SLICING THROUGH THE GORDIAN KNOT: "EMPLOYERS," STANDING, AND REMOVAL UNDER ERISA

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The Employee Retirement Income Security Act of 1974 causes judicial and legislative confusion of mythological proportions. The simple issue of an employer's standing to sue his or her benefits provider under ERISA has become a major source of judicial uncertainty owing to ERISA's tangled web of interlocking definitional provisions. This note recommends that courts determine as a threshold matter whether a plaintiff is an "employer" under common law agency principles, rather than under ERISA's circular definition of the term. Once the term "employer" is defined more usefully in this fashion, ERISA's other crucial terms—such as "employee," "participant," "beneficiary," and "employee welfare benefits plan"—become helpful interpretive guides, instead of the statutory construction pitfalls they are currently. The author's recommendation of implementing a modified version of the minority approach would, if adopted, permit courts to slice through the Gordian Knot and swiftly resolve ERISA employer standing cases consistent with the statute's purpose.

I. INTRODUCTION

Greek mythology teaches of King Gordius, ruler of Phrygia, who ascended to the throne by cleverly fulfilling an oracle's prophesy that the next king would arrive at the Temple of Zeus in a wagon.[1] When Gordius and his family showed up at the temple in an ox cart, the Phrygians believed the oracle's prophecy had been fulfilled, and they made him king.[2] As his first regal act, Gordius dedicated his ox cart to Zeus and secured the wagon to the square of the god's temple with a knot so complex that unraveling it was considered impossible.[3] Legend forecast that

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1. THOMAS BULFINCH, MYTHS AND LEGENDS: THE GOLDEN AGE 58 (George H. Godfrey ed., David D. Dickerson & Co. 1923) (1863).

2. *Id.*

3. *Id.* at 58–59.

the person who untied the knot would someday rule over all of Asia.[4] Decades later, during the first stages of his advance into Asia Minor, Alexander the Great tried to untie the great knot.[5] After several unsuccessful attempts, Alexander grew frustrated that he could not solve the knot's puzzle.[6] Realizing that untangling the knot required clear thinking rather than hours of excruciating work,[7] Alexander drew his sword and sliced through the Gordian Knot in a single blow, thereby assuring his successful conquest of Asia.[8] As a result of this mythology, solving apparently intractable problems with a simple solution came to be known as "cutting the Gordian knot."[9]

Despite the best efforts of America's foremost jurists, courts have been unable to untangle a new Gordian Knot, one created by an unwitting Congress and a confused judiciary. Under the Employee Retirement Income Security Act of 1974 (ERISA),[10] Congress set forth a comprehensive system for nationwide regulation of employee benefit plans and disputes arising under such plans.[11] This sweeping legislation contained provisions that frustrated ERISA's fundamental purposes and failed to provide a mechanism for resolving questions resulting from Congress' poor draftsmanship.[12] Rather than consistently employing longstanding principles of statutory interpretation to deal with the confusion, courts have entangled themselves further by employing arbitrary and ineffective modes of analysis. Riddled with interlocking definitional provisions and complicated by contrived judicial construction of this statutory language, ERISA represents a legal puzzle of Gordian proportions.

ERISA was intended to protect employees' interests,[13] but today it unfairly prevents employers from litigating their common-law claims against insurance companies in state courts.[14] For example, suppose that Elroy Employer, a millionaire partner in and controlling shareholder of his twenty-five-attorney law firm, sues his in-state insurance company for failing to provide benefits due under his health insurance policy. If Elroy

4. *Id.* at 59.

5. *Id.*; *see also* CAROLINE H. HARDING & SAMUEL B. HARDING, STORIES OF GREEK GODS, HEROES, AND MEN 186 (1899).

6. BULFINCH, *supra* note 1, at 59.

7. *See* HARDING & HARDING, *supra* note 5, at 186.

8. *Id.*; *see also* BULFINCH, *supra* note 1, at 59.

9. *See, e.g.*, Daniel A. Farber, *Dollars and Sense: A "New Paradigm" for Campaign Finance Reform?*, 37 U. RICH. L. REV. 979, 982 n.13 (2003); Sheila Weinberger, *The Wimbledon Paradox and the World Court: Confronting Inevitable Conflicts Between Conventional and Customary International Law*, 10 EMORY INT'L L. REV. 397, 436 n.211 (1996).

10. 29 U.S.C. §§ 1001–1461 (2000).

11. 29 U.S.C. § 1001(b)–(c).

12. *See, e.g.*, 29 U.S.C. §§ 1002(1), (3), (5)–(8) (defining key ERISA terms).

13. *See, e.g.*, 29 U.S.C. § 1001.

14. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 64–67 (1987) (upholding removal to federal court of various ERISA claims based on complete preemption doctrine).

advances breach of contract,[15] tort,[16] fraudulent inducement,[17] or bad faith[18] claims against the insurance provider, then one justifiably would assume that Elroy's suit should be litigated in state court since state common law provides the legal basis for his claims. Elroy probably wants to sue in state court because he is more familiar with the local rules and judges than he is with the federal courts, and, as the plaintiff, Elroy may select the forum where he wants the litigation to proceed.[19] Once he files suit in state court, however, Elroy is surprised to learn that the insurance company is removing his state-law claims to federal court. Confident that the federal district court will remand the case because, as an employer, he lacks standing under ERISA, Elroy again is shocked when the district judge denies Elroy's motion for remand and requires Elroy to proceed in federal court. Even though Elroy is an employer, the district court believes that ERISA preempts his state-law claims, thereby converting them into federal questions within the exclusive purview of the federal courts.[20] Though the statute plainly should not apply to Elroy because he is an employer,[21] most courts agree that ERISA preempts nearly all employers' common-law claims against their insurance companies. This overextension of ERISA's remedial provisions stems from the inability of the courts to recognize the simplest solution to the ostensibly impenetrable problems created by ERISA's interlocking definitional provisions.

This note demonstrates that the prevailing judicial analysis of an employer's[22] standing to bring claims[23] under ERISA is flawed, and the author proposes an alternative line of reasoning that would cut through ERISA's Gordian Knot to yield consistent, rational outcomes. Part II provides a primer on the basic principles of forum selection, explores the purpose, effects, and intricacies of ERISA and its provisions, and reviews some fundamental tenets of statutory construction.[24] Part III discusses the majority and minority approaches to issues of employer standing under ERISA.[25] It both explains the mode of analysis used by the majority of courts to resolve this question and shows how the majority approach

15. *See, e.g.*, Harper v. Am. Chambers Life Ins. Co., 898 F.2d 1432, 1433 (9th Cir. 1990) (noting that breach of contract is state common law claim).

16. *See, e.g.*, *id.* (noting that tort claims are rooted in state common law).

17. *See, e.g.*, Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1349 (11th Cir. 1998) (noting that fraudulent inducement is state law claim).

18. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (noting that bad faith is state common law cause of action).

19. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981) (noting that the plaintiff usually first selects the forum in which to file suit).

20. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–67 (1987).

21. *See infra* Part III.C.2.

22. "Employer," as used herein, refers to one who satisfies ERISA's definition of the term. *See* 29 U.S.C. § 1002(5) (2000) (defining "employer"); *see also infra* Part II.B.3.c.

23. "Claim," as used herein, refers to a civil claim.

24. *See infra* Part II.

25. *See infra* Part III.C.1–2.

results in inconsistent rulings due to the complex, interlocking nature of ERISA's provisions.[26] Part III concludes by illustrating how a new mode of judicial analysis would resolve the inconsistencies that result from the prevailing jurisprudence on employer standing under ERISA.[27] Finally, Part IV recommends the adoption and consistent application of basic statutory interpretation principles through a modified interpretive approach to achieve consistent results in employer standing cases.

II. BACKGROUND: TYING THE KNOT

Before grappling with the flaws in the prevailing ERISA employer standing jurisprudence, the reader must understand the basic aspects of ERISA, procedural and substantive issues in litigation, and relevant principles of statutory interpretation. This brief primer on forum selection principles,[28] the purpose of ERISA and the intricacies of some of its key terms and provisions,[29] and statutory construction[30] will serve as a useful precursor to analyzing the problem.

A. Forum Selection

The employer standing conflict between a plaintiff employer and a defendant insurance company derives from the parties' adverse interests with regard to selection of a forum. Understanding the nature of this struggle requires familiarity with basic forum-selection principles, including standing,[31] subject matter jurisdiction,[32] and removal.[33]

1. Standing

The problem addressed by this note is really an issue of standing.[34] Courts regularly determine whether a party has standing to sue as part of their jurisdictional analysis,[35] though the doctrine of standing is not universally accepted.[36] Generally, the purpose of standing in a lawsuit is to

26. *See infra* Part III.A–B.
27. *See infra* Part III.C.3.
28. *See infra* Part II.A.
29. *See infra* Part II.B.
30. *See infra* Part II.C.
31. *See infra* Part II.A.1.
32. *See infra* Part II.A.2.
33. *See infra* Part II.A.3.
34. *See generally supra* Part I (describing question whether employer has standing to bring ERISA claim).
35. *See, e.g.*, Ass'n of Data Processing Servicing Orgs. v. Camp, 397 U.S. 150, 151–52 (1970); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).
36. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting); Fletcher, *supra* note 35, at 221 ("The structure of standing law in the federal courts has long been criticized as incoherent."); *see also id.* at 221 n.4 (citing academic sources critical of standing doctrine).

ensure that the parties have a stake in the outcome of litigation,[37] that there is an actual case or controversy,[38] and that parties really are adverse.[39] Standing analysis also ensures that federal courts hear cases over which they have jurisdiction under Article III of the U.S. Constitution.[40] Absence of standing prevents a party from bringing suit in U.S. courts.[41] For claims arising under federal statutes, Congress creates rights of action and designates those who may sue to enforce those rights.[42] At issue in this note is whether an "employer"[43] has standing to sue under ERISA.

2. Subject Matter Jurisdiction

A party with standing[44] may only bring suit in a particular court[45] if that court is empowered to hear the party's claim.[46] A federal district court may hear a lawsuit if the court has both subject matter jurisdiction[47] over the claim and judicial jurisdiction over the defendant.[48] Subject matter jurisdiction is the court's power to hear and decide the type of case before it.[49] The three types of subject matter jurisdiction are federal question jurisdiction,[50] diversity jurisdiction,[51] and supplemental jurisdic-

37. *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement*, 93 HARV. L. REV. 297, 311 (1979).

38. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Felix A. Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924) ("[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting . . . Advisory opinions are rendered upon sterilized issues.").

39. *See, e.g.*, Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 679–81 (1973).

40. *See, e.g.*, Fletcher, *supra* note 35, at 222; *see also* U.S. CONST. art. III, § 2, cl. 1.

41. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (noting that standing is required for one's lawsuit to proceed); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (same).

42. *See* Fletcher, *supra* note 35, at 251.

43. *See infra* Part II.B.3.c (discussing ERISA "employer").

44. *See infra* Part II.A.1.

45. The forum issues raised in this note refer solely to the choice between litigating in state or federal court and, more specifically, whether federal courts should conclude that employer's state-law insurance claims belong in federal court. Issues of *forum non conveniens* and venue are beyond the scope of this note and therefore will not be discussed.

46. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties.").

47. Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. REV. 1, 3 (1988).

48. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945). Judicial jurisdiction is a form of asserting a court's authority over the person of a defendant. *Id.* at 316. Judicial jurisdiction is not relevant to the scope of this note.

49. *See* Martineau, *supra* note 47, at 3 ("[S]ubject matter jurisdiction means the authority to adjudicate the type of controversy involved in an action.").

50. *See* 28 U.S.C. § 1331 (2000) (federal question jurisdiction statute).

51. *See* 28 U.S.C § 1332 (federal diversity jurisdiction statute). Diversity jurisdiction is not relevant to the scope of this note and therefore will not be discussed further.

tion.[52] The federal question statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[53] Thus, parties' claims "arising under" federal law may be litigated in federal court.[54] ERISA claims fall under federal question jurisdiction since ERISA is a federal statute.

a. Well-Pleaded Complaint Rule

The traditional method of determining whether a party's claim arises under federal law is the "well-pleaded complaint" rule.[55] In *Louisville & Nashville Railroad Co. v. Mottley*, the Supreme Court handed down the well-pleaded complaint rule as the primary tool for federal question analysis.[56] In that case, the plaintiff railroad passengers sustained injuries due to the defendant railroad company's negligence.[57] The plaintiffs agreed to release their claims in exchange for the railroad's promise to provide them with free rail transportation for the rest of their lives.[58] Several years later, Congress proscribed issuance of free railroad passes like those the plaintiffs received.[59] The railroad refused to renew the plaintiffs' passes, and the plaintiffs filed suit in federal district court.[60] On appeal, the Supreme Court held that the district court did not have jurisdiction over the plaintiffs' claims because the complaint did not state a federal question sufficient to justify the district court's assertion of jurisdiction.[61] Even though the plaintiffs' complaint discussed the federal defense likely to be invoked by the railroad,[62] the Supreme Court reasoned that it would be inappropriate for district courts to rest their jurisdiction upon an argument that a defendant *might* raise.[63]

Thus, *Mottley* requires courts to look only within the four corners of a complaint to determine whether *the plaintiff's claim* raises a federal question.[64] Under this rule, courts cannot look beyond the complaint in

52. *See* 28 U.S.C § 1367 (federal supplemental jurisdiction statute). Supplemental jurisdiction is not relevant to the scope of this note and therefore will not be discussed further.

53. 28 U.S.C § 1331.

54. *See id.*

55. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (recognizing well-pleaded complaint rule as "long settled law"); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10–11 (1983) (noting longevity of "powerful" well-pleaded complaint rule).

56. 211 U.S. 149, 152–53 (1908).

57. *Id.* at 150.

58. *Id.*

59. *Id.* at 151.

60. *Id.* at 150.

61. *Id.* at 154.

62. *Id.* at 151.

63. *Id.* at 153.

64. *See id.* at 152 (finding federal question jurisdiction where "the plaintiff's statement of his own cause of action shows that it is based upon [federal] law[]"); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10 (1983) (noting that presence of federal question "must be deter-

anticipation of possible federal defenses[65] or counterclaims[66] that a defendant might assert. Consequently, the plaintiff, as "the master of the complaint," can carefully craft a complaint that asserts claims over which only state courts may exercise jurisdiction.[67] Subject to a few exceptions,[68] the well-pleaded complaint rule continues to thrive today.[69]

b. Exceptions to the Well-Pleaded Complaint Rule

Nevertheless, the Supreme Court has carved out several exceptions to the well-pleaded complaint rule. When a court determines that Congress intended to create an exclusive remedy,[70] then the congressional enactment completely preempts that area of law.[71] For example, state law claims that fall within the purview of section 301 of the Labor Management Relations Act of 1947[72] are completely preempted.[73] State usury claims against national banks similarly must give way to federal remedies.[74] In 1987, the Supreme Court held that ERISA also completely preempts state-law claims relating to employee benefit plans.[75]

3. Removal

Plaintiffs begin litigation by selecting a forum in which to file suit.[76] A defendant may then countermand the plaintiff's choice by having the suit removed.[77] Removal is one legal maneuver frequently used by defendants to offset plaintiffs' preferences for state court. A defendant

mined from what necessarily appears in the plaintiff's statement of his own [complaint]" (citing Taylor v. Anderson, 234 U.S. 74, 75–76 (1914))).

65. *See Franchise Tax Bd.*, 463 U.S. at 10 (explaining absence of district court's jurisdiction if plaintiff's complaint asserts state-law claim irrespective of defendant's federal defense); *see also Anderson*, 234 U.S. at 75–76 (same).

66. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002) (reaffirming well-pleaded complaint rule and declining to change prevailing rule to "well-pleaded-complaint-*or-counterclaim* rule").

67. *See id.*; Caterpillar, Inc. v. Williams, 482 U.S. 386, 398–99 (1987).

68. *See infra* Part II.A.2.b.

69. *See, e.g.*, *Holmes Group*, 535 U.S. at 830–32 (reaffirming well-pleaded complaint rule). Interestingly, the Supreme Court has noted that there exist viable alternatives to the well-pleaded complaint rule under which federal question determinations may occasionally require looking to a defendant's answer. *See Franchise Tax Bd.*, 463 U.S. at 10 n.9.

70. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

71. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 62–67 (1987).

72. 29 U.S.C. § 185 (2000).

73. *See Metro. Life*, 481 U.S. at 65 (noting that the "extraordinary pre-emptive power" of section 301 of the Labor Management Relations Act "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule").

74. *See* Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 4–6 (2003).

75. *See Metro. Life*, 481 U.S. at 66–67 (holding that ERISA's civil enforcement provisions completely preempt state-law claims relating to employee benefit plans); *see infra* Part II.B.2.b (discussing ERISA's complete preemption provisions).

76. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981) (noting that the plaintiff usually first selects the forum in which to file suit).

77. *See generally* 28 U.S.C. §§ 1441, 1446 (2000) (codifying removal procedures).

may remove to federal court a claim that a plaintiff files in state court if the federal court could have heard the claim had the plaintiff originally filed in the federal forum.[78] Often this determination hinges upon whether the plaintiff's cause of action falls within the district court's subject matter jurisdiction as a federal question.[79] A claim that has been removed generally will be litigated in federal court, provided that subject matter jurisdiction exists.[80] If the court determines that it lacks subject matter jurisdiction before judgment is entered, then the court will remand the action to state court.[81]

B. Employee Retirement Income Security Act of 1974

Because ERISA is a federal statute, the fundamental principles of forum selection described above apply.[82] Before examining the implications of forum selection in the ERISA context, one must become familiar with ERISA itself.

1. Purpose of ERISA

Congress enacted ERISA[83] to level the proverbial playing field between insurance providers and their policyholders.[84] Significant increases in the quantity, breadth, and magnitude of employees' insurance and pension plans prompted Congress to respond to public concern regarding employee benefit plans.[85] Congress found "that the continued well-being and security of millions of employees and their dependents are directly affected by these plans."[86] Prior to ERISA's enactment, Congress viewed the benefit plan landscape as affording insufficient protections to

78. 28 U.S.C § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

79. *See* 28 U.S.C § 1331 (federal question statute); 28 U.S.C § 1441(b) (authorizing removal from state court of federal question claims irrespective of parties' citizenship or residency); *see also supra* Part II.A.2.

80. *See* 28 U.S.C. § 1447(c) (2000); *see also* 28 U.S.C §§ 1331, 1441(a). Remand of a removed case may be granted on grounds other than lack of subject matter jurisdiction, such as a defendant's error in filing removal papers in the wrong federal court, failure to file a notice of the removal within thirty days of the defendant's receipt of a removable complaint, or failure to notify the state court from which a cause is removed. *See* 28 U.S.C §§ 1446(a), (b), (d). For purposes of this note, however, only subject matter jurisdictional defects will be examined in the removal and remand context.

81. 28 U.S.C § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

82. *See supra* Part II.A (discussing forum selection principles).

83. Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001–1461 (2000)).

84. *See* 29 U.S.C. § 1001 (2000) (outlining congressional findings).

85. *See* 29 U.S.C. § 1001(a) (finding "that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial").

86. *Id.*

employees nationwide.[87] Plan subscribers also received little information about the manner in which their benefit plans were administered.[88] Congress enacted ERISA to remedy these problems.[89]

2. Relevant ERISA Provisions

After determining ERISA's purpose and design, Congress attempted to codify these characteristics into ERISA's statutory language. In response to the problems it identified with employee benefits plans, Congress drafted ERISA's civil enforcement,[90] preemption,[91] and anti-inurement provisions.[92]

a. Civil Enforcement Provisions

One of ERISA's remedial hallmarks is its civil enforcement scheme.[93] The statute's civil enforcement provisions authorize four par-

87. *See id.* For example, Congress noted that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." *Id.* Congress intended ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b); *accord* Giardono v. Jones, 867 F.2d 409, 412 (7th Cir. 1989) (concluding that "ERISA was enacted by Congress for the purpose of protecting the interests of employees and their beneficiaries in employee benefit plans").

