ordinary care in making a decision." H.R. 4628, 108th Cong. § 402 (2004). The bill never became law.

12. ERISA preempts all state laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (2000). The Supreme Court has recognized ERISA's preemption clause to be "broad" and "expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). ERISA's savings clause, however, saves any state law that "regulates insurance." § 1144(b)(2)(A); see *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 334 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002); *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

legislation, namely ERISA. He demonstrates how a strong legislative drive for worker pension security—a component of employee welfare—came to dominate the process that resulted in the statute we live with today. Portions of the book are especially helpful to the ERISA neophyte who wants to understand the basic project that is ERISA and to evaluate how the statute has performed in light of its own objectives. On a general conceptual level, Congress was trying to devise a system that would protect workers from both default risk¹³ and forfeiture risk.¹⁴ Many of the statute's best known features—vesting rules,¹⁵ funding rules,¹⁶ accrual rules,¹⁷ the creation of the Pension Benefit Guaranty Corporation (PBGC)¹⁸—were designed explicitly to address one or both of these risks. However, Wooten argues, this did not happen as a result of “special interests” in spite of the popular view that “special interests” are invariably the key players in whether and how new legislation comes to life. Wooten notes that although organized labor was divided and many business groups opposed pension reform on the grounds that it would be onerous and costly,

[t]he historical record is clear. Government officials wanted to regulate pension plans because they believed it was the *right* thing to do. In published statements and private communications, officials in the executive branch and Congress repeatedly appealed

13. Default risk is simply the risk that a plan may lack adequate assets in the future to meet its financial obligations to participants. Even a casual reader of the business pages is aware that ERISA has not completely eliminated default risk for defined benefit plans in the United States. See Daniel Altman, *Enron's Collapse: The Pensions; Bush Promises a Look at Employee Risks, but Experts Say Solutions Won't Be Easy*, N.Y. TIMES, Jan. 11, 2002, at C4; *GE Reveals \$5.25-Billion Pension Loss*, L.A. TIMES, Mar. 11, 2003, § 3, at 4; *Panel to Investigate Polaroid Retirement Payments*, N.Y. TIMES, Jan. 16, 2002, at C4; Mary Williams Walsh, *Pension Law Loopholes Helped United Hide Its Troubles*, N.Y. TIMES, June 7, 2005, at C1; *WorldCom's Pension Plan Draws Warning*, L.A. TIMES, July 26, 2003, § 3, at 3.

14. Forfeiture risk is the risk that a plan participant will lose the ability to collect a pension because of job loss, layoff, job change, or other conduct which bars the participant from satisfying plan age or years of service requirements.

15. 29 U.S.C. §§ 1051-1053 (2000).

16. 29 U.S.C. §§ 1081-1085 (2000).

17. 29 U.S.C. § 1054 (2000).

18. 29 U.S.C. § 1302 (2000).

to a normative conception of the purposes pension plans should serve. . . . Their conduct only makes sense as an expression of their values.¹⁹

Wooten makes a persuasive case for a more than thirty-year-old process that appears, indeed, to have been dominated by figures who pressed for this historic legislation without regard to personal gain. That this seems so astonishing early in the twenty-first century is probably indicative of a level of pervasive cynicism about the legislative process that the key players in Wooten's narrative would have been unable to imagine. The use of possibly misleading data by ERISA proponents and the importance of the well-known failure of the Studebaker Corporation's pension plan²⁰ are part of the story, as is the development of distinct roles for the Labor Department and the IRS. It is a story that seems to contain about as many compromises as one would expect given the need to address many, disparate concerns—the taxation of plans, the needs of younger versus older workers, the costs to be borne by plan administrators (i.e., the business community), the mechanics of plan insurance, single versus multi-employer plans, and preemption. In some cases, also not surprising, legislators appear to have had an inkling of the trouble that certain provisions of the statute might create in the future. With respect to preemption, for example, which has absorbed a substantial amount of federal and state court time and attention in the last two decades,²¹ Wooten

19. JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 8 (2004).

20. See Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in *PENSION & EMPLOYEE BENEFIT LAW* 68-73 (John H. Langbein & Bruce A. Wolk eds., 3d ed. 2000); Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA*, 41 *WAYNE L. REV.* 1233, 1238 (1995) (acknowledging significance of 1963 Studebaker plant closing in ERISA's passage).

