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The Law and Economics of ERISA and Fiduciary Duty:Larue v. DeWolff, Boberg & Associates, Inc.

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The Law and Economics of ERISA and Fiduciary Duty: *Larue v. DeWolff, Boberg & Associates, Inc.*

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ABSTRACT

The opinion of the Supreme Court in *LaRue v. DeWolff, Boberg & Associates, Inc.* climaxed a controversy wherein a plaintiff-employee had brought suit over his 401(k) retirement savings plan regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). James LaRue claimed that his pension plan's administrator had failed to execute LaRue's investment directives, a fault draining LaRue's individual account and constituting a fiduciary duty breach. The Supreme Court held that ERISA does so authorize recovery for fiduciary breaches impairing the plan asset values of a participant's own account. This holding comports with the theory of law and economics, for the fiduciary principle is the law's reaction to the problem of divergent information costs. It minimizes the cost of self-protection (through its imposition of an utmost good faith duty) to a fiduciary's principal (like James LaRue). Financial fiduciaries of 2010 might well be scrutinized given the vulnerabilities of their principals in the wake of the Wall Street Hurricane of 2008-2009.

I. INTRODUCTION

The following pages assess the opinion of the Supreme Court in *LaRue v. DeWolff, Boberg & Associates, Inc.*[1] *LaRue* was a controversy wherein a plaintiff-employee brought suit over his 401(k) retirement savings plan regulated by the Employee Retirement Income Security Act of 1974[2] ("ERISA").[3] In 2010, a major advantage of fringe benefits, for employers, is that the costs of such benefits are deductible from the taxes owed by an employer.[4] Fringe benefits constitute a hefty element of total compensation of workers.[5] These include 401(k) retirement savings plans.[6] Such programs are defined contribution plans. Therein, employer/employee contributions translate directly into individual employee assets.[7] No benefits are guaranteed upon retirement.

In 2010, a comfortable and secure retirement for Americans looks to be increasingly dicey. The contemporary graying of the massive baby boomer generation means that widespread retirement funding shortfalls are an economic threat to the nation overall. Numerous American employees' 401(k) plans are ill-funded. Only lately have automatic enrollment plans attacked that difficulty. More positively, a 401(k) plan vests at once and is totally portable. But workers must manage these personal 401(k) investments on their own. Such had been the effort of James LaRue.[8]

LaRue's action claimed that his pension plan's administrator failed to execute LaRue's 401(k) investment directives, a dereliction draining LaRue's individual account and constituting a fiduciary duty breach under ERISA.[9] In *LaRue*, the Supreme Court considered whether section 502(a)(2)[10] of ERISA authorizes a defined contribution plan participant to sue a fiduciary whose alleged wrongs impaired the asset values in that participant's individual account.[11] The Supreme Court held that section 502(a)(2) does authorize recovery for fiduciary breaches impairing the plan asset values of a participant's own account.[12]

This *LaRue* holding comports with the theory of law and economics. For the fiduciary principle is the law's reaction to the problem of divergent information costs. It minimizes the cost of self-protection (through its imposition upon agents of an utmost good faith duty) to a fiduciary's principal (like James LaRue). Unequal information, to the detriment of the employee, is endemic to the 401(k) worker-principal/plan administrator-fiduciary relationship. The *LaRue* outcome is set to meet a supposedly impending twenty-first century American

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[1] 552 U.S. 248 (2008).

[2] Employmee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 (2010).

[3] *LaRue*, 552 U.S. at 250-51.

[4] *Fringe Benefit*, GALE ENCYCLOPEDIA OF U.S. ECONOMIC HISTORY (1999), *available at* http://www.encyclopedia.com/doc/1G2-3406400345.html.

[5] *Id.*

[6] *Id.*

[7] Henry McMillan, *Pensions*, *in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 591-92 (David R. Henderson ed., 1993).

[8] *See LaRue*, 552 U.S. at 250-51.

[9] *Id.*

[10] 29 U.S.C. § 1132(a)(2) (2010).

[11] *LaRue*, 552 U.S. at 250.

[12] *Id.* at 256.

society of self-reliant stakeholders. In fact, one business and finance encyclopedia offers under "Retirement Planning" this listing, herewith quoted in its entirety: "See*: Personal Financial Planning*."[13]

Indeed, American retirement planning for a society of self-reliant stakeholders does not contradict, but fulfills, the purportedNew Deal vision of President Franklin Delano Roosevelt. [15] In his January 17, 1935, Message to Congress on Social Security, President Roosevelt asserted:

> In the important field of security for our old people, it seems necessary to adopt three principles. First, noncontributory old-age pensions for those who are now too old to build up their own insurance. It is, of course, clear that for perhaps thirty years to come funds will have to be provided by the states and the federal government to meet these pensions. Second, compulsory contributory annuities which in time will establish a self-supporting system for those now young and for future generations. Third, voluntary contributory annuities by which individual initiative can increase the annual amounts received in old age. It is proposed that the federal government assume one-half of the cost of the old-age pension plan, which ought ultimately to be supplanted by self-supporting annuity plans.[16]

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[13] *Retirement Planning*, *in* 2 ENCYCLOPEDIA OF BUSINE$$ AND FINANCE 751 (Burton S. Kaliski ed., 2001)). The major economies of the West have deviated from the ideal of a self-reliant society of stakeholders for many years. *See* JOHN KENNETH GALBRAITH, ECONOMICS IN PERSPECTIVE: A CRITICAL HISTORY 210-12 (1987). Professor Amartya Sen, who was awarded the Nobel Prize in Economics by the Royal Swedish Academy of Sciences in 1998, acknowledges:

> All affluent countries in the world—those in Europe, as well as the US, Canada, Japan, Singapore, South Korea, Australia, and others—have, for quite some time now, depended partly on transactions and other payments that occur largely outside markets. These include unemployment benefits, public pensions, other features of social security, and the provision of education, health care, and a variety of other services distributed through nonmarket arrangements. The economic entitlements connected with such services are not based on private ownership and property rights.

Amartya Sen, *Capitalism Beyond the Crisis*, N.Y. REV., Mar. 26, 2009, at 27.

[15] Senator Bennett Champ Clark proposed an amendment to the initial Social Security bill providing that were an employer to afford employees a pension equal to that of Social Security, neither the employer nor employees need pay Social Security taxes. Passing the Senate on June 19, 1935, by a 51 to 35 vote, the Clark Amendment died in the Conference Committee, after being resisted ferociously by President Roosevelt. *See, e.g.*, CAROLYN L. WEAVER, THE CRISIS IN SOCIAL SECURITY: ECONOMIC AND POLITICAL ORIGINS 91-92 (1982); Historian's Office, Research Note #9: *The Clark Amendment to the 1935 Social Security Act*, http://www.ssa.gov/history/clarkamend.html; Bruce Bartlett, *Social Security Never Really a Retirement Program for Elderly*, HUMAN EVENTS, Sept. 10, 2001, http://findarticles.com/p/articles/mi_qa3827/is_200109/ai_n8982536/); Steve Forbes, *Oh! What Might Have Been*, FORBES, Sept. 21, 2009, at 13.

[16]Franklin Delano Roosevelt, *Message to Congress on Social Security: January 17, 1935*, *in* THE ESSENTIAL FRANKLIN DELANO ROOSEVELT 90, 93 (John Gabriel Hunt ed., Portland House, 1996) (emphasis added). In 2010, how self-supporting, is the Social Security System of compulsory contributory annuities? *cf.* EYTAN SHEHINSKI, THE ECONOMIC THEORY OF ANNUITIES (2007). A fully privatized Social Security System would combine a trio of changes mutually distinct from an analytical perspective. In principle, these three can be embraced (or declined) in any combination, notwithstanding that the tendency in the literature is to advance them as an indivisible package:

> First, it would be fully funded, implying greater saving overall to the extent that saving outside the system did not correspondingly decline. Second, it would increase investment choice within the system, permitting beneficiaries who so preferred to achieve higher and riskier returns overall to the extent that Social Security had previously locked them into an unduly low-risk, low-return position despite the at least theoretical availability of offsetting adjustments to their portfolios. Third, it would eliminate redistribution within Social Security, both between age cohorts and progressively within age cohorts, with the overall effect again depending on what offsetting adjustments, if any, were made outside the system.

In 2010, Roosevelt's ultimate attainment of self-supporting annuity plans proves long overdue.[17]

II. FRINGE BENEFITS IN 2010

Fringe benefits (also known as "employee benefits") constitute the major means utilized by businesses to entice workers to accept or to remain in jobs, aside from wages themselves.[18] They spontaneously can be offered by employers, be legally required, or be won via company-employee collective bargaining.[19] A critical advantage of fringe benefits, for employers, has been that the Internal Revenue Service permitted firms to deduct benefit payments (as an employee compensation expense) from their taxes owed.[20] Most small-business owners are certainly motivated to deliver enhanced employee-benefits should those owners themselves enjoy substantially increased tax-deductible benefits.[21] The permanent extension of the Economic Growth and Tax Relief Reconciliation Act of 2001's[22] pension provisions in the Pension Protection Act of 2006,[23] plus the increase in the combined plans employer deduction limit and new rules for cash balance pension plans, facilitate that objective.[24] Meanwhile, although employees had to pay taxes on salary increases, these benefits went untaxed.[25]

In the United States, fringe benefits grew far more common after collective bargaining grew widespread during the 1930s and 1940s, empowering employees to persuade businesses to

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DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY 203 (2000).

[17] Or did the President prevaricate? If President Roosevelt had a year earlier informed Congress: "We shall, in the process of recovery, seek to move as rapidly as possible from direct relief to publicly supported work and from that to the rapid restoration of private employment." *Roosevelt*, *supra* note 16, at 73, 77-78. The President added "that we are [now] definitely in the process of recovery[.]" *Id.* at 73. Has direct relief and public employment been superseded by private employment in 2010?

[18] *Fringe Benefit*, *supra* note 3.

[19] *Id.*

[20] *Id.* "Economic Theory seems to be silent about the relationship between the effort exerted and the scheme by which a person is paid---flat wage, individual piecework, group piecework, etc." JULIAN L. SIMON, EFFORT, OPPORTUNITY, AND WEALTH 58-59 (1987).

[21] Barry Milberg, *Pension Protection Act of 2006: Retirement and Estate Planning Opportunities*, J. FIN. SERV. PROF'LS, Mar. 2008, at 54.

[22] Economic Growth and Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified at scattered sections of Title 26 of the United States Code).

[23] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 820, 996-997 codified at scattered sections of Title 26 of the United States Code); Ernest J. Guerriro, *Pension Protection Act of 2006: Effects on Defined-Benefit Plans*, J. FIN. SERV. PROF'LS, 58, Mar. 2009.

> The Pension Protection Act of 2006 (PPA) has brought about the most comprehensive pension law changes in more than 30 years. It has strengthened the funding rules in addition to Pension Benefit Guaranty Corporation (PBGC) premium changes, relief for airlines, investment advice for plan participants, automatic contribution arrangements in 401(k) plans, clarification of cash balance plans, and allowable IRA distributions to charitable organizations. However, the most significant impact it has provided is for EGTRRA permanence (the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16). The overall change is to provide stability to the qualified plan marketplace with the intent of enticing employers to establish or maintain their plans during the accumulation phase, with the overall goal of increasing retirement savings during the deaccumulation phase.

Ernest J. Guerriero, *Pension Protection Act of 2006: Effects on Defined-Benefit Plans*, J. FIN. SERV. PROF'LS, Mar. 2009, at 58.

[24] Millberg, *supra* note 21, at 54.

[25] *Fringe Benefit*, *supra* note 3.

improve working conditions.[26] Union collective bargaining meant (at length) pensions.[27] Even union-free corporations remained so, partially, by offering their workers a pension plan before hirelings organized to demand one.[28] During the Second World War, the proportion of workers paying income taxes rose from six percent to seventy percent.[29] The Revenue Act of 1942 increased both the base and rates of the federal income tax.[31] That statute raised the corporate tax rate and levied an excess profits tax upon earnings exceeding their prewar level.[32] These changes constituted incentives for a company's reduction in its pretax profits.[33] The statute also required that, to reap the tax advantages of pensions, a company offer pensions to a minimum of seventy percent of fulltime, long-term employees.[34] A 1943 federal ruling excluded pension contributions from federal wage price controls.[35]

The earliest American company to initiate an employer-sponsored retirement plan had been American Express, in 1875.[36] The Baltimore and Ohio Railroad became number two during 1880.[37] During the early twentieth century, just ten percent of the private sector was covered by pensions.[38] Even at the close of the 1930s, America boasted a mere 600 employer-sponsored retirement plans.[39] But in 1946, three million workers were covered by over 7,000 such plans.[40]

Fringe benefits divide, generally, into those offered to employees as a group (e.g., free lunches or daycare facilities) and those offered individually.[41] The latter include the 401(k) retirement plan.[42] Most fringe benefit plans, traditionally, offer three basic benefits.[43] These are a retirement plan (or pension); health insurance; and additional benefits (e.g., life insurance or stock option plans).[44] There are two primary kinds of pension plans: defined benefit plans and defined contribution plans.[45] In defined benefit plans, the employer spells out those income/healthcare benefits to be rendered.[46] Assets backing such plans are neither selected by

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[26] *Id.*

[27] STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 582 (2005).

[28] *Id.* Of course, visible wage/fringe benefit enhancements running to unionized bargainers can be enjoyed at cost to faceless would-be workers barred from employment by strikers. George Steven Swan, *The Deconstruction of Marriage, Part 2: Political Economy of Gender-Based Affirmative Is the Action Good for the Home Economy?*, 24 FAMILY IN AMERICA: A JOURNAL OF PUBLIC POLICY I, 11-12 (2010).

[29] JOHN HOOD, INVESTOR POLITICS: THE NEW FORCE THAT WILL TRANSFORM AMERICAN BUSINESS, GOVERNMENT, AND POLITICS IN THE TWENTY-FIRST CENTURY 78 (2001). "War is the health of the State." George Steven Swan, *The Political Economy of Presidential Foreign Policymaking: The Contemporary Theory of a Bifurcated Presidency*, 21 CAL. W. INT'L L.J. 67 (1990) (citing Randolph S. Bourne, *The State, in* WAR AND THE INTELLECTUALS: ESSAYS BY RANDOLPH S. BOURNE, 1915-1919 65, 71 (C. Resek ed., 1964).

[30] *Hood*, *supra* note 29.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See id.*

[36] GORDON K. WILLIAMSON, MAKING THE MOST OF YOUR 401(K) 15 (1996).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See id.*

[41] *Fringe Benefit*, *supra* note 3.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] JEREMY J. SIEGEL, STOCKS FOR THE LONG RUN: THE DEFINITIVE GUIDE TO FINANCIAL MARKET RETURNS AND LONG-TERM INVESTMENT STRATEGIES 105 (2008); *McMillan*, *supra* note 7, at 591.

[46] *Id.* at 592.

nor owned by the workers.[47] Defined benefit plans must be funded, i.e., an enterprise must emplace assets in a separate account to cover those anticipated benefits associated with the plans.[48] Unfortunately, it has been said (e.g., in the United Kingdom) that every year a defined benefit pension plan member survives adds three percent to her plan's liabilities.[49] And employers command no means whereby to ascertain how much longer members are to survive.[50]

Defined contribution plans deposit both the employer's and employees' contributions directly into assets owned by employees:[52]

> For example, suppose a defined contribution plan specifies that 5 percent of a worker's salary be contributed each year to a pension fund. Suppose the worker starts at age thirty, retires at age sixty, and earns $50,000 annually. Then the firm's annual contribution would be $2,500 (5 percent of $50,000). If the fund earns 8 percent annually, the worker would have $283,208 in the pension fund at retirement, which could purchase a twenty-year annuity paying $28,845 annually.[53]

The firm guarantees no benefits.[54] Economist Teresa Ghilarducci of the New School for Social Research finds that as a firm increases spending on a 401(k) plan – a defined contribution plan – by ten percent, it decreases its overall spending on pensions by 3.5 percent.[55] The risk that the value of a plan at retirement cannot meet retirement expenses is borne by employees. In light of the global trend toward defined contribution plans, the sensitivity to the climate of heighted worker-retiree exposure to scary markets is widespread.[56] Nevertheless, defined contribution plans attracted enormous popularity during the 1990s bull market.[57]

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[47] *Id.* at 591-92.

[48] *See id.* at 592.

[49] Michael Skapinker, *If the Old Refuse to Die, Let Them Work Longer*, FIN. TIMES, June 17, 2008, at 13.

[50] *Id.* On the other hand, every year a defined benefit pension plan member survives adds twelve months wherein the pension fund—that big pool of money run for traditional corporate retirement plans—can throw off returns. A recent study by Dutch finance scholar Rik Frehen comparing the returns of 700 pension funds vs. returns of 4,000 mutual funds (1992-2004) revealed that the returns on the former had beaten mutual funds by at least 1.4 percent yearly on average (after adjusting for expenses, risk, fund-size, and investing-style). To be sure, the mutual fund industry does appear a solid and valuable one, at least in its American incarnation. Jason Zweig, *Why Pension Funds Beat Mutual Funds*, MONEY, July 2008, at 74; *see, e.g.*, MATTHEW P. FINK, THE RISE OF MUTUAL FUNDS: AN INSIDER'S VIEW (2008), having weathered the financial storms of 2007-2009. But a pension fund need not advertise its merits, mail prospectuses, nor maintain a 24-hour toll-free phone bank, as must a mutual fund. Jason Zweig, *Why Pension Funds Beat Mutual Funds*, MONEY, July 2008, at 74.

[52] Siegel, *supra* note 45, at 105; *See* McMillan, *supra* note 7, at 591-92.

[53] *Id.* at 592. Many citizens born between 1946 and 1964 are averse to conventional annuities, from fear of loss of liquidity. Shefali Anand, *Riding the Retirement Wave*, WALL ST. J., June 2, 2008, at R1. Brookings Institution economists propose that companies automatically divert a percentage of retirees' 401(k) assets into an immediate annuity for the initial two years of retirement (with a cancellation option then); such is status quo bias that few retirees would be expected to cancel. Stephen Gandel, *The Campaign to Make You Behave*, MONEY, Aug. 2008, at 126, 129; Anne Kates Smith, *An Income Stream to Last a Lifetime*, KIPLINGER'S PERSONAL FINANCE, Sept. 2008, at 15-16.

[54] *See* Siegel, *supra* note 45, at 106; Anand, *supra* note 53, at R1.

[55] TERESA GHILARDUCCI, WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM 131 (2008) (Ms. Ghilarducci was the 2006-2008 Wurf Fellow at Harvard Law School.).

[56] *See, e.g.*, RETIREMENT PROVISION IN SCARY MARKETS (Hazel Bateman ed., 2007).

[57] Siegel, *supra* note 45, at 105.

