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ARTICLES

THE PAPER CHASE: SHOULD THE PRINCIPLES OF CONTRACT LAW GOVERN ERISA SECTION 302?

Max Birmingham*

INTRODUCTION

This article addresses whether a collective bargaining agreement (hereinafter “CBA”) shields an employer from performing its obligations under Section 302 of the Employee Retirement Income Security Act (hereinafter “ERISA”),1 or whether an employer must make additional contributions when a pension plan fails to meet minimum funding requirements.

The Supreme Court of the United States (hereinafter “SCOTUS”) observes that ERISA was enacted “to promote the interests of employees and their beneficiaries in employee benefit plans”2 and “to protect contractually defined benefits . . . .”3 SCOTUS further elaborates that “[i]n enacting ERISA, Congress’ primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.”4 This Congressional concern stems from labor union corruption, in which investigations...

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unearthed bribes, cronyism, kickbacks, looting, and other inappropriate conduct in employee pension and benefit plans.\(^5\)

The benefit plans and pension plans covered by ERISA are collective bargaining agreements.\(^6\) SCOTUS holds that "... collective-bargaining agreements, including those establishing ERISA plans, [shall be interpreted] according to ordinary principles of contract law. ..."\(^7\) According to ordinary contract principles, contract interpretation always begins with the plain meaning rule.\(^8\) The plain meaning rule excludes extrinsic evidence,\(^9\) which elucidates the intentions of the contracting parties.\(^10\) The first step in applying the plain meaning rule is to analyze the contractual language and determine if it is either plain and clear or ambiguous.\(^11\) A contract is not ambiguous unless it is reasonably susceptible to more than one reasonable interpretation.\(^12\)

In *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.* (hereinafter "*Gastronomical Workers*"), the First Circuit completely ignores ordinary principles of contract law, despite acknowledging

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9. E. Allan Farnsworth, Contracts § 7.3, at 474 (3rd ed. 1990) ("Many courts, particularly in cases decided in the first half of the twentieth century, agreed that ... [i]f, on its face, the agreement appears to be completely integrated, the court should simply accept that this is so.").

10. See Rickman v. Carstairs (1833) 110 Eng. Rep. 930, 935; 5 B. & Ad. 651, 662-63 ("Unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used.").


12. Continental Bus Sys. v. NLRB, 325 F.2d 267, 273 (10th Cir. 1963) ("If the language of the contract is susceptible of more than one interpretation, the court should construe the contract in the light of the situation and relation of the parties at the time it was made, and, if possible, accord it a reasonable and sensible meaning, consonant with its dominant purpose.").
that “pension contribution obligations are contractual in nature,”¹³ and holds that an employer may need to contribute to a pension plan to meet minimum funding requirements even if it goes beyond what is required in the collective bargaining agreement.¹⁴ The Gastronomical Workers Court did not reason that the contractual language is unclear or ambiguous.¹⁵ Surreptitiously, the Court is silent on whether the contractual language is plain and clear or ambiguous, giving rise to the inference that the contract is plain and clear.¹⁶ If the Court finds that the contractual language is ambiguous, it is presumable that it would have declared so in its opinion to bolster its analysis.¹⁷ In a cursory analysis of contract law, with regard to the plain meaning rule, the Court says that “this tenet does not exist in a vacuum.”¹⁸

This article argues that a valid, enforceable contract does allow an employer to shield itself from ERISA liability under Section 302 simply by performing its obligations.¹⁹ To hold otherwise violates ordinary principles of contract law.²⁰ Moreover, the Gastronomical Workers decision may lead to reductio ad absurdum.²¹

This argument proceeds as follows. It begins with an introduction. Section I examines the purpose of ERISA and explores both congressional and judicial interpretations of the statute.²² Section II analyzes case law.²³ Section III interprets other ERISA sections, similar statutes, and other principles of law as to why principles of contract law are appropriate to guide the analysis of certain ERISA sections.²⁴ Section IV explores why principles of contract law are applicable in ERISA cases.²⁵ Section V identifies why not applying principles of contract law to ERISA cases is subject to reductio ad absurdum.²⁶ The final section concludes this argument.²⁷

¹³. Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d 54, 62 (1st Cir. 2010).
¹⁴. Id.
¹⁵. See id. at 62.
¹⁶. Id. (finding that the document “makes clear that the trustees lack the power to enlarge those obligations”).
¹⁷. See generally id.
¹⁸. Id. at 62.
¹⁹. See infra Section IV.
²⁰. See infra Section III.
²¹. See infra Section V.
²². See infra Section I.
²³. See infra Section II.
²⁴. See infra Section III.
²⁵. See infra Section IV.
²⁶. See infra Section V.
²⁷. See infra Conclusion.
I. UNDERLYING PURPOSE OF ERISA

There is a general consensus that the Congress passed ERISA with the intent to create a uniform body of law that provides federal remedies to employees who have been unjustly deprived of their benefit plans and pension plans. The purpose of pension plans is to provide income to employees in their retirement. Generally, pension plans either help an employee save funds for their retirement or promise an employee a defined amount of income in their retirement. In 1985, the Select Committee on Aging and the Subcommittee on Labor-Management Relations of the Committee on Education and Labor of the U.S. House of Representatives issued a report that chronicled a story about an employer who terminated its pension plan in order to capture excess assets and substantially reduced the pension plan without notifying the employee. Said employee expected to receive a pension plan of $800 a month but instead was going to receive $300 a month. Thus, the employee was left with a shortfall of $6,000 that he was counting on in his retirement.

The purpose of benefit plans is to provide welfare programs in an array of areas, such as medical, health, accident, day-care services, scholarship funds, or legal services. It is noteworthy that pension plans are subject to more regulation than benefit plans.

28. According to both the Senate and House Committee reports, Congress intended for ERISA to provide “the full range of legal and equitable remedies available in both state and federal courts” and ERISA’s “enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA].” H.R. REP. No. 93-533, at 17 (1973), as reprinted in 1974 U.S.C.A.N. 4369, 4655; S. REP. No. 93-127, at 35 (1973).

29. 120 CONG. REC. 29,942 (1974) (statement of Sen. Jacob K. Javits (D-NY)) (“It is also intended that 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.”) (emphasis added).


32. Id. at 33; see also Richard A. Ippolito, Issues Surrounding Pension Terminations for Reversion, 5 AM. J. TAX POL’Y 81, 83-87 (1986) (asserting that the termination of pension plans harms workers).


34. Id.

35. See ERISA § 302 (1)(A).

36. See 120 CONG. REC. 29,192 (1974) (statement of Congressman Carl D. Perkins, Chairman of the House Lab. and Educ. Committee) (“Mr. Speaker, to summarize what is being done today let me state – after years of study and investigation, hearings and debate, after endless hours of work, pension reform legislation of an historic character is almost complete.”) (emphasis added).
Before ERISA was enacted, there was a farrago of state regulation covering this field. As such, this marks the first time that federal remedies were made available to employees who have claims of being unjustly deprived of their benefit plans and pension plans. To ensure uniformity, the Congress declares that the ERISA statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," covered by ERISA.

A. Congressionally Declared Purposes of ERISA

At the time ERISA was signed into law, there was consternation amongst the general public as incidents of fraud with pension plans were occurring across the nation. In 1972, following a reports of abuse and fraud in pension plans across the nation, Congress passed a series of resolutions to examine the pension system. Employees who dedicated their life to a single employer were losing their pensions. Senator Jacob Javits (D-NY) noted that there were several instances in which beneficiaries who were unfamiliar with the terms of their pension plans had lost entitlements to expected benefits.

Shortly after ERISA was signed into law, Senator Javits observed:

The problem, as perceived by those who were with me on this issue in the Congress, was how to maintain the voluntary growth of private plans while at the same time making needed structural reforms in such areas

37. See STAFF OF S. COMM. ON AGING U.S. SENATE, supra note 5, at 8 (remarking that the Federal Welfare and Pension Plans Disclosure Act, passed in 1958, does not provide any federal remedies).
38. Id.
40. 120 CONG. REC. 29,932 (1974) (statement of Sen. Harrison A. Williams, Jr. (D-NJ)) (noting that ERISA is designed not just to protect pension benefits, but also to protect and regulate the administration of welfare benefits).
41. See generally S. REP. NO. 93-127, at 1-7 (1973) (discussing the history of abuses in private pension systems and attempts by the Congress to remedy said abuses through legislation); see also 120 CONG. REC. 29,934 (1974) (remarks by Sen. Jacob K. Javits (D-NY)) (indicating that an absence of oversight of private pension funds has led to the need for legislation).
42. S. REP. NO. 92-235, at 11 (1972); S. REP. NO. 93-127, at 1 (1973); see also 120 CONG. REC. 29,929 (1974) (statement of Sen. Harrison A. Williams, Jr. (D-NJ)), Chairman of Senate Committee on Labor and Public Welfare) (indicating that the Committee's study was initiated pursuant to resolution of the 91st Congress).
43. 120 CONG. REC. 29,949 (1974) (statement of Sen. Lloyd M. Bentsen, Jr. (D-TX)) (citing the instance of a woman who had lost her pension on a technicality -- and further insisting that ERISA should prevent similar economic tragedies in the future).
44. 120 CONG. REC. 29,934-35 (1974).
as vesting, funding, termination, etc., so as to safeguard workers against loss of their earned or anticipated benefits – which was their principal cause of complaint and which-over the years-had led to widespread frustration and bitterness * * * the new law represents an overall effort to strike a balance between the clearly-demonstrated needs of workers for greater protection and the desirability of avoiding the homogenization of pension plans into a federally-dicted structure that would discourage voluntary initiatives for further expansion and improvement.45

