Casenote

First Rock to the West, Straight on 'Til Morning: *WestRock* Draws Potential Roadmap to Substantive Challenges of ERISA Rehabilitation Plans Under Section 1132*

I. INTRODUCTION

Since its enactment, the Employee Retirement Income Security Act (ERISA)[1] has confused and frustrated practitioners, businesspeople, and citizens alike.[2] This convoluted statute encompassing over 1,000 pages[3] has become increasingly more difficult through several amendments as new Congresses continue to patch the statute and "kick the can" of retirement benefits to later sessions.[4]

In *WestRock RKT Co. v. Pace Industry Union Management Fund*,[5] WestRock RKT Company (WestRock), a contributing employer, brought

*To Dean Titshaw I owe my sincerest gratitude for his expertise, his time in reading and editing, and his kind words of encouragement. Also, while words cannot express what I owe to them, I can only hope this humble thank you to my wife, parents, grandparents, and the rest of the village without whom I would not have made it this far, will suffice.

1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).
2. Douglas L. Lineberry, *The Pension Protection Act of 2006*, 19 S.C. LAW. 16, 16 (2007).
3. *Id.*
4. *See infra* Part III (discussing amendments to the ERISA statute, their justifying purposes, and political impact).
5. 856 F.3d 1320 (11th Cir. 2017).

an action against Pace Industry Union Management Fund (The Fund) arguing a violation under ERISA, which sets minimum standards for pension plans in private industries.[6] WestRock pursued this action under a newer amendment of ERISA that, while not yet litigated, may allow employers to challenge the substance of certain management decisions of a fund's sponsors or directors. While the United States Court of Appeals for the Eleventh Circuit ultimately dismissed the case on procedural grounds, its opinion may provide a roadmap for future employers to challenge the actions of their common pension funds on substantive grounds, specifically, to challenge the "reasonableness" of measures adopted by the fund.[7]

This avenue would contribute to an already growing field of ERISA litigation.[8] Given the trillions of dollars at stake,[9] a long history filled with scandal,[10] and the third-rail political connotation associated with retirement benefits,[11] this robust source of litigation could have drastic implications on the management and oversight of one of our nation's most controversial institutions.[12]

II. FACTUAL BACKGROUND

The Fund is a multiemployer pension plan[13] to which WestRock had been a longtime contributor. The Fund was in dire financial condition,

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6. *Health Plans and Benefits: ERISA*, U.S DEP'T OF LAB., https://www.dol.gov/general/topic/health-plans/erisa (last visited Oct. 27, 2017).

7. *See WestRock*, 856 F.3d at 1320.

8. *See infra* Part V.

9. In June 2015, retirement assets accounted for 36% of the country's household financial assets. Government-sponsored defined-benefit plans, the focus of this Article, constituted $5.1 trillion of the $24.9 trillion of total U.S. retirement benefits. On the other hand, defined-contribution plans accounted for $6.8 trillion, with 401(k) plans making up $4.7 trillion. Nick Thornton, *Total Retirement Assets Near $25 Trillion Mark*, THINKADVISOR, https://www.thinkadvisor.com/2015/06/30/total-retirement-assets-near-25-trillion-mark/ (last visited Mar. 22, 2018).

10. *See infra* note 48.

11. The reason retirement benefits have become known as the "third rail" in political circles is a practical one. Older Americans, in general, vote more often than younger Americans. Accordingly, any politician's attempt to reform the benefit "creates a nasty backlash" from one of America's largest sectors, the "baby-boomers." *The Third Rail*, THE ECONOMIST, http://www.economist.com/node/3258130 (last visited Mar. 22, 2018).

12. *See infra* Part V.

13. A multi-employer plan is a pension plan to which more than one employer contributes, is maintained pursuant to collective-bargaining agreements, and satisfies other requirements. *See* 29 U.S.C. § 1002(37) (2018).

and under the ERISA statute, was in "critical status."[14] Therefore, ERISA required that its sponsors and directors adopt a "rehabilitation plan" to improve its financial well-being.[15] To achieve financial stability, these rehabilitation plans often, among other things, require a fund to reduce expenditures, reduce future benefit accruals, and increase employer contribution rates.[16] In this case, The Fund's sponsors adopted a rehabilitation plan in 2010, and a subsequent amendment in 2012, requiring WestRock and any other contributing employers seeking to withdraw from it to pay a share of the fund's "accumulated funding deficiency" in order to do so.[17]

