Interpreting the Sounds of Congress' Silence

Is a Fiduciary Entitled to Contribution or Indemnity from ERISA Co-Fiduciaries?

By Joseph R. Jeffery

While arguments that rights to contribution or indemnity in ERISA seem well-founded, recognizing them would likely be a bridge too far under Supreme Court ERISA jurisprudence.

Persons serving as fiduciaries of employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, are subject to strict duties of care and loyalty, the breach of which exposes them to personal liability.

In certain circumstances, a fiduciary can be jointly and severally liable for a co-fiduciary's breach. Under the common law of trusts that dominated the employee benefit landscape before ERISA, a fiduciary would be entitled to contribution or indemnity from a more culpable co-fiduciary.

ERISA, however, is silent about whether a fiduciary can seek contribution or indemnity from co-fiduciaries whose acts or omissions give rise to joint liability.

There is a 26-year split in the federal circuit courts of appeals over whether an ERISA fiduciary who is jointly and severally liable to an ERISA plan is entitled to seek contribution or indemnity from the co-fiduciary whose conduct exposed them both to joint liability.

Courts of appeals for the Second, Fifth, and Seventh Circuits have recognized or have suggested that they would recognize an ERISA fiduciary's right to contribution or indemnity from co-fiduciaries. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988); *Free v. Briody*, 732 F.2d 1331 (7th Cir. 1984).

Courts in the Eighth and Ninth Circuits hold that an ERISA fiduciary does not have a right to contribution or indemnity from co-fiduciaries. *Travelers Cas. & Sur. Co. of Am. v. IADA Services, Inc.*, 497 F.3d 862 (8th Cir. 2007); *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989); *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989).

The remaining circuits—the First, Third, Fourth, Sixth, Tenth, Eleventh, Federal, and the District of Columbia—have not decided the issue, though district courts within those circuits have, often splitting on whether ERISA permits such claims. *See In re Enron Corp., Derivative & "ERISA" Lit-*

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igation, 228 F.R.D. 541, 550 (S.D. Tex. 2005) (citing collected cases).

The most common arguments in favor of an ERISA fiduciary's right to contribution or indemnity from a co-fiduciary are that (1) the right exists under the federal common law of ERISA; (2) 29 U.S.C. §1132(a)(3) authorizes such claims; or (3) the claims are permitted under 29 U.S.C. §1132(a)(2).

ERISA imposes strict standards of conduct on plan fiduciaries. Those standards are drawn from the common law of trusts that governed most benefit plans before ERISA's enactment.

This article examines the strengths and weaknesses of those arguments and finds the arguments on both sides, as with so many ERISA issues, are well reasoned and persuasive, and there are no bright-line rules or principles which dictate that one argument prevails over the others. In the end, arguments advocating rights to contribution or indemnity in ERISA are well-founded, but recognizing them would likely be a bridge too far under the Supreme Court's current ERISA jurisprudence.

Before examining those arguments, however, a brief discussion of ERISA's fiduciary provisions and a trustee's right under the common law of trusts to contribution or indemnity is in order.

ERISA Fiduciary Liability and Contribution and Indemnity Under the Common Law of Trusts

ERISA imposes strict standards of conduct on plan fiduciaries. Those standards are drawn from the common law of trusts that governed most benefit plans before ERISA's enactment. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). ERISA's duty of loyalty requires a fiduciary to

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and… for the exclusive purpose of providing benefits to participants and their beneficiaries; and… defraying reasonable expenses of administering the plan.

29 U.S.C. §1104(a)(1)(A). ERISA's duty of care requires a fiduciary to

> discharge his duties with respect to a plan… with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. §1104(a)(1)(B).

A fiduciary who breaches his duties and causes losses to a plan will be personally liable to the plan for those losses, and he may be subject to various forms of equitable relief to redress his breaches or to enforce ERISA or the terms of a plan. 29 U.S.C. §1109(a) and §1132(a)(2) and (a)(3). A fiduciary may also be liable for the breaches of a co-fiduciary if

1. He "participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach";
2. By his failure to comply with the duties of loyalty and care imposed by 29 U.S.C. §1104(a)(1), he or she "has enabled such other fiduciary to commit a breach"; or
3. He "has knowledge of a breach by another fiduciary" and does not make "reasonable efforts under the circumstances to remedy the breach."