Holding that the main goal of ERISA is to protect the pension plans and benefit plans of employees,46 the Congress was cognizant of the financial and administrative burdens that ERISA may impose.47 The House Committee on Labor opines:

The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases has been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant.48

Senator Nelson went on to remark:

In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful

45. Staff of S. Comm. on Aging U.S. Senate, supra note 5, at 25.
46. Robert A. Cohen, Understanding Preemption Removal under ERISA § 502, 72 N.Y.U. L. Rev. 578, 589 (1997); see also S. Rep. No. 93-127, at 4846 (1974) ("[A] major issue in private pension plans relates to the adequacy of plan funding ... The promise and commitment of a pension can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a promise of a pension which may be illusory and empty.").
protection for the employees and keeping costs within reasonable limits for employers. 49

B. Judicially Declared Purposes of ERISA

Notwithstanding, there are varying interpretations of the extent to which ERISA protects employees and when remedies are available. Several courts have elucidated their viewpoints on the comprehensiveness of the protections ERISA affords employees. 50 SCOTUS maintains that the purpose of ERISA is to protect and promote the interests of plan participants and beneficiaries. 51 In order to maintain the integrity of this purpose, the scope of ERISA’s preemption extends to state community property laws, particularly those with encompassing testamentary instruments. 52 The Second Circuit contends that the purpose of ERISA is to protect employee benefits and to promote the growth of pension plans. 53 The Second Circuit further elaborates that ERISA is meant to protect employees from losing their jobs, and also to guerdon employees for their service. 54 The Third Circuit holds that the purpose of ERISA is to protect employee benefits and to proselytize the growth of pension plans. 55 The Sixth Circuit states that the purpose of ERISA is to develop a uniform body of federal law, which in turn curtails the administrative and financial burdens of employers. 56 The Ninth Circuit interprets the purpose of ERISA as ensuring that workers actually receive their benefit plans and pension plans in their retirement. 57 The United States District Court for the Southern District of New York promulgates that the purpose of ERISA

49. SUBCOMM. ON LAB. OF THE COMM. ON LAB. AND PUB. WELFARE, 94TH CONG., LEGISLATIVE HIST. OF THE EMP. RETIREMENT INCOME SEC. ACT of 1974, at 4800 (Comm. Print 1976); see also Cohen, supra note 46, at 613.
51. See Boggs, 520 U.S. at 845.
52. Id. at 852-53.
53. See Siskind, 47 F.3d at 503; see also Bradwell, 954 F.2d at 801.
54. See Bradwell, 954 F.2d at 801.
55. See Curcio, 33 F.3d at 240 (McKelvie, dissenting) (“One of Congress’ primary purposes for enacting ERISA is ‘to protect contractually defined benefits.’”) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)).
57. See Michael v. Riverside Cement Co. Pension Plan, 266 F.3d 1023, 1026 (9th Cir. 2001).
is to reward employees for past service to their employers and to protect employees from the economic hardship of unemployment.\footnote{58}{See Bennett v. Gill & Duffus Chems., Inc., 699 F. Supp. 454, 459 (S.D.N.Y. 1988) ("In addition, we must note that severance benefits serve two purposes. Severance pay can be given to reward past service to a company as well as to provide protection against future unemployment.").}

The central purpose of ERISA is to encourage the growth of pension plans\footnote{59}{See Varity Corp. v. Howe, 516 U.S. 489, 538-39 (1996) (Thomas, J., dissenting) ("Although Congress sought to guarantee that employees receive the welfare benefits promised by employers, Congress was also aware that if the cost of providing welfare benefits rose too high, employers would not provide them at all."); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 n.17 (1985) (warning against expanding liability beyond that intended by Congress, "lest the cost of federal standards discourage the growth of private pension plans") (emphasis added); see also 120 CONG. REC. 29,949 (1974); H.R. REP. NO. 93-533, at 1 (1973).} and safeguard the benefit plans of employees.\footnote{60}{See Massachusetts v. Morash, 490 U.S. 107, 112-13 (1989) ("ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits. The 'comprehensive and reticulated statute,' contains elaborate provisions for the regulation of employee benefit plans.") (citations omitted); see also Jay Conison, Suits For Benefits Under ERISA, 54 U. Pitt. L. Rev. 1, 3 (1992).}

From the enumerated objectives of the enactment of ERISA, to the remarks of Congress and court cases, the constant theme of employees being granted relief is fraud.\footnote{61}{See generally Conison, supra note 60, at 42 ("[J]udicial review of benefit denials 'does lie where applicants can show a breach of fiduciary trust, fraud or arbitrary action.' The court thus understood the rule as a trust-law rule for protecting employees.'").} Specifically, employees being dispossessed of their rightful pension plans and benefit plans.\footnote{62}{See id. at 44.} It is unfathomable to presume that Congress ever intended for employees to be able to avail themselves to seek remedy with regard to their pension plans or benefit plans if said employees negotiated it away in a collective bargaining agreement.\footnote{63}{See generally M&G Polymers USA v. Tackett, 574 U.S. 427, 435 (2015) ("[T]he rule that contractual 'provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan.'") (alteration in original) (citation omitted).} This is because the employees would have received consideration in a collective bargaining agreement and willfully decided to forgo a part of their pension plan or benefit plan in order to obtain something that they placed a higher value on.\footnote{64}{See id. at 441.}
II. CURRENT STATE OF THE LAW

A. Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.

1. United States District Court for the District of Puerto Rico

The trustees of the Gastronomical Workers Union Local 610 & Metropolitan Hotel Association Pension Fund (hereinafter "the Fund"), a multi-employer pension plan, brought suit against a number of contributing employers to obtain additional contributions necessary to eliminate a funding deficiency for the 2005 plan year.65

The Federal District mistakenly analogized the case before it with Central Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc. (hereinafter "Central Pennsylvania Teamsters"), a case from the Third Circuit.66 The Federal District proclaims the Third Circuit barred the employers from making a contract defense,67 but this is because the Third Circuit holds that the plain language of the CBA is not at issue.68 Central Pennsylvania Teamsters is not applicable to this case because it is a party trying to enforce a contract by relying on plain language that was the result of a mutual mistake in drafting.69 Ironically, the Third Circuit holds that third party beneficiaries are allowed to enforce the plain language of the CBA, regardless of a mutual mistake in contract drafting.70 Thus, this seems to favor the employers argument.71 If the plain language of the CBA is enforceable, it would mean that the employers are not required to fund additional contributions necessary to eliminate a funding deficiency for the 2005 plan year.72 Both parties filed cross-motions for summary judgment.73 The Federal District Court ended up ruling in favor of the trustees, granting their motion and holding that the

66. See id. at 106.
67. See id.
69. Id. at 1099.
70. Id. at 1099-1100.
71. Id.
72. Id. at 1105; see also Gastronomical Workers, 476 F. Supp. 2d at 103.
73. See Cent. Pa. Teamsters Pension Fund, 85 F.3d at 1102.
employers were pro rata liable under Section 302 for the amounts necessary to cure the 2005 funding deficiency.\textsuperscript{74}

2. United States Court of Appeals for the First Circuit

The employers appealed the decision of the Federal District Court.\textsuperscript{75} The employers make four arguments, which the court rejects.\textsuperscript{76} However, there are severe deficiencies with the court’s analysis of the employers’ arguments.\textsuperscript{77}

a. Ripeness

The employer’s first argument is that the matter is not ripe because the Internal Revenue Service (hereinafter “IRS”) did not decide on their application regarding a funding waiver.\textsuperscript{78} In 2006, the Fund requested a minimum funding waiver for the contributions required for 2005.\textsuperscript{79} The IRS had not acted on said request as of the date of the court’s opinion.\textsuperscript{80}

Since the IRS did not decide on the aforementioned application, the employers claim that there is no injury.\textsuperscript{81} The Court held a different viewpoint, opining that the events giving rise to the funding deficiency were “matters of historical fact” and that, if those facts were true, “the Fund has suffered an injury.”\textsuperscript{82} The Court then offered an initial explanation, which is \textit{petitio principii} (a circular argument sometimes known as begging the question),\textsuperscript{83} as to why it decides the matter is ripe.\textsuperscript{84} In \textit{United States v. Jannotti}, Judge Aldisert declared there is a \textit{petitio principii} in the

\textsuperscript{74} Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d. 54, 59-60 (1st Cir. 2010).
\textsuperscript{75} \textit{Id.} at 57.
\textsuperscript{76} \textit{Id.} at 61-65 (“In their appeal, the employers argue that the district court erred because (i) the suit is not ripe; (ii) the CBA foreclosed the trustees from seeking increased employer contributions; (iii) the accumulated funding deficiency was attributable to trustee mismanagement and, therefore, not properly chargeable against the employers; and (iv) the accumulated funding deficiency no longer exists. We confront these arguments in turn.”) (emphasis added).
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 61.
\textsuperscript{79} \textit{Id.} at 58.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 59.
\textsuperscript{82} \textit{Id.} at 61.