WestRock challenged this amendment in the United States District Court for the Northern District of Georgia "based on both the invalid substance of the Amendment and the faulty procedure through which the Amendment"[18] sought to require additional contribution requirements from WestRock and other employers.[19] Relying on a newly amended cause of action,[20] WestRock argued the rehabilitation plan was invalid because it violated ERISA's collective-bargaining requirement and levied an automatic payment prohibited under ERISA. However, the district court instead agreed with the Fund's contention that the amendment was valid and WestRock could not challenge its actions in this instance.[21]

In a case of first impression, the United States Court of Appeals for the Eleventh Circuit ultimately affirmed the district court's dismissal of WestRock's complaint.[22] Since WestRock failed to sufficiently allege the Fund's amendment violated ERISA in any manner, the Eleventh Circuit based its decision on procedural grounds and did not need to resolve the issue of whether ERISA authorized WestRock's challenge of the *substance* of the rehabilitation plan's amendment. However, in the process, the Eleventh Circuit's opinion may have provided a roadmap for

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14. A fund is in critical status if it is less than 65% funded. *See* 29 U.S.C. § 1085(b)(2)(A)(i) (2018).

15. 29 U.S.C. § 1085(a)(2)(A) (2018).

16. *See* 29 U.S.C. § 1085(e)(3)(A)(i) (2018).

17. *WestRock*, 856 F.3d at 1322. "Under 29 U.S.C. § 1084(a), a fund's accumulated funding deficiency is the amount by which the accumulated charges to the plan's 'funding standard account' exceed the accumulated credits to that account." *WestRock*, 856 F.3d 1320, 1322 n.2.

18. *WestRock*, 856 F.3d at 1324.

19. *Id.*

20. *Id.*; *see* 29 U.S.C. § 1132 (2018).

21. *See WestRock*, 856 F.3d at 1322.

22. *Id.* at 1323, 1326.

future substantive challenges to be brought under the ERISA statute in this way.[23]

III. LEGAL BACKGROUND

To properly examine the facts and implications of this case, it is necessary to begin with an overview of the history and statutory framework of relevant sections of the ERISA statute.

A. ERISA

Originally enacted in 1974, ERISA was Congress's answer to the large-scale failure of defined-benefit plans[24] that had become popular with the rise of labor unions after World War II. During the post-war boom, "old world industries" such as automobile, steel, textile, and coal, made up the lion's share of the corporate landscape, and most of these industries sponsored defined-benefit plans as mandated by their collective-bargaining agreements (CBA).[25] However, by the 1970s, these old world industries had fallen on hard times, leaving their employees to question the stability of their financial future,[26] particularly the soundness of their pension plans, sparking public outcry for pension reform.[27] In enacting ERISA, Congress guaranteed that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever

23. *See infra* Part V.

24. A defined-benefit plan is a pension program that guarantees a specific monthly payment at retirement. These are funded by the employer, usually as part of a CBA, and calculate benefits using a formula that takes into account age, salary, and number of years an employee worked at the company. This results in a plan where for example, an employee would be entitled to 1% of average salary times total years of service, such as $100 a month. On the other hand, a defined-contribution plan does not guarantee a specific benefit amount upon retirement. Instead, both the employer and the employee contribute to the employee's individual account which the employee is responsible for choosing how it is invested. Upon retirement, the employee receives the value of the account. *Retirement Plans and ERISA FAQs*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-consumer (last visited Mar. 22, 2018).

25. Janice Kay McClendon, *The Death Knell of Traditional Defined Benefit Plans: Avoiding a Race to the 401(k) Bottom*, 80 TEMP. L. REV. 809, 819 (2007).

26. *Id.* at 820.

27. Famously, when Studebaker, a large automobile manufacturer, closed its plant in 1963, its pension plan was so poorly funded, that of their more than 10,000 employees, only 3,600 were given their full benefits. Of the rest, 4,000 received a lump sum estimated to be valued at only 15% of their value, and the rest received nothing for their years of service. *The U.S. Department of Labor at 40 Timeline*, U.S. DEP'T OF LAB., https://www.dol.gov/featured/erisa40/timeline (last visited Mar. 22, 2018).

conditions are required to obtain a vested benefit—he will actually receive it."[28]

As enacted, this "comprehensive and reticulated" statute aimed to ensure employees and other beneficiaries were not deprived of their retirement benefits by a premature dissolution of their pension plans.[29] To achieve this goal of protecting anticipated retirement benefits, ERISA proscribed standards for the funding, management, and benefit provisions of these plans. Also, ERISA established the Pension Benefit Guaranty Corporation (PBGC).[30] The PBGC is a wholly owned government corporation organized within the Department of Labor and designed to administer an insurance system for these employer-sponsored defined-benefit plans. Contributing employers were required to pay premiums to the PBGC which, in turn, guaranteed benefit payments to employees and beneficiaries in the event a pension fund failed.[31]

