ERISA REMEDIES: RETHINKING INDEMNIFICATION AND CONTRIBUTION FOR CO-FIDUCIARIES

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INTRODUCTION

Congress passed the Employee Retirement Income Security Act of 1974 (“ERISA”) 1 to protect participants and beneficiaries of private employee benefit plans. ERISA imposes strict duties upon those who manage benefit plans and their assets. 2 Although these people—otherwise known as “fiduciaries”—are held accountable for breaching their obligations, the statute makes no reference as to whether fiduciaries can seek contribution or indemnification from others when found liable for breaching their duties. 3 This is important because if such rights are not implied, then breaching fiduciaries may sustain


3 Contribution apports liability among joint tortfeasors by requiring each to pay his proportionate share, whereas indemnification shifts the entire liability from one tortfeasor to another who should bear it instead. Virginia Sur. Co. v. Northern Ins. Co. of N.Y., 866 N.E.2d 149, 153 (Ill. 2007).
liability unequal to their share of wrongdoing. To date, federal courts of appeal are split as to whether contribution and indemnification should be allowed as equitable remedies under ERISA.

Part I of this article briefly discusses the history and purpose of ERISA. Part I then presents the issue of whether ERISA co-fiduciaries can seek indemnification and contribution as equitable remedies in light of their statutory roles, duties, and liabilities. Part II analyzes the circuit split pertaining to this statutory issue. Part III then examines the recent Seventh Circuit decision in Chesemore v. Fenkell both factually and procedurally. Finally, Part IV argues that the Seventh Circuit got its decision wrong when it held the district court had the authority to provide indemnification and contribution to co-fiduciaries.

**ERISA BACKGROUND**

Throughout the 1950s and early 1960s, the Studebaker automobile company was struggling to compete against the Big Three in the United States automotive industry. In an attempt to save the company, Studebaker increased the pension benefits it was promising to its employees on several occasions; however, Studebaker was unable to sustain these contributions. By the end of 1963, Studebaker ceased its automotive operations and terminated its pension plan, leaving more than 4300 workers and retirees without the pension benefits they had

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5 829 F.3d 803 (7th Cir. 2016).


7 “A pension plan is a retirement plan that requires an employer to make contributions into a pool of funds set aside for a worker’s future benefit. The pool of funds is invested on the employee’s behalf, and the earnings on the investments generate income to the worker upon retirement.” *Pension Plan*, INVESTOPEDIA http://www.investopedia.com/terms/p/pensionplan.asp (last visited Oct. 26, 2016).

8 Lowenstein, *supra* note 6.
been promised. The collapse of the Studebaker automobile company subsequently pushed Congress to undertake pension reform, which eventually led to the enactment of ERISA in 1974.

ERISA is a federal law that establishes minimum regulatory standards for employee pension benefit plans in the private sector. These benefit plans include any plan, fund, or program that is maintained by an employer to the extent that it defers employees’ income up to their employment termination or beyond. This means that if an employer chooses to provide employee benefits—e.g., retirement income, hospital or medical care, vacation benefits, prepaid legal services, etc.—it generally has to comply with ERISA regulations and procedures. Notably, ERISA does not cover benefit plans that are established or maintained by governmental entities, church plans, or plans that are maintained for the purpose of complying with workers’ compensation, unemployment, or disability laws. ERISA also does not cover plans that are maintained outside of the United States for the benefit of non-resident aliens.

The main goal of ERISA is to protect participants and beneficiaries of employee benefit plans against fiduciary abuses and mismanagement. Congress attempted to achieve this by subjecting plan fiduciaries to numerous duties, liabilities, and standards of conduct. As discussed below, analyzing the roles and responsibilities of a fiduciary will contextually frame the issue of whether co-fiduciaries can seek indemnification and contribution as equitable remedies under ERISA.

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10 Id. at 433 (citing James A Wooten, “The Most Glorious Story of Failure in the Business”: The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683, 686 (2001)).
12 Id. § 1002(2)(A).
13 Id. § 1003(b)(1)–(3).
14 Id. § 1003(b)(4)–(5).
15 See generally id. § 1001(a)–(c).
16 Id. § 1001(b).
A. Who is A Fiduciary?

ERISA reserves liabilities for both named fiduciaries and functional fiduciaries. A named fiduciary has the authority to manage plan operations and is specifically listed as a fiduciary in the plan documents. A functional fiduciary, however, is not listed in the plan documents. Similar to the authority exercised by a named fiduciary, a person is a functional fiduciary to the extent that he (i) exercises discretionary authority or control regarding the management of an employee benefit plan or the disposition of its assets; (ii) provides investment advice regarding plan assets for compensation or has any authority to do so; or (iii) has discretionary authority in the administration of the plan. As fiduciary status is not only determined by formal designations, courts must carefully evaluate all of the facts and circumstances surrounding the individual’s relationship with the plan. The key to determining fiduciary status is primarily based on whether the person exercises discretion over the plan’s assets. If an individual is deemed to be a fiduciary, then he or she will be subject to numerous duties and liabilities.

B. Fiduciary Liability

Fiduciaries are subject to various standards of conduct because they act on behalf of plan participants and beneficiaries. These duties primarily include (1) the duty of loyalty, (2) the duty of prudence, (3) the duty of diversification, and (4) the duty to follow plan

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17 Id. § 1102(a)(2).
18 Id. § 1002(21)(A).
documents. As detailed below, a breach of any of these duties will generally subject a fiduciary to liability.

