BROWN V. CONTINENTAL AIRLINES: IS A FRAUDULENT DIVORCE A VALID WAY FOR A PLAN PARTICIPANT TO MANIPULATE THE PROVISIONS OF ERISA?

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INTRODUCTION

Would you get a divorce for one million dollars? Nine Continental Airlines pilots and their spouses said yes to this question.1 Fearing that Continental’s pilot-only defined benefit plan was near financial failure, these pilots filed for divorce.2 The divorce decrees assigned the pilots’ pension benefits to their former spouses, and Continental, relying on the orders of the state courts, paid the former spouses their elected lump sum distributions.3 Following the payment of benefits, the formerly-divorced couples remarried.4 Continental filed suit seeking reimbursement for the benefits paid, alleging these divorces were “sham[s]” undertaken only to receive the pension benefits that the pilots would have not otherwise been eligible to receive because they were still employed by Continental.5 Based on analogous precedent established by the Supreme Court, the district court dismissed Continental’s claim.6 The Fifth Circuit affirmed the trial court’s decision and set precedent of its own—a fraudulent divorce may be used to manipulate the provisions of an ERISA-regulated pension plan and a defrauded plan sponsor has essentially no recourse.7

By failing to provide relief to Continental’s plan, the Fifth Circuit incentivized other plan participants to similarly obtain benefits to which they are not yet entitled via fraudulent domestic relations orders, including sham divorce.8 The Supreme Court precedent relied upon by the Fifth Circuit established that the Employee Retirement Income Security Act (ERISA) does not authorize a pension plan to “investigate the subjective intentions or good faith underlying a divorce.”9

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1 Brown v. Cont’l Airlines, Inc., 647 F.3d 221, 224–25 (5th Cir. 2011).
2 Id. at 225.
3 Id.
4 Id.
5 Id.
6 Id. at 226–28.
9 Brown, 647 F.3d at 223; see also Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plans, 555 U.S. 285, 301–02 (2009).
Therefore, as long as the domestic relations orders relating to plan disbursements meet the qualification criteria outlined in ERISA, the plan must distribute benefits pursuant to the order.\(^\text{10}\) As shown by the result of *Brown v. Continental Airlines*, even though the purpose and result of the “sham” divorces were to manipulate and “circumvent” Continental’s plan design and ERISA,\(^\text{11}\) the Fifth Circuit failed to protect Continental’s pension plan and its participants.

When a pension plan is manipulated, relief must be provided to protect the financial integrity of the plan for the sake of all plan participants. ERISA’s purpose, along with the duties of plan fiduciaries, provide ample and sound bases for extending relief to all defrauded pension plans. The purpose of this Note is to discuss the Fifth Circuit’s decision in *Brown* and to further assert the implications that denying relief could have on all ERISA benefit plans. Part I summarizes ERISA, its domestic relations order qualification requirements, and how these provisions relate to the facts of *Brown*. Part II discusses the statutory, monetary, and policy-based reasons that should move courts to provide remedies to defrauded plans. Finally, Part III provides two legal theories—the sham transaction doctrine and a restitutionary approach—that may be used to grant equitable relief to defrauded pension plans.

I. ERISA AND QUALIFIED DOMESTIC RELATIONS ORDERS: THE DECIDING FACTOR IN *BROWN V. CONTINENTAL AIRLINES*

In denying Continental relief, the Fifth Circuit focused on the qualification of the domestic relations orders at issue.\(^\text{12}\) The court concluded that a plan sponsor is not allowed to consider any criteria not specifically enumerated in the ERISA provisions, especially criteria involving subjective determinations—such as the validity of a divorce action.\(^\text{13}\) The following summarizes ERISA’s domestic relations order qualification standards and provides a synopsis of the facts and decision of *Brown v. Continental Airlines*.

A. ERISA, the Alienation of Pension Benefits, and the Qualification Standards of Domestic Relations Orders

The Employee Retirement Income Security Act was enacted in response to mismanagement of private-sector pension plan funds.\(^\text{14}\) The Act provided a federally regulated level of security to participants in privately funded pension plans.\(^\text{15}\) An ERISA “benefit plan” is one “established or maintained by an

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\(^\text{10}\) *Brown*, 647 F.3d at 226–28.

\(^\text{11}\) Reply Brief for Appellants, *supra* note 8, at 5.

\(^\text{12}\) *Brown*, 647 F.3d at 226.