29 U.S.C.A. §1105(a)(1)–(3).

At the same time, ERISA gives fiduciaries tools to protect themselves from its liability provisions. For instance, a fiduciary will escape liability for a co-fiduciary's breach if a plan specifically assigned the responsibilities, obligations, or duties that were breached to the co-fiduciary. 29 U.S.C. §1105(b)(1)(B). And while ERISA bans provisions that would relieve a fiduciary of liability for his breaches, plans can purchase insurance for fiduciaries and for themselves to cover liability or losses resulting from breaches of fiduciary duty. 29 U.S.C. §1110. Also, a fiduciary can purchase insurance to cover liability resulting from his breaches or those of his co-fiduciaries. 29 U.S.C. §1110.

At common law, a trustee traditionally was not liable for a co-trustee's breach of trust unless he participated in the breach or the breach occurred under circumstances similar to those set forth in 29 U.S.C. §1105(a). Restatement (Second) of Trusts §224 (1959). When the common law imposed joint and several liability, a trustee could obtain *contribution* from co-trustees if he discharged the parties' joint liability by paying more than his equitable share of that liability. Restatement (Second) of Trusts §258(1) (1959); Restatement (Second) of Torts §886A(2). But in cases when a co-trustee was substantially more at fault, the less culpable trustee would be entitled to *indemnity* from the co-trustee. Restatement (Second) of Trusts §258(1)(a) (1959); Restatement (Second) of Torts §886B(1) cmt. b.

Finally, common law actions for contribution and indemnity were equitable in nature. 18 C.J.S. Contribution §2 ("The doctrine of contribution… is founded on principles of equity, principles of natural or fundamental justice, as well as on public policy."); 42 C.J.S. Indemnity §31 ("Implied indemnity rests upon the equitable principle of the right to restitution…."); *see also* Restatement (Second) of Trusts §258 (1959).

While there are significant differences between rights of contribution and indemnity, courts analyzing whether such rights may be asserted under ERISA typically do not treat the differences as controlling. *But see, e.g., Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 242 (2d Cir. 2002); *Youngberg v. Bekins Co.*, 930 F. Supp. 1400–1401 (E.D. Cal. 1996). Consequently, the discussions in this article do not distinguish between those two remedies.

Common Law Rights and Obligations in ERISA?

As the Supreme Court observed, "ERISA abounds with the language and terminology of trust law." *Varity Corp. v. Howe*, 516 U.S. at 496; *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). The Act's legislative history confirms Congress borrowed heavily from that body of laws for the ERISA fiduciary responsibility provisions, stating that ERISA, "in essence, codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of

the law of trusts." *Id.* at 110 (citing H.R. Rep. No. 93-533, at 11 (1973), U.S. Code Cong. & Admin. News 1974, at 4,639, 4,649).

Importantly, Congress did not enumerate *all* aspects of a fiduciary's powers and duties in ERISA. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985). Instead, Congress relied on the common law of trusts to define the general scope of fiduciary authority and responsibility and explained that it expected the courts to develop a body of federal common law rights and obligations tailored to the special needs of ERISA plans. *Id.* at 570; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985) (Brennan, J., concurring) (quoting 120 Cong. Rec. 29,942 (1974)); *Firestone*, 489 U.S. at 110.

With that history in mind, the Supreme Court has explained that the common law of trusts provides a "starting point" for analyzing ERISA, provided the common law is not inconsistent with ERISA's language, its structure, or its purposes. *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (quoting *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755 (1999)).