That dizzying bull market persuaded many employees that they could extract a return on their own investments superior to those promised by their firm.[58] (Better yet, a report by the Boston College Center for Retirement Research disclosed that the advent of the 401(k) had enhanced job mobility.)[59] In 2008, approximately sixty percent of workers had a defined contribution plan versus twenty percent under defined benefit plans.[60] In the early 1980s those proportions were the reverse.[61] In 1979, sixty-two percent of American employees participated in a pension plan only.[62] By 2005, sixty-three percent of workers participated in a 401(k) solely.[63] An employee's management of his own 401(k) plan investments proved at issue in *LaRue*.[64]

III. JUSTICE STEVENS DELIVERS *LARUE*

A. The Majority Opinion

In his opinion for the Supreme Court in *LaRue*, an up-to-date Justice John Paul Stevens differentiated between the 2008 defined benefit plan and the defined contribution plan (or individual account plan).[65] As already seen herein *in extenso*, the former promises, generally, to

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[58] *Id.* at 106. What ignited the heady 1990s bull market? Was this a market failure?

> A number of congressional actions may have contributed to the U.S. stock market and economic bubble of the late 1990s. For example, a law passed in the early 1990s limited the cash compensation of leaders of public companies. This shifted more and more executive compensation to stock options and thus may have inadvertently encouraged stock speculation. The accounting profession's policy board was also warned by leading senators that if it persisted in a plan to require companies to treat stock options as ordinary business expenses, legislation would put a stop to it. The policy board chose to bow before congressional pressure.
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> Tax laws throughout these years permitted companies to deduct the cost of borrowing money, but treated dividend payments to shareholders as taxable twice, once at the company level and again at the shareholder level. This made equity financing much more expensive than debt financing, and thus encouraged companies to borrow heavily. In part, companies borrowed heavily to buy back shares, a move that sent share prices higher and higher and (not incidentally) made the value of company executives' stock options soar.
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> . . . .
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> Other tax laws required companies selling capital goods to book their earnings all at once, but permitted companies buying the capital goods to recognize the expense over a number of years. This treatment exaggerates reported corporate profits during a boom, when capital goods are most in demand, then exaggerates the decline in profits after the bust, when the sellers have few orders and the buyers are still expensing the purchases of prior years, many of which will have turned out to be mistakes.
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> The U.S. Federal Reserve probably had more impact on the U.S. economy than Congress in the late 1990s, but Congress also arguably played an important role.

HUNTER LEWIS, ARE THE RICH NECESSARY?: GREAT ECONOMIC ARGUMENTS AND HOW THEY REFLECT OUR PERSONAL VALUES 229-31 (2007).

[59] Peter Keating, *Let's Make a (Bad) Deal: Converting to Cash-Balance Plans Has Lots of Benefits—for Employers*, SMARTMONEY, Apr. 2007, at 41, 43.

[60] Jeff Madrick, *The Specter Haunting Old Age*, N.Y. REV. BOOKS., Mar. 20, 2008, at 42, 43.

[61] *Id.*

[62] Jennifer Levitz, *Americans Delay Retirement as Housing, Stocks Swoon*, WALL ST. J., Apr. 1, 2008, at A1, A13.

[63] *Id.*

[64] 552 U.S. at 248.

[65] *Id.* at 250 n.1.

each participant a fixed retirement income.[66] This return typically is based upon an employee's years of service and compensation.[67] The latter assures each participant at retirement the value of her individual account.[68] This value largely is a function of the sums contributed therein and the investment outcomes of her contributions.[69]

In 2004, James LaRue of Southlake, Texas[70] (an employee of a South Carolina-based management consulting firm)[71] had filed his action against DeWolff, Boberg & Associates (his ex-employer) and the ERISA-regulated 401(k) retirement savings plan administered by DeWolff.[72] That Plan permitted a participant to direct investment of her contributions in accord with specific requirements and procedures.[73] LaRue alleged that during 2001-2002 he had directed DeWolff to make certain changes to the investments in LaRue's account, but DeWolff failed to execute LaRue's directives.[74] LaRue claimed that DeWolff's omission had depleted LaRue's stake in the plan by approximately $150,000, constituting a breach of fiduciary[75] duty under ERISA.[76] In his complaint, he sought, *inter alia*, to be made whole or to be granted other equitable relief as allowed under section 502(a)(3)[77] of ERISA.[78]

Respondents moved for judgment on the pleadings.[79] They argued that LaRue's complaint essentially was one for monetary relief not recoverable under section 502(a)(3).[80] LaRue's counter was that he solicited no monetary award, but he simply wanted the plan accurately to reflect what must be his interest therein but for the breach of fiduciary duty.[81] The District Court assumed, *arguendo*, the breach of fiduciary duty.[82] Nevertheless, the District Court granted the judgment motion.[83] The District Court concluded that, inasmuch as DeWolff and the plan possessed no funds in dispute, LaRue sought damages instead of equitable relief available under section 502(a)(3).[84]

On appeal, LaRue argued, *inter alia*, that he enjoyed a cognizable relief claim under sections 502(a)(2)[85] and 502(a)(3).[86] The Court of Appeals rejected on the merits the section

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[66] *See* McMillan, *supra* note 7, at 592.

[67] *Id.*

[68] *LaRue*, 552 U.S. at 250 n.1.

[69] *Id.*

[70] Kathy Chu, *High Court Greenlights Worker's 401(k) Suit*, USA TODAY, Feb. 21, 2008, at 3B.

[71] Gregory Froom, *Supreme Court Opens Door to 401(k) Lawsuits*, N.C. LAWYERS WEEKLY, Mar. 3, 2008, at 2.

[72] *LaRue*, 552 U.S. at 250.

[73] *Id.* at 250-51.

[74] *Id.* at 251.

[75] "The word fiduciary comes from the Latin word fiducia, meaning trust. Its original meaning in financial services likely arose in the world of trusts and estates, but the notion of fiduciary spread beyond the world of trusts and estates into the world of financial planning and further[.]" Ronald F. Duska, *On Fiduciary Duty: Have We Set the Bar Too High?*, J. FIN. SERV. PROF'LS, Jan. 2009, at 20, 20.

[76] *LaRue*, 552 U.S. at 251. The word fiduciary comes from the Latin word fiducia, meaning trust. Its original meaning in financial services likely arose in the world of trusts and estates, but the notion of fiduciary spread beyond the world of trusts and estates into the world of financial planning and further. Ronald F. Duska, *On Fiduciary Duty: Have We Set the Bar Too High?*, J. FIN. SVC. PROFS., Jan. 2009, at 20.

[77] 29 U.S.C. § 1132 (2010).

[78] *LaRue*, 552 U.S. at 251.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *LaRue v. DeWolff*, No. 2:04-1747-18, 2005 WL 5568764, at *4 (D. S.C. June 23, 2005).

[84] *LaRue*, 552 U.S. at 251.

[85] 29 U.S.C. § 1132(a)(2).

502(a)(2) argument, although stating that *LaRue* first had raised this section 502(a)(2) argument on appeal.[87] The intermediate appellate court also rejected LaRue's "argument that the make-whole relief he sought was 'equitable' within the meaning of [section] 502(a)(3)."[88] While the Supreme Court's grant of *certiorari* included LaRue's section 502(a)(3) issue, the Stevens opinion did not address that issue because it determined that the Court of Appeals had "misread [section] 502(a)(2)."[90]

"Section 502(a)(2) provides for suits to enforce the liability-generating provisions of [section] 409,[91] concerning breaches of fiduciary duties [which] harm [a plan]."[92] Section 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.[93]

Stevens comprehended that the Court of Appeals had read the Supreme Court opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*[94] to hold that section 502(a)(2) provides remedies solely for an entire plan, not for an individual.[95] Recovery, the appellate court opined, needs to inure to the benefit of the overall plan, not to any particular person commanding rights therein.[96] The Court of Appeals called into question whether LaRue's individual remedial interest might serve as proxy for the plan in its entirety.[97]

Assuming the breach of fiduciary obligations defined in section 409(a), and further assuming that such breaches adversely impacted the value of the plan assets in James LaRue's account, Justice Stevens added that section 502(a) authorizes, *inter alia*, plan participants and beneficiaries "to bring actions on behalf of the plan to recover for" section 409(a) violations.[98] The misconduct which had been alleged by Mr. LaRue "squarely" falls within the category of violation of statutory duties laid upon fiduciaries by section 409(a).[99] Section 502(a)(2) embraces appropriate claims over forgone profits.[100]

"Unlike the defined contribution plan in [*LaRue]*, the disability plan [in controversy] in *Russell*" lacked individual accounts.[101] The administrative misconduct of a defined benefit plan,

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[86] *LaRue*, 552 U.S. at 251.
[87] *Id.*
[88] *Id.* at 252.
[90] *Id.*
[91] 29 U.S.C. § 1109 (2009).
[92] *LaRue*, 552 U.S. at 251.
[93] 29 U.S.C. § 1109(a).
[94] 473 U.S. 134 (1985)).
[95] *LaRue*, 552 U.S. at 251-52 (quoting *Russell*, 473 U.S. at 142).
[96] *LaRue v. DeWolff*, 450 F.3d 570, 573 (4th Cir. 2006).
[97] *Id. at* 574.
[98] *LaRue*, 552 U.S. at 252-53.
[99] *Id.* at 253 (quoting *Russell*, 473 U.S. at 142).
[100] *Id.* at 253 n.4.
[101] *Id.* at 255.

as in *Russell*, does not affect an individual's entitlement until it creates or widens the risk of default by the entire plan.[102] Such default risk "prompted Congress to require defined benefit plans," not defined contribution plans, to render premium payments to the Pension Benefit Guaranty Corporation and to meet complicated minimum funding standards.[103] The *Russell* emphasis upon protecting an entire plan from fiduciary malfeasance reflects a bygone landscape of employee benefit plans.[104]

Justice Stevens explained that, for defined contribution plans, fiduciary mischief need not menace the entire plan's solvency to cut benefits beneath what a participant otherwise would enjoy.[105] A fiduciary duty breach creates the type of evil which concerned the drafters of section 409, whether said breach diminishes plan assets payable to all, or only to a party linked to her individual account.[106] Any *Russell* references to the entire plan are wholly beside the point in the *LaRue* defined contribution environment.[107] In addition, "entire plan" is a phrase nowhere found in sections 409 or 502(a)(2).[108] Justice Stevens could comfortably distinguish *Russell* because Stevens, in 1985, had penned the opinion of the Supreme Court in that case.[109]

Too, section 404(c) exempts a fiduciary from liability for losses engendered by a participant's own exercise of control over assets in her individual account. [111] Such a provision could serve no genuine aim were fiduciaries never liable for losses to an individual account.[112] *LaRue* held that, while section 502(a) provides no "remedy for individual injuries distinct from plan injuries," section 502(a) "authorize[s] recovery for [a fiduciary breach impairing] the value of plan assets" in the individual account of a participant.[113]

B. Justice Thomas Concurs

Justice Clarence Thomas, with whom Justice Antonin Scalia joined, concurred in the *LaRue* judgment.[114] Yet their concurrence might be still more receptive to a plaintiff like James LaRue than was the Stevens opinion for the majority. Justice Thomas agreed with the majority that James LaRue had alleged a claim cognizable under section 502(a)(2).[115] However, it was ERISA's text, not the kind of harm that concerned ERISA's drafters, which compelled Thomas's decision.[116] Neither was his reading of sections 409 and 502(a)(2) contingent upon pension plan market trends, but emphatically upon the unambiguous text thereof as applicable to defined contribution plans.[118] According to Justice Thomas, "On their face, [sections] 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach."[119]

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[102] *See id.*

[103] *LaRue*, 552 U.S. at 255 (citing Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 475-78 (2004)).

[104] *Id.* at 254.

[105] *Id.* at 255-56.

[106] *Id.* at 256.

[107] *See id.*

[108] *LaRue*, 552 U.S. at 256.

[109] *See Russell*, 473 U.S. at 136.

[111] 29 U.S.C. § 1104(c) (2010).

[112] *LaRue*, 552 U.S. at 256.

[113] *Id.*; *See, e.g.*, Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 705 (7th Cir. 2008).

[114] *LaRue*, 552 U.S. at 260 (Thomas, J., concurring).

[115] *Id.*

[116] *Id.*

[118] *Id.* at 261.

[119] *Id.* (emphasis in original).

The *LaRue* question was whether losses resulting from the alleged breach of fiduciary duty were losses to the plan.[120] Justice Thomas answered, "In my view they were, because the assets allocated to petitioner's individual account were plan assets."[121] Again, "The allocation of a plan's assets to individual accounts for bookkeeping purposes does not change the fact that all the assets in the plan remain plan assets."[122]

C. Chief Justice Roberts Concurs

Chief Justice John Roberts, with whom Justice Anthony Kennedy joined, concurred in part with the majority opinion in *LaRue* and concurred in the judgment: "I agree with the Court that the Fourth Circuit's analysis was flawed, and join the Court's opinion to that extent."[123]

The Chief Justice highlighted that the majority's conclusion that James LaRue could bring his section 502(a)(2) claim was reached sans consideration of whether potential relief under section 502(a)(1)(B)[124] should alter such conclusion.[125] It, at a minimum, is arguable that a claim like Mr. LaRue's lays under section 502(a)(1)(B) alone.[126] Section 502(a)(1)(B) "allows a plan participant or beneficiary 'to recover benefits,'" enforce rights under the plan, or to clarify rights to future benefits: "It is difficult to imagine a more accurate description of LaRue's claim."[127]

Moreover, it is unclear whether, if LaRue could bring his claim under section 502(a)(1)(B), he could also do so under section 502(a)(2).[128] For, "Allowing a [section] 502(a)(1)(B) action to be recast as one under [section] 502(a)(2) might permit plaintiffs to circumvent safeguards for plan administrators that have developed under [section] 502(a)(1)(B)."[129] These safeguards include an exhaustion of administrative remedies mandated by ERISA section 503[130] prior to filing suit under section 502(a)(1)(B).[131] And Roberts notes: "Sensibly, the Court leaves open the question whether exhaustion may be required of a claimant who seeks recovery for a breach of fiduciary duty under [section] 502(a)(2)."[132] Equally significant, ERISA plans under *Firestone Tire & Rubber Co. v. Bruch*[133] may grant

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[120] *LaRue*, 552 U.S. at 262 (Thomas, J., concurring).

[121] *Id.*

[122] *Id.* "Of course, a participant suing to recover benefits on behalf of the plan is not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan." *Id.* at 263 n.*.

[123] *Id.* at 257 (Roberts, C. J., concurring and concurring in part).

[124] 29 U.S.C. § 1132(a)(1)(B).

[125] *LaRue*, 552 U.S. at 257 (Roberts, C. J., concurring and concurring in part).

[126] *Id.* Roberts "concludes his opinion by practically inviting the lower court to decide this case based on § 501(a)(1)(B)." Mary Komornicka, *Analysis of* LaRue v. DeWolff*: How the Supreme Court Reached Its Decision and What It Means For Plan Sponsors*, 35 J. PENSION PLAN. & COMPLIANCE 49, 71 (2009).

[127] *Id.* (quoting U.S.C. § 1132(a)(1)(B)).

[128] *Id.* at 258.

[129] *Id.*

[130] 29 U.S.C. § 1133 (2010).

[131] *LaRue*, 552 U.S. at 258-59 (Roberts, C. J., concurring and concurring in part) (citing Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 418 n.4 (6th Cir. 1998) (citing cases)).

[132] *Id.* at 259 n.*. Nonetheless: "ERISA's exhaustion requirement generally has been held not to apply to claims based on direct violations of the statute, including a breach of fiduciary duties." Ellen M. Doyle & Stephen M. Pincus, *Restoring Retirement Nest Eggs*, TRIAL, Apr. 2009, at 46, 50 (citing Smith v. Sydnor, 184 F.3d 356, 364-65 (4th Cir. 1999); Milofsky v. Am. Airlines, Inc., 442 F.3d 311, 313 (5th Cir. 2006) (per curiam); *but see* Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1224-25 (11th Cir. 2008)).

[133] 489 U.S. 101 (1989)

administrators and fiduciaries discretion in defining plan terms and benefit eligibility.[134] Those decisions can be reviewed for abuse of discretion alone.[135]

Then how did Americans react to *LaRue*?

IV. AMERICA'S RECEPTION OF *LARUE*

A. LaRue *Awaited*

It has been observed that statutes afford at least three authorities relevant to fiduciaries.[136] These authorities include not only the Employee Retirement Income Security Act,[137] but the Uniform Prudent Investor Act,[138] which had been enacted in its entirety or in substantial part by some 40 states as of the commencement of the *LaRue* litigation,[139] and the Uniform Management of Public Employee Retirement Systems Act[140].[141] The latter, as of early in the *LaRue* litigation, had been formally adopted by South Carolina alone.[142]

The well-known legal journalist Tony Mauro fancied the advancing *LaRue* controversy to be an important business case.[143] Watched hawkishly by the business community, *LaRue* was anticipated to be a landmark case regarding ERISA remedies.[145] The ERISA statute is complex.[146] Not in over a third of a century had the Supreme Court succeeded in simplifying it.[147] ERISA, in its complexity and its comprehensiveness, often is compared to the Pension Protection Act[148] of 2006.[149] Many commentators grumbled that ERISA's remedies were too stingy.[150] Indeed, it was vexing to define what remedies ERISA permits.[151] Nonetheless, Congress had declined to amend the statute to expand such remedies.[152] It was speculated after

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[134] *LaRue*, 552 U.S. 248 at 259 (Roberts, C. J., concurring and concurring in part) (citing *Bruch,* 489 U.S. at 115).

[135] *Id.* (citing *Bruch,* 489 U.S. at 115).

[136] Stuart Ober, *Fiduciary Responsibility: Liability and Consequences*, J. FIN. PLAN., Nov. 2005, at 50, 52.

[137] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

[138] *See generally* UNIF. PRUDENT INVESTOR ACT (1995).

[139] Ober, *supra* note 138, at 52.

[140] UNIF. MGMT. OF PUBLIC EMPLOYEE RETIREMENT SYS. ACT (1997).

[141] Ober, *supra* note 138, at 52.

[142] *Id.*

[143] Tony Mauro, *Key Business Cases May Do Supreme Court Disappearing Act*, LEGAL TIMES, Sept. 20, 2007, *available at* www.law.com/jsp/article.jsp?id=1190192573250.

[145] *Id.*

[146] "Former Secretary of Labor Robert Reich has described ERISA as 'the single most complicated piece of legislation ever to be enacted.'" Doyle & Pincus, *supra* note 89, at 47 (quoting ROBERT REICH, SUPERCAPITALISM: THE TRANSFORMATION *OF* BUSINESS, DEMOCRACY AND EVERYDAY LIFE 67 (2008) (Alfred A. Knopf 2007)).

[147] Linda Greenhouse, *Top Court Allows Suits Over 401(k)*, N.Y. TIMES, Feb. 21, 2008, at C1.

[148] *See generally* Pension Protection Act of 2006, 120 Stat. 820.