21. See *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003) (holding that to "regulate insurance" and be saved from ERISA preemption, state law must (1) be specifically directed toward insurance entities and (2) substantially affect the risk pooling arrangement between the insurer and the insured); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990) (holding that ERISA preempts state law claim for unlawful discharge to prevent attainment of benefits under ERISA plan); *FMC Corp. v. Holliday*, 498 U.S. 52, 64-65 (1990) (holding that ERISA preempts state laws relating to self-funded

describes an eerily prescient exchange in which concern was expressed that “[a] federal law which preempts only particular aspects of pension and welfare plans . . . will leave a two-fold effect: (1) states will seek out legislation aspects not specifically preempted, and (2) endless litigation will emerge from disputes over whether a particular aspect has, or has not, been preempted.”²²

No one seems to have anticipated that this now all-too-familiar drama would play itself out in the welfare plan arena,²³ but it is clear that the broad ERISA preemption provision bequeathed by the statute was intended as such.

As a political history, Wooten’s book makes for interesting, detailed, and, at times, passionate reading. His characterization of ERISA, however, as representative of a shift in thinking about federal pension policy—i.e., from pensions as a tool for managing employees to a worker-security model—left me wondering about the large body of

ERISA plans, because such plans fall within ERISA’s “deemer clause”); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (explaining that ERISA’s preemption provision is “broad” and “expansive”); *Levine v. United Healthcare Corp.*, 402 F.3d 156, 166 (3d Cir. 2005) (holding that ERISA preempts New Jersey collateral source law that applies to both insurance and non-insurance entities); *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1355-56 (11th Cir. 1998) (holding that ERISA preempts Alabama rule of civil procedure); *Stillmunkes v. Hy-Vee Employee Benefit Plan and Trust*, 127 F.3d 767, 770 (8th Cir. 1997) (holding that ERISA’s “deemer clause” exempts self-funded plan from Iowa subrogation laws); *Haw. Mgmt. Alliance Ass’n v. Ins. Comm’r*, 100 P.3d 952, 959 (Haw. 2004) (holding that ERISA does not preempt Hawaii’s Patient’s Bill of Rights and Responsibilities Act, because Act “regulates insurance”).

22. WOOTEN, *supra* note 19, at 265.

23. See *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2501 (2004) (upholding ERISA preemption as a ground for removal); *Wirth v. Aetna U.S. Healthcare*, 137 F. App’x 455, 459 (3d Cir. 2005) (holding plaintiff’s state claims completely preempted by ERISA and holding that federal district court, after removal, had subject matter jurisdiction); *Levine v. United Healthcare Corp.*, 402 F.3d 156, 163 (3d Cir. 2005) (holding that state law claims to recover reimbursement paid to insurers are essentially claims for “benefits due,” and are accordingly preempted by ERISA) (citing *Arana v. Ochsner*, 338 F.3d 433, 438 (5th Cir. 2003)); *Kuthy v. Mansheim*, 124 F. App’x 756, 757 (4th Cir. 2004) (holding proper the removal of plaintiff’s claim for failure of HMO to authorize necessary bone marrow transplant for cancer patient); *Land v. Cigna Healthcare of Fla.*, 381 F.3d 1274, 1276 (11th Cir. 2004) (holding plaintiff’s state law malpractice claims against HMO completely preempted by ERISA and removable to federal court); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 449 (3d Cir. 2003) (affirming federal district court’s exercise of removal jurisdiction over plaintiff’s claim against HMO for negligent interference with doctor’s decision to insert tracheostomy tube).

common law that has repeatedly defended the absence of vesting and other standards for welfare plans on the ground that employers need complete freedom and flexibility to design plans for the purpose of attracting and retaining employees. If Congress' work on ERISA represents a shift in the government's view of pension policy, there is scant evidence that it has permeated that of the federal courts or the employer community. Wooten notes that ERISA has had a major impact on the provision of healthcare in the United States at a time when the industry was itself undergoing dramatic changes. However, ERISA provides few substantive protections to health and disability plan participants and their beneficiaries, and state court actions are often preempted. The "regulatory vacuum"²⁴ that Wooten describes is huge and presents a serious problem for thousands of workers every year. He suggests that ERISA's political history implies "that, without the threat of conflicting state laws, employers and unions that sponsor multistate health plans will oppose initiatives to create federal minimum standards for health plans or expand the liability of such plans."²⁵ This sounds like a "special interests" model at work to keep the "worker security" model from being completely realized.