1. Duty of Loyalty

A fiduciary’s duty of loyalty consists of acting solely in the interest of plan participants and beneficiaries. This duty requires fiduciaries to act with “complete and undivided loyalty” with an “eye single to the interests of the participants and beneficiaries.” Moreover, this duty requires fiduciaries to act for the exclusive purpose of providing benefits to participants and beneficiaries, as well as to settle reasonable expenses for administering the benefit plan. Additionally, the duty of loyalty requires fiduciaries to avoid placing themselves in situations where a substantial conflict of interest between the fiduciary and the participant may arise. The classic example of a fiduciary breaching the duty of loyalty is where the interests of the employer are at odds with the interests of the beneficiaries, and the fiduciary subsequently acts in a way that places the employer’s interests above the beneficiaries—e.g., self-dealing, acting contrary to the interests of the plan, or kickbacks.

27 Martin et al., supra note 21, at 608; see 29 U.S.C. § 1106 (2012) (describing transactions that are prohibited between a fiduciary’s plan and a party of interest).
2. Duty of Prudence

The duty of prudence, otherwise known as the duty of care, is an objective standard. A fiduciary must act with the same care, skill, prudence, and diligence as an objectively prudent fiduciary acting under the same circumstances. This fiduciary duty is intended to be very stringent. As such, federal courts have generally required plan fiduciaries to perform adequate investigations related to any substantive decisions affecting the plan, such as the risks of an investment, the qualifications of an investment advisor, and all other facts that would be deemed relevant from an objectively prudent fiduciary’s point of view. Moreover, the duty of care requires a fiduciary to understand the surrounding facts and circumstances relevant to the investment plan or the investment course of actions. If a fiduciary lacks the requisite knowledge to assess the prudence of an investment decision, then the duty of care may require the fiduciary to hire an independent professional advisor. Accordingly, the fiduciary should ask questions, consider the professional advisor’s suggestions, and then continue to act prudently when exercising his duty of care. The completion of a careful and impartial investigation prior to making an investment decision provides an adequate basis for a fiduciary’s defense.

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29 Id.
30 Susan J. Stabile, Pension Plan Investments in Employer Securities: More is Not Always Better, 15 YALE J. ON REG. 61, 71 (1998); see Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983) (interpreting the prudent person test under both trust law and the significance of employee benefits).
31 See Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983); Donovan v. Mazzola, 716 F.2d 1226, 1232–33 (9th Cir. 1983); see also, Martin et al., supra note 21, at 608.
33 See id. § 2550.404a–1(b)(3)(i).
3. Duty of Diversification

Beyond the fiduciary duties of loyalty and care, ERISA fiduciaries must also exercise the duty of diversification.\textsuperscript{35} This duty requires fiduciaries to diversify the investments of a benefit plan for the purpose of minimizing the risk of loss, unless exercising such authority would violate a fiduciary’s duty of care.\textsuperscript{36} Although ERISA does not detail actual percentage limits for fiduciaries to abide by when diversifying their investments, this duty prohibits fiduciaries from investing disproportionately in a particular venture.\textsuperscript{37} A Congressional Committee report on the Act’s diversification provision stated:

A fiduciary usually should not invest the whole or an unreasonable large proportion of the trust property in a single security. Ordinarily the fiduciary should not invest the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon conditions in one locality, since the effect is to increase the risk of large losses.\textsuperscript{38}

Notably, there is no \textit{per se} violation under the duty of diversification. Each case depends on its own unique facts and circumstances.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{35} 29 U.S.C. § 1104(a)(1)(C) (2012).
\item \textsuperscript{36} \textit{Id}.
\item \textsuperscript{37} \textit{In re Unisys Sav. Plan Litig.}, 74 F.3d 420, 438 (3d Cir. 1996).
\end{itemize}
4. Duty to Follow Plan Documents

Finally, fiduciaries have a duty to act in accordance with plan documents insofar as such documents are consistent with ERISA. In other words, fiduciaries cannot implement plan provisions that violate ERISA. Additionally, every benefit plan must be in writing and must (1) provide a procedure for implementing a funding policy that is consistent with the plan’s objectives, (2) describe the procedure for allocating fiduciary responsibilities, (3) identify who can amend the plan and provide the procedure for amending the plan, and (4) specify how payments are made to and from the plan.

C. Co-Fiduciary Liability

ERISA fiduciaries may also be liable for the actions of other fiduciaries—otherwise known as “co-fiduciaries.” A co-fiduciary can either be appointed by another fiduciary or appointed by the plan. A fiduciary may be liable for another fiduciary’s breach if the fiduciary (1) knowingly conceals the other’s breach, (2) enables the other’s breach, or (3) does not make reasonable efforts to remedy the other’s breach if he was aware of it. As co-fiduciaries are jointly and severally liable for breaches of duty, federal courts encourage ERISA fiduciaries to take affirmative steps in remedying perceived issues that are related to plan operations. That is, a fiduciary cannot avoid

41 Id. § 1102(a)(1).
42 Id. § 1102(b)(1)–(4).
43 See id. generally § 1105.
46 Id. § 1105(b)(1).
liability by simply doing nothing in the wake of another’s breach of duty.\textsuperscript{48}

\textbf{D. The Arising Issue: Indemnification and Contribution}

The aforementioned provisions establish that fiduciaries are obliged to act in the best interest of plan participants and are jointly and severally liable for breaching their duties. Nevertheless, although ERISA expressly assigns liabilities to plan fiduciaries, the Act is silent as to whether liabilities may be allocated between two or more fiduciaries in relation to a single judgment. Section 1132 states that “[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 1109.”\textsuperscript{49} Moreover, Section 1109 provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary . . . .\textsuperscript{50}

