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While I am old enough to remember the adoption of ERISA,[1] most individuals present today probably are not. In 1974, in his concluding speech to Congress endorsing ERISA, Senator Jacob Javits stated, "Mr. President, we have reached the end of a very long road."[2] In retrospect, I doubt that anyone could have foreseen the enormous amount of hard work and dedication required to put the pension reform legislation on the U.S. statute books.

I have a lot of admiration for Senator Javits. He was the leading force behind ERISA. Without him, not only would we not have ERISA, but I and many other ERISA attorneys would be practicing in another field. Senator Javits, however, was mistaken in stating that 1974 was the end of the long road; rather, it was the beginning of one we now have traveled for twenty years with no end in sight. I was going to title this speech "20 years and 20 million pages." Since 1974, ERISA has grown from 200 pages of legis-

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1 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)). Since its original enactment in 1974, ERISA has been amended several times. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364; Retirement Equity Act of 1984, Pub. L. No. 98-397; Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272; Tax Reform Act of 1986, Pub. L. No. 99-514; Omnibus Budget Reconciliation Act ("OBRA") of 1987, Pub. L. No. 100-203; Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647; Omnibous Budget Reconciliation Act ("OBRA") of 1989, Pub. L. No. 100-239; OBRA 1990, Pub. L. No. 101-508; Rural Telephone Cooperative Associations ERISA Amendments Act of 1991, Pub. L. No. 102-89; Omnibus Budget Reconciliation Act ("OBRA") of 1993, Pub. L. No. 103-66.

2 Summary of Major Provision of Williams-Javits Pension Reform Bill, S.4, 93d Cong., 1st Sess. 118 (1973) (containing remarks by Jacob J. Javits, co-sponsor of S.4).

lation and legislative history to 700 pages of legislation, 3600 pages of regulations, and countless pages of cases and commentary.

When I first heard about ERISA in 1974, I was a second-year corporate lawyer. A partner came to my office and informed me that there was a need for experts on both ERISA and economic controls. He then asked me in which field I would prefer to become the expert. I decided that I really did not want to learn economic controls—they appeared too complicated and were not likely to last—so instead I chose ERISA. I was not aware that at that moment I was choosing my future.

The same types of decisions were being made throughout the country by scores of young lawyers. These young lawyers, many of whom are now the current leaders of the ERISA bar, were having ERISA thrust upon them. Most of us had little idea at the time what we were getting into; nor, I doubt, did Senator Javits realize what would follow along that long road.

In 1974, when ERISA was passed, the total assets of private pension plans amounted to 164 billion dollars.[3] Today we contribute nearly 140 billion dollars to pension plans each year. Today total pension assets equal over two trillion dollars.[4] In 1974, the private pension system covered thirty to thirty-five million workers;[5] today it covers over forty-eight million.[6] Pension plans currently account for more than twenty-four percent of the U.S. equity market.[7] Moreover, these figures do not include, or even begin to recognize, the assets involved in medical, life insurance, and other welfare plans.

To a large extent ERISA has been remarkably resilient. True, since 1974, twenty-seven separate bills have amended various as-

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[3] *See, e.g.,* H.R. Rep. No. 533, 93d Cong., 1st Sess. 1, 3, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641 (estimating that in 1974 assets of private pension plans totaled over $150 billion).

[4] *See, e.g.,* Olena Berg, *Putting Pensions to Work: Targeted Investments Create Jobs, Business—And Solid Returns*, USA TODAY, Nov. 29, 1993, at 11A. "With more than $4 trillion in assets overall, both public and private pension funds comprise over one-fifth of the total financial assets in the USA today." *Id.*

[5] *See, e.g.,* H.R. Rep. No. 533, 93d Cong., 1st Sess. 1, 3, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641 (indicating membership in private pension plans increased from 21 million in 1960 to 30 million in 1974).

[6] *See PBGC: Congress Fails to Act on Pensions Despite Similarities with S&L Crisis, Lockhart Says*, 19 Pens. & Ben. Rep. (BNA) at 673 (Apr. 20, 1992).

[7] *See* David Isgur, *Pension Plans on Last Legs, Observer Says*, L.A. TIMES, July 3, 1990, at D7 (Orange County ed.). "A 24% share of the U.S. equity market belongs to pensions . . . ." *Id.*; *see also* Berg, *supra* note 4.

pects of ERISA.[8] Most of the amendments, however, have been revenue driven and have left the basic structure of ERISA intact.