[149] George Steven Swan, *The Law and Economics of Interprofessional Skirmishing:* Financial Planning Association v. Securities and Exchange Commission, 16 U. MIAMI BUS L. REV., 75, 82 (2007) (citing April K. Caudill, *Changing the Retirement Plan Landscape: The Pension Protection Act of 2006*, J. FIN. SERV. PROF'LS., Jan. 2007, at 32).

[150] Seyfarth Shaw LLP, *The Supreme Court will Decide a 401(k) Case that Addresses the Scope of ERISA Remedies*, ONE MINUTE MEMO, June 21, 2007, *available at* http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_html/object_id/0e1c7308-1787-4cc2-ad0b-65fb1b657ca7.

[151] *Id.*

[152] *Id.*

the Supreme Court granted *certiorari* in *LaRue*[153] that Congress might amend ERISA if the decision of the Fourth Circuit was upheld.[154] Well could such have transpired since, under the 1937-2007 federal interbranch division of labor theory, Congress steers the economy practically without any constitutional curb.[155]

It was recognized, after the Supreme Court granted *certiorari*, that *LaRue* would enable the Justices to clarify matters associated with 401(k) plan participants' claims to recover investment losses deriving from breach of fiduciary duty.[156] However, it then was likewise acknowledged that how the Supreme Court would rule remained uncertain.[157] The practicing litigator Stephen D. Rosenberg expected the forthcoming *LaRue* opinion to favor the 401(k) plan participant, expanding the rights of plan participants individually to sue over breach of fiduciary duty.[158] So mused others.[159] The prominent investors' periodical, *Barron's*,[160] shared a piece of Jim McTague's mind: "The Bush administration supports LaRue. Perhaps you should too."[161]

On the other hand, attorney at the Bryan Cave's Employee Benefits Group in St. Louis, Carrie Byrnes McNichols offered of the impending *LaRue* opinion: "'That could be potentially very costly to the company sponsoring the plan and will likely lead to increased lawsuits and potentially increased liabilities[.]'"[162] *The Metropolitan Corporate Counsel* advised: "If the participant prevails in *LaRue*, increased litigation by individual plan participants could follow, making it wise for plan sponsors to have the ability, when necessary, to demonstrate compliance with the myriad of rules that govern plans subject to ERISA."[163] Wachovia Insurance Services supposed the Fourth Circuit's opinion in *LaRue* to have been at odds with the Congressional intent, such being a reason for the Supreme Court's opting to hear the case.[164] Wachovia Insurance Services eyed its opening to peddle insurance:

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[153] LaRue, 450 F.3d 570, *cert. granted*, 551 U.S. 1130 (2007).

[154] Deloitte, *Supreme Court to Review 401(k) Plan Case*, WASHINGTON BULLETIN, June 25, 2007, *available at* http://benefitslink.com/articles/washbull070625.html.

[155] *See, e.g.*, George Steven Swan, *The Political Economy of the O'Connor Court: Professor Thomas M. Keck Vindicated*, 33 OKLA. CITY U. L. REV. 151, 162-64 (2008); George Steven Swan, *The Political Economy of the Interstate Commerce Clause:* United States v. Lopez *and* United States v. Robertson, 5 J. LEGAL STUD. BUS. 165 (1997).

[156] Proskauer Rose LLP, *U.S. SUPREME COURT TO CONSIDER AVAILABLE REMEDIES UNDER ERISA*, CLIENT ALERT, June, 2007, at 1, *available at* http://www.proskauer.com/files/News/979dcac7-4fe3-4a20-8ac8-0e985f70f1d5/Presentation/NewsAttachment/7ed68f25-1831-4ff1-b471-e7a6e468b49e/Times-14653-062807-Supreme%20Court%20to%20Consider%20Available%20Remedies%20Under%20ERISA.pdf.

[157] *Id.* at 2.

[158] Posting of Stephen D. Rosenberg to BOSTON ERISA & INSURANCE LITIGATION BLOG, www.bostonerisalaw.com/archives/121195-print.html (Feb. 20, 2008) (The post is entitled "The Supreme Court Decides LaRue, in Probably Predictable Fashion.").

[159] *Id.*

[160] "You should be an avid reader of the financial pages of daily newspapers, particularly the *New York Times* and the *Wall Street Journal*. Weeklies such as *Barron's* should be on your 'must read' list as well." BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET: THE TIME-TESTED STRATEGY FOR SUCCESSFUL INVESTING 370 (2007) (1973).

[161] Jim McTague, *Investor Protection Gets Its Day in Court*, BARRON'S, Sept. 24, 2007, at 30.

[162] Diana Ransom, *Quick Tips: Limiting Liability in Retirement Plans*, SMARTMONEY, Jan. 3, 2008, *available at* www.smsmallbiz.com/benefits/Limiting_in_Retirement_Plans.html (quoting Carrie Byrnes McNichols).

[163] Denise Trujillo, *Retirement Plan Governance — Stay Ahead of the Wave*, THE METROPOLITAN CORPORATE COUNSEL, Aug. 2007, at 37.

[164] Wachovia Insurance, *Supreme Court Revisiting Duties to 401(k) Plan Participants*, WACHOVIA INSURANCE CLIENT ALERTS , July 2007, at 2 (on file with author).

> If the Supreme Court overturns the Fourth Circuit decision, there will surely be heightened liability for the plan sponsors and the fiduciaries of the defined contribution plan. While a fiduciary liability insurance policy is neither required by most corporate by-laws nor statutorily mandated, it would be beneficial for companies to reassess their risk management program due to this potential increase in exposure. For companies that already have such a policy in their insurance portfolio, then a limits adequacy review is warranted.[165]

After all, larger enterprises virtually never make a move respecting their qualified retirement plans sans consultation with professional advisors.[166] For an employer, or whomever he or she names in their stead, bears an established obligation to operate retirement plans as prudent experts on the behalf of their participants.[167] Whereas in the world of small to midsize companies, roughly those boasting fewer than 1,000 employees, the idea that employers are fiduciaries carrying legal obligations had failed, historically, to take hold.[168]

B. LaRue *Saluted*

Post-*LaRue*, the popular press proclaimed that individual workers now could sue their boss for mismanagement of the employee's 401(k) plan.[169] Jeff Russell, a retirement law expert at the Bryan Cave firm, declared that, pre-*LaRue*, "'businesses were protected from claims unless an error impacted the entire [retirement] plan. But now an error affecting even a single participant will be grounds for litigation."[170] Given that fifty million workers had $2.7 trillion invested in 401(k) retirement plans,[171] the mainstream press alerted its readers that *LaRue* had opened the floodgates of potential litigation.[172]

Senior Vice-President for Policy at the American Benefits Council, which represents employers and financial firms administering employee benefits, Lynn Dudley cautioned: "'If you make it too easy to sue, then costs go up for companies, and if costs go up, employers might get more hesitant to offer 401(k) plans[.]'"[173] Attorney Mary Ellen Signorille with the AARP Foundation opined of *LaRue*: "'My sense is this will end up producing a tremendous amount of litigation[.]'"[174] Vice-President of the Profit Sharing/401(k) Council of America Ed Ferrigno

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[165] *Id.*

[166] Pete Swisher, *Solving an Employer's Fiduciary Dilemma: Liability, Discretion, and the Role of the Qualified Plan Advisor*, J. FIN. PLAN., Feb. 2004, at 42.

[167] Theo Francis & Mark H. Anderson, *Ruling Allows Workers to Sue on 401(k) Losses*, WALL ST. J., Feb. 21, 2008, at D1.

[168] Swisher, *supra* note 169, at 42. "Of nearly 6 million small employers in the US, only 30% offer a retirement plan, according to the National Foundation of Independent Business." Donald J. Korn, *Small-Biz Entrepreneurs' 401(k) Perks*, INVESTOR'S BUSINESS DAILY, July 21, 2008, at A10.

[169] *See, e.g.*, Interview with Jeffrey Russell, esq., in St. Louis, *in Supreme Court: You Can Sue Your Boss*, KIPLINGER'S PERS. FIN., May 2008, at 14; Linda Stern, *Quick! Plug Those Holes*, NEWSWEEK, Mar. 3, 2008, at 52. "Before LaRue, no case had definitively addressed whether workers could file lawsuits over individual losses, say Peter Stris, the lawyer representing LaRue." Chu, *supra* note 39, at 3B.

[170] Patti Waldmeir, *Supreme Court Ruling Limits Medical Lawsuits*, FIN. TIMES, Feb. 21, 2008, at 3 (quoting Jeff Russell).

[171] Associated Press, *Justices OK suits on 401(k) inaction; Bar raised on claims over medical devices*, CHICAGO TRIBUNE, Feb. 21, 2008, at C1.

[172] *See* Chu, *supra* note 39, at 3B.

[173] *Id.* (quoting Lynn Dudley).

[174] Jonathan Peterson, *High court allows workers to sue over 401(k) losses*, L.A. TIMES, Feb. 21, 2008, at A1.

believes that *LaRue* "'opens the door'" to a variety of worker suits, encompassing attacks upon fees employees are charged to administer their plans.[176] Russell agreed that issues concerning enrollment, or cashout instructions, would arise in lawsuits over the 2008-2012 span as attorneys probe the frontiers of *LaRue*.[177] This will increase the expense of offering 401(k)s inasmuch as employers now must defend against more suits.[178] Russell, whose specialties include employee benefits, concurred with other experts that heavier administrative fees to cover the menace of the possibility of new litigation[179] will cause expenses to be passed onto individual participants.[180]

While some companies might fix upon offering no plan whatsoever, the 401(k) entails so many advantages over defined benefits pension plans that there will be no substantial contraction of the 401(k) universe.[181] Nevertheless, President of the aforementioned nonpartisan group,[182] Employee Benefit Research Institute, Dallas L. Salisbury declared: "'You could see a decline in the number of 401(k) plans being made available,'" particularly among smaller employers. [184] These smaller employers already could be struggling to deliver such plans.[185] (Recall the crisp differences already mentioned between larger enterprises and small companies.)

LaRue was hailed by U.S. House of Representatives Education and Labor Committee Chairman George Miller: "'American workers and retirees should have the right to seek justice when their trust is violated by the very companies that manage their hard-earned retirement savings, and thanks to today's decision, they now have that right[.]'"[186] Note the link between 'trust' and 'fiduciary.' Attorney Gregory L. Ash of Overland Park, Kansas acknowledged: "'If somebody screws up in the administration of the plan, the workers now have an easier way to have that error corrected in court[.]"[187] University of Alabama School of Law Professor Norman Stein, a specialist in pension law, praised *LaRue*: "'How in the world could this ever really have been uncertain?'"[188] James LaRue himself posited: "'Somebody should not be able to do

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[176] *Id.* (quoting Ed Ferrigno).

[177] Interview, *supra* note 172, at 14.

[178] *Id.*

[179] Peterson, *supra* note 129, at A1.

[180] Interview, *supra* note 172, at 14.

[181] *Id.*

[182] Chu, *supra* note 39, at 3B.

[184] Peterson, *supra* note 129, at A1 (quoting Dallas L. Salisbury).

[185] *Id.*

> The lesson of history, in fact, is that over most of the field of law, and especially of private law, in most political and economic circumstances, political rulers need have no interest in determining what the rules of law are or should be (provided always, of course, that revenues roll in and that the public peace is kept).

ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 97 (1991).

[186] Peterson, *supra* note 129, at A1 (quoting Rep. George Miller). Miller's phrase "thanks to today's decision" reminds one that Congress had failed plainly to delineate the right being defined by the Supreme Court. Had Congress forthrightly done so, the February 20, 2008, opinion would have been unnecessary. Essentially, Miller crows over his own branch's drop of the ball.

Comparable was Chairman Miller's response to the Labor Department's July 22, 2008, release of proposed fee disclosure rules, effective for plan years beginning on or after Jan. 1, 2009, for companies offering 401(k) plans: "'I will continue to press the [Labor] Department to improve these proposed rules to ensure that workers have access to complete and understandable information about the fees they are paying at one location,' Rep. Miller said in an email." Daisy Maxey, *U.S. Pushes for Clear Disclosure of 401(k) Fees*, WALL ST. J., July 23, 2008, at D3 (quoting Rep. George Miller). As long as the Supreme Court or Labor Department does the heavy lifting, Congress, ostensibly the legislative branch, *see* U.S. CONST. art. I, § 8, need merely sit in the shade to chatter.

[187] Peterson, *supra* note 129, at A1 (quoting Gregory L. Ash).

[188] Francis & Anderson, *supra* note 122, at D1 (quoting Norman Stein).

whatever they want with your money and say: 'You know what? You can't touch me''[.]"[189] LaRue, then self-employed, said of the opinion: "'It was good news for me, and I'm hoping it's good news for a lot of the 401(k) participants[.]'"[190]

Pleased with *LaRue* was an attorney who had represented James LaRue, Robert E. Hoskins of Greenville, South Carolina: "'You cannot overstate the importance of this opinion for folks with 401(k) plans and any sort of retirement plan[.]'"[191] Hoskins added of Justice Stevens' opinion:

> "It's still about the integrity of the plan, but now we see it's about the individual account also. . . . I think Justice Stevens summed it up best when he said that, in reality, a 401(k) plan is nothing but the sum of its individual parts, and that's not the case with a defined-benefit plan.
>
> To protect the integrity of the plan, we have to be able to protect each of its component parts[.]"[192]

Hoskins expatiated:

> "Before this case came out, theoretically if you had a plan with 100 people in it, and one person had $100,000 stolen out of his account, that person had no remedy. The plan would be short $100,000 so the integrity of the plan would have been compromised. But, because it was just one individual account, there would have been no remedy. We believe that was not what Congress intended, and that was just what the court found."[193]

C. LaRue *in the Aftermath*

Still, Robin Conrad of the National Chamber Litigation Center (the legal arm of the United States Chamber of Commerce) discerned *LaRue* to be narrower than anticipated: "'It is one that we can live with, it could have been much more difficult for the business community.'"[194] Numerous are those employees griping that their 401(k) plans are gorged with high-fee funds.[195] (Since 2009, ratings of 401(k) plans have been publicly available on the Internet.[196]) Nevertheless, *LaRue* is not seen to afford any fresh remedy to workers who dislike the investment options offered by employers.[197]

Karla Grossenbacher of Seyfarth Shaw in Washington, D.C., which authored an *amicus curiae* brief in *LaRue* on behalf of the United States Chamber of Commerce and the Financial Services Roundtable, proffers several procedural and substantive defenses to *LaRue*-style claims

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[189] Associated Press, *Court: Suit Against 401(k) Administrator OK*, DALLAS STAR-TELEGRAM, Feb. 21, 2008, *available at* www.star-telegram.com/business/story/486456.html (quoting James LaRue).

[190] Peterson, *supra* note 129, at A1 (quoting James LaRue).

[191] Froom, *supra* note 40 (quoting Robert E. Hoskins).

[192] *Id.* at 2, 8 (quoting Robert E. Hoskins).

[193] *Id.* at 8 (quoting Robert E. Hoskins).

[194] Waldmeir, *supra* note 125, at 3 (quoting Robin Condrad).

[195] Leslie Scism, Daisy Maxey & Jennifer Levitz, *Investing in Funds: Five Lessons from a Wild First Half*, WALL ST. J., July 3, 2008, at R1, R17.

[196] Ratings have been available on brightscope.com since January 2009. Amy Feldman, *How Good Is Your 401(k)?*, BLOOMBERG BUS. WEEK, Jan. 11, 2010, at 60, 62.

[197] Peterson, *supra* note 129, at A22.

under section 502(a)(2).[198] She follows a roadmap affably drawn for defendants by Chief Justice Roberts.[199] For example, DeWolff can assert that LaRue must be required to proceed under section 1132(a)(1)(B) of ERISA.[200] It allows a participant to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]"[201] It could be argued that LaRue's section IV(c)(2) claim proved but a benefits claim disguised as one for breach of fiduciary duty. Most courts demand an individual first to exhaust her administrative remedies via following her plan's internal procedures prior to bringing such claim before a court.[202] This requirement gives a plan administrator the chance to interpret the plan and dispose of the claim.[203]

Also, if the plan administrator has been allotted adequate discretion under the plan's terms, courts review her decision under the (deferential) abuse of discretion standard based upon the record, further discovery.[204] (Familiar is the term fiduciary duty: to invoke it is to conjure the law of trusts.)[205] As Whittier Law School's Peter K. Stris, of Costa Mesa, California, who argued *LaRue* in Washington for James LaRue,[206] grouses:

> Unsurprisingly, ever since the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch* ruled that a fiduciary's granting itself discretion to make benefits determinations would entitle it to deferential "arbitrary and capricious" review, tempered by the degree to which conflict of interest was present in the given case, virtually every plan contains a grant of such discretion. Other scholars, notably Professor John Langbein, have assailed the Court's ruling that an ERISA fiduciary's discretion deserves deference given the inherent conflict created by ERISA's decision to permit fiduciaries to be plan administrators.[207]

Moreover, DeWolff could argue that LaRue must exhaust his administrative remedies prior to proceeding with a section 502(a)(2) claim.[208] Circuits divide over whether this administrative exhaustion requirement is applicable to statutory claims arising under section 502(a)(2).[209] Factual issues in a *LaRue*-style claim include that a plaintiff must establish the

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[198] Karla Grossenbacher, 'LaRue' *Lets Individuals Sue Plans*, NAT'L L. J., May 19, 2008, at S1, S7.

[199] Roberts "supplies some ideas for attorneys tasked with defending these lawsuits in the future." David E. Nardolillio, *The Supreme Court's Opinion in* LaRue, *One Year Later: What Happens Next*, ROBINS, KAPLAN, MILLER & CIRESI ARTICLES, Jan. 20, 2009, http://www.rkmc.com/The-Supreme-Court's-Decision-in-emLaRueem,-One-Year-Later-What-Happens-Next.htm.

[200] Grossenbacher, *supra* note 201 at S7.

[201] 29 U.S.C. § 1132(a)(1)(B).

[202] Grossenbacher, *supra* note 201 at S7 (citing Communication Workers of America v. AT&T, 40 F.3d 426 (D.C. Cir. 1994).

[203] Grossenbacher, *supra* note 201, at S7 (citing AT&T, 40 F.3d at 428, 431-32 (collecting cases)).

[204] *Id.* (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).

[205] Jones v. Harris Associates, L.P., 527 F.3d 627, 632 (7th Cir. 2008) (citing *Firestone*, 489 U.S. at 110), *reh'g. en banc denied,* 537 F.3d 728 (7th Cir. 2008), *cert. granted,* 129 S. Ct. 1579 (2009).

[206] "Hoskins did not argue the case in Washington; instead, that was handled by Peter K. Stris of Costa Mesa, Calif." Froom, *supra* note 40, at 8.

[207] John Bronsteen, Brendan S. Maher & Peter K. Stris, *ERISA, Agency Costs, and the Future of Health Care in the United States*, 76 FORDHAM L. REV. 2297, 2326 (2008) (footnote omitted) (citing generally John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315 (2007)).