\(^\text{13}\) *Id.*


employer” for the express purpose of “provid[ing] retirement income to employees.” To ensure the employee-participants are the actual beneficiaries of the pension programs established on their behalf, the retirement benefits payable under these plans are not assignable or alienable. ERISA though provides one exception to this anti-alienation provision: benefits may be assigned pursuant to a qualified domestic relations order.

A “domestic relations order” (DRO) is a state court order relating to “marital property rights.” Under ERISA, a “qualified domestic relations order” (QDRO) is a DRO that assigns “an alternate payee’s right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan . . . ” and meets specific, enumerated criteria. For example, to be a qualified DRO, the order must not attempt to circumvent the specific plan document and design, such as “requir[ing] a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan . . . .” In 2009, the Supreme Court noted that in qualifying a DRO, the plan’s “enquiry is relatively discrete, given the specific and objective criteria” enumerated in ERISA. And, once qualified, “the plan must pay benefits ‘in accordance with’” the parameters of the QDRO.


Between 2005 and 2007, following significant asset losses by the pension plan and fearing a resultant decrease in their accrued benefits, nine Continental pilots took drastic measures to procure early payment of their benefits. The pilots divorced their spouses and obtained DROs from their respective state courts assigning their pension benefits to their spouse. In all nine divorces, the assignment percentage was either 90 or 100 percent.

20 Id. § 206(d)(3)(B)(i).
21 Id. § 206(d)(3)(C).
22 Id. § 206(d)(3)(D)–(E).
26 Id. See Brown v. Cont’l Airlines, Inc., 647 F.3d 221, 225 (5th Cir. 2011); see also John L. Utz, Need Cash Now? Try a Short Duration Divorce, ERISA LITIGATION REPORTER (LegalWorks, a Thomson Business), Nov. 2011, at 1.
27 Brown, 647 F.3d at 225.; see Brief for Appellant, supra note 25, at 7.
Continental’s plan contained an early retirement provision allowing a participant to separate from service and commence receiving their benefits as early as age fifty. Under this design, a participant’s former spouse could receive benefits assigned pursuant to a DRO as soon as the participant reached fifty years of age, regardless of whether that participant was still employed. Because all of the pilots in Brown were over age fifty, the nine former spouses elected to receive their assigned portion of benefits immediately as a lump sum payment. Continental reportedly paid approximately $10 million in lump sum distributions to these nine spouses.

The crux of Continental’s argument for relief focused on the qualification of the pilots’ DROs. Because the DROs required the plan to pay a benefit that was not allowed under the plan design—i.e., a premature lump sum payment while the participant was still actively employed—the DRO should never have been qualified under ERISA. If not qualified, then Continental should not have paid the benefits and, therefore, should be reimbursed. But, this “qualification” argument was quickly rejected by the court, which viewed it as circular and, given prior precedent, unconvincing.

The court offered no relief to Continental because it found that the qualification criteria were not open to subjective interpretation. Relying on its

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29 Brown, 647 F.3d at 225.

30 Id.


33 Id. at 14–15.

34 Id.

35 “Continental argues that it can refuse to qualify the DRO because the DRO would not be qualified.” Brief for Appellees at 4, Brown v. Cont’l Airlines, Inc., No. 10-20015 (5th Cir. April 27, 2010), 2010 WL 3163511.

36 Brown, 647 F.3d at 227; see Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plans, 555 U.S. 285, 301–02 (2009) (“[A] QDRO enquiry is relatively discrete, given the specific and objective criteria for a domestic relations order that qualifies as a QDRO . . . .”); Matassarin v. Lynch, 174 F.3d 549, 568 (5th Cir. 1999) (“Once a plan administrator determines that a domestic relations order meets the criteria set forth in 29 U.S.C. § 1056(d)(3) and thus is ‘qualified,’ he is required to act in accordance with the QDRO . . . . ‘ERISA does not require, or even permit, a pension fund to look beneath the surface of the order.’” (citation omitted)).

37 Brown, 647 F.3d at 227.
own precedent, as well as precedent established by the Supreme Court, the court held that a “determination of whether a DRO is qualified [is] a straightforward matter . . . .” 38 A plan administrator must take the DRO “at face value” and is not allowed “to engage in complex determinations of underlying motives or intent.” 39 Therefore, under these requirements, the DROs submitted to Continental were properly qualified and, in that regard, the benefits properly paid. 40

As a result, Continental was defrauded out of pension plan assets and left without any means to seek restitution. Yet, it is unclear why Continental decided to pursue its qualification argument rather than focus on a purely restitution theory, given the unfavorable precedent on qualification. 41 Under a restitutionary theory, the ERISA qualification standards can remain untouched and plans can continue to qualify DROs as mechanically as they have done in the past. But, if a particular divorce and subsequent DRO seem fraudulent, a plan administrator, as fiduciary, would be allowed to investigate and seek a remedy from the court if fraud is discovered. Providing relief to a defrauded pension plan would not need to disrupt administrative practice and would allow a plan to seek reimbursement for benefits fraudulently distributed.