There is general agreement that much pre-ERISA systematic forfeiture risk has indeed been eliminated as Congress hoped.²⁶ Also, the evidence with respect to default risk is that ERISA has been largely successful in spite of

24. WOOTEN, *supra* note 19, at 272.

25. *Id.*

26. The vesting rate (the percentage of the entire population with at least some entitlement to an employer's contributions) increased overall from 24% in 1979 to 41% by 1998. The participant vesting rate (the percentage of all participants at least partially vested in a retirement plan) rose from 52% in 1979 to 93% in 1998, cutting across workers in different sectors and of both sexes. Much of this improvement can be credited to the Tax Reform Act of 1986, which mandated 100% vesting for all employees by the end of their fifth year of employment with the plan sponsor. Employee Benefits Research Institute, *EBRI Data Book on Employee Benefits*, ch. 10, tbl 10.5 (4th ed. 2005), <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2010.pdf>.

In addition, the Economic Growth and Tax Relief Reconciliation Act of 2001 greatly enhanced pension portability, allowing workers to transfer their retirement savings from one employer's plan to another's or to an Individual Retirement Account (IRA).

the prominent failures of the past few years.²⁷ Of course, Congress does not appear to have anticipated the dramatic decline in the number of defined benefit plans²⁸ and the simultaneous explosion of defined contribution²⁹ plans. One view of this change is that plan sponsors, seeking a degree of protection from certain ERISA provisions,³⁰ have abandoned defined benefit plans, and the insurance³¹ that accompanies them, in search of lower cost and less regulated options. Wooten also suggests that “[t]he decline of qualified defined-benefit plans likely owes something to the fact that the corporate officers who select compensation programs do not stand to gain much from such a [defined-benefit] plan.”³²

Many have commented on this shift from pensions in which the plan bears the risk of investment performance to plans in which this risk is borne by participants.³³ Wooten

27. The number of total PBGC plan terminations fell from 28,572 during 1975-1979 to 6969 during 2000-2004. These numbers reflect both voluntary and involuntary (PBGC-initiated) plan terminations. CORP. POLICY & RESEARCH DEPT., PENSION BENEFIT GUAR. CORP, PENSION INSURANCE DATA BOOK 2004, at 28 (2005) [hereinafter PENSION], available at http://www.pbgc.gov/docs/2004_databook.pdf.

28. Defined benefit plans are those pension plans under which employers promise employees a fixed level of retirement income determined by a formula, typically dependent on the employee's years of service and level of compensation.

29. Defined contribution plans are distinguished from defined benefit plans in that employers do not promise any fixed level of retirement income. Rather, the employer contributes to each employee's individual account in the plan, and the value of this account at retirement determines the employee's retirement benefit.

30. 29 U.S.C. §§ 1081-1085 (2000) (establishing rates at which employers must fund plans to ensure that there are assets sufficient to meet benefit obligations); 29 U.S.C. §§ 1301-1322(a) (2000) (relating to plan termination, but does not apply to defined contribution plans).

31. A desirable consequence of abandoning a defined benefit plan in favor of a defined contribution plan is the cost savings to the employer that comes with no longer having to pay PBGC premiums. In 1974, the flat-rate premium per participant for single-employer plans was \$1.00. In 1986, that figure reached \$8.50. By the mid-1990s, it had grown to \$19.00 per participant. PENSION, *supra* note 27, at 62.

32. WOOTEN, *supra* note 19, at 279.

33. *See id.* at 278 n.32.

hints that there is evidence that suggests that ERISA itself is at least partially responsible for this change.³⁴

What is lacking in the discussion is an explicit acknowledgement of the important role that cost plays in virtually every plan design decision.