88. 29 U.S.C. § 1001(a) (citing "the lack of employee information . . . concerning [benefit plan] operation"). Congress concluded that "it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made . . . with respect to the establishment, operation, and administration of such plans." *Id.*

89. *See id.* (finding it "desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness"); *see also* 29 U.S.C. § 1001(b) (declaring ERISA's aim to "require[] the disclosure and reporting to participants and beneficiaries of financial and other information with respect [to employee benefit plans] by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans"); 29 U.S.C. § 1001(c) (declaring ERISA's goal as "improving the equitable character and the soundness of [employee benefit plans]").

90. *See infra* Part II.B.2.a.

91. *See infra* Part II.B.2.b.

92. *See infra* Part II.B.2.c.

93. 29 U.S.C. § 1132(a). The full text of ERISA's civil enforcement provisions reads as follows:

A civil action may be brought—

(1) by a participant or beneficiary—
  (A) for the relief provided for in subsection (c) of this section, or
  (B) 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;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

ties to bring claims: (1) a participant,[94] (2) a beneficiary,[95] (3) a fiduciary,[96] and (4) the U.S. Secretary of Labor.[97] ERISA grants these parties nearly exclusive rights to bring suit under ERISA in federal court.[98] State courts have concurrent jurisdiction in those rare cases where exclusivity does not exist.[99]

Of the four parties empowered to sue under ERISA, this note focuses on "participants" and "beneficiaries."[100] The statute provides that

> [a] civil action may be brought . . . by a participant or beneficiary . . . 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.[101]

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(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (*l*) of this section;
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);
(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

Id. References to ERISA's "civil enforcement scheme" or "civil enforcement provisions" hereinafter generally will refer to 29 U.S.C. sections 1132(a)(1)(B) (authorizing "participants" and "beneficiaries" to file suit for recovery of basic insurance plan benefits) and 1132(e) (establishing courts' jurisdiction for ERISA claims).

94. *See* 29 U.S.C. § 1132(a)(1)–(4), (9) (authorizing a "participant" to bring suit for various remedies); *see also* 29 U.S.C. § 1102(7) (defining "participant").

95. *See* 29 U.S.C. § 1132(a)(1)–(4), (9) (authorizing a "beneficiary" to bring suit for various remedies); *see also* 29 U.S.C. § 1102(8) (defining "beneficiary").

96. *See* 29 U.S.C. § 1132(a)(2)–(3), (9) (authorizing a "fiduciary" to bring suit for various remedies). The role of ERISA fiduciaries in the civil enforcement of ERISA is largely beyond the scope of this note, so discussion of fiduciaries will be limited.

97. *See* 29 U.S.C. § 1132(a)(2), (4)–(6), (8)–(9) (authorizing the Secretary to bring suit for various remedies); *see also* 29 U.S.C. § 1102(13) (defining "Secretary" as "the [U.S.] Secretary of Labor").

98. *See* 29 U.S.C. § 1132(e).

99. *See id.*

100. Since the subject of this note deals principally with private rights of action, discussion of the rights of the Secretary of Labor is unnecessary. This note also excludes discussions of suits by ERISA fiduciaries. Unlike ERISA participants and beneficiaries, fiduciaries are not defined in terms of employers and employees. *Compare* 29 U.S.C. § 1132(a)(3) (listing "fiduciary" without clear definition), *with* 29 U.S.C. §§ 1002(7), (8) (defining "participant" and "beneficiary"). Also, when a fiduciary employer files suit on behalf of its employees, then Congress' remedial purposes are not upset because ERISA is, in effect, protecting employees' rights and interests through the fiduciary's suit. *See* Giardono v. Jones, 867 F.2d 409, 412 (7th Cir. 1989) (discussing role of fiduciary when bringing suit); *see also* 29 U.S.C. § 1001 (delineating ERISA's remedial purpose); *supra* Part II.B.1 (discussing ERISA's purpose).

101. 29 U.S.C. § 1132(a)(1)(B).

This civil enforcement scheme[102] expressly authorizes "participants" and "beneficiaries" to file suit to obtain benefits denied by an insurance provider. This scheme represents the sole means of recovering benefits under the statute.[103] Consequently, in a state-law suit against an insurance provider, the insurance company may assert a federal defense of preemption[104] to the state-law claims in an attempt to get the state-law claim dismissed from state court.[105]

b. Complete Preemption

In addition to providing a federal preemption defense, ERISA's civil enforcement provisions so completely subsume[106] any state-law claims within the scope of its enforcement scheme that ERISA effectively transforms related state-law claims into federal questions, which then are removable to federal court.[107] Through specific enactments, Congress unambiguously expressed its intent that ERISA would completely preempt most state-law insurance claims by establishing the sole available remedy.[108] As a result, the Supreme Court held that these provisions transformed state-law claims within their scope, making them "necessarily federal in character"[109] and therefore removable as federal questions.[110] These "complete preemption" provisions provide that ERISA's civil enforcement scheme "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[111] This supersedure clause, though not limitless,[112] is quite "expansive."[113]

102. References to ERISA's "civil enforcement scheme" or "civil enforcement provisions" hereinafter generally will refer to 29 U.S.C. § 1132(a)(1)(B) (authorizing "participants" and "beneficiaries" to file suit for recovery of basic insurance plan benefits) and 1132(e) (establishing courts' jurisdiction for ERISA claims).

103. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52–56 (1987). These enforcement provisions do not, however, foreclose a party's recovery under state law when ERISA does not preempt a state-law claim against an insurance company.

104. It is important to distinguish between the federal defense of preemption discussed here and the doctrine of "complete preemption." Federal defense preemption simply results in dismissal of a plaintiff's state-law claims without converting the case into a federal-law claim such that it remains nonremovable under the *Mottley* rule. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) (discussing federal preemption defenses). "Complete preemption," on the other hand, *transforms* a plaintiff's state-law claims into removable federal questions, and a defendant can immediately remove the cause to federal court. *See infra* Part II.B.2.b; *see also Metro. Life*, 481 U.S. at 63–64 (introducing "complete preemption").

105. *See Pilot Life*, 481 U.S. at 54.

106. This complete displacement is codified at 29 U.S.C. § 1144(a) (2000) (ERISA's supersedure clause).

107. *See Metro. Life*, 481 U.S. at 67 (holding that state-law claim within scope of ERISA's civil enforcement scheme was "necessarily federal in character by virtue of the clearly manifested intent of Congress"); *see also* 29 U.S.C. § 1144(a).

108. *See Metro. Life*, 481 U.S. at 62–67; *see also* 29 U.S.C. § 1144(a).

109. *Metro. Life*, 481 U.S. at 67.

110. *See* 28 U.S.C. § 1331 (2000) (federal question statute); *see also supra* Part II.A.3 (discussing removal).

111. 29 U.S.C. § 1144(a).

c. Anti-Inurement

To allay concerns about improper self-dealing,[114] ERISA prohibits employers from receiving benefits from employee benefit plans.[115] Through its "anti-inurement" provision, ERISA ensures that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."[116] Some courts have concluded that this anti-inurement provision is relevant to the question whether an "employer" has standing under ERISA because the provision arguably suggests that Congress did not intend ERISA to give standing to "employers" generally.[117] Other courts have held that the anti-inurement provision applies only to an employer's interactions with employees' pension plan assets,[118] rather than to general health plan benefits.

3. ERISA's Terminology

There are several key ERISA terms critical to interpreting the statute's civil enforcement and preemption provisions. These terms include "employee benefit plan,"[119] "employee welfare benefit plan,"[120] "employer,"[121] "employee,"[122] "participant"[123] and "beneficiary."[124]

a. "Employee Benefit Plan"

ERISA governs employee benefit plans.[125] An ERISA "employee benefit plan" is "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit

112. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (discussing the "saving clause" and "deemer clause" that restrict ERISA's "supersedure clause"); *see also* 29 U.S.C. § 1144(b)(2)(A), (b)(2)(B) (ERISA's "saving clause" and "deemer clause," respectively). ERISA's "saving" and "deemer" clauses are not relevant to the scope of this note.

113. *Pilot Life*, 481 U.S. at 47 (noting supersedure clause's "expansive sweep").

114. *See* Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 357–58 (3d Cir. 1999); Prudential Ins. Co. v. Doe, 76 F.3d 206, 209 (8th Cir. 1996).

115. *See* 29 U.S.C. § 1103(c)(1) (anti-inurement provision).

116. *Id.*

117. *See, e.g.*, Giardono v. Jones, 867 F.2d 409, 411–12 (7th Cir. 1989); Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1085–86 (N.D. Ill. 1993).

118. *See, e.g.*, Elward v. Benicorp Ins. Co., 201 F. Supp. 2d 939, 941 (N.D. Ind. 2002).

119. *See infra* Part II.3.B.a.

120. *See infra* Part II.3.B.b.

121. *See infra* Part II.3.B.c.

122. *See infra* Part II.3.B.d.

123. *See infra* Part II.3.B.e.

124. *See infra* Part II.3.B.f.

125. *See* 29 U.S.C. § 1002(3) (defining "employee benefit plan"). *See generally id.* § 1132(a) (requiring employee benefit plan to trigger civil enforcement provisions).

plan and an employee pension benefit plan."[126] In essence, "employee benefit plan" is ERISA's categorical term for an "employee welfare benefit plan"[127] or an "employee pension benefit plan."[128]

b. "Employee Welfare Benefit Plan"

The comprehensive term "employee welfare benefit plan" encompasses health insurance benefits.[129] ERISA defines the term as follows:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing its participants or their beneficiaries, through the purchase of insurance or otherwise, [various benefits].[130]

An insurance policy can be an employee welfare benefit plan.[131] Since ERISA includes "employee welfare benefit plan" within the definition of "employee benefit plan," courts consider the statute's civil enforcement provisions in insurance plan benefits cases.[132]

c. "Employer"

ERISA's use of the word "employer" causes tremendous confusion in the courts. ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to

126. 29 U.S.C. § 1002(3). This definition also applies to any instances of the statute's use of the single word "plan." *Id.*

127. *See* 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan").

