

Unreliable Securities for Retirement Income Security: Certifying the ERISA Stock-Drop Class

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I. INTRODUCTION

Catherine Stevens had built her retirement savings “a dollar at a time over a lifetime of hard work” when it was “reduced to virtually zero” at Enron’s collapse.¹ “I feel very strongly that we have all been wronged,” she said. Her plans for a secure future had been destroyed.²

Almost eight years after Enron’s failure, stories like Catherine’s persist, and employee retirement income security remains as comforting as an imaginary friend. A falling stock market in the wake of financial finagling leaves many employee retirement plans dangerously insecure.³ Employees like Catherine who bet their futures on their company’s stock have seen some of the worst losses,⁴ with catastrophic results.⁵ Like imaginary friends, the reality of retirement security becomes clearer with age and utterly disappointing. As we grow up, we realize it doesn’t exist.

In response to the financial finagling, many employees have filed lawsuits under the Employee Retirement Income Security Act of

1. Declaration of Catherine Stevens in Support of Plaintiffs’ Motion for Class Certification ¶ 6, at 2, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. H 01–CV–3913 (S.D. Tex. June 7, 2006) [hereinafter Declaration of Catherine Stevens], available at <http://external.hbsslaw.com/Enron/courtdoc-en-cstevensdecl.pdf>.

2. *Id.*

3. See Andrea Coombes, *Retirements in Peril: US System Full of Holes*, DOW JONES NEWS SERVICE, Sept. 21, 2009, available at <http://www.marketwatch.com/story/retirements-in-peril-us-system-is-full-of-holes-2009-09-21> (arguing that the recent economic recovery has not reached retirement savings, which lost “40% or more in the downturn”); Editorial, *From Here to Retirement*, N.Y. TIMES, Jan. 26, 2009, at A22 (“So far, the cumulative wipe-out of household retirement savings totals about \$2 trillion, and no one believes that the downturn is anywhere near over.”); Robert Powell, *Retirement-Plan Recovery Still Far Off*, DOW JONES NEWS SERVICE, Aug. 5, 2009, available at <http://www.marketwatch.com/story/retirement-plan-recovery-still-far-off-2009-08-04> (citing a 16.4 percent decline in defined-contribution account holdings since 2007).

4. See Paul J. Lim, *Don’t Paint Nest Eggs in Company Colors*, N.Y. TIMES, Mar. 30, 2008, at BU5 (explaining the risk associated with investing in employer stock, but noting that “nearly two of every five 401(k) participants” at the end of 2008 “were putting 20 percent of their money or more into employer stock”); see also *Employers Begin to Reinstate 401(k) Matches as Economy Shows Signs of Improvement*, MANAGING 401(K) PLANS, Jan. 2010 (reporting data that twenty-seven percent of companies that had suspended matches said that they have reinstated their matches, or plan to reinstate in 2010).

5. See Mark Gimein, *Don’t Count on Your 401(k)*, WASH. POST, May 17, 2009, at G01 (“We’re already witnessing the beginning of [this] catastrophe now . . .”).

1974 (“ERISA”).⁶ According to legal and financial analysts, ERISA “stock-drop” litigation is steadily on the rise.⁷ But the proliferation of these lawsuits may be a cause for academic concern. ERISA law on its own already provides a complex yet shaky foundation,⁸ and with the inability of some plaintiffs to aggregate their claims, savings built “a dollar at a time over a lifetime of hard work” may crumble without recourse in the law.⁹

Further complicating ERISA stock-drop litigation is the overlapping and evolving relationship with claims under Securities and Exchange Commission (“SEC”) Rule 10b-5.¹⁰ One of the most common claims in an ERISA stock-drop lawsuit is that the pension plan’s fiduciaries breached their duty of loyalty to plan participants by either misrepresenting the value of company stock or failing to disclose material information.¹¹ Because Rule 10b-5 lawsuits also challenge communications affecting the value of corporate securities,¹²

6. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001–1461 (2006).

7. See Jerry Crimmins, *Worker, Retiree Class Actions Surge: Report*, CHI. DAILY L. BULL., Jan. 29, 2009, at 1, available at 2009 WLNR 22565321 (“Class-action litigation over workplace retirement plans surged in 2008 both in filings and settlements as workers struggled to recoup 401(k) losses . . .”). Many legal scholars have also predicted that the Supreme Court’s 2008 decision in *LaRue v. DeWolf* is likely to increase the number of stock-drop lawsuits brought as class actions. See, e.g., Meredith Z. Maresca, *ERISA Practitioner Says LaRue Will Give Rise to Misrepresentation Claims in Lower Courts*, 35 Pens. & Ben. Daily (BNA) 2305 (Oct. 7, 2008) (noting likely “surge of litigation in lower federal courts” after *LaRue*); *More Participant Claims Expected in Wake of LaRue Rule*, MANAGING 401(K) PLANS, Apr. 2008 (explaining that the *LaRue* decision expands the scope of participants who may bring suit under ERISA section 502(a)(2)).

8. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (explaining that ERISA is “an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs”).

9. Declaration of Catherine Stevens, *supra* note 1.

10. See Mark Casciari & Ian Morrison, *Should the Securities Exchange Act be the Sole Federal Remedy for an ERISA Fiduciary Misrepresentation of the Value of Public Employer Stock?*, 39 J. MARSHALL L. REV. 637, 637 (2006) (arguing that “ERISA does not provide an additional remedy” for misrepresentations or nondisclosures); Craig C. Martin & Elizabeth L. Fine, *ERISA Stock Drop Cases: An Evolving Standard*, 38 J. MARSHALL L. REV. 889, 889–90, 912–18 (2005) (examining parallel and divergent factual bases and standards of liability under each regime); Susan J. Stabile, *I Believed My Employer and Didn’t Sell My Company Stock: Is There an ERISA (or ‘34 Act) Remedy For Me?*, 36 CONN. L. REV. 385, 388–89, 423–24 (2004) (investigating overlap of ERISA and securities laws and urging caution in allowing a cause of action for behavior that arguably constitutes a violation of both).

11. See *Varity Corp. v. Howe*, 516 U.S. 489, 510–15 (1996) (expanding the ERISA duty of loyalty to include nondisclosure and misrepresentation claims).

12. SEC Rule 10b–5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

To employ any device, scheme, or artifice to defraud,

securities fraud and ERISA lawsuits often arise from the same underlying facts.¹³ Central to both of these claims is the security holder's feeling that she has been "wronged" by the fraudulent or otherwise dishonest conduct of the employer-defendant.¹⁴ The 10b-5 and ERISA plaintiffs both allege financial loss in connection with artificially inflated company stock and material omissions or misstatements of corporate insiders. Both target the same accounting errors, irregularities, or otherwise fishy corporate conduct and involve an overlapping set of defendants. Even so, courts maintain that 10b-5 and ERISA lawsuits are two different causes of action, which must be analyzed in different ways.¹⁵

Driving this judicial determination are four key substantive and procedural differences between lawsuits under Rule 10b-5 and ERISA sections 409(a) and 502(a)(2).¹⁶ First, most 10b-5 lawsuits are governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which provides for an automatic discovery stay and heightened pleading requirements.¹⁷ Mirroring Federal Rule of Civil Procedure 9(b), the PSLRA requires that 10b-5 claimants plead "loss causation" and "state with particularity" facts creating a "cogent and compelling inference" that the defendants acted with intent to

To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2010).

13. Casciari & Morrison, *supra* note 10, at 637.

14. Declaration of Catherine Stevens, *supra* note 1.

15. See *Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 704 (7th Cir. 2008) (Easterbrook, C.J.) ("ERISA is a different statute, in a different title of the United States Code. Plaintiffs seek to use ERISA to recover for events that as a result of PSLRA could not support an action on behalf of shareholders at large."). Despite clear indications that courts will continue, in practice, to recognize ERISA misrepresentation and nondisclosure claims, many scholars argue that ERISA should not provide a separate remedy to the extent that it overlaps and even conflicts with securities laws. See, e.g., Casciari & Morrison, *supra* note 10, at 637 ("[F]or misrepresentation claims . . . the exclusive and appropriate federal remedy . . . should be the one provided by Congress under the federal Securities Exchange Act. In attempting to assert such claims under ERISA, the plaintiffs' bar is simply attempting to extract duplicative recovery and attorneys' fees, to the ultimate detriment of plan participants."). While this may inform the analysis of the scope of ERISA fiduciary duties, I recognize here only that ERISA misrepresentation claims exist. I will not attempt to argue whether they *should* exist.

16. For a more comprehensive overview of the substantive and procedural differences between ERISA stock-drop suits and securities law claims, see Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation under the Guise of ERISA?*, 26 HOFSTRA LAB. & EMP. L.J. 497, 501-27 (2009).

17. 15 U.S.C. § 78u-4(b)(1), (2), (3)(B) (2006).

deceive.¹⁸ ERISA claims, however, are not covered by PSLRA, and Federal Rule of Civil Procedure 26 is the sole guidance for discovery.¹⁹ Without the additional requirements of PLSRA and Rule 9(b), ERISA plaintiffs need only plead facts creating a “plausible” inference of causal connection under Federal Rule of Civil Procedure Rule 8(a),²⁰ making it easier to survive a motion to dismiss. Second, Rule 10b-5 plaintiffs must show that the defendants acted with scienter, which is a wrongful state of mind requiring at least a showing of recklessness,²¹ while ERISA requires only a showing of negligence.²² Third, Rule 10b-5 only allows for the recovery of damages as defined by the loss resulting from the defendant’s misstatements.²³ Remedies under ERISA, however, may exceed the plaintiffs’ damages, including lost profits and other equitable relief restoring the benefit plan for losses.²⁴ Finally, Rule 10b-5 defendants are defined broadly by their relationship to *any* fraudulent misstatements,²⁵ while ERISA defendants must be plan fiduciaries.²⁶ This means that targeted communications in an ERISA suit are limited to those made by plan fiduciaries in connection with the benefit plan itself.²⁷ Plan documents, however, often incorporate by reference SEC filings, and plan fiduciaries are often corporate insiders. Thus, defendants in Rule

18. Compare 15 U.S.C. § 78u-4(b)(1), (2), (4) (2006) (providing that a complaint must “state with particularity” all facts establishing the misleading statements and omissions and required state of mind), and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323–24 (2007) (“Congress did not merely require plaintiffs to ‘provide a factual basis for their allegations,’ i.e., to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a “strong”—i.e., a powerful or cogent—inference.”), with FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

19. *Rogers*, 521 F.3d at 704.

20. *In re Dynergy Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 867 (S.D. Tex. 2004) (“ERISA does not have heightened pleading requirements.”); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 625 (S.D. Tex. 2003) (“ERISA does not even have heightened pleading requirements, but it is subject to . . . notice pleading.”); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (confirming the *Twombly* plausibility standard for FED. R. CIV. P. 8(a)).

21. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

22. *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449, 452 (6th Cir. 2002).

23. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972) (providing that damages for violations of section 10b-5 are to be measured by the difference between the value of what the seller received for the shares and the fair market value of the shares at the time of the sale).

24. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2006).

25. See SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2010) (“It shall be unlawful for any person, directly or indirectly . . .”).

26. ERISA § 409(a).

27. *Varity Corp. v. Howe*, 516 U.S. 489, 500 (1996) (specifying that fiduciary status is a necessary element for an ERISA claim).

10b-5 and ERISA misrepresentation lawsuits frequently intersect, even if only incidentally.²⁸

In spite of these differences—and also *because* of them—apparent similarities between 10b-5 and ERISA lawsuits create fertile ground for inconsistent standards. Because ERISA stock-drop law is alarmingly underdeveloped, it is tempting for both plaintiffs and defendants to import old-as-dirt securities law principles into the ERISA context.²⁹ Surprisingly, neither the parties nor the courts give an adequate rationale as to why these principles are transferable, resulting in disparate judicial opinions, disjointed laws, and uncertain grounds for high-stake settlement negotiations.³⁰

The most vivid example of uncertainty in the ERISA stock-drop context is the reliance element for misrepresentation and nondisclosure claims.³¹ In securities law, detrimental reliance provides the requisite causal connection between the defendant's fraudulent misstatement and the plaintiff's financial loss.³² Proving individual reliance, however, precludes class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3), which require that common issues predominate over the individual ones.³³ In fraud-on-the-market cases, 10b-5 classes are only certified under the *Basic v. Levinson* presumption of reliance, which stems from the theory of efficient capital markets.³⁴ Courts have not uniformly applied the same presumption, however, in ERISA section 502(a)(2) cases, even though the reliance element likewise provides a causal nexus and requires

28. See *infra* Part III.1 and accompanying notes.

29. See Bravo, *supra* note 16, at 498 (concluding that “the substantial overlap and potential conflict between the two actions warrants substantive clarification and procedural harmonization to prevent plaintiffs’ lawyers from using ERISA to evade the protections that the federal securities laws provide against abusive litigation”).