II. SOME ECONOMICS OF EMPLOYEE BENEFITS

As Wooten notes at several points, ERISA, although primarily focused on pensions, also applies to a wide range of non-pension welfare benefits, including many long- and short-term disability plans, and many health insurance plans.³⁵ One important feature of all ERISA regulated plans is that they are non-mandatory—i.e., offered at the discretion of the plan sponsor who is often an employer. While there is reasonably well-developed literature on the economics of employee benefits,³⁶ most legal academics pay little attention to it with predictable consequences. Consistent with this approach, Wooten, whose attachment to the notion that “special interests” in the political science sense were not critical to the core ERISA story is unwavering, and fails to address in a systematic way the central role of cost, paternalism, and worker preferences in both pre-ERISA and post-ERISA regimes.

For example, as the current crisis in healthcare insurance coverage³⁷ suggests, cost and workers’

34. “In part, the shift toward defined-contribution plans is the result of changes in federal law. ERISA created new regulatory standards for defined-benefit and defined-contribution plans, but the funding rules and insurance program affect only defined-benefit plans. Later revisions of ERISA’s protective policies . . . further increased the cost difference between defined-benefit and defined-contribution plans.” *Id.* at 278.

35. An ERISA-governed plan generally requires the following: (1) identification of the intended benefits, (2) identification of the intended beneficiaries, (3) a source of financing, and (4) a procedure for obtaining benefits. *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982).

36. A good starting point and personal favorite of mine is Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989). See also Gail A. Jensen et al., *Cost Sharing and the Changing Pattern of Employer-Sponsored Health Benefits*, 65 MILBANK Q. 521 (1987); Deborah Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. Chi. L. Rev. 1275 (1991).

37. The number of individuals without health insurance in the United States rose to 45.8 million in 2004, constituting 15.7% of the population.

preferences are crucial to understanding the problem and, presumably, to crafting a solution. Wooten notes that changes in the labor market, principally the decline in union density rates, have “reinforced the effects of the federal law.”³⁸ This is an important issue that cries out for additional attention. The link between unionization and the presence of, for example, health insurance is strong.³⁹ If Congress was indeed motivated by a worker security model when it enacted ERISA, why has that model failed to surface in other areas of federal law? Why, for instance, has Congress resisted most of organized labor’s legislative agenda for the past three decades, even though much of that agenda was designed to facilitate the organizing of employees?⁴⁰ In other words, to the extent that union penetration is a proxy for the provision of pension and health insurance benefits, why did the worker security model fail to extend itself to federal labor law?

The absence of a coherent economic framework makes it hard to understand and accept the notion that worker security ruled the day in the early 1970s and then gave way to the post-ERISA landscape we currently inhabit. One cannot understand the behavior of plan sponsors or participants without focusing on the crucial role that cost containment and flexibility play. On the welfare plan side, plan sponsor devotion to ERISA preemption is primarily a function of the need to preserve future flexibility with respect to cost control. As Wooten notes, welfare plan benefits generally do not vest—i.e., they do not become the property of plan participants in the way pension benefits do. The absence of vesting means an employer that has decided to offer health or disability insurance in the current year can reduce or eliminate altogether those benefits in a

CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU POPULATION REPORTS: INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE U.S. 16 (2004), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>. Many of those uninsured are working people or the dependents of working people.

38. WOOTEN, *supra* note 19, at 279.

39. See Karen Seccombe & Cheryl Amey, *Playing by the Rules and Losing: Health Insurance and the Working Poor*, 36 J. HEALTH & SOC. BEHAV. 168, 176 (1995).

40. The Public Safety Employer-Employee Cooperation Act of 2003 was the last attempt on Capitol Hill to require unionization of police officers and firefighters post-9/11. The bill never became law. See S. 606, 108th Cong. (2003).

future year. In fact, as health insurance premiums have soared⁴¹ recently, many employers have sharply reduced benefits, increased premiums, or dropped coverage entirely. The health insurance crisis is a story about costs—specifically who can and will bear them and for how long. Employers that can contribute toward coverage today may not be certain of that ability tomorrow. ERISA's regulatory vacuum for welfare plans has repeatedly been cited by courts as beneficial to employer flexibility.⁴² It is also a story about worker preferences, for as workers face increasing costs in their share of premiums, many choose to go without insurance. The problem with this expressed employee preference is that some percentage of the time employees incorrectly evaluate the likelihood that they will need medical care. This negative adverse selection has serious consequences for public hospitals and other institutions that often step into the breach.