128. *See* 29 U.S.C. § 1002(2)(A) (defining "employee pension benefit plan"). The focus of this note is on litigation with respect to employee welfare benefit plans, which relates to insurance claims. Therefore, while this note's analysis of ERISA's interlocking definitional provisions and their impact on the removability of employers' state-court claims may apply in the context of pension claims, this analysis will address specifically health benefits-related claims.

129. *See* 29 U.S.C. § 1002(1).

130. *Id.* The full text of this definition reads as follows:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id.

131. *See id.* (defining "employee welfare benefit plan" as "any plan . . . established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing its participants and their beneficiaries, *through the purchase of insurance* or otherwise, [various benefits]" (emphasis added)).

132. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (discussing civil enforcement provisions in insurance benefits case); Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1351 (11th Cir. 1998) (same).

an employee benefit plan[,] and includes a group or association of employers acting for an employer in such capacity."[133] Although the definition of an ERISA "employer" seems basic, its simplicity can be misleading. A closer examination reveals that ERISA essentially defines an "employer" as one who acts as or on behalf of an employer, thereby couching the word's definition in its own terms. Furthermore, problems result from other terms' use of "employer" in their definitions.[134] For example, use of the word "employer" within ERISA's definition of "employee" creates yet another circularity problem that complicates courts' interpretation of ERISA.[135]

d. "Employee"

Similarly, ERISA defines an "employee" as "any individual employed by an employer."[136] This statutory definition provides little interpretive guidance to courts.[137] In fact, the definition is so "completely circular" that it "explains nothing."[138] Part of the problem with ERISA's definition of "employee" is the fact that it includes the term "employer," which is itself defined in a circular fashion.[139]

The Supreme Court has interpreted the term "employee" under general common law agency principles.[140] In *Nationwide Mutual Insurance Co. v. Darden*, the Court held that when "determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."[141] The *Darden* Court noted several other factors that can inform agency analysis, including whether, and the degree to which, a hired party's work and benefits are controlled by some other party.[142]

e. "Participant"

As discussed above, an employee welfare benefit plan "participant" has standing to sue under ERISA.[143] An ERISA "participant" is defined as

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may be-

133. 29 U.S.C. § 1002(5).
134. *See infra* Parts II.B.3.d, II.B.3.e.
135. *See infra* Part II.B.3.d.
136. 29 U.S.C. § 1002(6).
137. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (concluding that ERISA's definition of "employee" is a "nominal" one).
138. *Id.*
139. *See* 29 U.S.C. § 1002(6); *see also supra* Part II.3.c.
140. 503 U.S. at 323 (adopting common-law agency test for defining ERISA "employee").
141. *Id.* (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)).
142. *Id.* at 323–24.
143. *See supra* Part II.2.a; *see also* 29 U.S.C. § 1002(7) (defining "participant").

> come eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.[144]

Classification of a party as a "participant" raises serious interpretive issues because ERISA defines the term using other poorly and circularly defined terms, such as "employee,"[145] "employer,"[146] "employee benefit plan,"[147] and "beneficiary."[148] This definition also muddles the question whether an "employer" also classified as a "participant" has standing to sue under ERISA.

f. "Beneficiary"

A "beneficiary" also is entitled to bring suit under ERISA.[149] An ERISA "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."[150] Like several other ERISA terms such as "employee" and "employee benefit plan," the definition of "beneficiary" presents interpretive problems in part because of its inclusion of the word "participant."

The relationship between a "participant" and an ERISA "beneficiary" contributes further to the intractability of the courts' current predicament. Although some courts reason that a person cannot be both a "participant" in and "beneficiary" of a single employee benefit plan,[151] other courts hold that one person simultaneously can be an ERISA "participant" and "beneficiary" under the same plan.[152]

4. Seeing the Puzzle

When viewed together with the statute's preemption and anti-inurement provisions, ERISA's definitions muddy what is already a confusing area of statutory interpretation. It is easy to see why most courts stumble when determining whether employers have standing to sue under ERISA as either "participants" or "beneficiaries." The answer to this employer standing question determines whether ERISA governs an employer's insurance policy, and therefore whether ERISA preempts

144. 29 U.S.C. § 1002(7).
145. *See* 29 U.S.C. § 1002(6); *see also supra* Part II.3.d.
146. *See* 29 U.S.C. § 1002(5); *see also supra* Part II.3.c.
147. *See* 29 U.S.C. § 1002(3); *see also supra* Part II.3.a (describing how "employee benefit plan" includes "employee welfare benefit plan," which in turn encompasses several other poorly defined terms).
148. *See* 29 U.S.C. § 1002(8); *see also infra* Part II.3.f.
149. *See supra* Part II.B.2.a; *see also* 29 U.S.C. § 1002(8) (defining "beneficiary").
150. 29 U.S.C. § 1002(8).
151. *See, e.g.*, Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1087 (N.D. Ill. 1993).
152. *See, e.g.*, Wolk v. UNUM Life. Ins. of Am., 186 F.3d 352, 357–58 (3d Cir. 1999).

any state-law claims the employer may wish to bring against the policy's issuer. The answer also determines whether an insurance company may remove to federal court an employer's claims against it. This intricate chain of definitions, interpretation, standing, and removal ultimately weaves a legal knot of Gordian proportions.

C. Principles of Statutory Construction

With a basic understanding of the problems with which courts are confronted when considering employer standing issues, a brief overview of some fundamental principles of statutory interpretation will further underpin this note's analysis. Three relevant interpretive tools include plain language, legislative history, and administrative interpretation.

1. Plain Language

Nearly all statutory interpretation begins with the plain language of the statute, which is the "touchstone" of statutory construction.[153] By looking to the plain meaning of a statute's words, courts attempt to determine legislative intent.[154] If the language of a statute clearly reveals congressional intent, then that intent generally controls judicial interpretation of the statute.[155] Courts look past the plain language of a statute only if the legislature's intent is unclear.[156]

The "plain meaning" or "plain language" principle is important to employer standing analysis under ERISA for two reasons. First, the prevailing jurisprudence on the construction of ERISA's civil enforcement provisions (and the corresponding issue of employer standing) claims it is based on a plain language interpretation of ERISA.[157] Second, the plain language principle generally assumes the plain meaning of a statute's provisions will be readily apparent.[158] However, ERISA's circular and interlocking definitions arguably preclude any meaningful application of the plain meaning rule.[159]

153. *See* Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125–26 (1985).

154. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

155. *Id.*

156. *See id.* at 843.

157. *See, e.g.*, Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1350–51 (11th Cir. 1998) (holding that employer had standing under ERISA's "plain language"). As demonstrated in Part III, *infra*, this perspective strains credibility in light of ERISA's ambiguous, interlocking definitional provisions.

158. *See Chevron*, 467 U.S. at 842–43.

159. *See infra* Part III.A–B.

2. Legislative History

Records of congressional debates, reports, and actions comprise legislative history.[160] Though not entirely without criticism,[161] courts rely upon legislative history to help them divine the intent of the legislature when the plain language of a statute fails to convey legislative intent unambiguously.[162] Courts only defer to the legislative history when it expresses clear congressional intent in opposition to the statute's plain meaning.[163] However, legislative history is sparse on the question whether an "employer" has standing under ERISA as a "participant" or "beneficiary."[164]

3. Administrative Interpretation

Similarly, courts look to executive agencies' interpretations of the statutes they enforce.[165] If administrative regulations conflict with a statute's plain meaning, then the regulations are invalid.[166] However, if a statute's language and legislative history do not resolve an issue clearly, then courts may give some deference to an executive agency's interpretation of a statute if the agency was authorized by Congress to address issues not resolved under plain language principles.[167] Generally, courts turn to regulations which are "reasonably defensible" to help illuminate congressional intent.[168]

Congress authorized the U.S. Department of Labor to promulgate regulations for enforcing ERISA's provisions.[169] Accordingly, the Secretary of Labor issued regulations that address issues relating to employer standing.[170] For example, the Department of Labor issued a regulation clarifying that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the

160. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 27 (1997).

161. *See, e.g.*, *id.* at 29–37 (outlining some criticisms of legislative history as a tool for statutory construction).

162. *See id.* at 29.

163. *See* Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 355 (3d Cir. 1999) (holding that "absent a clearly expressed legislative intention to the contrary, [the statute's] language must ordinarily be regarded as conclusive" (citation omitted)).

164. Harper v. Am. Chambers Life Ins. Co., 898 F.2d 1432, 1434 (9th Cir. 1988) ("Scant legislative history illuminates the terms 'participant' and 'beneficiary' or who may sue under the ERISA enforcement scheme.").

165. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

166. *See* Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 126 (1985).

167. *See, e.g.*, *Wolk*, 186 F.3d at 356.

168. Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 891 (1984); *see Chevron*, 467 U.S. at 844.

169. 29 U.S.C. § 1135 (2000) ("[T]he Secretary [of Labor] may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.").

170. *See, e.g.*, 29 C.F.R. § 2510.3-3 (2000).

plan."[171] The Department also created an "employee-owner" exception providing that a person who works for his own wholly-owned business is not to be considered an "employee" for ERISA purposes.[172] The Department further notes that a partner in a partnership is not an "employee" of the partnership under ERISA.[173] These regulations clarify how different types of "employers" are treated by ERISA.

III. ANALYSIS: ASSESSING THE PUZZLE

A. ERISA's Interlocking Definitional Provisions

Analysis of the confused jurisprudence on employer standing under ERISA is possible only after fully understanding the problems underlying the confusion. As discussed above, ERISA's definition of key terms creates a tangled web of legislative proclamation.[174] This quandary stems from two main problems: (1) some ERISA terms are poorly defined, and (2) these poorly defined terms then are used to define other terms. These problems are compounded several times over until the statute's definitions become impossibly circular.

1. "Employee" and "Employer"

ERISA defines "employer" as one "acting directly as an *employer*, or indirectly in the interest of an *employer*, in relation to an employee benefit plan."[175] This definition provides almost no assistance to the courts because the word "employer" is couched in its own terms. ERISA's definition of "employer" is akin to a child defining "friend" as "someone who is my friend" or "someone who treats me like a friend."

Interpreting the statute becomes even more difficult when courts turn to ERISA's definition of "employee." The statute defines an "employee" as "any individual employed by an *employer*."[176] Thus, determining the meaning of "employee" necessarily requires a judge to look back to the circular definition of "employer." A closer examination of the definition of "employee" suggests that an ERISA "employee" essentially is a "non-employer." After all, if an "employee" was the same as an "employer," then Congress would not have needed two distinct terms.