Within its broad scope, one class of pension plan created by ERISA is the multiemployer pension plan, which allows several employers to contribute to a common fund that, in turn, provides benefits to covered retirees.[32] These plans proved advantageous for employers and employees alike: employees could change jobs without losing pension coverage, and employers could share the cost and risk of the plan with one another.[33] However, multiemployer pension plans presented a problem in the original ERISA statute. If an employer withdrew from the plan, it significantly threatened the financial stability of the fund.[34]

> [A] key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral

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28. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 720 (1984).
29. *Id.*
30. *Id.*
31. *Who We Are*, PENSION BENEFIT GUARANTY CORP., https://www.pbgc.gov/about/who-we-are (last visited Mar. 22, 2018).
32. *See* 29 U.S.C. § 1301(a)(3).
33. Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust Fund for S. Cal., 508 U.S. 602, 606–07 (1993).
34. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 215 (1986).

may continue until it is no longer reasonable or possible for the pension plan to continue.[35]

To say that ERISA did not adequately address this issue would be an understatement. In fact, certain provisions actually had the effect of encouraging employer withdrawal since the employers could often do so without compensating the plans for their inherited liabilities.[36] The original withdrawal rules designed to protect the PBGC did not protect multiemployer pension funds or their contributing employers from the burden of withdrawal.[37] Congress became concerned that the potential of "cascading withdrawals" threatened to "impose too heavy a burden on the PBGC" and would "collapse . . . the plan termination insurance program."[38] Fearing this potential collapse, Congress delayed the multiemployer plan's mandatory insurance coverage under the PBGC until July 1, 1979, to avoid heavy withdrawals.[39] Then, in 1980, Congress responded to the issue by enacting the Multiemployer Pension Plan Amendments Act (MPPAA).[40]

B. The Multiemployer Pension Plan Amendments Act

To alleviate the issue of employer withdrawal, the MPPAA enacted new rules which required employers to pay a "fixed and certain debt to the pension plan" in the event of their withdrawal.[41] The PBGC's suggestions, which were principally adopted in the final statute, aimed to ensure that an "employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities," as such "withdrawal liability" would discourage withdrawal and "cushion the financial impact" on the plan.[42] Under the final amendment, a withdrawing employer incurred a withdrawal liability equal to their proportional share of the multiemployer plan's unfunded vested benefits, which was to be "calculated as the difference between the present value of the vested benefits and the current value of

35. *Id.* at 216 (quoting *Pension Plan Termination Insurance Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind)).

36. Tr. of Local 138 Pension Trust v. F.W. Honerkamp Co., 692 F.3d 127, 129 (2d Cir. 2012).

37. *Gray*, 467 U.S. at 722.

38. *Honerkamp*, 692 F.3d at 129.

39. *Gray*, 467 U.S. at 722; *see* Pub. L. No. 95-214, 91 Stat. 1501.

40. *Gray*, 467 U.S at 724–25; *see* Pub. L. No. 96-364, 94 Stat. 1208.

41. *Gray*, 467 U.S. at 725.

42. *Connolly*, 475 U.S. at 217.

the plan's assets."[43] Essentially, the withdrawing employer would be required to compensate the fund to continue payment of the employer's own retired employees' benefit packages. Unfortunately, the value of a fund's assets and benefits are influenced by several factors largely out of the control of the fund,[44] and this patch on ERISA did not stand the test of time.[45]

By 2005, many outside economic circumstances,[46] along with the actual or imminent dissolution of several large pension plans, again threatened ERISA and the PBGC's system of federally insured pension plans.[47] Corporate bankruptcies and scandals like those of Enron and WorldCom,[48] coupled with numerous documented cases of defined-benefit plan underfunding, positioned the PBGC's financial viability at the forefront of both public and congressional concern.[49] In fact, by the end of 2005, the PBGC estimated their own total terminated plans deficit to be $23 billion; this included the highly publicized United Airlines and

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43. *Gray*, 467 U.S. at 725.

44. The value of a fund's benefits is largely in control of the fund. The plan trustees set benefit labels according to a rate negotiated in collective bargaining. On the other hand, the value of the fund's assets may fluctuate with the market and other outside influences, since trustees of the fund typically invest these assets. Carolyn Diane Gentile, *The Effect of the Multiemployer Pension Plan Amendments Act's Withdrawal Liability Rules on Collective Bargaining Relationships and Pension Administration*, 1 HOFSTRA LAB. & EMP. L.J. 251, 253 (1983).