\textsuperscript{83} \textit{See Petitio Principii}, BLACK’S LAW DICTIONARY (11th ed. 2019) (explaining that the logical fallacy \textit{petitio principii} is sometimes known as begging the question. This logical fallacy attempts to support a claim with a premise that itself presupposes the claim).
\textsuperscript{84} Gastronomical Workers, 617 F.3d at 61.
majority’s decision.85 There, the Defendant was charged with conspiracy, which requires an effect on interstate commerce for the federal court to have jurisdiction.86 The Defendant argued that there was factual impossibility, but the majority’s opinion is centered on the fact that factual impossibility is not a defense to conspiracy.87 Judge Aldisert notes that:

[T]he reasoning “cooks the books,” to use Professor Neil MacCormick’s phrase, or more popularly, it puts the bunny in the hat by begging the question in a classic *petitio principii*: Instead of *proving* the conclusion (presence of federal jurisdiction), the argument *assumes* it and then argues substantive law: factual impossibility as a defense to the conspiracy charge.88

Here, the *Gastronomical Workers* court states the injury is concrete, but then admits that the IRS could very well grant the funding waiver.89 If the IRS granted the funding waiver, there would be no injury.90 Since the injury could be cured or undone depending on a future action, it is not concrete.91

Furtively, the Court then posits that the employers made the wrong argument with ripeness, and that the correct argument would be standing.92 “Consequently, it is the future event, not the trustees’ injury, that is speculative. Viewed in this light, DBHC’s argument is not a ripeness argument at all.”93

The doctrines of standing and ripeness are directed to different concerns.94 The doctrine of standing requires the plaintiff to demonstrate that he has suffered an injury or will imminently be injured.95 SCOTUS elucidates that the injury must be “actual,” “distinct,” “palpable,” and “concrete.”96 The doctrine of ripeness addresses whether the matter is ready for review or if it is premature, as well as if the plaintiff has suffered an injury or will imminently be injured:

86. *Id.* at 580-81 (highlighting the majority opinion).
87. *Id.* at 626 (Aldisert, J., dissenting).
88. *Id.* (citing NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 72 (1978)).
89. *Gastronomical Workers*, 617 F.3d. at 61.
90. *Id.*
91. *Id.*
92. *Id.* at 62.
93. *Id.* at 61-62.
The difference between an abstract question and a 'controversy' . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.97

Theoretically, the doctrine of standing might be used to analyze whether the plaintiff has suffered an injury, or present injury.98 The doctrine of ripeness might be used to analyze whether the plaintiff will imminently suffer an injury or future injury.99 Nonetheless, no such line of demarcation can be found in case law.100 One lawyer has commented that "[i]n measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing analysis."101

Nevertheless, the First Circuit could have discussed standing even though the Fund did not make the argument.102 Perhaps the First Circuit did not feel comfortable bringing up the standing argument sua sponte.103


98. Gastronomical Workers, 617 F.3d at 61.

99. See id. ("Consequently, it is the future event, not the trustees' injury, that is speculative. Viewed in this light, DBHC's argument is not a ripeness argument at all.") (emphasis added).

100. Laird v. Tatum, 408 U.S. 1, 9-11, 13 (1972) (explaining that the Court characterized the plaintiff's claim as a theoretical injury that the U.S. Army may someday cause injury by misusing their information. Employing the doctrine of standing, the Court dismissed the claim and held that plaintiffs did not sufficiently demonstrate that they were "immediately in danger of sustaining a direct injury as a result of [the U.S. Army's] action" and, therefore, could not "invoke the judicial power to determine the validity of [the] action") (citation omitted); see Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 62 (1976) (explaining that SCOTUS employed the doctrine of standing and held that a group of doctors had "sufficiently demonstrated a direct threat of personal detriment" to review an abortion statute even though it had been enacted but not yet taken effect at the time the action was filed); but see United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956) (explaining that SCOTUS concluded that the broadcasters had standing to sue, and incorporated the doctrine of ripeness as well in its analysis when it states that jurisdiction "depends upon standing to seek review and upon ripeness").


103. Id. at 477.
because it declined to do so.  

As such, the First Circuit did not address this issue. 

It is noteworthy that the First Circuit did not provide an analysis of the doctrine of standing in order to differentiate it from the doctrine of ripeness in the context of this case.  

In New Hampshire Right to Life Political Action Committee v. Gardner, the First Circuit stated that "the doctrine of standing, though vitally important for federal courts, remains a morass of imprecision."  

In Rhode Island Association of Realtors v. Whitehouse, the First Circuit acknowledges that "standing and ripeness may substantially overlap."  

"The imbrication is nowhere more apparent than in pre-enforcement challenges."  

In Gastronomical Workers, there is a pre-enforcement challenge.  

The Gastronomical Workers court’s premise is that the matter is ripe because the Fund did suffer an injury.  

The premise then contends that since said injury is not speculative, it is ripe.  

Notwithstanding, the Court admits that the IRS could later grant the funding waiver.  

If the IRS grants the funding waiver, the employees would not have an injury.  

Thus, the injury is not concrete. Concrete injuries are injuries that have harmed a party or parties and have not been remedied.  

As such, a ripeness argument is apropos.

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104. See generally United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); Erie R.R. v. Tompkins, 304 U.S. 64, 82 (1938) (dissenting opinion) ("No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.") (citation omitted); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 604, 605 (1936) ("No application has been made for reconsideration of the constitutional question there decided ... [the State of New York] is not entitled and does not ask to be heard upon the question whether the Adkins case should be overruled."); Esselstyn v. Casteel, 288 P.2d 215, 217 (Or. 1955) ("The court can only decide questions that are before it.").

105. Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d. 54, 60-62 (1st Cir. 2010).

106. Id.


109. Id.

110. Gastronomical Workers, 617 F.3d. at 58.

111. Id. at 61.

112. Id.

113. Id.

114. Id.

115. See Nichol, Jr., supra note 101, at 172.
b. The CBA Defense

With regard to the employer’s next argument, the collective bargaining agreement defense, the Court engages in cherry picking when it says that “[t]he Plan cannot contract around [ERISA].” First, the Second Circuit in Esden v. Bank of Boston is referring to specific sections of ERISA, none of which are Section 302, which is the subject matter at issue in Gastronomical Workers. Moreover, the Second Circuit is basing its opinion on sections of the statute that are not pertinent to the claim rather than relying on a contract law argument.

Ironically, the First Circuit accuses the employers of belaboring the point that the duty to contribute to a pension plan is contractual in nature yet surprisingly the First Circuit makes no attempt at a contract law analysis. With regard to the employers’ defense of pointing to the contract, the First Circuit holds that “[t]his suit is not an action to collect under, or enforce, the CBA. Rather, it is an action to garner the amounts needed to satisfy ERISA’s minimum funding requirement.” This argument is *circulus in demonstrando* (circular reasoning), as it relies on a premise to assume the truth of the conclusion instead of supporting it. The Fund is arguing that the CBA protects them from having to satisfy ERISA’s minimum funding requirement due to the circumstances in this case. To summarize the Court’s reasoning: The Fund’s contractual argument is irrelevant because this suit is not about contracts, it is about satisfying a minimum funding requirement. Since this suit is about satisfying

116. MILOS JENICEK, HOW TO THINK MEDICINE, REASONING, DECISION MAKING, AND COMMUNICATION IN HEALTH SCIENCES AND PROFESSIONS 530 (2018) (ebook) (defining that cherry picking as the act of pointing at individual cases or data that seem to confirm a particular position, while ignoring a significant portion of related cases or data that may contradict that position).


118. Id. at 172 n.23 (“Title I of ERISA governs the ‘Protection of Employee Benefit Rights.’ Each of the ERISA sections on which we rely appears in Title I.”) (emphasis added); Gastronomical Workers, 617 F.3d at 62.

119. Esden, 229 F.3d at 173 (“See ERISA § 404(a)(1)(D) (documents and instruments governing plan may only be enforced insofar as they ‘are consistent with the provisions of [ERISA Titles I and IV].’”) (emphasis added).

120. Gastronomical Workers, 617 F.3d. at 62.

121. Id. at 63.

122. DOUGLAS N. WALTON, PLAUSIBLE ARGUMENT IN EVERYDAY CONVERSATION 206 (1992) (“A is true because B is true; B is true because A is true. “Wellington is in New Zealand. Therefore, Wellington is in New Zealand.”).