ERISA was a labor law bill; the tax aspects were secondary. Some of the stories from Senator Javits' speech[9] emphasized pensioners losing their pensions after many years of service because of technical violations of complicated vesting rules,[10] because of retirement before age sixty-five,[11] or because of bankruptcy of companies with inadequately funded plans.[12]

In the last ten years, benefit laws have become revenue driven.[13] To a large degree, the intent of protecting the worker, providing adequate retirement benefits upon retirement, and assuring adequate funding have become secondary. We have seen funding limitations installed that limit deductions to protect revenues. Thus, companies that actually want to fund their plans could not. It is only in the recently introduced Pension Benefit Guarantee Corporation ("PBGC") legislation that some of these concerns and balancing have begun to resurface.[14]

The labor provisions of ERISA have remained reasonably steady. Although, with deference to Mr. Ball,[15] guidance on defining some of even the basic requirements under ERISA, such as the definition of "top hat" plans, has been somewhat slow. Indeed, it was only on October 13, 1993 (a Friday the 13th), that we finally received guidance on ERISA section 404(c),[16] which is an excep-

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8 *See, e.g.,*, IRC §§ 401-418E, 4971, 4975, 6057-6059 and 7476 *as amended by* Revenue Act of 1978, Pub. L. No. 95-600; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248; Deficit Reduction Act of 1984, Pub. L. No. 98-369; Unemployment Compensation Amendments of 1992, Pub. L. No. 102-318.

9 Summary of Major Provision of Williams-Javits Pension Reform Bill, S.4, 93d Cong., 1st Sess. 118 (1973) (containing remarks by Jacob J. Javits, co-sponsor of S.4).

10 *Id.*

11 *Id.*

12 In 1964, the shutdown of the Studebaker plant resulted in the termination of an underfunded defined-benefit pension plan. Many of the workers, some of them with 40 years of service, lost much of their accrued benefits. In part, the impact of this incident prompted Congress to enact ERISA in 1974. *See* H.R. Rep. No. 807, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4670-80.

13 *See* Stephen R. Bruce, PENSION CLAIMS: RIGHTS AND CONTRIBUTIONS 5-6 (2d ed. BNA 1993). The lost federal tax revenues from these tax advantages were estimated to be four billion dollars when ERISA was enacted. In 1990, the estimated lost revenue attributable to the tax advantages was in excess of 65 billion dollars. *Id.*

14 The proposed legislation become part of the GATT bill. *See* H.R. 5110, 103d Cong., 2d Sess. (1994)

15 David George Ball was Assistant Secretary of Labor for Pension and Welfare Benefits from 1989 until 1993 and was another speaker at the symposium.

16 ERISA § 404(c), 29 U.S.C. § 1104(c). This section provides:

tion to the fiduciary liability rules that limits the fiduciary's responsibility for permitting a participant's election among available investment vehicles. Section 404(c) was part of the original ERISA legislation in 1974; thus, it took approximately twenty years for that guidance to be promulgated.

The Department of Labor ("DOL") has generally left the interpretation of many of the key issues of ERISA to the courts. The recent *Mertens*[17] case has helped to define the liability of nonfiduciaries, and the *Shumate* case[18] has defined access of a creditor to a participant's plan benefits in bankruptcy. Both cases, however, have suddenly drawn the attention of Congress. Even perhaps more important is the *Harris Trust* case,[19] which may change the way insurance company general accounts are structured.

Preemption has remained a major testing ground despite such cases as *Pilot Life*[20] and *Ingersoll-Rand*.[21] In 1987, in *Fort Halifax Packing Co. v. Coyne*,[22] the Supreme Court found that ER-

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> (c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account (as determined under regulations of the Secretary) —
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> (1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
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> (2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Id.

17 Mertens v. Hewitt Assocs., 113 S. Ct. 2063 (1993).

18 Patterson v. Shumate, 112 S. Ct. 2242 (1992).

19 John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993). This decision had not been issued at the time of Mr. Sirkin's speech. The Court has since held that an insurer is a fiduciary under ERISA with regard to the portion of its general account that is not purely a guaranteed contract. *Id.*

20 Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

21 Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).