[208] Grossenbacher, *supra* note 152, at S7.

[209] *Id.*

fiduciary breach.[210] Too, causation questions arise.[211] For section 1104(c) insulates fiduciaries from liability for defined contribution plan losses caused by the participant's own exercise of control over assets.[212]

On the other hand, James LaRue's attorney Robert E. Hoskins aggressively anticipated the *LaRue* case's return to United States District Court in South Carolina: "'I think there were issues raised by Chief Justice Roberts in his concurring opinion that are going to be developed further [on remand] and which may actually broaden the scope of the opinion.'"[213] In the event, Mr. LaRue voluntarily dismissed his case because it was "not financially feasible to continue to pursue his claim."[214] At any rate, the finest economists comprehended during the *LaRue* litigation that fiduciary duty can weigh heavily in contexts wherein the behavior of a defendant (e.g., a coldblooded corporate plan administrator) cannot be influenced by a sense of identity with another (e.g., a plan participant).[215] Issues for development, to broaden and deepen the lessons of *LaRue*, include the economic dimension thereof.

V. ECONOMICS AND FINANCIAL PLANNING

Economics affords its own approach to financial planning. It is one in contrast to conventional planning.[216] This approach of economics is premised upon consumption smoothing.[217] That approach stands for the proposition that households aim to spread their spending power over time, as well as across times (be those times fair or foul).[218] Consumption smoothing derives from the assumption of diminishing marginal utility.[219] That is the commonsensical idea – or even psychological law – that spending more (and

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[210] *Id.*

[211] *Id.*

[212] 29 U.S.C. § 1104(c).

[213] Froom, *supra* note 40, at 8 (quoting Robert E. Hoskins).

[214] Consent order of dismissal pursuant to Fed. R. Civ. P. 41(a)(2) at 1, LaRue v. Dewolff, (D. S.C. Oct. 21, 2008) (No. 2:04-1747-DCN). "A plaintiff, unable to meet her financial needs by obtaining such 'credit'—in this case a cash advance from a litigation firm—may be forced to accept an unfair settlement offer or relinquish her claim." Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 514-15 (2006) (citing Eileen Libby, *Whose Lawsuit Is It?: Ethics Opinions Express Mixed Attitudes About Litigation Funding*, A.B.A. J., May 2003, at 36); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 649 (2005); George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 819 (2001); George Steven Swan, *The Economics of Usury and the Litigation Funding Industry:* Rancman v. Interim Settlement Funding Corp., 28 OKLA. CITY U. L. REV. 753, 758 (2003).

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> It must, of course, be recognized that the rejection of purely self-interested behavior does not indicate that one's actions are necessarily influenced by a sense of identity with others. It is quite possible that a person's behavior may be swayed by other types of considerations, such as her adherence to some norms of acceptable conduct (such as financial honesty or a sense of fairness), or by her sense of duty—or fiduciary responsibility—toward others with whom one does not identify in any obvious sense. Nevertheless, a sense of identity with others can be a very important—and rather complex—influence on one's behavior which can easily go against narrowly self-interested conduct.

AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY 22-23 (2006).

[216] Laurence J. Kotilkoff, *Economics' Approach to Financial Planning*, J. FIN. PLAN., Mar. 2008, at 42.

[217] *Id.*

[218] *Id.*

[219] "Diminishing marginal utility The psychological law that as extra units of a commodity are consumed by an individual, the satisfaction gained from each unit will fall." Graham Bannock, R. E. Baxter & Evan Davis, DICTIONARY OF ECONOMICS 105 (1998).

more) at a particular juncture yields less (and less) additional pleasure.[220] In the words of the late Milton Friedman,who in 1976 was awarded the Nobel Prize in Economics by the Royal Swedish Academy of Science:[221]

> [T]he marginal utility of diamonds can be very high (because diamonds are very scarce) relative to the marginal utility of water (because water is very abundant); and in consequence, the price of diamonds can be high relative to the price of water; and yet the total utility of water can be much greater than the total utility of diamonds.[222]

Bear in mind that marginal benefits (and marginal costs) are what really count toward economic efficiency.[223]

Some economists, in their evaluations of economic policy alternatives, are utilitarians.[224] They weigh what they call the total utility of an outcome.[225] Economists, of course, term the capacity to render satisfaction[226] utility.[227] Utility is a subjective appraisal depending on the party concerned – because in the instance of utility the immediate sensation of preference is never itself a ground for comparison of utilities between persons[228] – and depending on the

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[220] Kotilkoff, *supra* note 165, at 42.

[221] Bannock, et al., *supra* note 166, at 166.

[222] MILTON FRIEDMAN, PRICE THEORY 36 (2007). "However, the triumph of marginal and diminishing marginal utility has, in a sense, been carried too far." *Id.*

[223] TIM HARFORD, THE UNDERCOVER ECONOMIST: EXPOSING WHY THE RICH ARE RICH, THE POOR ARE POOR—AND WHY YOU CAN NEVER BUY A DECENT USED CAR! 243 (2006).

[224] JAMES A. MIRRLEES, WELFARE, INCENTIVES, AND TAXATION 69 (2006).

[225] *Id.* Professor Tyler Cowen (the George Washington U. economist) explicated the prosaic merit inhering in expected utility theory, even were utility not a scientific concept:

> In contrast to many brainstorming sessions, trying to compute probabilities is a useful means of generating self-knowledge. When we are truly in doubt about different career paths, or about marriage proposals, we should try to quantify the choices. We should sit down with a pen and paper and try to figure out what probability of which outcome would be required to make one choice better than the other.
>
> This sounds impossibly wonky, but the goal is not to generate a rational number from the process. The claim is not that "expected utility theory" is somehow descriptively true or can reflect the complexity of our choices. The goal is to get people over their useless delusions. Thinking about numbers tends to slow down some of the least rational parts of our brains. It forces us to look at the matter from a less emotional perspective.

TYLER COWEN, DISCOVER YOUR INNER ECONOMIST: USE INCENTIVES TO FALL IN LOVE, SURVIVE YOUR NEXT MEETING, AND MOTIVATE YOUR DENTIST 127 (2007). Anyway, John Cardinal Henry Newman counseled: "Courage does not consist in calculation, but in fighting against chances." *Other Comments*, FORBES, September 15, 2008, at 26.

[226] "No demand exists for those things which possess no utility, *i.e.*, capacity to render satisfaction." CLARK LEE ALLEN, JAMES M. BUCHANAN & MARSHALL R. COLBERG, PRICES, INCOME, AND PUBLIC POLICY: THE ABCS OF ECONOMICS 18 (1954). Of course, James M. Buchanan in 1986 was awarded the Nobel Prize in Economics by the Royal Swedish Academy of Science. Bannock et al., *supra* note 222, at 39.

[227] Kotilkoff, *supra* note 165, at 42.

[228] "In fact, economists reject the possibility of interpersonal comparison of utility." JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 3 (2008).

> Historically, utility was first conceived as quantitatively measurable, i.e.[,] as a number. Valid objections can be and have been made against this view in its original, naive form. It is clear that every measurement—or rather every claim of measurability—must ultimately be based on some immediate sensation, which possibly cannot and certainly need not be analyzed any further. In the case of utility the immediate sensation of preference—of one object or aggregate of objects as against another—provides this basis. But this permits us only to say when for one person one

object considered.[229] According to James A. Mirrlees, who in 1996 was awarded the Nobel Prize in Economics by the Royal Swedish Academy of Science, to suppose erroneously the comparability of individual utilities might imply, simplemindedly, an economic model profoundly dysfunctional:

> In one exceedingly simple model, which perhaps many economists had in mind, people are all the same, and each person obtains utility from a single consumption good, of which a fixed amount is available. Then it is easy for the government to do it. Assuming diminishing marginal utility of consumption, and comparability of individual utilities, an equal distribution of assets is what we require. No information, other than a census, is required for that. People might have some doubts about the measurability, perhaps even about the meaningfulness, of utility; but at least, in a rough and ready way, there was a strong case for thinking that transfer from richer to poorer was an improvement. Carrying that to the logical extreme, the riches of the earth should be equally distributed.
>
> It was not a popular policy, in part for good reasons. Obviously, if a perfectly equalising policy were carried out, the ordinary incentive to work would be eliminated. 'From each according to his abilities, to each according to his needs' (Karl Marx, *Criticism of the Gotha Programme*) is not thought to be feasible, even if desirable. Nothing in the simple model allowed for that.[230]

> utility is greater than another. It is not in itself a basis for numerical comparison of utilities for one person nor of any comparison between different persons. Since there is no intuitively significant way to add two utilities for the same person, the assumption that utilities are of non-numerical character even seems plausible. The modern method of indifference curve analysis is a mathematical procedure to describe this situation.

JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 16 (4th ed. 2004) (60th anniversary edition). "Such as the sensations of light, heat, muscular effort, etc., in the corresponding branches of physics." *Id.* at 16 n.1.

[229] HAROLD S. SLOAN & ARNOLD J. ZURCHER, A DICTIONARY OF ECONOMICS 346 (4th ed. 1969).

[230] Mirrlees, *supra* note 228, at 4-5. On the other hand, so esteemed a scholar of law and economics as Dr. Nicholas L. Georgakopoulos resists the claim that, because the utility increments of different persons are incomparable, a redistribution argument (based on diminishing marginal utility of wealth) fails. NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 76-79 (2005).

In contrast to the Marxist motto, *see Marginal Notes to the Programme of the German Workers' Party*, *in* 3 KARL MARX & FREDERICK ENGELS: SELECTED WORKS 13, 19 (1977) ("From each according to his ability, to each according to his needs!"), a simple maxim for a society of liberty would be: "*From each as they choose, to each as they are chosen*[,]" ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160 (1974) (Nozick's emphasis). Therefore, has the Supreme Court been misguided concerning the right, 42 U.S.C. § 1982 (2010), to contract, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968). For the right to voluntary exchange is not a right to contract with *any* party. Nozick, *supra* note 233, at 264. Instead, the right to contract bears a hook. *Id.* That hook must clasp the corresponding hook of the counterpart. *Id.* Hence, "as they are chosen":

> The right to engage in a certain relationship is not a right to engage in it with anyone, or even with anyone who wants to or would choose to, but rather it is a right to do it with anyone who has the right to engage in it (with someone who has the right to engage in it…). Rights to engage in relationships or transactions have hooks on them, which must attach to the corresponding hook of another's right that comes out to meet theirs.

Id. However, Nozick admits this thinking to be extremely tentative. *Id.*

One finds no unit whereby to measure utility.[231]

The response appropriate to a diminishing marginal utility is neither to hoard one's spending power, nor to squander it.[232] The proper response is to smooth expenditures through time.[233] Especially of interest as to retirement planning, a person expends approximately identical sums over his or her lifespan whether he or she spends it all short-term or defers money into a retirement fund to spend thereafter.[234] The sole distinction lies in how spending is distributed.[235]

Basic economics instructs one that smooth consumption paths yield higher welfare than do volatile ones.[236] Intermediate economics adds that, practically speaking, for households to sustain purchasing smoothly month to month, they need either savings or access to lending (which access many households lack).[237] Due to such constraints, consumption tracks income more closely than simple theory would posit.[238] Advanced economics instructs that financial markets ought to provide consumption insurance.[239] Such insurance would empower individuals to borrow and to lend.[240] This empowerment would diminish the dependence of current expenditure upon current income.[241] Here lies the invariable bottom line: Individuals require capital to accomplish goals today, which otherwise they could not afford.[242]

The financial markets – for a price – provide that capital to individuals.[243] For financial markets enable each one among us to smooth our consumption over a lifetime.[244] Active

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[231] Sloan & Zurcher, *supra* note 175, at 346.

> Economics does not provide the tools for answering philosophical questions related to income distribution. For example, economics cannot prove that taking a dollar forcibly from Bill Gates and giving it to a starving child would improve overall social welfare. Most people intuitively believe that to be so, but it is theoretically possible that Bill Gates would lose more utility from having the dollar taken from him than the starving child would gain. This is an extreme example of a more general problem: We measure our well-being in terms of utility, which is a theoretical concept, not a measurement tool that can be quantified, compared among individuals, or aggregated for the nation. We cannot say, for example, that Candidate A's tax plan would generate 120 units of utility for the nation while Candidate B's tax plan would generate only 111.

CHARLES WHEELAN, NAKED ECONOMICS: UNDRESSING THE DISMAL SCIENCE 60 (2002).

[232] Kotlikoff, *supra* note 165 at 42.

[233] *Id.* Recognizes University of Chicago economist Steven Levitt: "The right reason to save is so you can even out your consumption." *The Smartest Advice I Ever Got*, MONEY, Aug. 2008, at 119, 123.

[234] James Schaefer, Letter to the Editor, *Clunker Program's Opportunity Cost*, WALL ST. J., Oct. 23, 2009, at A20.

[235] *Id.*

[236] Stephen Cecchetti, *We need to sustain the 'great moderation*,' FIN. TIMES, June 23, 2008, at 11.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] Cecchetti, *supra* note 239, at 11. By the Great Moderation is meant the notable contraction in macroeconomic volatility which the U.S. economy underwent following the mid-1980s (until, at least, July 2007). Debatable are those sources of that Great Moderation. *See, e.g.*, Jordi Gali & Luca Gambetti, *On the Sources of the Great Moderation* (Nat'l Bureau of Econ. Research, Working Paper No. 14171, 2008), *available at* http://papers.nber.org/papers/w14171.

[242] Wheelan, *supra* note 177, at 120.

[243] *Id.* According to former Treasury Under Secretary Peter Fisher: "'Capitalism is premised on the idea that capital is a scarce commodity rationed with a price mechanism.'" Maria Bartiromo, *Face Time, Blackrock's Peter Fisher on When the Pain will End*, BUS.WK., Oct. 20, 2008, at 21, 22 (quoting Peter Fisher). Economist at the U. of Chicago Booth School of Business Richard Thaler concludes: "While imperfect, financial markets are still the

secondary markets for business lending, car loans, consumer credit, and home mortgages facilitate both collateralized and non-collateralized borrowing.[245] That facilitation weakens dramatically the correlation between income and expenditure for businesses and households.[246] It is different to exaggerate the importance of these innovations, when consulting the U.S. data.[247]

Even for other nations (for which we hold less data), there emerges a plain sense that financial innovations have been behind a reduction of the previously direct connection between income and consumption.[248] In Central and Eastern Europe's industrialized economies, which initiated their transmutation into market economies devoid, essentially, of financial systems, it exhausted nearly a decade for fragile banks genuinely to extend credit beyond the government, major companies, and wealthy persons.[249] By the date of *LaRue*, well-capitalized institutions there (often supported by foreign parents) actively backed lending, e.g., financed mortgages for people aiming to purchase their own homes.[250] Due to improved financial access, people in the Baltic states trust their banks more than they trust their legal institutions.[251] (Whereas, on the date of *LaRue*, their labor-wages constituted the central or even solitary source of disposable income for most of China's consumers.)[252] From the smoother growth in household expenditure is born a less volatile real growth.[253] The upshot of the last twenty years of financial innovations is that one can ensure virtually anything and undertake activities hitherto out of reach.[254] The accompanying growth was more stable (with business cycles less frequent and less severe).[255]

Smoothing one's consumption (or more precisely, one's living standard) is one of four fundamental economic commandments relative to personal finance.[256] The other three are: maximize your standard of living; price lifestyle options in terms of your standard of living; and protect your standard of living.[257] Note that all four strategies not only focus upon the household's standard of living: each emanates from the diminishing marginal utility assumption.[258]

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best way to allocate capital." Richard Thaler, *The Price Is Not Always Right and Markets Can Be Wrong*, FIN. TIMES (London), Aug. 5, 2009, at 9.

[244] Wheelan, *supra* note 177, at 121-22.

[245] Cecchetti, *supra* note 180, at 11; *see, e.g.*, LENDOL G. CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT (2001).

[246] Cecchetti, *supra* note 180, at 11.

[247] *Id*.

[248] *Id*.

[249] Erik Berglof & Raghuram Ranjan, *Progress in Emerging Markets is Being Put at Risk*, FIN. TIMES, July 18, 2008, at 9.

[250] *Id*.

[251] *Id*.

[252] Zhiwu Chen, *Privatisation Would Enrich China*, FIN. TIMES, August 8, 2008, at 9. In 2009, China's middle class and poor still lacked credit. Posting of David Lynch to FAR EASTERN ECONOMIC REVIEW, Oct. 1, 2009, http://www.feer.com/economics/2009/september53/The-Next-Chinese-Revolution.

[253] Cecchetti, *supra* note 180, at 11.

[254] *Id*.

[255] *Id*. On the other hand, be advised that respecting an individual retiree's distribution portfolio, volatility must not be overfeared. A decrease in real returns has a heavier impact on the probability of portfolio failure than has a corresponding increase in volatility. David M. Blanchett and Brian C. Blanchett, *Data Dependence and Sustainable Real Withdrawal Rates*, J. FIN. PLAN., Sept. 2008, at 70, 78, 80.

[256] Kotilkoff, *supra* note 165, at 42.

[257] *Id*.

[258] *Id*. The idea of the so-called Great Moderation is attributable to economists James H. Stock and Mark W. Watson. James H. Stock & Mark W. Watson, Has the Business Cycle Changed?: Evidence and Explanations (August 2003, rev. September 2003), *available at* http://www.kc.frb.org/Publicat/sympos/2003 /pdf/Stock-

Financial planning attorneys of 2010 might well investigate the financial planning case of *LaRue* – an employment case hinging upon breach of fiduciary duty – as they, themselves, are informed by economics. After all, the law and economics of labor and employment law,[259] and the law and economics of torts,[260] are familiar professional topics.[261]

VI. THE LAW AND ECONOMICS OF FIDUCIARIES

A. Fiduciary Obligations and Managerial Capitalism in 2010

The fashion whereby economic incentives and forces function remains constant, notwithstanding the eternal flux of interest rates, prices, wages and technologies.[262] At bottom, legal systems present but two levels of fealty between parties who contract: fiduciary relationships and arm's-length relationships.[263] The former impose a pure duty of loyalty.[264] Thereby, the fiduciary must place the interests of another before his or her own.[265] In contrast, arm's-length relationships permit exploitation, albeit within the parameters of *bona fides*.[266]

It was Joseph E. Stiglitz, who in 2001was awarded the Nobel Prize in Economics by the Royal Swedish Academy of Sciences, who remarked that, in a market evincing information

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Watson.0902.2003.pdf (prepared for the Federal Reserve Bank of Kansas City symposium, *Monetary Policy and Uncertainty*, Jackson Hole, Wyoming, Aug. 28-30, 2003). Over roughly the three decades prior to mid-2007, economic activity had become less volatile in most G7 nations (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States). *Id.* at 9.