An example more clearly illustrates the difficulty. Suppose that the court must determine whether Elroy Employer is an "employee" or an

171. 29 C.F.R. § 2510.3-3(b).

172. 29 C.F.R. § 2510.3-3(c)(1). This provision explains that "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse." *Id.*

173. 29 C.F.R. § 2510.3-3(c)(2). This provision provides that "[a] partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." *Id.*

174. *See supra* Part II.B.3.

175. 29 U.S.C. § 1002(5) (2000) (emphasis added).

176. 29 U.S.C. § 1002(6) (emphasis added).

"employer" under ERISA.[177] Since an "employer" can include a partnership or corporation,[178] Elroy's law firm could be an "employer" within ERISA's definition of the term. The court then would look to the definition of "employee" to answer whether Elroy is an "employee." Since Elroy arguably is "an[] individual employed by"[179] his law firm, the court may be correct in concluding that Elroy is an "employee" for ERISA purposes. However, Elroy just as easily fits ERISA's definition of "employer" too because, as managing partner and controlling shareholder of his law firm, he "act[s] directly as an employer, or indirectly in the interest of an employer," when selecting the firm's insurance provider.[180] Accordingly, under ERISA's definitions, Elroy is both an "employer" and "employee." Whether someone actually may possess such "dual status" under ERISA is a question with significant ramifications on the employer standing issue.

2. "Employee" and "Participant"

The terms "participant" and "employee" are another example of ERISA's interlocking definitional provisions. An ERISA "participant" is "any *employee* or former *employee* of an *employer* . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers *employees* of such *employer* . . . or whose beneficiaries may be eligible to receive any such benefit."[181]

By so prevalently including the poorly defined words "employee" and "employer" within the definition of "participant," Congress added another layer to the "employer"-"employee" circularity problem discussed above.[182] Moreover, applying these definitions to actual litigants becomes significantly more difficult for the courts. For instance, is Elroy an ERISA "participant"? If he is an "employee," then the answer is yes.[183] If he is an "employer," then the answer is no.[184] Unfortunately, the court cannot answer whether Elroy is a "participant" because, as illustrated above, the court does not know whether Elroy is an "employee," an "employer," or both.[185]

177. *See supra* text accompanying notes 14–21 for a reintroduction to Elroy Employer.

178. ERISA's definition of "employer" refers to "any *person*." 29 U.S.C. § 1002(5) (emphasis added). The statute then broadly defines "person" as "an individual, partnership . . . corporation, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9). Thus, an "employer" may be either an "individual" or a nonhuman legal entity, such as a "partnership" or "corporation." *See id.*; *see also* 29 U.S.C. § 1002(5).

179. 29 U.S.C. § 1002(6).

180. 29 U.S.C. § 1002(5).

181. 29 U.S.C. § 1002(7) (emphasis added).

182. *See supra* Part III.A.1.

183. *See* 29 U.S.C. § 1002(7) (defining "participant" essentially as an "employee").

184. *See id.* (distinguishing between "employee" and "employer").

185. *See supra* Part III.A.2.

3. "Participant" and "Beneficiary"

ERISA's threads become even more tangled when courts attempt to reconcile the definitions of "participant" and "beneficiary." An ERISA "beneficiary" is "a person designated *by a participant*, or *by the terms of an employee benefit plan*, who is or may become entitled to a benefit thereunder."[186] This definition suggests that someone can become a "beneficiary" in either of two ways: designation by a "participant" or designation by a plan.

a. Designation by a "Participant"

First, a person becomes an ERISA "beneficiary" if a "participant" names him or her as such.[187] For example, if a husband is an employee of a business that provides him with insurance as part of an employee benefit plan, then he can name his wife as a "beneficiary" entitled to a payout upon his death. As an "employee" of a business,[188] the husband is an ERISA "participant."[189] As a "participant," the husband then can name his wife a "beneficiary."[190]

This analysis seems simple in the abstract; however, practical application becomes much more difficult. For example, what happens if the husband in this example is Elroy? Would Elroy's wife be a "beneficiary"? If Elroy is a "participant," then his wife would be a beneficiary.[191] If Elroy is not a "participant," then she would not be.[192] The question then becomes whether Elroy is a "participant," and, as discussed above, the court cannot answer *that* question clearly either.[193]

b. Designation by a Plan

The second way a person becomes an ERISA "beneficiary" is if he or she is designated one "by the terms of an employee benefit plan."[194] Using the husband-wife example, assume that the husband's insurance policy expressly lists his wife as one "who is or may become entitled to a benefit [under the policy]."[195] Is the wife now a "beneficiary"? Answer-

186. 29 U.S.C. § 1002(8) (emphasis added).

187. *See id.*

188. A business, such as a corporation, is an "employer" under the statute. *See* 29 U.S.C. §§ 1002(5), (9).

189. *See* 29 U.S.C. § 1002(7) (defining "participant" as an "employee . . . of an employer").

190. *See* 29 U.S.C. § 1002(8) (defining "beneficiary" as "a person designated by a participant" to receive a benefit).

191. *See id.* (defining "beneficiary" as "a person designated *by a participant*" (emphasis added)).

192. *See id.* (distinguishing between "beneficiary" and "participant"). If Elroy were not a "participant," then he could not designate his wife a "beneficiary" within the meaning of 29 U.S.C. § 1002(8).

193. *See supra* text accompanying notes 185–88.

194. 29 U.S.C. § 1002(8).

195. *Id.*

ing this question requires knowing whether the husband's insurance policy is an "employee benefit plan."[196] Unfortunately, since the interlocking nature of ERISA's definitional provisions does not stop here, further review of these definitions—specifically the definitions of "employee benefit plan" and "employee welfare benefit plan"—is required to resolve the question.

4. "Employee Welfare Benefit Plan" and "Participant"

To determine whether the wife is a "beneficiary" by designation of her husband's insurance policy, we must determine whether the policy is an "employee benefit plan." The term "employee benefit plan" serves as a stand-in term for three specific types of plans,[197] of which an "employee welfare benefit plan" is the most relevant for purposes of this note.

An "employee welfare benefit plan" is more complicated.[198] This term is defined as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing its participants or their beneficiaries, through the purchase of insurance or otherwise, [various benefits].[199]

Predictably, this definition's inclusion of the terms "employer," "participants," and "beneficiaries" causes massive interpretive problems.

Consider first the husband's insurance policy. His policy is a "plan . . . maintained by an employer" through the husband's premium payments.[200] Since the husband is a "participant," and since he therefore would be able to designate his wife a "beneficiary," the husband's policy seems to be an "employee welfare benefit plan."[201] Fortunately, this analysis provides one answer to the question left open above, for we know that if the husband's policy is an "employee benefit plan," then his wife is a "beneficiary" under the plan.

Not surprisingly, however, the answer is significantly less clear when we substitute Elroy for the husband. Is Elroy's insurance policy an "employee welfare benefit plan"? If Elroy is both an "employee" and a "participant," then yes.[202] If Elroy is not an "employee" or a "participant," then no.[203] Since Elroy's status as an "employee" and "partici-

196. *Id.* (defining "beneficiary" as "a person designated . . . by the terms of an employee benefit plan" to receive a benefit).

197. *See* 29 U.S.C. § 1002(3).

198. *Compare* 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan"), *with* 29 U.S.C. § 1002(3) (defining "employee benefit plan").

199. 29 U.S.C. § 1002(1).

200. *Id.*

201. *Id.*

202. *See id.* (referring to "employee" and "participants").

203. *See id.*

pant" is unclear,[204] then so, too, is the status of his insurance plan under ERISA.

B. Other Statutory Language Issues

ERISA's interlocking definitional provisions are not the only source of confusion for the courts. For example, use of a small, simple pronoun in ERISA's definition of "employee welfare benefit plan" creates major interpretive problems. Under the statute, an "employee welfare benefit plan" is a plan created "for the purpose of providing for its participants and *their* beneficiaries."[205] Inclusion of the possessive pronoun "their" in this definition suggests that the existence of a "beneficiary" depends on the existence of the antecedent to which the pronoun refers, namely, "participants." In other words, this language suggests that the "participant" must designate his or her "beneficiary"; that is, a "beneficiary" cannot exist under an "employee welfare benefit plan" unless the plan also has a "participant." The statute's plain meaning conditions the existence of "beneficiaries" on the existence of "participants." Otherwise, the insurance policy would not operate as an ERISA "employee welfare benefit plan" since the policy would not provide a benefit for *their*—that is, the *participants'*—beneficiaries.

C. Conflicting Approaches

The complexity of ERISA's provisions helps explain why the courts have not resolved the employer standing issue with unanimity. The federal circuits are divided over an employer's standing to sue under ERISA.[206] The precise nature of their split is difficult to express[207] because there can be many types of "employers," such as sole proprietors/owners,[208] partners,[209] controlling shareholders,[210] minority shareholders,[211] and directors.[212] Since the courts generally do not lump these employer types into a single "employer" category when considering their

204. *See supra* Parts III.A.1–2.

205. 29 U.S.C. § 1002(1) (emphasis added).

206. *Compare, e.g.*, Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 356 (3d Cir. 1999) (holding that "employers" may have standing to sue as ERISA "beneficiaries"), *with, e.g.*, Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1087 (N.D. Ill. 1993) (holding that "employer" does not have standing to sue under ERISA).

207. *But see infra* Part III.C.1–2 (discussing majority and minority approaches).

208. *See, e.g.*, Kelly v. Blue Cross & Blue Shield of R.I., 814 F. Supp. 220, 222–23 (D.R.I. 1993) (sole owner of corporation considered "employer").

209. *See, e.g.*, *Wolk*, 186 F.3d at 355 (law firm partner considered "employer"); *Madden*, 835 F. Supp. at 1083 (same).

210. *See* Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 209 (8th Cir. 1996) (considering whether controlling shareholder was "employer").

211. *See* Myerscough, Inc. v. Fortis Benefits Ins. Co., 86 F. Supp. 2d 821, 823–24 (C.D. Ill. 2000) (considering whether minority shareholder was "employer").