Based on this language, courts are left to interpret fiduciary liabilities in light of the phrase “other equitable or remedial relief.”\textsuperscript{51}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Free, 732 F.2d at 1336 (trustee of plan was liable under ERISA for co-fiduciary’s breach where at no time did trustee take any action to determine assets of plan to asset control over plan assets or to assure that plan assets would be protected from losses); In re CMS Energy ERISA Litig., 312 F. Supp. 2d 898, 909–10 (E.D. Mich. 2004) (ERISA fiduciaries who did not allegedly participate in co-fiduciaries’ breaches may still be liable if they have knowledge of, but took no action to prevent, co-fiduciaries’ acts); In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 661–62 (S.D. Tex. 2003) (ERISA fiduciaries may be liable for failing to investigate the propriety of investments of plan funds made by co-fiduciaries).
\item 29 U.S.C. § 1132(a) (2012).
\item Id. § 1109(a) (emphasis added).
\item Id.
\end{enumerate}
\end{footnotesize}
Although courts have considered whether fiduciaries can seek indemnification or contribution as equitable remedies, the federal courts of appeal have taken various and inconsistent positions as to whether such remedies are available under ERISA. As described below, this contention is fundamentally based on how courts have answered the following two questions: (1) when should a right be implied under a federal statute; and (2) to what degree does ERISA incorporate common law trust principles.52

1. The Implied Cause of Action Theory

The Supreme Court has recognized a right of contribution under a federal statute where (1) Congress created an express right of action or (2) through the power of the federal courts.53 As Congress never expressly addressed contribution or indemnification under ERISA, the question is whether this right should be implied through the power of the federal courts.54 In Cort v. Ash55 the Supreme Court devised a four-part analysis for determining whether a right can be implied under a federal statute: (1) whether the party seeking the remedy is a class member for whose benefit the statute was enacted; (2) whether there is legislative intent to create or deny the implicit cause of action; (3) whether the cause of action is consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law.56

The Supreme Court relied on the aforementioned analysis in Massachusetts Mutual Life Insurance Co. v. Russell57 when it considered whether a fiduciary to an employee benefit plan was liable

56 Id. at 78.
to a plan participant for punitive damages caused by improper handling of benefit claims. In Russell, a beneficiary of an employee benefit plan brought an action to recover damages for improperly processing her disability benefit claim. The beneficiary argued that the fiduciary deliberately delayed processing her request, thereby aggravating a psychological condition that caused her back ailment. The beneficiary then filed an action against the fiduciary seeking extra-contractual and punitive damages.

The Supreme Court held that Section 409 of ERISA entitles claimants to equitable relief, but does not allow parties to recover for extra-contractual damages. Based on ERISA’s statutory language, the Supreme Court emphasized that a fiduciary’s liability is “to make good to such plan” for breaching his duties. The Court noted that nothing under ERISA supported the conclusion that a delay in processing a disability claim gave rise to a right of action for punitive relief. Rather, the Court reasoned that the statute’s language only concerned the misuse of plan assets, as well as remedies that would protect the plan, not the rights of an individual beneficiary. Furthermore, the Court stated that it was “reluctant to tamper with an enforcement

58 Id. at 136.
59 Id. at 134.
60 Id. at 136–37.
61 Id.
62 29 U.S.C. § 1109(a) (2012) (“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.”).
64 Id. at 140 (quoting 29 U.S.C. § 1109(a) (2012)).
65 Id. at 144.
66 Id. at 142.
scheme crafted with such evident care as the one in ERISA.” The Supreme Court also noted that courts should be cautious about reading remedies into a statute that Congress deliberately chose not to include.68

Although the Russell decision suggests that implied remedies under ERISA are rarely found, the Court never expressly banned implied remedies beyond extra-contractual or punitive damages. As a result, the Russell decision stands as a pillar, as well as a point of contention, for the federal courts of appeal in determining whether co-fiduciaries can seek contribution or indemnification under ERISA.

1. The Incorporation of Common Law Trust Principles

A trustee is generally responsible for expenses improperly incurred by him on behalf of administering a trust.69 In the event two trustees are liable for a breach of trust, both trustees are entitled to contribution from the other.70 However, if one of the two trustees is substantially more at fault than the other, traditional trust law allows for the trustee who is not substantially more at fault to seek indemnification from the other.71 In other words, traditional trust law uses indemnification as a means to fully compensate a paying trustee where the other trustee is primarily responsible for the breach of trust.72

The degree in which common law trust principles are incorporated under ERISA is heavily contested among the federal courts of appeals.

67 Id. at 147.
68 Id. (citing Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 19 (1979)).
69 See Restatement (Second) of Trusts § 224 (Am. Law Inst. 1959).
70 Restatement (Second) of Trusts § 258 (Am. Law Inst. 1959). For example, A and B are trustees for C. Both trustees participate in a breach of trust, resulting in a $1000 loss to C. If A paid C $1000 for the loss, A would be entitled to recover $500 from B.
71 Restatement (Second) of Trusts § 258 (Am. Law Inst. 1959).
This point of contention is, in part, fueled by ERISA’s legislative history, which provides that “[t]he fiduciary responsibility section . . . makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.” Although these principles apply to the fiduciary duties of care and loyalty, the duties of diversification and adherence to plan documents represent new obligations that have been altered to the needs of benefit plans. In light of such legislative ambiguity, the federal courts of appeal dispute whether the rights of indemnification and contribution should also be implied under ERISA based on common law trust principles.

**THE CIRCUIT SPLIT**

**A. The Seventh Circuit**

The Seventh Circuit was one of the first circuit courts to issue an opinion supporting indemnification or contribution under ERISA; however, the court sidestepped analyzing this issue under federal common law. In *Free v. Briody*, the Seventh Circuit addressed whether ERISA provides indemnification and contribution rights to fiduciaries. This case is an illustrative example of a fiduciary allowing a co-fiduciary to injure participants of a plan by failing to

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74 See RESTATEMENT (SECOND) OF TRUSTS § 174 (AM. LAW INST. 1959) (“The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . . .”); RESTATEMENT (SECOND) OF TRUSTS § 170(1) (AM. LAW INST. 1959) (“The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.”).