[259] *See, e.g., Labor and Employment Law and Economics* (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds.) , *in* ENCYCLOPEDIA OF LAW AND ECONOMICS (2d ed. 2009); ECONOMICS OF LABOR AND EMPLOYMENT LAW (John J. Donohue III ed., 2007); ANN-SOPHIE VANDENBERGHE, AN ECONOMIC ANALYSIS OF EMPLOYMENT LAW (2010).

[260] *See, e.g., Tort Law and Economics*, *in* ENCYCLOPEDIA *supra* note 262 (Michael Faure ed., 2009); ECONOMICS OF TORT LAW (Alan O. Sykes ed., 2007).

[261] The combination of law with the economy is deemed inseparable from a smoothly-functioning free market. As Thomas C. Schelling, awarded the Nobel Prize in Economics by the Royal Swedish Academy of Science in 2005, frames the topic:

> There are a lot of requirements for making the free market work well, or even work at all. In addition to physical protection and contract enforcement, there has to be a lot of shopping around so that people know what trades are available, or enough information so that without shopping around people know what to expect when they buy or sell. Behind a typical free market is centuries of patient development of property rights and other legal arrangements, and an extraordinary standardization of goods and services and the terminology for describing them. Think of all the things you can actually purchase by telephone, confident that you will get what you asked for or be able to tell the difference at a glance. A lot of legal and institutional arrangements are designed to protect the rights of people who might, though affected by a transaction, be left out of it.

THOMAS C. SHELLING, MICROMOTIVES AND MACROBEHAVIOR: WITH A NEW PREFACE AND THE NOBEL LECTURE 29 (2006); *cf.* SVETOZAR PEJOVICH & ENRICO COLUMBATTO, LAW, INFORMAL RULES AND ECONOMIC BEHAVIOR: THE CASE FOR COMMON LAW (2008).

[262] Nicholas L. Georgakopoulos, Meinard v. Salmon *and the Economics of Honor*, 1999 COLUM. BUS. L. REV. 137, 153 (1999).

[263] *Id.* at 152.

[264] *Id.*

[265] *Id.*

[266] *Id.* Of course, the scope of a fiduciary's duty is not always self-evident. Indeed, in the People's Republic of China, fiduciary duty remains a concept alien even to the bar. Robert J. Allan, *The Conflicted Duty of Chinese Lawyers: Clients Shouldn't Expect U.S. Levels of Fiduciary Duty from Local Counsel*, NAT'L L. J., Sept. 1, 2008, at 13, 17.

asymmetry, groups wielding the information exploit those devoid of it.[267] The companies in want of that data depart the market, pending the elimination of that information advantage.[268] Arm's-length relationships indeed permit exploitation.

In overview, the economic principle of broad fiduciary obligations constitutes a cornerstone of the managerial capitalism[269] of 2010.[270] And, this constitutes the post-Keynesian[271] managerial business philosophy:

> Essentially, the managerial ideology deemphasizes the traditional forces of supply and demand as determining prices in the competitive market and stresses more the composite group decision making of government, business, labor, and the public consumer. It argues that management is a trustee who serves the interest of all groups, taking account of more than just the concern of his own stockholders for profits. Why does the managerial group hold this position regarding the expanded role of government when such views are anathema to businessmen of the classical orientation? In addition to difference in personality structure and liberality of educational background, the managerialists are more adjusted to and less alienated from modern government. The "why" behind this realism is difficult to determine precisely, but it may well be that managerialists are convinced of the necessity of the expanded role of government to prevent deep depressions and possible radicalism. By accepting such a position, one held by most United States economists as well, they are facing the problem of

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[267] Richard Field, *We Need Daily Data to Get Credit Markets Working Again*, FIN. TIMES, Aug. 20, 2009, at 18.

[268] *Id.* A founding principle in free market theory is that markets optimally function given the free flow of information. Gillian Tett, *The Financial Doublethink That Needs to Be Eliminated*, FIN. TIMES, Aug. 21, 2009, at 22.

[269] Longstanding has been the displacement of capitalists by managers:

> It is the fact that during the past several decades the *de facto* management of the instruments of production has to a constantly increasing extent got out of the hands of the capitalists that so plainly proves society to be shifting away from capitalism and the capitalists losing their status as the ruling class. In ever-widening sectors of world economy, the actual managers are not the capitalists, the *bourgeoisie*; or, at the very least, the managerial prerogatives of the capitalists are being progressively whittled down.

JAMES BURNHAM, THE MANAGERIAL REVOLUTION 78 (1966).

> [T]o an ever-growing extent the managers are no longer, either as individuals or legally or historically, the same as the capitalists. There is a combined shift: through changes in the technique of production, the functions of management become more distinctive, more complex, more specialized, and more crucial to the whole process of production, thus serving to set off those who perform these functions as a separate group or class in society; and at the same time those who formerly carried out what functions there were of management, the *bourgeoisie*, themselves withdraw from management, so that the difference in function becomes also a difference in the individuals who carry out the function.

Id. at 82.

[270] *See* Georgakopoulas, *supra* note 192, at 139.

[271] *See, e.g.,* John MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1965); JOHN MAYNARD KEYNES, A TREATISE ON PROBABILITY (1962); JOHN MAYNARD KEYNES, ESSAYS IN PERSUASION (1963). James M. Buchanan acknowledges that: "No one can challenge the proposition that John Maynard Keynes exerted a major influence on the ideas and events of this century." JAMES M. BUCHANAN, *Keynesian Follies, in* 1 THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY 164 (1999).

> determining how government can be most effectively utilized in our mixed market economy.[272]

Broad fiduciary obligations ("management is a trustee") define a critical phase toward the formation of an economic system reliant upon financing from passive investors and dependent upon that decentralized decisionmaking which financial markets render feasible.[273] (The inclusive interpretation of fiduciary duties is libertarian, insofar as it facilitates an expansion of contracting options in a free market.[274]) The economy of broad fiduciary obligations will enjoy a minimum of four substantial advantages over the narrow fiduciary obligation economy.[275] These are that: (1) endeavors can be financed, which, otherwise, would have languished; (2) projects will be launched which otherwise would not have been undertaken (even had they possibly been financed); (3) decisions by the financial markets prove the more salutary for the economy; and (4) managerial incentives align with social welfare and investor desires alike.[276] But whence derives the fiduciary relationship *per se*?

B. Economics and the Fiduciary Relationship

Contrast two means whereby production can be organized.[277] In the first, an entrepreneur hires persons to acquire component parts; to assemble those components; and to sell the finished product.[278] This organizational method is the domain of master-servant law (in law) and the firm (in economics).[279] In the second, an entrepreneur contracts with a first party to supply components; with another party to assemble them; and with a third to act as her salesperson.[280] This latter organizational method is the domain of contract law (in law) and the market (in economics).[281] Intermediate between the firm and contracting lies the principal-agent

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[272] R. JOSEPH MONSEN, JR. & MARK W. CONNON, THE MAKERS OF PUBLIC POLICY: AMERICAN POWER GROUPS AND THEIR IDEOLOGIES 47 (1965). "Perhaps one main reason why they appear less alienated from the government is that they frequently play an important role in it—either officially or as unofficial advisers." *Id.*

[273] Georgakopoulos, *supra* note 192, at 148. Agency theory aptly informs the latest investigations of the business ethics of corporate governance, *see e.g.*, CORPORATE GOVERNANCE AND BUSINESS ETHICS (Jeremy Moon, Marc Orlitzky, Glen Whelan, Kevin Keasey, & Mike Wright eds., 2010). And law and economics-insights inform the study of investor protection enforcement respecting corporate governance. The Law and Economics of Corporate Governance: Changing Perspectives (Alessio M. Pacces ed., 2010).

[274] Asserts Dr. Georgakopoulos:

> [C]ontracting parties cannot create levels of fiduciary obligations outside the two choices: arm's-length or fiduciary relations. That is, parties cannot agree to give the investor fewer opportunities than a pure arm's-length relationship or more opportunities than a pure fiduciary relationship. The farther apart the legal system keeps the definitions of the two, the more latitude parties have to fine-tune their relationships. In order to expand contracting choices, the two levels of loyalty available must be kept as far apart as possible.

Georgakopoulos, *supra* note 192, at 153. Other authority agrees on the general desirability of a generous freedom of contract in fiduciary relationships. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1069 (1991).

[275] Georgakopoulos, *supra* note 192, at 151.

[276] *Id.* at 151-52.

[277] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 419 (7th ed. 2007).

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.* U.S. Court of Appeals for the Seventh Circuit Judge Posner's most recent book is RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

relationship (should the agent not be her principal's employee).[282] A principal-agent relationship looks to be a fiduciary, rather than an arm's-length, relationship.[283]

An agent is a party who performs on behalf of another: her principal.[284] Agency law is to be viewed, properly, as a parcel of contract law.[285] An agency relationship, typically, is contractual.[286] Most agents (e.g., accountants, brokers, lawyers, trustees) are fiduciaries.[287] In the fiduciary relationship (or confidential relationship), the duty of disclosure weighs more heavily than in the ordinary commercial relationship.[288] An agent is reimbursed for treating her principal as she would treat herself: to be her principal's *alter ego*.[289] (As one might expect, the legal role of a parent falls nearer to that of a fiduciary, like a trustee, than to that of an ordinary agent acting for a principal.[290]) Yet exactly why?

Of critical importance is the fiduciary concept.[291] The law affords a reasonably highly evolved, albeit imperfect, institutionalized technique of reasoning over conflicting interests.[292]

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[282] Posner, *supra* note 280 at 420 n. 3.

[283] *Id*. It was a famous paper, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), which popularized what is styled agency theory. Stefan Stern, *How to Encourage Managers to Act More Like Owners*, FIN. TIMES, July 7, 2009, at 10. Well might scholars like Jensen and Meckling weigh agency costs and managerial performance:

> Obviously no economist in the great classical tradition can either regret or deny profit maximization. And none can suppose that it is other than a deeply personal motivation, something one does for oneself and not gratuitously for others. Yet the modern corporation is assumed to require of its management that profit maximization be for others, for stockholders who are both powerless and unknown. In fact, and often spectacularly in recent times, profit maximization has come to be for those with the power of decision. Management pay, bonuses and perquisites, golden parachutes in case of loss in a takeover struggle, are set by management for itself.

GALBRAITH, *supra* note 7, at 277.

[284] POSNER, *supra* note 280, at 114.

[285] *Id*.

[286] *Id*.

[287] *Id*.

[288] *Id*.

[289] POSNER, *supra* note 280, at 114. "Lawyers are, of course, fiduciaries—trustees—for other people's money. By far the most common cause of disbarment has been 'commingling'—treating the client's money as one's own and 'borrowing' it." SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 34 (1994).

[290] RICHARD H. MCADAMS & ERIC B. RASMUSSEN, *Norms and the Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1573, 1606 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (citing Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. REV. 2401 (1995)). "Once one has mastered the agency model, it is a fine game, especially on long car trips, to apply it to everything in the universe." Eric A. Posner, *Agency Models in Law and Economics* 11 (The Coase Lecture Winter 2000, John M. Olin Law & Economics Working Paper No. 92, 2d Series), *available at* http://www.law.uchicago.edu/Publications/Working/index.html.

[291] According to one of the most distinguished business law scholars in American history. LOUIS LOSS, ANECDOTES OF A SECURITIES LAWYER 20 (1995). Indeed, Loss was "the intellectual father of modern securities law[.]" MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 204 (1994).

> When Loss moved into law teaching in the 1950s, after fifteen years with the Securities and Exchange Commission, it was natural that he should design a course dealing with the field that he had helped to create in the New Deal era. His initial treatise in 1951 gave a name and a shape to a field that had only been a mass of statutes, regulations, and court decisions involving modern finance. Loss's *Securities Regulation* was a godsend to practitioners. His three-volume second edition never left my desk when I worked on securities cases in practice; it was a cornucopia of ideas on hard problems. Up to the mid-1970s, treatises like Loss on securities regulation, Areeda on antitrust, Wright and Miller on civil procedure, and Wigmore on evidence were widely regarded as the highest form of legal scholarship. Their authors were the superstars of the legal academy.

Informational asymmetries post-contractual entry relate to the contractual implementation phase.[293] It proves difficult for a principal to observe what her agent does to fulfill the agency obligation; whereas, that agent is the better-informed.[294] It is expensive for a principal to supervise her agent.[295] Usually, expenses run so high as to render it unprofitable for a principal to avoid surrendering to her agent a leeway exploitable to that agent's advantage.[296] Some property rights falling undefined legally (i.e., the aforementioned play in the joints), there obtains a want of coordination and, therefore, a residual loss.[297]

The fiduciary principle is the law's response to the challenge of unequal costs of information.[298] Information is expensive to acquire.[299] This fiduciary principle permits you to hire someone (commanding information superior to yours) to deal on your behalf with others (likewise commanding such information).[300] The fiduciary principle minimizes the cost, to the fiduciary's principal, of self-protection.[301] It does so via imposition of the duty of utmost good faith, by contrast to the ordinary contractual duty of ordinary good faith.[302] (The fiduciary incurs legal liability for violating her duty, beyond a merely norm-based penalty for her violation.[303]) This duty especially looms large in a setting wherein a principal proves helpless to defend herself; for example, she could be a minor or even an unborn child.[304] Norms[305] enter into

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Id.

[292]

> Law is a rather highly evolved, though of course imperfect, institutionalized form of practical reasoning about how to cope with conflicting interests. The appropriate attitude for the ethical theorist who wishes to bring theory to bear on practical problems is to recognize the power of law as an institution and the resources of law as a mode of practical reasoning, while maintaining a critical, revisionist attitude toward both.

ALLEN E. BUCHANAN AND DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 5 (1992).

[293] LARS WERIN, ECONOMIC BEHAVIOR AND LEGAL INSTITUTIONS: AN INTRODUCTORY SURVEY 129 (2003).

[294] *Id.*

[295] *Id.* "Principals need ways to reassure themselves that their agents will work hard when they aren't being watched, whether because watching them is impossible as a practical matter or too expensive to be worth the bother." WARD FARNSWORTH, WITH ERIC POSNER, *Agency, in* THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 87 (2007).

[296] Werin, *supra* note 296 at 129.

[297] *Id.* "If the principles of agency law are not well known today in the financial world, it is time they were." Jonathan Davis, *Law Clear on Agent's Duty, Whatever Arena*, FIN. TIMES (London), April 6, 2009, at 20. The most recent appellate opinion which "lays out, with splendid clarity, the principles that the law applies to anyone who acts as—and is paid to be—an agent of another person," *id.*, is *Imageview Management Ltd. v. Kelvin Jack*, EWCA Civ. 63 (2009) (in the Supreme Ct. of Judicature Ct. of Appeal (Civil Div.)).

[298] POSNER, *supra* note 203, at 114. On the other hand, noted scholars of law and economics disclaim the supposition that fiduciary duty redresses informational of power imbalances between contracting parties. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 436 (1993). They proposed the rationale for fiduciary duty to be a judicial circumvention of impossibly burdensome transaction cost. *Id.* at 438, 444-46.

[299] POSNER, *supra* note 280, at 69.

[300] *Id.* at 114.

[301] *Id.*

[302] *Id.*

> [A] professional must adhere to high standards of conduct, whether self-imposed or defined by an organized association of other professionals. It is the commitment to adherence to this "code" that all aspirants to professionalism have in common. This commitment to act as a fiduciary, to act always in the best interests of the client, drives the very spirit of professionalism.

Jeanne A. Robinson & Charles G. Hughes, Jr., *To Act...Like a CFP*, J. FIN. PLAN., Apr. 2009, at 67, 70.

[303] MCADAMS & RASMUSSEN, *supra* note 206, at 1606.

[304] POSNER, *supra* note 280, at 114.

defining the fiduciary's duty.[306] In numerous contexts, a complete comprehension of the law requires a correct grasp of the content of a norm.[307] The legal rule effectively can incorporate a norm by reference.[308]

To reiterate: The fiduciary principle is the law's answer to the problem of unequal information costs. The director of the Observatoire de la Finance in Geneva, the University of Fribourg's Paul Dembinski, contrasts trust-based relationships with transactional relationships.[309] According to Dembinski, interparty informational asymmetry beckons predation, absent the fiduciary constraint, in numerous market transactions.[310] (Recall the Stiglitz observation.)

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[305] *See, e.g.,* ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); DENNIS CHONG, RATIONAL LIVES: NORMS AND VALUES IN POLITICS AND SOCIETY (2000). A social sanction entails judgments upon the praiseworthy/blameworthy, and encompasses social penalties/rewards. The concept of sanction generally accents the stabilizing function of traditional practices toward protecting society from unpredictable behavior. FRITZ REDLICH, *Sanctions and Freedom of Enterprise, in* STEEPED IN TWO CULTURES: A SELECTION OF ESSAYS WRITTEN BY FRITZ REDLICH 172-73 (1971) (citing THOMAS C. COCHRAN, *Role and Sanction in American Entrepreneurial History, in* CHANGE AND THE ENTREPRENEUR 153, 158 (1949)). "To most people there is nothing immoral about a game of cards, but there is definitely something immoral about cheating at cards. In cards, the code of morals is established by custom and enforced by the fact that anyone who cares to stop playing may do so." KENNETH N. WALTZ, MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS 207 (1959).

> Because individual freedom is recognized and because modern Western democratic society grew out of feudal stratified society, Western democracies have opened the door for the coexistence of numerous codes of sanctions. What distinguishes the situation in a modern mass democracy from that in medieval stratified society is the fact that in a democracy the various sets conflict, compete, and overlap.
>
> Same of these competing, conflicting, and overlapping sets of sanctions are, at least potentially, all-embracing. Others are, by character, of such narrow applicability that they are meant to be valid only for a limited number of people while engaged in very specific activities. In between is the vast majority of sets which overlap and among which free citizens in a free society may choose more or less. On the one extreme stand the sanctions that emanate from churches; on the other, those worked out by bridge clubs or football teams.

REDLICH, *supra* note 308, at 173-74. Often heeded are these opposite extremes (bridge clubs, churches) of the sanctions continuum: "In the case of chess, institutional rights are fixed by constitutive and regulative rules that belong distinctly to the game, or to a particular tournament. Chess is, in this sense, an autonomous institution; I mean that it is understood, among its participants, that no one may claim an institutional right by direct appeal to general morality." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 101 (1977).

[306] MCADAMS & RASMUSSEN, *supra* note 206, at 1606.

[307] *Id.* at 1592-93. Sen recounts Budda's argument that when one is enormously more powerful than another one bears some responsibility exactly connected with such power-asymmetry. AMARTYA SEN, THE IDEA OF JUSTICE 205-06, 270-71 (2009).

> The justification here takes the form of arguing that if some action that can be freely undertaken is open to a person (thereby making it feasible), and if the person assesses that the undertaking of that action will create a more just situation in the world (thereby making it justice-enhancing), then that is argument enough for the person to consider seriously what he or she should do in view of those recognitions. There can, of course, be many actions that individually satisfy these dual conditions, which one may not be able to undertake. The reasoning here is, therefore, not a demand for full compliance whenever the two conditions are met, but an argument for acknowledging the obligation to consider the case for action.