The post-ERISA pension story is also one that is driven by cost considerations. Defined benefit plans force plan sponsors to bear the risk that the plan may not have sufficient assets to satisfy its financial obligations as employees retire. Defined benefit plans and the insurance

41. See Rob Kaiser, *Health Premiums Soar; Annual Cost to Insure a Family Almost 60% Higher Than in 2001, Study Finds*, CHI. TRIB., Sept. 10, 2004, at C1.

42. See *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2499 (2004) ("The limited remedies available under ERISA are an inherent part of the 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.") (citation omitted); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("[C]ourts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection . . . and . . . its desire not to create a system that is so complex that administrative costs . . . unduly discourage employers from offering welfare benefit plans in the first place."); *Graham v. Balcov Co.*, 146 F.3d 1052, 1055 (9th Cir. 1998) ("With ERISA preemption, Congress sought to encourage the formation of employee benefit plans by standardizing the regulatory requirements applicable to plan administrators."); *McGann v. H & H Music Co.*, 946 F.2d 401, 407 (5th Cir. 1991) ("Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. . . . [U]nstable variables prevent accurate predictions of future needs and costs." (quoting *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)); *Forbes v. Cemex*, No. Civ.A.1:03CV67-R, 2005 WL 1801923, at *2 (W.D. Ky. July 28, 2005) ("ERISA preempts state laws that . . . 'bind employers or plan administrators to particular choices or preclude uniform administrative practice'" (citation omitted).

program to protect them administered by the PBGC⁴³ contain a number of well-known and arguably perverse incentives.⁴⁴ Defined contribution plans are consistent with an increasingly unorganized workforce in which all of the investment risk remains with employees who are presumed competent to make private savings decisions. After all, employees who do not need unions to mediate their work experience can probably be counted on to appropriately express their retirement preferences. If a participant makes intelligent choices and saves consistently she ought to enjoy a financially comfortable retirement. If she fails to save, or makes poor choices, no insurance or other back up will support her after she retires.

Thus, the non-mandatory benefits world is now characterized by a strongly anti-paternalistic ethos. Employers make the choices they feel are best (i.e., most cost effective) for them, and employees do likewise. Benefits are now explicitly a tool for attracting and retaining employees. Wooten's worker security model, if it really ruled the day thirty years ago, now lives a precarious existence in the mandatory benefits arena. And, as the ongoing debate over privatizing Social Security⁴⁵ (perhaps

43. See 29 U.S.C. § 1302 (2000).

44. The PBGC too often lacks lien priority status in employer bankruptcy proceedings, arguably leaving employers less accountable to their employees while shifting the burden of promised pension benefits to the PBGC. See Jill L. Uylaki, Note, *Promises Made, Promises Broken: Securing Defined Benefit Pension Plan Income in the Wake of Employer Bankruptcy: Should We Rethink Priority Status for the Pension Benefit Guaranty Corporation?* 6 ELDER L.J. 77, 91-96 (1998). Related to this issue is the moral hazard associated with PBGC insurance and the perverse incentives encouraging withdrawal and plan termination. See, e.g., Alicia H. Munnell, *Guaranteeing Private Pension Benefits: A Potentially Expensive Business*, NEW ENG. ECON. REV., Mar.-Apr. 1982, at 24, 28-33; DAN M. MCGILL & DONALD S. GRUBBS, JR., *FUNDAMENTALS OF PRIVATE PENSIONS* 584-85 (6th ed. 1989) (explaining incentives for employers to terminate plans or not fund the maximum tax-deductible level, since, "[c]ontrary to sound insurance principles, the insured event was largely under the control of the plan sponsor").

45. President George W. Bush has proposed partial privatization of Social Security through a transition to individual accounts. Under such a proposal, a worker could divert a percentage of wages from the Federal Insurance Contributions Act (FICA) and voluntarily place the funds into private accounts for investment in stocks, bonds, or mutual funds. Debate rages over the wisdom of subjecting workers' retirement income to market risks. See, e.g., Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 981 (2000) ("[A]dvocating

the best known and most important mandatory employee benefit) demonstrates, the appropriate role for cost considerations and the anti-paternalistic model is up for grabs.