30. These settlements can be costly. See, e.g., *Court Gives Final OK to \$70.5M Settlement Ending ERISA Stock-Drop Claims Against Tyco*, MANAGING 401(K) PLANS, Jan. 2010 (noting a \$70.5 million settlement after seven years of litigation).

31. See *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 190 (W.D. Mo. 2009) (“The question on whether plaintiffs must individually show reliance on [section] 502(a)(2) communications claims—and, thus, whether class treatment is appropriate—has not been settled by the courts.”).

32. *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988) (“Reliance provides the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury.”).

33. *Id.* at 242 (“Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.”). This aspect of Rule 23(b)(3) is often called “the predominance requirement.” See, e.g., *Malack v. BDO Seidman, LLP*, No. 09-4475, 2010 U.S. App. LEXIS 17090, at *2 (3d Cir. Aug. 16, 2010) (noting “predominance requirement of Rule 23(b)(3)”).

34. *Id.* at 243-44, 248-50; see, e.g., *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (noting basic elements of action under 10b-5).

individualized proof. Rather, for ERISA stock-drop claims there are at least four ways in which courts treat this detrimental reliance element, breaking down into two analytically distinct questions: (1) does ERISA section 502(a)(2) require a showing of eyeball reliance, and, if so, (2) does this affect class certification? Because of the stakes involved, plaintiffs in ERISA cases have pushed courts to answer “no” to the first question and avoid the issue of class certification altogether.³⁵ Although courts that have adopted this rule usually certify classes under Rule 23(b)(1) or (b)(2), it is difficult to explain how this view accounts for the but-for causation element of ERISA section 502(a)(2) claims.³⁶

The second view is to accept the eyeball reliance requirement as an element of ERISA section 502(a)(2) claims but to certify the class of plaintiffs anyway.³⁷ These courts reject the presumption of reliance from *Basic v. Levinson*, but for some reason do not find reliance to preclude class certification. Because such individual reliance would preclude certifying a class of 10b-5 plaintiffs, however, this approach requires an account of *why* ERISA claims are *different*. No court has yet supplied this analysis.

The third approach is to treat ERISA claims exactly like 10b-5 claims and to certify classes under the *Basic v. Levinson* framework. While some plaintiffs have succeeded in getting courts to adopt this framework, courts have done so without articulating their rationale.³⁸ The problem is that ERISA section 502(a)(2) cases are *not* securities 10b-5 claims,³⁹ and it is not clear that this analysis should apply.

Finally, at least six courts have rejected the *Basic v. Levinson* presumption and, finding reliance to be an element of a section

35. See, e.g., *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 353–54 (N.D. Ill. 2007) (certifying the class, finding that “[t]he Seventh Circuit has never expressly held that detrimental reliance is an element of an ERISA breach of fiduciary duty claim”).

36. See *infra* Part III.A.3 (explaining the causation element for ERISA misrepresentation claims).

37. See, e.g., *George v. Kraft Foods Global, Inc.*, 251 F.R.D. 338, 348 (N.D. Ill. 2008) (“[T]he issue of individual detrimental reliance is irrelevant to class certification in an ERISA action under Section 502(a)(2) or (3).”).

38. See, e.g., *In re Cardinal Health ERISA Litig.*, 424 F. Supp. 2d 1002, 1046 (S.D. Ohio 2006) (disposing reliance question by deferring determination on sufficiency until after discovery); *In re Tyco Int’l, Ltd.*, MDL No.02–1335–PB, 2006 U.S. Dist. LEXIS 58278, at *23–28 (D.N.H. Aug. 15, 2006) (importing concepts of reliance from the securities fraud context where “[d]efendants have not cited, and [the court has] not located, a decision” refusing to apply such concepts in ERISA litigation); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 833 (S.D. Ohio 2004) (finding sufficient reliance in plain articulation of presumption in pleadings).

39. *Rogers v. Baxter Int’l, Inc.*, 521 F.3d 702, 704 (7th Cir. 2008) (“ERISA is a different statute, in a different title of the United States Code.”).

502(a)(2) claim, refused to certify the class of plaintiffs on the misrepresentation claim.⁴⁰ This framework, however, effectively eliminates the possibility of aggregating misrepresentation claims under section 502(a)(2), which, like 10b-5 claims, provide little individual incentive to bring suit. Plaintiffs who cannot aggregate their claims may be left without a remedy, which is the problem that *Basic v. Levinson* was meant to solve.

Considering these four different approaches to the ERISA reliance element, the purpose of this Note is to resolve the insecurity plaguing class certification and to propose a new causal analysis for these claims. Part II traces the evolving standard of ERISA misrepresentation claims, the principles and policies that guide these claims, and the standard for class certification. Part III evaluates the existing status of the ERISA reliance element and its disparate treatment at class certification. It then compares the nature of reliance in both the securities fraud and ERISA contexts. Because investor decisions are heavily context dependent, and retirement plan participants are limited both by the number of options available to them and the dynamics of the employer-employee relationship, plan participants' claims under ERISA are sufficiently distinct from 10b-5 claims to require a different reliance standard for class certification.

Part IV articulates that standard. Rather than the 10b-5 requirement of individual reliance by every class member, this Note proposes a scheme of "overall reliance" in the case of ERISA misrepresentation claims. This standard requires a showing of detrimental reliance by *some* as opposed to *all* class members, focusing on the harm to the employee benefit plan as a whole rather than harm to the individual accounts.

Part V concludes that ERISA misrepresentation and nondisclosure claims should be evaluated with rigor given the high stakes of the litigation for both parties. Even though retirement security may seem at times to be illusory, the legal standard for ERISA class certification need not be uncertain.

40. *Tibble v. Edison Int'l*, No. CV 07-5359 SVW, 2009 U.S. Dist. LEXIS 120939, at *10-13 (C.D. Cal., June 30, 2009); *In re Merck & Co.*, MDL No. 1658 (SRC), 2009 U.S. Dist. LEXIS 10243, at *15-21 (D.N.J. Feb. 9, 2009); *In re RadioShack ERISA Litig.*, 547 F. Supp. 2d 606, 616 (N.D. Tex. 2008); *In re Schering-Plough Corp. ERISA Litig.*, No. 03-1204, 2008 U.S. Dist. LEXIS 89718, at *34-37 (D.N.J. Jan. 31, 2008); *Lively v. Dynegy, Inc.*, No. 05-cv-00063-MJR, 2007 U.S. Dist. LEXIS 14794, at *55-56 (S.D. Ill. Mar. 2, 2007); *In re Elec. Data Sys. Corp. ERISA Litig.*, 224 F.R.D. 613, 630 (E.D. Tex. 2004).

II. THE POLICIES OF ERISA AND THE CLASS CERTIFICATION STANDARD

Most ERISA stock-drop cases follow a single, well-defined path to settlement or trial.⁴¹ After a negative financial forecast and a drop in company stock price, participants and beneficiaries of the employer-sponsored defined-contribution retirement plan often lose substantial value in their accounts. These participants react by filing an ERISA suit, claiming that the company's previous stock price was bolstered by deceptive accounting practices or other misleading statements or omissions. The plaintiffs claim that the recent drop in stock price was a result of the market's learning of the inflated nature of previous stock prices.⁴²

The crux of the ERISA claim is that the fiduciaries of the employer-sponsored plan breached their duties to the plan and its participants by allowing them to invest in the company's stock at the artificially inflated price.⁴³ In addition, the plaintiffs usually allege that plan fiduciaries misrepresented or failed to disclose material information affecting the value of the company's stock.⁴⁴ These challenged communications sometimes include the company's mandatory SEC filings, incorporated by reference into the Summary Plan Description ("SPD")⁴⁵ and other fiduciary disclosures. In sum,

41. See Deborah S. Davidson & Julia Y. Trankiem, Employer "Stock Drop" Litigation Under ERISA 1–2 (Nov. 17, 2009) (paper presented at ABA Joint Committee on Employee Benefits 19th Annual National Institute on ERISA Litigation, Chicago, Ill.), available at http://new.abanet.org/calendar/19th-Annual-National-Institute-on-ERISA-Litigation/Meeting-Materials/I_Stock-Drop-Paper.pdf (explaining "the basic allegations of an ERISA stock drop lawsuit" based on the 200 that have been filed largely in the last five to six years).

42. See, e.g., Consolidated Class Action Complaint for Violations of the Employee Retirement Income Security Act ¶ 569, *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 458 F. Supp. 2d 455 (E.D. Mich. 2006) (MDL No. 1725) ("The Director Defendants breached their duty to inform and disclose by failing to provide to the other fiduciaries of the Plan complete and accurate information regarding the true financial condition of the company and the risks of investing Delphi stock, when they knew, as described above, that the Company was engaging in accounting irregularities which artificially inflated the value of Delphi stock and rendered the stock an unsuitable retirement investment for the Plan.").

43. This is often called the "prudence claim." See Davidson & Trankiem, *supra* note 41 (identifying the "prudence claim" as one of two substantive claims that the basic allegations of a stock-drop lawsuit usually comprise).

44. This is often called the "misrepresentation/omission claim." See Davidson & Trankiem, *supra* note 41 (identifying the "misrepresentation/omission claim" as one of two substantive claims that the basic allegations of a stock-drop lawsuit usually comprise).

45. See ERISA § 102(a), 29 U.S.C. § 1022(a) (2006) ("A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan

plaintiffs allege the three elements of an ERISA claim under sections 409(a) and 502(a)(2): that the defendants, (1) acting as fiduciaries, (2) breached one or more of the fiduciary duties outlined in section 404(a), and that (3) this breach caused harm to the plan.⁴⁶

Of these three elements of an ERISA stock-drop claim, causation has proven the most problematic to define and prove. Because defined-contribution accounts allow participants to choose whether to invest in employer stock,⁴⁷ plaintiffs allege that they were fraudulently induced to pick company equities through faulty information.⁴⁸ Therefore, just as in securities law, this “detrimental reliance” element often acts as the but-for causal nexus between the fiduciary’s breach of duty and the harm to the defined-contribution plan, satisfying the causation element of ERISA section 502(a)(2).

Courts have had trouble, however, coming up with a consistent standard for testing whether the ERISA plaintiff meets the detrimental reliance standard, or whether such a standard exists at all.⁴⁹ Scholars have also ignored this question, focusing instead on the disclosure duties of ERISA fiduciaries and the scope of fiduciary duties at the pleading stage.⁵⁰ Given the impact that the detrimental reliance

participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.”).

46. See *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1143 (C.D. Cal. 2009) (providing that plaintiffs must show that “there was a fiduciary breach and that but for the breach, the [p]lan’s assets would have been greater”).

47. See ERISA § 3(34) (“The term ‘individual account plan’ or ‘defined-contribution plan’ means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.”).

48. See Davidson & Trankiem, *supra* note 41 (identifying fiduciaries’ misleading of participants through deceptive company communications as a theme of stock-drop lawsuit allegations).

49. See *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 190 (W.D. Mo. 2009) (collecting cases) (“The question of whether plaintiffs must individually show reliance on [section] 502(a)(2) communications claims—and, thus, whether class treatment is appropriate—has not been settled by the courts.”).

50. See, e.g., Craig C. Martin & Elizabeth L. Fine, *ERISA Stock Drop Cases: An Evolving Standard*, 38 J. MARSHALL L. REV. 889, 889–90 (comparing standards of liability for securities fraud and ERISA stock-drop litigation, and discussing the implications of the differences between the two) (2005); Craig C. Martin, Matthew J. Renaud & Omar R. Akbar, *What’s Up on Stock-Drops? Moench Revisited*, 39 J. MARSHALL L. REV. 605, 606 (2006) (“This article addresses the confusion regarding fiduciary duties engendered by ERISA stock-drop litigation”); Stabile, *supra* note 10, at 388 (addressing whether “current ERISA case law allow for a claim of breach of fiduciary duty based on misrepresentations and nondisclosures concerning the value of a company and the prospects of its stock”).

element has on class certification, the inconsistent treatment of that element in ERISA misrepresentation claims is particularly troubling.

Detrimental reliance is difficult to prove on an individual basis. Because individual ERISA plaintiffs might have subjectively relied on any number of statements, including employer meetings, e-mails, newsletters, plan documents, or incorporated SEC filings, the reliance element might not be susceptible to aggregate proof, making it difficult to certify the class under Rule 23(b)(3), and in some circuits, even under Rule 23(a).⁵¹

The significance of this issue is amplified by the fact that the class certification stage is a pivotal—even determinative—moment in the litigation of ERISA stock-drop claims. If plaintiffs cannot certify the class, it is effectively the end of the litigation. Many of the claimants will not seek relief on their own because they cannot afford to litigate as individuals and lack incentive to litigate as employees of the defendant.⁵² For defendants, the determination is equally pivotal. Defendants facing a class action lawsuit have great pressure to settle because of the high variance associated with a single, aggregate verdict.⁵³ Class certification creates great risks for the rare defendant

51. See, e.g., *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 353–354 (N.D. Ill. 2007) (explaining that information was disseminated “through ‘town hall’ meetings, internal blast e-mail updates, and newsletters”); Declaration of Gary Scott Dreadin in Support of Plaintiffs’ Motion for Class Certification at 2, *Tittle v. Enron Corp.*, No. H–01–9313, 2008 U.S. Dist. LEXIS 68578 (S.D. Tex. Aug. 29, 2008) [hereinafter Declaration of Gary Scott Dreadin], available at <http://external.hbsslaw.com/Enron/courtdoc-en-dreadindecl.pdf> (“Enron management also used the Company’s internal email network to assure the employees concerning the financial health of the company.”).