212. *See, e.g.*, Grantham v. Beatrice Co., 776 F. Supp. 391, 403 (N.D. Ill. 1991) (holding that corporate directors were not "employees").

ERISA claims, litigants rarely can anticipate whether the case will ultimately proceed in state or federal court because the courts do not analyze the issue uniformly. Rather, the courts' case-by-case standing inquiry affects whether a defendant is permitted to remove claims in federal court. Such obviously avoidable uncertainty is inconsistent with the pursuit of justice. Consequently, this note proposes a uniform classification in order to remedy the courts' confusion about how to approach employer standing under ERISA.

Among those jurisdictions considering employer standing in ERISA cases, most courts[213] have held that an "employer" has standing under ERISA as either a "participant" or a "beneficiary." The Third,[214] Fourth,[215] Eighth,[216] Ninth,[217] and Eleventh[218] circuits subscribe to this view. The First,[219] Fifth,[220] Sixth,[221] and Tenth[222] circuits have held that an "employer" cannot have standing as either a "participant" or a "beneficiary." Other jurisdictions have not fully answered the question. For example, while the Seventh Circuit has held that "employers" cannot have standing as ERISA "participants,"[223] it has not yet addressed the question whether an "employer" can be a "beneficiary."[224] The Seventh Circuit's district courts have disagreed on this latter issue.[225]

1. Majority Approach

The majority approach states that parties can have standing under ERISA as either "participants" or "beneficiaries" even if they simultaneously satisfy the ERISA definition of "employer."

a. "Employers" as "Participants"

Among those courts holding that "employers" can be "participants," the leading case is *Madonia v. Blue Cross & Blue Shield of Vir-*

213. Although the circuit split described below appears evenly divided, the author's own review of cases on point reveals that the majority of *courts* (as opposed to circuits) considering this question have held that "employers" have standing to sue as either "participants" or "beneficiaries."

214. *See Wolk*, 186 F.3d at 356–58.

215. *See* Madonia v. Blue Cross & Blue Shield of Va., 11 F.3d 444, 448 (4th Cir. 1993).

216. *See* Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 208 (8th Cir. 1996).

217. *See* Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 409 (9th Cir. 1995); Harper v. Am. Chambers Life Ins. Co., 898 F.2d 1432, 1434 (9th Cir. 1990).

218. *See* Engelhardt v. Paul Revere Life Ins. Co. 139 F.3d 1346, 1351 (11th Cir. 1998).

219. *See* Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 959–60 (1st Cir. 1989).

220. *See* Meredith v. Time Ins. Co., 980 F.2d 352, 358 (5th Cir. 1993).

221. *See* Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 185–86 (6th Cir. 1992).

222. *See* Peckham v. Bd. of Trs. of Int'l Bhd. of Painters & Allied Trades Union, 653 F.2d 424, 426–27 (10th Cir. 1981).

223. *See* Giardono v. Jones, 867 F.2d 409, 411–12 (7th Cir. 1989).

224. Eichhorn, Eichhorn & Link v. Travelers Ins. Co., 896 F. Supp. 812, 814 (N.D. Ind. 1995) (noting that the Seventh Circuit has not answered whether an "employer" can be a "beneficiary").

225. *Compare, e.g.*, Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1087 (N.D. Ill. 1993) (holding that an "employer" cannot be a "beneficiary"), *with, e.g.*, *Eichhorn*, 896 F. Supp. at 814–15 (N.D. Ind. 1995) (holding that an "employer" can be a "beneficiary").

ginia.[226] In *Madonia*, the plaintiff, Virginia Madonia, was the wife of Dr. Eugene Madonia, a physician and the sole shareholder of a medical services corporation.[227] Dr. Madonia purchased a group health insurance plan from Blue Cross & Blue Shield.[228] Dr. Madonia's insurance plan covered his four clinic employees, and his wife Virginia was listed as a beneficiary on his own policy.[229] Virginia subsequently was diagnosed with breast cancer.[230] Her doctor recommended chemotherapy that Blue Cross & Blue Shield deemed too experimental to be covered under her husband's policy.[231] After Mrs. Madonia filed state-law contract, tort, and bad faith claims against Blue Cross & Blue Shield, the insurance provider removed the case to federal court under ERISA.[232] Mrs. Madonia unsuccessfully sought remand of her lawsuit.[233] On appeal she argued that since her husband, Dr. Madonia, was an "employer" under ERISA as the sole shareholder of the clinic that purchased the insurance plan, he therefore was not an ERISA "participant."[234] In turn, Mrs. Madonia argued, she therefore could not be a "beneficiary" since her husband's lack of standing as a "participant" prevented him from naming her as an ERISA "beneficiary."[235]

The Fourth Circuit rejected Mrs. Madonia's arguments, holding that she had standing as a "beneficiary," which made Blue Cross & Blue Shield's removal of her case proper under ERISA's complete preemption provisions.[236] The court reasoned that Dr. Madonia satisfied the ERISA definition of "employee" since he was employed by his own clinic.[237] The *Madonia* court ultimately held that even though a corporation's sole shareholder can be an ERISA "employer," he or she also can be an ERISA "participant" by simultaneously satisfying the statute's definition of "employee."[238]

Although *Madonia* represents one component of the majority approach to resolving employer standing issues by holding that an "employer" has standing under ERISA, most of the other majority approach courts have held that "employers" cannot also be "participants." These courts acknowledge the impossibility of reconciling the definition of "participant" with those of "employer" and "employee" in light of their

226. 11 F.3d. 444, 445–48 (4th Cir. 1993).
227. *Id.* at 445.
228. *Id.*
229. *Id.*
230. *Id.* at 446.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 447–48.
235. *Id.* at 448.
236. *Id.*
237. *Id.* Interestingly, the *Madonia* court held earlier in its opinion that Dr. Madonia's status as an "employer" precluded him from being a "participant" for determining whether an ERISA-governed plan existed. *Id.*
238. *See id.* at 448–50.

interlocking nature.[239] For example, in *Peterson v. American Life & Health Insurance Co.*, the Ninth Circuit held that an "employer" could not be a "participant" after noting administrative regulations promulgated by the U.S. Department of Labor.[240] By declaring that a business owner and his spouse were not "employees" of their business under ERISA, the Department of Labor clarified Congress' intent that certain "employers" not have standing as ERISA "participants."[241]

The reasoning of several other courts further undercuts *Madonia*. For example, in *Meredith v. Time Insurance Co.*, the Fifth Circuit deemed as "legal fiction" the idea that the owner of a small business "might be regarded as an employee of herself and, simultaneously, an employer of herself."[242] Moreover, the First Circuit in *Kwatcher v. Massachusetts Service Employees Pension Fund* held that Congress' intent was clear: "'Employee' and 'employer' are plainly meant to be separate animals."[243] The *Kwatcher* court went on to note that "the twain shall never meet."[244] Consequently, these courts and others reject the reasoning of *Madonia* and hold that an "employer" cannot be a "participant."[245]

b. "Employers" as "Beneficiaries"

More often, courts holding that employers have standing under ERISA have determined that "employers" can be ERISA "beneficiaries." This view is illustrated best by the Third Circuit in *Wolk v. UNUM Life Insurance of America*.[246] In *Wolk*, the plaintiff, Janice Wolk, was a former law firm partner who sued her firm's disability insurance provider, UNUM Life Insurance of America, on various common law grounds after UNUM stopped sending the disability payments for the chronic fatigue syndrome from which Ms. Wolk suffered.[247] The district court granted summary judgment for the insurance provider because of ERISA preemption, and Ms. Wolk appealed to the Third Circuit arguing that, as a former law firm partner, she was an "employer" under her insurance plan and therefore lacked standing under ERISA.[248] The crux of

239. *See, e.g.*, Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 407 (9th Cir. 1995) ("Neither an owner of a business nor a partner in a partnership can constitute an 'employee' for purposes of determining the existence of an ERISA plan.").

240. 48 F.3d 404, 470 (9th Cir. 1995); *see also supra* Part II.C.3 (discussing Department of Labor's administrative regulations).

241. *See* 29 C.F.R. § 2510.3-3(c)(1) (2000).

242. 980 F.2d 352, 355 (5th Cir. 1993).

243. 879 F.2d 957, 959 (1st Cir. 1989).

244. *Id.*

245. *See* Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 407 (9th Cir. 1995); Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 959 (1st Cir. 1989); *accord, e.g.*, Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 186 (6th Cir. 1992); Giardono v. Jones, 867 F.2d 409, 411–12 (7th Cir. 1989).

246. 186 F.3d 352 (3d Cir. 1999).

247. *Id.* at 354.

248. *Id.* at 354–55.

Ms. Wolk's argument was that congressional intent precluded her from being classified as either a "participant" or "beneficiary" because her former partner status made her an "employer."[249] She argued that, as an "employer," she lacked standing to sue under ERISA, which in turn made UNUM's ERISA preemption defense inapplicable to her common law claims.[250]

The *Wolk* court rejected Ms. Wolk's claims and held that she had standing as an ERISA "beneficiary."[251] In so holding, the Third Circuit concluded that Ms. Wolk fell squarely within the plain language of ERISA's definition of "beneficiary" because she was someone "designated . . . by the terms of an employee benefit plan" to receive a benefit.[252] The *Wolk* court also concluded that permitting parties like Ms. Wolk to sue insurance providers in state court while other "employees" had to sue in federal court would frustrate Congress' desire for nationwide uniformity.[253]

Although other circuits have agreed with *Wolk*,[254] the Third Circuit's reasoning is not unassailable. First, the word "beneficiary" plainly applies only to dependents and other people selected by employees to receive benefits under insurance plans.[255] Thus, contrary to the assertions in *Wolk*, Congress surely did not intend for an "employer" to be able to name himself the intended recipient of his employees' benefits by listing himself as a plan "beneficiary."[256]

Second, several courts have noted that Congress never intended for ERISA to cover employers.[257] Instead, according to relevant legislative history, Congress was principally "concerned that employers would exploit, misuse, or loot the huge reserves of funds collected for employee benefit plans."[258] The legislature's intent was not to cover the gamut of employment benefits cases, but rather *to protect employees*.[259] This desire is evident in ERISA's anti-inurement provision, which forbids employers from benefiting from the benefit plans of their employees.[260] Furthermore, perhaps the strongest evidence that Congress intended ERISA to exclude "employers" comes from the enactment of several laws designed to benefit employers who could not obtain employee pension plans pro-

