THE ERISA AMENDMENT PROVISION AS A DISCLOSURE FUNCTION: INCLUDING WORKABLE TERMINATION PROCEDURES IN THE FUNCTIONAL PURPOSE OF SECTION 402(b)(3)

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I. INTRODUCTION

The Employee Retirement Income Security Act of 1974[1] (ERISA) excludes welfare benefits,[2] such as health care and life insurance, from

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automatic vesting under employee welfare benefit plans.[3] ERISA permits pension benefits[4]—monthly cash payments—to vest automatically under employee pension plans.[5] Additionally, plan participants[6] and beneficiaries[7] do not forfeit accrued pension benefits when plan sponsors, namely employers,[8] terminate pension benefit plans.[9] Plan participants and beneficiaries, which include employees, retirees, and their spouses and dependents, sue plan sponsors under ERISA to preserve both pension and welfare benefits by requesting courts to declare plan terminations *ineffective*.[10] These participants

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colleagues at this meeting for their comments and suggestions. The ideas of this Article are solely those of the author.

1. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994). The Employee Retirement Income Security Act (ERISA) and the Labor Management Relations Act, 29 U.S.C. § 141-188, do not forbid the unilateral termination, modification, and amendment of employee and postretirement benefit plans by plan sponsors—namely employers. *See, e.g.*, Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1229 (1995) (involving a post-ERISA decision); Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 188 (1971) (involving a pre-ERISA decision); *see also infra* notes 73-82 and accompanying text.

2. 29 U.S.C. § 1002(1). Employee welfare benefits generally do not vest under the terms and conditions of welfare benefit plans if a plan sponsor has reserved the right to terminate these benefits unilaterally under the reservation clause of the welfare benefit plan. *See id.* § 1051(1); Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228; Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 181 n.20; UAW Local 134 v. Yardman, Inc., 716 F.2d 1476, 1479-83 (6th Cir. 1984); *see also infra* notes 73-82 and accompanying text. When this clause unambiguously prohibits vesting of welfare benefits, plan participants and beneficiaries can do little to prevent a unilateral plan decision that either curtails, eliminates, or reduces nonvested welfare benefits. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228; Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 181 n.20.

3. 29 U.S.C. § 1051(1). ERISA permits the unilateral termination of postretirement welfare benefit plans by companies. *Id.*; Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

4. 29 U.S.C. § 1002(2)(A). Employee pension benefits vest under ERISA's participation and vesting provisions. *Id.* §§ 1051-1061. Thus plan participants and beneficiaries are prevented from forfeiting accrued pension benefits at the termination of a pension plan. *Id.* § 1053; Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

5. 29 U.S.C. § 1341.

6. *Id.* § 1002(7).

7. *Id.* § 1002(8).

8. *Id.* § 1002(5). ERISA permits *employee organizations* to sponsor pension and welfare benefit plans. *See id.* § 1002(1)-(2), (4).

9. *Id.* § 1053. Plan sponsors must comply with section 4041 guidelines and procedures for the termination of single-employer pension benefit plans. *Id.* § 1341(a)(1); Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d 1202, 1209-10 (11th Cir. 1994).

10. *See, e.g.*, Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1785-86 (1996); Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1225-26 (1995); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 563-64 (7th Cir. 1995); Hennessy v. FDIC, 58 F.3d 908, 912-14 (3d

and beneficiaries file ERISA claims that alleged that plan sponsors did not comply with one or more of the technical requirements of ERISA provisions.[11] This Article examines one of those ERISA claims. This claim has split two federal circuits on whether the functional purpose of the ERISA plan amendment provision requires a plan sponsor to provide *plan termination procedures* for a harsh, unilateral plan decision that is subject to few restrictions at its execution under ERISA.

Plan participants and beneficiaries have filed ERISA claims alleging that plan sponsors did not comply with the plan amendment requirements of section 402(b)(3),[12] which required plan sponsors to provide plan amendment procedures to amend their pension and welfare benefit plans.[13] These participants and beneficiaries alleged that the section 402(b)(3) mandated plan amendment procedures were not provided or followed by plan sponsors and thus any plan termination made under an invalid plan amendment was ineffective.[14] Moreover, they have argued that the section 402(b)(3) requirements apply to a pension and welfare benefit *plan termination*.[15] Participants' claims have split the United States Courts of Appeal for the Third Circuit and Eleventh Circuit on whether the scope of the functional purpose of section 402(b)(3) required plan sponsors, namely employers, to provide *plan amendment* and *plan termination* procedures.[16]

A. *ERISA, Precedents, and the Issue Among the Circuits*

This Article examines whether the scope of the Third Circuit's or Eleventh Circuit's functional purpose of section 402(b)(3), which was applied to pension and welfare benefit plan terminations, remains consistent with the United States Supreme Court's functional purpose of section 402(b)(3). The Court explicitly noted the scope of the functional purpose of section 402(b)(3) in applying it to a welfare *plan amendment* in *Curtiss-Wright Corp. v. Schoonejongen*[17] and to a pension *plan amendment*[18] in *Lockheed Corp. v.*

Cir. 1995), *cert. denied*, 116 S. Ct. 1318 (1996); Ackerman v. Warnaco, Inc., 55 F.3d 117, 119-20 (3d Cir. 1995); Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1204.

11. Lockheed Corp. v. Spink, 116 S. Ct. at 1785-86; Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1225-26.

12. 29 U.S.C. § 1102(b)(3).

13. Lockheed Corp. v. Spink, 116 S. Ct. at 1783; Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1225.

14. Lockheed Corp. v. Spink, 116 S. Ct. at 1785-86; Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1225-26; Murphy v. Keystone Steel & Wire Co., 61 F.3d at 563-64; Hennessy v. FDIC, 58 F.3d at 912-14; Ackerman v. Warnaco, Inc., 55 F.3d 119-20; Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1204.

15. Hennessy v. FDIC, 58 F.3d at 912-14; Ackerman v. Warnaco, Inc., 55 F.3d at 119; Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1204.

16. Hennessy v. FDIC, 58 F.3d at 912-14; Ackerman v. Warnaco, Inc., 55 F.3d at 119; Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1204.

17. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995).

Spink.[19] The pertinent language of section 402(b)(3) states that "[e]very employee benefit plan shall . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan."[20] In *Curtiss-Wright*, the Court concluded that section 402(b)(3) was a functional requirement and its purpose is to "ensure that every plan *has* a workable amendment procedure."[21] *Curtiss-Wright* did not end all questions regarding the functional purpose of section 402(b)(3).

This Article comments on the scope of the functional purpose of section 402(b)(3) as concluded by the Third and Eleventh Circuits in their application of section 402(b)(3) to plan terminations. The examination of the functional purpose of section 402(b)(3) is made in light of *Curtiss-Wright*, which restricted the functional purpose of section 402(b)(3) to a *workable amendment procedure*.[22] ERISA and its development must be the starting point for this examination because applying an unneeded plan procedure to a plan termination could undermine plan flexibility. Part I discusses the development of ERISA and its impact on regulating benefit plans, providing welfare and pension benefits, and maintaining flexible plan management. Part II examines the Court's interpretation of section 402(b)(3) in *Curtiss-Wright* and the Third Circuit's efforts in *Curtiss-Wright* to expand the functional purpose of section 402(b)(3). Part III discusses the application of section 402(b)(3) by the Third and Eleventh Circuits to a plan termination in light of *Curtiss-Wright*. Part IV comments on how the application of section 402(b)(3) to a plan termination unnecessarily complicates some problematic ERISA questions that were left unresolved by *Curtiss-Wright* and that do not necessarily maintain the flexibility of employee benefit plan administration. The Article concludes that the application of section 402(b)(3) to a plan termination is inconsistent with the purpose of section 402(b)(3) found by the Supreme Court in *Curtiss-Wright* and established by the legislative intent of ERISA.

The Article recognizes that expanding the functional purpose of section 402(b)(3) complicates unresolved remedial and technical issues and delays a plan termination by requiring technical procedures. Therefore, given the federal circuits' split on the application of section 402(b)(3) to welfare and pension plan terminations, the Court may eventually need to review whether the scope of the functional purpose of section 402(b)(3) includes a unilateral plan termination.

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18. Lockheed Corp. v. Spink, 116 S. Ct. at 1789-90 (discussing an amendment to a pension benefit plan); Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227-28 (discussing an amendment to a welfare benefit plan).

19. Lockheed Corp. v. Spink, 116 S. Ct. 1783 (1996).

20. 29 U.S.C. § 1102(b)(3) (1994).

21. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

22. *Id.*

B. *The Gravaman of the Split Between Federal Circuits*

There remains sufficient doubt whether the United States Court of Appeals for the Third Circuit fully agrees with the Supreme Court's explicit limit on the scope of the functional purpose of section 402(b)(3). In *Ackerman v. Warnaco, Inc.*,[23] the Third Circuit concluded that section 402(b)(3)[24] applies to employee welfare "plan terminations as well as plan amendments."[25] In its rationale for such an application, the Third Circuit noted that a benefit plan termination and plan amendment are both harsh plan actions and that ERISA protects against more severe unilateral plan actions.[26] In an earlier case, the Eleventh Circuit had decided the same issue and agreed with the Third Circuit, in part, but applied a different provision of ERISA. In *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*,[27] the United States Courts of Appeals for the Eleventh Circuit concluded that section 402(b)(3) does not govern a pension plan termination.[28] The Eleventh Circuit concluded that section 4041[29] governs a pension plan termination and also apprises plan participants and beneficiaries of their rights and obligations.[30] Thus, the *gravaman* of the split between the Third Circuit and Eleventh Circuit is whether the scope of the functional purpose of section 402(b)(3) provides a *workable amendment procedure* and a *workable termination procedure* to plan participants and beneficiaries under ERISA's informational scheme, which apprises participants and beneficiaries of their plan rights and obligations.

The scope of the functional purpose of section 402(b)(3) was explicitly addressed by the Court in *Curtiss-Wright* in reply to the Third Circuit's nontextual reading of section 402(b)(3).[31] In *Curtiss-Wright*, the Court interpreted section 402(b)(3) in an effort to decide whether the reservation clause of a welfare benefit plan of the Curtiss-Wright complied with the section 402(b)(3) requirements when this clause provided "the Company" as an identification procedure and provided "by the Company" as an amendment procedure.[32] The Court concluded that the functional purpose of section 402(b)(3) is to "ensure that every plan *has* a workable amendment

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23. Ackerman v. Warnaco, Inc., 55 F.3d 117 (3d Cir. 1995).

24. 29 U.S.C. § 1102(b)(3).

25. Ackerman v. Warnaco, Inc., 55 F.3d at 121; *see also* Hennessy v. FDIC, 58 F.3d 909, 922-23 (3d Cir. 1995). For an analysis of *Ackerman*, see *infra* Part IV.A.1. For the facts of *Hennessy*, see *infra* note 228 and accompanying text.