52. See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 402–03 (1980) (“The justifications that led to the development of the class action include . . . the facilitation of the spreading of litigation costs among numerous litigants with similar claims.”) (citing FED. R. CIV. P. 23 advisory committee’s notes); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [T]his lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”).

53. The “high variance” associated with class-action litigation stems from the possibility of having one enormous, aggregate verdict, as opposed to seeing losses spread out across multiple courts in multiple jurisdictions. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (noting the concern “with forcing the[] defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability”). Under Posner’s theory, defendants would rather settle than risk bankruptcy from that large, aggregate verdict, no matter how small the chance of the verdict is. *Id.* As some scholars have noted, however, whether this “settlement pressure” is a bad thing is

who wants to take her case all the way to trial.⁵⁴ And even for the defendants who wish to settle immediately, certification is essential for precluding future claims against them on a global, class-wide scale.⁵⁵ These factors raise the stakes for all parties involved in ERISA misrepresentation claims and put the reliance determination at center stage.

Despite the significance of the reliance determination, courts have largely erred in their analysis of this element, either by deciding that no such element exists, by drawing too strong an analogy to Rule 10b-5 claims, or by creating distinctions from 10b-5 claims where none should logically exist. The following Subpart discusses the particular standards for ERISA claims and the existing framework for class certification in order to set a foundation for evaluating these disparate judicial approaches in Part III.

A. The Policies and Elements of an ERISA Misrepresentation Claim

The standards for ERISA litigation are rooted in principles unique to the structure and purposes of employee benefit plans. Congress enacted ERISA to provide “minimum standards . . . assuring the equitable character” and “financial soundness” of retirement benefit plans.⁵⁶ ERISA imposes on plan fiduciaries a standard of conduct that is “the highest known to the law,”⁵⁷ and courts typically interpret this language broadly.⁵⁸

Under ERISA section 404(a), pension plan fiduciaries have four enumerated duties.⁵⁹ First, fiduciaries must act loyally, that is, “solely in the interest of the participants and beneficiaries,” and “for the exclusive purpose” of “providing [them] benefits.”⁶⁰ Fiduciaries must

still up for debate, and may depend on *why* the variance exists. RICHARD A. NAGAREDA, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 61–63 (2009).

54. See NAGAREDA, *supra* note 53 (highlighting the risks of a single, aggregate verdict).

55. See *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (listing class actions as a mechanism for precluding future claims).

56. ERISA § 2(a), 29 U.S.C. § 1001(a) (2006).

57. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (citing RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959)). See also *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1988) (“Such a result would clearly contravene ERISA’s imposition of a fiduciary duty that has been characterized as ‘the highest known to law.’”) (quoting *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1468 (5th Cir. 1986)).

58. See, e.g., *Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1086 (8th Cir. 2009) (“ERISA is remedial legislation and should be liberally construed . . .”) (citing *Starr v. Metro Sys., Inc.*, 461 F.3d 1036, 1040 (8th Cir. 2006)).

59. ERISA § 404(a).

60. *Id.* § 404(a)(1)(A).

also act with prudence, discharging their duties with the same “care, skill, prudence, and diligence” that a prudent man would use in like circumstances.⁶¹ In addition to their duties of loyalty and prudence, fiduciaries must act “in accordance with the documents and instruments governing the plan,” which includes making required disclosures.⁶² Finally, for fixed, defined benefit plans in which participants do not choose their investments, fiduciaries must “diversify[] the investments of the plan so as to minimize the risk of large losses.”⁶³

Even though ERISA is a “comprehensive and reticulated statute,” the Supreme Court has held that these enumerated duties are to be informed and even amplified by the common law of trusts.⁶⁴ In *Varity Corp. v. Howe*, the Court recognized that trust law principles ought to inform ERISA law to the extent that trust law accords with the special nature and purposes of employee benefit plans.⁶⁵ Although these purposes can often be conflicting, the goal of protecting employee benefits and the policy of encouraging employers to retain welfare benefit plans in the first place will often inform the ERISA analysis.⁶⁶ Because ERISA does not require employers to sponsor benefit plans,⁶⁷ an overly burdensome scheme would likely discourage their existence, even though “they have become an important factor affecting the stability of employment and the successful development of industrial relations.”⁶⁸ In fact, the legislative history of ERISA suggests that “increas[ing] the number of individuals participating in retirement plans” is a primary goal of the ERISA regulatory scheme.⁶⁹

61. *Id.* § 404(a)(1)(B).

62. *Id.* § 404(a)(1)(D).

63. *Id.* § 404(a)(1)(C). This diversification requirement does not apply to the holding of employer stock in eligible individual account plans (EIAPs), or defined-contribution accounts, which are the subject of misrepresentation suits. *Id.* § 404(a)(2).

64. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251–52 (1993) (explaining the high standards for fiduciaries under ERISA and its remedial and “comprehensive” aims).

65. 516 U.S. 489, 497 (1996).

66. *Id.* (finding that courts may consider “Congress’ desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place”).

67. *See* ERISA § 4 (defining the scope of employer-sponsored benefits to which ERISA applies, but not requiring employers to sponsor such plans).

68. *Id.* § 2(a).

69. S. REP. NO. 93–383, at 1069 (1973) (“At the same time, the committee recognized that private retirement plans are voluntary on the part of the employer, and, therefore, it has carefully weighed the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits.”); *see also* H.R. REP. NO. 93–533, at 2348–49 (1973) (identifying as a goal of ERISA the promotion of “a renewed expansion of private

Another basic principle guiding ERISA stock-drop litigation is the representative nature of ERISA stock-drop claims, which are brought by the plan participants and beneficiaries on behalf of the retirement benefit plan itself.⁷⁰ ERISA section 409(a) establishes a fiduciary's personal liability for losses "to [the] plan" resulting from a fiduciary's breach of duty, including any of the plan's lost profits.⁷¹ ERISA section 502(a) creates a private right of action for losses and identifies the types of civil actions that may be brought in response to a fiduciary's breach of duty.⁷² Most ERISA stock-drop claims are brought under ERISA section 502(a)(2),⁷³ which authorizes the Secretary of Labor, as well as plan participants, beneficiaries, and fiduciaries, to bring actions on behalf of the plan for the obligations defined in section 409(a).⁷⁴ Thus, the remedy sought is *for the employee benefit plan* to restore to the plan all losses caused by the fiduciary breach.⁷⁵

The Supreme Court's decisions in *Massachusetts Mutual Life Insurance Co. v. Russell*⁷⁶ and *LaRue v. DeWolff, Boberg & Associates*⁷⁷ explain this representative nature of claims under ERISA section 502(a)(2). In *Russell*, the plaintiff received all benefits to which she was contractually entitled but sought consequential damages under ERISA section 502(a)(2) for a delay in processing her claim.⁷⁸ In holding that section 502(a)(2) did not provide a remedy for this type of injury, the *Russell* court stressed that the text of section 409(a) characterizes the relevant fiduciary relationship as one "with respect to a plan," and repeatedly identified "the plan" as the victim of any fiduciary breach and the recipient of any relief.⁷⁹

retirement plans and increase [in] the number of participants receiving private retirement benefits").

70. See *infra* notes 76–84 and accompanying text.

71. ERISA § 409(a) ("Any person who is a fiduciary with respect to a plan . . . shall be personally liable to make good to such plan any losses to the plan resulting from each [fiduciary] breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary . . .").

72. *Id.* § 502(a).

73. Davidson & Trankiem, *supra* note 41, at 30.

74. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 253 (2008).

75. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (finding that the representative nature of a section 502(a)(2) claim is "supported by the text of [section] 409, by the statutory provisions defining the duties of a fiduciary, and by the provisions defining the rights of a beneficiary").

76. 473 U.S. 134 (1985).

77. 552 U.S. 248 (2008).

78. *Russell*, 473 U.S. at 136–37.

79. *Id.* at 140–42.

In *LaRue*, the defendants used the “entire plan” language from *Russell* as a shield, arguing that the plaintiffs did not have standing under ERISA unless they sought a remedy for *all* plan participants.⁸⁰ The *LaRue* Court held, however, that *individual* account holders could seek relief under ERISA section 502(a)(2) so long as they were not seeking individualized relief, but relief to their accounts through the plan.⁸¹ The Court distinguished between an individualized injury and standing for an individual account holder: plaintiffs may not seek damages for individual injuries under ERISA section 502(a)(2), but they may seek recovery for losses to their individual accounts to the extent that such losses result from injuries to plan assets which are allocated to those individual accounts.⁸² In *LaRue*, the Court relied heavily on ERISA’s legislative history, revealing that “‘the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators.’”⁸³ Because sections 502(a)(2) and 409 protect “the financial integrity of the plan,” the relevant injury that plaintiffs assert in an ERISA stock-drop claim is that of the employer-sponsored benefit plan *through* the losses to the individual accounts.⁸⁴

B. Class Certification as an Efficient Mechanism for Common Claims

Also relevant to ERISA misrepresentation and nondisclosure suits is the standard for class certification. Given the plan-wide nature of the section 502(a)(2) remedy and the wide-reaching effects of plan mismanagement, most ERISA stock-drop claims proceed as class actions under Federal Rule of Civil Procedure 23. Economic evidence suggests a growing relationship between class certification and settlement,⁸⁵ making this an important stage for both parties as they determine whether and how to proceed towards trial.⁸⁶

80. *LaRue*, 552 U.S. at 256.

81. *Id.* (finding that section 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries).

82. *Id.*; *see also id.* at 262 (Thomas, J., concurring) (“The allocation of a plan’s assets to individual accounts for bookkeeping purposes does not change the fact that all the assets in the plan remain plan assets.”); *Tullis v. UMB Bank*, 515 F.3d 673, 680 (6th Cir. 2008) (finding that any assets recovered from the defendant under section 502(a)(2) “would first be paid into the plan, then allocated to [the plaintiffs’] individual accounts”).

83. *LaRue*, 552 U.S. at 254 (quoting *Russell*, 473 U.S. at 140 n.8).

84. *Id.*

85. *See* H.R. REP. NO. 104–369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730 (noting that the PSLRA was an attempt to curb “the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle”); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J.

The principal purpose of class certification is to achieve efficiency and economy of litigation with respect to the parties and the courts.⁸⁷ Because individual litigants often do not have the resources and economic incentive to pursue certain claims on their own,⁸⁸ “[c]lass relief is ‘peculiarly appropriate’ when the ‘issues involved are common to the class as a whole’ and when they ‘turn on questions of law applicable in the same manner to each member of the class.’”⁸⁹ In this sense, the class action device is a way of increasing access to the courts and delegating regulatory functions to private individuals by providing a collective incentive to sue.⁹⁰

Even so, class certification is an “exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only” and raises serious concerns about the due process rights of the parties involved, particularly the absent class members.⁹¹ Because of this, the Federal Rules of Civil Procedure provide strict guidelines for class certification, ensuring that the named plaintiffs will be adequately represented and the claims are generally susceptible to aggregate proof. To certify a class, the district court must find that the plaintiffs meet all of the prerequisites of Rule 23(a) and that certification is appropriate under one of the three subsections of Rule 23(b).⁹²

LEGAL STUD. 399, 418 (1973) (stating that an increase in the parties’ costs of litigation relative to their settlement costs will reduce the likelihood of litigation).

86. See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) (“With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant’s operations.”).

87. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155, 159 (1982); 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1:6 (4th ed. 2010) [hereinafter *NEWBERG*] (explaining the objectives of the class-action device).

88. See *supra* note 52 and accompanying text.

89. *Falcon*, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

90. See *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“The aggregation of individual claims in the context of a classwide [sic] suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“As commentators have noted, from the plaintiffs’ point of view a class action resembles a ‘quasi-administrative proceeding, conducted by the judge.’”).