78 *Id.* at 1336.
take action, rendering both fiduciaries jointly and severally liable for breaching their fiduciary duties.\textsuperscript{79}

Free involved a corporation’s profit-sharing plan and two trustees.\textsuperscript{80} At one point, the primary trustee transferred plan assets to a purported financial adviser after being warned to exercise greater care over the plan’s assets by the trustee’s accountant.\textsuperscript{81} The primary trustee also withdrew securities from the profit-sharing plan to satisfy outside obligations.\textsuperscript{82} Throughout the course of these transactions, the co-trustee did not monitor the plan assets and did nothing to protect the plan from losses.\textsuperscript{83} Thereafter, both the corporation and the primary trustee declared bankruptcy and the assets that were transferred to the financial adviser were never returned to the profit-sharing plan.\textsuperscript{84} The co-trustee appealed the district court’s decision, which held (1) both trustees were jointly and severally liable for the losses incurred by the profit-sharing plan and (2) denied the co-trustee’s claim for indemnification against the other fiduciary.\textsuperscript{85}

As for the liability issue, the Seventh Circuit affirmed that the co-trustee was jointly and severally liable for the plan’s losses.\textsuperscript{86} The court noted that the co-trustee could have easily taken action while the primary trustee was misappropriating plan assets.\textsuperscript{87} On the second question, the Seventh Circuit held that “ERISA grants the courts the power to shape an award so as to make the injured plan whole while at the same time apportioning the damages equitably between the wrongdoers.”\textsuperscript{88} The courts reading of Section 1109 was based upon

\textsuperscript{79} See id. at 1333–34.
\textsuperscript{80} Id. at 1333.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 1331.
\textsuperscript{86} Id. at 1336.
\textsuperscript{87} Id. at 1335.
\textsuperscript{88} Id. at 1337.
ERISA’s legislative history.\footnote{Id.} The court noted, “Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans.”\footnote{Id. at 1337–38.} Because the general principles of trust law provide for indemnification under certain circumstances, the court was able to extend its holding and indemnify the primary trustee under ERISA.\footnote{Id. at 1338.}

### B. The Ninth Circuit

After the Seventh Circuit’s decision, the Ninth Circuit was the first federal court of appeal to definitively rule against allowing co-fiduciary indemnification rights under ERISA. In \textit{Kim v. Fujikawa},\footnote{871 F.2d 1427 (9th Cir. 1989).} Rodney Kim (“Kim”) was an official of the Pacific Electrical Contractors Association (“PECA”), a multi-employer bargaining representative.\footnote{Id. at 1428-29.} PECA entered into a collective bargaining agreement with the International Brotherhood of Electrical Workers Local No. 1186 (“the Union”), which required employers to contribute to a benefit plan that was jointly administered by Kim and a union official.\footnote{Id. at 1429.} At one point, the union official improperly withdrew plan assets to pay Union-related expenses.\footnote{Id. at 1428-29.} Kim filed an action to recover all related payments, and the union official sought contribution under ERISA against Kim.\footnote{Id. at 1429.} The district court held that ERISA did not provide the union official a right of contribution against Kim, and the Ninth Circuit affirmed.\footnote{Id. at 1432.}

The Ninth Circuit heavily relied on the \textit{Russell} decision, holding that Section 409 of ERISA only establishes remedies for the benefit of
a plan.\footnote{98} “Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary.”\footnote{99} Unlike \textit{Free’s} broad interpretive reading of ERISA’s legislative history, the court reasoned there was no indication in ERISA’s legislative history “that Congress was concerned with softening the blow on joint wrongdoers.”\footnote{100} Moreover, the court reasoned that implying a right of contribution is inappropriate where the seeking party is a member of the class that Congress intended to regulate for purposes of protecting an entirely distinct class—e.g., ERISA plans.\footnote{101}

\textbf{C. The Second Circuit}

The Second Circuit was the first federal court of appeals to rule in favor of indemnifying ERISA fiduciaries under the federal common law, thereby forming the circuit split. In \textit{Chemung Canal Trust Co. v. Sovran Bank/Maryland},\footnote{102} Fairway Spring Company, Inc. (\textit{Fairway}) established a retirement plan for its employees.\footnote{103} The plan allowed Fairway to appoint a trustee to exercise fiduciary authority over the plan and its assets.\footnote{104} Chemung, the plan’s trustee, sued the plan’s former fiduciary, Sovran, alleging that Sovran breached its duty of care by continuing imprudent investments that were previously made by the plan trustee who preceded Sovran.\footnote{105} Sovran requested contribution or indemnity, alleging that Chemung adequately failed to evaluate the plan, thereby contributing to the losses that were subject to the lawsuit against Sovran.\footnote{106}
The Second Circuit first addressed whether ERISA permitted a claim for contribution or indemnity. After noting that Congress did not expressly provide for either remedy under ERISA, the Second Circuit quickly dismissed the implied action test devised under *Cort v. Ash*. The Second Circuit held that applying the *Cort* test would automatically dismiss Sovran’s claim because ERISA was enacted to protect plan participants and not former fiduciaries, such as Sovran. As a result, the court addressed whether contribution or indemnification were available under the federal common law.

By incorporating the common law trust principles referenced in ERISA’s legislative history, the court held that the right to contribution was recognized under ERISA. Although the Supreme Court in *Russell* dismissed a plan beneficiary’s action to recover damages that were not expressly authorized under ERISA, the Second Circuit distinguished *Russell* on the grounds that the Court did not discuss the availability of federal common law remedies. The Second Circuit reasoned that Congress’s failure to articulate certain remedies did not necessarily mean Congress intentionally precluded such remedies. Rather, it was more likely Congress simply lost focus of those beyond the protection of plan participants and beneficiaries. Based on these principles, the court held there was “no reason why a single fiduciary who [was] only partially responsible for a loss should bear its full brunt.”