Under the common law of trusts, a trustee's right to contribution or indemnity from co-trustees has been "an integral and universally-recognized [sic] part of trust doctrine" for over a century. *Chemung*, 939 F.2d at 16; Restatement (Second) of Trusts §258 (1959). Thus, when the circumstances demand it, incorporating rights of contribution or indemnity modeled on the common law of trusts is broadly consistent with Congress' expectation that courts develop a federal common law for ERISA. *Id.* at 16 ("We are simply following the legislative directive to fashion, where [C]ongress has not spoken, a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence."); *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1027 (2d Cir. 1992). The unanswered question is whether recognizing those rights would be inconsistent with ERISA.

Are Rights to Contribution and Indemnity Consistent with ERISA?

In enacting ERISA, Congress sought to provide employees with enhanced protection for their benefits. *Varity*, 516 U.S. at 497. The joint and several liability provision fosters that goal by ensuring that ERISA plaintiffs receive the full amount of a damage award when fiduciaries breach their duties. *Donovan v. Robbins*, 752 F.2d 1170, 1185 (7th Cir. 1985). Advocates for recognizing a right to contribution or indemnity in ERISA argue that those rights would not conflict with Congress' goals because they "would have no financial impact" on an ERISA plaintiff's recovery. *Chemung*, 939 F.2d at 16; *Guididas v. Community Nat'l Bank Corp.*, 2012 WL 5974984, at *6 (M.D. Fla. Nov. 5, 2012). Rather, plaintiffs "would continue to recover their full loss from any or all breaching fiduciaries, each of whom would be jointly and severally liable to the plaintiffs." *Chemung*, 939 F.2d at 16. At the same time, allowing contribution and indemnity claims would put breaching fiduciaries on notice that they will bear responsibility for the liabilities that their acts or omissions cause, thereby deterring future breaches. *Youngberg*, 930 F. Supp. at 1402.

Rights of contribution and indemnity are also consistent, so the argument goes, with Congress' desire to encourage employers to offer and maintain employee benefit plans. *See Varity*, 516 U.S. at 497. Allowing equitable allocations of liability between co-fiduciaries furthers that objective by encouraging employers to offer benefit plans without fear of being held liable for another's wrongdoing. *Youngberg*, 930 F. Supp. at 1402. Also, "Congress clearly did not intend trustees to act as insurers of [their] co-trustees' actions" and, to that end, it sought "to protect trustees from being ruined by the actions of their co-fiduciaries." *Free*, 732 F.2d at 1337; *In re Masters Mates & Pilots*, 957 F.2d at 1029.

For instance, compared to the common law, Congress in §1105(a) limited the circumstances under which a fiduciary could be jointly and severally liable for the breaches of a co-fiduciary. *Free*, 732 F.2d at 1337; *see* Restatement (Second) of Trusts §224 (1959). And ERISA allows fiduciaries to avoid liability for a co-fiduciary's breach altogether by assigning responsibility for various functions to specific fiduciaries. *Free*, 732 F.2d at 1337 (discussing 29 U.S.C. §1105(b)(1)(B)). Thus, proponents argue, rights to contribution and indemnity are consistent with ERISA's text, structure, and purposes and may be adopted as part of ERISA's federal common law. *Free*, 732 F.2d at 1337.

Other courts have found that adopting contribution and indemnity rights are not consistent with ERISA. They contend that Congress, by adopting a joint and several liability scheme without also including rights for contribution or indemnity, signaled its intent to "maximize the deterrent effect of civil liability by declining to ameliorate the liability of wrongdoers." *Travelers*, 497 F.3d at 867; *NARDA Inc. v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F. Supp. 685, 696 (D. Md. 1990) ("It is not surprising that rights of indemnification and contribution among culpable fiduciaries are not provided. On the contrary, ERISA precisely tailors fiduciary liability to fit particular breaches, thereby minimizing any perceived need for the common law rights of indemnification and contribution."). In other words, Congress arguably decided that it had no interest in "softening the blow on joint wrongdoers," opting instead to create a significant deterrent to bad behavior by plan fiduciaries. *Kim*, 871 F.2d at 1433.