The remainder of this Note discusses the policy, statutory, and monetary-based reasons behind the necessity of providing relief and restitution to a plan that has been taken advantage of by participants. This Note also asserts that this relief is paramount to the future financial maintenance of a plan for the continued benefit of all plan participants. Further, this Note will provide two legal theories on which defrauded pension plans could base their reimbursement arguments.

III. THE 5TH CIRCUIT GOT IT RIGHT (AND WRONG): WHY DEFRAUDED PENSION PLANS DESERVE A REMEDY

In rejecting Continental’s circular qualification argument, 42 the Fifth Circuit made the right decision. 43 Imposition of administrative burdens and subjective criteria to a DRO qualification determination could be detrimental to the overall function of a pension plan. 44 Requiring a plan sponsor to question the legitimacy of a divorce could put fiduciaries in an uncomfortable and unprofessional position with plan participants. 45 But, by denying relief to Continental altogether, the Fifth Circuit aided the pilots in perpetrating fraud. 46

To adequately fulfill the purpose of ERISA—protecting private-sector employees’ stable retirement income—fiduciaries need to be able to protect plan

38 Id.
39 Id.
40 Id.
41 See Matassarin, 174 F.3d at 568.
42 Brief for Appellees, supra note 35, at 4.
43 Brown, 647 F.3d at 227.
44 Id.
45 See Utz, supra note 26, at 2.
46 Reply Brief for Appellants, supra note 8, at 4–5.
assets against participants who intentionally defraud the plan. An ERISA-covered pension plan should be able to recover benefits paid due to misrepresentation and fraud, as denying relief is contrary to the purpose of ERISA, prevents a plan fiduciary from fulfilling statutory obligations, and negatively affects the financial future of the plan.

A. Denying Relief Is Contrary to the Purpose of ERISA

In enacting ERISA, Congress outlined explicit policy goals of the statute. One purpose was to “increase the likelihood that participants and beneficiaries [in private-sector employee benefit plans] would receive their full benefits . . . .” Congress felt that by requiring plan administrators to properly fund their plans, and then requiring documentation of this funding to assist governmental oversight, the risk of lost pension benefits would be reduced.

To help facilitate the reliability and protection of these retirement benefits, ERISA established “minimum vesting standards.” These standards provide that, under certain mandatory minimum conditions, benefits accrued by a plan participant become non-forfeitable regardless of continued employment or future earnings. This irrevocability bolsters the notion that provision of benefits should be governed from a contractual viewpoint.

Pension plans arise from employment agreements. These agreements include promises from the employee to provide adequate employment services for the employer in exchange for certain forms of compensation. Therefore, it makes sense that the provisions of a pension plan would be governed in a similar, contract-based way.

\[47\] 29 U.S.C.A. § 1001b. (West 2012); see Brief for Appellants, supra note 25, at 8–10. “[P]lan fiduciaries must have the ability to protect plan assets from abusive practices that result in favoritism toward, unequal treatment of, or disadvantage to some participants and their beneficiaries. Namely, conferring undue benefits to some plan participants or beneficiaries means others will have less money available from which to draw valid benefits . . . for which ERISA demands the remedy of restitution.” Id. at 34 (internal citations omitted).


\[49\] 29 U.S.C.A § 1001b; see also PURCELL & STAMAN, supra note 14, at 7.

\[50\] ERISA § 302, 29 U.S.C.A. § 1082; see also Geller v. Cnty. Line Auto Sales, 86 F.3d 18, 22 (2d Cir. 1996).

\[51\] ERISA § 203(a), 29 U.S.C.A. § 1053(a).

\[52\] Id.; see also PURCELL & STAMAN, supra note 14, at 14.


\[54\] See Langbein, supra note 53, at 1329–30.

\[55\] Id.
The Fifth Circuit has analyzed pension benefits based on contract law and found that a pension contract includes enforceable promises made by both employer and employee.\footnote{Coop. Benefit Adm’rs v. Ogden, 367 F.3d 323, 330 (5th Cir. 2004).} For example, in 2004, the court found a “contractual reimbursement obligation” on the part of an unjustly enriched participant.\footnote{Id.} Therefore, to facilitate the purpose of ERISA, the provision and acceptance of pension benefits should be viewed in terms of a contract, with both sides—employer and employee—equally liable to the other for breaches of that contract.