45. *See* McClendon, *supra* note 25.

46. For a discussion of the many economic factors leading up to the 2005 pension crisis, see McClendon, *supra* note 25.

47. *Id.* at 809–12.

48. The Enron and WorldCom scandals raise a parallel concern driving pension reform not directly addressed by this Article. As opposed to the traditional pension style defined-benefit plans discussed herein, ERISA also distinguished another type of retirement plan: the "defined-contribution plan," or more commonly known as an "individual account plan," such as a 401(k). *See* 29 U.S.C. §§ 1002(34), (35). These plans grew in popularity after the MPPAA since they were not subject to termination liability because individual employees were in charge of their own investments, not the trustees of a fund. 29 U.S.C. § 1321(b)(1) (2018); *see* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980). However, these individual plans left employees with no fixed benefit post-retirement, and largely in the dark on their investments due to a prohibition of investment advice under the original ERISA statute. Lineberry, *supra* note 2, at 18. To illustrate, Enron sponsored a 401(k) plan like most large corporations, and offered a company stock investment alternative packed with incentive. However, these employees received no independent investment advice and consequently invested 60% of their 401(k) plan assets in Enron stock collectively. When Enron ultimately collapsed, these employees lost more than $1 billion in company stock holdings. Unfortunately, Enron is not the lone example. WorldCom employees lost $1.1 billion in its scandal, and employees of RiteAid and many others suffered the same fate. McClendon, *supra* note 25, at 832.

49. McClendon, *supra* note 25, at 809–12.

US Airways terminations which alone discharged $9.6 billion in pension liabilities onto the PCBG. Moreover, this estimate did not account for plans not currently administered by the PCBG,[50] and thus did not reflect the magnitude of the issue.[51] For example, the largest defined-benefit plan in the United States is operated by General Motors (GM) and covers more than 600,000 workers. The PBGC estimated that GM's plan was underfunded by $31 billion in December 2005.[52] In all, the Department of Labor estimated that active defined-benefit plans were underfunded by more than $450 billion.[53] Ultimately, Congress instituted a plan designed to stabilize pension plans and to ensure they remained solvent.[54]

C. The Pension Protection Act of 2006

On August 17, 2006, President Bush signed what he characterized as "the most sweeping reform of America's pension laws in over 30 years."[55] Heralded as "one of the most important pieces of legislation"[56] of the year, the Pension Protection Act of 2006 (PPA)[57] was Congress's answer to the federally regulated pension crisis. Totaling over one thousand pages, the primary aim of the PPA was to stabilize benefit plan funding and to ensure they remained funded by reducing the PCBG's exposure to liability and to incentivize defined-contribution plans,[58] as opposed to the traditional defined-benefit plans.[59]

Notably, the act raised funding requirements of defined-benefit plans to 100%, and imposed additional funding requirements on plans determined to be at-risk.[60] These measures were "designed to protect and restore multiemployer pension plans in danger of being unable to meet their pension distribution obligations in the near future."[61] To this end,

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50. *Id.* at 810.

51. *Id.* at 811.

52. *Id.*

53. *Id.*

54. Lineberry, *supra* note 2.

55. McClendon, *supra* note 25, at 809 (quoting President George W. Bush's Statement Before Signing Pension Protection Act of 2006 (Aug. 17, 2006)).

56. *Id.* (quoting Press Release, Senator Chuck Grassley, Chairman, U.S. Senate Comm. on Fin., Memorandum re: Signing of the Pension Protection Act of 2006 (Aug. 17, 2006)).

57. Pub. L. No. 109-280, 120 Stat. 780.

58. The PPA removed ERISA's prohibition that 401(k) plans could not advise participants on investments. Lineberry, *supra* note 2, at 16.

59. McClendon, *supra* note 25, at 812.

60. *Id.*

61. *Honerkamp*, 692 F.3d at 130.

the PPA established two categories[62] of at-risk plans: "endangered," in which the fund is less than 80% funded, and "critical," in which the fund is less than 65% funded.[63] Further, in the event a plan reaches critical status, "the plan sponsor must notify the participating employers and unions,"[64] each participating employer is automatically required to contribute an additional 5–10%[65] of the amount specified under the CBA to account for the deficiency,[66] and, most importantly, the plan sponsor is required to "adopt a rehabilitation plan to restore the [f]und's financial health going forward."[67] According to U.S.C. § 1085,[68] a proper rehabilitation plan consists of the following:

> (i) actions, including options or a range of options to be proposed to the [employers and unions], formulated, based on reasonably anticipated experience and reasonable actuarial assumptions, to enable the plan to cease to be in critical status by the end of the [ten year] rehabilitation period and may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the [employers and unions], or any combination of such actions, or
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> (ii) if the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan can not reasonably be expected to emerge from critical status by the end of the rehabilitation period, reasonable measures to emerge from critical status at a later time or to forestall possible insolvency. . . .[69]

These rehabilitation plans force plan sponsors, employers, and employees to take affirmative action to improve the financial viability of the fund.[70]

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62. Section 1085 of 29 U.S.C. sets the requirements for both categories of at-risk plans. It details how to determine if a fund is in critical or endangered status, 29 U.S.C. § 1085(b), the process of adoption and updates of funding improvement plans for endangered funds, 29 U.S.C. § 1085(c), and adoption and updates of rehabilitation plans for critical funds, 29 U.S.C. § 1085(e).

63. *Honerkamp*, 692 F.3d at 130.

64. *Id.*

65. Normally, when a fund is facing an accumulated funding deficiency, employers face an automatic payment to compensate for the deficiency. However, under 29 U.S.C. § 1082, employers may be relieved from this payment when a rehabilitation plan is adopted. *WestRock*, 856 F.3d at 1325.

66. *Honerkamp*, 692 F.3d at 131.

67. *Id.*

68. 29 U.S.C. § 1085 (2018).

69. 29 U.S.C. § 1085(e)(3)(a)(i)–(ii).

70. *WestRock*, 856 F.3d at 1323.

By design, the PPA sets out two alternative versions of rehabilitation plans: the first, § 1085(e)(3)(a)(i),[71] enumerates several financial options a fund may explore to shed their critical status provided they reach an agreement with the contributing employers or unions through collective bargaining and contribution rate schedules are provided annually to the bargaining parties;[72] the second version, § 1085(e)(3)(a)(ii),[73] allows for other "reasonable measures" to be employed if the plan is not expected to shed its critical status within the rehabilitation period.[74] However, the latter alternative, while not requiring an agreement between the parties, requires the plan sponsor to specify the alternatives considered, give an explanation as to why they do not expect the plan to emerge from critical status, and state "when, if ever, the plan is expected to emerge from critical status."[75]

Since the PPA's enactment, these rehabilitation plans have proven to be mutually beneficial. The funds and their sponsors are more likely to reach financial stability, and employers, who would face an automatic payment upon entering critical status to compensate for their fund's deficiencies,[76] are instead relieved from this automatic payment in lieu of the compensation schedule set out in the rehabilitation plan.[77]

Additionally, as part of the PPA, Congress's amendments to ERISA included a new cause of action for employers "in certain scenarios related to these special funding rules" the PPA created.[78] Under the original enactment and subsequent amendments of ERISA, contributing employers were afforded no cause of action to challenge the actions of the fund and its sponsors in civil suits.[79] Instead, since "Congress enacted ERISA to protect . . . the interests of participants in employee benefit plans and their beneficiaries,"[80] employers' rights were extremely limited. However, due to these new funding requirements affecting contributing employers, Congress amended subsections in § 1132[81] of ERISA to allow an employer to bring a civil action "if the plan sponsor fails to update or comply with the terms of the funding improvement or

71. 29 U.S.C. § 1085(e)(3)(a)(i).
72. *See id.*
73. 29 U.S.C. § 1085(e)(3)(a)(ii).
74. *See id.*
75. *Id.*
76. *WestRock*, 856 F.3d at 1325.
77. *Id.*
78. *Id.* at 1323.
79. *See* Dime Coal Co. v. Combs, 796 F.2d 394 (11th Cir. 1986).
80. Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004).
81. 29 U.S.C. § 1132 (2018).

rehabilitation plan in accordance with the requirements"[82] of at-risk plans.[83]

IV. COURT'S RATIONALE

The *WestRock* case came before Circuit Judge Charles Wilson, who wrote the opinion of the court, Senior Circuit Judge Lanier Anderson, and the Honorable Barbara Jacobs Rothstein, United States District Judge for the District of Columbia, sitting by designation. In this case, employer WestRock asserted a cause of action challenging The Fund's sponsor's amendment to its rehabilitation plan. WestRock contended that § 1132(a)(10)(B)[84] authorized their action[85] in that it states that "a civil action may be brought by an employer: if the plan sponsor—(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of [§ 1085]"[86] In short, it argued this amendment violated the strict guidelines for enacting rehabilitation plans set forth in § 1085.[87]

WestRock placed heavy importance on the "in accordance" phrase of § 1132(a)(10)(B). It contended that this statute provides contributing employers a cause of action to compel multiemployer pension plan sponsors to follow the correct procedure in adopting rehabilitation plan contribution requirements and a cause of action to ensure these rehabilitation plan requirements conform to the substantive guidelines set out in § 1085.[88] Under this view, § 1132 would allow WestRock to challenge both the substance and procedure of The Fund's amendment under § 1085. On the other hand, The Fund interpreted subsection B narrowly and claimed it "only permits an employer to bring an action when the Board fails to update in accordance with the procedural requirements of §1085—specifically the requirements that the rehabilitation plan must be updated annually and that the update must be filed with the plan's annual report."[89] Under this view, arguments as

82. 29 U.S.C. § 1132(a)(10)(B).