Viewed in that light, Congress' failure to include rights of contribution or indemnity was intentional. And if ERISA's joint-and-several liability provisions are understood as Congress' attempt to enhance ERISA's regulation of fiduciaries and deter even minor fiduciary breaches, such as nonfeasance (*see* §1105(a)(2)), adopting rights of contribution and indemnity to mitigate the deterrent effects of those provisions would be inconsistent with ERISA. *See Kim*, 871 F.2d at 1433. Finally, Congress arguably provided all the mitigation it believed was appropriate when it authorized the purchase of insurance to cover exposure for the breaches of a co-fiduciary. 29 U.S.C. §1110.

How Do Courts Understand Congress' Silence?

Courts rejecting rights to contribution and indemnity in ERISA "acknowledge that when a federal statute is silent, a right to contribution can arise by operation of federal common law," although they "emphasize that the Supreme Court has indicated that the 'need and authority… to formulate what has come to be known as federal common law… are few and restricted.'" *In re Enron Corp., Derivative & "ERISA" Litigation*, 228 F.R.D. at 551 (quoting *Texas*

Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). They note that the Supreme Court has described ERISA as "a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system," and that the Court has been "especially reluctant to tamper with [the] enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text." *Travelers*, 497 F.3d at 865 (quoting *Great-Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 209 (2002)).

Those courts further observe that ERISA's "carefully integrated civil enforcement scheme… provide[s] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Travelers*, 497 F.3d at 866 (citing *Russell*, 473 U.S. at 146–47); *Kim*, 871 F.2d at 1432; *In re Enron*, at 551. That principle, taken together with rule that the federal common law should only be used "if necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress," convinced those courts that the power to develop a federal common law for ERISA did not extend to recognizing a right to contribution or indemnity from a co-fiduciary. *Travelers*, 497 F.3d at 865 (quoting *Bollman Hat Co. v. Root*, 112 F.3d 113, 118 (3d Cir. 1997)); *In re Enron*, 228 F.R.D. at 551 (citing *Cooperative Benefit Administrators, Inc. v. Ogden*, 367 F.3d 323, 329–30 (5th Cir. 2004)). Finally, those courts observe that deciding "whether to provide for a right of contribution is 'a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.'" *Travelers*, 497 F.3d at 867 (quoting *Texas Industries*, 451 U.S. at 647).

To proponents of a federal common law right to contribution or indemnity in ERISA, Congress' silence suggests nothing about whether it intended to preclude such rights. *Chemung*, 939 F.2d at 18; *Free*, 732 F.2d at 1337. The "more likely inference" to draw from that silence, they explain, "is that when it came to remedies under ERISA, [C]ongress simply did not focus its attention beyond the welfare of the plan's participants and beneficiaries." *Chemung*, 939 F.2d at 18. Furthermore, they argue that Congress' silence must be analyzed in the context of its expectation that courts would develop a federal common law based on the common law of trusts.

Congress' silence, they argue, should be understood to mean that Congress left it to the courts to determine whether and under what circumstances an ERISA fiduciary might be entitled to contribution or indemnity from a co-fiduciary. In other words, "ERISA was *not* so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it." *Russell*, 473 U.S. at 156–57 (Brennan, J., concurring).

Courts declining to find a right to contribution or indemnity in ERISA's common law also often cite two non-ERISA Supreme Court decisions that rejected requests to find contribution rights in the federal common law of other federal statutes. *See Travelers*, 497 F.3d at 864. In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 79–80 (1981), the Court held that an employer had no right to contribution under the Equal Pay Act and Title VII of the Civil Rights Act. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court declined to find a common law right to contribution under federal antitrust laws. 451 U.S. at 642–43.

To the courts relying on *Northwest Airlines* and *Texas Industries*, those decisions reflect a general reluctance on the part of the Supreme Court to recognize contribution rights under the federal common law; therefore, denying similar rights under the common law of ERISA is in accordance with those two holdings. *Travelers*, 497 F.3d at 864; *In re Enron*, 228 F.R.D. at 551; *Spear v. Fenkell*, 2014 WL 7745845, at *7–8 (E.D. Pa. Dec. 12, 2014). *See also Northwest Airlines*, 451 U.S. at 95; *Texas Industries*, 451 U.S. at 641.