### B. Denying Relief Prevents Fiduciaries from Carrying Out Their Statutorily-Mandated Duties

To ensure the reliability of pension benefit provisions, ERISA places a duty of care on the fiduciaries of a plan with regard to the management and administration of plan assets.\footnote{ERISA §§ 404(a), 409, 29 U.S.C.A. §§ 1104(a), 1109 (West 2012).} Anyone in a fiduciary position has an “obligation[] to protect plan assets for the benefit of all plan participants and beneficiaries to ensure the availability of contractually-defined benefits.”\footnote{Brief for Appellants, supra note 25, at 8; see also ERISA § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).} Failure to carry out this duty prudently could make a fiduciary “personally liable” to make that plan monetarily whole, if necessary.\footnote{ERISA §§ 404(a), 409, 29 U.S.C.A. §§ 1104(a), 1109.} To fulfill this duty, the Supreme Court found that a fiduciary must locate and “take control” of any improperly dispersed plan assets.\footnote{Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., 472 U.S. 559, 572 (1985).} Therefore, based on this finding, failure to secure reimbursement could be grounds for breach of fiduciary duty.\footnote{Id.}

The Department of Labor (DOL) has issued opinions consistent with the Supreme Court’s view.\footnote{See, e.g., Emp. Benefits Sec. Admin., Dep’t of Labor, DOL Op. Letter 99-13A, Plan Administrator May Not Ignore Questionable QDRO, But Should Not Independently Invalidate Order (1999); Off. of Pension & Welfare Benefit Programs, Dep’t of Labor, Op. No. 77-08 (1977).} For example, in 1977, the DOL indicated that to comply with ERISA-imposed duties, “a fiduciary must attempt . . . to recover erroneous payments made from a plan.”\footnote{Off. of Pension & Welfare Benefit Programs, supra note 63.} More recently, the DOL responded to a request made in 1999 by United Airlines.\footnote{Emp. Benefits Sec. Admin., Dep’t of Labor, supra note 63.} Like Continental in \textit{Brown}, United’s pension plan had paid out after a set of similarly suspect divorces and asked for an assessment from the DOL regarding the relationship between their fiduciary duty and the possibility of recovering potentially fraudulent DRO payments.\footnote{Id.; see also Utz, supra note 26, at 3–6.} The DOL
indicated that a plan administrator is not required to evaluate the “correctness” of a DRO issued by a state court—a sentiment later echoed by the Supreme Court and the Fifth Circuit.67

However, the DOL also determined that the fiduciary “must [still] carry out his or her responsibilities [and duties].”68 Further, if a plan administrator has “evidence calling into question the validity” of a DRO or divorce proceeding, the DOL insists that the administrator cannot ignore this information.69 The “administrator must take reasonable steps to determine its credibility . . . .”70 So while the Supreme Court has ruled that a plan administrator cannot delve into the personal lives of participants to determine if a divorce is legitimate,71 the DOL has indicated that failure to so investigate could be grounds for breach of fiduciary duty.72 This leaves plan administrators, such as Continental, in a precarious position.

C. Denying Relief Can Harm the Financial Soundness of a Pension Plan

Although providing reliable benefits and allowing fiduciaries to satisfy statutory duties are important reasons to provide relief to a defrauded plan sponsor, the most compelling reason is a matter of dollars and cents. Proper plan funding is the only way that benefits can be timely paid and fiduciary duties satisfied. Allowing participants to fraudulently manipulate the terms of a plan can severely jeopardize long-term funding and can compromise future benefits for remaining participants.

In Brown, the pilots contended that the validity of the divorces was immaterial because they were only paid benefits that were their contractual property.73 Continental argued that whether the funds were vested and payable in the future does not “negate the importance” of administering the plan according to the plan provisions.74 Continental further argued that if participants were allowed to commence retirement benefits “whenever they liked [and] without regard to plan restrictions,” a pension plan would be unable to maintain sufficient assets to “preserve and grow” benefits for all entitled participants.75 ERISA was designed to “prevent one party from gaining an advantage relative to [another] person[.]”