22 482 U.S. 1 (1987). Fort Halifax operated a poultry packaging and processing plant for more than a decade. *Id.* at 4. In 1981 it ceased operations and laid off almost all of its employees. *Id.* Eleven employees brought suit pursuant to a Maine statute which requires a one-time severance payment. *Id.* at 5. Fort Halifax argued that the Maine statute was preempted by ERISA. The Supreme Court, however, held that ERISA's preemption provision does not refer to state laws relating to any "employee benefit," but only to state laws relating to "employee benefit plans." *Id.* at 7-8 (citing 29 U.S.C. § 1144(a)). The Court found that Congress intended ERISA to provide a uniform set of administrative procedures for employers. 482 U.S. at 7-8. A need for such uniform procedures arises only with benefits which require ongoing administrative programs to comply with the employer's obligation. *Id.* Thus, the Court reasoned that Congress intended ERISA preemption to apply only to plans, not to

ISA did not preempt a state-required severance pay statute because it was of limited administrative burden and not a continuing obligation. But recently, in *Simas v. Quaker Fabric Corp.*,[23] the First Circuit stated that a Massachusetts severance benefit arrangement was preempted because it had continuing obligations and required case-by-case evaluations.

The distinctions become finer and finer while ERISA's reach broadens. In *Morgan Guarantee Trust Co. v. Tax Appeals Tribunal*,[24] the New York Court of Appeals found that ERISA preempted application of a real property transfer tax to employee benefit plans. In *Travelers Ins. Co. v. Cuomo*,[25] the Second Circuit affirmed the Southern District's finding that ERISA preempted the New York hospital surcharge statute.

Clearly ERISA is and will continue to be a developing law. For example, such complex issues as the extent to which a fiduciary can follow the directions of plan participants in voting plan shares on a merger or tendering shares in response to a tender offer remain unresolved. There have been several court cases and a series of DOL letters,[26] but this is a major issue that has affected

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one-time benefits. *Id.* at 12. The Court concluded that preemption of the Maine law would not serve the purpose intended by ERISA's preemption provision. *Id.* at 15.

23 6 F.3d 849 (1st Cir. 1993).

24 599 N.E.2d 656 (N.Y. 1992) (holding that ERISA preempted state law of general application). The *Morgan* court analyzed the law to determine whether it "related to" employee benefit plans. *Id.* at 659. Using a broad, common sense meaning, the court found that a tax imposed on a gain derived from a property transfer was preempted by ERISA. *Id.*

25 813 F. Supp. 996 (S.D.N.Y. 1993), *aff'd in part, rev'd in part*, 14 F.3d 708 (2d. Cir. 1993), *cert. granted sub nom.* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 305 (1994). Using a congressional intent analysis, the court held that although surcharges do not expressly refer to ERISA plans, the statutes did have a "connection with such plans and accordingly are preempted by ERISA." 813 F. Supp. at 1001. In *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (1993) (2d Cir. 1993), the Second Circuit affirmed the district court's analysis that surcharges are "related to" employee benefit plans within the meaning of ERISA's preemption clause. *Id.* at 714.

26 *Compare* Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982) (holding that corporate trustees did not violate ERISA merely because actions taken to promote interest of plan resulted in incidental benefit to administering corporation), *cert. denied*, 459 U.S. 1069 (1982) *with* Central Trust Bank, N.A. v. American Avents Corp., 771 F. Supp. 871 (S.D. Ohio 1989) (holding that trustee and committee were obligated to exercise fiduciary duties with respect to pension plans solely in interest of participants and beneficiaries). *See* Dep't Lab. Op. Letter re: *Polaroid Stock Equity Plan*, Feb. 23, 1989, *available in* LEXIS, Penben Library, ERISA File; *see also* Dep't Lab. Op. Letter re: *Avon Co.*, Feb. 23, 1988, *available in* LEXIS, Penben Library, ERISA File.

business for twenty years now and there is still no definitive answer.

The debates remain interesting. Some people believe that there are insufficient penalties under ERISA, and that it is too hard to find a lawyer to bring claims because of the lack of punitive damages and the difficulty in collecting legal fees. Others believe equally strongly that the law makes it too easy for a participant to harass the sponsor and to file nuisance lawsuits. Congress continues to debate the issue and the DOL promises more plan audits.

The DOL is not the only one auditing plans. The Internal Revenue Service ("IRS") has also promised more audits.[27] Virtually all employers are concerned about these audits, as well as the penalties imposed by the agencies for noncompliance with what they believe are purely technical requirements.