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107 *Id.* at 15.
108 *Id.*
109 *Id.* In determining whether a private cause of action is implicit under a federal statute, recall that the first part of the *Cort* test asks whether the party seeking the remedy is a member of the class whose benefit the statute was intended to protect.
110 *Id.* at 16.
111 *Id.*
112 *Id.* at 17-18.
113 *Id.* at 18.
114 *Id.*
115 *Chemung Canal Tr. Co.*, 939 F.2d at 16.
D. The Eighth Circuit

The Eighth Circuit, in Travelers Casualty & Surety Co. of America v. IADA Services, Inc. 116 is the most recent federal court of appeals to deny a fiduciary’s right to contribution under ERISA. In that case, IADA Services, Inc. (“IADA Services”) performed administrative and investment services on behalf of an association’s employee benefit plan. 117 After the Department of Labor (“DOL”) conducted an audit, the DOL alleged that IADA Services violated its fiduciary duty by charging fees in excess of the plan’s direct expenses. 118 The DOL claimed that IADA Services was a plan fiduciary because several trustees of the plan also served as directors for IADA Services. 119 Travelers Casualty and Surety Company of America (“Travelers”), the insurer for the trustees of the plan, settled the claim on behalf of the trustees. 120 Travelers then sued IADA Services, asserting claims for indemnification and contribution under ERISA. 121

The Eighth Circuit agreed with the Ninth Circuit in Kim v. Fujikawa, holding that Section 409 of ERISA does not provide an equitable remedy of contribution in favor of a breaching fiduciary. 122 While the statute indicates that a breaching fiduciary “shall be subject to such other equitable or remedial relief as the court may deem appropriate,” 123 the Eighth Circuit held that the remedies under this provision are to the ERISA plan. 124 Similar to the Supreme Court’s reasoning in Russell, the court reasoned that the Act only allows for the possibility of “other equitable or remedial relief” after it declares a

116 497 F.3d 862 (8th Cir. 2007).
117 Id. at 863.
118 Id.
119 Id.
120 Id. at 864.
121 Id.
122 Id. at 866.
124 IADA Services, Inc., 497 F.3d at 866.
fiduciary liable “to make good to such plan” and “to restore to such plan” any lost profits. Hence, ERISA could not be read to provide contribution in favor of a breaching fiduciary. Moreover, the Eighth Circuit noted that the statute’s “carefully crafted and detailed enforcement scheme provide[d] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.” Notwithstanding the authority to create federal common law under ERISA, the court was reluctant to alter a reticulated statute that is backed by a decade of congressional scholarship.

CHESEMORE V. FENKELL

A. Factual Background

In the 1990’s, David Fenkell and the companies he controlled—i.e., Alliance Holdings, Inc. (“Alliance”), A.H.I., Inc. (“AHI”), and AH Transitions—were in the business of buying and selling companies with an employee stock ownership plan (“ESOP”). In a standard transaction, Fenkell would fold an acquired company’s ESOP into Alliance’s ESOP, hold the company for a brief period of time, and then flip the company at a profit. Fenkell’s business model was entirely legal, assuming he complied with his ERISA fiduciary duties. Nevertheless, Fenkell breached his fiduciary duties in a particular

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125 Id. (quoting 29 U.S.C. § 1109(a) (2012)).
126 Id.
128 See id. at 865.
129 Chesemore v. All. Holdings, Inc. (“Chesemore I”), 886 F. Supp. 2d 1007, 1012 (W.D. Wis. 2012); Employee Stock Ownership Plans (ESOPs), U.S. SEC. & EXCH. COMM’N, https://www.sec.gov/answers/esops.htm (last updated Nov. 5, 2012) (“An employee stock ownership plan (ESOP) is a retirement plan in which the company contributes its stock (or money to buy its stock) to the plan for the benefit of the company’s employees.”).
130 Chesemore I, 886 F. Supp. 2d at 1012.
131 Id.
transaction, where he methodically flipped Trachte Building Systems, Inc. (“Trachte”) shortly before the company’s stock became worthless.\textsuperscript{132} In 2002, Alliance purchased Trachte, a manufacturer of self-storage systems, for $24 million and merged its ESOP into Alliance’s ESOP (the “2002 Transaction”).\textsuperscript{133} All of the Trachte common stock that was held in the former ESOP (“Old Trachte ESOP”) was swapped for Alliance common stock, and the Old Trachte ESOP was dissolved.\textsuperscript{134} In exchange, the Trachte employees became participants of the Alliance ESOP, with accounts equal in value to their previous accounts.\textsuperscript{135} Fenkell projected that he could later sell Trachte for roughly $50 million in five years.\textsuperscript{136} By the time Fenkell was prepared to sell, however, Trachte’s overall profitability was flat.\textsuperscript{137} By the end of 2006 and early 2007, Trachte’s sales revenues were steadily declining and no independent buyer would purchase Trachte on the open market.\textsuperscript{138} As a result, Fenkell offloaded Trachte in a leveraged buyout (the “2007 Transaction”).\textsuperscript{139} Fenkell created a new Trachte ESOP, where the new Trachte ESOP bought back the Trachte shares from Alliance in exchange for a promissory note.\textsuperscript{140} Next, the Trachte employee accounts in the Alliance ESOP were spun off to the new Trachte ESOP.\textsuperscript{141} The new Trachte ESOP then repaid the promissory notes by transferring back the Alliance stock to Alliance.\textsuperscript{142} Fenkell essentially designed the transaction so that the accounts of the Trachte employees

\begin{itemize}
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Chesemore v. Fenkell, 829 F.3d 803, 808 (7th Cir. 2016).
\item \textsuperscript{134} Chesemore I, 886 F. Supp. 2d at 1017.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Fenkell, 829 F.3d at 806.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id. at 808.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Chesemore I, 886 F. Supp. 2d at 1037-38.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\end{itemize}
in the Alliance ESOP were used as leverage to purchase Trachte from Alliance.\textsuperscript{143} By the end of the 2007 Transaction, the new Trachte ESOP had paid $45 million for 100\% of Trachte’s equity and incurred roughly $36 million in debt.\textsuperscript{144}