249. *Id.* at 355–56.
250. *Id.*
251. *Id.* at 358.
252. *Id.* at 356–57 (3d Cir. 1999); *see also* 29 U.S.C. § 1002(8) (2000) (defining "beneficiary").
253. *Wolk*, 186 F.3d at 357.
254. *See, e.g.*, Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 209–10 (8th Cir. 1996).
255. Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1086–87 (N.D. Ill. 1993).
256. *Id.*
257. *See, e.g.*, Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 960–61 (1st Cir. 1989); Kelly v. Blue Cross & Blue Shield of R. I., 814 F. Supp. 220, 226 (D.R.I. 1993).
258. *Kwatcher*, 879 F.2d at 960 (citing several examples in the legislative record); *see also supra* Part II.C.2 (discussing importance of legislative history in determining the will of Congress).
259. *See Kwatcher*, 879 F.2d at 960–61.
260. *See* 29 U.S.C. § 1103(c) (2000); Giardono v. Jones, 867 F.2d 409, 411–12 (7th Cir. 1989).

tected by ERISA.[261] These enactments included establishing individual retirement accounts and elevating deductions for the self-employed.[262]

2. Minority Approach

In stark contrast to the majority view, courts adopting the minority approach have concluded that a party who satisfies the ERISA definition of "employer" cannot have standing to sue as either a "participant" or a "beneficiary." This approach is illustrated best by *Madden v. Country Life Insurance Co*.[263] In *Madden*, the plaintiff, James Madden, sued his insurance company for excising him from coverage under his health insurance policy.[264] Mr. Madden was one of two partners in his law firm.[265] The insurance company issued a group health insurance policy to the law firm, and both partners and an employee were covered under the policy.[266] After receiving a claim for medical treatment submitted by Mr. Madden, Country Life Insurance notified him that the company was rescinding his insurance coverage.[267] Mr. Madden filed state-law claims against the insurance company, and the insurance company removed the case to federal district court.[268] Country Life Insurance premised removal of the action on the theory that ERISA's civil enforcement provisions preempted Mr. Madden's state-law claims, thereby making them removable federal question claims.[269] Mr. Madden responded by moving for remand to state court, arguing that his state-law claims against Country Life Insurance were not removable under ERISA.[270]

Mr. Madden's arguments on remand focused on the dissonance created by ERISA's interlocking definitional provisions. The *Madden* court agreed to remand the case to state court, reasoning that Mr. Madden satisfied the definition of "employer" as a partner in his law firm.[271] As an ERISA "employer," Mr. Madden could not simultaneously be an ERISA "employee" since the latter is defined as "any individual employed *by an employer*."[272] Ultimately, the *Madden* court concluded that Mr. Madden's "employer" status precluded him from being either an

261. *Kwatcher*, 879 F.2d at 962.
262. *Id.*
263. 835 F. Supp. 1081 (N.D. Ill. 1993).
264. *Id.* at 1083.
265. *Id.*
266. *Id.*
267. *See id.*
268. *Id.*
269. *Id.*; *see supra* Part II.A.3.
270. *Madden*, 835 F. Supp. At 1083.
271. *Id.* at 1086–87; *see also* 29 U.S.C. § 1002(5) (defining "employer").
272. *Id.* at 1087 (emphasis added); *see also* 29 U.S.C. § 1002(6) (defining "employee"). The *Madden* court relied upon other Seventh Circuit precedent which held that "partners," like Madden, were ERISA "employers" because of their managerial control. *Madden*, 835 F. Supp. at 1086 ("ERISA excludes partners from its protections." (quoting Bane v. Ferguson, 890 F.2d 11, 12 (7th Cir. 1989))).

ERISA "participant" or "beneficiary," thereby denying him standing under ERISA.[273]

Madden is an important case for the minority approach because it does not feign ignorance of the litigants' identities.[274] Instead, the *Madden* court recognized that the outcome of its standing analysis necessarily depended on whether Mr. Madden was an "employer" under ERISA.[275] Subscribing to the minority approach exemplified by *Madden* would both simplify judicial analysis and lead to consistent results for employer standing issues under ERISA, in sharp contrast to the convoluted and unpredictable holdings yielded by the majority approach.[276]

3. Modified Mode of Analysis

Resolving the conflict between the majority and minority approaches to employer standing under ERISA requires a heightened appreciation of the analytical problems inherent in the majority approach. Understanding the scope of the problem is essential to recognizing the value of the modified analytical approach proposed in this note.

a. Analytical Problems with Majority Approach

It is staggering to consider the number of situations in which litigants' standing under ERISA could be affected by their status as "employers." Even more unbelievable is how the majority approach to determining employer standing under ERISA would treat these litigants differently based solely on narrow, largely indefensible distinctions. Consider ten types of "employers":[277]

Employer #1: Employer #1 is the sole shareholder of a corporation employing dozens of employees.[278]

Employer #2: Employer #2 is the controlling[279] shareholder of a corporation that employs dozens of employees.[280]

Employer #3: Employer #3 holds forty percent of the shares of the corporation that Employer #2 controls.[281]

273. *Madden*, 835 F. Supp. at 1087.

274. *Id.* at 1084 (noting that the court could not "ignore the identity of the party seeking to avail himself of the remedies sought").

275. *See id.*

276. *See supra* Part III.C.1.

277. Each of the following ten examples arguably satisfies ERISA's definition of "employer."

278. *See, e.g.*, Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 958 (1st Cir. 1989) (noting that plaintiff was "sole shareholder" of corporation).

279. Note that Employer #2 is not the "sole" shareholder of the corporation, but rather is one of multiple shareholders. However, Employer #2 holds more than fifty percent of the company's shares.

280. *See, e.g.*, Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 207 (8th Cir. 1996) (noting that plaintiff was "controlling shareholder" of his corporation).

281. *See, e.g.*, Myerscough, Inc. v. Fortis Benefits Ins. Co., 86 F. Supp. 2d 821, 822 (C.D. Ill. 2000) (noting that plaintiff was "part-owner" of company).

Employer #4: Employer #4 is a director of a corporation that employs dozens of employees.[282]

Employer #5: Employer #5 is the chief executive officer of a corporation that employs several workers.[283]

Employer #6: Employer #6 is the managing partner of his law firm, which is organized as a partnership under state law,[284] and his firm employs several junior attorneys and secretaries.[285]

Employer #7: Employer #7 is one of the other partners in Employer #6's law firm.[286]

Employer #8: Employer #8 is a member of a partnership in which only the partners are on the payroll.[287]

Employer #9: Employer #9 is a sole proprietor of his small business, which employs three workers.[288]

Employer #10: Employer #10 is the sole proprietor of his small business, and he is the only person on the payroll.[289]

Under the majority approach to the question of employer standing under ERISA, any of these ten employers also could qualify as an "employee," "participant," or "beneficiary" under ERISA. For instance, the Fourth Circuit has held that employers can have "dual status," simultaneously serving both as the "employers" and the "employees."[290] While the Fourth Circuit's reasoning is not without its critics,[291] other courts have held that an employer still may qualify as a "beneficiary"[292] even if the employer cannot be an ERISA "participant."[293]

Courts are forced to resolve the employer standing issue in convoluted ways because of logical problems with the majority approach. For

282. *See, e.g.*, Grantham v. Beatrice Co., 776 F. Supp. 391, 392 (N.D. Ill. 1991) (noting that plaintiffs were former "directors" of corporation).

283. *See, e.g.*, Bellisario v. Lone Star Life Ins., 871 F. Supp. 374, 375 (C.D. Cal. 1994) (noting that plaintiff was "president" of his company).

284. Note that Employer #5's law firm is *not* formally a corporation under state law, but rather is organized under the state's partnership laws.

285. *See, e.g.*, *Doe*, 76 F.3d at 207 (noting that plaintiff is managing attorney of his law firm).

286. *See, e.g.*, Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 354 (3d Cir. 1999) (noting that plaintiff was former nonmanaging partner of law firm).

287. *See, e.g.*, Robertson v. Alexander Grant & Co., 798 F.2d 868, 869–70 (5th Cir. 1986) (suggesting that ERISA would not govern plans that apply only to "partners" and not "employees").

288. *See, e.g.*, Kelly v. Blue Cross & Blue Shield of R.I., 814 F. Supp. 220, 222 (D.R.I. 1993) (noting that decedent was "sole owner" of her company).

289. *See, e.g.*, Meredith v. Time Ins. Co., 980 F.2d 352, 352–53, 358 (5th Cir. 1993) (noting that plaintiff is "sole proprietor" of her one-person enterprise).

290. *See* Madonia v. Blue Cross & Blue Shield of Va., 11 F.3d 444, 448–50 (4th Cir. 1993). The Fourth Circuit reasoned that if an "employer" also satisfied the ERISA definition of "employee," then the employer qualified as an ERISA participant. *Id.*; *see also supra* text accompanying notes 279–91.

291. *See, e.g.*, Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 408–09 (9th Cir. 1995) (citing Harper v. Am. Chambers Life Ins. Co., 898 F.2d 1432, 1434 (9th Cir. 1990)).

292. *See, e.g.*, Spurlock v. Employers Health Ins. Co., 13 F. Supp. 2d 884, 885–86 (E.D. Wisc. 1998) (holding that "employer" could also be ERISA "beneficiary").

293. *See Peterson*, 48 F.3d at 408 (noting that "an [employer] could not bring suit as a 'participant' because *only employees* are participants" (emphasis added)); *see also* 29 U.S.C. § 1002(7) (2000) (defining ERISA "participant").

example, reconciling current jurisprudence on this issue requires one to accept that a corporation's *sole* shareholder would *not* have standing under ERISA as an "employer,"[294] while a corporation's "controlling shareholder"[295] or a "minority shareholder"[296] *would* have standing as "employers." These results clearly are inconsistent with ERISA's purpose. This jurisprudence permits an "employer" who wholly owns a company to sue under ERISA, which is a statute designed to help employees.[297] The majority approach also would treat a corporation's part-owners more like "employers" denied standing by ERISA.[298]

The problems with these results are obvious. A corporation's sole shareholder answers only to himself or herself. In this way, the sole shareholder is as much of an "employer" as one can be. In contrast, a part-owner must answer to at least one other person. Even a "controlling shareholder" is at least partially responsible to minority shareholders. Thus, in comparison with sole shareholders, part-owners bear a closer resemblance to "employees."[299] Even so, courts using the majority approach still insist on treating sole shareholders like employees when construing ERISA.