123. Id.

124. Gastronomical Workers, 617 F.3d at 58.
minimum funding requirements, the Fund is required to satisfy the minimum funding requirement.125

The Court completely ignores the Fund’s argument.126 The Fund is arguing to enforce the CBA because it is claiming that it has met its obligations.127 The Fund is simply stating that they have already fulfilled this obligation and should not be required to do so again.128 Ultimately, the Court holds that ERISA supersedes the CBA in question but it does not elucidate its syllogism for how it came to this determination.129

c. Trustee Mismanagement

The third argument advanced by employers is that the funding deficiency is caused by trustee mismanagement.130 The Court claims that trustee mismanagement is irrelevant when deciding funding deficiency issues.131 The First Circuit opines that 29 U.S.C. § 1082(b)(1) lays out the factors for determining funding deficiencies, and trustee mismanagement is not listed.132 However, the Court does not specify the factors and how they are not applicable.133 29 U.S.C. § 1082(b)(1) states:

Except as provided in paragraph (2), the amount of any contribution required by this section (including any required installments under paragraphs (3) and (4) of section 1083(j) of this title or under section 1085a(f) of this title) shall be paid by the employer responsible for making contributions to or under the plan.134

There is not a canon of construction that interprets 29 U.S.C. § 1082(b)(1) to mean that an employer has to make a contribution after it initially does so.135 Statutory interpretation begins with a plain reading of

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125. See Gastronomical Workers, 617 F.3d at 58-59, 63.
126. Id. at 62.
127. Id.
128. Id.
129. Id. at 62-63.
130. Id. at 63.
131. Id.
132. Id.
133. Id. ("ERISA sets forth a specific set of computations that must be made to determine whether a funding deficiency exists. See 29 U.S.C. § 1082(b). Those computations do not include investigations into the propriety of how the fund is managed.").
135. Max Birmingham, Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act, 13 FLA. A & M U. L. REV. 1, 15 (2017) ("If a court performs statutory interpretation without a canon of construction, it is admitting that there is no legal basis for its interpretation.").
the statute.136 Since there is no definitive text on liability for employers after they make the required installment under 29 U.S.C. § 1082(b)(1), contrary to what the First Circuit claims,137 statutory interpretation must shift to the aforementioned sections referenced.138 Section 1083(j)(3)(A) states, in part, “[i]n any case in which the plan has a funding shortfall for the preceding plan year, the employer maintaining the plan shall make the required installments under this paragraph . . . .”139 Under Section 1083(j), the meaning of the term “required installment” is open to various interpretations, as it is not explicitly defined.140 Section 1083(j)(C)(ii) provides a set date for payments of the required installments (first payment is April 15; second payment is July 15; third payment is October 15; fourth payment is January 15 of the following year).141 Under a noscitur a sociis (“a word is known by the company it keeps”)142 canon of construction interpretation, the required installment obligations of employers is met once they make the full payments on each of these dates.143

Section 1085a(f)(3)(A) states “[t]here shall be 4 required installments for each plan year”144 and cites the same four dates as Section 1083(j)(C)(ii).145 “Shall” is generally imperative or mandatory when it is used in statutes, contracts, or the like.146 In the instant matter, a plain

136. United States v. Wiltberger, 18 U.S. 76, 96 (1820) (“The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, . . . in search of an intention which the words themselves did not suggest.”).
137. Gastronomical Workers, 617 F.3d at 64.
138. Id.
140. U.S.C. § 1083(j)(6)(B) states: "The terms "due date" and "required installment" have the meanings given such terms by subsection (j)." Nevertheless, the meaning of "required installment" under U.S.C. § 1082(j) is open to interpretation.
143. See id.; see also 29 U.S.C. §§ 1083(j)-1083(k) (2012).
146. Indep. Sch. Dist. No. 561 v. Indep. Sch. Dist. No. 35 & 438, 170 N.W.2d 433, 440 (Minn. 1969), People v. O’Rourke, 13 P.2d 989, 992 (Cal. Dist. Ct. App. 1932) (“In common, or ordinary parlance, and in its ordinary signification, the term ‘shall’ is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into a mere permission, etc.”); County of Los Angeles v. Cal., 222 P. 153, 156 (Cal. Dist. Ct. App. 1923); Stockton Plumbing & Supply Co. v. Wheeler, 229 P. 1020, 1023 (Cal. Dist. Ct. App. 1921).
reading of the statute draws the following conclusion: The employers have an obligation to fund the required installments on the four dates, as per the CBA,\textsuperscript{147} but do not have an obligation to do so at any other time, much less a duty to make a required installment to cure a funding deficiency from previous years.\textsuperscript{148}

It is presumable that trustee mismanagement would play a part in the analysis of a funding deficiency.\textsuperscript{149} SCOTUS has ruled that under ERISA any exercise of authority or control gives rise to fiduciary status.\textsuperscript{150} This definition includes trustees.\textsuperscript{151} Legislative history also suggests that trustees are fiduciaries under ERISA.\textsuperscript{152} In \textit{Firestone Tire & Rubber Co. v. Bruch} (hereinafter "\textit{Firestone"}), SCOTUS acknowledged the potential problem for self-interested fiduciaries.\textsuperscript{153} ERISA’s exclusive benefit rule mandates fiduciaries to act “solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: . . . providing benefits to participants and their beneficiaries . . .”\textsuperscript{154} Moreover, the Court holds that a “conflict [of interest] must be weighed as a ‘facto[r] in determining whether there is an abuse of discretion.’”\textsuperscript{155} Thus, one would think trustee mismanagement would play a part in the analysis of a funding deficiency.\textsuperscript{156}

It is a rather hypocritical stance of the First Circuit to cite other ERISA sections in its explanation of rejecting the Fund’s CBA argument,\textsuperscript{157} and then ignore an entire ERISA section dedicated to trustee principles as the court rejects the Fund’s trustee mismanagement argument.\textsuperscript{158} ERISA section 405(a) determines the liability for trustees.\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{149} Gastronomical Workers Local Union 610 v. Dorado Beach Hotel Corp., 617 F.3d 54, 63-64 (1st Cir. 2010).
\item \textsuperscript{151} Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989).
\item \textsuperscript{153} \textit{Firestone Tire & Rubber Co.}, 489 U.S. at 115 (quoting \textit{RESTATEMENT (SECOND) OF TRUSTS} § 187 cmt. d (1959)).
\item \textsuperscript{154} \textit{Employee Retirement Income Security Act (ERISA) of 1974 § 404(a)(1); 29 U.S.C. § 1104(a)(1) (2012).}
\item \textsuperscript{155} \textit{Firestone Tire & Rubber Co.}, 489 U.S. at 115 (citation omitted).
\item \textsuperscript{156} Gastronomical Workers Local Union 610 v. Dorado Beach Hotel Corp., 617 F.3d 54, 63-64 (1st Cir. 2010).
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{SEE ERISA § 405(a).}
\end{itemize}
Circuit also blatantly ignores the legislative history of ERISA that fiduciary principles are not just explicit but are also implicit.\(^{160}\)

**d. The Vanishing Deficiency**

With regard to the employer's fourth and final argument, the vanishing funding deficiency was not in existence at the time of the district court's order.\(^{161}\) The First Circuit discerns that the Federal District Court did not rule on this issue.\(^{162}\)

The Court remarks that if there was no longer a deficiency, the Federal District Court's award would constitute "double-dipping" on the part of the trustees.\(^{163}\) The Court remarks that the Fund's 2006 Form 5500 indicated that there was no funding deficiency at that time of the Federal District Court's award.\(^{164}\) The trustees assert that "the withdrawal liability payments in this case were earmarked for the 2006 and 2007 plan years and, thus, had no effect on the funding deficiency for the 2005 plan year."\(^{165}\) The First Circuit disagreed with this statement, and remanded the case to the Federal District Court to determine whether a funding deficiency existed.\(^{166}\)

The First Circuit also issued the Federal District Court to consider another issue on remand: whether the trustees may be granted relief under ERISA § 502(a)(3), under which the trustees brought suit.\(^{167}\) The First Circuit raised the question as to whether the relief sought was equitable

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\(^{160}\) H.R. REP. NO. 93-1280, at 5083 (1974) (Conf. Rep.) (proclaiming "that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.").

\(^{161}\) Gastronomical Workers, 617 F.3d at 64.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id. at 65.

\(^{165}\) Id.

\(^{166}\) Id. ("Given the rolling nature of ERISA accounting, this seems counter-intuitive; but in any event, the record is tenebrous as to how the additional payments were applied. Moreover, the cogency of the documentary evidence depends in large part on inference and interpretation. To complicate matters, the district court did not inquire into the subject. This is a mystery, wrapped in a riddle, tucked inside an enigma. The only thing that we can say with assurance is that the employers have raised genuine issues of material fact about the continued existence of the funding deficiency and about the appropriateness of the remedy — issues that demand further inquiry.") (emphasis added).

\(^{167}\) Id. at 66-67 ("For the reasons elucidated above, we vacate both the dollar-certain judgment and the order denying relief under ERISA section 502(g)(1). We affirm the order denying relief under ERISA section 502(g)(2). We remand the case to the district court. On remand, the district court should conduct such further proceedings, consistent with this opinion, as it deems desirable to develop the record in the necessary respects. If the court determines that the trustees are entitled to prevail, it shall fashion whatever equitable relief may be appropriate.").
relief under ERISA § 502(a)(3), since SCOTUS has ruled that compelling defendants pay money to plaintiffs are usually legal rather equitable.168

III. INTERPRETATIONS OF OTHER ERISA SECTIONS, AS WELL AS OTHER SIMILAR STATUTES AND PRINCIPLES OF LAW

A. Other ERISA Sections

1. Top Hat Plans

Principles of contract law, as opposed to ERISA’s fiduciary standards, govern top hat plans.169 Top hat plans are unfunded pension benefit plans that are “maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.”170 Top hat plans are not subject to ERISA’s vesting,171 funding,172 and fiduciary responsibility requirements.173 Withal, the Second Circuit concludes that this is “because Congress deemed top-level management, unlike most employees, to be capable of protecting their own pension expectations.”174

If top-level management is capable of protecting their own pension plans and benefit plans, then it is logical to deduce that unions negotiating CBAs are capable of protecting pension plans and benefit plans of their constituents.175 With regard to negotiating CBAs, one scholar states that “[i]n an ongoing bargaining relationship, the party who commands the default position has the advantage. The party with the advantage can

168. Gastronomical Workers, 617 F.3d at 64 (“[T]he Supreme Court has stated that ‘[a]lmost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for “money damages,” as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty. And “[m]oney damages are, of course, the classic form of legal relief.”’”) (citations omitted).