83. At-risk plans are defined *supra* Part III.

84. 29 U.S.C. § 1132(a)(10)(B).

85. *WestRock*, 856 F.3d at 1324. WestRock had no cause of action under subsection A of § 1132(a)(10). Subsection A applies to challenges where no pension fund rehabilitation plan has been adopted. *See* 29 U.S.C. § 1132(a)(10)(A).

86. *WestRock*, 856 F.3d at 1323.

87. WestRock also contended that 29 U.S.C. § 1451(a) supported their cause of action as well. This argument will not be addressed in this Article as it was ultimately struck down by the court. *See WestRock*, 856 F.3d at 1323.

88. *WestRock*, 856 F.3d at 1324.

89. *Id.*

to the substance of a rehabilitation plan are outside the scope of § 1132 and, thus, does not afford a cause of action.[90]

Unfortunately, the court did not need to determine whether § 1132 authorized substantive challenges, since WestRock failed to properly allege the amendment was not in accordance with § 1085 at all, either procedurally or substantively.[91]

WestRock claimed the amendment violated § 1085 because (1) contribution rate schedules were not provided to it and that the amendment was not bargained for among the parties, and (2) critical status rehabilitation plans may not unilaterally impose contribution requirements on employers to avoid accumulated funding deficiencies.[92]

Procedurally, WestRock's argument that it did not collectively bargain for the amendment and was not provided with contribution rate schedules was inapplicable as it implicated the first version of rehabilitation plan under § 1085(e)(3)(a)(i),[93] whereas The Fund's amendment was actually enacted under the second version of rehabilitation plans created by § 1085(e)(3)(a)(ii).[94] Therefore, while WestRock would be correct that collective bargaining is required to increase contributions under the first version,[95] the second version of rehabilitation plan created by § 1085 allows The Fund to enact "reasonable measures" to emerge from critical status without collective bargaining.[96] The court reached this conclusion relying on the comprehensive nature of the ERISA statute to determine congressional intent.[97] Since the language "if agreed to by the bargaining parties," which appears as a requirement of the first version of rehabilitation plan,[98] is absent from the text of the second version,[99] the court reasoned this was done intentionally and refused to infer Congress's silence as accidental.[100] Essentially, if Congress had intended "reasonable

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90. *Id.*
91. *Id.*
92. *Id.*
93. 29 U.S.C. § 1085(e)(3)(a)(i).
94. *WestRock*, 856 F.3d at 1324.
95. 29 U.S.C. § 1085(e)(3)(a)(i).
96. 29 U.S.C. § 1085(e)(3)(a)(ii).
97. *WestRock*, 856 F.3d at 1325.
98. 29 U.S.C. § 1085(e)(3)(a)(i).
99. 29 U.S.C. § 1085(e)(3)(a)(ii).
100. *WestRock*, 856 F.3d at 1324; *see* Shotz v. City of Plantation, 344 F.3d 1161, 1168 (11th Cir. 2003) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

measures" to be subject under the collective-bargaining requirement, it would have said so.

Further, while § 1085(e)(3)(a)(ii) "does place [procedural] restrictions on a plan sponsor's ability to adopt reasonable measures,"[101] WestRock did not attack this statute. Section 1085(e)(3)(a)(ii) states that the rehabilitation plan's sponsors must provide annual standards, "set forth the alternatives considered, explain why the plan is not reasonably expected to emerge from critical status by the end of the rehabilitation period, and specify when, if ever, the plan is expected to emerge from critical status in accordance with the rehabilitation plan."[102] However, WestRock failed to allege that the Fund did not meet any of these requirements, and therefore, did not state a claim which would support a cause of action under § 1132(a)(10)(B).[103]