Another example is illustrative. Courts have held that partners in partnerships[300] that hire employees could have standing to sue under ERISA even though the partners satisfy ERISA's definition of "employer."[301] However, other courts have held that partners in partnerships that do *not* hire workers (other than the partners themselves),[302] would *not* have standing under ERISA.[303] Attempts to reconcile these holdings

294. *See, e.g.*, Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 968 (1st Cir. 1989) (holding that corporation's "sole shareholder and chief executive officer" had no standing under ERISA). Employer #1 listed *supra* was a "sole shareholder." *See supra* note 278 and accompanying text.

295. *See, e.g.*, Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 207, 210 (8th Cir. 1996) (holding that "controlling shareholder" possessed standing as ERISA "beneficiary"). Employer #2 listed *supra* was a "controlling shareholder." *See supra* notes 279–80 and accompanying text.

296. *See, e.g.*, Myerscough, Inc. v. Fortis Benefits Ins. Co., 86 F. Supp. 2d 821, 822 (C.D. Ill. 2000) (holding that company's "minority shareholder" had standing under ERISA). Employer #3 listed *supra* was a "minority shareholder." *See supra* note 281 and accompanying text.

297. *See supra* Part II.B.1 (discussing ERISA's purpose).

298. *See supra* Part II.B.1.

299. This fact does not mean that part-owners are not also ERISA "employers." Instead, this point illustrates only that a part-owner is more similar to an "employee" than is a sole shareholder.

300. This example leaves the realm of an entity's formal incorporation, focusing instead on entities organized under state partnership laws.

301. *See, e.g.*, Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 355 (3d Cir. 1999) (holding that law firm "partner-employer" had standing to sue under ERISA). Employers #6 and #7 listed *supra* were partners in a partnership that employed nonpartner workers. *See supra* notes 284–86 and accompanying text.

302. Employer #8 listed *supra* was a partner in a partnership with no nonpartners on the payroll. *See supra* note 287 and accompanying text.

303. *See, e.g.*, Robertson v. Alexander Grant & Co., 798 F.2d 868, 868 (5th Cir. 1986) (holding that ERISA "is inapplicable to retirement plans covering only partners"). In reaching this decision, the *Robertson* court relied upon administrative regulations issued by the Secretary of Labor. *Id.* at 869–71; *see also supra* Part II.C.3 (discussing administrative interpretations as important tool for construing ERISA). While the accounting firm in *Robertson* had national presence and therefore pre-

reveal another flaw in the majority approach. After all, partners who hire nonpartner employees are more akin to traditional "employers" than partners who do *not* hire nonpartner employees. These courts with the majority view nevertheless conclude that partners without other employees should have standing under ERISA as "employers," while partners that actually employ other workers should not.[304]

b. A New Approach

Since issues of standing under ERISA in these cases stem almost exclusively from a plaintiff's alleged "employer" status, determining whether a plaintiff is an "employer" should be the proper threshold question. After all, even evaluating the existence of an "employee welfare benefit plan" frequently requires determining whether the policyholder or recipient of a benefit under the policy is an "employer."[305] Therefore, by making this question the threshold inquiry into employer standing, and by giving its answer some dispositive force, the majority approach's analytical problems can be resolved.

A new mode of analysis would be easy to implement. When confronted with cases where a plaintiff may satisfy ERISA's definition of "employer," the courts should first ask whether the plaintiff in fact is an "employer." If the plaintiff is *not* an "employer," then the court should proceed with the analysis customarily followed.

However, if the plaintiff *is* an ERISA "employer," then the court should conclude that the plaintiff has no standing under ERISA. On the plaintiff-employer's motion, the federal court should remand to state court. This analysis properly recognizes that ERISA does not permit a litigant to have "dual status" as "employer" and "employee."[306] ERISA's plain language simply forecloses this possibility.[307] The statute's remedial purpose, legislative history, and administrative interpretations provide ample support for this position, as do other policy initiatives enacted by Congress to supplement ERISA's intended effect.[308] Furthermore, by first determining the plaintiff's "employer" status, and then holding that the plaintiff has no standing if he or she is an "employer," the courts will have resolved the interpretive dilemma presently resulting from

sumably hired secretaries and the like, the ERISA plan at issue was issued only for the firm's partners. *Robertson*, 798 F.2d at 868–70. Therefore, *Robertson*'s reasoning applies equally well to partners in a partnership that employs no nonpartners.

304. *Compare, e.g.*, *Wolk*, 186 F.3d at 355–58, *with, e.g.*, *Robertson*, 798 F.2d at 868.

305. *See supra* Part III.A.4.

306. *See, e.g.*, Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 959 (1st Cir. 1989) (holding that ERISA's plain language precludes one's dual status as "employer" and "employee" under the statute).

307. *See id.*

308. *See, e.g.*, *id.* at 962–63 (noting that Congress was "[c]onscious that ERISA would not cover everyone in the workplace" and listing other mechanisms through which Congress protected the rights of workers at all levels).

ERISA's interlocking definitional provisions,[309] as well as the difficulty courts have in overcoming the plainest of meanings derived from congressional language.[310]

ERISA's own definition of the term "employer" simply is not helpful.[311] The Supreme Court has handed down the prevailing test for determining one's employment status under ERISA:

> Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[312]

By first applying these common-law agency factors to an employer standing issue, courts could determine quickly whether a plaintiff satisfies ERISA's definition of "employer." Since sole proprietors, partners, corporate directors, and significant shareholders each will satisfy most, if not all, of the common law agency factors, judicial rulings should yield predictable, consistent results on standing questions for these types of plaintiffs.[313] In other words, none of the ten employer examples listed above[314] would have standing under ERISA because they would qualify as ERISA "employers."

Under this modified minority approach,[315] the rest of the standing analysis will be simple once the court determines whether a litigant is an "employer." For example, in the case of Elroy Employer, the court quickly could determine that Elroy is an "employer" under ERISA because, as the managing partner of his law firm, he hires and fires employees, sets his firm's policy, provides benefits for his employees in addition to their salaries, and manages his own workload and that of others.[316] After determining his "employer" status according to common law agency principles, the court then would grant Elroy's motion for remand since, as an "employer," he does not have standing under ERISA as either a

309. *See supra* Part III.A (discussing ERISA's interlocking definitional provisions).

310. *See supra* Part III.B (discussing an interpretive issue resulting from ERISA "employee welfare benefit plan" definition's use of word "their").

311. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992); *see also supra* Part III.A.1.

312. *Darden*, 503 U.S. at 323–24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

313. *See id.* at 326 (noting the importance of "predictable results").

314. *See supra* text accompanying notes 278–89.

315. Note that this approach combines the solid analysis of the minority approach, *see supra* Part III.C.2 (discussing minority approach), with the new element of making the courts' employment status analysis a threshold question with dispositive effect.

316. *See Darden*, 503 U.S. at 323–24.

"participant" or "beneficiary." Accordingly, since he lacks standing, Elroy's state-law claims should be remanded to state court.

IV. RESOLUTION: DRAWING THE JUDICIAL SWORD

This note recommends that courts adopt a modified analytical approach to resolving employer standing questions under ERISA, namely, the method exemplified by *Madden v. Country Life Insurance Co.*[317] The courts should begin their standing analysis in each case by first determining whether the plaintiff is an "employer" under the statute. Common law agency principles will facilitate this inquiry.[318] If the plaintiff is an "employer" under ERISA, then the court should remand a removed lawsuit to state court on the plaintiff's motion.[319]

When construing ERISA's interlocking definitional provisions, the court should avoid two pitfalls to endless circularity. First, the court should not permit any litigant to have "dual status" as both "employer" and "employee." Such duality only yields confusion when applying ERISA's provisions. If an "employer" can also be an "employee," then the "employer" might also be a "participant" or a "beneficiary," which in turn affects whether there even exists an "employee benefit plan" within the meaning of the statute. By rejecting the possibility of "dual status," the court would avoid becoming mired in ERISA's otherwise irreconcilable definitions.[320]

Second, the court must decline to give the term "beneficiary" greater than its intended breadth. If judges are persuaded that an "employer" has standing under ERISA simply because the employer is listed as a beneficiary in an insurance policy, then Congress's desired exclusion of "employers" from ERISA's coverage never will be realized. Instead, the courts should adhere strictly to the minority approach by refusing to find standing under ERISA for an "employer." In view of the daunting nature of disentangling oneself from the foreboding branches of ERISA's interlocking definitions, the often awkward procedural posturing of removed ERISA suits, and the countless situations in which "employers" may appear to be their own "employees," the simplicity of the modified minority approach would be both refreshing and effective.[321]

317. 835 F. Supp. 1081 (N.D. Ill. 1993).

318. *See Darden*, 503 U.S. at 323–24.

319. Remand obviously is appropriate only if the plaintiff's state-law claims were removed by the defendant. If the plaintiff is attempting to sue in federal court as an ERISA "employer," then the court should dismiss the plaintiff's claim outright for want of standing.

320. For illustration of the endless circularity resulting from these interlocking provisions, see *supra* Part III.A.

321. Among other reasons, the predictability of results under the minority approach should provide for better informed litigation by "employers." *Darden*, 503 U.S. at 326 (discussing predictability of results).

V. CONCLUSION

Alexander the Great recognized that the simplest solution is often the best. Alexander simply drew his sword and cut the Gordian Knot rather than wasting his time trying to unravel it.[322] In the same spirit, courts should step back and adopt a new mode of analysis that will slice through the confusion of mythological proportions that stems from ERISA's interlocking definitional provisions.

322. *See* BULFINCH, *supra* note 1, at 59; HARDING & HARDING, *supra* note 5, at 186.