In sum, the economics of federal pension and employee benefits policy is mostly about cost shifting and retaining flexibility in the face of future uncertainty. Where Wooten's worker security model seems most applicable, however, is with respect to Social Security. Although, as Professor Weiss observed more than ten years ago, it applies to private pensions as well:

The United States attempts to provide retirement income security through two programs: Social Security and the system of tax subsidies for retirement savings. Both of these mechanisms display Congress' desire to protect people from the consequences of their own actions by restricting individual choice. . . . Participation in Social Security is compulsory. Thus, for the individual contributor, the Social Security system is just like forced savings: individuals are required to give up consumption now in return for more consumption later. . . . The system of tax incentives also has a paternalistic character, though of a more subtle kind. Unlike Social Security, the tax system does not require individuals to save. Rather, it encourages savings through subsidies. But existing subsidies are intended to serve a paternalistic objective. . . . [T]he Internal Revenue Code provides the highest ceilings on tax deductions to those pension programs that leave the least room for individual choice regarding savings levels.⁴⁶

Wooten's claim that worker security more than "special interests" informed the process that gave birth to ERISA is problematic from a backward-looking standpoint. From the vantage point of thirty years hence, worker security seems to have little to do with ERISA. The preemption cases, the

privatization . . . constitute[s] a step in the direction of eliminating middle class retirement as a labor force management tool, substituting in its place an economic old age lottery in which retirement would once again become a hope rather than an expectation."); Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 83-85 (2004) (highlighting incompetence of average American adult's portfolio management skills); Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341 (2000) (speculating on partial privatization's effects on women, minorities, and low-income workers).

46. Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275, 1279-80 (1991).

ongoing *Goeres*-type struggle to fashion make-whole remedies, the record levels of employees without access to health insurance coverage, and the shift from defined benefit plans to defined contribution plans do not, individually or collectively, tell a story in which Congress struggles to achieve worker security. On the contrary, the story is one about ever-shifting efforts to contain and shift costs in the face of future unknowns. I suspect that Wooten knows this disappointing post-ERISA landscape as well as anyone. It would be enormously helpful to learn how we moved from the worker security model to the current state of affairs.

It is hard, for example, to see even a glimmer of worker security in the remedy cases. The current cost-dominated climate is in no way consistent with Wooten's description of worker security in the early 1970s. Add to that the perverse incentives created by ERISA in the remedy cases and the reader is left wondering whether someone will write a book that explains what happened to the worker security model (and, possibly, how to revive it). Cases like *Goeres* are not troubling simply because a plan participant or beneficiary is left without a make whole remedy, although that is a persistent and tragic hallmark of the *Mertens* and *Great West* line of cases. *Goeres* and every case like it⁴⁷ create an incentive for plan sponsors and administrators to exercise little or no care in their dealings with participants and beneficiaries.⁴⁸ Again, the economics literature⁴⁹ on damages and incentives is helpful here.

47. See cases cited *supra* note 10.

48. ERISA allows participants and beneficiaries to bring a civil action for a breach of fiduciary duty, but the legal and equitable relief available in such an action cannot be individualized. Rather, the relief sought must inure to the plan as a whole. See 29 U.S.C. §§ 1109(a), 1132(a)(2) (2000); see also *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985) (“[ERISA’s] draftsmen were primarily concerned with . . . remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.”). Under § 1132(a)(3), individuals may seek relief for violations of ERISA or the terms of the plan, but this provision permits only “appropriate equitable relief,” the Supreme Court having narrowly interpreted this language to mean relief “typically available in equity.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

49. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 183 (1968) (“Although only the attitudes offenders have toward risk can directly determine whether ‘crime pays,’ rational public policy

In employee benefits, as in other areas of law such as torts,⁵⁰ antitrust,⁵¹ and criminal law,⁵² the central concern in creating a penalty regime is to maximize participant and beneficiary welfare without discouraging conduct, which is in fact socially optimal. In other words, the goal of a properly functioning system of penalties is to optimally discourage undesirable conduct without discouraging socially beneficial conduct. As Professor Langbein⁵³ has noted (and Wooten appears to agree⁵⁴) ERISA is fundamentally federal trust law. (Many have noted the appropriation of many key features of trust law by the drafters of ERISA.)⁵⁵ The importance of this connection between trust law and ERISA is that the law of trusts would have been

indirectly insures that 'crime does not pay' through its choice of [the probability of conviction] and [the level of punishment]." (citation omitted).