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67 EMP. BENEFITS SEC. ADMIN., DEP’T OF LABOR, supra note 63; see also Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plans, 555 U.S. 285, 300–02 (2009); Brown v. Cont’l Airlines, Inc., 647 F.3d 221, 227 (5th Cir. 2011).
68 EMP. BENEFITS SEC. ADMIN., DEP’T OF LABOR, supra note 63.
69 Id.
70 Id.
71 Kennedy, 555 U.S. at 300–02.
72 EMP. BENEFITS SEC. ADMIN., DEP’T OF LABOR, supra note 63.
73 Brief for Appellees, supra note 35, at 3–4, 26.
74 Reply Brief for Appellants, supra note 8, at 14–15.
75 Brief for Appellants, supra note 25, at 35.
which is exactly what these pilots sought to do. Federal circuit courts have long agreed with this unjust enrichment argument.

In 1976, the Eighth Circuit said, “[t]he actuarial soundness of pension funds is . . . too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan.” Commentators have argued that a guarantee of future pension benefits relies on the “[s]tability and predictability” of plan asset management, and that payment of large, unanticipated, lump sum distributions can severely disrupt the financial security of the plan.

In basic terms, a pension plan, for accounting purposes, is required to hold a liability for each participant’s vested accrued benefit. The total liability is then used to determine how much a plan sponsor must contribute to the pension plan to fund the outstanding benefit liabilities. With respect to participant distributions, a lump sum distribution is a single payment made in lieu of an annuity payment. The lump sum amount represents the present value, based on interest rate and life-expectancy assumptions, of the future annuity payments.

Plan funding issues often result from the discrepancy between the interest rate assumptions used when valuing plan liabilities and lump sum distributions. Often, pension plans value the liabilities at a higher interest rate than the rate used to calculate an actual lump sum distribution. This valuation method causes the lump sum amount paid from plan assets to be greater than the amount that had been held as a liability and therefore, the amount that had actually been funded by the plan. When a plan is forced to pay out a significant number of lump sum distributions, it can “work like a bank run” and severely weaken a plan that may

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76 Reply Brief for Appellants, supra note 8, at 14–15.
77 See, e.g., Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (“The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan.”); see also J. Daniel Plants, Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment, 89 MICH. L. REV. 2000, 2047 (1991).
78 Phillips, 542 F.2d at 55 n.8; see also Plants, supra note 77, at 2047.
79 Plants, supra note 77, at 2047.
82 Id.
83 See, e.g., Wozniak & Chittim, supra note 80, at 1.
84 Id. at 1–2.
85 Id. at 2.
86 Id.; see also Pension Comm. of the Am. Acad. of Actuaries, supra note 81, at 5–6.
87 See Wozniak & Chittim, supra note 80, at 1–2.
This drain of plan assets creates risk for all the remaining beneficiaries of a plan.89

In its most recently available annual report, Continental’s defined benefit pension plan was approximately 50 percent funded,90 meaning that the plan currently has enough assets to pay about half of its promised benefits. Due to these alleged fraudulent divorces in Brown, Continental paid out roughly $10 million in lump sum distributions.91 That $10 million is no longer in the fund and thus, the plan is unable to make investment gains on that money for the benefit of all participants. The premature distribution of the $10 million weakened the entire future funding projection, and based on the Fifth Circuit’s decision, other plan participants could follow the lead of the nine pilots and get early distributions from the plan. If forced to pay such additional lump sums, the plan could easily need to disburse all its remaining plan assets. Because the plan is only 50 percent funded, half of the participants may never receive any benefits.

Why should some contractually-accrued benefits be more important than others? These pilots perpetrated a fraud on the plan which, if not remedied, forms precedent protecting any plan participant who wishes to “legally” access their pension benefits before a plan is financially stable enough to pay them.
IV. LEGAL THEORIES FOR A DEFRAUDED PENSION PLAN: WHAT IS A BASIS FOR REQUESTING REIMBURSEMENT?

To pay future benefits to participants, a plan needs to maintain a stable asset base. If benefits are paid earlier than actuarially projected, plan assets could be depleted and remaining benefits jeopardized. To eliminate unnecessary burdens on assets, a plan needs relief from participants who intentionally manipulate the terms of a plan. Two possible legal theories for granting such relief are either, reliance on the sham transaction doctrine, or on a common-law restitutionary theory.

A. Sham Transaction Doctrine: Should It Apply to the Private Sector?

One potential remedy, as argued by Continental, would be the application of the sham transaction doctrine. The sham transaction doctrine allows for a transaction to be ignored if that transaction was entered for the sole “purpose of tax avoidance.” For example, in federal income tax, bankruptcy, and immigration proceedings, the sham transaction doctrine can be invoked regarding a divorce ruling. If the court finds the divorce to be fraudulent and obtained for the sole purpose of avoiding the law, the divorce is essentially nullified for the purpose of the proceeding. As argued by Continental, precedent supporting the doctrine provides that a court is not required to validate a fraudulent divorce just because a couple has “satisfied legal formalities.” Yet, in Brown, the Fifth Circuit declined to extend the sham transaction doctrine into an ERISA-related matter. The court reasoned that the doctrine should only be invoked by the federal tribunal and not by a private entity, like a plan administrator. The court felt that allowing a private actor to pry into the personal motives behind a couple’s divorce would extend the doctrine too far.