26. Ackerman v. Warnaco, Inc., 55 F.3d at 121 & n.1.

27. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d 1202 (11th Cir. 1994).

28. *Id.* at 1210. For an analysis of *Aldridge*, see *infra* Part IV.A.2.

29. 29 U.S.C. § 1341.

30. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1209.

31. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1230 (1995).

32. *Id.* For an analysis of *Curtiss-Wright*, see *infra* Part III.

procedure."[33] But the Court noted that other ERISA provisions establish an "elaborate scheme . . . for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents."[34] Moreover, the Court concluded that importing section 402(b)(3) to bolster other functional features of ERISA's informational scheme placed plan sponsors at a disadvantage and was not consistent with the legislative intent.[35] In light of the Court's interpretation of section 402(b)(3) in *Curtiss-Wright*, the Third and Eleventh Circuits are still split on the functional purpose of section 402(b)(3) to provide benefit plan information on a unilateral plan termination under ERISA's informational scheme.

II. ERISA AND ITS DEVELOPMENT

ERISA is the product of a decade of congressional study on the nation's private employee benefit system.[36] ERISA is a "comprehensive and reticulated statute."[37] ERISA mandates an extensive procedural burden, including mostly technical guidelines, on employers that were accustomed to relying on common-law contract and trust principles for the administration of employee welfare and pension plans.[38] Although ERISA contains a plethora of procedural or technical requirements, it "does not create any substantive

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33. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

34. *Id.* For an analysis of *Curtiss-Wright* and its interpretation of section 402(b)(3), see James E. Holloway & Douglas K. Schneider, *ERISA, FASB, and Benefit Plan Amendment: A Section 402(b)(3) Violation as a Loss Contingency for a Plan Amendment*, 46 DRAKE L. REV. 97 (1997). The Holloway and Schneider article is quite similar to this Article, which applies the same law to resolve an entirely different issue. This issue is part of the ERISA research and publication of Professor Holloway's earlier work. The Holloway and Schneider article examined the application of section 402(b)(3) to disputes involving amendments to postretirement welfare benefit plans. It also considered the impact of these disputes on financial accounting standards effecting accounting for postretirement welfare benefits. Finally, the Holloway and Schneider article considered the ethical, social, and economic consequences of postretirement welfare plan terminations.

The present Article examines the application of section 402(b)(3) to pension and welfare benefit plan terminations in light of *Curtiss-Wright*. *These plan terminations* are neither affected by nor caused by a specific plan amendment. This Article focuses primarily on the application and interpretation of section 402(b)(3) in disputes involving plan terminations.

35. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230-31.

36. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980). The disclosure of plan information and documents has resulted in much litigation. *See generally* Varity Corp. v. Howe, 116 S. Ct. 1065, 1074 (1996) (requiring an employer that is acting as plan administrator to disclose accurate information to avoid breaching a duty of loyalty owed to plan participants).

37. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. at 361.

38. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

entitlement to employer-provided health benefits or any other kind of welfare benefits."[39]

A. *Coverage and Functional Requirements of ERISA*

ERISA governs pension benefit plans[40] and welfare benefit plans.[41] Welfare benefits include severance benefits[42] and health care benefits.[43] ERISA broadly regulates employee benefit plans by mandating procedural requirements for reporting and disclosure,[44] participation, and vesting[45] and fiduciary responsibilities.[46] These provisions govern employee pension benefit plan administration more stringently than employee welfare benefit plan administration.[47] Fiduciary responsibility requirements govern both pension and welfare benefit plans.[48] Moreover, reporting and disclosure requirements govern both pension and welfare benefit plans.[49] Congress excluded welfare benefit plans from the coverage of participation and vesting[50] and the funding[51] provisions of ERISA.[52]

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39. *Id.* at 1228.

40. 29 U.S.C. § 1002(2)(A) (1994).

41. *Id.* § 1002(1).

42. Massachusetts v. Morash, 490 U.S. 107, 113 n.8 (1989).

43. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

44. 29 U.S.C. §§ 1021-1031. In *Curtiss-Wright*, the Court found 29 U.S.C. §§ 1021-1024 to be the heart of ERISA's elaborate informational scheme that apprises retirees, employees, and others of their rights and obligations under employee benefit plans. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230-31.

45. 29 U.S.C. §§ 1081-1086.

46. *Id.* §§ 1101-1104. In *Curtiss-Wright*, the Court noted that section 402(b)(3) is a part of ERISA's fiduciary responsibility section. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. Therefore, the Court explicitly refused to expand the section 402(b) coverage to bolster functions of the disclosure and reporting requirements of 29 U.S.C. §§ 1021-1031. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

47. *See* Adams v. Avondale Indus., 905 F.2d 943, 947 (6th Cir. 1990).

48. *See* Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1790 (1996); Adams v. Avondale Indus., 905 F.2d at 947. A number of articles discuss fiduciary duties and liabilities under ERISA. *See* Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever A Fiduciary Duty To Disclose?*, 54 U. PITT. L. REV. 979, 984-1009 (1993); Jon C. Bruning, *ERISA Plan Fiduciaries Beware*, 45 LAB. L.J. 402, 403-16 (1994); Nick C. Geannacopulos & Daniel J. Julius, *Understanding Document Disclosure Requirements Under ERISA*, 45 LAB. L.J. 359, 361-64 (1994); Nancy G. Ross & Judith A. Kelley, *Employer Duties to Make Benefits Disclosures: The Emerging Case Law*, BENEFITS L.J., Summer 1995, at 5, 5-23; Nancy G. Ross & Judith A. Kelley, *Misrepresenting Future Plan Changes: Fiduciary Liability Under ERISA*, 21 EMPLOYEE REL. L.J. 73, 77-89 (1995); Mary O. Jensen, Comment, *Separating Business Decisions and Fiduciary Duty in ERISA Litigation?*, 10 BYU J. PUB. L. 139, 141-44 (1996).

49. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230; Adams v. Avondale Indus., 905 F.2d at 947.

50. 29 U.S.C. §§ 1051-1061.

51. *Id.* §§ 1081-1086.

ERISA contains numerous functional features that serve various operational and technical purposes for the administration of pension and welfare benefit plans. ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument."[53] Employers must comply with these procedural requirements, including the ERISA amendment provisions[54] that provide technical requirements to amend an employee benefit plan.[55] ERISA consists of an elaborate informational scheme that is created by disclosure and reporting requirements to apprise plan participants and beneficiaries of their rights and obligations under benefit plans.[56] Notwithstanding these mandated requirements, employers still remain free to terminate, modify, and amend employee welfare benefits, and in some instances, pension plans at-will.[57]

B. *Enforcement and Review of ERISA Claims*

ERISA's structure and policy maintain much of the protection that had been provided by the common law to plan sponsors and thus leaves a wide latitude in employee benefit plan management. Foremost, plan sponsors are subject only to federal regulation in the management of employee benefit plans. ERISA preempts state tort, contract, and trust claims that "relate to" employee welfare and pension benefit plans.[58] States cannot regulate the substantive contents of employee welfare benefit plans.[59] ERISA preempts claims that would, *inter alia*, "provide an alternative cause of action to employees to collect benefits protected by ERISA."[60] Next, section 502 of ERISA is the civil enforcement provision.[61] Section 502(a)[62] permits either individuals or plans to file uniquely ERISA-based claims.[63] Individuals can

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52. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90-91 (1983)); Adams v. Avondale Indus., 905 F.2d at 947.

53. 29 U.S.C. § 1102(a)(1).

54. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

55. *Id.* at 1228.

56. *Id.* at 1230-31; *see infra* notes 147-56 and accompanying text.

57. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

58. 29 U.S.C. § 1144(a); *see, e.g.*, Greater Washington Bd. of Trade v. District of Columbia, 506 U.S. 125, 129 (1992); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983).

59. *See* Greater Washington Bd. of Trade v. District of Columbia, 506 U.S. at 129.

60. AETNA Life Ins. Co. v. Borges, 869 F.2d 142, 146 (2d Cir. 1989).

61. 29 U.S.C. § 1132(a)-(m).

62. *Id.* § 1132(a).

63. *Id.* § 1132(a)(1); *see* Varity Corp. v. Howe, 116 S. Ct. 1065, 1069 (1996). In *Varity Corp.*, the Court concluded that individual plan members can file claims under 29 U.S.C. § 1132(a)(1)(B) for wrongful denial of benefits, and for a breach of a fiduciary duty in the administration of the employee benefit plan under 29 U.S.C. § 1132(a)(3). Varity Corp. v. Howe, 116 S. Ct. at 1077, 1079. *See generally* Eduard A. Lopez, *Equitable Remedies for Breach of Fiduciary Duty Under ERISA After* Varity Corp. v. Howe, 18 BERKELEY J. EMPL. & LAB. L. 323 (1997) (discussing the impact of *Varity Corp.* on the administration of employee pension and welfare benefit plan by fiduciaries); Nancy G. Ross & J. Y. Chen, Varity Corporation v. Howe:

bring these claims to protect their rights and enforce obligations under the terms and conditions of employee benefit plans.[64]

The de novo standard of review applies to ERISA claims that allege the unlawful denial or termination of employee welfare benefits under section 502(a)(1)(B)[65] of ERISA.[66] In *Firestone Tire & Rubber Co. v. Bruch*,[67] the Court held that federal courts must apply the de novo standard of review when a plan sponsor has not reserved the right to interpret the terms and conditions of the employee welfare benefit plan.[68] The de novo standard of review also applies to ERISA claims for unlawful termination and modification of postretirement benefit plans under section 502(a)(1)(B).[69] In *DeGeare v. Slatery Group, Inc.*,[70] the Court instructed the Eighth Circuit to consider its holding in *Firestone Tire & Rubber Co. v. Bruch* on remand.[71] If plan sponsors retain the right to interpret terms and conditions of their benefit plans, then federal courts must apply the arbitrary and capricious standard of review, which provides only a deferential review of plan sponsors' interpretation of plan terms.[72]

The plan sponsor's right to amend, terminate, and modify employee or postretirement welfare plans is well-settled federal labor policy.[73] Unambiguous reservation clauses permit the unilateral termination, amendment, and modification of postretirement welfare benefits at plant closings and other circumstances and thus do not violate section 502(a)(1)(B)[74] of ERISA or section 301(a) of the Labor Management Relations Act[75] of federal labor policy.[76] Welfare benefits that vest under the terms and conditions of a postretirement welfare benefit plan do not terminate, however, at plant closings or other circumstances.[77] Employee welfare benefits normally do not vest at retirement and thus are subject to termination or modification at-

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Employers' Duty of Honesty in Administering Benefit Plans, BENEFITS L.J., Summer 1996, at 2 (same).