91. See *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).

92. See FED. R. CIV. P. 23(a)–(b) (outlining the prerequisites and requirements for class certification).

Federal Rule of Civil Procedure 23(a) provides four prerequisites for class certification: numerosity,⁹³ commonality,⁹⁴ typicality,⁹⁵ and adequacy of representation.⁹⁶ Although the Supreme Court has found that the commonality and typicality prerequisites “tend to merge,” the requirements are slightly different in their analytical scope.⁹⁷ Commonality looks to legal and factual questions among the class members to determine whether the class is sufficiently cohesive to bring its claims together.⁹⁸ Courts agree that this “commonality” prerequisite is “not demanding”—the proposed class members need only share one question of fact or law in common in order to meet the Rule 23(a)(2) commonality requirement, so long as the question moves the litigation forward.⁹⁹

Typicality, however, looks to the relationship between the named plaintiff and the absent class members to “determine[] whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.”¹⁰⁰ In *Sprague v. General Motors*, the Sixth Circuit gave the following summary of the “premise” of the typicality requirement: “[A]s goes the claim of the named plaintiff, so go the claims of the class.”¹⁰¹

Also tending to merge with the commonality and typicality requirements of Rule 23(a) is the adequacy of representation prerequisite.¹⁰² Looking to the incentives of both the named plaintiffs and class counsel, this requirement calls the court to evaluate adequacy through conflicts of interest to ensure vigorous and “fair”

93. FED. R. CIV. P. 23(a)(1) (“[T]he class is so numerous that joinder of all members is impracticable.”). Numerosity is not typically challenged in ERISA stock-drop cases, as there are usually several plaintiffs scattered across the nation challenging the defendant’s conduct.

94. FED. R. CIV. P. 23(a)(2) (“[T]here are questions of law or fact common to the class.”).

95. FED. R. CIV. P. 23(a)(3) (“[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class.”).

96. FED. R. CIV. P. 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”).

97. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.13 (1982).

98. NEWBERG, *supra* note 87, § 3:10; *see also* RICHARD A. NAGAREDA, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 73–75 (2009) (describing the commonality and typicality analysis in *Falcon* and explaining “minimal commonality”).

99. NEWBERG, *supra* note 87, § 3:10; *see also* NAGAREDA, *supra* note 98, 73–75 (2009).

100. NEWBERG, *supra* note 87, § 3:13.

101. 133 F.3d 388, 399 (6th Cir. 1998).

102. *Falcon*, 457 U.S. at 158 n.13 (explaining that both commonality and typicality serve as guideposts for assuring that “the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence”).

litigation.¹⁰³ The requirements “tend to merge,” because, when a proposed class fails on typicality, the named plaintiff will not have the *incentive* to present evidence for claims other than his own. In the context of detrimental reliance, some circuits have found this determinative¹⁰⁴—if each plaintiff must prove reliance individually, the named plaintiff will not have the incentive to prove the absent class members’ reliance, and the named plaintiffs’ reliance will not push the litigation forward.

Together with numerosity, commonality, typicality, and adequacy of representation, a party seeking class certification must also satisfy one of the three subsections of Rule 23(b), which also serves to ensure that class certification is efficient and fair to all parties involved.¹⁰⁵ Rules 23(b)(1) and 23(b)(2) provide for “mandatory” classes with no ability to opt out. Traditionally, courts will certify classes under Rule 23(b)(1) or (b)(2) when the plaintiffs seek injunctive or equitable relief or relief with respect to a limited fund.¹⁰⁶ Plaintiffs in this case are already “tied together” as a class by outside circumstances.¹⁰⁷ Rule 23(b)(1)(B), for example, applies to claims against trusts and other entities with limited assets and multiple potential claimants.¹⁰⁸ In that sense, Rule 23(b)(1)(B) is like a mass-scale version of joinder under Rule 19—since deciding for some parties would be dispositive of the rights of other parties, it is best to decide all of the claims together. Rules 23(b)(1)(A) and 23(b)(2) likewise focus on a common *res* or action. These rules apply in the case of injunctive relief, where multiple rulings risk subjecting the defendant to inconsistent standards.¹⁰⁹ For example, in a civil rights claim brought by multiple plaintiffs, some courts may grant injunctive relief and

103. *Id.*

104. *See, e.g., Sprague*, 133 F.3d at 399.

105. *See* FED. R. CIV. P. 23(b).

106. NEWBERG, *supra* note 87, §§ 4:3, 4:11.

107. Professor Richard A. Nagareda, Complex Litigation Lecture, Vanderbilt University Law School (Spring 2010).

108. *See* FED. R. CIV. P. 23(b)(1)(B) (providing that a class action may be maintained when separate actions could result in a determination which “as a practical matter, would be dispositive of the interests of the other [class] members . . . or would substantially impair or impede their ability to protect their interests”). Examples of this type of class action provided by the Advisory Committee Notes include: “an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society”; “an action by shareholders to compel the declaration of a dividend”; and “an action by a creditor to set aside a fraudulent conveyance . . . when the debtor’s assets are insufficient to pay all creditors’ claims.” FED. R. CIV. P. 23(b)(1)(B) advisory committee’s note. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), for a fuller explanation of the limited fund doctrine generally.

109. NEWBERG, *supra* note 87, §§ 4:4, 4:11.

order the defendant to stop doing X, while other courts may rule that X is not illegal. Rules 23(b)(1)(A) and 23(b)(2) gather these claims together, so that the court only issues *one* ruling for relief common to the class as a whole.¹¹⁰

Rule 23(b)(3), by contrast, provides for an opt-out provision and is usually sought in the case of damage claims, where the plaintiffs are not already “tied together.”¹¹¹ Plaintiffs seeking a Rule 23(b)(3) class must show that common issues predominate over individualized issues and that the class mechanism is a superior mode of litigation.¹¹² In securities fraud cases, which are uniformly certified under Rule 23(b)(3),¹¹³ the “predominance” requirement prevents certification in the absence of the fraud-on-the-market presumption because individualized reliance issues would pervade the litigation.¹¹⁴ Under this reasoning, class certification would neither be “efficient” nor “superior” because of the need for mini-trials to determine the reliance of each plaintiff in a class of thousands. The fraud-on-the-market presumption shifts this burden, making it such that the common issues predominate over the issue of reliance, which no longer presents an individualized inquiry.¹¹⁵

ERISA stock-drop claims under section 502(a)(2) have been certified under several sections of Rule 23(b), further complicating the reliance analysis. Many courts certify ERISA section 502(a)(2) claims under 23(b)(1)(B), for example, because of the derivative nature of these claims on behalf of the plan.¹¹⁶ Given ERISA’s grounding in the equitable principles of trust law, several courts have found that claims under section 502(a)(2) are analogous to “restor[ing] the subject of a trust” for losses.¹¹⁷ They find that the resolution of the case could be dispositive for other plan participants because of the unified nature of

110. *Id.*

111. *See id.* § 4:21.

112. FED. R. CIV. P. 23(b)(3).

113. 4 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD AND COMMODITIES FRAUD § 7:462 (2d ed. 2010) (discussing the relationship of Rule 10b-5 to the class-action device).

114. *Id.* § 7:457 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)).

115. *Id.*

116. *See, e.g., In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (“In light of the derivative nature of ERISA [section] 502(a)(2) claims, breach of fiduciary duty claims brought under [section] 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held.”); *Hochstadt v. Boston Sci. Corp.*, No. 08-12139-DPW, 2010 U.S. Dist. LEXIS 41007, at *27-30 (D. Mass. Apr. 27, 2010) (same).

117. *Schering Plough*, 589 F.3d at 604; *Hochstadt*, No. 08-12139-DPW, 2010 U.S. Dist. LEXIS 41007, at *27-30.

“the plan” and that multiple cases would subject the fiduciaries to different standards.¹¹⁸

By contrast, some courts refuse to certify ERISA stock-drop classes under Rule 23(b)(2) on the grounds that *LaRue*, which allowed individual account holders to bring separate suits for recovery, complicates the Rule 23(b) analysis.¹¹⁹ ERISA plaintiffs are, in essence, seeking monetary relief for losses to their individual accounts, which will be returned to them *through* recovery to the plan.¹²⁰ “The very fact that participants may sue to recover the losses to their individual accounts takes these cases out of the traditional realm of Rule 23(b)(1)(B).”¹²¹ Under *LaRue*, individual account holders may bring separate suits having a similar purpose and effect to the 10b-5 damage claims: *monetary* recovery for losses caused by the fiduciary breach, inuring to the individual plan participant’s account.

Whether ERISA stock-drop cases ought to be certified under Rule 23(b)(1), (b)(2) or (b)(3) need not be decided now to resolve the problem at hand. Either way, the issue of detrimental reliance remains central to the certification decision. Courts that would certify ERISA section 502(a)(2) claims under 23(b)(3) must analyze individualized reliance as part of the predominance requirement,¹²²

118. *Schering Plough*, 589 F.3d at 604; *Hochstadt*, No. 08–12139–DPW, 2010 U.S. Dist. LEXIS 41007, at *27–30.

119. *See, e.g., In re Fremont Gen. Corp. Litig.*, No. 2:07–cv–02693–JHN–FFMx, 2010 U.S. Dist. LEXIS 85175 (C.D. Cal. Apr. 15, 2010), at *12–20 (“Because [under *LaRue*] usual preclusion rules would not appear to adversely affect an individual’s ability to bring his or her own claims in the event that another individual’s claim is defeated, class certification under Rule 23(b)(1)(B) is unnecessary to protect the interests of unnamed class members.”); *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610, 621–22 (C.D. Cal. 2009) (finding that neither certification under 23(b)(1)(A) nor under 23(b)(1)(B) was appropriate for claims under ERISA section 502(a)(2) because of the Supreme Court’s decision in *LaRue*); *In re Computer Scis. Corp. ERISA Litig.*, No. CV 08–02398 SJO (JWJx), 2008 U.S. Dist. LEXIS 109027, at *8 (C.D. Cal. Sept. 2, 2008) (finding certification under 23(b)(1)(B) to be inappropriate in light of *LaRue*).

120. *First Am. Corp.*, 258 F.R.D. at 622 (“Here, the Plan Participants primarily seek monetary damages; damages to the Plan, and demands that the First American Defendants make the Plan whole, are the primary focus of this action.”).

121. Mark A. Perry & Paul Blankenstein, *The Inapplicability of Rule 23(b)(1) to ERISA Class Actions*, 6 Workplace L. Rep. (BNA) 1571, 1575 (Dec. 5, 2008), available at <http://www.gibsondunn.com/publications/Documents/Perry-Blankenship-ERISAClassActions.pdf> (“*LaRue* confirms that most claims for breach of fiduciary duty under ERISA, brought by participants in 401(k) and other defined contribution plans seeking monetary relief, cannot be certified as mandatory class actions under Rule 23(b)(1)(B). Rather, such claimants must satisfy the more rigorous requirements, and the more robust protections, of Rule 23(b)(3) before their claims can proceed on a class basis.”).

122. *See In re Elec. Data Sys. ERISA Litig.*, 224 F.R.D. 613, 629–30 (E.D. Tex. 2004) (refusing to certify an ERISA section 502(a)(2) claim under Rule 23(b)(3) because of individualized issues of reliance).

and even the courts that use Rule 23(b)(1) will consider reliance within the context of typicality.¹²³ A solution to the problem of detrimental reliance for ERISA section 502(a)(2) claims must therefore consider both typicality and predominance in order to succeed regardless of how courts resolve the Rule 23(b) divide.

III. ERISA FIDUCIARY DUTIES AND RELIANCE AT CLASS CERTIFICATION: THE NEED FOR A “BASIC SOLUTION”

Given the representative nature of claims under ERISA section 502(a)(2) and the efficiency goals of class certification, ERISA misrepresentation and nondisclosure claims are particularly attractive candidates for class-wide treatment. ERISA plaintiffs are, after all, seeking to recover losses to the same employer-sponsored benefit plan, and are therefore asserting a shared harm. Additionally, most of the legal and factual questions in an ERISA misrepresentation claim will focus on the defendants’ statuses as fiduciaries and whether their behavior constituted a breach, and will therefore be common to all class members.

In this respect, ERISA misrepresentation and nondisclosure claims are similar to securities fraud claims under Rule 10b-5. The majority of the 10b-5 elements also focus on the behavior of the defendant, rendering the issues common across all plaintiffs.¹²⁴ However, as in securities fraud, the but-for causation element for ERISA misrepresentation claims may require individual proof of detrimental reliance. Under Rule 10b-5, this detrimental reliance element precludes class certification absent the fraud-on-the-market presumption because of the need for individualized proof.¹²⁵

The purpose of this Part is to evaluate whether a solution similar to the fraud-on-the-market presumption is applicable to ERISA misrepresentation claims, allowing for class certification. The current four-way split in ERISA case law creates two analytically distinct questions about ERISA misrepresentation and nondisclosure claims: (1) Does an ERISA misrepresentation claim require a showing

123. See, e.g., *In re Merck & Co.*, MDL No. 1658, 2009 U.S. Dist. LEXIS 10243, *15–21 (D.N.J. Feb. 9, 2009) (certifying the prudence claim under Rule 23(b)(1), but refusing to certify the communication claim under any of the three subsections because of problems of individualized reliance).

124. Steven Serajeddini, Note, *Loss Causation and Class Certification*, 108 MICH. L. REV. 255, 257 (2009).

125. *Id.* at 258; see *supra* Part II.B (analyzing securities fraud claims under the class certification standard).

of detrimental reliance, and, if so, (2) does this affect class certification? After a more rigorous analysis of ERISA misrepresentation and nondisclosure claims and the proof they require, this Part examines the solutions currently used in the district courts, and evaluates the merits of each one.