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92 Brief for Appellants, supra note 25, at 21–22.
95 See Boyter, 668 F.2d at 1387 (sham transaction doctrine can be used to invalidate foreign divorce proceedings when used for the sole purpose to avoid tax liability, although the divorce in this case was found to be valid); In re Rodgers, 315 B.R. at 530 (bankruptcy discharge denied using sham transaction doctrine used when divorce used to defraud creditors); In re Aldecoaotolora, 18 I. & N. Dec. at 430 (sham transaction doctrine used to invalidate a foreign divorce that “was entered into for the sole purpose of circumventing the immigration visa preference system.”).
96 Brief for Appellants, supra note 25, at 28.
97 Brown v. Cont’l Airlines, Inc., 647 F.3d 221, 227-28 (5th Cir. 2011).
98 Id.
99 Id.; see also, e.g., Utz, supra note 26, at 2.
The court seemed to forget, however, about a provision of ERISA that makes pension plans, and their funding, a potential tax matter: the Pension Benefit Guaranty Corporation (PBGC).\textsuperscript{100} The PBGC is an insurance program organized to help “encourage the continuation and maintenance” of private-sector pension plans.\textsuperscript{101} If a sponsor terminates a plan—either voluntarily, in cases of employer financial hardship, or involuntarily, in cases the PBGC feels the plan should be immediately liquidated to preserve plan assets—the PBGC takes over the remaining plan funds and disburses the plan’s vested benefits.\textsuperscript{102} The PBGC helps “to insure that participants of defined benefit plans are not left empty-handed when an employer becomes insolvent and unable to pay its pension obligations.”\textsuperscript{103}

The PBGC is currently funded by annual insurance premiums charged to plans, the assets and subsequent recoveries from bankruptcy actions for the pension plans terminated and assumed by the PBGC, and through the PBGC’s own investment earnings.\textsuperscript{104} Based on the PBGC’s 2011 Annual Report, the PBGC was holding benefit liabilities for about 1.5 million participants in more than 4,300 insolvent pension plans.\textsuperscript{105}

However, current PBGC funding methods are inadequate to cover these outstanding benefits.\textsuperscript{106} During the 2011 fiscal year alone, the PBGC assumed the assets and liabilities of 152 single-employer pension plans, with an aggregate net loss to the PBGC of $1.19 billion.\textsuperscript{107} Although the PBGC does not currently receive public funds to help meet its obligations,\textsuperscript{108} the reality is that it is only a matter of time before the PBGC will need some type of federal assistance. As discussed above, a fraudulent divorce can lead to a premature lump sum distribution, which could result in plan funding problems. Plan funding problems could then lead to a plan termination and subsequent takeover by the PBGC. Therefore, transactions affecting ERISA and pension plan funding, like fraudulent divorces, should be looked at as a public matter.

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\textsuperscript{100} ERISA § 4002, 29 U.S.C.A. § 1302 (Westlaw 2012).
\textsuperscript{101} Id. § 4002(a)(1).
\textsuperscript{104} Id. at 189. See generally ERISA §§ 4002–4007, 29 U.S.C.A. §§ 1302–1307 (West 2012).
\textsuperscript{106} Id. at 19–21.
\textsuperscript{107} Id. at 21.
\textsuperscript{108} See, e.g., Cearley, supra note 103, at 189–91.
B. Simple Restitution: The Equitable Relief Provided by the Second and Seventh Circuits

Instead of relying on a potentially complicated tax doctrine, regardless of its applicability, it is best for plans to focus on a more straightforward restitutitional approach. In certain situations, ERISA provisions and the courts’ interpretations currently allow pension plans to recover benefit payments made erroneously to participants.\(^{109}\) For instance, a plan may recover overpayments resulting from computational errors or misrepresentations by participants.\(^{110}\) But in situations such as *Brown*, the court’s interpretation of ERISA’s enforcement statute seems contrary to common sense,\(^{111}\) which would allow a pension plan relief under principles such as unjust enrichment and liability for fraudulent misrepresentation.\(^{112}\) The court’s lack of enforcement, though, likely stems from ERISA’s broad preemption provisions.\(^{113}\)