64. Varity Corp. v. Howe, 116 S. Ct. at 1077; *see infra* notes 73-78 and accompanying text.

65. 29 U.S.C. § 1132(a)(1)(B).

66. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

67. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

68. *Id.* at 112-13.

69. *See* DeGeare v. Alpha Portland Indus., 837 F.2d 812 (8th Cir. 1988), *vacated and remanded sub nom.*, DeGeare v. Slatery Group, Inc., 489 U.S. 1049 (1989).

70. DeGeare v. Slatery Group, Inc., 489 U.S. 1049 (1989).

71. *Id.*

72. *Id.*

73. *See infra* note 78 and accompanying text.

74. 29 U.S.C. § 1132(a)(1)(B) (1994).

75. *Id.* ¤ 185(a).

76. *See infra* notes 77-79 and accompanying text.

77. *See* Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971).

will by plan sponsors[78] when the company closes its facilities,[79] files for bankruptcy,[80] transfers assets,[81] or merges with another company.[82]

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78. *See, e.g.*, Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995) (stating ERISA does not create any substantive entitlement to welfare benefits, plan sponsors are generally free to terminate or modify welfare plans under ERISA, and ERISA does not establish minimum vesting requirements in welfare plans); Allied Chem. & Alkali Workers of Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 181 n.20 (stating that retirees are no longer members of a bargaining unit for welfare benefits); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 566-67 (7th Cir. 1995) (stating that the express termination language in the plan was inconsistent with the plaintiff's claim that the plan vested retirement benefits); Senn v. United Dominion Indus., 951 F.2d 806, 814 (7th Cir. 1992) (finding that in the absence of a vesting provision within the agreement, the benefits did not intend to vest); Howe v. Varity Corp., 896 F.2d 1107, 1110 (8th Cir. 1990) ("No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits."); Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 602-03 (7th Cir. 1989) ("Through those instruments, the parties are free to subject such welfare benefits to vesting requirements not provided by ERISA, or they may reserve the power to terminate such plans."); Musto v. American Gen. Corp., 861 F.2d 897, 905-06 (6th Cir. 1988) (holding that welfare benefits plans are not subject to "vesting" and, therefore, are subject to termination by employers); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (rejecting automatic vesting because "the costs of such plans are subject to fluctuating and unpredictable variables"); DeGeare v. Alpha Portland Indus., 837 F.2d 812, 814, 816-17 (8th Cir. 1988) (rejecting the argument that employee welfare benefits automatically vest), *vacated and remanded sub nom.* DeGeare v. Slatery Group, Inc., 489 U.S. 1049 (1989); Anderson v. Alpha Portland Indus., 836 F.2d 1512, 1517 (8th Cir. 1988) (stating that "welfare benefits do not automatically vest as a matter of law"); White Farm Equip. Co. v. White Motor Corp., 788 F.2d 1186, 1193 (6th Cir. 1986) (stating that Congress "expressly exempted employee welfare benefit plans from stringent vesting"); Policy v. Powell Pressed Steel Co., 770 F.2d 609, 613-15 (6th Cir. 1985) (explaining that "normally retiree benefits are vested"); UAW v. Yardman Inc., 716 F.2d 1476, 1482 (6th Cir. 1983) (holding that employee welfare benefits do not vest on retirement).

The termination and modification of postretirement welfare benefits has generated many scholarly articles. *See, e.g.*, Marilyn J. Ward Ford, *Broken Promises: Implementation of Financial Accounting Standards Board Rule 106, ERISA, and Legal Challenges to Modification and Termination of Postretirement Health Care Benefit Plans*, 68 ST. JOHN'S L. REV. 427 (1994) (discussing the implementation of financial accounting Standards Board Rule 106, ERISA, and legal challenges to modification and termination of postretirement health care benefit plans); John Thatcher McNeil, *The Failure of Free Contract in the Context of Employer-Sponsored Retiree Welfare Benefits: Moving Towards a Solution*, 25 HARV. J. LEGIS. 213 (1988) (exploring "the American legal system's failure to protect a critical element of many retired people's health care: employer-sponsored retiree health plans"); Leonard R. Page, *Retiree Insurance Benefits: Enforcing Employer Obligations*, 38 LAB. L.J. 496 (1987) (discussing the enforcement of retiree insurance benefits); Joan Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 INDUS. REL. L.J. 183 (1987) (discussing ERISA and the failure to include retirees' medical and health insurance benefits among "assurances that promised pension benefits would be received by retirees"); Gregory J. Ossi, Note, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. CONTEMP. HEALTH L. & POL'Y 233 (1996) (discussing the need for health care reform because employers have terminated the

III. SECTION 402(b)(3) AND ITS FUNCTIONAL PURPOSE

Public and individual hardships that are caused by terminating and modifying postretirement welfare benefits may become more severe as federal and state governments reduce spending on health care and medical assistance programs. ERISA was enacted during the expansion of federal social policy programs, such as Medicare[83] and Medicaid,[84] which now faces cost overruns that demand prudent federal and state administration.[85] Retirees should not expect increased medical care assistance from federal and state programs.[86] Cost reductions and other program reforms in Medicare and Medicaid to reduce federal spending are not new.[87] Retirees are not exempt from cost reduction in Medicare and Medicaid, thus causing stronger reliance on postretirement health care and other benefits.[88] When plan sponsors terminate or severely modify postretirement welfare benefit plans, this reliance on welfare benefits causes a plan termination and modification to impact significantly the economic and social status of individuals.[89]

Curtiss-Wright Corp. v. Schoonejongen[90] exemplifies retirees' efforts to minimize both social and economic consequences of a plan termination by alleging that the plan termination was invalid because of some other unlawful plan decision, such as a plan amendment governed by ERISA. In *Curtiss-Wright*, the Supreme Court was to decide whether a plan amendment, which had added a plan term used to execute a plan termination, was a violation of section 402(b)(3)—where the Curtiss-Wright Corporation had amended its plan by adding a condition that automatically terminated the welfare benefit plan on occurrence of a specific event.[91] Retirees argued that the plan termination was invalid because the plan amendment violated section

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lifetime health care benefits of their retirees); Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909 (1970) (discussing developments in common law and statutory remedies for the protection of retirees' pension rights).

79. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228 (stating that employers are "generally free . . . to adopt, modify, or terminate" plans).

80. *See* White Farm Equip. Co. v. White Motor Corp., 788 F.2d at 1192-93 (stating that there is no mandatory voting requirements in situations where the employer files for bankruptcy).

81. *See* Ryan v. Chromalloy Am. Corp., 877 F.2d at 604 (upholding a plan termination in a situation where the employer sold "all or substantially all" of the employer's assets).

82. *See* Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995) (holding that 402(b)(3) applies to plan terminations, as well as plan amendments).

83. 42 U.S.C. §§ 1395-1396d (1994).

84. *Id.* §§ 1396-1396v.

85. *See* Richard Lacayo, *It's Middle-Class Warfare*, TIME, Oct. 2, 1995, at 40, 40-43.

86. *Id.* at 41-42.

87. *Id.* at 41.

88. *See id.*

89. *See supra* notes 73-82 and accompanying text.

90. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995).

91. *Id.* at 1227.

402(b)(3) and was ineffective to terminate the plan.[92] Section 402(b)(3) provides, "Every employee benefit plan shall . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ."[93] The Court agreed to decide whether Curtiss-Wright, the plan sponsor, violated section 402(b)(3) and thus granted a writ of certiorari to the United States Court of Appeals for the Third Circuit.[94]

A. *Plan Decisions Subject to Amendment Procedures*

The plan sponsor changes a plan provision to terminate or affect the plan management, but these changes can lead to questions regarding the violation of an ERISA functional requirement, such as section 402(b)(3),[95] which could result in invalidating a plan termination or other decision.[96] In *Curtiss-Wright*, Curtiss-Wright established a postretirement health benefit program for its employees at its Wood-Ridge, New Jersey plant.[97] In September 1976, Curtiss-Wright established a welfare benefit plan to comply with the recently enacted ERISA.[98] The major documents of the welfare benefit plan were the Constitution and Summary Plan Description (SPD).[99] Curtiss-Wright had always reserved the right to amend, modify, and terminate its welfare benefit plan.[100] In 1983, Curtiss-Wright issued a new SPD and also changed

92. *Id.*

93. 29 U.S.C. § 1102(b)(3) (1994). In *Lockheed Corp. v. Spink*, retirees sued Lockheed Corporation (Lockheed), alleging that an unlawful amendment of a pension plan in violation of ERISA, section 406(a). Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1787 (1996). Retirees believed that Lockheed's decision to amend the plan was made by Lockheed as a fiduciary and thus subject to review as a fiduciary. *Id.* First, the Court concluded that *Curtiss-Wright* applied to pension plans, as well as welfare plans. *Id.* at 1789. It observed that many federal circuits have applied "the same rule to cases involving both" pension and welfare benefit plans. *Id.* Furthermore, the definition of fiduciaries does not distinguish between pension and welfare benefit plans. *Id.* at 1790. The Court concluded that "the rules regarding fiduciary capacity—including the settlor-fiduciary distinction—should apply to pension and welfare plans alike." *Id.*

The Court stated that individuals must perform certain defined functions to be a fiduciary under ERISA. *Id.* at 1789. These functions "'includ[e] the exercise of discretionary authority or control over plan management or administration.'" *Id.* (quoting Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498, 505 (1995)). The Court noted that "'amending or terminating a plan . . . cannot be an act of plan management or administration.'" *Id.* (quoting Varity Corp. v. Howe, 116 S. Ct. 1065, 1074 (1995)). The Court concluded that Lockheed was not acting as a fiduciary but as a settlor when it amended its pension plan to grant early retirement incentives to its employees. *Id.* at 1790.

94. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1226.

95. *See id.* at 1227.

96. *See infra* notes 102-05 and accompanying text.

97. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.

98. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1037 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995).