50. See Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991) (highlighting the failure of both strict liability and negligence suits to internalize social costs of wrongdoing when litigation is costly); Keith N. Hylton, Reply, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998) (proposing a socially optimal framework indicating when punitive awards should aim to internalize victim's loss and when they should aim to eliminate tortfeasor's gain).

51. See Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987) (arguing that antitrust enforcement ought to give priority to advancing efficiencies in innovation and production over allocative efficiency); John E. Lopatka, *The Case for Legal Enforcement of Price Fixing Agreements*, 38 EMORY L.J. 1, 48 (1989) ("[A]n inefficient cartel may not be deterred and . . . an efficient cartel may set output below the proper level if antitrust penalties are sub-optimal.").

52. See Becker, *supra* note 49, at 170.

53. Langbein, *supra* note 5, at 1319 ("Congress made a deliberate choice to subject [ERISA] plans to the pre-existing regime of trust law rather than to invent a new regulatory structure.").

54. See generally WOOTEN, *supra* note 19, at 97.

55. See, e.g., 29 U.S.C. § 1103(a) (2000) ("assets of an employee benefit plan shall be held in trust"); *Cent. States v. Cent. Transp., Inc.*, 472 U.S. 559, 571-72 (1985) (drawing an analogy between the duty ERISA imposes on fiduciaries to notify all participants and beneficiaries of their status and rights under the plan and the duty of common-law trustees to notify beneficiaries of gifts made to them); H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107 (1988) (discussing the complexities of importing a duty of loyalty from private trust law into pension law).

extremely hostile to the now commonplace result for many ERISA plaintiffs: physical or financial harm caused by a plan with no make-whole remedy available. Relying on law/equity distinctions that Congress may not have intended to resurrect⁵⁶ “[t]he Supreme Court’s mishandling of ERISA remedy law has rendered the protections of ERISA illusory in any case in which the victim of ERISA-proscribed wrongdoing needs damages for consequential injury in order to be made whole.”⁵⁷

This is a near-classic description of an underdeterrence scenario—i.e., one in which, unfortunately, there is a *negative* incentive for an ERISA plan to exercise the optimal degree of care in its interactions with participants and beneficiaries. The present ERISA remedy regime makes it attractive for plans to behave in ways that harm or may harm participants and others since there is no mechanism by which the plan can be compelled to make its victim whole should money damages (as is so often necessary) be required. Additionally, the absence of punitive damages, reserved in the field of torts,⁵⁸ for example for outrageous conduct, means that even in

56. See *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221-22 (2002) (Stevens, J., dissenting) (“I would . . . [not] shackle an analysis of what constitutes ‘equitable relief’ under § 502(a)(3)(B) to the sort of historical analysis that the Court has chosen.”); *id.* at 225 (Ginsburg, J., dissenting) (“It is thus fanciful to attribute to members of the 93d Congress familiarity with those ‘needless and obsolete distinctions,’ [between law and equity] much less a deliberate ‘choice’ to resurrect and import them wholesale into the modern regulatory scheme laid out in ERISA.”) (quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1041, at 131 (2d ed. 1987)); *Health Cost Controls of Ill. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (“There is nothing to suggest that ERISA’s drafters wanted to embed their work in a time warp.”).

57. Langbein, *supra* note 5, at 1362.

58. At common law, punitive damages have long been awarded “where the injury has been wanton and malicious, or gross and outrageous.” *Day v. Woodworth*, 54 U.S. 363, 371 (1852). Such damages “hav[e] in view the enormity of [the] offence rather than the measure of compensation.” *Id.* In *Kemezy v. Peters*, 79 F.3d 33, 34-35 (7th Cir. 1996), Chief Judge Posner reviewed a number of reasons for awarding punitive damages. These reasons include ensuring that tortious conduct not be underdeterred, ensuring that individuals channel transactions through a legitimate market, relieving pressure on the criminal justice system, punishing for undetected violations where such risk exists, allowing the community to translate its abhorrence into a monetary award, and even allowing an alternative to violent self-help. *Id.*

extreme situations both money damages and the extraordinary sanction of a punitive penalty are unavailable.⁵⁹

Assuming that the public will slowly educate itself about this state of affairs, it may be that the political process will result in an amendment to ERISA that would explicitly reject the present law/equity distinction as a basis for crafting appropriate remedies. In the meantime, we can only hope that Congress' historical focus on worker security and not on "special interests" in the field of employee benefits will reassert itself and hasten much needed reform.