Id. at 206.

[308] MCADAMS & RASMUSSEN, *supra* note 206, at 1593, 1606. "'Reasonable' parties do not merely seek to accomplish rational objectives; they do so constrained by norms of fairness and honesty." CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 73 (1981). "[I]n determining what the law should require of promisors we should want to use sound principles that may be critical of existing law, *but our use of such principles is constrained by social practices and customs.*" MARK TUNICK, PRACTICES AND PRINCIPLES: APPROACHES TO ETHICAL AND LEGAL JUDGMENT 97 (1998) (emphasis in original).

[309] PAUL DEMBINSKI, FINANCE: SERVANT OR DECEIVER? 153-55 (2009).

[310] *Id.*

One might further suppose through James A. Mirrlees that the problem of unequal information costs does not alone summon the fiduciary principle to the principal-agent relationship.[311] One of the goals in "contract law is to discourage opportunism" when a first mover risks appropriation of her contractual performance by a second mover, who feels a powerful incentive to scoop-up that first mover's performance and thereupon abscond:[312] "It is not so much the asymmetry of information that is special about principal-agent relationships, but the asymmetry of responsibilities, with the principal moving first, the agent following."[313]

Hanoch Dagan, Professor of Law and Jurisprudence at Tel-Aviv University, conceded in 2004[314] that he had not resolved the notoriously frustrating conundrum of defining the fiduciary relationship.[315] Yet Dagan did declare: "The duty of loyalty is the distinctive feature of fiduciary law – the *entailment of the vulnerability of the beneficiary to the fiduciary's discretion* in using or working with a critical resource (such as information) belonging to the beneficiary."[316] The

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> The moral and legal obligations and responsibilities associated with transactions have in recent years become much harder to trace, thanks to the rapid development of secondary markets involving derivatives and other financial instruments. A subprime lender who misleads a borrower into taking unwise risks can now pass off the financial assets to third parties—who are remote from the original transaction. Accountability has been badly undermined, and the need for supervision and regulation has become much stronger.
>
> And yet the supervisory role of government in the United States in particular has been, over the same period, sharply curtailed, fed by an increasing belief in the self-regulatory nature of the market economy. Precisely as the need for state surveillance grew, the needed supervision shrank. There was, as a result, a disaster waiting to happen, which did eventually happen last year, and this has certainly contributed a great deal to the financial crisis that is plaguing the world today.

Sen, *supra* note 13, at 28. Sen dates his discussion February 25, 2009. *Id.* at 30. Trust indeed proves an analytical topic familiar to students of law and economics. *See, e.g.*, TRUST AND CRIME IN INFORMATION SOCIETIES (Robin Mansell & Brian S. Collins eds., 2005).

[311] MIRRLEES, *supra* note 171, at 21.

[312] MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 46 (1993).

[313] MIRRLEES, *supra* note 171, at 21.

[314] HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 236 n.86 (2004) (citing PETER JAFFEY, THE NATURE AND SCOPE OF RESTITUTION: VITIATED TRANSFERS, IMPUTED CONTRACTS AND DISGORGEMENT 401-02, 411-14 (2000)).

[315] The problematical nature of the fiduciary relationship is acknowledged in Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFFALO L. REV. 99, 161-66 (2008).

> [T]here is the "fiduciary principle" in the United States, and similar (although often somewhat less explicit) constructions in other countries. They amount to a general obligation of the management always to act and make decisions in the interest of the corporation. Rules of this kind are necessarily rather vague. Their concrete content must be derived from precedents. It seems in any case clear that the fiduciary duties to the corporation should be interpreted as duties primarily to the shareholders. There are also rules in various countries, stating that the board of directors and the CEO are not allowed to act so as to confer undue benefits on individual shareholders. These rules are vague, but to the extent their contents are clarified by precedents, they amount to mandatory prescriptions. They should be efficient.

WERIN, *supra* note 209, at 337.

[316] DAGAN, *supra* note 223, at 236 (citing D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402, 1404, 1407-11, 1449 (2002) (emphases added)). Scholars of law and economics long have wrestled with fiduciary duty. *See, e.g.*, Tamar Frankel, *Fiduciary Duties, in* 2 THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 127 (Peter Newman ed., 1998); Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1, 34 (2000); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975).

fiduciary principle minimizes the cost, to the principal, of self-protection. It particularly applies where a principal is defenseless.

In their well-received study published last year, *Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism*,[317] George A. Akerloff, who in 2001was awarded the Nobel Prize in Economics by the Swedish Royal Academy of Science, and Robert J. Shiller, the prospective Nobel laureate in economics,[318] admit: "Economists have only partly captured what is meant by trust or belief. Their view suggests that confidence is rational: people use the information at hand to make rational predictions; they then make a rational decision[.]"[319] Unfortunately, Akerloff and Shiller detect a flaw in "[t]he very term *confidence* – implying behavior that goes beyond a rational approach[.]"[320] Sure enough, scholars of law and economics instructed by Dembinki, Mirrlees, and Dagan might well concur that, in the abstract, it is not rational for a vulnerable agent to entrust her confidence in a potentially predatory principal.[321] Such is the law's improvisation of the fiduciary principle.

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[317] *See generally* GEORGE A. AKERLOFF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009).

[318] This is the view of, *e.g.*, Harvard's William Joseph Maier Professor of Political Economy Benjamin M. Friedman. Benjamin M. Friedman, *The Failure of the Economy and the Economists*, 59 N.Y. REV. BOOKS 42, 43 (May 28, 2009) .

[319] AKERLOFF & SHILLER, *supra* note 226, at 12.

[320] *Id.* at 13. It has been alleged that the explanatory tension between the irrational components of human behavior, and the rationality of the analytical simplification called *Homo economicus*, Frank H. Knight, *Anthropology and Economics*, *in* MELVILLE J. HERSKOVITS, ECONOMIC ANTHROPOLOGY: THE ECONOMIC LIFE OF PRIMITIVE PEOPLES 508, 512 (1952), is not inherent in economics: "The divorce between an interest in the psychological and cultural foundations of economic life and an interest in the consequences of economic interaction has been a peculiar feature of professional economics during the second half of the twentieth century, rather than an intrinsic character of the subject[,]" PAUL SEABRIGHT, THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE 100 (2004).

On the other hand, the highest scholarly authority vouches for economics as a deductive enterprise, Knight, *supra*, at 523, the premises whereof are intuited, economics therefore crisply contrasting with the natural sciences, *id.* at 511-12, 523.

> Economics, in the usual meaning, as a science of principles, is not, primarily, a descriptive science in the empirical sense at all. It "describes" *economic* behavior and uses the concept to explain the working of our modern economic organization and also to criticize and suggest changes. It is, of course, of some interest, in connection with the description, to point out contrasts between economic behavior and actual behavior, in our own and other culture settings, which does not conform to the principles as stated. But the interest in this contrast itself arises primarily out of the fact that the conceptual ideal of economic behavior is assumed to be, at least within limits, also a normative ideal, that men in general, and within limits, wish to behave economically, to make their activities and their organization "efficient" rather than wasteful. This fact does deserve the utmost emphasis; and an adequate definition of the science of economics as treated in modern textbooks, might well make it explicit that the main relevance of the discussion is found in it relation to social policy, assumed to be directed toward the end indicted, of increasing economic efficiency, of reducing waste.

Id. at 510. Knight's discourse is actually found in a section of text entitled *Deduction and Induction in Economics*. *Id.* at 507; *cf.* ROTHBARD, *infra* note 419.

[321] Meanwhile are economists familiar with the holdup problem, generally. One party, A, considering up-front delivery in exchange for an ongoing future incentive might decline such agreement, for fear B will thereafter demand an enhanced profit-share: B more credibly can threaten to decamp once A deeply-invests. Holdup problems inhibit efficient cooperation. Tim Harford, *Dear Economist*, FIN. TIMES, August 1/2, 2009, at 2 (Life and Arts section); about.com: Economics, *The Hold-Up Problem/Hold-Up Problems*, http://economics.about.com/library/glossary/bldef-hold-up-problem.htm. Compare that, a would-be homemaker-spouse might be deterred from marriage by fear a would-be breadwinner-spouse will divorce in mid-marriage (presuming no fault divorce upon unilateral demand). A cure for holdup problems is vertical integration, *i.e.*, A and B merge. The corresponding marital device would be legalization of marriage until death parts the spouses, *i.e.*, merger. George Steven Swan,

Now reflect on befuddled baby boomers with 401(k)s: For the 1995-2006 interval, defined benefit pension plans outperformed defined contribution plans by approximately one percentage point per annum. This resulted in a nearly fourteen percent cumulative dollar difference.[322] In 2007, Ariel Capital Management, Chicago, President Mellody Hobson opined: "Unfortunately, the off-loading of retirement planning to individuals without the requisite education is like handing people the keys to a car without driver's ed."[323] Even Hobson's requisite education is not likely to transmute ineptitude into financial finesse. Professor Lauren Willis of Loyola Law School, Los Angeles, specializes in the regulation of financial products. She was blunt in a post-*LaRue* interview:

> Q. What's so bad about financial education?
>
> A. It doesn't work. Sellers of financial products spend billions drowning out well-meaning messages to consumers from nonprofits or government agencies. Also, financial products are always changing – credit and insurance products have changed dramatically in the past 20 years – making it hard for educators to keep up. It's not like sex education. As far as I know, people get pregnant the same way they did when I was in high school.[324]

Was *LaRue* a clash scripted in law and economics heaven to demonstrate the breach of fiduciary duty?

C. The Law and Economics of LaRue

The Deconstruction of Marriage, Part 1: The Law and Economics of Unilateral No-Fault Divorce: The Social Deconstruction of Marriage, 23 THE FAMILY IN AMERICA: A JOURNAL OF PUBLIC POLICY 16, 30-34 (2009).

[322] Levitz, *supra* note 36, at R3 (June 2008 management consulting firm Watson Wyatt Worldwide Arlington, Virginia data).

[323] Mellody Hobson, *Broken Promises: Pension Plans Are Disappearing, So Take Control of Your Retirement Plan*, BLACK ENTERPRISE, July 2007, at 44. "Many 401(k) providers have long argued that participants just need more education to make appropriate investment decisions. Some in the industry are giving up on that notion." Eleanor Laise, *Big Slide in 401(k)s Calls for Change*, WALL ST. J., Jan. 8, 2009, at A1. Nor are the problems of perplexed financial product-consumers likely to be solved by enhanced informational disclosure. According to University of Chicago Law School Prof. Omri Ben-Shahar, an economist-attorney:

> "The trend in consumer protection has been to force companies to disclose more information about their products and services. But my research has shown that extra data do not help most people make better buying decisions. That's because disclosures tend to be very technical. We don't have time to absorb all that information about everything we buy. Rather, we become desensitized and ignore it. And then if there's a problem, companies can say, 'Hey, we warned you.'"

Donna Rosato, *You Need Simpler Choices, Not More Information*, MONEY, Oct. 2009, at 18 (quoting Omri Ben-Shahar).

[324] Interview with Lauren Willis by Stephen Gandel, *Why You Can't Teach Money*, MONEY, September 2008, at 24. Of course, it simultaneously was held that people no longer need get pregnant in the old-fashion way practiced when Prof. Willis attended high school:

> The California Supreme Court has ruled unanimously that doctors cannot invoke religion to refuse treatment to homosexual patients.
>
> The ruling on Aug. 18 reversed California's 4th District Court of Appeal in San Diego, which held in 2006 that two doctors should have been able to use their religious objections as an affirmative defense against a lawsuit filed by a lesbian whom the doctors refused to provide fertilization services.

Mike McKee, *Doctor's Can't Refuse Treatment to Gays*, NAT'L L. J., Aug. 25, 2008, at 15 (citing N. Coast Women's Care Med. Group Inc. v. Superior Court, 44 Cal. 4th 1145, 1162 (2008)).

In effect, James LaRue hired DeWolff, Boberg & Associates, Inc., which party commanded information superior to James's own. DeWolff, Boberg & Associates, Inc. was to deal on James's behalf with still others (who likewise commanded information superior to that of Mr. LaRue). Application of the fiduciary principle to a 401(k) plan participant's benefit (as in *LaRue*) minimizes the cost, to such plan participants, of their own several self-protections. The propriety of the application of that principle in *LaRue* looms large *if* a 401(k) plan participant is helpless to defend herself.

So, does it thus loom large? Employees in 401(k) plans choose where their money is invested.[325] This power lands them squarely in the midst of decisionmaking over their plans.[326] It leads inevitably to the type of dispute in which James LaRue became embroiled.[327] In 2007, St. Louis solo practitioner Thomas C. Farnam, who since 1970 has worked in benefits law, looked ahead to the Supreme Court opinion in *LaRue* from this perspective: "'So long as the Fourth Circuit's decision is overturned, it will be expensive for plan administrators to ignore investment directions. . . . If the Fourth Circuit's decision is upheld, they can basically say, 'Oh sorry, you lose.'"[328] *Sorry, you lose*. *Helpless to defend herself.*

Farnam expounded upon the Fourth Circuit's opinion:

> It just plays havoc with the whole directed investment portfolio situation. . . . It's not required for a 401(k) plan to have directed investments, but it's the most common approach. It's become a very, very, very common tool in terms of plan design and operation, and it's difficult for me to imagine that the court would let it stand if they can strike it down.[329]

Application of the fiduciary principle to a 401(k) plan participant's benefit in *LaRue* was altogether fitting and proper. [330]

The changes sought by James LaRue are of a piece with the revisions to retirement savings plans emplaced by the Pension Protection Act of 2006. They clearly fit naturally into the current zeitgeist,[331] for everyone is bombarded daily with the mantra that, in the defined contribution world, which independent, stakeholder Americans of 2010 are to inhabit, the individual must be responsible for his own retirement.[332] *It's every man for himself.* If the system severally renders individual plan participants the caretakers (and risk bearers) of their

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[325] Associated Press, *Court: 401(k) Enrollees Can Sue*, RICHMOND TIMES-DISPATCH, Feb. 21, 2008, at B9.

[326] *Id.*

[327] Associated Press, *supra* note 328, at B9. The general public confronting the financial industry is alerted to the fiduciary duty principle. "It's one of those high-minded terms thrown around by financial industry watchdogs and is often the stuff of lawsuits. Essentially, 'fiduciary duty' is a financial professional's obligation to put your interests above his." Roya Wolverson, *Term of the Month: Fiduciary Duty*, SMARTMONEY, May 2009, at 30.

[328] Donna Walter, *U.S. Supreme Court Will Consider 401(k) Management Suit,* ST. LOUIS DAILY RECORD & ST. LOUIS COUNTIAN, June 19, 2007, http://findarticles.com/p/articles/mi_qn4185/is_20070619/ai_n19327705 (quoting Thomas C. Farnam).

[329] *Id.*

[330] *Cf.* Regina L. Readling, Comment, *Rethinking "The Plan": Why ERISA Section 502(a)(2) Should Allow Recovery to Individual Defined Contribution Pension Plan Accounts*, 55 BUFFALO L. REV. 315, 350-51 (2008).

[331] Posting of Stephen D. Rosenberg to Boston ERISA Law Blog: Equitable Relief, *Me and LaRue, and Business Insurance Too*, www.bostonerisalaw.com/archives/cat-equitable-relief.html (June 26, 2007). "Zeitgeist is a term so overused that the vocabulary guru of The New York Times once banned it until further notice." Anna Quindlen, *Summertime Blues*, NEWSWEEK, July 7/14, 2008, at 78.

[332] Posting of Stephen D. Rosenberg to Boston ERISA Law Blog: Equitable Relief, *Excessive Fee Litigation, 401(k) Plans and LaRue*, www.bostonerisalaw.com/archives/cat-equitable-relief.html (June 21, 2007).

own retirement funding, then it is in keeping with such *zeitgeist* that each participant be handed the legal tools with which to protect his investments.[333] Surely the participant needs such weapons in the investment jungle. For instance, when a *SmartMoney* reporter visited eight brokerages, a high proportion of advisors could not (or would not) even explain what "fiduciary duty" *is*.[334] Queried as to what it means to be a fiduciary, i.e., to put his or her client's financial interest above the interests of his or her firm, every broker but one either dodged the question or botched the answer.[335]

More theoretically, only within a system of secure entitlements (e.g., as to James LaRue's individual account) can there be liberty for self-reliant stakeholders (e.g., James LaRue).[336] This system explains the intimate connection between liberty and the rule of law[337] (e.g., the Supreme Court's protection of the lone James LaRue's financial position). In more pedestrian argot, if James LaRue would have been handed a defeat in Washington, it would have meant a callous unilateral disarmament of worker-investors by the Supreme Court.

D. Organizational Forms and the Fiduciary Duty

1. An Agency Cost Ponderable

One cannot quantify precisely any fiduciary standard.[338] Still, the fiduciary obligation demarcates the private trust's foremost check against managerial agency costs.[339] The trust law flavor of the broader notion of fiduciary duty answers the challenge emergent from a disparity in beneficiaries' and trustees' respective tropisms toward risk.[340] While ERISA mandates that a pension fund's assets be held in trust form,[341] it by no means lays upon a pension fund manger those standard form fiduciary duties laid upon trustees by trust law.[342] Rather, ERISA itself explicates its fiduciary duties[343] (sans dependence upon trust law).[344]

An agency cost approach facilitates comparison of the trust against alternative organizational forms.[345] Trust fiduciary law – particularly in its duty of loyalty – proves more stringent and more prophylactic than does the fiduciary law embodied in alternative organizational forms.[346] Trust law programs the trustee's default duty of care at the reasonable person standard.[347] Instructively, this duty of care is more restrictive than the loose constraint of corporate law's business judgment rule.[350] Managers owe a fiduciary duty to equity investors,

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[333] *Id.*
[334] Dyan Machan, *The New Broker Game*, SMARTMONEY, Apr. 2007, at 84, 87.
[335] *Id.* at 89.
[336] CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 94 (2007).
[337] *Id.*
[338] Lewis J. Walker, *The Fiduciary Bombshell*, J. FIN. PLAN., Oct. 2009, at 36.
[339] Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 678 (2004).
[340] *Id.* at 655.
[341] *See* 29 U.S.C. §1103 (2010).
[342] Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 467 (1998).
[343] *See* 29 U.S.C. §§1104-1112.
[344] Hansmann & Mattei, *supra* note 345, at 467.
[345] Sitkoff, *supra* note 244, at 647.
[346] *Id.* at 680.
[347] *Id.* at 657.
[350] *Id.* at 656.

yet to neither employees nor debt investors.[351] Why? These latter can contract at modest cost, whereas costs of specification prove prohibitive for those former residual claimants.[352]

Meanwhile, ERISA's definition of fiduciary duty in relevant part provides:

> (a) Prudent man standard of care
>
> (1) . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan[.][353]

Is this ERISA language interpretation consistent with the more exacting background of trust fiduciary law, or of the more lenient corporate business judgment rule?