99. *Id.*

100. *Id.*

carriers.[101] This SPD included a new provision that stated: "TERMINATION OF HEALTH CARE BENEFITS. . . . Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."[102] The primary authors of the new provision were the director of benefits and labor counsel, who only intended to clarify the terms of the reservation clause.[103] Later, in November 1983, Curtiss-Wright closed the Wood-Ridge plant and stated that it would terminate retiree benefits for nonunion employees who had retired from the Wood-Ridge plant.[104] The executive vice president wrote retirees "a series of letters informing them that their postretirement health benefits were being terminated" by Curtiss-Wright.[105]

In 1984, the retirees sued Curtiss-Wright for a violation of section 402(b)(3).[106] Among other things, they argued that the new provision of the SPD did not clarify the existing provisions of the Curtiss-Wright plan, but actually was a term that identified when this plan would terminate.[107] Specifically, the retirees claimed that the new term—reserving the right to terminate in the event of a plant closure—was an amendment to the Curtiss-Wright plan.[108] Curtiss-Wright responded to the retirees' claim by stating that the new provision of the SPD was merely language that clarified its plan.[109]

In 1990, the United States District Court for the District of New Jersey found that Curtiss-Wright had amended its plan in 1983 when it revised its SPD to state that its plan would terminate at the closing of its facilities.[110] The district court found that Curtiss-Wright's revision of its SPD was a plan amendment in violation of ERISA.[111] The district court found that the Curtiss-Wright's benefit plan failed to provide a plan procedure for identifying who possessed the authority to amend and a plan procedure for amending the plan as required by section 402(b)(3)[112] of ERISA.[113] The district court concluded that adding the new term was a substantial change to Curtiss-Wright's employee welfare benefit plan.[114] It also concluded that Curtiss-Wright amended its plan but had not provided a procedure to identify who possessed the authority to amend the plan and had not provided a procedure to amend the plan.[115] Therefore, Curtiss-Wright had violated section

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1036.
107. *Id.* at 1038.
108. *Id.*
109. *Id.*
110. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1227 (1995).
111. *Id.*
112. *See* 29 U.S.C. § 1102(b)(3) (1994).
113. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.
114. *Id.*
115. *Id.*

402(b)(3).[116] The district court then held that Curtiss-Wright's termination of its employee benefit plan was ineffective under the new provision of the SPD of its plan.[117] As a remedy for Curtiss-Wright's procedural violation, the district court awarded retirees a $2.6 million judgment.[118] Curtiss-Wright appealed the judgment of the district court.[119]

B. *Sufficiency of Plan Procedures for a Valid Decision*

The United States Court of Appeals for Third Circuit affirmed the district court judgment but concluded that *detailed procedures* were required by ERISA for the company or plan sponsor to exercise authority to make a unilateral plan decision that simply involved amending a provision of a benefit plan.[120] Curtiss-Wright then requested that the United States Supreme Court decide whether plan sponsors must provide detailed procedures, first, in providing a procedure to identify the individual or individuals that possess authority to amend the plan, and second, in providing a procedure to amend the plan.[121] The Court granted a writ of certiorari[122] and reversed the Third Circuit on its interpretation of section 402(b)(3).[123] The Supreme Court concluded that section 402(b)(3) required companies to establish a "procedure identifying persons with amendment authority,"[124] and not to identify the person.[125] The Court concluded that "the Company" was sufficient under a reservation clause of a benefit plan to identify persons that possessed amendment authority.[126] The Court noted that "the Company" is substantial because it requires plan participants, beneficiaries, and others to look to the *company*, and not to other parties outside of the company to "exercise amendment authority."[127] The language "the Company," therefore, functions as an identification procedure as required by ERISA.[128]

ERISA requires companies to establish "a procedure for amending the plan."[129] The Court concluded that the reservation clause provides a proce-

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116. *Id.*

117. *Id.*

118. *Id.* ERISA normally does not provide for legal relief as monetary damages for technical violations. *See infra* Part V.A.

119. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995).

120. *Id.* at 1038. See *infra* Part IV.B for a discussion of the impact of detailed procedures on plan terminations that need to be executed without few uncertainties.

121. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

122. *Id.*

123. *Id.*

124. 29 U.S.C. § 1102(b)(3) (1994); *see also* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

125. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

dure for amending the plan by stating "by the Company."[130] The Court found "by the Company" to be "the barest of procedures" but "substantial" enough under section 402(b)(3).[131] The Court's ground for its conclusion was that Curtiss-Wright could amend its plan at-will without the consent of retirees or third parties.[132] The Court concluded that section 402(b)(3) "ensure[s] that every plan has a workable amendment procedure."[133] The court of appeals had concluded that section 402(b)(3) "ensures that interested parties will know how a plan may be altered and who may make such alterations."[134] In fact, the court of appeals had also concluded that retirees and others persons should "be able to determine with certainty at any given time exactly what the plan provides."[135] The Supreme Court did not agree with the Third Circuit's expansive interpretation of section 402(b)(3) and concluded that detail and specification were not requirements of section 402(b)(3) and that other functional features of ERISA provided adequate protection to the rights of retirees and employees.[136]

C. *Plan Decisions Within the Functional Purpose of Section 402(b)(3)*

In *Curtiss-Wright*, the Supreme Court began its interpretation of section 402(b)(3) by noting that "ERISA does not create any substantive entitlement to employer-provided . . . welfare benefits."[137] Next, it concluded that the "text of § 402(b)(3) actually requires *two* things: a 'procedure for amending [the] plan' *and* '[a procedure] for identifying the persons who have authority to amend the plan."[138] It found that the text was awkward in requiring an authority identification procedure, and not the identity of a person.[139] The Court concluded that "the literal terms of § 402(b)(3) are ultimately indifferent to the level of detail in an amendment procedure, or in an identification procedure for that matter."[140] The Court reasoned that a "unilateral company decision"[141] was an adequate procedure, defined as "'a particular way' of doing something"[142] or "manner of proceeding."[143]

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130. *Id.* at 1229.

131. *Id.*

132. *Id.*

133. *Id.* at 1230.

134. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1038 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995).

135. *Id.*

136. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

137. *Id.* at 1228.

138. *Id.*

139. *Id.*

140. *Id.* at 1229. The requirement for detailed procedures could impact the ability of plan sponsors to execute reasonably certain and timely plan terminations. *See infra* Part IV.B.

141. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

142. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1976)).

143. *Id.* (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1542 (2d ed. 1987)).

In relying on the text of section 402(b)(3),[144] the Court concluded that a reading other than the textual reading of section 402(b)(3) would severely undermine ERISA's purpose, a result that "Congress could not have intended."[145] The Court stated:

> In the end, perhaps the strongest argument for a textual reading of § 402(b)(3) is that to read it to require specification of individuals or bodies within a company would lead to improbable results. That is, it might lead to the invalidation of myriad amendment procedures that no one would think violate § 402(b)(3), especially those in multiemployer plans—which, as we said, § 402(b)(3) covers as well.[146]

The Court's textual reading of section 402(b)(3) is consistent with the structure and design of ERISA and its legislative purpose.[147] The Court still "indulge[d] an argument based on legislative purpose where the text alone yields a clear answer."[148] The Court stated that "[s]ection 402(b)(3)'s primary purpose is obviously functional: to ensure that every plan *has* a workable amendment procedure."[149] It also noted that the placement of section 402(b)(3) within section 402(b) and the textual clarity of section 402(b)(3) supports the functional purpose of section 402(b)(3).[150] It refused to find that section 402(b)(3) had a secondary purpose of ensuring "that the procedure conveys enough detail to enable beneficiaries to learn their rights and obligations under the plan at any time."[151] The Court observed that other functional features of ERISA provided an "elaborate scheme" for such purpose,[152] observing that a written instrument[153] and reporting and disclosure requirements[154] were part of this scheme.[155] The Court also observed that

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144. 29 U.S.C. § 1102(b)(3) (1994).

145. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. "Textualism" is an interpretive method applied by the Court to give meaning to provisions of ERISA and other statutes, which has resulted in a wealth of commentary. *See, e.g.*, Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. LEGIS. 35 (1996); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1995); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacaphony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

146. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

147. *Id.* at 1229-30. For a discussion of ERISA and its structure, see *supra* Part II.

148. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (citing 29 U.S.C. § 1102(a)(1) (1994)).

154. *Id.* at 1230 (citing 29 U.S.C. §§ 1021-1031 (1994)). Specifically, the Court noted the requirements of section 104(b)(1), which requires plan sponsors or companies to provide a summary plan description. *Id.* (citing 29 U.S.C. § 1024(b)(1) (1994)). It also noted that section 102(b) requires companies to provide the names and addresses of individuals with

although the scheme was thorough, it may not be foolproof, but Congress did not intend for section 402(b)(3) to supplement other functional features of ERISA.[156]

IV. APPLICATION OF SECTION 402(b)(3) TO A PLAN TERMINATION

Curtiss-Wright Corp. v. Schoonejongen[157] did not end all questions regarding the scope of the functional purpose of section 402(b)(3). The question in *Curtiss-Wright* was raised by an amendment to a plan provision utilized by the plan sponsor to terminate the benefit plan. The same question is now raised by a plan termination that was not executed by a newly amended plan term or provision. Moreover, two federal circuits disagree on whether a plan termination, which is harsher than a plan amendment, is within the

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amendment authority. *Id.* (citing 29 U.S.C. § 1022(b) (1994)). ERISA section 104(b)(1) was amended by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 101(c)(1), 110 Stat. 1936, 1951 (1996) (codified at 29 U.S.C.A. § 1024(b)(1) (West Supp. 1998)). The purposes of the Health Insurance Portability and Accountability Act (HIPAA) are, among others, to "improve portability and continuity of health insurance coverage in the group and individual markets . . . [and] to simplify the administration of health insurance." *Id.* preamble, 110 Stat. at 1936. Title I of the HIPAA covers the "health care access, portability, and renewability" of insurance coverage. *Id.* § 521, 110 Stat. at 1939.

The HIPAA significantly reduces the time period that plan administrators must furnish descriptions of changes or modifications to group health benefit plans to plan participants or beneficiaries. *See* 29 U.S.C.A. § 1024(b)(1) (West Supp. 1998). The HIPAA reduces the time period from 210 days to 60 days. *Id.* The pertinent language of section 104(b)(1) states:

> If there is a modification or change described in section 1022(a)(1) of this title that is a material reduction in covered services or benefits provided under a group health plan (as defined in section 1191b(a)(1) of this title), a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days.

Id. The exception requires that the modification or change to group health plan be a *material reduction in covered services or benefits. Id.* Moreover, plan participants and beneficiaries must be furnished notice of a material reduction not later than 60 days after the adoption of such change or modification. *Id.* The amendment to section 104(b)(1) raises still a more fundamental question: If a material reduction that is a modification or change includes a plan termination, do the procedural guidelines of section 104(b)(1) apply differently to health care and nonhealth care benefits? Treating benefits differently under welfare benefit plans could erode the flexible technical guidelines for plan terminations that are generally unilateral business decisions by plan sponsors. The HIPAA, however, does not change the time period for every other welfare benefit. *See id.*

155. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. The Court explicitly noted that section 402(b)(3) was not a part of the reporting and disclosure responsibilities section of ERISA. *Id.*

156. *Id.* at 1230.

157. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995).

functional purpose of section 402(b)(3). Section III analyzes the disputes that gave rise to the issue, examines the rationale of the courts of appeals that decided this question, and explores the implications of requiring workable plan termination procedures.