171. Id.; see also Gallione, 70 F.3d at 725.

172. ERISA § 301; see also Gallione, 70 F.3d at 724-25.

173. ERISA § 401; see also Gallione, 70 F.3d at 724-25.

174. Gallione, 70 F. 3d at 727 (emphasis added).

preval on a particular issue by either excluding language unfavorable to
its interests or by including language favorable to its interests."

B. Similar Statutes

1. Labor Management Relations Act

Section 301 of the Labor Management Relations Act (hereinafter
"LMRA") provides a cause of action for violations of a CBA between an
employer and union. This statute transforms a state common law claim
into a federal claim.

While LMRA Section 301(a) is very similar to ERISA Section
502, they are two distinct labor laws. In the Conference Report of
ERISA Section 502, Congress acknowledges this:

[W]ith respect to suits to enforce benefit rights under the plan or to re-
cover benefits under the plan which do not involve application of the
title I provisions, they may be brought not only in U. S. district courts
but also in State courts of competent jurisdiction. All such actions in
Federal or State courts are to be regarded as arising under the laws of
the United States in similar fashion to those brought under section 301

Principles of contract law govern LMRA Section 302. When a
claim under LMRA Section 302 is made, courts first look to the language
of the contract. If the contract has plain language, the analysis ends
there. If the contract is ambiguous, the court may consider extrinsic

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and NLRA Section 8(d), 10 INDUS. REL. L.J. 465, 470 (1988).
178. Id. (showing that the Labor Management Relations Board does not deprive state courts of
jurisdiction in actions brought thereunder); see also Charles Dowd Box Co. Inc. v. Courtney, 368
U.S. 502, 514 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962) (showing
the importance for state courts to follow and apply federal law); Textile Workers Union v. Lincoln
(2012); see also Richard Rouco, Available Remedies Under ERISA Section 502(a), 45 ALA. L. REV.
631, 635, 640 (1994) (explaining the similarities between LMRA and ERISA).
5038, 5107 (emphasis added).
182. Id. at 451 ("[W]e look first to the CBAs' explicit language for clear manifestations of
the parties' intent. . . . If, however, the plain language is susceptible to more than one interpretation, we
then consider extrinsic evidence to supplement the parties' intent.").
183. Id.
evidence to support the contention of the parties as to what the ambiguity means. Where lifetime vested healthcare benefits following retirement are at issue and "were agreed upon pursuant to a union-negotiated contract," an LMRA claim creates a "derivative ERISA claim." In this particular instance, courts look to whether "the promise was negotiated via collective bargaining," if the plan is a "product of collective bargaining ... [the court] applies 'ordinary principles of contract interpretation.'" Therefore, it follows that principles of contract law may indeed govern ERISA as applied to negotiated collective bargaining agreements.

C. *Principles of Trust Law*

SCOTUS has explained that the intent of Congress in enacting ERISA is to protect employees from the mismanagement of funds for their benefit plans and pension plans. This concern arose from Congressional investigations into union corruption, which unearthed cronism, kickbacks, and loot in benefit plans and pension plans. In response, Congress imposes fiduciary standards analogous to those in trust law.

A major premise in trust law is that fiduciaries are disinterested. While Congress may have explicitly stated that contracts may also apply, a reason they chose to refrain from doing so is because contracting parties are expected to be self-interested. Perhaps there was concern that the trustees would not be a contracting party, and they could sidestep liability. While a trustee may have a duty of loyalty, a duty of care, and a duty of prudent administration backed by personal liability if

185. *Moore*, 690 F.3d at 450.
186. *Id.*
187. *Id.* at 450, 458.
190. *Id.; see* Zino v. Whirlpool Corp., 763 F. App'x. 470, 474 (6th Cir. 2019) (citing IUE-CWA v. GE, 745 F. App'x 583, 599 (6th Cir. 2018) ("I can only conclude that we have failed to heed 'the principles of ERISA that command us to honor the fundamental duties of the law of trusts.'"); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).
192. *See id.*
195. *Id.* at 655; *RESTATEMENT (SECOND) OF TRUSTS* § 170 (AM. LAW. INST. 1959).
197. *Id.* at 656.
there is a breach, it can be sidestepped if the trustee only agrees to serve if the fiduciary obligations are relaxed or if there are exculpatory clauses. However, under ERISA, fiduciary responsibility is enhanced since it covers actions and authority as well as voiding exculpatory clauses.

While Congress acknowledges that trustees or fiduciaries may make decisions that lead to investment losses, the concern is the process of the decision. Congress wants to ensure that the decision was made with pure intentions. As a remedy, a fiduciary who breaches one of ERISA’s fiduciary duties must “make good . . . any losses to the plan resulting from each such breach.”

While “ERISA abounds with the language and terminology of trust law,” we see that there are sections of ERISA that are abound with the language and terminology of contract law. If trust law can guide the ERISA sections that are apropos, it is reasonable to have contract law guide the ERISA sections that are apropos.

IV. PRINCIPLES OF CONTRACT LAW APPLIED IN ERISA CASES

A. Principles of Contract Law

In Firestone, SCOTUS comments that before ERISA was enacted principles of contract law governed disputes over employee benefits. It is further explained that in the case of a dispute, the court would first look

198. See Langbein, supra note 194, at 659-60.
199. Id.
201. See ERISA § 410(a); see Wiedenbeck, supra note 200, at 124-25.
202. Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980); see S. Rep. No. 93-127, at 29 (1974) (noting that ERISA modifies traditional trust law’s settlor instructions, which states that “if the settlor specify[d] that the trustee shall be allowed to make investments which might otherwise be considered imprudent” because Congress finds this is “insufficient to adequately protect the interests of plan participants and beneficiaries”); see also H.R. Rep. No. 93-533, at 12 (1973).
203. See Amato, 618 F.2d at 567.
204. ERISA § 409(a).
206. See ERISA § 3(18) (discussing adequate consideration); see also ERISA § 406 (showing the sections of ERISA that contain language and terminology of contract law).
207. Firestone Tire & Rubber Co., 489 U.S. at 112-13 (“Actions challenging an employer’s denial of benefits before the enactment of ERISA were governed by principles of contract law.”).
208. Id. at 112 (“The trust law de novo standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA.”).
at the plain language of the contract, and then if there was any ambiguity it would turn to the intentions of the parties. The Firestone Court goes on to explain that ERISA was enacted "to protect contractually defined benefits." The overriding legal theory in which SCOTUS based the Firestone opinion on is trust law. The Firestone opinion has come under heavy criticism from both the United States Court of Appeals for the Third Circuit, the U.S. Solicitor General, and scholars who all argue that SCOTUS should have applied principles of contract law to the case. Moreover, the Firestone decision stated specific sections of ERISA in which trust law would be apropos. This does not, however, mean that contract law cannot guide sections of ERISA if it is apropos.

At its core, ERISA is based upon principles of contract law. In Rud v. Liberty Life Assurance Co. of Boston, Plaintiff brought suit seeking

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209. *Firestone Tire & Rubber Co.*, 489 U.S. at 112-13 ("If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim -- by looking to the terms of the plan and other manifestations of the parties' intent.") (citations omitted).


211. *Id.* at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law.") (emphasis added) (citations omitted);

Neither general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review. As this case aptly demonstrates, the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

*Id.* at 115 (emphasis added).

212. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 147 (1987) ("We suggest several principles of contractual construction which we believe will be relevant in the proceedings to come.").


214. Donald T. Bogan, *ERISA: The Foundational Insufficiencies for Deferential Review in Employee Benefit Claims -- Metropolitan Life Insurance Co. v. Glenn*, 27 HOFSTRA LAB. & EMP. L.J. 147, 149; see also HENRY H. PERRITT, *EMPLOYEE BENEFITS CLAIMS LAW AND PRACTICE* 126 (1990) ("Once a common law contract right exists, ERISA may dictate contract terms or standards for determining breach and affording remedies different from those applicable under common-law contract doctrines.").

215. *See Firestone Tire & Rubber Co.*, 489 U.S. at 147; Brief for the Respondents, supra note 213, at 15; Bogan, supra note 214; PERRITT, supra note 214.

216. *Firestone Tire & Rubber Co.*, 489 U.S. at 111.

217. *Id.*


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insurance benefits and argued that Defendant had a conflict of interest. \(^{219}\) "He argues that a conflict of interest exists because any money Liberty Life pays to a claimant reduces its profit." \(^{220}\) The Seventh Circuit rejects this argument and holds that "[t]here is doubtless some truth in these critiques, but their acceptance would destabilize large reaches of contract law, of which ERISA is, after all, a part, since it neither requires employers to establish welfare and pension plans nor prescribes the terms of such plans." \(^{221}\)

Since the inception of the doctrine of contract law, courts have largely ignored the bargaining power asymmetries. \(^{222}\) This is because courts presume that contracting parties are self-interested. \(^{223}\) If an employer performs its obligations under the CBA by paying, it will have complied with the condition exactly as stipulated. \(^{224}\) Under contract law, courts rarely require exact compliance since "the law abhors a forfeiture." \(^{225}\) In *Gastronomical Workers*, the employers made the payments as directly stated in the CBA. \(^{226}\) Furthermore, SCOTUS has held that parties to a CBA are not required to perform beyond the plain language of the contract. \(^{227}\) In *Lewis v. Benedict Coal Corp.*, the Appellant-union went on strike, and in response the employer stopped making contributions to a welfare and retirement fund, asserting that the union had violated its

begins with the plan's terms. For Chief Justice Roberts, the medical plan acted properly by enforcing its repayment provision because it 'followed the money.' *This holding indicates that because ERISA plans are in essence contracts, a court can apply equitable remedies to enforce their terms.* (emphasis added).