2. A Residual Claimants Ponderable

However, agency costs-curbing machinery in the private trust turns upon the comparatively scant presence of residual claimants.[354] By contrast, so constructed is a public corporation that it can muster numerous residual claimants.[355] And during 2004, agency costs analysis was applied to employee benefit and pension trusts, with their ERISA-impressed[356] trust law paradigm. So in light of the hefty number of participants therein, must the gravitational tug of agency costs analysis of pension and employee benefit trusts elicit judicial holdings less resembling those requisite to the traditional, gratuitous private trust, than holdings more resembling those requisite to public corporations[357] with their less onerous fiduciary duty?

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[351] Easterbrook & Fishel, *supra* note 211, at 437 (citing Jonathan R. Macey, An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties, 21 STETSON L. REV. 23, 25, 36-43 (1991); *see generally* FRANK H. EASTERBROOK & DANIEL L. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)).

[352] Easterbrook & Fishel, *supra* note 211, at 437 (citing Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25, 36–43 (1991); *see generally* EASTERBROOK & FISCHEL, *supra* note 354.

[353] 29 U.S.C. § 1104(a).

[354] Sitkoff, *supra* note 244, at 680.

[355] *Id.*

[356] 29 U.S.C. § 1103.

[357] Sitkoff, *supra* note 244, at 681.

> Shareholders enjoy limited liability. As a result, the responsibility they bear for the malfeasance or incompetence of management is highly circumscribed. The claim of shareholders is solely on the residual income of the company. But, since shareholders can diversify their portfolios with ease, their exposure to the risks generated by an individual company is far less than the exposure of workers with firm-specific knowledge and skills. Shareholders lack the ability to assess or monitor a company's performance. If they are able to sell their shares in liquid markets,

Recall that Justice Stevens taught – regarding defined contribution plans – fiduciary naughtiness need not menace the solvency of the total plan to reduce benefits beneath what a given participant otherwise could harvest. A breach of fiduciary duty engenders the problem that ERISA's drafters were beware: to constrict plan assets payable to everyone or solely to a party through his own account. Is such a denuded party – i.e., James LaRue – more like one of those relatively few residual claimants of the private trust, or more like the horde of residual claimants to succor from a public corporation?

VII. ELASTICITY AND *LARUE*

In any case, recall the disquieting supposition of Jeffrey Russell that, because more burdensome administrative fees appear forthcoming, to fund litigation on the post-*LaRue* horizon, expenses will be passed along to 401(k) plan participants individually.[358] Taxable investors must always grasp that they must look behind the tax feature of 401(k) plans, for example, to ensure that tax deferral advantages are not overwhelmed by other costs. These costs particularly include a grasping promoter's take.[359]

The level at which costs are passed to consumers turns upon the elasticity of demand.[360] The concept of elasticity is useful.[361] Senior Fellow Ajay Shah at the National Institute of Public Finance and Policy (the New Delhi think tank) exploited that concept in explaining a worrying global hike in food prices:

> It's true that strong demand in India and China is having an effect on prices. But prosperity in these countries has risen since 1978. The simple story of people in these countries requiring food does not explain why food prices rose sharply after 2005. It's not just that Asians are getting richer and eating more. It's that poor Indians and Chinese are no longer serving as a shock absorber for the world.

> they do not have incentives to do so either. Failures of corporate governance in widely held public companies are, if follows, inevitable.

Martin Wolff, *Britain's Strategic Chocolate Dilemma*, FIN. TIMES, Jan. 29, 2010, at 9.

[358] Interview, *supra* note 124, at 14.

[359] PETER L. BERNSTEIN, THE PORTABLE MBA IN INVESTMENT 371 (1995).

[360] POSNER, *supra* note 280, at 336 n.2.

[361] *Id.* at 279. Elasticity has been exploited to help identify which geographic level of government can prove the more tolerant. George Steven Swan, *The Political Economy of State Democracy:* Romer v. Evans, 7 STETSON HALL CONST. L.J. 1, 47-49 (1996). And racial profiling discussion has recognized different groups' relative elasticity to policing. George Steven Swan, *The Law and Economics of Racial Profiling: New Jersey's Racial Profiling Statute of 2003*, 26 N.C. CENT. L.J. 1, 17-19 (2003). On the other hand, the elasticity concept can, emphatically, be carried too far:

> It is sometimes asserted that *luxuries* and *necessities* may be classified by the elasticity of the demand curve, a necessity having an inelastic demand and a luxury having an elastic demand. This definition of a luxury and a necessity leads to some odd results. For example, it classifies cigarettes as a necessity but white bread as a luxury. Actually, it is very difficult to define the two terms in any meaningful manner. A consumer is only in equilibrium when he regards himself as getting the same "value" or "utility" or "satisfaction" for a unit of money spent in one use as for a unit of money expended in any other use; otherwise, why doesn't he subtract the unit from the one use and spend it on the other use? It therefore follows that on the margin everything is equally necessary or equally unnecessary.

FRIEDMAN, *supra* note 169, at 22 (emphasis in original).

> In the old days when food prices went up, millions of people in India and China ate less. That made the world's demand for food quite elastic. When prices rose a bit, demand dropped enough to clear the market. Or to turn the elasticity formula around: The world adjusted to a fall in supply with a modest increase in price.
>
> As people in India and China become wealthier, their behavior is changing. The new middle class is less price sensitive. Food prices would have to rise by more to crimp consumption.[362]

Recently, important work motivated by problems in administration and enforcement has scrutinized what is referred to as the elasticity of taxable income.[363] Indeed, many different kinds of elasticity (e.g., price elasticity) are measurable.[364]
Elasticity is the proportionate change in a first variable by the proportionate change in a second.[365] In Friedman's formulation of elasticity:

> To speak in general terms, it describes the effect of a change in price on quantity demanded – the extent to which quantity demanded "stretches" when price changes. Changes in quantity and price are generally measured as percentage changes, in order to have an elasticity measure that is independent of the units in which price and quantity are expressed. More specifically, elasticity of demand is the ratio of the percentage change in quantity demanded to the percentage change in price that is responsible for this change in quantity demanded when "other things" are given and when the change in price approaches zero.[366]

"The more elastic the demand, the smaller the fraction of" a charge which can be passed along.[367] Conversely, the less elastic the demand curve, the heavier the price fluctuation upon a given change in quantity supplied.[368]

So distinguished an economist[369] as the late William H. Hutt would go as far as defining the competitive process itself as the substitution (to consumer benefit) of the least expensive means to attain any objective.[370] This definition encompasses the production and the sale of any commodity.[371] In all events, things are definable as substitutes in terms of the cross-price effects between them.[372] Things are assumed to be substitutable for one another (or for money) at the margin, i.e., there is a rate of exchange between any two things that renders an individual

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[362] Ajay Shah, *Food Fight: Why the Conventional Wisdom on Crazy Food Prices Is Wrong*, FORBES, June 16, 2008, at 44.

[363] Louis Kaplow, *Taxation*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 647, 729 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[364] HENRY N. BUTLER, ECONOMIC ANALYSIS FOR LAWYERS 145 (1998).

[365] POSNER, *supra* note 280, at 279.

[366] FRIEDMAN, *supra* note 169, at 19.

[367] POSNER, *supra* note 280, at 336 n.2.

[368] FRIEDMAN, *supra* note 169, at 21.

[369] *See*, *e.g.*, WILLIAM H. HUTT, INDIVIDUAL FREEDOM: SELECTED WORKS OF WILLIAM H. HUTT (Svetozar Pejovich & David Klingaman eds., 1975).

[370] WILLIAM H. HUTT, THE ECONOMICS OF THE COLOUR BAR: A STUDY OF THE ECONOMIC ORIGINS AND CONSEQUENCES OF RACIAL SEGREGATION IN SOUTH AFRICA 175 n.1 (2007).

[371] *Id*.

[372] BANNOCK, BAXTER & DAVIS, *supra* note 166, at 397. The economists' law of substitution is, of course, familiar in legal discourse. *See*, *e.g.*, George Steven Swan, *The Law and Economics of State-Sanctioned Marijuana:* Gonzales v. Raich, 7 FLA. COASTAL. L. REV. 473, 510-12 (2006).

indifferent between them.[373] This tradeoff idea is central to economic reasoning.[374] If something like 401(k) plan administration has no close substitutes in demand, i.e., nothing which appears to afford a customer with the same service at approximately an identical price, *and* sellers of other services cannot easily switch to delivering it themselves, then that market's demand/supply elasticities presumably are low.[375] Elasticity of demand turns, primarily, upon availability of substitutes.[376] Low elasticity, remember, is ominous for the consumer 401(k) plan participants.

Economists divide the adjustment to a price change into three intervals: the market period; the short run; and the long run.[377] Elasticities (both of supply and demand) usually are greater over the long run than over the short term.[378] While a price change evokes an immediate impact upon the consumption rate, such impact will prove greater after a week and greater yet after a month, until the entire adjustment becomes effective).[379] In the first place, more and more persons are learning of the price change.[380] Moreover, the expense of revising consumption patterns diminishes when accomplished less hastily and with more thrifty side-adjustments.[381] Whether fresh sellers of the 401(k) plan administration service can be recruited as needed during 2010, to preclude heavier levies against individual accounts by incumbent administration-service providers, remains an empirical question.

VIII. THE FINANCIAL HURRICANE OF 2008-2009

While America aged,[382] a comfortable and secure retirement for Americans looked increasingly unlikely. In 1996, the year when Federal Reserve Board Chairman Alan Greenspan publicly wondered how to know when irrational exuberance unduly escalates asset prices,[383] 401(k) investors had been advised:

> There are a few ways in which you may be able to participate in common stocks within a 401(k): (1) direct ownership, (2) mutual funds, (3) variable annuities, and (4) variable life insurance. Most companies use either mutual funds or annuities for their 401(k) plan. The advantage of having your retirement plan in common stocks is that this will most likely be the best-performing part of the portfolio, particularly if a comparison is made after five or more years. In fact, there is better than a 50-50 chance that a stock portfolio will do better than a

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[373] CENTO G. VELJANOVSKI, ECONOMIC PRINCIPLES OF LAW 20 (2007).
[374] *Id.*
[375] POSNER, *supra* note 280, at 313.
[376] FRIEDMAN, *supra* note 169, at 22.
[377] BUTLER, *supra* note 267, at 151.
[378] DAVID FRIEDMAN, HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE 90 (1996).
[379] ARMEN A. ALCHIAN & WILLIAM R. ALLEN, EXCHANGE AND PRODUCTION: THEORY IN USE 71 (1969).
[380] *Id.*
[381] *Id.*
[382] *See, e.g.*, ROGER LOWENSTEIN, WHILE AMERICA AGED (2008).
[383]

> Clearly, sustained low inflation implies less uncertainty about the future, and lower risk premiums imply higher prices of stocks and other earning assets. We can see that in the inverse relationship exhibited by price/earnings ratios and the rate of inflation in the past. But how do we know when irrational exuberance has unduly escalated asset values, which then become subject to unexpected and prolonged contractions as they have in Japan over the past decade?

Chairman Alan Greenspan at the Annual Dinner for the Francis Boyer Lecture of the American Enterprise Institute for Public Policy Research, Washington, D.C. 1, 6 (Dec. 5, 1996), *available at* www.federalreserve.gov/boarddocs /speeches/1996/19961205.htm.

> bond or money market account after one year. The disadvantage is that common stocks are a good way to take advantage of the capital gains tax – something you lose inside a qualified retirement plan such as a 401(k).
>
> In general, a moderate or very large percentage of your retirement plans should be in stocks. They have an excellent track record, and since most people cannot touch retirement accounts for a number of years, one of the greatest downfalls of stock investors – moving money around too quickly – is minimized. A case can be made against common stocks, just as a case can be made against any investment; however, one would be bucking a track record that has been unmatched for about two hundred years.[384]

But, surveying the financial ruins left behind by Hurricane Wall Street when it raged commencing in September 2008[385] – a storm certain to sow the lawsuits of shareholders complaining that their corporate directors had breached their fiduciary duty[386] – editorialist Christopher Caldwell warned:

> The financial era that started a quarter-century ago is drawing to a close. Since the instruments that permitted an extraordinary leveraging of assets have been discredited without really being understood, leverage itself will be regulated against. Once that happens, there simply will not be the profitability in investment banking to enable hundreds of well-connected Ivy League kids of middling talents to become multi-millionaires every year.
>
> By the time the situation calms and memories fade, there is unlikely to be enough capital in the economy to fund a restoration. Right now, the oldest baby boomers are 63. The ratio of earners to dependents has been at an all-time high. A vast earner generation is about to begin its transformation into a dependent generation. Probably a more dependent one than anticipated.[387]

Does anyone feel a chill in the air?

According to the Employee Benefits Research Institute, of 401(k) participants during 2006 aged fifty-six to sixty-five, twenty-seven percent devoted ninety percent or more of their account to stocks.[388] But, between late 2007 and late 2008, over $500 billion melted away from

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[384] WILLIAMSON, *supra* note 20, at 148.

[385] *See, e.g.*, THE PANIC OF 2008: CAUSES, CONSEQUENCES AND REFORM (Lawrence E. Mitchell & Arthur E. Wilmarth, eds., 2010); Paul M. Barrett, *Wall St. Staggers*, BUS. WK., Sept. 29, 2008, at 28; Carrick Mollenkamp, Neil Shah & Aaron Patrick, *U.S. Mulls Plan to Clean Up Finance System As Part of Widening Effort to Stem Crisis*, WALL ST. J., Sept. 19, 2008, at 1; Krishna Guha, Michael Mackenzie & Gillian Tett, *Credit Panic Hits Historic Levels*, FIN. TIMES, Sept. 18, 2008, at 1; Tom Lauricella, Liz Rappaport & Annelena Lobb, *Mounting Fears Shake World Markets as Banking Giants Rush to Find Buyers*, WALL ST. J., Sept. 18, 2008, at 1. "In mid-October, at the peak of the financial crisis, the phrase 'suicide methods' suddenly rose to a multi-year high on Google Trends, which tracks how often words or phrases have been searched on Google." James Altucher, *Never a Better Moment to Set Up in Business*, FIN. TIMES, Jan. 6, 2009, at 6.

[386] Nathan Koppel, *No Shortage of Work Expected for Lawyers*, WALL ST. J., Sept. 20/21, 2008, at A2. Meanwhile, it is suggested in light of the 2008 financial crisis that lawyers themselves had dropped the ball. Sarah Kellogg, *Financial Crisis 2008: Where Were the Lawyers?*, WASH. LAW., Jan. 2010, at 20.

[387] Christopher Caldwell, *There Is No Free Lunch and No Free Economy Either*, FIN. TIMES, Sept. 21, 2008, at 9. But the first baby boomers having been born on January 1, 1946, the eldest in 2008 was only 62 (not 63). *See* U.S. Census Bureau, *Facts for Features, Oldest Baby Boomers Turn 60!* (Jan. 3, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html.

[388] Eleanor Laise, *Crisis on Wall Street: Statement Shock hits 401(k)s*, WALL ST. J., Oct. 11, 2008, at B2.

401(k) plans in the initial major market retreat since employers launched a substantial offensive to enroll employees in 401(k) plans automatically.[389] (The then-recovering S&P 500 opened January 2010 at a level still beneath a retrieval of even half of its October 2007 – March 2009 bear market losses.[390]) By late 2008, approximately fifty percent of big companies automatically enrolled new employees in 401(k)s.[391] The contributions were invested, mainly, in diversified stock and bond portfolios.[392] In the worst week in the history of the Dow Jones Industrial Average, that gauge, through October 6-10, 2008, fell eighteen percent.[393] In 2008, through October 9, the average 401(k) account balance hemorrhaged by roughly nineteen to twenty-five percent (depending upon a participant's age and tenure in her plan).[394] The average 401(k) account bled off twenty to thirty percent of its value between July 2007 and December 2008.[395] Over $2 trillion in savings for retirement had evanesced.[396] Nevertheless, few pension experts contended that the 401(k) reverses of 2008 justified scrapping that system.[397] For 401(k) plans entail an array of investment options, whereby participants shy of risk can invest in the less volatile alternatives.[398]

The inevitable graying of the gigantic baby boom generation signifies that retirement funding shortfalls are a broad economic threat to the country overall. Defined contribution plans' returns were outpaced by those of defined benefit plans by an average of one percentage point annually from 1995 to 2006.[399] And from 2003 on, defined benefit plans returned 1.6 percentage points higher per annum.[400] Many U.S. employees' 401(k) plans are poorly-funded. Only recently have automatic enrollment plans confronted that problem. Sure enough, from the December 2007 inauguration of the recent recession through 2008, the number of employed

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[389] *Id.* "The worst market meltdown in 80 years exposed the flaws of 401(k)s and similar defined-contribution plans, which shift the burden and risk of saving for retirement from employers to employees." Mary Beth Franklin, *401(k) Plans: Not Dead Yet*, KIPLINGER'S PERS. FIN., Feb. 2010, at 60.

> Older adults were anxious about the economy long before this latest Wall Street tempest. Retirees feeling very confident of a financially secure retirement fell to 29% in April, down from 41% a year earlier, according to a survey conducted by the Employee Benefit Research Institute in Washington — the lowest level in 10 years.
>
> And for good reason. The weak economy has hit older adults of every income and age level, said Richard Johnson, principal research associate at the Urban Institute, a research group based in Washington. The 40% of older adults who rely almost completely on Social Security are hit hardest by inflation and high prices of food, energy and health care.

Clare Ansberry, *Retirees Fret Over Investments*, WALL ST. J., Oct. 21, 2008, at D6.

[390] Kopin Tan, *The Trader: 2009 Sets the Stage…For What?*, BARRON'S, Jan. 4, 2010, at M3, M4.

[391] Anne Tergesen, *How to Fix 401(k)s*, WALL ST. J., Dec. 13/14, 2008, at R1, R4.

[392] *Id.*

[393] Rob Curran, *Dow Jones Industrials Lose 18% in Their Worst Week Ever*, WALL ST. J., Oct. 11, 2008, at B3.

[394] Laise, *supra* note 287, at B2. Wags quipped: "My 401(k) is now a 201(k)." Knight Kiplinger, *TLC for Your 401(k)*, KIPLINGER'S PERS. FIN., Feb. 2009, at 21.

[395] Charles R. Schwab, *Restore the Uptick Rule, Restore Confidence*, WALL ST. J., Dec. 9, 2008, at A17.

[396] *Id.* In the twelve months following the October 2007 stock market apogee, beyond $1 trillion worth of stock values reposing in 401(k) and other defined contribution plans vanished, according to the Boston College Center for Retirement Research. Laise, *supra* note 232, at A12. Approximately $2 trillion of stock values disappeared, if individual retirement accounts (largely consisting of money rolled over from 401(k)s are taken into account. Laise, *supra* note 232, at A12.