III. ERISA AND INNOVATION

The state of ERISA remedy law may be shameful and ERISA may have failed to anticipate and prepare for the shifts in healthcare and from defined benefit to defined contribution plans. However, the statute has clearly succeeded in certain respects. The elimination of most forfeiture risk and default risk from the traditional pension system is a prime example. Thus, on its own albeit modest terms the statute has achieved Congress' principal aims. Wooten also makes a larger claim for the statute though—that the much maligned preemption and remedial provisions in fact encouraged innovation in the health care arena. I found this curious at first until I understood that he was describing the other side of the appallingly weak damages regime described above.

59. The federal courts have declared punitive and other "extracontractual" damages (those damages compensating for anything other than benefits due) unavailable under ERISA's civil enforcement provision, offering only the court's condolences in the most egregious violations. See *Bast v. Prudential Ins. Corp. of Am.*, 150 F.3d 1003, 1005 (9th Cir. 1998) (plan administrator's delay of almost six months in authorizing bone marrow transplant allowed cancer to metastasize into brain making participant ineligible for transplant and resulting in participant's death); *Corcoran v. United Healthcare, Inc.*, 965 F. 2d 1321, 1322-24 (5th Cir. 1992) (ignoring the warnings of employee's doctor as well as those of an independent medical consultant, employer twice denied pregnant employee temporary disability benefits, resulting in a shortened hospital stay and death of the fetus); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 50-53 (D. Mass. 1997) (while doctors at several hospitals, and even the courts of Massachusetts, had determined that suicidal beneficiary required thirty-day alcohol detoxification and rehabilitation program specifically covered by plan, plan refused on three occasions to authorize more than eight days of treatment, and beneficiary eventually committed suicide with beer in hand).

Wooten points to utilization review and other now common managed care tools as examples of innovations that might not have developed but for the protections ERISA afforded plans.⁶⁰ He describes a common scenario in which

courts understandably interpreted ERISA to preempt state law remedies against utilization reviewers. Often the only meaningful remedy available to a plan participant was to sue for medical benefits due under the plan. Yet, as many observers have noted, this limited remedy left health plans with little or no incentive (besides reputation) to approve benefit claims. The worst that could happen if a plan denied a claim was that the participant would bring a lawsuit and force the plan to pay the claim (and, perhaps, attorneys' fees).⁶¹

I am not certain what the final verdict will be on the desirability of utilization review and other tools of managed care. A health care system built on second guessing decisions of physicians and other providers by insurance company employees may not be ideal; on the other hand, we are all familiar with the unchecked costs associated with fee for service arrangements.

It is clear though that Wooten believes that plans take advantage (i.e., "innovate") when they think they will be largely insulated from the consequences of their actions. Wooten is correct that this innovation might, from time to time, be a good thing. However, Wooten implicitly credits the economic approach to penalties and deterrence when he notes that the plan had little incentive to improve claims. This is also an implicit admission that the worker security model, whatever its life in Congress, did not manage to take hold in the plan sponsor community.

CONCLUSION

ERISA is thirty years old—no longer a new statute with lots of provisions in need of interpretation by the federal courts. In many important respects the congressional effort that resulted in the passage of ERISA in 1974 must be lauded for substantially reducing the likelihood that an

60. WOOTEN, *supra* note 19, at 283.

61. *Id.*

employee will reach retirement age and discover that his employer does not have the promised funds to pay in retirement. The statute also, via its funding, accrual, and vesting provisions, eliminated most forfeiture risk in defined benefit plans.

The workplace and employee benefits have changed tremendously over the past three decades. Neither Congress nor anyone else seems to have anticipated the huge social shifts in healthcare, the dramatic decline of union density, and the triumph of defined contribution plans over defined benefit plans. Wooten tells his readers to put aside the political science model of “special interests” dominated legislation when thinking about ERISA, and he makes a strong case for his alternative, a worker security vision that informed this important effort. As even a cursory review of current ERISA jurisprudence suggests, “special interests,” specifically self interest and cost avoidance, now dominate every aspect of pension and welfare plan administration and litigation. The only coherent method for making sense of the present situation is to work in economics and other areas of law that focus on remedies and incentives.