\(^{219}\) Rud v. Liberty Life Assurance Co. of Bos., 438 F.3d 772, 775 (7th Cir. 2006).

\(^{220}\) Id. ("The ubiquity of such a situation makes us hesitate to describe it as a conflict of interest. There is no contract the parties to which do not have a conflict of interest in the same severely attenuated sense, because each party wants to get as much out of the contract as possible. How serious the conflict is depends on circumstances.").

\(^{221}\) Id. at 776 (emphasis added).


\(^{223}\) Langbein, *supra* note 194, at 223.

\(^{224}\) *See, e.g.*, Gastronomical Workers Union Local 610 v. Dorado Beach Resort & Country Club, 476 F. Supp. 2d 99, 106 (D.P.R. 2007) ("This dispute is therefore not about . . . the CBAs at all . . . [but rather] obligations under ERISA, which clearly states that Defendants must adequately fund the Pension Fund they have agreed to sponsor.").

\(^{225}\) UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 360 (1999); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. B (AM. LAW INST. 1981) ("The policy favoring freedom of contract requires that, within broad limits . . ., the agreement of the parties should be honored even though forfeiture results. When, however, it is doubtful whether or not the agreement makes an event a condition of an obligor's duty, an interpretation is preferred that will reduce the risk of forfeiture.").

\(^{226}\) *Gastronomical Workers*, 476 F. Supp. 2d at 104.

contract. SCOTUS rejected this argument; citing the plain language of the contract, it held that parties to a collective bargaining agreement agree to what is expressed in the contract, therefore the parties must perform what is provided unequivocally in the agreement. Contract law should govern contract disputes, even if the claim is brought under ERISA.

B. Case Law

1. United States Court of Appeals for the Sixth Circuit

a. Plain Meaning Rule

The United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") has applied the plain meaning rule to a dispute over a CBA. In Zino v. Whirlpool Corp., an unpublished opinion, the Court first looks to see if the CBA in dispute is written in the plain language of the CBA. In Zino, employees brought suit under ERISA and the LMRA over claims that they were owed healthcare benefits. After a number of acquisitions, Defendant-Whirlpool Corp. was the party responsible for providing said healthcare benefits. Whirlpool Corp. announced significant reductions to healthcare benefits, and the employees sued.

The Sixth Circuit observes that nowhere in the CBA is there language to be found that requires the Defendant to do what the Plaintiffs seek remedy for. The Court even opens the door for the possibility of

228. Lewis, 361 U.S. at 462-64.
229. Id. at 470-71.
230. But see Gastronomical Workers, 476 F. Supp. 2d at 106-07 (holding that ERISA essentially had the ability to override the general laws of contracts where pension funds are concerned).
231. See Scalia & Garner, supra note 142, at 195 (describing the Plain Meaning Rule).
232. Zino v. Whirlpool, 763 F. App 'x 470, 472 (6th Cir. 2019) ("We look first to what each contract says; if its plain language lacks ambiguity, we stop there.").
233. Id. at 471.
234. Id.
235. Id.
236. Id. at 472 ("Here, none of the CBAs contain such language; they state that the company will pay insurance premiums 'in accordance with the terms and conditions of the [Welfare Benefit] Plan,' that retirees 'shall have the opportunity to continue' healthcare coverage, or that coverage for retirees 'shall be' for 'pre-65 coverage only.' None of these statements says clearly and affirmatively that the relevant general durational clause doesn't control the termination of healthcare benefits — whether by reference to the general durational clause itself or by other language stating explicitly that healthcare benefits continue past the relevant agreement's expiration. And nowhere else in any of the CBAs does such language appear. This means the general durational clauses control the termination of Whirlpool's obligation to provide healthcare benefits to plaintiffs, which means the obligation ended when the last CBA expired.")
arguing that the Defendant is obligated to provide the healthcare benefits sought if the contract is ambiguous or lacks plain language.237 The Court remarks that the Plaintiffs made the argument that the CBA does not contain plain language, but it found the argument unpersuasive.238 This reaffirms that courts should always first interpret contracts according to the plain meaning rule, whether there are claims brought under ERISA or any other law, statute, rule, or regulation.239

b. Public Policy

The key issue in Shelter Distribution, Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89 (hereinafter “Shelter Distribution”) is whether, under ERISA Section 410, it is repugnant to public policy for a union to indemnify an employer in a CBA for any contingent withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter “MPPAA”).240 Under ERISA, as amended by the MPPAA, an employer who either partially or completely withdraws from a multiemployer pension plan is subject to withdrawal liability for a portion of the plan’s unfunded pension benefits.241 The CBA provision states, in part:

The Union and the members of the Bargaining Unit have agreed that only the liability of the Company to the [pension plan] are, have been and shall be limited to the actual contributions it makes during the course of the past, present and future Contracts, and the Company shall not be liable for any other obligation or contingent obligation of any kind or nature whatsoever. The Union shall indemnify the Company for any contingent liability which may be imposed under the Multi- Employer Pension Plan Amendments Act of 1980.242

237. Zino, 763 F. App’x at 472 (“And this threshold requirement is just that: a threshold. If a CBA does unambiguously disconnect certain benefits from the agreement’s general durational clause, the agreement might well vest those benefits – even absent clear vesting language. Or ambiguity as to vesting might exist. To make the call, a court would need to examine any ‘clues’ that ‘spring from the CBA.’ Although plaintiffs point to a number of clues they say show that the parties intended to vest healthcare benefits, those clues carry no clout here because no CBA unambiguously disconnects healthcare benefits from the governing general durational clauses. And that means the CBAs unambiguously do not vest lifetime healthcare benefits, which ends our inquiry.”) (citations omitted).

238. Id. at 472.

239. See id. (explaining that if the plain language of the contract lacks ambiguity, the analysis is simple).


241. See id. at 610, 612.

242. Id. at 610.
The Plaintiff demanded indemnification from the Union for its portion of the withdrawal liability, citing the indemnification provision in the CBA. In response, the Union argued that the MPPAA established public policy which prohibits employers and unions from shifting withdrawal liability through a negotiated CBA.

The Court looked at the plain language of the CBA and held that the indemnification provision does not violate public policy. The Union did not argue that the contract was ambiguous, invalid, or that the employers were avoiding their contractual duties. Instead, the Union relied on a public policy argument. The Court did not find this argument persuasive. The Court reasoned that there is no logical difference between the employers making a contract with the union or another party for the indemnification provision, and blazons “it would be illogical to interpret the statute as prohibiting indemnification agreements which accomplish the same thing.”

The Sixth Circuit’s analysis focuses entirely on public policy. Ultimately, the Sixth Circuit held that a CBA, in which a union indemnified an employer for any contingent liability to a multiemployer pension plan established under ERISA, does not violate public policy. Although the

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243. *Id.*
244. *Id.*
245. *Id.* at 613 (“Under the agreement, the Union is the entity analogous to the insurance company described in section 1110(b). Here, as in Pfahler, there is no violation of section 1110(a) because there was no shifting of the financial liability under the agreement: Shelter was still financially liable to the Fund and the company satisfied its financial obligation. Under the indemnification provision, the Union simply agreed to reimburse Shelter for any financial liability it would incur should any contingent liability be imposed by the pension plan. Thus, we hold that Section 8(m) of the collective bargaining agreement between Shelter and the Union is not a violation of any ‘well defined and dominant’ public policy.”).
246. *Id.* at 610.
247. *Id.* ("During arbitration, the Union argued that Section 8(m) was unenforceable because it violated public policy. The Union asserted that the Multiemployer Pension Plan Amendments Act established a public policy prohibiting employers and unions from shifting withdrawal liability through a negotiated collective bargaining agreement because such a shift defeats the purpose of the statute.").
248. See *id* at 613.
249. *Id.*
250. *Id.* at 612.
251. *Id.* at 613 (“Because the collective bargaining agreement does not violate public policy, we AFFIRM the decision of the district court.”).
Court notes that it is a matter of first impression, the Third Circuit ruled on a similar case and came to the same conclusion as the Sixth Circuit.

In Gastronomical Workers, the Court does not examine the contract at issue to ascertain whether it is in plain language nor does it examine the language of the statute it emphasizes its reasoning on. The Court acknowledges that the employers fulfilled their contractual obligations. The Court simply states the employers have a statutory obligation to cure the funding deficiency. It is noted that nowhere in the statute does it require employers to cure funding deficiencies. Dissimilar to the First Circuit in Gastronomical Workers, the Sixth discusses that the contract is valid and that there is no explicit language in the statute that prohibits the provision at issue. There is no explicit language in the statute cited in Gastronomical Workers that employers are obligated to cure funding deficiencies.