A. ERISA Misrepresentation and Nondisclosure Claims

Although the law in this area is “both controversial and evolving,”¹²⁶ all ERISA plaintiffs must demonstrate three basic elements in order to prevail under sections 409 and 502(a)(2). Plaintiffs must show that the defendant, (1) acting in his fiduciary capacity, (2) breached his fiduciary duty under section 409, and that (3) the breach resulted in harm to the plan.

1. Fiduciary Status

Establishing that the defendants are fiduciaries under ERISA is largely a functional analysis. Unlike in trust law, which ties the fiduciary label to a given individual,¹²⁷ the ERISA fiduciary is defined in time by her actions and will therefore often wear “two hats.”¹²⁸ As the Supreme Court explained in *Pegram v. Herdrich*,¹²⁹ this creates an inherent conflict of interest: “Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries when they act as employers . . . or even as plan sponsors.”¹³⁰ ERISA requires, however, “that a fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.”¹³¹

This “two hat” doctrine has two pertinent consequences for ERISA misrepresentation and nondisclosure claims. First, because securities fraud defendants are defined by their relationship to *any*

126. *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1045 (S.D. Ohio 2006).

127. See RESTATEMENT (THIRD) OF TRUSTS Introductory Note (2003) (explaining that “an executor, guardian, agent, or corporate officer or director is a fiduciary” simply by virtue of her title).

128. Richard L. Kaplan, Nicholas J. Powers, & Jordan Zucker, *Retirees at Risk: The Precarious Promise of Post-Employment Health Benefits*, 9 YALE J. HEALTH POL’Y, L. & ETHICS, 287, 302 (2009).

129. 530 U.S. 211 (2000).

130. *Id.* at 224.

131. *Id.* (citing *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)); see also ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2006) (providing a functional definition of fiduciary status).

alleged fraudulent communications (and not to employee benefits),¹³² the set of defendants in ERISA and 10b-5 causes of action will only intersect incidentally.¹³³ In other words, not all communications are made while the employer is wearing her “fiduciary hat,” so the scope of actionable communications is much narrower.¹³⁴

Accordingly, several courts have ruled that statements to the market or corporate communications to all employees are not actionable because they are not made in a fiduciary capacity.¹³⁵ Even so, these “to the market” SEC filings will often be considered fiduciary communications when incorporated by reference into the SPD or some other plan-specific communication.¹³⁶ Because incorporation seems to be common practice among ERISA defendants, this tends to increase the extent to which ERISA and securities communications intersect, even if this intersection is also incidental.

In addition, the “two hat” doctrine emphasizes the unique role of many ERISA fiduciaries. Because ERISA fiduciaries are often employers or corporate insiders, they will usually have information that would be relevant to investors generally, including employees investing in company stock through a defined-contribution plan.¹³⁷ Especially when it comes to investment in employer stock, fiduciaries cannot be expected to forget the information that they have learned in either role just by putting on a different hat.¹³⁸ This conflict sets the stage for all ERISA misrepresentation claims, which are rooted in

132. See 17 C.F.R. § 240.10b-5 (2010) (specifying that any defrauding party may be liable under Rule 10b-5); 15 U.S.C. § 78t(a) (creating control person liability for “[e]very person who directly or indirectly, controls any person liable”); *id.* § 17t(e) (creating liability for an aidor or abettor, which is “any person that knowingly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title”).

133. See *Bravo*, *supra* note 16, at 501.

134. *Varity*, 516 U.S. at 505 (finding that a fiduciary is not liable under ERISA “simply because it made statements about its expected financial condition” or “because an ordinary business decision turned out to have an adverse effect on the plan”).

135. Davidson & Trankiem, *supra* note 41, at 22. *But see In re Lehman Bros. Sec. & ERISA Litig.*, 683 F. Supp. 2d 294, 300 (S.D.N.Y. 2010) (“[P]laintiffs contend that the Director Defendants are functional fiduciaries because they made or approved inaccurate statements in Lehman’s SEC filings, which were incorporated into the Plan documents. The flaw in this argument, however, is that there is no basis for the assumption that the Director Defendants acted in an ERISA fiduciary capacity when making these statements.”).

136. Under ERISA section 402(a), the Summary Plan Description (“SPD”) is the primary mandatory disclosure mechanism for benefit plan fiduciaries. It requires that fiduciaries disclose basic information, which is “sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.”

137. Beverly Cohen, *Divided Loyalties: How the MetLife v. Glenn Standard Discounts ERISA Fiduciaries’ Conflicts of Interest*, 2009 UTAH L. REV. 955, 956.

138. *Id.*

broad principles of a fiduciary duty requiring all decisions to be made “with an eye single to the interests of the participants and beneficiaries.”¹³⁹

2. Breach of Fiduciary Duty

After establishing the threshold question of fiduciary status, an ERISA plaintiff must also show that the challenged misrepresentation or nondisclosure constituted a breach of fiduciary duty under ERISA section 409(a). Usually, this involves a showing of both materiality and scope—that is, that the communication or omission was both likely to mislead the plan participants and was the type of communication that ERISA fiduciary duties are meant to guard against.

In general, an ERISA misrepresentation is material “if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision.”¹⁴⁰ As Judge Frank Easterbrook observed in a recent opinion, the efficient markets hypothesis defines “materiality” in ERISA stock-drop cases: because “securities law assumes that markets for widely traded stock . . . are efficient and impound all publicly available information,” information that does *not* move the stock price is necessarily not material to investors’ decisions.¹⁴¹

After establishing materiality and fiduciary communication status, the scope of ERISA misrepresentation claims is relatively clear. “Lying is inconsistent with the duty of loyalty owed by all [ERISA] fiduciaries,”¹⁴² and materially misleading statements specific to the plan will always be actionable under ERISA.¹⁴³ What is less clear is the scope of fiduciary duties underlying nondisclosure claims.¹⁴⁴ Because ERISA already specifies detailed disclosure

139. *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1988) (quoting *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988)); *see also* *Stabile*, *supra* note 10, at 397 (“Executives in many of the companies now being sued were paid quite lavishly by their employers, and also held a lot of company stock in their own portfolios. Thus, they had personal interest in the company continuing to be perceived as a strong investment . . . [creating] a very divided interest.”).

140. *Fisher v. Phila. Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir. 1996) (noting also that the materiality of a representation is a mixed question of law and fact).

141. *Nelson v. Hodowal*, 512 F.3d 347, 350 (7th Cir. 2008).

142. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (quoting *Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)).

143. *Stabile*, *supra* note 10, at 392.

144. *Trevino*, *supra* note 16, at 511 (“A more difficult duty question arises when the fiduciary remains silent about a material fact that a reasonable plan participant would need to know to protect his interest in the plan.”).

requirements for plan fiduciaries, some courts are reluctant to expand the scope of these requirements.¹⁴⁵ Viewing ERISA's detailed disclosure requirements as "comprehensive," the idea of expanding them even more raises concerns about the accompanying administrative costs.¹⁴⁶ Even so, the Department of Labor has unofficially opined that the fiduciary duty of loyalty sometimes requires disclosures not otherwise specified in ERISA.¹⁴⁷ In fact, several courts have held that fiduciaries have an affirmative duty to disclose to plan participants the *circumstances* that render stock an imprudent investment, including irregular accounting practices.¹⁴⁸

In sum, a breach of fiduciary duty happens when a fiduciary makes a materially misleading statement or fails to disclose certain information. Disclosure requirements include at least those disclosures specified by ERISA. Courts are still divided, however, as to whether fiduciaries must disclose information in addition to the disclosures specified by statute.

3. Causation

After establishing fiduciary status and breach of fiduciary duty, an ERISA stock-drop plaintiff must demonstrate a causal connection between the breach and the harm alleged. This causation element is a side effect of the nature of defined-contribution accounts, which include 401(k) plans and Employer Stock Ownership Plans ("ESOPs").¹⁴⁹ Unlike defined-benefit accounts, which provide "guaranteed benefits prefunded in accordance with actuarial standards,"¹⁵⁰ defined-contribution accounts are participant-

145. See, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995) (explaining that Congress did not intend to supplement ERISA's reporting and disclosure scheme "by a faraway provision in another part of [ERISA.]").

146. See *Stabile*, *supra* note 10, at 399 ("In part, this reflects a concern with protecting an employer's legitimate business objectives and a feeling that it is inappropriate for the court to interfere with business decisions by requiring disclosures to participants.").

147. Amended Brief of the Secretary of Labor, Elaine L. Chao, As Amicus Curiae In Support of Plaintiffs-Appellants at 10, *Hecker v. Deere*, 569 F.3d 708 (7th Cir. Apr. 4, 2008) (No. 06-C-719-S) ("ERISA's duties of prudence and loyalty not only forbid fiduciaries from misleading plan participants, but may, under some circumstances, also require fiduciaries to disclose information that participants need to protect their interests, even if the disclosure is not specifically requested or otherwise mandated in ERISA's reporting and disclosure provisions.").

148. See, e.g., *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1132 (explaining the plaintiffs' cause of action for the defendants' failure to disclose "backdating and other imprudent mismanagement").

149. See Edward A. Zelinsky, *The Defined-Contribution Paradigm*, 114 YALE L.J. 451, 455-69 (2004) (outlining the differences between defined-contribution and defined benefit plans).

150. *Id.* at 512.

directed.¹⁵¹ Usually, these plans provide an array of securities in which participants can invest both their own money and employer contributions.¹⁵² Along with more favorable tax treatment,¹⁵³ defined-contribution accounts provide several advantages to employers over defined benefit accounts, resulting in their increased popularity over the past decade.¹⁵⁴ For example, defined-contribution plans are not as heavily regulated as defined-benefit plans and are less costly to administer.¹⁵⁵ Defined-contribution plans also allow for more profit sharing, portability, and “consumer control”—all of which employers value highly.¹⁵⁶

The primary consequence of an employer adopting a defined-contribution account is clear: it shifts the ordinary risk associated with investing away from the employer and places it with the employee.¹⁵⁷ The safe harbor provision of ERISA—section 404(c)—confirms this risk-shifting model. Under ERISA section 404(c), if a defined-contribution plan permits each employee to direct the investment of the funds in his own account, the plan’s fiduciary bears no liability to the employee for investments.¹⁵⁸ The assumption here is that the participant is in control. Accordingly, plan participants must be offered a broad range of investment options with varying risk and return characteristics, be permitted to move in and out of those options with relative frequency, and receive sufficient information about each of the options.¹⁵⁹ The role of the fiduciary under the defined-contribution paradigm is to provide prudent investment options under modern portfolio theory and disclose all material information.¹⁶⁰ Because the participants have control over which

151. *Id.* at 457.

152. *See, e.g., In re Schering Plough Corp. ERISA Litig.*, 420 F.3d 231, 234 (3d Cir. 2009) (describing a plan where plan participants had fourteen options in their defined-contribution account, with a cash employer contribution).

153. *Id.* at 233.

154. *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008) (“Defined-contribution plans dominate the retirement plan scene today.”); *see also* Craig C. Martin, Matthew J. Renaud, & Douglas A. Sondgeroth, *Baby Ka-Boom! Coming Developments in ERISA Litigation Due to Social, Demographic, and Financial Pressures from the Baby Boom Generation*, 41 J. MARSHALL L. REV. 1037, 1040 (2008) (describing the factors giving rise to the shift to defined-contribution plans).

155. Zelinsky, *supra* note 150, at 478.

156. *Id.* at 473.

157. *Id.* at 453.

158. ERISA § 404(c), 29 U.S.C. § 1104(c) (2006).

159. 29 C.F.R. § 2550.404C-1(d)(2)(i)(E)(4)(iii) to (vi) (2008).

160. The Department of Labor’s section 404(c) regulations make clear that compliance with the regulations shields the employer from liability for losses caused by the participants’ exercise

investments they select, the diversification requirements of section 402(a)(1) do not apply, and participants can invest one hundred percent of their funds in their employer's securities.¹⁶¹

The employee-choice side of defined-contribution accounts produces another element for a plan participant bringing an ERISA stock-drop claim: causation between the breach and the harm. Even though ERISA is a remedial statute that seeks primarily to curb bad fiduciary behavior,¹⁶² basic principles of fairness dictate that in order to be actionable, the bad fiduciary behavior must have *actually* caused some harm to the plan. Moreover, ERISA section 409(a) provides that when a fiduciary breaches her duties to the employee benefit plan, she “shall be personally liable to make good to such plan any losses to the plan *resulting from* each such breach”¹⁶³ Most courts interpret this clause as requiring plaintiffs to show both a plan loss and a causal connection and to phrase the elements of an ERISA claim accordingly. This causation element also controls administrative costs by limiting fiduciary liability, while protecting the plan and plan participants from the adverse consequences of fiduciary action.¹⁶⁴

In securities fraud claims under 10b-5, where plaintiffs also “choose” their investments by purchasing securities on the open capital markets, causation is characterized both by loss causation and detrimental reliance. Detrimental reliance, or “transaction causation,” is equivalent to but-for causation.¹⁶⁵ As the Supreme Court explained in *Basic*, it “provides the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury,”¹⁶⁶ because, absent reliance, the same injury could have happened even *without* the defendant’s breach. Loss causation, on the other hand, is a form of proximate cause—the plaintiffs must establish that it was the revelation of the fraud to the market that in fact caused the decline in

of control over their plan accounts, but that the employer is not relieved from its duties of prudence and loyalty. 29 C.F.R. § 2550.404C-1(b)(2)(i).