But proponents of federal common law rights to contribution and indemnity argue that *Northwest Airlines* and *Texas Industries* are distinguishable. *Travelers*, 497 F.3d at 864. Congress did not give the judiciary authority to create federal common law under the Equal Pay Act and Civil Rights Act, which obviously distinguishes those statutes from ERISA. *Northwest Airlines*, 451 U.S. at 98 n. 42. And while the legislative history of the Sherman Act and the Clayton Act confirmed that Congress gave courts the power to develop a federal common law for *some* provisions in those statutes, nothing suggested that Congress gave courts the power to develop a federal common law in connection with the specific provisions before the Supreme Court. *Texas Industries*, 451 U.S. at 642–46. In both decisions, therefore, the case for finding a federal common law right to contribution was far weaker than the case for finding rights of contribution and indemnity in the federal common law of ERISA.

For courts faced with deciding whether or not to find a federal common law right to contribution or indemnity under ERISA, resolving the issues discussed above typically came down to whether the court believed that Congress' silence should be construed as a rejection of such rights, or whether that silence should be understood as Congress' expectation that the courts were free to recognize the rights, if appropriate, through the development of a federal common law for ERISA.

While the federal common law offers ERISA fiduciaries one avenue for asserting contribution and indemnity claims against their more culpable co-fiduciaries, the Supreme Court, by all appearances, is extremely reluctant to exercise that power. The Court's obvious preference is to hew closely to the remedies Congress expressly provided in 29 U.S.C. §1132(a). On that note, we turn our attention to arguments that ERISA's civil enforcement scheme in §1132(a) authorizes a fiduciary's claims for contribution or indemnity against a co-fiduciary.

A Right to Contribution or Indemnity Under 29 U.S.C. §1132(a)(3)?

Section 1132(a)(3) permits plan participants, beneficiaries, and fiduciaries to bring civil actions for the following purposes:

1. To enjoin any act or practice that violates Title One of ERISA concerning the protection of employee benefits or the terms of the plan;
2. To obtain "appropriate equitable relief… to redress" violations of Title One of ERISA or the plan; or
3. To obtain "appropriate equitable relief… to enforce any provisions" of Title One of ERISA or the terms of the plan.

29 U.S.C. §1132(a)(3).

Fiduciaries seeking contribution or indemnity under §1132(a)(3) point out that contribution and indemnity claims are equitable and contend that the relief they seek is appropriate to redress their co-fiduciaries' violations of ERISA or the terms of a plan. Disputes over whether §1132(a)(3) authorizes those claims focus on whether fiduciaries can seek relief for themselves, personally, under that Section and whether their claims seek redress for violations of ERISA or the terms of a plan.

Courts finding that §1132(a)(3) does not authorize a fiduciary's contribution and indemnity claims say the Section's focus is to protect plans, participants, and beneficiaries; therefore, the only claims a fiduciary can assert under that Section are claims on behalf of a plan. *See Russell*, 473 U.S. at 142 ("A fair contextual reading of [ERISA] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, *and with remedies that would protect the entire plan, rather than with the rights of an individual*.") (emphasis added); *NARDA Inc.*, 744 F. Supp. at 696 ("An analysis of ERISA reveals an intent to protect participants, beneficiaries, and plans, and remedies are provided to fiduciaries only insofar as they advance that purpose."); *Meoli v. American Medical Services of San Diego*, 35 F. Supp.2d 761, 764–65 (S.D. Cal. 1999). That reasoning is consistent with the "expect[ation] that courts, in fashioning appropriate equitable relief, will keep in mind the special nature and purpose of employee benefit plans, and will respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others." *Meoli,* 35 F. Supp.2d at 764–65 (citing *Varity*, 516 U.S. at 515).