V. REDUCTIO AD ABSURDUM

A. Unjust Enrichment

1. "Simple Expedient of Sharp Bargaining"

Contract law is based on the principle that agreements parties freely enter into will be enforced by courts because "the will of the parties . . . is


254. See supra Section II(A)(i).

255. Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d 54, 62 (1st Cir. 2010) ("Because the employers paid these contributions as required under the CBA, this argument runs, they have no further payment responsibilities notwithstanding the occurrence of an accumulated funding deficiency.").

256. Id. ("The statutory obligation is independent of whatever arrangements private agreements may contemplate.").

257. See supra Section II(A)(ii)(C).

258. Shelter Distribution Inc., 674 F.3d at 612-13 ("If Congress thought that an employer should not be able to contractually oblige a third party to indemnify it for any financial responsibility incurred under ERISA, the enactment of the Multiemployer Pension Plan Amendments Act would likely have amended section 1110 of ERISA to prohibit the insurance provisions of section 1110(b). ").

259. See Gastronomical Workers, 617 F.3d at 62 (reference to 29 U.S.C. § 1082(a)(1) with respect to employers curing funding deficiencies); but see Employee Retirement Income Security Act (ERISA) of 1974, § 302(a)(1), 29 U.S.C. § 1082(a)(1) (2012) ("A plan to which this part applies shall satisfy the minimum funding standard applicable to the plan for any plan year.").
something inherently worthy of respect." It is expected that contracting parties are self-interested. In *Gastronomical Workers*, the First Circuit reasons that the CBA does not apply because the "parties could elude ERISA's commands by the simple expedient of sharp bargaining." Ironically, a party was able to elude their contractual obligations due to their bargaining skill. The employers were forced to pay for the funding deficiency even though they already made all of their contractual payments. The First Circuit ultimately concluded that employers contributing to a multi-employer pension plan have an obligation, mandated by section 302 of ERISA, to cure a funding deficiency, even if to do so requires contributions beyond those set forth in the collective bargaining agreement.

The reasoning of the Court in *Gastronomical Workers* with regard to "sharp bargaining" is subject to *reductio ad absurdum*. If contracting parties are self-interested, it is reasonable to infer that the parties bargained for their consideration. It is reasonable to infer that the employers made concessions during the negotiation process in order to gain the considerations they prioritized. While the *Gastronomical Workers* Court held that the employers were sharp bargainers, it is the Fund that were the sharp bargainers. The Fund may have made a concession to the employers

261. Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MONT. L. REV. 493-94 (2010) ("An ever growing body of case law and scholarship has fashioned a rigid dichotomy between sophisticated and unsophisticated parties in a wide array of contract inquiries. Courts mention party sophistication in determining whether the parties intended to form a contract and what they meant by the terms they used. They determine the enforceability of reliance disclaimers, exculpatory clauses and liquidated damages provisions based, at least in part, on party sophistication. Courts also reference sophistication in determining whether a party can avoid a contract on the grounds of mistake or fraud.").
262. *Gastronomical Workers*, 617 F.3d at 62.
263. *Id.* ("The CBA in effect here contains an employer-specific, dollar-specific schedule of such contributions. Because the employers paid these contributions as required under the CBA, this argument runs, they have no further payment responsibilities notwithstanding the occurrence of an accumulated funding deficiency. *We agree with the employers that pension contribution obligations are contractual in nature.* But this tenet does not exist in a vacuum. Whatever a private contract may provide, ERISA continues to govern employers' funding obligation with respect to covered pension plans.") (emphasis added) (citations omitted).
264. *Id.*
265. *See id.* ("Were the rule otherwise, parties could elude ERISA's commands by the simple expedient of sharp bargaining. This result, intolerable in itself, also would frustrate one of ERISA's primary goals: to ensure that covered pension plans provide employees promised retirement benefits.").
266. *See Miller, supra* note 261, at 495 (noting that courts presume that sophisticated parties are aware of the terms of their contracts and that they bargained for them).
267. *See Gastronomical Workers*, 617 F.3d at 62 (suggesting that if the employers only had to stick to the agreement they could avoid ERISA's obligations through "sharp bargaining").
and used this as bargaining leverage and then relied on the court to over-
turn this part of the negotiation, holding it invalid.\textsuperscript{268} Thus, the Fund has
been unjustly enriched by having the employers forced to perform an ob-
ligation that they did not agree to in the contract.\textsuperscript{269} If a party is forced to
perform beyond the plain language of an enforceable contract, the other
party or parties will reap the rewards of unjust enrichment.\textsuperscript{270} The prin-
ciple of unjust enrichment is “[a] person who has been unjustly enriched at
the expense of another is required to make restitution to the other.”\textsuperscript{271} The
principle of unjust enrichment is subject to wide interpretation, as the
main purpose is corrective justice.\textsuperscript{272} Black’s Law Dictionary defines un-
just enrichment as:

1. The retention of a benefit conferred by another, without offering com-
ponent, in circumstances where compensation is reasonably ex-
pected. 2. A benefit obtained from another, not intended as a gift and
not legally justifiable, for which the beneficiary must make restitution
or recompense. 3. The area of law dealing with unjustifiably benefits of
this kind.\textsuperscript{273}

It is absurd to hold that a contract or contract provision is unenforce-
able because one of the parties had negotiating leverage.\textsuperscript{274} If this reason-
ing were to be extrapolated, parties to contracts would simply argue they
negotiated from a weaker position and thus the contract is unenforce-
able.\textsuperscript{275} Contracts would then be unenforceable.

\textsuperscript{268} See Roger Fisher, Negotiating Power: Getting and Using Influence, 27 AM. BEHAV. SCI.
149, 150 (1983) (“The concept of ‘negotiating power’ is more difficult: If I have negotiating power,
I have the ability to affect favorably someone else’s decision. This being so, one can argue that my
power depends upon someone else’s perception of my strength . . . .”).

\textsuperscript{269} See Restatement of The Law of Restitution: Quasi Contracts and
Constructive Trusts § 1 cmt. d (AM. LAW INST. 1937) (stating how a party who receives an overt-
payment from another party beyond what was agreed to would be unjustly enriched if they kept such
payment).

\textsuperscript{270} See id.

\textsuperscript{271} Id.

\textsuperscript{272} See Jules L. Coleman, Intellectual Property and Corrective Justice, 78 VA. L. REV. 283,
284 (1992) (“[U]njust enrichment posits that wrongly or unjustly secured gains must be annulled. . . .
[T]he principle offers little guidance to a common law judge.”).

\textsuperscript{273} Unjust Enrichment, BLACK’S LAW DICTIONARY (10th ed. 2014).

\textsuperscript{274} See Robert A. Dahl, The Concept of Power, 2 BEHAV. SCI. 201, 202-03 (1957) (“A has
power over B to the extent that he can get B to do something B would not otherwise do.”); see also
Fisher, supra note 268, at 150 (discussing how power may be used in negotiations to affect another
person’s decisions).

\textsuperscript{275} See James W. Kuhn, David Lewin & Paul J. McNulty, Neil W. Chamberlain: A Retrospec-
tive Analysis of His Scholarly Work and Influence, BRIT. J. INDUS. REL. 143, 143-44 (1983) (“We
may define bargaining power (of A, let us say) as being the cost to B of disagreeing on A’s terms
relative to the costs of agreeing on A’s terms . . . Stated in another way, a (relatively) high cost to B
Moreover, the *Gastronomical Workers* Court engaged in judicial activism by alleging that the contract provision was unenforceable but did not give a legal reason as to why it was unenforceable. "Sharp bargaining" is not a legally sufficient reason to explain why a contract or contract provision is unenforceable. The *Gastronomical Workers* Court concealed its judicial activism by not providing a legal reason as to why the contract provision is unenforceable such as lack of capacity, duress, undue influence, misrepresentation, nondisclosure, unconscionability, public policy, mistake, impossibility, inter alia.

2. Statutory Requirement

In support of the reasoning in *Benedict Coal*, Representative Frank Thompson, Jr. (D-NJ) remarked that the purpose of ERISA Section 515 is to “permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law – other than 29 U.S.C. 186.” He further added that the costs of delinquent payments by employers to benefit and welfare plans:

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of disagreement with A means that A’s bargaining power is strong. A (relatively) high cost of agreement means that A’s bargaining power is weak. Such statements in themselves, however, reveal nothing of the strength or weakness of A relative to B, since B might similarly possess a strong or weak bargaining power. But if the cost to B of disagreeing on A’s terms is greater than the cost of agreeing on A’s terms, while the cost to A of disagreeing on B’s terms is less than the cost of agreeing on B’s terms, then A’s bargaining power is greater than that of B. More generally, only if the difference between B’s and A’s bargaining power is greater than that of B."

276. *Judicial Activism*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.”).


280. *Id.* §§ 174-175.

281. *Id.* § 177.

282. *Id.* § 164.

283. *Id.* § 161.

284. *Id.* § 208.

285. *Id.* § 178.

286. *Id.* §§ 151-152.