A. *Section 402(b)(3) and a Plan Termination*

The Third and Eleventh Circuits split on whether "the requirements of section 402(b)(3) apply to plan terminations."[158] The Third Circuit reasoned that section 402(b)(3) applies to a plan amendment and plan termination,[159] finding that a plan termination and plan amendment were categorically similar in effects and thus justified similar protection under the ERISA framework.[160] The Third Circuit concluded that refusing to apply section 402(b)(3) of ERISA to a plan termination would undermine the purpose of section 402(b)(3) in protecting the rights of plan participants.[161] In making the opposite conclusion, the Eleventh Circuit concluded that ERISA requires "employers to adopt written plan instrument[s] and establish written amendment procedures" to apprise employees and retirees of their obligations and rights.[162] This split between the Third and Eleventh Circuits creates uncertainty regarding the scope of the functional purpose of section 402(b)(3)—protection against plan surprises brought about by an unanticipated plan amendment[163] that is often less onerous than a plan termination, a "wholesale elimination of benefits."[164]

1. *The Third Circuit's Functional Purpose and a Plan Termination*

The United States Court of Appeals for the Third Circuit, in *Ackerman v. Warnaco, Inc.*,[165] concluded that the functional purpose of section 402(b)(3) included a plan termination procedure.[166] In *Ackerman*, the plaintiffs were 169 former employees who were "in production positions" of Warnaco's Altoona, Pennsylvania plant.[167] In January 1988, Warnaco published an "Employee Handbook" (1988 Handbook) which was then distributed to all its employees.[168] The 1988 Handbook described a severance benefit or termination allowance policy, and also listed conditions and

158. Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995).

159. *Id.*

160. *Id.* (citing Deibler v. United Food & Commercial Workers' Local 23, 973 F.2d 206 (3d Cir. 1992)).

161. *Id.*

162. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d 1202, 1210 (11th Cir. 1994).

163. *See* Ackerman v. Warnaco, Inc., 55 F.3d at 121 & n.1; Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1210.

164. Ackerman v. Warnaco, Inc., 55 F.3d at 121 & n.1.

165. Ackerman v. Warnaco, Inc., 55 F.3d 117 (3d Cir. 1995).

166. *Id.* at 125.

167. *Id.* at 119.

168. *Id.*

circumstances that made employees eligible and ineligible for the termination allowance.[169] One such circumstance was that employees would "not be entitled to a termination allowance if, prior to termination of [their] employment, management has altered or rescinded this termination allowance policy."[170] In a memorandum dated December 26, 1990, Warnaco rescinded its termination allowance policy, effective December 19, 1990.[171] The memorandum was issued by the Secretary and Assistant General Counsel of Warnaco.[172] The memorandum stated that meetings would be held to inform all employees of the rescission of the termination allowance policy.[173] Employees alleged that such a meeting was not held at Warnaco's Altoona plant, though a meeting was held at the Duncanville, Pennsylvania warehouse.[174] At the Duncanville plant meeting, one of Warnaco's vice presidents informed the employees of the rescission of the termination allowance policy.[175] One employee at the Altoona plant alleged, however, that employees at the Altoona plant had not received notice of the rescission of the termination allowance policy until January 22, 1992.[176] The employees asserted that the notice was given by a Warnaco Vice President when he was asked whether they would receive severance benefits that had been provided under provisions of the 1988 Handbook.[177] The Duncanville meeting was to discuss issues raised by the closing of the Altoona plant.[178] Warnaco terminated all of the employees between October 1991 and January 1992.[179]

The employees and Warnaco did not dispute that Warnaco published an updated Employee Handbook in 1991 (1991 Handbook), which reflected an elimination of the termination allowance policy.[180] They also did not dispute that Warnaco's President informed the employees by letter about "unfavorable economic times,"[181] noting "a salary freeze and *changes* in our severance policy are difficult."[182] The employees acknowledged receipt of the letter but considered it to be vague regarding rescission of the termination allowance policy.[183] The employees of the Altoona plant alleged that they did not receive a copy of the 1991 Handbook, but acknowledged that Warnaco distributed the 1991 Handbook to employees at its other

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169. *Id.*
170. *Id.* at 119-120.
171. *Id.* at 120.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

locations.[184] Warnaco did not produce any evidence that it distributed the 1991 Handbook to its employees at the Altoona plant.[185] Furthermore, the 1991 Handbook or record made no reference "*to the procedure that was followed in eliminating the termination allowance or the precise date such action was accomplished.*"[186]

Employees filed suit against Warnaco in the United States District Court for the Western District of Pennsylvania to recover severance benefits provided for under the 1988 Handbook.[187] The district court granted summary judgment for Warnaco.[188] The employees appealed to the United States Court of Appeals for the Third Circuit.[189] In presenting their appeal, the employees relied heavily on *Curtiss-Wright*.[190] The court of appeals had already "ordered supplemental briefing on the question of the effect of the [*Curtiss-Wright*] case on the instant appeal."[191] The employees raised an issue that was closely analogous to the section 402(b)(3) issue decided by *Curtiss-Wright*[192]*—the scope of the functional purpose of section 402(b)(3) in a plan amendment.* "The [employees'] first claim [was] that the district court erred by concluding that a complete rescission of a welfare plan does not implicate the amendment procedures required by section 402(b)(3) of ERISA."[193] The Third Circuit reversed the district court and concluded that "a complete rescission of a benefit plan does implicate the requirements of section 402(b)(3) of ERISA."[194]

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184. *Id.*

185. *Id.*

186. *Id.* at 120 (emphasis added).

187. *Id.* at 119.

188. *Id.*

189. *Id.*

190. *Id.* at 120.

191. *Id.*

192. *See id.*

193. *Id.* at 121. *Ackerman* also involved an alleged violation of a notice requirement the Third Circuit stated its conclusion on awarding substantive remedies for procedural violations of ERISA. *Id.* at 123. It stated that ERISA provided for a substantive remedy under section 502(a)(1)(A). *Id.* at 124 (citing Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 (3d Cir. 1991); Berger v. Edgewater Steel Co., 911 F.2d 911, 921 (3d Cir. 1990); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1169-70 (3d Cir. 1990)).

The Third Circuit recognized that a substantive remedy could be awarded for "extraordinary circumstances." *Id.* at 124-25. Such circumstances include technical violations "where the employer has acted in bad faith, or has actively concealed a change in the benefit plan, and the covered employees have been substantively harmed by virtue of the employer's actions." *Id.* at 125 (citing Berger v. Edgewater Steel Co., 911 F.2d 911, 920-21 (3d Cir. 1990); Blau v. Del Monte Corp., 748 F.2d 1348, 1353-54 (9th Cir. 1984)).

194. *Id.* In *Ackerman*, the court of appeals also held that the district court must determine whether Warnaco complied with its amendment procedure. *Id.* Finally, the Court of Appeals held that the district court must determine "whether Warnaco acted in bad faith, or actively concealed the rescission of the termination allowance policy." *Id.*

The Third Circuit's conclusion in *Ackerman* did not agree with the Eleventh Circuit's conclusion in *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*.[195] Immediately below, Part IV.A.2 discusses *Aldridge*, which had been decided before *Ackerman*. Finally, Part IV.B will contrast the rationales of *Aldridge* and *Ackerman*. These rationales are the grounds for the split between the Third and Eleventh Circuits on the scope of the functional purpose of section 402(b)(3).

2. *The Eleventh Circuit's Functional Purpose and a Plan Termination*

The Eleventh Circuit concluded that the functional purpose of section 402(b)(3) did not include providing procedures for a pension plan termination.[196] In *Aldridge*, in October 1986, the Board of Directors (Board) of the Lily-Tulip, Inc. (Lily) voted to amend and terminate the Lily-Tulip, Inc. Salary Retirement Plan (Lily Plan).[197] The Board adopted several resolutions.[198] One resolution stated that the Lily Plan would terminate on December 31, 1986.[199] Another resolution stated that the Lily Plan was amended to reduce accrued benefits.[200] Lily notified employees of the proposed termination but did not inform employees of the proposed amendment.[201] "Lily submitted the termination and amendment documents to the Pension Benefit Guaranty Corporation (PBGC) for review pursuant to 29 U.S.C. § 1341 [ERISA section 4041]."[202] "Lily also submitted the documents to the Internal Revenue Service (IRS), requesting a determination from the IRS that the Plan would

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195. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm. 40 F.3d 1202 (11th Cir. 1994).

196. *Id.* at 1210.

197. *Id.* at 1204.

198. *Id.* at 1204-05.

199. *Id.* at 1205.

200. *Id.*

201. *Id.*

202. *Id.* In *Aldridge*, the United States Court of Appeals for the Eleventh Circuit found that Lily had complied with section 4041. *Id.* at 1209. It noted that the procedural requirements of section 4041 were sufficient to protect pensioners' interest. *Id.* at 1210. The court of appeals stated that:

> Under this provision, the plan administrator is required to give the participants at least sixty days' notice of intent to terminate. The administrator must also notify the PBGC [Pension Benefit Guaranty Corporation] as soon as practicable after notifying the participants. The notice to the PBGC must include a certification by the plan's enrolled actuary that, among other things, the plan is projected to be sufficient, as of the proposed termination date, to pay all the benefit commitments when it is time to distribute them.

Id. at 1209 (citations omitted). Nevertheless, in *Ackerman*, the Third Circuit could not "see how 29 U.S.C. § 1341 [ERISA section 4041] ensures that employees will be apprised of a termination of their severance benefits." Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 n.1 (3d Cir. 1995).

continue to retain its tax-qualified status."[203] The PBGC approved the termination and amendment; and the IRS issued a favorable determination subject to changes in the amendment.[204]

The employees challenged both the plan termination and amendment.[205] They claimed that the plan termination denied or eliminated the employees' contingent subsidized early retirement.[206] They also claimed that the amendment "change[d] the actuarial interest rate and mortality assumptions used in calculating benefits."[207] The employees filed a civil action in the United States District Court for the Southern District of Georgia, claiming, *inter alia*, that Lily had committed notice and procedural violations under ERISA.[208] The district court dismissed some of the claims, dismissed some in part, and certified two claims for interlocutory appeal.[209] Following the court of appeals decision on the interlocutory appeal, the district court addressed the other ERISA claims and entered summary judgment for employees, holding that the Plan was not properly amended and terminated and thus was ongoing.[210] Lily presented three issues on appeal to the United States Court of Appeals for the Eleventh Circuit.[211] On the issue of the validity of the plan termination, the court of appeals decided whether a plan termination must comply with section 402(b)(3) to be valid under ERISA.[212] In resolving this issue, the court of appeals reversed the district court[213] and concluded that a plan termination did not violate section 402(b)(3) because a plan termination did not implicate section 402(b)(3) and the application of section 402(b)(3) did not further its legislative purpose.[214] Thus, the Third and Eleventh Circuits are split on the scope of section 402(b)(3)'s functional purpose under ERISA's informational scheme to protect plan participants and beneficiaries against unanticipated benefit plan changes that are often harsher than plan amendments.