The courts that view §1132(a)(3) as a vehicle for asserting contribution and indemnity claims counter that the Section is a "catchall" provision that permits individualized equitable relief for violations of ERISA or a plan that §1132(a) does not elsewhere adequately remedy. *See Youngberg*, 930 F. Supp. at 1400 (citing *Varity*, 516 U.S. at 512). Moreover, nothing in §1132(a)(3) limits a fiduciary's ability to bring a claim in his personal capacity, and the fact that such claims were an engrained part of the common law of trusts suggests that it would be inappropriate to impose such a limitation. *Id.* at 1400–1401. *See also Mertens*, 508 U.S. at 266 n.1 (White, J., dissent).

The closely related but more difficult question is whether a fiduciary's claims for contribution or indemnity seek *redress for violations of ERISA or the terms of a plan* within the meaning of §1132(a)(3). The section does not say whether redress is limited to injuries to plans, participants, and beneficiaries only, or whether it also authorizes redress for injuries to fiduciaries caused by a co-fiduciary's violations of ERISA or of a plan.

Generally speaking, §1132(a) seeks to redress acts or omissions that threaten the rights of plans, participants, and beneficiaries. 29 U.S.C. §1132(a); *see also Varity*, 516 U.S. at 512. It says nothing about redressing violations that affect the interests of fiduciaries, personally. But while most of §1132(a)'s subparagraphs are specific about what injuries they redress, §1132(a)(3) is a "catchall" provision that Congress designed as a "safety net" to help ensure unforeseen violations of ERISA or a plan are not without a remedy. *Varity*, 516 U.S. at 512. The absence of language in §1132(a)(3) limiting the types of injuries it redresses opens the door to arguments that fiduciaries may use it to obtain contribution or indemnity from co-fiduciaries.

Nevertheless, courts have found that ERISA's otherwise total focus on redressing injuries to plans, participants, and beneficiaries means that §1132(a)(3) likewise only redresses violations that injure plans, participants, or beneficiaries. *See Meoli*, 35 F. Supp.2d at 764–65. Actions for contribution or indemnity do not redress those types of injuries, but rather seek to "rectif[y] the perceived unfairness of placing the loss on a party who is liable only because of the actions of another." *Id.* at 764. Such claims, in other words, do not inure to the benefit of a plan, participant, or beneficiary but are "primarily, if not entirely, for the benefit of the [fiduciary] who seeks it." *Id.* at 764. As a result, a fiduciary's contribution or indemnity claims do not seek the type redress that §1132(a)(3) authorizes, and therefore do not fall within the scope of that section. *Id.* at 764–65.

Courts finding that a fiduciary can state claims for contribution or indemnity under §1132(a)(3) counter that according to ERISA's plain language, when an ERISA fiduciary breaches a duty of care or loyalty, there has been a violation of ERISA, the plan, or both, and a suit that seeks redress for such violations falls within §1132(a)(3). *Youngberg*, 930 F. Supp. at 1401; *See Emmons v. Equitable Life Assurance Soc'y of the United States*, 799 F. Supp. 1123, 1128 (D. N.M. 1992). They further argue that

Congress arguably decided that it had no interest in "softening the blow on joint wrongdoers," opting instead to create a significant deterrent to bad behavior by plan fiduciaries.

recognizing a fiduciary's right to assert contribution and indemnity claims under §1132(a)(3) helps assure fiduciaries that they will not have to bear the burden of another's breach of trust, which serves a secondary goal of ERISA: encouraging the creation and maintenance of employee benefit plans. *Youngberg*, 930 F. Supp. at 1402; *Varity*, 516 U.S. at 497 (confirming that ERISA represents "competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to… unduly discourage employers from offering welfare benefits in the first place."). Allowing those claims to proceed would also ensure that plan fiduciaries cannot escape liability for their actions, such as when a breaching fiduciary controls a plan and brings an action on behalf of the plan against a former fiduciary, or when a plaintiff sues one fiduciary but not his more culpable co-fiduciary. *See, e.g., In re Masters Mates & Pilots*, 957 F.2d at 1029 ("ERISA's purpose of deterring pension plan abuse is frustrated when solvent breaching fiduciaries are allowed to escape the consequences of their actions."); *Chemung*, 939

F.2d at 16 ("There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt. Full responsibility should not depend on the fortuity of which fiduciary a plaintiff elects to sue."); *Blackmar v. Lichtenstein*, 603 F.2d 1306, 1310 (8th Cir. 1979).