161. ERISA § 402(a).

162. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 254 (2008) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985)) (“[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators.”).

163. ERISA § 409(a) (emphasis added).

164. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (finding that courts may consider “Congress’ desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plan in the first place”).

165. *Dura Pharms., Inc. v. Brudo*, 544 U.S. 336, 341 (2005).

166. *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988).

the stock's value.¹⁶⁷ This can be established though the efficient capital markets hypothesis without reference to the plan participants' behavior.¹⁶⁸

Many but not all courts have read the causation element in ERISA as also requiring plaintiffs to show both loss causation and detrimental reliance for misrepresentation and nondisclosure claims.¹⁶⁹ The courts that require plaintiffs to show loss causation similarly use the efficient capital markets hypothesis. For example, in *In re Computer Sciences Corp. ERISA Litigation*, a district court granted the defendants' summary judgment motion because the plaintiffs failed to show that it was the revelation of the fraud on the market—and not any of the other announcements that the company made that day—that caused the company's stock to decline.¹⁷⁰

Detrimental reliance, or transaction causation, in the ERISA context is also treated similarly to the corresponding element in 10b-5 claims. Courts that require a showing of detrimental reliance specifically look to the statements of the plan participants, the evidence that each participant considered, and the reasonableness of relying on that evidence. Because many plaintiffs do not read plan documents, instead gathering their information from e-mails, newsletters, company meetings, and conversations, this element can lead to a fact-intensive, individualized inquiry.¹⁷¹ Unlike any of the other elements under ERISA section 502(a)(2), this element looks to the plaintiff's *reaction* to the defendants' actions. It can be a difficult standard to meet.

Accordingly, in order to support an ERISA stock-drop claim under section 502(a)(2), the plaintiffs must show that “there was a fiduciary breach and that *but for* the breach, the [p]lan's assets would have been greater.”¹⁷² For misrepresentation and nondisclosure claims, most of these elements can be shown without reference to the plaintiffs, focusing instead on the fiduciary's actions. However, courts that require a showing of transaction causation force the plaintiff to

167. *Dura Pharms.*, 544 U.S. at 341.

168. *See, e.g., In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1139 (C.D. Cal. 2009); Davidson & Trankiem, *supra* note 41, at 27–28.

169. Davidson & Trankiem, *supra* note 41, at 22.

170. 635 F. Supp. 2d at 1139.

171. *See, e.g., Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 354 (N.D. Ill. 2007) (explaining that information was disseminated “through ‘town hall’ meetings, internal blast e-mail updates, and newsletters”); Declaration of Gary Scott Dreadin, *supra* note 51, at 2 (“Enron management also used the Company's internal e-mail system to assure the employees concerning the financial health of the company.”).

172. *Darnigals v. Grace Capital, Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989) (emphasis added).

show that she detrimentally relied on the specific statements of the plan fiduciary in purchasing the asset. This puts the focus on the behavior of plan participants, thereby creating a problem for class certification.

B. Class Certification for Securities Fraud Claims: The Basic v. Levinson Framework

In *Basic, Inc. v. Levinson*, the Supreme Court addressed a similar problem relating to class certification for securities fraud claims under Rule 10b-5.¹⁷³ The *Basic* Court found that Rule 10b-5 similarly required a showing of transaction causation and that detrimental reliance “provide[d] the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury.”¹⁷⁴ Proof of detrimental reliance, however, is an individualized inquiry, which precludes class certification under Rules 23(a) and 23(b)(3), requiring “that the questions of law or fact common to class members predominate over any questions affecting only individual members.”¹⁷⁵ Claims with individualized proof can only advance the interests of each party *individually*, frustrating the purpose and economy of class certification, which is to advance the common claims of plaintiffs together.¹⁷⁶

By presuming reliance though the fraud-on-the-market theory, the *Basic* Court created a “practical resolution to th[is] problem of balancing the substantive requirement of proof of reliance in securities cases against the procedural requisites of [Federal Rule of Civil Procedure] 23.”¹⁷⁷ The fraud-on-the-market theory is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business.¹⁷⁸ Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.¹⁷⁹ Because “common sense and probability” confirm that “it is hard to imagine that there is ever a buyer or seller who does not rely on market

173. 485 U.S. 224 (1988).

174. *Id.* at 243.

175. FED. R. CIV. P. 23(b)(3).

176. *See supra* Part II.B.

177. *Basic*, 485 U.S. at 245.

178. *Id.*

179. *Id.*

integrity,” this theory provides the requisite causal connection to support a securities law claim under Rule 10b-5.¹⁸⁰

Under *Basic*, therefore, any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance and defeat class certification.

C. Analysis of the Existing Judicial Approaches

Even though ERISA misrepresentation claims and securities fraud claims under 10b-5 seem to share a similar problem at the class certification stage, the judicial approaches to certifying classes of ERISA misrepresentation claims have been far more varied. District courts have generally come up with four ways of addressing the problem of individualized proof at class certification.¹⁸¹ These four solutions separate the analysis into two distinct questions: (1) Does an ERISA misrepresentation claim require a showing of individual detrimental reliance, and, if so, (2) does this affect class certification?

By answering “no” to the first question, some courts have avoided the class certification problem altogether and focused the inquiry entirely on the behavior of the pension plan fiduciary.¹⁸² This solution is justified both by the remedial purpose of ERISA section 409(a) and the representative nature of claims under ERISA section 502(a)(2).¹⁸³ However, inasmuch as the solution creates an untenable causal connection—one in which *the plan* relies upon the misstatements—no court should adopt this analysis of ERISA misrepresentation claims.

Courts that answer “yes” to both the first and the second question recognize the necessary causal connection that detrimental reliance provides, but also find it to be a barrier to class

180. *Id.* at 247 (“An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for the purposes of a Rule 10–b5 action.”).

181. No federal appellate court has addressed the issue of detrimental reliance in the context of certifying classes of ERISA stock-drop plaintiffs.

182. *E.g.*, *Jones v. NovaStar Fin., Inc.* 257 F.R.D. 181, 190 (W.D. Mo. 2009); *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 208–09 (W.D. Mo. 2006).

183. *See, e.g., Aquila*, 237 F.R.D. at 208–09; *NovaStar*, 257 F.R.D. at 190.

certification.¹⁸⁴ These courts reject the argument that reliance can be presumed from materiality based on a lack of precedent.¹⁸⁵ They fail to consider, however, the unique posture of ERISA claims under section 502(a)(2), which allege harm to the benefit plan as a whole.

Courts that answer “no” to the first question and “yes” to the second follow two distinct lines of reasoning. The first group of courts applies a presumption of reliance to ERISA misrepresentation and nondisclosure claims, which allows the class to be certified under the same framework as securities class actions under *Basic v. Levinson*. The second “solution” would be to hold that individualized proof of reliance absent a presumption does not always defeat class certification under Rule 23(a) and (b). While some courts have held this impliedly, advocating what seems to be a version of the “common evidence” theory, this solution would require a relevant distinction between ERISA misrepresentation and 10b-5 claims, which no court has attempted to draw thus far.

The remainder of this Part addresses each of these approaches to answering the two questions about ERISA misrepresentation claims. First, this Part answers “yes” to question one, arguing that detrimental reliance is a necessary element of a misrepresentation claim, and that this reliance must be that of the plan participants. Second, this Section evaluates the two positions that courts answering “no” to question two take. Rejecting both the *Basic v. Levinson* framework and the “common evidence” theory, this Note reemphasizes the problem that reliance may cause for certifying classes of ERISA stock-drop plaintiffs, and the implications for all of the parties involved.

1. Why Individual Detrimental Reliance Ought to Be an Element of a Misrepresentation Claim Under ERISA § 502(a)(2)

ERISA section 409(a) provides that when a fiduciary breaches her duty to the employee benefit plan, she “shall be personally liable to make good to such plan any losses resulting from each such breach.”¹⁸⁶ This “resulting from” language creates a causal connection, which many courts have interpreted as but-for causation requiring a

184. See, e.g., *In re Merck & Co.*, MDL No. 1658, 2009 U.S. Dist. LEXIS 10243, at *15–21 (D.N.J. Feb. 9, 2009); *In re Elec. Data Sys. Corp. ERISA Litig.*, 224 F.R.D. 613, 629–30 (E.D. Tex. 2004).

185. See, e.g., *Merck*, 2009 U.S. Dist. LEXIS 10243, at *15–21; *Elec. Data Sys.*, 224 F.R.D. at 629–30.

186. ERISA § 409(a), 29 U.S.C. § 1109(a) (2006).

showing of detrimental reliance.¹⁸⁷ Absent actual reliance, the same loss could have occurred without “resulting from” the fiduciary’s breach. Combined with the employee-choice aspect of defined-contribution plans,¹⁸⁸ requiring detrimental reliance is a sensible interpretation of the ERISA section 502(a)(2) cause of action.

Even so, it can be difficult to prove detrimental reliance, and some courts have therefore discarded this element. The view that individual detrimental reliance is not an element of a misrepresentation claim under ERISA section 502(a)(2), and is therefore not a problem for class certification, is best explained by the U.S. District Court for the Western District of Missouri in *Jones v. NovaStar Financial, Inc.*¹⁸⁹ In *NovaStar*, the defendants argued that class certification of the misrepresentation claims was not appropriate because these claims would require a showing of individual detrimental reliance.¹⁹⁰ In holding that “Jones’ claims [were] sufficiently typical of those of the class,” the *NovaStar* court found that such actual, individual reliance was not an element of an ERISA communication claim, and instead focused its inquiry on fiduciary behavior.¹⁹¹

The primary motivation for the *NovaStar* court’s decision was that “ERISA § 502(a)(2) focuses on plans rather than individuals.”¹⁹² Citing *LaRue*, the court explained that an action brought by a plan participant under section 502(a)(2) is brought in a *representative capacity* on behalf of the plan. This means that the relevant injury is that of the employee benefit plan, and “[t]hus, even assuming that detrimental reliance must be proved, the detrimental reliance is that of the Plan, not the individual Plan participants.”¹⁹³

Other courts that have adopted this position rely on the legislative history and purpose of ERISA to support their holding that individual reliance is not an issue when communications were made on a “plan-wide basis.”¹⁹⁴ Congress enacted ERISA, after all, to protect “the financial integrity of the plan” and to prevent “misuse and

187. See, e.g., *Darnigans v. Grace Capital, Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989).

188. See *supra* Part III.A.3 and accompanying notes.

189. 257 F.R.D. 181, 190–92 (W.D. Mo. 2009).

190. *Id.* at 191.

191. *Id.*

192. *Id.*

193. *Id.* (citing *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 208–09 (W.D. Mo. 2006)).

194. *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 353–54 (N.D. Ill. 2007); *Shirk v. Fifth Third Bancorp*, No. 05–cv–049, 2009 WL 692124, at *11 (S.D. Ohio Jan 29, 2009); *Aquila*, 237 F.R.D. at 208–09.

mismanagement by plan administrators.”¹⁹⁵ Accordingly, if the plan participants can show both that the integrity of the plan was compromised and that the plan’s fiduciaries acted inappropriately by making misstatements of material fact or failing to disclose relevant information, the activities of the participants should not matter.

Courts following this approach have erred in doing away with detrimental reliance. The problem with attributing reliance to “the plan” is that it does not create a sufficient causal connection between the fiduciary breach and the harm to the plan. Thus, even though such a rule may in fact prevent fiduciaries from making misrepresentations and help ensure the financial integrity of employer-sponsored plans, it is outside the statutory scope of ERISA section 409, which requires that the harm “result[] from” such a breach.¹⁹⁶

When the duty of prudence is implicated, but-for causation can often be established without reference to the behavior of the plan participants. This is because a prudence claim alleges that the plan fiduciaries breached their duties to the plan by including the company stock as an *option* in the plan, even though they knew it to be unsuitable. Therefore, even though plan participants may make individualized investment choices, the participants could not have invested in funds that were not included as options, and they could not have invested in the bad funds but for the breach.¹⁹⁷ This creates the requisite but-for causal relationship between the fiduciary breach and the harm to the plan without reference to the behavior of plan participants.

However, with misrepresentation and nondisclosure claims, no such causal analysis exists. This is because it is possible that, with or without such a breach, the exact same injury could have resulted to the plan so long as the “bad fund” remained an option for investors. This is why the detrimental reliance element is necessary—it creates that causal connection between the harm and the breach, even if the harm is to the plan.

195. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 254 (2008) (quoting *Mass. Mut. Life Ins. Co. et al. v. Russell*, 473 U.S. 134, 141, 142 n.9 (1985)).