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\(^{110}\) See, e.g., Militello v. Cent. States, Se. & Sw. Areas Pension Fund, 360 F.3d 681, 684, 687–88 (7th Cir. 2004) (plan allowed to recover benefits overpaid because plan participant represented that he was not reemployed in prohibited employment). Currently, there are not a lot of litigated claims regarding recovery of overpayment due to computational or administrative errors because this right of recovery is well established. See, e.g., Neulander, *supra* note 109, at 2. ERISA § 502(a)(3) has also been interpreted to allow a plan recovery under plan reimbursement provisions and under disability benefit provisions that require reimbursement following a retroactive Social Security disability award. See, e.g., Sereboff v. Mid Atlantic Med. Servs., Inc., 547 U.S. 356, 360, 369 (2006) (plan granted reimbursement from a court settlement paid to the beneficiary of health plan benefits); Brief for Appellants, *supra* note 25, at 38.

\(^{111}\) In *Brown*, the pilots likely received benefits to which they were not entitled and which they should, therefore, restore under a theory of unjust enrichment. *Restatement (First) of Restitution* § 1 (1937). “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” *Id.* See also *Plants*, *supra* note 77, at 2044. In *Brown*, the pilots misrepresented the state of their marriages, and arguably perjured themselves, to induce Continental to pay benefits from the plan. Under the common law theory of fraudulent misrepresentation, the pilots should be liable for the plan’s loss due to their misrepresentations. *Restatement (Second) of Torts* § 525 (1977). This theory places liability on “[o]ne who fraudulently makes a misrepresentation of fact” that is then relied upon. *Id.*

\(^{112}\) ERISA § 514(a), 29 U.S.C.A. § 1144(a) (West 2012).
ERISA preempts “state laws of general application . . . when their application has reference to or connection with an ERISA plan.”114 Because the common law principles of restitution and unjust enrichment are traditionally governed by state common law, courts often consider them inapplicable.115 Nonetheless, ERISA’s legislative history indicated that Congress did not intend these restitutionary claims to fall through the cracks.116 With such broad preemption, “a body of Federal substantive law will [need to] be developed by the courts to deal with issues involving rights and obligations under private . . . pension plans.”117 Also, the Supreme Court has acknowledged the need to create a body of federal common law to settle disputes under ERISA.118 Although courts have alluded to “federal common law right[s],”119 the small body of existing law is not helpful to a plan seeking restitution.120 ERISA’s current statutory language provides fiduciaries, as well as plan participants and beneficiaries, a cause of action to seek “equitable relief” from the courts.121

Unfortunately, the Supreme Court’s response to actions for relief has been less than equitable. For example, a plan sponsor sought enforcement of a reimbursement provision in their ERISA-regulated plan.122 These reimbursement provisions provided that if a participant had been the beneficiary of health plan benefits following an accident and received a monetary settlement to cover those injuries from that accident, the participant was required to reimburse the plan.123 Essentially, the plan was to be made whole if a third-party was liable for the health costs associated with an accident.124 Yet, the Supreme Court refused to enforce the reimbursement requirement under the “equitable relief” provisions of ERISA.125


117 120 CONG. REC. 29,94229942 (1974) (remarks of Sen. Javits); see also Jamail, Inc., 954 F.2d at 303; Plants, supra note 77, at 2023.


119 Jamail, Inc., 954 F.2d at 306.


122 Great-West, 534 U.S. at 206.

123 Id. at 207; see also Neulander, supra note 109, at 2–3.

124 Great-West, 534 U.S. at 207.

125 Id. at 212–13.
The Court narrowly interpreted the word “equitable” to mean only those remedies that were typically available from courts of equity in the “days of the divided bench.”126 The plan sponsors were prevented from seeking restitution if that relief would “impose personal liability on the defendant” or would result in compensatory damages.127 To meet the “equitable relief” test, the funds that the plan sought to be restored must be “in the defendant’s possession.”128

Therefore, in theory, as long as an enriched participant spent the funds at issue, they would never have to repay the plan. Under this interpretation, a participant could perpetrate a fraud on the plan, spend the benefits paid based on the plan’s reliance on that fraud, and never be held accountable.129 The majority decision in Great-West Life & Annuity Insurance Co. v. Knudson, though, was met with strong dissent.130 The dissenting justices iterated that the decision of the majority was explicitly contrary to the purpose of ERISA and the intention of Congress.131