B. *The Functional Purpose of Section 402(b)(3) Within the ERISA Scheme*

The Third and Eleventh Circuits offered conflicting rationales for their conclusions concerning the application of section 402(b)(3) to a benefit plan

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203. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1205.

204. *See id.*

205. *Id.* at 1204.

206. *Id.* at 1205.

207. *Id.*

208. *Id.* at 1206.

209. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 741 F. Supp. 906, 921 (S.D. Ga. 1990), *aff'd in part and rev'd in part*, 953 F.2d 587 (11th Cir. 1992).

210. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1207.

211. *Id.*

212. *Id.*

213. *Id.* at 1212.

214. *Id.* at 1210.

termination. Both circuits found their grounds in the functional purpose of ERISA,[215] and thus, implicated *Curtiss-Wright*'s conclusion on the functional purposes of section 402[216] and section 104[217] in the ERISA informational scheme.[218] In *Curtiss-Wright*, the Court flatly refused to extend the functional purpose of section 402(b),[219] notwithstanding the fact that the Third Circuit in *Curtiss-Wright* had found this argument most persuasive.[220] It noted that "[s]ection 402(b)(3)'s primary purpose is obviously functional: to ensure that every plan *has* a workable amendment procedure,"[221] and that such functional purpose was apparent on the face of the provision and its placement in section 402(b), "which lays out the requisite functional features of ERISA plans."[222] The Court noted, however, that ERISA's other functional provisions, such as sections 401-414[223] and sections 101-111,[224] fully apprised retirees and employees of their rights and obligations and thus found no need to apply section 402(b)(3) to supplement these provisions in other parts of ERISA.[225]

The Court explicitly noted in *Curtiss-Wright* that Congress did not intend for section 402(b)(3), a section regarding fiduciary responsibilities,[226] to supplement the ERISA informational scheme "in a way that would lead to improbable results."[227] It must be determined, however, whether the Third Circuit and Eleventh Circuit gave sufficient consideration to the Court's interpretation of section 402(b)(3) in *Curtiss-Wright*. In *Ackerman*, the Third Circuit concluded "that the requirements of section 402(b)(3) apply to plan terminations as well as plan amendments."[228] The Third Circuit reasoned that

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215. *See infra* notes 227-54 and accompanying text.

216. 29 U.S.C. § 1102 (1994).

217. *Id.* § 1024; *see infra* note 229 and accompanying text.

218. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1231 (1995).

219. *See id.*

220. *Id.* at 1230.

221. *Id.*

222. *Id.*

223. 29 U.S.C. §§ 1101-1114 (1994).

224. *Id.* §§ 1021-1031.

225. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

226. 29 U.S.C. §§ 1101-1114.

227. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

228. Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995); *accord* Hennessy v. FDIC, 58 F.2d 908 (3d Cir. 1995). In *Hennessy*, the Third Circuit held that section 402(b)(3) applied to a plan termination. *Id.* at 922. In *Hennessy*, the plaintiffs, former employees and retirees of Meritor Savings Bank (Meritor), sued the Federal Deposit Insurance Corporation (FDIC), which had taken over Meritor. *Id.* at 914-15. The district court granted a summary judgment for the FDIC and concluded that section 402(b)(3) did not apply to a life and health insurance benefit plan termination. *Id.* at 921-22. In relying on its holding in *Ackerman*, the court of appeals concluded that the district court erred in holding that section 402(b)(3) did not apply to a plan termination. *Id.* at 922.

The court of appeals refused to vacate and remand *Hennessy* to the district court. *Id.* It concluded that Meritor's welfare benefit plan had complied with section 402(b)(3) by provid-

ERISA protects against both a plan amendment and a plan termination, and thus, strongly disagreed with the district court's contrary conclusion.[229] The

ing an authority identification procedure by "reserv[ing] to Meritor (the Company) the right to terminate these plans." *Id.* It also concluded that Meritor's welfare benefit plan had provided an amendment procedure. *Id.* It also recognized a special status for the FDIC in taking over Meritor and concluded that the official receiver appointed by the FDIC did not have to follow "normal methods of corporate governance." *Id.* at 922-23. The court of appeals concluded that a letter by the FDIC informing employees and retirees of the termination of their welfare benefit plan was sufficient to follow Meritor's procedure to terminate the plan. *Id.* at 923. Thus, the receiver appointed by the FDIC was not required to call a meeting of the board of directors to follow Meritor's termination procedure. *Id.*

229. Ackerman v. Warnaco, Inc., 55 F.3d at 121. The court of appeals also concluded that section 104(b)(1) applied to plan terminations. *Id.* at 123-24 & n.5. The pertinent part of section 104(b)(1) states that:

> Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:
> (1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title.

29 U.S.C. § 1024(b)(1). The pertinent part of section 102(a)(1) of ERISA states that:

> A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

29 U.S.C. § 1022(a)(1). Moreover, the pertinent part of section 104(b)(1)(B) of ERISA states that:

> If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

29 U.S.C. § 1024(b)(1)(B). In finding that section 104(b)(1) applied to plan terminations, the Third Circuit relied on the same rationale it used to justify the application of section 402(b)(3) to plan terminations. Ackerman v. Warnaco, Inc., 55 F.3d at 123 n.5. The court of appeals stated that "we do not believe Congress intended to protect employees from undisclosed plan amendments, but leave them defenseless with respect to a plan termination, a change with potentially more dramatic effects." *Id.* at 123 n.5. The court of appeals, however, took no position on "whether the 210 days notice period sufficiently protects employees' rights." *Id.* *But see* 29 U.S.C.A. § 1024(b)(1) (West Supp. 1998) (reducing the time period from 210 days to 60 days for a material reduction in group health insurance benefits); Willet v. Blue Cross & Blue Shield, 953 F.2d 1335, 1340 (11th Cir. 1992) (concluding that 210 days to notify of a plan termination was not prompt enough to protect against such a devastating plan action); Rucker v. Pacific FM, Inc., 806 F. Supp. 1453, 1460 (N.D. Cal. 1992) (denying a motion for summary judgment, the district court concluded that 210 days was not prompt enough to protect participants from the hardships of a plan termination); Steven Davi, Note, *To Tell the Truth: An Analysis of Fiduciary Disclosure Duties and Employee Standing to Assert Claims Under*

Third Circuit observed that finding a plan termination totally different from a plan amendment would be inconsistent with its holding in *Deibler v. United Food & Commercial Workers' Local Union 23.*[230] In *Deibler*, the Third Circuit stated that "ERISA generally allows employers to *amend or terminate* welfare benefit plans at will *so long as the procedure followed is consistent with the plan and the Act.*"[231] Furthermore, the district court found that statements made by the court of appeals in *Curtiss-Wright* appeared inconsistent with *Deibler.*[232] The Third Circuit concluded, however, that its statements in *Curtiss-Wright* described an argument of the employer and that the Supreme Court reversed *Curtiss-Wright.*[233] Thus, it concluded that in *Curtiss-Wright* it had not made a conclusion of law on the application of section 402(b)(3) to a plan termination.[234]

The Third Circuit's conclusion in *Ackerman* that section 402(b)(3) applied to a plan termination relied on the same rationale that was rejected by the Supreme Court in *Curtiss-Wright*—the refusal to expand the functional purpose of section 402(b)(3) to include a unilateral plan decision.[235] Such an expansion, increases plan liability by requiring plan sponsors to provide a procedure to identify who possesses the authority to terminate and a procedure to terminate the plan.[236] Such an expansion of ERISA's functional features unnecessarily imposes ERISA functional requirements on unilateral plan decisions that Congress did not intend to cover under ERISA procedural mandates.[237]

The Eleventh Circuit's rationale for not implicating authority identification and termination procedures in a plan termination limits the coverage of section 402(b)(3).[238] The Eleventh Circuit focused primarily on the functional purpose of sections 402(b) and 402(b)(3), and thus, it avoided imposing administrative or managerial restraints on plan sponsors by expanding the functional purpose of section 402(b)(3) to apprise plan participants of their plan rights and obligations.[239] The Eleventh Circuit found that section 402 requires "employers to adopt a written plan instrument and establish written amendment procedures" to apprise

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ERISA, 10 ST. JOHN'S LEGAL COMMENT. 625 (1995) (analyzing the fiduciary duties of employers and plan administrators).

230. Deibler v. United Food & Commercial Workers' Local 23, 973 F.2d 206, 210 (3d Cir. 1992).

231. *Id.* at 210.

232. Ackerman v. Warnaco, Inc., 55 F.3d at 121.

233. *Id.* at 122.

234. *Id.*

235. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228-29 (1995).

236. *See* Ackerman v. Warnaco, Inc., 55 F.3d at 121-22.

237. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229-31.

238. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d 1202, 1210 (11th Cir. 1994). For a discussion of the implications of applying section 402(b)(3) to plan terminations, see *infra* notes 239-54 and accompanying text.

239. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1210.

employees and retirees of their obligations and rights.[240] It concluded that the application of section 402(b)(3) to plan terminations did not further the functional purpose of section 402(b)(3).[241] It observed that the application of section 402(b)(3) to plan terminations did not prevent "unanticipated amendments from defeating employees' expectations of benefits."[242] The Eleventh Circuit reasoned that "notice and procedural requirements" of section 4041[243] provided sufficient protection against surprised or unanticipated plan terminations.[244] The Third Circuit found that a plan termination can have devastating effects and that section 4041 does not necessarily apprise employees of the termination of employee welfare benefits, such as severance pay.[245] The Third Circuit's reasoning imports section 402(b)(3) to a part of ERISA where it is functionally unnecessary under the ERISA informational scheme.[246]

Expanding the scope of the functional purpose of section 402(b)(3) to include a plan termination could eventually expose some plan sponsors to a fiduciary obligation for an unilateral business decision that is given limited protection under ERISA.[247] "'[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefit plan.'"[248] Section 402(b)(3) is located in the fiduciary responsibilities part of ERISA[249] and is aimed primarily at plan administrators or trustees,[250] and not settlors or plan sponsors.[251] Settlors are plan sponsors or companies that establish employee benefit plans,[252] and are not subject to fiduciary obligations in terminating benefit plans.[253] Expanding section 402(b)(3) to include plan terminations could indirectly impose fiduciary obligations on companies that

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240. *Id.*

241. *Id.*

242. *Id.*

243. 29 U.S.C. § 1341 (1994).

244. Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d at 1210. In *Curtiss-Wright*, the Supreme Court noted that Congress did not intend to supplement the functional requirements of ERISA's informational scheme with section 402(b)(3), "a far-away provision in another part of the statute." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1231 (1995).

245. Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 & n.1 (3d Cir. 1995); *see supra* note 202 and accompanying text.

246. *See infra* notes 247-54 and accompanying text.

247. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230; *see infra* note 253 and accompanying text.

248. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228 (quoting Adams v. Avondale Indus., 965 F.2d 943, 947 (6th Cir. 1990)) (alteration in original); *accord* Varity Corp. v. Howe, 116 S. Ct. 1065, 1074 (1995).

249. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230 (citing 29 U.S.C. §§ 1101-1104) (1994)).

250. *Id.*

251. *See* Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1790 (1996).

252. *Id.* at 1789.

253. *See id.*

are making mostly managerial decisions.[254] Effectively, section 402(b)(3) would complicate a plan termination by imposing obligations of the fiduciary responsibilities part that does not cover unilateral business decisions that are market driven.

Applying section 402(b)(3) to a plan termination, reduces the plan sponsor's flexibility that Congress preserved by refusing to mandate the vesting of welfare benefits and permitting the vesting of pension benefits that still remain terminable subject to certain requirements. In *Ackerman*, the Third Circuit applied section 402(b)(3) to a plan termination[255] and concluded that Warnaco's reservation clause that "reserved for the management the right to terminate and modify the plan"[256] provided adequate authority identification and amendment procedures and that Warnaco had thus complied with the section 402(b)(3) requirements.[257] Yet, it remanded *Ackerman* to the district court for it to determine whether Warnaco complied with these valid procedures in terminating the plan.[258] The Third Circuit's interpretation of section 402(b)(3) will effectively delay the finality of a plan termination, where plan obligations would be severed by a unilateral plan decision. Consequently, federal district courts will engage in "fact-intensive inquir[ies]"[259] to determine if a workable termination procedure existed and was followed by the company.[260] Such an expansion of the functional purpose of section 402(b)(3) raises remedial, procedural, and technical issues that complicate a plan termination in an already complex statutory scheme.

V. ISSUES COMPLICATING THE EXPANSION OF SECTION 402(b)(3)

Expanding the scope of the functional purpose of section 402(b)(3) to include a workable termination procedure raises issues that have not been resolved in providing an effective amendment procedure.[261] Applying section 402(b)(3) to plan terminations, requires courts to address issues that were

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254. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. In *Curtiss-Wright*, the Court stated, "That Congress may have had plan administrators in mind is suggested by the fact that § 402(b)(3), and § 402(b) more generally, is located in the 'fiduciary responsibilities' section of ERISA." *Id.* (citing 29 U.S.C. §§ 1101-1114 (1994)).

255. Ackerman v. Warnaco, Inc., 55 F.3d 117, 122 (3d Cir. 1995).

256. *Id.* at 122 n.2. In *Curtiss-Wright*, the Court concluded that Curtiss-Wright's use of "the company" was sufficient for an authority identification procedure, and "by the company," was sufficient for an amendment procedure. Curtiss-Wright v. Schoonejongen, 115 S. Ct. at 1228; *see supra* Part III.C.

257. Ackerman v. Warnaco, Inc., 55 F.3d at 122.

258. *Id.* at 122. For a discussion of the possible impact of corporate law and agency law that is adopted for application to disputes arising under ERISA, see Holloway & Scheider, *supra* note 34, at 126-34.

259. Ackerman v. Warnaco, Inc., 55 F.3d at 122.

260. *See* Hennessy v. FDIC, 58 F.3d 908, 922-23 (3d Cir. 1995).

261. *See infra* notes 268-302 and accompanying text.

raised in the application of section 402(b)(3) to plan amendments.[262] Applying section 402(b)(3) to plan amendments has been problematic. ERISA neither mandates welfare benefits[263] nor provides for legal remedies. Thus, applying section 402(b)(3) to plan terminations exposes plan sponsors to financial liability that may not have been intended by Congress.[264] ERISA relies on trust and contract law[265] and provides an elaborate informational scheme that affects plan rights and obligations by imposing the *least disruption* on plan relationships at common law.[266] Thus, applying section 402(b)(3) to plan termination issues would reduce economic incentives for establishing benefit plans, complicate procedural mandates for managing plans, and undermine the informational scheme of ERISA.[267]

A. *No Legal Remedies Under ERISA for Some Technical Violations*

Legal relief is normally not available for violations of ERISA section 502(a)[268] nor for technical violations, such as section 402(b)(3), except when ERISA prescribes legal relief.[269] Giving such relief would complicate a plan termination by exposing plan sponsors to financial and legal liabilities that would unnecessarily slow plan terminations. Legal relief would encourage litigation to preserve benefit plans and would promote recovering money damages for business decisions.

ERISA precedents do not appear to support legal relief for technical violations of section 402(b)(3)—even if it is expanded to cover a plan termination that is a unilateral business decision between the nonfiduciary plan sponsor and plan participants. In *Massachusetts Mutual Life Insurance Co. v. Russell*,[270] the Supreme Court addressed the question whether ERISA authorizes contractual damages for a breach of a fiduciary duty by a fiduciary under a section 502(a)(2)[271] claim.[272] The Court reversed the court

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262. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1231 (1995).

263. *Id.* at 1228.

264. *See supra* note 194 and accompanying text; *see also infra* notes 276-84 and accompanying text.

265. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

266. *See id.* at 1230-31.

267. *Id.*

268. 29 U.S.C. § 1132(a) (1994). For a discussion of the ethical, social, and economic impacts of plan terminations that have been permitted by the exclusion of welfare benefits from vesting requirements of ERISA, see Holloway & Scheider, *supra* note 34, at 135-47.

269. *See infra* notes 270-84 and accompanying text. *See generally* George Lee Flint Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611 (1994) (discussing legal relief available under ERISA); Lopez, *supra* note 63 (same); Richard Rouco, Note, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631 (1994) (same).

270. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985).

271. 29 U.S.C. § 1132(a)(2).

272. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. at 138-48. Russell was a beneficiary under two employee benefit plans of Massachusetts Mutual Life Insurance Com-

of appeals and concluded that section 409,[273] which established liability for a breach of fiduciary duty, did not authorize contractual damages for claims brought under section 502(a)(2) for the "improper or untimely processing of benefit claims."[274] Furthermore, the Court concluded that section 409 did not create a private cause of action for beneficiaries and participants for relief but instead "inures to the benefit of the plan as a whole" to recover relief.[275]

A few years later, the Court refused to hold that ERISA authorized extra contractual damages in claims brought under section 502(a)(3).[276] In *Mertens v. Hewitt Associates*,[277] the Court addressed the question of whether ERISA authorizes extracontractual damages for a breach of a fiduciary duty by a nonfiduciary under a section 502(a)(3)[278] claim.[279] The Court agreed to

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pany (Mass Mutual). *Id.* at 136. Russell was also an employee—a claims examiner—of Mass Mutual. *Id.* Mass Mutual's employee benefit plans were governed by ERISA. *Id.* These plans were funded and administered by Mass Mutual. *Id.* Russell became disabled and received plan benefits. *Id.* Approximately five months later, these benefits were terminated based on a report issued by an orthopedic surgeon. *Id.* Russell sought a review of her claims and subsequent medical reevaluations. *Id.* Approximately five months later, Russell's plan benefits were reinstated by the plan administrator. *Id.* Russell was paid back benefits but sued to recover extracontractual compensatory or punitive damages under California state law and ERISA. *Id.* Specifically, Russell alleged that fiduciaries, who were company officials administering Mass Mutual's plan, breached a fiduciary duty in processing her benefit claims. *Id.* at 136-37.

The United States District Court for the Central District of California held for Mass Mutual and concluded that ERISA preempted state law claims, and that ERISA barred extracontractual damages. *Id.* at 137. The United States Court of Appeals for the Ninth Circuit affirmed the district court's holding on the preemption issue, but reversed the district court's holding on extracontractual damages. *Id.* The court of appeals concluded that the fiduciaries took an excessive amount of time—approximately 132 days—in processing the claim and thus failed to process it in a "good faith and in a fair and diligent manner." *Id.* The court of appeals held that this breach of a fiduciary duty violated 29 U.S.C. § 1109, and thus, Russell could recover damages under 29 U.S.C. § 1132(a)(2). *Id.* at 138.

273. 29 U.S.C. § 1109.

274. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. at 148.

275. *Id.* at 140. *But see* Varity Corp. v. Howe, 116 S. Ct. 1065, 1069 (1996) (holding that individual plan members can sue plan administrator under section 502(a)(3) for a breach of a fiduciary duty but can recover only equitable damages).

276. Mertens v. Hewitt Assocs., 508 U.S. 248, 262-63 (1993).

277. Mertens v. Hewitt Assocs., 508 U.S. 248 (1993).

278. 29 U.S.C. § 1132(a)(3).

279. Mertens v. Hewitt Assocs., 508 U.S. at 249-50. Mertens and others were former employees of the Kaiser Steel Corporation (Kaiser). *Id.* at 250. They "participated in the Kaiser Steel Retirement Plan [Kaiser Plan], a qualified pension plan under ERISA." *Id.* Hewitt Associates was the Kaiser Plan's actuary in 1980. *Id.* At the same time, Kaiser phased out its steelmaking operations, prompting early retirement of participants of the Kaiser Plan. *Id.* Hewitt Associates did not change the actuarial assumptions of the Kaiser Plan to reflect early retirement of some participants. *Id.* The Kaiser Plan was insufficiently funded and thus the Kaiser Plan "assets became insufficient to satisfy its benefit obligations." *Id.* The Pension

decide "whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty."[280] The Court held that even though equity permitted recovery of money relief for a breach of fiduciary duty, ERISA did not authorize suits for the recovery of compensatory or punitive damages as "appropriate equitable relief" under section 502(a)(3).[281] The Court found that participants sought compensatory damages—"monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties,"[282] and thus, actually wanted legal relief.[283] It is highly unlikely, therefore, that plan participants and beneficiaries will be awarded legal relief for a section 402(b)(3) violation, though some courts have strongly suggested that fraudulent acts causing substantive harm would justify legal or substantive relief.[284]

B. *Less Need for a Procedure for a Unilateral Plan Decision*

In *Curtiss-Wright Corp. v. Schoonejongen*,[285] the Supreme Court concluded that section 402(b)(3) requires a coherent amendment procedure.[286] The Court's reasoning for such a procedure does not support

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Benefit Guaranty Corp. terminated the Kaiser Plan and paid the participants benefits guaranteed by ERISA. *Id.* The ERISA guaranteed benefits were much less than the benefits paid under the Kaiser Plan. *Id.*

Mertens and others sued the fiduciaries of the failed Kaiser Plan for a breach of fiduciary duties. *See* Mertens v. Kaiser Steel Retirement Plan, 744 F. Supp. 917, 920 (N.D. Ca. 1990), *aff'd sub nom.* Mertens v. Black, 948 F.2d 1105 (9th Cir. 1991), *aff'd sub nom.* Mertens v. Hewitt Assocs., 508 U.S. 248 (1993). They sued Hewitt Associates, claiming it was "a nonfiduciary that knowingly participated in the plan fiduciaries' breach of their fiduciary duties," and for other violations of ERISA. Mertens v. Hewitt Assocs., 508 U.S. at 250-51. The United States District Court for the Northern District of California dismissed the complaint and the United States Court of Appeals for the Ninth Circuit affirmed in part. Mertens v. Hewitt Assocs., 948 F.2d 607, 614 (9th Cir. 1991), *aff'd*, 508 U.S. 248 (1993).