288. 126 CONG. REC. 23,039 (1980).
detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. 289

ERISA Section 515 states:

Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement. 290

In Gastronomical Workers, there is no language in the contract that says the employers are responsible to cure funding deficiencies. 291 The Court engaged in judicial activism again when it claimed that there is a statutory requirement to do so, even though the statute does not state this. 292 Additionally, the Court neither cites nor acknowledges ERISA Section 515, which is the statutory requirement that states employers must make payments according to the collective bargaining agreement. 293

The First Circuit also falsely claims that parties cannot contract around ERISA. 294 The Williston contract treatise states that parties are free to contract around the law, unless it harms the public or the renunciation affects the rights of a non-contracting party or parties. 295 Throughout history, courts have opined that contracts between private parties

289. 126 CONG. REC. 23,039 (1980).
291. Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d 54, 62 (1st Cir. 2010).
292. Max Birmingham, Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act, 13 FLA. A&M U. L. REV. 1, 6 (2017) ("There are three salient methods in which courts execute judicial activism: (1) rule that a law is unconstitutional; (2) the canon of constitutional doubt (use precedential opinions to find incompatibilities which create doubt); and (3) misconstrue the statute to claim it should be interpreted in a manner that is consistent with the judge's personal policy preference.") (emphasis added).
293. See generally Gastronomical Workers, 617 F.3d at 62-63 (dismissing ERISA Section 515 arguments).
294. Id. at 62.
should be interpreted according to the plain meaning of the contract, so as to not disrupt the rights of parties.  

B. Trustee Mismanagement

The First Circuit's reasoning and holding in *Gastronomical Workers* is subject to *reductio ad absurdum*. Shockingly, the First Circuit completely ignored the argument that the employers should not be held liable for curing the funding deficiency since it was caused by mismanagement of the trustees. The Court maintains that under ERISA, mismanagement does not factor into the computations as to whether there is a funding deficiency.

Under the Court's reasoning, employers could face limitless liability for trustee mismanagement. Since the Court opines that trustee mismanagement is not a factor in determining who should cure a funding deficiency, it is possible that trustees could mismanage and cause a funding deficiency. Employers would then be liable to cure the deficiency. The First Circuit did not consider how many times trustees caused a funding deficiency. Theoretically, trustees could game the system and take advantage of an employer. Trustees can cause funding deficiencies numerous times, and each time the employer would be liable to cure the funding deficiency. Trustees, then, have no concern since they are not

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296. United States v. Schooner Peggy, 5 U.S. 103, 110 (1801) ("It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ."); Farouki v. Petra Int'l Banking Corp., 63 F. Supp. 3d 84, 87-88 (D.D.C. 2014), aff'd 608 F. App'x. 8 (D.C. Cir. 2015); Holzsager v. D.C. Alcoholic Beverage Control Bd., 979 A.2d 52, 57 (D.C. 2009).


298. *Gastronomical Workers*, 617 F.3d at 61, 63-64.

299. Id. at 63.

300. See generally id. (mentioning that the ERISA "computations do not include investigations into the propriety of how the fund is managed" trustees never face liability and employers are always on the hook).

301. Id.

302. Id.

303. See generally id. (noting that none of the ERISA computations include an investigation into how the funds were managed by trustees).

304. Id. at 61, 63-64.
responsible and can take on as much risk as they want. Then there would be a funding deficiency that employers would be liable to cure, even though they are not responsible for said funding deficiency.

C. Preemption of Contract Law Claims Under ERISA

Holding that trustee mismanagement cannot be computed in determining a funding deficiency leads to *reductio ad absurdum*, as employers would have no legal recourse since ERISA preempts contract law claims. In the case of *Gastronomical Workers*, the employers claim that they are within the contract and that the root cause of the funding deficiency is trustee mismanagement. However, due to ERISA’s complete preemption doctrine, employers are prevented from litigating their common-law claims, including contract claims, in state courts. As is the case of *Gastronomical Workers*, the employers cannot bring forth a claim of trustee mismanagement as breach of contract, thus leaving the employers without a way to seek remedies. Under the reasoning of the First Circuit, then, the trustees are free to breach the contract and cannot be held liable under ERISA.

305. See generally *Gastronomical Workers*, 617 F.3d at 63 (mentioning that trustee mismanagement of funding is not included in the ERISA computation as to whether a “funding deficiency exists”).

306. See generally id. at 63-64 (“In short, allegations of trustee mismanagement should be raised in a suit for breach of fiduciary duty. They play no role in the decisional calculus in this suit over a funding deficiency.”).

307. See *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 60 (1987) (“The question presented by this litigation is whether these state common law claims are not only pre-empted by ERISA, but also displaced by ERISA’s civil enforcement provision . . . , to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b).”)(citations omitted).

308. See *Gastronomical Workers*, 617 F.3d at 61.

309. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (“ERISA’s pre-emption provision was prompted by a recognition that employers establishing and maintaining employee benefit plans are faced with a task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that administrative practices of a benefit plan will be governed by only a single set of regulations.”).

310. See id.; *Metro. Life Ins. Co.*, 481 U.S. at 62 (holding that respondent is preempted from bringing “common law contract and tort claims” by ERISA).

311. See *Gastronomical Workers*, 617 F.3d at 63-64 (“[A]llegations of trustee mismanagement should be raised in a suit for breach of fiduciary duty. They play no role in the decisional calculus in this suit over a funding deficiency.”).

312. See id.
"In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."\(^{313}\) It follows, therefore, that preventing employers from bringing claims of trustee mismanagement, and holding employers liable for said mismanagement, directly contradicts congressional intent behind ERISA.\(^{314}\)

**CONCLUSION**

Principles of contract law should govern ERISA Section 302. If principles of contract law govern ERISA Section 302, employers may pursue remedies for trustee mismanagement.\(^{315}\) If courts apply principles of contract law to ERISA Section 302, then they can also apply the plain meaning rule.\(^{316}\) The plain meaning rule was first adopted by courts to combat faulty memory and dishonesty.\(^{317}\) Unfortunately, faulty memory and dishonesty are present in modern times, as the New York Court of Appeals promulgates that the plain meaning rule brings "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate the extrinsic evidence."\(^{318}\)

*Gastronomical Workers*’ ruling that employers need to perform beyond the plain meaning of the contract leads to *reductio ad absurdum*.\(^{319}\) The recipient of the performance will come into unjust enrichment, since said party is the beneficiary of said performance without having to give bargained-for consideration in return.\(^{320}\)

If a contract is unambiguous, courts need an extraordinary reason or reasons to come to an interpretation that affects the rights of the parties.

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314. See id. ("In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.").
315. See *supra* Section V(C) (discussing ERISA's preemption of contract law claims).
316. See *supra* Section IV(A) (discussing the plain meaning rule).
319. See *supra* Section V.
320. See OLIVER WENDELL HOLMES, THE COMMON LAW 230 (M. Howe ed. 1963) ("[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise."). Justice Holmes also stated that consideration "must not be confounded with what may be the prevailing or chief motive in fact." Id.
If the First Circuit applied principles of contract law in its *Gastronomical Workers* analysis, the court would have first looked at the language of the contract to determine if it is ambiguous on its face.\(^{321}\) If the court did a proper analysis and found the contract to be unambiguous, then it would have based its reasoning and opinion on the plain language of the contract.

If courts issue opinions that employers deem unfair, there is a pragmatic effect that employers will not offer benefit plans or pension plans.\(^{322}\) In various areas of the law, scholars apply an economic analysis to evaluate the rationales for the effects of legal rules.\(^{323}\) With regard to contract law, scholars have come to conclude that legal rules proselytize efficient markets.\(^{324}\) In contrast, with regard to statutory law, scholars claim that legal rules and statutory requirements do not promote market efficiency.\(^{325}\) ERISA does not require employers offer benefit plans or pension plans.\(^{326}\) Employers are free to bargain these types of compensation, but it is not mandated.\(^{327}\) The Seventh Circuit posits that if employers want to lower labor costs, they will offer "lower wages or promised lower benefits from the start."\(^{328}\) It would be sagacious to expect employers to

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321. See Intercontinental Planning, Ltd. v. Daystrom, Inc., 248 N.E.2d 576, 580 (N.Y. 1969) (noting that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face," so the plain meaning of the words should control the interpretation of the contract).

322. See CHARLES NOBLE, WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE 7-8 (1997) (noting that American employers have a vast amount of discretion when it comes to determining if, and which, benefit plans they will provide to their employees).

323. See id.

324. See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

325. Id. at 312 (claiming that statutory requirements are usually enacted in response to parties who demand regulation because they will profit from it).

326. See Wendy E. Parmet, Health Care and the Constitution: Public Health and the Role of the State in the Framing Era, 20 HASTINGS CONST. L.Q. 267, 274-75 (1993) (discussing how the United States government is not obligated to ensure that its citizens have adequate healthcare protection).

327. Id. at 329.

328. Rud v. Liberty Life Assur. Co. of Boston, 438 F.3d 772, 776 (7th Cir. 2006) ("We have pointed out that given reasonably well-informed employees, an employer cannot reap a long-run benefit from reducing welfare benefits, whether directly or by delegating administration to a hard-nosed insurance company. The employee's total compensation package includes benefits as well as wages; reducing any component reduces the total. If the employer could have met its labor needs with a cheaper compensation package, it would have paid lower wages or promised lower benefits from the start. There would have been no need to incur the bother and uncertainty of trying to "steal" contracted-for benefits through the back door. This analysis can be criticized as reflecting too sunny a view of the operation of labor markets, assuming as it does that employees have such good information that they cannot be fooled in the fashion suggested and that employers are always in for the long haul and therefore always cultivate a reputation for fair dealing with employees. Employees, the argument continues, might be less quick to blame their employer for an adverse benefits decision by an insurance company, albeit a company that had been retained by the employer, than they would... 

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offer lower wages, promised lower benefits, or possibly even not offer benefits at all, if there is a feeling that they will not be given a fair chance at litigating issues they feel strongly about.