Trachte was unable to sustain the debt load that it incurred as a result of the 2007 Transaction.\textsuperscript{145} Trachte projected six months after the 2007 Transaction that it was unable to meet its loan covenants.\textsuperscript{146} By the end of 2008, Trachte’s equity was worthless.\textsuperscript{147}

B. Procedural History

A group of current and former Trachte employees filed a class-action lawsuit under ERISA, alleging numerous breaches of fiduciary duties by Alliance, Fenkell, the Trachte Trustees, and several other entities.\textsuperscript{148} The U.S. District Court for the Western District of Wisconsin found the defendants liable.\textsuperscript{149} Alliance and Fenkell argued they were only fiduciaries during the spin-off and, therefore, should not be held accountable.\textsuperscript{150} This made Trachte responsible for any decisions made with respect to the plaintiff’s accounts after the spin-off.\textsuperscript{151} Nevertheless, the court found Alliance and Fenkell acted in fiduciary capacities throughout the entire 2007 Transaction.\textsuperscript{152}

The court reasoned that Alliance and Fenkell (1) arranged the 2007 Transaction so that it would only benefit them, (2) ensured no one on the opposite side of the transaction looked out for the new Trachte ESOP participants, and (3) ensured that those on the opposite

\textsuperscript{143} Id. at 1054.
\textsuperscript{144} Fenkell, 829 F.3d at 807.
\textsuperscript{145} Chesemore I, 886 F. Supp. 2d at 1040.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 1013.
\textsuperscript{149} Id. at 1054–57.
\textsuperscript{150} Id. at 1052.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1054.
side of the transaction would remain liable to Alliance and Fenkell should they not go through with the 2007 Transaction.\textsuperscript{153} Moreover, Alliance and Fenkell made no effort in determining whether the 2007 Transaction was in the best interest of the Trachte employees.\textsuperscript{154} In short, the court stated it was a typical example of “heads I win, tails you lose.”\textsuperscript{155} As a result, the court held Alliance and Fenkell violated their fiduciary duties owed to the Trachte employee participants in the Alliance ESOP.\textsuperscript{156}

After an additional hearing, the judge ordered Alliance and Fenkell to indemnify the Trachte trustees because Alliance and Fenkell’s culpability greatly exceeded that of the Trachte trustees.\textsuperscript{157} The court found that Alliance and Fenkell orchestrated the 2007 Transaction and used their position of authority over the trustees.\textsuperscript{158} The judge analogized: “Fenkell was the unquestioned conductor and the Trachte Trustees mere musicians.”\textsuperscript{159} The Trachte trustees were subsequently indemnified for any compensatory relief they were required to pay.\textsuperscript{160} Fenkell appealed to the Seventh Circuit, mainly contesting that ERISA did not permit the court to order indemnification among co-fiduciaries.\textsuperscript{161}

\textbf{C. The Seventh Circuit’s Decision}

In addressing whether indemnification and contribution are equitable remedies under ERISA, the Seventh Circuit first acknowledged that the Supreme Court has previously incorporated

\begin{footnotesize}
\textsuperscript{153} \textit{Id.} at 1052.
\textsuperscript{154} \textit{Id.} at 1054–55.
\textsuperscript{155} \textit{Id.} at 1052.
\textsuperscript{156} \textit{Id.} at 1055.
\textsuperscript{157} Chesemore v. All. Holdings, Inc. (\textit{Chesemore II}), 948 F. Supp. 2d 928, 949–50 (W.D. Wis. 2013).
\textsuperscript{158} \textit{Id.} at 949.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at 950.
\textsuperscript{161} Chesemore v. Fenkell, 829 F.3d 803, 807 (7th Cir. 2016).
\end{footnotesize}
trust principles under ERISA. The Supreme Court has defined "appropriate equitable relief" as "those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity." Based on this definition, the Seventh Circuit held the district court’s remedial authority under ERISA incorporated the law of trusts, which subsequently encompasses the power to fashion "traditional equitable remedies." Based on this context, the Seventh Circuit quickly concluded that indemnification and contribution were among those remedies.

Moreover, the Seventh Circuit noted that it already addressed this issue long ago in *Free*, where the court held that the protections of Section 1105(b)(1)(B) were not exclusive remedies under ERISA. *Free* recognized that "Congress intended to codify the principles of trust law with whatever alternations were needed to fit the needs of employee benefit plans," which included the right to indemnification under appropriate circumstances. In response, Fenkell argued that *Free* was “implicitly overturned” in *Summers v. State Street Bank & Trust Co.*, where the Seventh Circuit noted in passing that “a right of contribution” under ERISA “remains an open [question] in this circuit.” Nevertheless, the Seventh Circuit rejected Fenkell’s

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162 Id. at 811; see CIGNA Corp. v. Amara, 563 U.S. 421, 439 (2011) (noting that ERISA commonly treats a plan as a trust and a plan fiduciary “as a trustee”); see also Tibble v. Edison Intern., 135 S.Ct. 1823, 1828 (2015) (“In determining the contours of an ERISA fiduciary’s duty, courts often must look to the law of trusts.”); Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (“[W]e believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties.”).

163 *Fenkell*, 829 F.3d at 811 (citing *CIGNA Corp.*, 563 U.S. at 439).

164 Id. (citing *CIGNA Corp.*, 563 U.S. at 440).

165 Id. at 812.

166 Id.


168 453 F.3d 404 (7th Cir. 2006).