Substantively, WestRock's argument that unilaterally charging employers who wish to withdraw for their share of accumulating funding deficiencies violates § 1085 fails on two grounds.[104] First, § 1132(a)(10)(B) only provides a cause of action for violations of rehabilitation plans arising under § 1085.[105] However, it is Section 1082 that relieves employers from automatic payment upon the adoption of a rehabilitation plan.[106] Moreover, even if this had arisen under § 1085, this argument would have failed because § 1082 only exempts employers from the automatic payments to compensate for the deficiency normally faced, and "it does not go so far as to prohibit a charge based on accumulated funding deficiencies in all scenarios."[107] Essentially, while § 1082 waives an automatic payment, it does not prevent a fund from including additional contributions in its rehabilitation plan.[108] Again, the court based this conclusion on the comprehensive nature of the ERISA statute.[109] Since nothing in the text indicates Congress exempted any charges related to accumulated funding deficiencies, its silence is controlling.[110]

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101. *WestRock*, 856 F.3d at 1325–26.
102. 29 U.S.C. § 1085(e)(3)(a)(ii).
103. *WestRock*, 856 F.3d at 1324.
104. *Id.*
105. *See* 29 U.S.C. § 1085(e)(3)(a)(i).
106. 29 U.S.C § 1082.
107. *WestRock*, 856 F.3d at 1325.
108. *Id.*
109. *Id.*
110. *See* CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1226 (11th Cir. 2001) ("Where Congress knows how to say something but chooses not to, its silence is controlling.").

V. IMPLICATIONS

While the Eleventh Circuit left unanswered the question of whether § 1132 authorized a cause of action to challenge the substantive requirements of a rehabilitation plan enacted under § 1085, it may have provided a roadmap to do just that. It appears WestRock merely attacked the wrong statute if § 1132(a)(10)(B) does indeed allow substantive challenges to be brought against rehabilitation plans devised under § 1085. Therefore, the court may have considered the "reasonableness" of measures enacted by The Fund under § 1085(e)(3)(a)(ii) had WestRock correctly asserted this claim.[111]

In view of both interpretations of § 1132(a)(10)(B)'s grant, and the court's rationale in deciding the case, it appears the court would have considered the "reasonableness" of the rehabilitation plan adopted by The Fund without collective bargaining under § 1085(e)(3)(a)(ii). The court ultimately decided the case on the grounds that "where Congress knows how to say something but chooses not to, its silence is controlling."[112] In applying this holding to the statute in question, § 1132, The Fund's argument that § 1132(a)(10)(B) only permits an action when a rehabilitation plan "fails to update in accordance with the procedural requirements of § 1085" seems suspect. Because "procedural" does not appear in the text,[113] this court may have been inclined to find the absence of "procedural" in § 1132(a)(10)(B)'s grant to be intentional in light of its recognition of the "comprehensive and reticulated" nature of the ERISA statute, and the court's acquiescence to Congress's silence when it has "already said so much out loud."[114] Therefore, WestRock may have been permitted to bring a substantive challenge of the "reasonable measures" under which the amendment was adopted had it correctly challenged them under § 1085(e)(3)(a)(ii).[115]

Policy arguments support this contention as well. In line with the theme of congressional intent, Congress may have intended to create a substantive cause of action when it amended § 1132. Prior to the amendment, contributing employer's rights were admittedly extremely limited "to protect the interests of participants in employee benefit plans and their beneficiaries."[116] However, in creating the new special funding rules discussed here, it was necessary to afford the employers a right of

111. *See WestRock*, 856 F.3d at 1320.

112. *CBS*, 245 F.3d at 1226 (quoting Griffith v. United States, 206 F.3d 1389, 1394 (11th Cir. 2000)).

113. *See WestRock*, 856 F.3d at 1320.

114. Useden v. Acker, 947 F.2d 1563, 1582 (11th Cir. 1991).

115. *See WestRock*, 856 F.3d at 1320.

116. *Davila*, 542 U.S. at 208.

action in certain instances, presumably to protect the interest of the employers and employees alike.[117]

In this scenario, when a plan sponsor enacts a rehabilitation plan pursuant to the first version of § 1085(e)(3)(a)(i), its substantive terms are protected from abuse by the contributing employers or labor unions themselves. The employers or unions have the statutory right to bargain for these financial proposals, whether they be reductions in plan expenditures, reductions in future benefits, or increases in contributions.[118] This provides a check-and-balance system on the fund to protect the interests of the contributing employers and beneficiaries.