The preemption provisions of ERISA were designed to protect pension plans from unexpected and potentially detrimental financial consequences resulting from being subject to claims in various state courts.132 However, the current interpretation prevents pension plans from seeking basic relief. Given this current precedent, it may be necessary for plan sponsors to take a different approach if they want to seek relief for their plans. One such approach involves bringing claims under state common law and arguing that because benefits have been dispersed, they no longer “relate to” a benefit plan.133

Both the Second and Seventh Circuits have purposefully avoided the ERISA preemption issue and relied on state common law to afford necessary relief to pension plans.134 In 1996, the Second Circuit allowed a plan sponsor to seek reimbursement after it was discovered that the plan had paid medical expenses for a non-employee.135 The defendant in Geller v. County Line Auto Sales, who was an eligible plan participant, registered his girlfriend for benefits claiming she was a

126 Id. at 212, 219; see also Neulander, supra note 109, at 2.
127 Great-West, 534 U.S. at 214.
128 Id. The Fifth Circuit also relied on the Supreme Court’s interpretation of “equitable” in similar decisions. In Bombardier Aerospace Emp. Welfare Benefits Plan v. Ferrer, Poirer & Wansbrough, the court held that a plan could seek recovery of funds that belonged to the plan as long as the funds were “within the possession and control of the defendant-beneficiary[.]” 354 F.3d 348, 356 (5th Cir. 2003).
129 See, e.g., Langbein, supra note 53, at 1358.
130 Great-West, 534 U.S. at 221–34.
131 Id. at 234.
133 See ERISA § 514(a), 29 U.S.C.A. § 1144(a) (West 2012).
134 See Tr. of the AFTRA Health Fund v. Biondi, 303 F.3d 765, 783 (7th Cir. 2002); Geller v. Cnty. Line Auto Sales, 86 F.3d 18, 23 (2d Cir. 1996); see also Langbein, supra note 53, at 1359 n.249.
135 Geller, 86 F.3d at 23.
full-time employee. After paying her medical expenses, the plan learned she had never been employed. The plan then sought reimbursement under a common law fraud claim. The Geller court allowed the defrauded plan to pursue their claim because such a claim would not “compromise the purpose of Congress and [would] not impede federal control over the regulation of employee benefit plans.” The court viewed recovery under a common law fraud claim as a means to further ERISA’s purpose of safeguarding the interests of all participants in a given plan. The court felt “the preemption provision should not be read to contravene [ERISA’s] underlying design.”

Similarly in 2002, the Seventh Circuit also allowed a health plan to pursue a common law fraud claim against a participant. To allow his ex-spouse to remain as a beneficiary under the plan, the participant did not inform his employer of his divorce. The plan then sought reimbursement under a claim of fraudulent misrepresentation for benefits paid to the ineligible former spouse. The participant argued that the reimbursement claim was governed by state common law and thus preempted by ERISA. Relying on Supreme Court precedent, the Seventh Circuit concluded that a claim must be evaluated based on the “structure and purpose” and overall objective of ERISA before it is broadly preempted. Therefore, to preserve the ultimate purpose of the plan—providing reliable benefits to participants—the court felt it necessary to allow a defrauded plan to recover. Relying on the above federal precedent, and to fulfill the purpose of ERISA and further the intention of Congress, one way a defrauded pension plan should be allowed to seek “equitable relief” is through the channels of state common law.

CONCLUSION

Defrauded pension plans like Continental’s need relief. The courts allowing, and thus condoning, such fraud only place pension plans at greater risk for financial failure. ERISA’s purpose is to help ensure that plan participants who rely on a pension plan from a private-sector employer receive their promised retirement income. The fiduciaries of these plans need to be able to carry out their mandated

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136 Id. at 20.
137 Id. at 19–20.
138 Id.
139 Id. at 23.
140 Id.
141 Id.
142 Tr. AFTRA Health Fund v. Biondi, 303 F.3d 765, 783 (7th Cir. 2002).
143 Id. at 769.
144 Id. at 770–71, 777.
145 Id. at 773.
146 Id. at 774, 782; see also N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995).
147 Tr. of the AFTRA Health Fund v. Biondi, 303 F.3d 765, 782-83 (7th Cir. 2002); see ERISA § 3(2)(A), 29 U.S.C.A. § 1002(2)(A) (West 2012).
duties and protect plan assets entrusted to their care from fraudulent depletion. And, especially in the case of lump sum payments like those paid by Continental, a plan needs protection from participant misrepresentations that could detrimentally affect the long-term funding of their pension plans for the sake of the remaining (and honest) plan participants. Therefore, if Congress is unwilling to create an explicit remedy provision in ERISA, the courts need to allow a defrauded pension plan relief under either the sham transaction doctrine or basic restitutionary principles of state common law.