169 *Fenkell*, 829 F.3d at 812 (citing *Summers*, 453 F.3d 404, 413 (7th Cir. 2006)).
argument, holding that *Summers* never mentioned *Free*, let alone overturned it.\(^{170}\)

The Seventh Circuit continued by distinguishing *Chesemore* from the Supreme Court’s holding in *Russell*, where the Supreme Court held that ERISA does not entitle claimants to punitive damages.\(^ {171}\) Although *Free* and *Russell* both interpreted Section 409 of ERISA, the Seventh Circuit held that *Russell* did not undermine *Free*.\(^ {172}\) The court greatly simplified its reasoning, noting that an ERISA fiduciary seeking a right of indemnification is not equivalent to a plan participant seeking punitive damages under an implied right of action theory.\(^ {173}\) Despite acknowledging the differences between *Free* and *Russell*, the Seventh Circuit failed to explain the distinction and quickly affirmed that the district court had the authority to indemnify the Trachte ESOP trustees.\(^ {174}\)

**ARGUMENT**

Although the Seventh Circuit has supported the accessibility of indemnification and contribution as equitable remedies under ERISA, the court has never explicitly scrutinized this issue under the federal common law.\(^ {175}\) Instead, the Seventh Circuit has analyzed this issue based on the lower court’s remedial authority. Recall that in *Free v. Brody*, the Seventh Circuit held “ERISA grants the courts the power to shape an award so as to make the injured plan whole while at the same time apportioning the damages equitably between the wrongdoers.”\(^ {176}\) Similarly, in *Chesemore v. Fenkell*, the court held “the district court had the authority to order Fenkell to indemnify the new Trachte ESOP

\(^{170}\) *Id.*  
\(^{171}\) *Id.* at 813 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985)).  
\(^{172}\) *Id.*  
\(^{173}\) *Id.*  
\(^{174}\) *Id.*  
\(^{175}\) Thomsen & Smith, *supra* note 77, at 756.  
trustees.” 177 This is unlike the Ninth Circuit, which definitively held that contribution and indemnification are not available remedies under ERISA. 178 Although this distinction is subtle, it is important because the Seventh Circuit has not explicitly addressed whether there is an implied right of indemnification or contribution under ERISA.

The Seventh Circuit in Fenkell incorrectly held that the lower court had the authority to indemnify a co-fiduciary in accordance with the background principles of trust law. 179 Allowing a breaching fiduciary, which has exploited his position of power to the detriment of benefit plan participants, to seek equitable remedies is not only unjust, but contrary to ERISA’s purpose. As described below, the Seventh Circuit’s holding in Fenkell is improper for two reasons: (1) Congress did not intend to incorporate such equitable remedies; and (2) contribution is an inefficient remedy that increases the cost of litigation but not the deterrence for breaching fiduciaries.

A. Congressional Intent: A Closer Look at ERISA’s Language and Legislative History

In Cort v. Ash, the Supreme Court looked to congressional intent for purposes of creating or denying an implicit right within a federal statute. 180 The Supreme Court stated that a right could only be implied under a federal statute if congressional intent can be inferred from the statute’s language, the statutory structure, or from some other source. 181 Therefore, federal courts can only provide ERISA co-fiduciaries the equitable right to indemnification or contribution if Congress intended to incorporate such rights. Analyzing ERISA’s language and legislative history makes it abundantly clear that Congress did not intend to extend such privileges to co-fiduciaries.

177 Fenkell, 829 F.3d at 813 (emphasis added).
178 Kim v. Fujikawa, 871 F.2d 1427, 1432 (9th Cir. 1989).
179 See Fenkell, 829 F.3d at 813.
A review of the statute’s express language is crucial to this analysis. The relevant language under ERISA provides that any breaching fiduciary “with respect to a plan . . . shall be personally liable to make good to such plan . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.”\(^\text{182}\) Although the statute does not explicitly define “other equitable or remedial relief,” examining the entirety of this provision illustrates that Congress is emphasizing the relationship between the fiduciary and the plan, not the relationship among co-fiduciaries.\(^\text{183}\)

Specifically, the statute expressly characterizes a fiduciary’s relationship as one “with respect to a plan” where a fiduciary is liable “to such plan.”\(^\text{184}\) Immediately thereafter, Section 1109(a) provides that a liable fiduciary may be liable for other relief, such as removal from the fiduciary’s position.\(^\text{185}\) By reading Section 1109(a) in its totality, it seems clear that Congress included the “removal of such fiduciary” as one example of a plan-related remedy that is permitted under ERISA, not a remedy among co-fiduciaries.\(^\text{186}\) Moreover, nothing under Section 1109(a) expressly indicates that Congress intended to apportion relief among co-fiduciaries in the form of indemnification or contribution.

Nevertheless, the Seventh Circuit incorrectly held that the lower court had the authority to indemnify a co-fiduciary in accordance with the background principles of trust law.\(^\text{187}\) Although ERISA’s fiduciary responsibility provisions are shaped by the common law of trusts, the Seventh Circuit in \textit{Fenkell} mistakenly assumed that Congress inadvertently omitted a co-fiduciary’s equitable right to contribution and indemnification. ERISA is the product of over ten years of congressional scholarship, making it highly unlikely that Congress

\(^\text{183}\) \textit{Russell}, 473 U.S. at 139.
\(^\text{185}\) \textit{Id}.
\(^\text{186}\) \textit{Russell}, 473 U.S. at 142.
\(^\text{187}\) \textit{Chesemore v. Fenkell}, 829 F.3d 803, 813 (7th Cir. 2016).
simply neglected to include equitable remedies under the statute. The Supreme Court has repeatedly supported this argument, noting that the statute’s “carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.’”¹⁸⁸ Moreover, the reasons for including some equitable remedies while excluding others—i.e., the right to contribution and indemnification—would be completely undermined if courts were free to supplement remedies under state law that Congress deliberately chose not to include. Given that Congress deliberately excluded a co-fiduciary’s right to indemnification and contribution, the Seventh Circuit failed to adequately consider ERISA’s congressional intent in reaching its decision.