However, when plan sponsors enact a rehabilitation plan pursuant to the second version of § 1085, § 1085(e)(3)(a)(ii), the statutory protection of collective bargaining is not afforded to the contributing employers and their beneficiaries. Instead, it is within the plan sponsor's unilateral authority to adopt "reasonable measures" to secure the financial stability of the fund, free from oversight or input from the contributing employers.[119] In fact, the only requirements these reasonable measures carry is that the plan sponsor set forth the alternatives they may (or may not) have considered, explain their reasoning for believing the plan will not emerge from critical status within the rehabilitation time, and state when, if at all, they expect the plan to emerge from critical status.[120] Given that all of these requirements would arise from procedural challenges, if § 1132(a)(10)(B) did not provide for substantive review of a rehabilitation plan's terms, contributing employers or unions would be left without redress in the event of an unreasonable substantive term enacted completely out of their authority. In essence, as long as a plan's sponsors dot their *i*'s and cross their *t*'s, their governance becomes a despotic tyranny, and contributing employers would be subject to any amendments the sponsors may choose to adopt until the fund emerges, if ever, from critical status.[121]

Also, this would not be the only area under which a § 1132 cause of action has been interpreted broadly to protect beneficiaries. The jurisprudence of § 1132(a)(1)(B),[122] which provides a cause of action for employees to recover plan benefits, and § 1132(a)(3),[123] which provides a cause of action for a fund sponsor's breach of fiduciary duty, has

117. Pub. L. No. 109-280, 120 Stat. 780 (2006).
118. 29 U.S.C. § 1085(e)(3)(a)(i).
119. 29 U.S.C. § 1085(e)(3)(a)(ii).
120. *Id.*
121. *Id.*
122. 29 U.S.C. § 1132(a)(1)(B).
123. 29 U.S.C. § 1132(a)(3).

increasingly been interpreted to allow pension plan beneficiaries to assert both claims against the fund. A recent United States Court of Appeals for the Eighth Circuit case, *Jones v. Aetna Life Insurance Co.*,[124] is the latest in a line of cases from several circuits "regarding a plan participant's ability to assert simultaneous actions under sections 1132(a)(1)(B) and 1132(a)(3)."[125] In short, four circuits "have held that a plan participant can assert a claim for equitable relief while simultaneously seeking plan benefits," a conclusion rarely reached in the past when it was thought plan benefits provided an adequate remedy and that an equitable remedy was not needed.[126] Therefore, with increasing willingness of the courts to interpret § 1132 broadly, those that defend benefit claims find it likely that claims arising from breaches of fiduciary duties will become more common.[127]

Further, other phases of ERISA have seen an uptick in litigation in the last two years as well. Several recent cases have questioned the fiduciary process of a fund via excessive fee arrangements.[128] Driving these new allegations has been *Tibble v. Edison*,[129] a recent Supreme Court of the United States decision requiring plan sponsors to monitor its investments.[130]

Targets of litigation have also been broadening in scope. Aside from the typical corporate plan sponsors, university and college plan sponsors have been involved, and church plans have even faced lawsuits.[131] These recent decisions will lead a new era of ERISA litigation that questions not only fees but the administration and selection of the investments of these funds. These developments show a willingness of the court to restrain fund sponsors and protect the interests of contributing employers and thereby the fund's beneficiaries.[132]

If it were indeed found that rehabilitation plans implemented or amended under § 1085 could be challenged on substantive grounds by § 1132(a)(10), it could result in a widespread flood of litigation. As more

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124. 856 F.3d 541 (8th Cir. 2017).

125. Patrick Begos, *It May Be Time To Start Thinking About Equitable Claims Again*, ERISA Claim Defense Blog (May 18, 2017), https://www.erisaclaimdefense.com/may-time-start-thinking-equitable-claims/.

126. *Id.*

127. *Id.*

128. Rebecca Moore, *Expect More Varied ERISA Litigation in 2017*, PLANADVISER, https://www.planadviser.com/expect-more-varied-erisa-litigation-in-2017/ (last visited Mar. 23, 2018)

129. 135 S. Ct. 1823 (2015).

130. *Id.* at 1828.

131. Begos, *supra* note 125.

132. *Id.*

and more of these traditional defined-benefit pension plans continue to struggle because large corporations, and even municipalities, file for bankruptcy, critical status plans will remain an issue. Accordingly, the means of keeping these plans financially viable will remain hotly contested. However, by granting contributing employers a ticket into court as broad as "unreasonable measures" taken pursuant to § 1085(e)(3)(a)(ii), § 1132 may create a flood of ERISA litigation courts are ill-prepared to handle. If this were indeed to become an issue, and if we are to learn anything from the tangled history of ERISA, one likely should not expect the issue to be resolved. Rather, one would expect another convoluted "patch" on the ERISA statute in the near future as yet another Congress "kicks the can" further down the line to avoid the aptly named third rail of politics.[133]

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133. *See supra* Part III.