The differences between the competing constructions of §1132(a)(3) boils down to whether the remedies it provides for violating ERISA or a plan's terms are available *solely* to redress injuries to plans and participants, or whether they are also available to redress injuries to a fiduciary caused by a co-fiduciary's breach of trust. To read §1132(a)(3) as flexible, as the Supreme Court has, is consistent with the Section's status as a "catchall" remedy and gives hope to those who believe it permits fiduciaries to state contribution and indemnity claims against co-fiduciaries. But ERISA's focus on protecting the rights of plans, participants, and beneficiaries cannot be overlooked, and it suggests Congress' intent was that §1132(a)(3) was limited to providing remedies to address threats to those interests only.

A Right to Contribution or Indemnity Under 29 U.S.C. §1132(a)(2)?

On its face, the argument that §1132(a)(2) authorizes a fiduciary's claim for contribution or indemnity is appealing. That Section authorizes fiduciaries and others to bring a civil action "for appropriate relief under section 1109 of this title." 29 U.S.C. §1132(a)(2). Section 1109 provides that a plan fiduciary who breaches any of the responsibilities, obligations, or duties imposed by ERISA

> shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, *and shall be subject to such other equitable or remedial relief as the court may deem appropriate*, including the removal of such fiduciary.

29 U.S.C. §1109(a) (emphasis added).

In sum, §1109 confirms that fiduciaries who breach their duties to a plan will be subject to a range of remedies, including equitable relief, and §1132(a)(2) gives fiduciaries the power to enforce §1109 through a civil action.

That was the approach that the Seventh Circuit took in *Free v. Briody*, 732 F.2d at 1337. Briody and Hodgman were plan trustees. Briody, however, viewed himself as a nominal trustee and did not exercise any oversight over the plan's assets or Hodgman's conduct, which allowed Hodgman to breach his fiduciary duties to the plan by dissipating plan assets. The Seventh Circuit concluded §1109(a) and §1132(a)(2) granted it "the power to shape an award so as to make the injured plan whole while at the same time apportioning the damages equitably between the wrongdoers" through Briody's claim for indemnity. *Id.* at 1337–382.

Fourteen months later, the Supreme Court decided *Massachusetts Mutual Life Insurance Company v. Russell*, which held that a pension plan participant could not obtain individual relief from a breaching fiduciary under §1109(a) because that section only authorized relief on behalf of a plan. *Russell*, 473 U.S. at 141–44. Barring revision to the Court's construction of §1109, a fiduciary likely does not have a right to contribution or indemnity under that section or under its enforcement mechanism, §1132(a)(2). *Travelers*, 497 F.2d at 866; *Kim*, 871 F.2d at 1432; *Call*, 881 F.2d at 630–31; *Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596, 600 (N.D. Ill. 1989).

Conclusion

The trend among courts is to find that fiduciaries do not have a right to contribution or indemnity from co-fiduciaries under ERISA. That said, the issue is by no means resolved. There are persuasive arguments in favor of finding such rights, particularly given Congress' intent that courts develop a federal common law for ERISA. And there are several unanswered questions about how §1132(a)(3) should be construed, all of which bear directly on whether that section authorizes fiduciary claims for contribution and indemnity.

In the end, resolving those arguments comes down to whether a court believes Congress intended to exclude fiduciary rights to contribution or indemnity, or whether it believes Congress anticipated such claims might be permitted whenever "appropriate." In light of the unsettled nature of the debate, practitioners faced with or considering a claim for contribution or indemnity under ERISA must pay close attention to circuit precedent, where applicable, and to the specific legal theories on which any right to contribution or indemnity is based.