[397] Tergesen, *supra* note 289, at R4.

[398] *Id.*

[399] *See supra* Section VI.B.

[400] *Observer: Stats & Facts*, J. FIN. PLAN., Oct. 2008, at 12, 14.

persons aged fifty-five and older rose nearly 900,000, whereas nearly 2.9 million people aged twenty-five to fifty-four lost jobs.[401]

More affirmatively, a 401(k) plan vests immediately and is wholly portable. On the other hand, prudent savers render their life-savings hostage to an avaricious central state. Familiar to students of law and economics are the problematical implications of shifting rules.[402] On October 21, 2008, Argentine President Christina Kirchner proposed to her Congress the nationalization of $30 billion in 401(k)-like, individually-held retirement accounts managed by private pension funds.[403] Toronto's credit-rating agency, DBRS, styled the nationalization a "'confiscation of personal assets and an infringement of property rights.'"[404] These funds amounted to some ten percent of the gross domestic product.[405] Approximately twenty-five percent of publicly-traded shares were owned by the fourteen-year-old private pension system's ten funds.[406] With most of that $30 billion being invested in government bonds, the government could save $3 billion (as calculated by Credit Suisse) by meeting interest payments with more bonds![407]

IX. CONCLUSION

The preceding discussion assessed the opinion of the Supreme Court in *LaRue v. DeWolff, Boberg & Associates, Inc*.[408] Therein, a plaintiff-employee brought suit over his 401(k) retirement savings plan regulated by ERISA.[409] A major advantage of fringe benefits, for employers, in 2010 is that the expense of such benefits is deductible from taxes owed by an employer. Fringe benefits constitute a heavy portion of total employee compensation. They encompass 401(k) retirement savings plans, which are defined contribution plans. Employer/employee contributions therein directly become individual employee assets. No benefits, however, are guaranteed upon a worker's retirement.

Employees must manage their personal 401(k) investments on their own. Such self-direction had been the endeavor of James LaRue. LaRue claimed that his pension plan's administrator neverexecuted LaRue's 401(k) investment directives, a delict diminishing LaRue's individual account and creating a fiduciary duty breach under ERISA.[410] In *LaRue*, the Supreme

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[401] Joseph Weber, *This Time, Old Hands Keep Their Jobs*, BUS. WK., Feb. 9, 2009, at 50; *cf*. Gordon B. Pye, *When Should Retirees Retrench? Reducing the Need with Part-Time Work and Annuitization*, J. FIN. PLAN., Jan. 2009, at 48.

[402] *See, e.g.*, Daniel Shaviro, *supra* note 9; RICHARD E. SPEIDEL, CONTRACTS IN CRISES: EXCUSE DOCTRINE AND RETROSPECTIVE GOVERNMENT ACTS (2007). The core thesis of the latter "is the extent to which contract law (private law) provides relief to a promisor put in the zone of coercion by the enactment by government of retrospective private law." *Id*. at 7.

[403] Editorial, *Argentina's Property Grab*, WALL ST. J., Oct. 23, 2008, at A16. Argentina had completed erection of its full-fledged welfare state at last as of the 1955 close of its populistic, George Steven Swan, *A Preliminary Comparison of Long's Louisiana and Duplessis' Quebec*, 25 LA. HIST. 289, 313 (1984), dictatorship of Juan Peron, DONNA J. GUY, WOMEN BUILDING A WELFARE STATE: PERFORMING CHARITY AND CREATING RIGHTS IN ARGENTINA, 1880-1955 (2009).

[404] Matt Moffett, *Kirchner's Move on Pensions Hits Argentine Markets*, WALL ST. J., Oct. 23, 2008, at A11.

[405] Editorial, *Argentine Own Goal*, FIN. TIMES (London), Oct. 29, 2008, at 10.

[406] Jude Webber, *Argentine Opposition to Pension Bill Grows*, FIN. TIMES, Oct. 27, 2008, at 7.

[407] *The Lex Column*, FIN. TIMES, Oct. 23, 2008, at 12. "By law half of the privately managed pension assets are already allocated to government debt." Mary Anastasia O'Grady, *Argentina Impoverishes Itself Again*, WALL ST. J., Nov. 3, 2008, at A17.

[408] 552 U.S. at 248.

[409] *Id*. at 250.

[410] *Id*. at 251.

Court weighed whether section 502(a)(2) of ERISA authorizes a defined contribution plan participant to sue a fiduciary, the alleged wrongs of whom had impaired the asset values in that participant's individual account.[411] The Supreme Court held that section 502(a)(2)authorizes recovery for fiduciary breaches impairing the plan asset values of a participant's individual account.[412]

After the financial sector upheaval of 2008, distinguished scholar of financial regulation Larry D. Barnett[413] mused that law carries a slight direct punch upon social activities, yet can be useful in controlling functions predominantly economic.[414] The profession of economics[415] is history[416] struggling[417] to become physics.[418] The *LaRue* holding squares with the theory[419] of

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[411] *Id.* at 250.

[412] *Id.* at 256.

[413] *See, e.g.*, Larry D. Barnett, *Law as Symbol: Appearances in the Regulation of Investment Advisors and Attorneys*, 55 CLEV. ST. L. REV. 289 (2007).

[414] Larry D. Barnett, *The Financial Sector Upheaval of 2008: Sociological Antecedents and Their Implications for Investment Company Regulation*, 5 HASTINGS BUS. L.J. 229, 251 n.96 (2009) (citing LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT 162-63 (1993)).

[415]

> [M]odern ("quantitative") theory formulates economic hypotheses (models) from the outset in such a way that the deductive argument can take the mathematical form.
>
> Progressing consistently for years along this road, economists have made economics all but a "disguised branch of mathematics," as Milton Friedman put it. Consequently, the climate in economics is today such that qualitative research has to fight for recognition. Taken to mean non-quantitative research or else defined with reference to the latter, it is held almost in contempt by the exponents of modern economic analysis, i.e., the analysis of the "outside" of economic actions.

REDLICH, *supra* note 308, at 307, 310 (footnotes omitted) (citing, *inter alia*, MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 12 (1953)).

[416] According to Emeritus Professor of Political Economy, at Warwick University, Robert Skidelsky: "Many historians feel that history is in some way inferior to the more exact sciences; the thought that he can 'do' economics gives the historian an expanding sense of mastery. I know the feeling, because I've lived through it myself." Robert Skidelsky, *Can You Spare a Dime?*, N.Y. REV. BOOKS, Jan. 15, 2009, at 28, 30.

On the other hand, major scholarly authority, *see, e.g.*, MURRAY N. ROTHBAND, POWER AND MARKET: GOVERNMENT AND THE ECONOMY (1970), holds economics to be an *a priori* discipline cut loose from the lessons of history:

> Economics is *praxeological*, i.e., its propositions are absolutely true given the existence of the axioms—the basic axiom being the existence of human action itself. Economics, therefore, is not and cannot be "empirical" in the positivist sense, i.e., it cannot establish some sort of empirical hypothesis which could or could not be true, and at best is only true approximately. Quantitative, empirico-historical "laws" are worthless in economics, since they may only be coincidences of complex facts, and not isolable, repeatable laws which will hold true in the future.

MURRAY N. ROTHBARD, 1 MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 756-57 (1970); *cf.* Knight, *supra* note 229.

[417] According to Robert H. Frank, Henrietta Johnson Louis Professor of Management and Professor of Economics, Johnson Graduate School of Management, Cornell University: "As more and more economists increase the level of formalism in their work, the threshold for signaling intellectual prowess gradually rises. The resulting arms race may lead to excessive formalism." ROBERT H. FRANK, THE ECONOMIC NATURALIST: IN SEARCH OF EXPLANATION FOR EVERYDAY ENIGMAS 140 (2007).

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> Economists are not, after all, very good at predicting the balance of payments, while the successes of physics are all around us. It is, therefore, understandable, if unfortunate, that scientists give more credence to engineers who claim to be able to predict the future of the world economy than we would to economists who claimed to be able to land men on the moon.

MIRRLEES, *supra* note 171, at 40. According to the authors respectively of PAUL WILMOTT, PAUL WILMOTT 1 ON QUANTITATIVE FINANCE (2006) and of EMANUEL DERMAN, MY LIFE AS A QUANT: REFLECTIONS ON PHYSICS AND

law and economics.[420] The fiduciary principle is the response of the law to the difficulties of uneven information costs. The fiduciary principle minimizes the cost of self-protection, via imposing an utmost good faith duty, to a fiduciary's principal (like James LaRue). Unequal information, to the disadvantage of the worker, is endemic to the 401(k) worker-principal/plan administrator-fiduciary relationship.

The *LaRue* outcome is also fitting to America's[421] supposedly impending twenty-first century society[422] of self-reliant[423] stakeholders.[424] Analysis of welfare states (and of the alternatives

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FINANCE (2004): "Physics, because of its astonishing success at predicting the future behavior of material objects from their present state, has inspired most financial modeling." Emanuel Derman and Paul Wilmott, *Perfect Models, Imperfect World*, BUS.WK., Jan. 12, 2009, at 59. "Financial theory has tried hard to emulate physics and discover its own elegant, universal laws." *Id.*

[419] According to Amb. Sol M. Linowitz:

> When Milton Katz, the organizer of the Marshall Plan in Europe, taught at the Harvard Law School, he was trying to show law students how the "legal order" has an impact on economic activity; today's economics-and-law movement that grows out of work at Yale, the University of Chicago, and the University of Rochester in the 1970s tries to convince lawyers that economic consequences should control their thinking about the role and the rule of law.

LINOWITZ, *supra* note 205, at 136.

[420]

> One of the most startling, and I think beneficial, developments in the law has been the relatively recent spread of economic learning among judges (even more perhaps among their clerks), among professors in law schools, among practitioners—this list is not in descending order of importance—and in many other segments of the policymaking and law-making world. I don't want to overstate this. Few, if any, judges qualify as economists. I certainly do not come close, and I have no aspirations in that direction. But, in a way, that is precisely what is most important about the development. It's the spread of basic economic concepts and the awareness of economic ideas to noneconomists that is so unexpected and so promising. One does not have to be a real economist to benefit, because microeconomics is a field in which the simple ideas are the most powerful ideas.

ROBERT H. BORK, *Antitrust in Transition: The Role of the Courts in Applying Economics*, *in*, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 465-66 (2008).

[421] A rather pallid reflection of the stakeholder society idea, which has been assimilated into British mainstream thought, is called the choice agenda:

> The idea is that core welfare state services, above all health and education, should remain state financed, but that the users should have a greater choice, for instance, among schools and hospitals. At a minimum they should be able to select among state providers; but in the more daring version, private enterprise providers would be able to compete too, as long as the services remained free at the point of entry.
>
> . . . .
>
> The search for a third way between "free" state services and private payment has its roots in one rather unattractive aspect of the electorate, especially its middle-class members. They are too mean to pay themselves for public services, but they also begrudge paying taxes for state provision. So they are thought to be in the market for any device that disguises the alternatives.

Samuel Brittan, *The Fallacy of the 'Choice Agenda'*, FIN. TIMES, July 18, 2008, at 9.

[422]

> The relationship between ownership and political behavior is clear. Social scientists have long observed the tendency of homeowners to perceive issues and express themselves in local politics differently from renters, even when earning similar incomes or coming from similar backgrounds. One of the most tantalizing aspects of the new Investor Politics is the early evidence that a similar transformation begins to occur to those who become owners, rather than just users, of capital assets through stock and bond investing. They come to think about issues such as taxes and regulations quite a bit differently than they did when they were only "renting" assets as workers.

HOOD, *supra* note 20, at 9.

[423] For example, a national homeownership rate correlates negatively to the magnitude of its welfare expenditures. ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 182-83 n.62

thereto) in prosperous democracies can facilitate rejection of the centralized welfare state approach and tend toward the embrace of a more market-oriented, libertarian framework.[425] Such was the ownership society at hand, at least preceding the widely-mystifying[426] financial turbulence[427] of 2008[428]-2009.[429] A replacement of a federal old-age pension plan with a network of self-supporting annuities must incarnate the original dream[430] of President Franklin Delano Roosevelt.[431]

(2008) (citing SHLOMO ANGEL, HOUSING POLICY MATTERS: A GLOBAL ANALYSIS 330-39 (2000)). Better yet: "Housing was an extraordinarily good investment in some U.S. metropolitan areas between 1995 and 2004." *Id.* at 181 n.49.

But the span 2006-2008 saw the clifftop-leap of housing prices as 2007-2009 witnessed the wholesale rout of stock prices. Of course, that housing price bubble expressly had been identified at the time. *See, e.g.*, George Steven Swan, *The Law and Economics of Affirmative Action in Housing: The Diversity Impulse*, 15 U. MIAMI BUS. L. REV. 133, 155 (2006).

[424] To be sure, Columbia Law School Prof. Michael Heller invokes the economic theory of the tragedy of the anticommons to warn that, should too many parties own pieces of one thing, the outcome is gridlock. Olga Kharif, *Ownership Spread Too Thin*, BUS.WK., Aug. 4, 2008, at 80; *see, e.g.*,MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008). For as familiar to contemporary legal discourse as the tragedy of the commons, *see, e.g.*, Swan, *supra* note 274, at 534, is the law and economics of the anticommons. *See, e.g.*, BEN DEPOORTER AND FRANCESCO PARISI, THE LAW AND ECONOMICS OF THE ANTICOMMONS (2008); Swan, *supra* note 111, at 177 n.147; IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 68-69 (2005).

[425] *See, e.g.*, DANIEL SHAPIRO, IS THE WELFARE STATE JUSTIFIED? (2007).

[426]

> With the bursting of the stock market bubble in the fall of 2008, the demise of investment banks, the general recession, and the consequent losses to individual retirement accounts and financial nest eggs, near hysterical cries and laments were heard claiming the financial world was falling apart. Explanations about what had occurred were numerous and varied. No one factor seemed to be able to explain everything. All sorts of causes were identified—lack of liquidity, lack of transparency, toxic derivatives, secretive hedge funds, credit default swaps, overleveraging, poor regulation, inaccurate ratings, faulty auditing, and more.

Ronald F. Duska, *Corruption, Financial Crises, and the Financial Planner*, J. FIN. SERV. PRO'LS., Mar. 2009, at 14.

[427] *See, e.g.*, GEORGE SOROS, THE NEW PARADIGM FOR FINANCIAL MARKETS: THE CREDIT CRISIS OF 2008 AND WHAT IT MEANS (2008); PAUL MUOLO AND MATTHEW PADILLA, CHAIN OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS (2008).

> The financial markets . . . are generally highly competitive: Information flows rapidly and different volumes of instruments can change hands more or less continuously with little friction. But the efficiency and smooth working of these markets is not an accident; their structures and procedures have been designed to achieve those goals. Even then they sometimes temporarily fail.

HENDRIK S. HOUTHAKKER & PETER J. WILLIAMSON, THE ECONOMICS OF FINANCIAL MARKETS 5 (1996).

[428] Zachary Karabell, *End of the 'Ownership Society'*, NEWSWEEK, Oct. 20, 2008, at 39-40.

> Economists and demographers say [Baby] Boomers will need to replace some $2 trillion of wealth lost in retirement funds during the recent stock meltdown, plus the billions in home equity that have vanished in the housing crash. Government policy makers will have to figure out how to provide for a huge cohort of people who could live well into their 80s. That task is rendered more complicated by the likelihood that proposals to privatize Social Security or enforce more saving in stock funds are nonstarters, at least until the memories of the past six months fade.

Joe White, *Boomer Bust: How Will the Economy Rebound Without Post-War Babies Financing Their Harleys?*, WALL ST. J., Oct. 21, 2008, at A13.

[429] *See, e.g.*, Damian Paletta, Deborah Solomon & Serena Ng, *Stocks Drop to 50% of Peak*, WALL ST. J., Feb. 24, 2009, at A1.

[430] In 2008, then U.S. Senator Barack Obama mocked President Franklin Delano Roosevelt's ideal for America, through Obama's attack upon Senator John McCain, Jr.:

> Now, I don't believe that Senator McCain doesn't care what's going on in the lives of Americans; I just think he doesn't know.

> Why else would he define middle-class as someone making under $5 million a year? How else could he propose hundreds of billions in tax breaks for big corporations and oil companies, but not one penny of tax relief to more than 100 million Americans?
>
> How else could he offer a health care plan that would actually tax people's benefits, or an education plan that would do nothing to help families pay for college, or a *plan that would privatize Social Security and gamble your retirement?*
>
> It's not because John McCain doesn't care; it's because John McCain doesn't get it.
>
> For over two decades—for over two decades, he subscribed to that old, discredited Republican philosophy: Give more and more to those with the most and hope that prosperity trickles down to everyone else.
>
> In Washington, *they call this the "Ownership Society," but what it really means is that you're on your own*. Out of work? Tough luck, you're on your own. No health care? The market will fix it. You're on your own. Born into poverty? Pull yourself up by your own bootstraps, even if you don't have boots. *You are on your own*.

Barack Obama's Acceptance Speech, N.Y. TIMES, Aug. 28, 2008, *available at* http://www.nytimes.com/2008/08/28/us/politics/28text-obama.html (emphasis added).

[431] On the other hand, the weltanschauung of Franklin Delano Roosevelt, the attorney, did contradict the worldview of law and economics. New York Gov. Roosevelt informed the 1932 Democratic National Convention: "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings." *Speech Before the 1932 Democratic National Convention: Chicago, Illinois, July 2, 1932, A New Deal*, *in* THE ESSENTIAL FRANKLIN DELANO ROOSEVELT, *supra* note 16, at 17, 27. Roosevelt's proposition in this, his "New Deal" speech, *id.* at 29, belies the very textbook fundamentals of law and economics:

> Economics is an analytical discipline and a practical science—its aim is to provide a set of tools to understand, analyze, and sometimes, solve problems. Just as a physicist must take into account the effects of gravity, so too must a lawyer understand the effects of economic forces. In a very real sense, economic forces are the gravity of the social world—often invisible, but omnipresent.

HENRY L. BUTLER, *supra* note 267, at 3 (first words). The objective scholar sees that either the premises of the New Deal, or the logic of law and economics, must be renounced.

On the still-other hand, it is protested that law and economics scholarship scarcely proves itself clinically objective. For "[o]bjectivity in legal theory implies the existence of non-controversial, consensus-based norms that determine law and can be articulated by neutral observers, be they jurists or theorists." JAMES R. HACKNEY, JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY xiii-xiv (2007). Whereas "[b]y cloaking legal-economic theory (an enterprise that is shot through with wealth distribution politics) in science, theorists act to legitimate their preferred political-economic system." *Id.* at xvi. Anyway, still do scholars inquire whether economic efficiency is a solid foundation upon which to erect public policies. *See, e.g.*, RICHARD S. MARKOVITS, TRUTH OR ECONOMICS: ON THE DEFINITION, PREDICTION, AND RELEVANCE OF ECONOMIC EFFICIENCY (2008).