280. Mertens v. Hewitt Assocs., 508 U.S. at 251.

281. *Id.* at 255.

282. *Id.*

283. *Id.*

284. *See* Ackerman v. Warnaco, Inc., 55 F.3d 117, 124-25 (3d Cir. 1995); *see also* Holloway & Scheider, *supra* note 34, at 112-22 (discussing the application of section 402(b)(3) to a dispute involving the amendment of a postretirement benefit plan and the impact of the dispute on accounting standards effecting accounting for welfare benefits). For an examination of the availability of equitable remedies under trust law and ERISA, see Lopez, *supra* note 63.

In *Howe v. Varity Corp.*, retirees claimed that the company's disclosure of inaccurate financial information was a breach of a fiduciary duty by a plan administrator under section 404(a)(1), and thus, allowed them to assert a claim under section 502(a)(3). Howe v. Varity Corp., 36 F.3d 746, 753 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065 (1996). The Court held that retirees could sue the plan administrator, who was also the employer, for breach of fiduciary duty, but also concluded that the appropriate remedy was equitable damages. *Id.* at 1075.

285. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995).

286. *Id.* at 1230.

the need under section 402(b)(3) for a coherent termination procedure. The Court gave three reasons for a coherent *amendment procedure*.[287] It stated that "[f]irst, for a plan *not* to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles."[288] This supports keeping plans freely terminable in that it permits unilateral decisionmaking to execute the terms and conditions of reservation clauses and other provisions. Next, the Court stated that "such a requirement increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve."[289] This reason supports a termination procedure, but plan terminations are usually a final event that only occurs once. Creating a termination procedure may not give employees or retirees any additional protection. Third, the Court concluded:

> [H]aving an amendment procedure enables plan administrators, the people who manage the plan on a day-to-day level, to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not.[290]

This final reason has little impact on a plan termination. A plan termination is a single event that should not be confused with other routine communications. Undoubtedly, a plan termination is a serious event but plans still need to remain freely terminable. Authority identification and termination procedures, however, would provide no additional protection in light of other functional requirements of ERISA. Congress purposely sought to keep termination procedures unencumbered by refusing to require vesting,[291] limiting funding requirements,[292] and limiting participation requirements[293] for employee welfare benefit plans, but requiring the vesting of pension benefits that can be terminated under some circumstances.[294] A plan termination procedure would increase the likelihood that plan sponsors would be forced to provide equitable relief, mostly restitution, for technical violations that may be merely administrative errors. Congress purposely excluded welfare benefits from stringent vesting, participation,[295] and funding[296] requirements of

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287. *Id.*
288. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 331(2) (1957)).
289. *Id.*
290. *Id.*
291. *Id.* at 1228 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90-91 (1983)).
292. 29 U.S.C. § 1081(a)(1) (1994).
293. *Id.* § 1051(1).
294. *See supra* notes 215-25 and accompanying text.
295. 29 U.S.C. §§ 1051-1106.
296. *Id.* §§ 1081-1086.

ERISA and thus sought to keep welfare benefit plans freely terminable and subject to the fewest of administrative burdens.[297]

C. *Effecting a Plan Termination Under an Invalid Termination Procedure*

Expanding the functional purpose of section 402(b)(3) to include a plan termination would require courts to determine whether a benefit plan that fails to follow a plan termination procedure is nonterminable. In *Curtiss-Wright*, the Court concluded that a lack of a coherent plan amendment procedure would make the plan unamendable, and thus, it supported fewer details in providing authority identification and amendment procedures.[298] It stated that "for a plan *not* to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles."[299] Applying the same reasoning to a termination procedure would render general reservation clauses—which reserve the right to terminate at-will—ineffective, except where these clauses are accompanied by a mechanism for implementing them. Although section 402(b)(3) would require the same or similar mechanism for a plan amendment and a plan termination, it would still be a burdensome administrative requirement to implement a one-time event that employees and retirees should know could occur at anytime. Requiring a termination procedure would slow the termination of benefit plans. If plan participants are permitted to raise technical violations under section 402(b)(3), any financial gain or other market advantages of plan terminations would be reduced.[300] Making plans interminable or slowly terminable does not make good economic or market sense.

Market, social, and political events that require an immediate, sustained reduction of labor and other costs cannot be addressed quickly under cumbersome decisional procedures that purposely limit reaction to unanticipated events and market surprises. A plan termination in the absence of a termination procedure would require a clear manifestation of intent by plan sponsors to engage in a unilateral plan termination.[301] In applying section 402(b)(3) to plan amendments, federal courts have concluded that a benefit plan may be amended only through a manifestation of intent to alter the

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297. *See supra* notes 215-25 and accompanying text; *see also* Holloway & Scheider, *supra* note 34, at 103 n.17 (examining the application of section 402(b)(3) to a dispute involving the amendment of a postretirement benefit plan that was eventually terminated by the plan sponsor).

298. Curtiss-Wright Corp. Schoonejongen, 115 S. Ct. 1223, 1230 (1995).

299. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 331(2) (1957)).

300. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; Hennessy v. FDIC, 58 F.3d 908, 922-23 (3d Cir. 1995); Ackerman v. Warnaco, Inc., 55 F.3d 117, 122-23 (3d Cir. 1995). In *Curtiss-Wright*, the dispute was caused by a termination of Curtiss-Wright's welfare benefit plan that had been amended to notify of a termination of this plan at the closing of plant facilities. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.

301. Biggers v. Wittek Indus., 4 F.3d 291, 295 (4th Cir. 1993).

plan.[302] Unlike plan amendments, plan terminations tend to be extremely definite—plan terminations are the complete elimination of plan benefits. Applying section 402(b)(3) to a plan termination would impede plan administration, and thus, gives an unintended right to plan participants by requiring the plan sponsor to find means "to 'sufficiently manifest [its] intention' to [terminate]" the plan in the absence of invalid or incomplete execution of plan termination procedures.[303] Therefore, if a plan sponsor fails to follow its authority identification and termination procedures, it would have to manifest intent to terminate by other means, and thus, would create uncertainty regarding the status of *vested and nonvested* employee benefits until a court approved the plan termination.[304]

VI. CONCLUSION

Even though the Eleventh Circuit gives less protection to retirees and employees under ERISA, its reliance on the notice and procedural requirements of section 4041 and functional features of other ERISA sections is consistent with the Supreme Court's textual reading of section 402(b)(3) and the purposes of ERISA's informational scheme.[305] In *Curtiss-Wright*, the Court observed that ERISA functional features[306] were adequate to apprise employees and retirees of their rights and obligations under written employee benefit plans[307] and concluded that Congress did not intend to import the amendment provision, section 402(b)(3), to disclosure and reporting sections.[308] The Supreme Court and the Eleventh Circuit find that less *detail* and *an elaborate scheme* provide enough protection for plan participants and beneficiaries that are accorded protection under a textual reading of section 402(b)(3).[309]

The Third Circuit and Eleventh Circuit do not agree on whether the functional purpose of section 402(b)(3) includes apprising retirees and employees of harsh unilateral plan decisions—namely the plan termination that Congress sought to make flexible.[310] In light of *Curtiss-Wright*, the Third Circuit's interpretation of section 402(b)(3) appears *inconsistent* with the legislative intent that sought to make a plan termination the most flexible, though this flexibility raises a public policy concern regarding the certainty

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302. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; Biggers v. Wittek Indus., 4 F.3d at 295.

303. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229 (citing RESTATEMENT (SECOND) OF TRUSTS § 331 cmt. c (1957)).

304. *See id.* at 1230-31; *see also* Holloway & Scheider, *supra* note 34, at 101-07 (applying section 402(b)(3) to a dispute involving the amendment of a postretirement benefit).

305. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230-31.

306. 29 U.S.C. §§ 1021-1031, 1102(a)(1) (1994).

307. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230-31.

308. *Id.* at 1231.

309. *See id.* at 1230; *supra* notes 238-54 and accompanying text.

310. *See supra* Part IV.B.

of employer-sponsored health care plans.[311] Therefore, the Court needs to address whether section 402(b)(3)'s purpose is to apprise plan participants and beneficiaries of the termination of pension and welfare benefit plans.[312]

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311. *See* 29 U.S.C. §§ 1051(1), 1053; *supra* notes 73-82 and accompanying text. In *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, the Court stated that:

> The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that "requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "they would err initially on the side of omission."

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Sante Fe Ry. Co., 117 S. Ct. 1513, 1516 (1997) (quoting S. REP. NO. 93-838, at 51 (1993)) (alteration in original); *see also* Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1791 (1996) ("obtaining waivers of employment-related claims" does not offend the policy of ERISA); K. A. Jensen & A. M. Kelly, *The Impact of* Lockheed*: More Flexibility for Employers in Pension Benefit Plans*, 22 EMPL. REL. L.J. 25 (1996) (commenting on the impact of *Lockheed*).

312. The scope of the functional purpose of section 402(b)(3) takes on even greater significance when one understands that companies must now accrue expenses and liabilities and costs of pension, postretirement, and postemployment benefits plans under financial accounting standards. Accruing these costs and liabilities effect financial accounting statements, such as the income statement. Consequently, companies may more readily amend, modify, and terminate these benefits to limit their impact on income statements and balance sheets that are scrutinized by creditors, investors, stockholders, and business partners. *See* EMPLOYERS' ACCOUNTING FOR POSTEMPLOYMENT BENEFITS AN AMENDMENT OF FASB STATEMENT NO. 5 AND 43, FINANCIAL ACCOUNTING STANDARDS NO. 112 (Financial Accounting Standards Bd. 1995); EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PENSIONS, FINANCIAL ACCOUNTING STANDARDS NO. 106 (Financial Accounting Standards Bd. 1990); EMPLOYERS' ACCOUNTING FOR PENSIONS, FINANCIAL ACCOUNTING STANDARDS NO. 87 (Financial Accounting Standards Bd. 1985).

For commentary on FASB and its impact on benefits plan management, see Ford, *supra* note 78, at 441-45; Holloway & Scheider, *supra* note 34, at 97; Ossi, *supra* note 78, at 238-40.