The DOL had an amnesty last year on Form 5500 annual report filings—pay $1000 and you are cured.[28] They received thousands of submissions.[29] Why? Not because sponsors were previously intentionally ignoring the requirements, but because they were confused. When the amnesty was announced and the lawyers, actuaries, and consultants began to examine whether their clients were in compliance with the Form 5500 filing requirements, they found that many employers had plans, such as severance or flexible spending accounts, that they never anticipated being covered by ERISA. In fact, these plans were covered. Then they all filed or, hopefully, most of them filed. Pension administration has become too complicated. There are thousands of pension plan administrators and services out there—including accounting firms, law firms, actuarial firms, insurance agents, and banks. Everyone wants to administer the plans properly, but it is a technical nightmare and no one gets it fully right. Thus, we have situations in which the participants believe they do not have enough remedies, the government is urged to audit compliance, and the sponsors (even the largest) are failing to comply because the rules are too technical and too burdensome. Most importantly, they are continually changing.

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[27] *See* 60 TAX NOTES 674, 674 (Aug. 9, 1993).

[28] *See, e.g., Labor Department Assesses $36 Million in Fines Under Civil Penalties Programs*, 19 Pens. & Ben. Rep. (BNA) 1903 (Oct. 26, 1992).

[29] *Id.* "Between 12,000 and 13,000 reports arrived in the mail October 20 under the grace period program . . . ." *Id.*

In 1994, the nondiscrimination regulations[30] implementing the 1986 tax reform become effective.[31] Obviously, eight years have lapsed. These rules do not, however, even apply until 1996 to tax exempt and governmental plans.[32] The IRS (which is, in fact, dedicated and concerned) had been so busy working to support Congress on possible new legislation that it could not address compliance with the old legislation. The result has been chaos and legal limbo for employers, participants, and fiduciaries. Hopefully, the tax area will become more settled now that we are getting final regulations from the Internal Revenue Service in the Tax Reform rules and changes in legislation have slowed down (at least for the moment).

ERISA is here to stay and it will be a major force in society. Most investments are seeking pension money, which raises fiduciary issues and prohibited transaction concerns. Health care issues such as surcharges raise ERISA preemption issues. A big issue in every merger or acquisition is benefits and severance pay. The big issue in many recent bankruptcies is the obligations to the pension plans and the PBGC. The big issues under the Family and Medical Leave Act[33] and Americans with Disabilities Act[34] involve benefit plans.

I feel sorry for today's young lawyers who want to be ERISA attorneys. I "learned" ERISA in two weeks and forever thereafter. We are asking them to learn much more and become experts in numerous areas of law. To practice ERISA today lawyers need to understand tax law, labor law, corporate law, and trust law, plus a little experience in bankruptcy, state insurance law, and litigation would be helpful.

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30 I.R.C. § 401(a)(4) (1986). The nondiscrimination law prohibits a tax qualified retirement plan from being designed or operated in favor of highly compensated employees. *Id.*

31 *See* 58 Fed. Reg. 3876, 3877 (1993). "On May 14, 1990 the IRS published in the Fed. Register proposed amendments to the Income Tax Regulations under § 401(a)(4) of IRC of 1986." *Id.* The proposed regulations were modified and published in 1990. Comments were received from the public, a hearing was held, and the regulations were adopted. *Id.* On August 10, 1992, the IRS proposed to extend the effective date of the regulation to years beginning on or after January 1, 1994. *Id.* Final regulations were issued on September 3, 1993. 58 Fed. Reg. 46,773 (1993).

32 59 Fed. Reg. 32,903, 32,905 (1994).

33 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

34 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1988 & Supp. IV 1993).

I've now lived with twenty years of ERISA. I expect that twenty years from now, practicing ERISA and benefits law will be even more complicated and the unanswered questions even more complex.

In closing, I would once again like to quote Senator Javits from his speech urging passage of ERISA:

> We have given our all—we have done our very best—to make this bill into strong and sound legislation. We have fought as hard as we know how to make this a good bill—and it is a very good bill—and now we shall be judged on what we have done.[35]

I leave it to you to judge what they did and what we have done since then.

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[35] Summary of Major Provision of Williams-Javits Pension Reform Bill, S.4, 93d Cong., 1st Sess. 118 (1973) (containing remarks by Jacob J. Javits, co-sponsor of S.4).