196. ERISA § 409(a), 29 U.S.C. § 1109(a) (2006); see also Michael C. Joyce, Note, *Setting a Standard to Rely On: ERISA Benefit Claims Where the Summary Plan Description and Plan Document Conflict*, 90 IOWA L. REV. 765, 786 (2005) (examining the reliance element of a different ERISA cause of action and finding that “[i]n short, reaching a no-reliance standard seems more like a policy decision than statutory construction”).

197. The fact that the causal chain here also requires the decision of plan participants to invest in the “bad fund” does not affect this but-for causal connection. Fundamentally, it is always possible to have multiple but-for causes. That does not reduce the causal force of the initial actor.

In *Jones v. NovaStar Financial*, the district court attempted to recapture this causal connection by arguing that if the *plan itself* relies on the misrepresentations, this could result in an injury to the plan.¹⁹⁸ It is difficult to imagine, however, how an employee benefit plan relies on communications, or what sort of proof the defendants could put on to refute such a claim.¹⁹⁹ Even though section 502(a)(2) creates a derivative cause of action on behalf of the employee benefit plan, section 409 only requires that the loss be to “the plan”—it does not leave out the plan participants entirely.²⁰⁰ As the District of New Jersey explained in *In Re Honeywell International ERISA Litigation*:

The fact that [p]laintiffs will have to show individual reliance does not imply that they do not seek recovery for the whole Plan: losses to the plan may have resulted from decisions by individual participants; but that does not mean that the losses were not individual losses to the Plan, it simply means that some of the decisionmaking for Plan investments was conducted by the participants who contributed to it.²⁰¹

Plan participants, in this sense, are the causal intermediary between the fiduciary’s breach and the harm to the employee benefit plan. And, as explained above, this causal intermediary is necessary both under the plain text of section 409(a) and implicitly in the risk-shifting model of the section 404(c) safe harbor.²⁰² Moreover, a causal requirement reduces administrative costs by ensuring that fiduciaries will only be liable for harm that they actually caused. This effect supports the second, “conflict[ing]” purpose of ERISA, which is to “increas[e] the number of individuals participating in retirement plans” by encouraging plan sponsors to adopt them. A no-reliance standard is therefore inappropriate under the clear text and purpose of ERISA section 502(a)(2). Courts must address individual proof of reliance when certifying classes for ERISA misrepresentation and nondisclosure claims, and should not characterize reliance as that of “the plan.”

198. 257 F.R.D. at 191.

199. See *In re Merck & Co.*, MDL No. 1658, 2009 U.S. Dist. LEXIS 10243, at *15–21 (D.N.J. Feb. 9, 2009) (emphasizing that communications are made to people, not plans). In coming up with an alternative causal account in *Basic*, the Court noted how important it was for the defendants to be able to refute the plaintiffs’ evidence of a causal connection. In this case, because it is unclear what evidence would be necessary to establish that “the plan” relied to its detriment—except, perhaps, for plan-wide communication—it is equally unclear how defendants would be able to refute this evidence.

200. ERISA §§ 409(a), 502(a)(2).

201. *In re Honeywell Int’l ERISA Litig.*, Civ. No. 03–1214, 2004 U.S. Dist. LEXIS 21585, at *30 (D.N.J. June 14, 2004).

202. See *id.* (finding that the section 404(c) safe harbor provided implicit proof for the plan participants as causal intermediaries).

2. The Reliance Element's Effect on Certification

After determining that individual detrimental reliance is an element of an ERISA misrepresentation claim under section 502(a)(2), the second question to ask is whether this affects class certification. At least six courts have held that individual reliance *does* affect class certification and, finding that reliance is either a problem for typicality under Rule 23(a)(3) or for predominance under Rule 23(b)(3), have refused to certify the class.²⁰³

Several other courts, however, have found that individual reliance is an element of an ERISA misrepresentation claim, but have certified the class of plaintiffs anyway. Generally, these courts relied upon two basic justifications: either there is a presumption of reliance borrowed from *Basic v. Levinson*, or proving reliance requires some common evidence. Because these justifications either draw too stark an analogy to securities fraud claims or find differences where none should reasonably exist, neither adequately solves the problem of certifying classes in ERISA stock-drop claims. This Subpart analyzes each of these positions below.

a. Retirement Security, Not Securities Fraud: Why the Basic v. Levinson Framework Does Not Fit

Drawing from theories in securities fraud is an attractive solution for advocates faced with problems in ERISA stock-drop claims. The two areas of law share overlapping facts and similar legal theories: the same securities, misstatements, defendants, harm, and loss of value are at issue. In fact, lawyers who specialize in securities law often litigate ERISA stock-drop claims.²⁰⁴ Even so, the claims are different in several important ways, and the reliance problem at class certification for ERISA stock-drop claims cannot be solved through the fraud-on-the-market presumption.

In ERISA misrepresentation claims, reliance is problematic because it is necessary to form a causal nexus, but difficult to support with aggregate proof. In *Basic*, the Court held that there is “more than

203. *Tibble v. Edison Int'l*, No. CV 07–5359 SVW, 2009 U.S. Dist. LEXIS 120939 (C.D. Cal. June 30, 2009); *Merck*, 2009 U.S. Dist. LEXIS 10243, at *15–21; *In re Radioshack ERISA Litig.*, 547 F. Supp. 2d 606 (N.D. Tex. 2008); *In re Shering-Plough Corp. ERISA Litig.*, 2008 U.S. Dist. LEXIS 89718 (D.N.J. Jan. 31, 2008); *Lively v. Dynegy, Inc.*, No. 05–cv–00063–MJR, 2007 U.S. Dist. LEXIS 14794, at *55–56 (S.D. Ill. Mar. 2, 2007); *In re Elec. Data Sys. ERISA Litig.*, 224 F.R.D. 613, 630 (E.D. Tex. 2004).

204. This statement was verified through a Martindale search, cross-referencing the terms “ERISA” and “securities.”

one way to demonstrate [this] causal connection” and solved the problem of aggregate proof by presuming reliance.²⁰⁵

Applying the framework of *Basic* to ERISA stock-drop claims, many courts have presumed reliance at the pleadings stage after a 12(b)(6) motion, allowing the plaintiffs to allege merely that the “plaintiffs relied on, and are presumed to have relied on” the defendants’ material misrepresentations.²⁰⁶ These same courts suggest that such a rule might be appropriate going forward to class certification, summary judgment, and trial, given the analogy to securities fraud claims and the difficulty with proving detrimental reliance on an individual level.²⁰⁷

The presumption also has carried over into class certification. For example, in *In re Tyco International, Ltd. Multidistrict Litigation*,²⁰⁸ a case that ended up settling for over seventy million dollars,²⁰⁹ the U.S. District Court for the District of New Hampshire recognized that reliance was troublesome for both the typicality and predominance requirements.²¹⁰ In order to overcome the obstacles to certification, the court held that “the fraud-on-the-market and *Affiliated Ute* presumptions of reliance” applied “equally well to a claim like [the] plaintiffs’ [ERISA] misrepresentation count” and certified the class of ERISA plaintiffs.²¹¹ Among the reasons given by the *Tyco* court was the fact that it would be overly burdensome to require plaintiffs to prove individual reliance in the context of ERISA stock-drop claims, which are similar to securities fraud causes of action.²¹² Moreover, the *Tyco* court noted that it would be “logically impossible” to prove reliance in the case of a nondisclosure claim and

205. 485 U.S. 224, 243 (1988) (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153–54 (1972)).

206. See *In re Uniphase Corp. ERISA Litig.*, No. 03-04743 CW, 2005 U.S. Dist. LEXIS 17503, at *43 (N.D. Cal. July 13, 2005) (“[T]he participants are presumed to have relied on such misrepresentations or omissions to their detriment.”); see also *In re Diebold ERISA Litig.*, No. 5:06 CV 0170, 2008 U.S. Dist. LEXIS 42746, at *36 (N.D. Ohio May 28, 2008); *In re Coca-Cola Enters., ERISA Litig.*, No. 1:06-CV-0953 (TWT) 2007 U.S. Dist. LEXIS 44991 (N.D. Ga. June 19, 2007); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 828 (S.D. Ohio 2004); *In re Cardinal Health ERISA Litig.*, 424 F. Supp. 2d 1002, 1046 (S.D. Ohio 2006).

207. See cases cited *supra* note 206.

208. *In re Tyco Int’l, Ltd.*, No. MD-02-1335-PB, 2006 WL 2349338, at *6–7 (D.N.H. Aug. 15, 2006).

209. *401(k) News Briefs: Court Gives Final OK to \$70.5M Settlement Ending ERISA Stock-drop claims Against Tyco*, MANAGING 401(K) PLANS, Jan. 2010.

210. *Tyco*, 2006 WL 2349338, at *6–7.

211. *Id.*

212. *Id.*

that plan participants generally rely on the integrity of the given price for the fund in their defined-contribution plan.²¹³

Despite the similarities between securities fraud and ERISA claims, there are serious problems with applying the *Basic* framework. Although the courts that reject the application of the fraud-on-the-market presumption to ERISA stock-drop claims do so only on *stare decisis* grounds,²¹⁴ there are more fundamental reasons for rejecting the presumption. Namely, the nature of reliance in the context of ERISA is fundamentally different from that of securities fraud. Because, for the reasons discussed below, *any* defendant in an ERISA misrepresentation claim would be able to rebut this fraud-on-the-market presumption, it cannot be used to “save” class certification.²¹⁵

Under *Basic*, “[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.”²¹⁶ Because securities are traded on an impersonal and efficient market, most investors only rely on the price of the security as representative of the security’s value. Any changes in material information should materially move the market price, providing a substitute for reliance on the information.²¹⁷ In other words, “[t]he market is acting as the unpaid agent for the investor, informing him that given all of the information available to it, the value of the stock is worth the market price.”²¹⁸

Putting aside the behavioral finance objections to the efficient capital markets hypothesis,²¹⁹ there is good empirical evidence for this

213. *Id.*

214. See *In re Elec. Data Sys. Corp. “ERISA” Litig.*, 224 F.R.D. 613, 629–30 (E.D. Tex. 2004) (noting that in light of *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407 (5th Cir. 2003), individual assessments of whether class members knew or should have been aware of other information minimizing the alleged misrepresentations would be required); *In re Merck & Co.*, Nos. MDL 1658 (SRC), 05–1151 (SRC), and 05–2369 (SRC), 2009 U.S. Dist. LEXIS 10243, at *15–21 (D.N.J. Feb. 9, 2009) (noting that the case law suggested the plaintiffs would be required to show individual reliance on the defendants’ alleged misrepresentations).

215. See Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 460–66 (describing the efficient capital markets hypothesis, the fraud on the market theory, and how “*Basic v. Levinson* [s]olves the [p]roblem of [r]eliance in [c]lass [c]ertification”).

216. *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 (1988).

217. Dunbar & Heller, *supra* note 215, at 465.

218. *Basic*, 485 U.S. at 244 (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

219. See Dunbar & Heller, *supra* note 215, at 471–97 (listing some objections).

fraud-on-the-market presumption²²⁰ and there are also good equitable reasons for adopting it.²²¹ In the context of securities fraud, investors may choose from the shares of thousands of companies, where billions of shares are traded every day.²²² This leads to an unbounded ability to choose from thousands of different prices, finely gradated along a continuum. In the context of this impersonal, mass market for securities, investors are presumed to rely both on the price itself and on the market's ability to price the security efficiently.

The only relevant difference in the context of ERISA is that the employer stock is offered as an option through a defined-contribution plan managed by an institutional investor. Therefore, plan participants do not go directly to the market.²²³ However, the simple fact that the stock is offered through a defined-contribution plan should not alone affect the force of the underlying rationale for the reliance presumption. Assuming that the employer is a publicly traded company, all public information will impound into the price of the employer security, which is made available through the employee benefit plan.²²⁴ Because fiduciary communications are typically public information,²²⁵ the fiduciaries' material misrepresentations and nondisclosures should affect the market price of the employer securities.

220. See Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-On-The-Market Theory*, 42 STAN. L. REV. 1059, 1082–83 (1990) (noting that the evidence regarding the semi-strong form of the efficient capital markets hypothesis is sufficiently persuasive such that this form of ECMH is an accepted working assumption in financial economics research).

221. See Dunbar & Heller, *supra* note 215, at 523 (noting that some believe the Supreme Court accepted the fraud-on-the-market doctrine in order to make securities class action litigation more feasible, believing that class actions are necessary to deter fraud and ensure efficient revelation of information to the market).

222. The New York Stock Exchange alone has nearly 2,800 listed companies. On an average day, 1.42 billion shares valued at more than \$38 billion trade on the New York Stock Exchange. New Release, N. Y. Stock Exch., New York Stock Exchange and Shanghai Stock Exchange Sign Memorandum of Understanding (Oct. 15, 2003), <http://www.nyse.com/press/1066215618814.html>.