Regardless of the statute’s congressional intent, however, one may assert that if such equitable remedies are not implied, then co-fiduciaries run the risk of sustaining liability that is unequal to their share of wrongdoing.¹⁸⁹ Nevertheless, recall that in determining whether a right should be implied under a federal statute, the Supreme Court’s four-part test considers whether the action is consistent with the underlying purpose of the legislative scheme.¹⁹⁰ Here, not only does ERISA’s legislative history fail to address equitable remedies among co-fiduciaries, but implying such remedies in favor of a breaching fiduciary would directly undermine ERISA’s purpose. The statute was specifically designed to protect plan participants from the mismanagement of plan assets by requiring fiduciaries to adhere to various standards of conduct.¹⁹¹ Moreover, fiduciaries are subject to such liabilities because they act on behalf of plan participants and

¹⁸⁹ See, e.g., Chemung Canal Tr. Co. v. Sovran Bank/Md., 939 F.2d 12, 16 (2d Cir. 1991) (“There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt.”).
beneficiaries.\textsuperscript{192} It is the plan participant that suffers as a result of a fiduciary’s breach of duty, not the co-fiduciary. Therefore, granting equitable remedies in favor of co-fiduciaries would tilt the scale and contradict the purpose of ERISA.

\textbf{B. The Seventh Circuit Failed to Consider the Economic Inefficiencies of Contribution}

At its core, the right of contribution allows a liable defendant to recover damages from other liable parties.\textsuperscript{193} If exercised in \textit{Chesemore v. Fenkell}, for example, Fenkell would have had the opportunity to recover damages from the other breaching fiduciaries, such as the new Trachte ESOP trustees. Although this remedy was not ordered by the court, the Seventh Circuit held the district court had the authority to order ERISA fiduciaries to provide indemnification and contribution to co-fiduciaries in accordance with trust law principles.\textsuperscript{194} From a policy standpoint, however, one major efficiency-based criticism with this holding is that allowing contribution among liable co-fiduciaries increases the cost of litigation without simultaneously increasing deterrence.\textsuperscript{195}

As previously mentioned, ERISA fiduciaries must comply with their primary duties—i.e., the duty of loyalty, the duty of prudence, the duty of diversification, and the duty to follow plan documents—for purposes of avoiding liability.\textsuperscript{196} A fiduciary may nonetheless be liable for another fiduciary for (1) knowingly concealing the other’s breach, (2) enabling the other’s breach, or (3) not making reasonable efforts to

\textsuperscript{194} Chesemore v. Fenkell, 829 F.3d 803, 813 (7th Cir. 2016).
\textsuperscript{195} See Di Cola, supra note 52, at 1553.
\textsuperscript{196} 29 U.S.C. § 1104 (2012) (outlining the various fiduciary duties under ERISA).
remedy the other’s breach if he has knowledge of it.\textsuperscript{197} Hence, once one fiduciary complies with his statutory obligations, the other fiduciaries are encouraged to comply because any fiduciary that is subsequently liable for a breach would have to bear 100\% of the damages.\textsuperscript{198}

Notably, providing a co-fiduciary the right to contribution under ERISA does not change this outcome.\textsuperscript{199} “So long as the sum of all tortfeasors’ expected shares of the total loss is 100\%, the incentives for efficient accident avoidance are the same under contribution or no-contribution.”\textsuperscript{200} In other words, the total damage or loss resulting from a breaching fiduciary or fiduciaries is always the same, regardless of whether the damages are apportioned by contribution. By analogy, it would be the same thing as asking whether one prefers eating a whole pizza, or the same pizza cut into eight different slices. Regardless of what you choose, the amount of pizza is the same, just as the loss is the same. Because each fiduciary will theoretically still comply with his statutory obligations for purposes of avoiding liability, contribution does not change the overall level of deterrence. The only thing that does change, however, is the transaction costs among multiple injurers.\textsuperscript{201} Nevertheless, the Seventh Circuit did not take this into consideration in reaching its decision.

\textbf{SUMMARY AND CONCLUSION}

The issue of whether ERISA co-fiduciaries can seek contribution and indemnification as equitable remedies is a question of statutory interpretation. ERISA expressly assigns liabilities to plan fiduciaries, yet fails to include whether fiduciary liabilities may be allocated among other parties in relation to a single judgment. ERISA’s legislative history similarly lacks any explanation or reference to this

\textsuperscript{197} Id. § 1105(a).
\textsuperscript{198} See Di Cola, supra note 52, at 1553.
\textsuperscript{199} See id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
issue. Moreover, the few federal courts of appeal that have addressed this issue have taken various and inconsistent positions as to whether such remedies should be implied.

The Seventh Circuit in *Fenkell* recently ruled on this issue, where it incorrectly held that the lower court had the authority to indemnify co-fiduciaries under ERISA. Although ERISA incorporates certain aspects of trust law principles, it does not include all of them—i.e., the right to contribution and indemnification. The statute was objectively designed to protect participants and beneficiaries in employee benefit plans from fiduciary mismanagement. A plain reading of the statute further supports this argument, where Congress clearly highlighted the relational concern between fiduciaries and their respective plans, rather than the relationship between co-fiduciaries. The fact that Congress chose to include some equitable remedies and not others is further evidence that such remedies were purposely omitted. As a result, the Seventh Circuit’s failure to properly incorporate the meaning of ERISA’s language and legislative history contravenes Congress’s intent and risks subjecting lower courts to unnecessary litigation costs in the future.

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202 See Chesemore v. Fenkell, 829 F.3d 803, 813 (7th Cir. 2016).

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