223. Zelinsky, *supra* note 149, at 479–80 (describing the nature of defined-contribution accounts).

224. The applicability of the ECMH to the price of employer stock in defined-contribution accounts is widely accepted among the district courts. See, e.g., *Benitez v. Humana, Inc.*, No. 3:08CV-211-H, 2009 U.S. Dist. LEXIS 92323, at *29 (W.D. Ky. Sept. 30, 2009) (“[O]nce the mistake was made . . . continuing to invest in the stock could not have caused the claimed injury. Given the efficient market hypothesis, the stock market price would have decreased whenever the information about Humana’s errors in its earnings guidance was released.”).

225. See ERISA § 104(b), 29 U.S.C. § 1024(b) (2006) (providing the procedures by which the summary plan description and annual report should be published and made available to plan participants and beneficiaries).

The fact that the relevant security is *employer stock*, however, being offered as an option *through* the employee benefit plan, renders the *Basic* framework inapposite. Employee benefit plan participants face a much different set of options and alternatives when choosing among investments as compared to the typical open-market investor. Because empirical research suggests that choices are context dependent,²²⁶ this changes the causal analysis for defined-contribution plans, severing the link between the decision and the price.

The behavioral theorist's notion of context dependence holds that the options presented to the decisionmaker and how those options are presented affect the choices being made.²²⁷ As Professor Susan Stabile asserts, this is more than a theoretical idea.²²⁸ Numerous empirical studies have verified the extent to which "people's preferences are affected by the set of options under consideration."²²⁹ Offering people additional choices influences them to choose an option they would have declined if fewer options had been made available. Professor Cass Sunstein gives a simple example of this effect. Whereas most people choosing between a small ratio and a mid-sized ratio may choose the small ratio, given a choice among a small, a mid-sized, and a large ratio, many of those same people will choose the mid-sized ratio.²³⁰

Context dependence also implies that, given fewer options to choose from, the specific details of the particular option will matter

226. Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 87 (2002) (citing Mark Kelman et al., *Context-Dependence in Legal Decisionmaking*, 25 J. LEGAL STUD. 287 (1996)).

227. *Id.* Moral philosophers and philosophers of mathematics and science have also long held that our choices may be guided primarily by our more immediate and past sensual perceptions, which are necessarily dependent on the context in which those perceptions arise. Hume, for example, writes that "[t]he chief spring or actuating principle of the human mind is pleasure or pain; and when these sensations are remov'd, both from our thought and feeling, we are, in a great measure, incapable of . . . volition." DAVID HUME, A TREATISE OF HUMAN NATURE 574 (P.H. Nidditch ed., Oxford Univ. Press 1978) (1888). In fact, Hume observed that even the principle of causation arises within the context of our perception of "constant conjunction"—which is when one thing is always coupled with another. *See id.* at 82–83. Kant likewise theorized that we cannot know "things in themselves," but that experience is necessarily relational—a combination of perception and pure understanding. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 46–47 (Gary Hatfield ed. & trans., Cambridge Univ. Press, rev. ed. 2004) (1783).

228. *See* Susan J. Stabile, *Another Look at 401(k) Plan Investments In Employer Securities*, 35 J. MARSHALL L. REV. 539, 547 (2002) (noting empirical demonstration of this theory).

229. *Id.* at 547 n.34 (quoting Amos Tversky & Itamar Simonson, *Context-Dependent Preferences*, 39 MGMT. SCI. 1179, 1187 (1993)).

230. Shlomo Benartzi & Richard H. Thaler, *How Much is Investor Autonomy Worth?*, 57 J. FIN. 1593, 1608–10 (2002), available at <http://faculty.chicagobooth.edu/richard.thaler/research/pdf/Autonomy.pdf>.

less to the chooser. That is, the fewer the options with which the chooser is provided, the more abstract the options appear.²³¹ For example, given a range of integers from one through one hundred, the chooser is more likely to select a number based on the specific value. However, when presented with only three numbers—such as one, thirty, and one hundred and ninety-eight—the value becomes less important than the range to which the number belongs; the choice is now between the low, middle, and high values, and not between specific integers. This change in context will change the way in which the chooser decides.

Context dependence theory applies with equal force to decisions made by plan participants with defined-contribution accounts.²³² As compared to the thousands of choices available on the open securities market, providing for finely gradated prices along a continuum, the average 401(k) plan provides participants with a choice of only fourteen investment options.²³³ This means that the individual price of those investment options will matter less than the price range and the range of risk to which the options belong. Accordingly, while plan participants may rely on the price of a security to an extent, the reliance cannot be as robust as it is on the open securities market because the price value simply *means less*. In effect, this severs the firm connection between the information and the “price,” making the fraud-on-the-market presumption inapplicable.

Even if a 401(k) plan provided for hundreds of investment options,²³⁴ however, further research shows that a presumption of reliance is simply inappropriate when it comes to an employee’s decision to invest in employer stock. In 2004, professors at the University of Chicago and the Vanguard Center for Retirement Research studied the factors that employees typically consider when choosing employer stock as a retirement investment.²³⁵ Among these

231. See Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 288 (1996) (explaining options in a limited set as subject to “compromise effects” or “contrast effects”).

232. See Stabile, *supra* note 228, at 546–48 (explaining the findings of a study by the Employee Benefits Research Institute, which indicate that the quality and quantity of options available affect plan participant decisionmaking).

233. JEFFREY R. BROWN & SCOTT J. WEISBENNER, NAT’L BUREAU OF ECON. RESEARCH RETIREMENT RESEARCH CTR., 401(K) INVESTMENT OPTIONS, PORTFOLIO CHOICE AND RETIREMENT WEALTH 4 (2005), <http://www.nber.org/programs/ag/rrc/NB05-03%Brown%Final.pdf>.

234. In fact, (although it is very rare) some 401(k) plans actually do. See, e.g., Jon Christensen, *When a Smorgasbord Replaces a Diet Plate in a 401(k)*, N.Y. TIMES, Feb. 22, 1998, § 3, at 1 (giving the example American Stores Company, whose 401(k) plan offers 137 choices).

235. Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus & Cass R. Sunstein, *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & ECON. 45 (2007).

considerations were loyalty to the company and confidence in the employer, but not the actual price of the security.²³⁶ In fact, the employees' special relationship to the employer makes them rather *unlike* the typical investor making decisions on the open capital market. As Professor Stabile suggests, “[m]any employees invest heavily in employer stock because of overconfidence in the employer.”²³⁷ Not only does investing in employer stock yield more favorable tax treatment, but the employee also has private, subjective information about the company and its performance, and considers that information when choosing among the various options.²³⁸

The *Basic v. Levinson* presumption, which is based on a large and impersonal securities market “acting as the unpaid agent for the investor,” is simply inappropriate in the ERISA context where context dependence and other considerations affect the participants' choice. There is no *Basic* solution for detrimental reliance when certifying plaintiffs with ERISA stock-drop claims.

b. Retirement Security as Securities Law: Why Common Evidence is Insufficient

Without the framework of *Basic v. Levinson*, other district courts still recognize a detrimental reliance element but certify the class of ERISA plaintiffs anyway. These courts seem to be doing so implicitly through a common evidence theory of proving detrimental reliance, which holds that certification is appropriate where the circumstantial evidence that can be used to show reliance is common to the class as a whole.²³⁹

For example, in *Spano v. Boeing Company*, the Southern District of Illinois found that “[c]ourts deciding similar questions regarding omissions and misrepresentations under ERISA section 502(a)(2) claims have concluded that if alleged misrepresentations were made to class members in general, on a plan-wide basis (rather than individually or personally), then . . . class certification is appropriate.”²⁴⁰ The implication here is that, under both the typicality and predominance analyses, the evidence showing the named

236. *Id.* at 56; see also Stabile, *supra* note 228, at 547–52.

237. Stabile, *supra* note 228, at 548.

238. Benartzi et al., *supra* note 235, at 50–52; see also Stabile, *supra* note 226, at 80–86.

239. See *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) (noting that while each plaintiff must prove his own reliance, class action certification is still appropriate because the circumstantial evidence that can be used to show reliance is common to the whole class).

240. No. 06-cv-743-DRH, 2008 U.S. Dist. LEXIS 74924, at *19 (Sept. 29, 2008).

plaintiffs' reliance would support the claims of the class as a whole. This analysis is particularly attractive given that alleged ERISA misrepresentations often appear in company-wide e-mails, meetings, newsletters, and plan documents. Plaintiffs can claim that this collective evidence is all that is necessary to draw an inference of reasonable reliance, even though the standard is also subjective.

The problem with this version of a common evidence theory, however, is that it neglects an important aspect of the detrimental reliance equation: participants' *reaction* to the common evidence. Fraud-on-the-market 10b-5 claims likewise involve the similar common evidence of press releases, newspaper articles, and SEC disclosures, but the classes will not be certified absent the fraud-on-the-market presumption. It is not clear why there should be an exception for ERISA stock-drop cases, in which the reasons for investing tend to be more varied.

Empirical evidence of plan participants' investing behavior also shows that participants choose employer stock for a myriad of reasons, and not always because of the stock's disclosed profitability.²⁴¹ Company loyalty, overconfidence, private information, and strong tax incentives complicate the analysis for detrimental reliance, making a common evidence theory untenable.

3. The Implications: Where Do We Go From Here?

The previous Subparts analyzed two analytically distinct questions about ERISA misrepresentation and nondisclosure claims under sections 409(a) and 502(a)(2): (1) Does an ERISA misrepresentation claim require a showing of detrimental reliance, and, if so, (2) does this affect class certification?

For both ERISA and securities fraud claims, the first answer is "yes": the need for a causal nexus makes detrimental reliance necessary to establish transaction causation for each claim. Securities fraud, however, has a well-established solution to this element's effect on class certification. The *Basic* Court's alternative causal account though the fraud-on-the-market theory has effectively "saved" securities fraud class action litigation. Because class certification is an important tool for deterrence and access to the courts, several scholars note that it was important for the Court to preserve the certification vehicle. Some scholars reason that this might have weighed heavily in

241. See *supra* notes 228–40 and accompanying text.

the Court's decision, explaining the "quickest known adoption by the Supreme Court of a new economic principle."²⁴²

The goals of ERISA section 502(a)(2) are likewise aligned with the advantages of class action litigation, but the courts have not been able to "save" the ERISA device. Section 502(a)(2), like the class action device, is meant to *encourage* private enforcement of a congressional regulatory scheme and compensate the plan participants for their losses. While these losses can be large, individual litigation incentives are quite small, especially in the employee-employer context.

The current case law does not provide an adequate way of dealing with this certification problem. This is because ERISA stock-drop litigation is both too different from securities fraud to import *Basic v. Levinson* and too similar to create a new common evidence theory based on communications "to the plan." Because plan participants invest in company stock for a variety of reasons and with different goals, presuming or generalizing reliance is untenable under the current models of evaluating ERISA stock-drop claims.²⁴³

Part V proposes a new model for certifying ERISA stock-drop claims based on the analysis of causation discussed above. Because ERISA relief under section 502(a)(2) is a two-step process through the plan, only limited reliance is necessary to prove actual causation.

IV. IT'S ALL PART OF "THE PLAN": OVERALL RELIANCE UNDER A RIGOROUS ANALYSIS

In order to preserve the class action device for ERISA cases, courts ought to assume that a showing that merely *some* beneficiaries of a defined-contribution plan relied detrimentally on employer

242. Dunbar & Heller, *supra* note 215, at 457.

243. A final, alternative solution would simply be to allow for class certification under the "certify now, ask questions later" standard of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), as adopted by some circuits in the context of RICO claims. *See, e.g.*, *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480 (7th Cir. 2002) (noting that *Eisen* indicates a court should not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits). This solution would be justified under the theory that merits determinations are inappropriate at the class certification stage, and that the Rule 23 standards are liberal given its efficiency goals. With the settlement pressure and importance associated with class certification, however, especially in the context of ERISA stock-drop actions, certifying now and asking questions later is a risky and high stakes endeavor. As the Supreme Court explained in *General Telephone Company of the Southwest v. Falcon*, "it may be necessary for a court to probe behind the pleadings before coming to rest on the class certification question." 457 U.S. 147, 160 (1982). "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable," and a court must perform a "rigorous analysis" before deciding that class certification is appropriate. *Id.* at 160-61.

information satisfies the relevant commonality and typicality requirements for reliance as a class. While ERISA misrepresentation claims might be similar to Rule 10b-5 claims, courts are right to assert that “the plan” makes them different. The causal nexus contemplated in section 502(a)(2) is between the fiduciary’s breach and the harm to the employee benefit plan. Because plan participants act merely as causal intermediaries, only some reliance is necessary to establish liability.

A. *LaRue Revisited: What It Means to Seek Relief on Behalf of “the Plan”*

The Supreme Court’s decision in *LaRue v. DeWolf, Boberg, & Associates* creates a unique model for ERISA stock-drop recovery. On the one hand, *LaRue* did not disturb the traditional notion that ERISA section 502(a)(2) claims are derivative suits on behalf of the employee benefit plan.²⁴⁴ ERISA section 502(a)(2) “authorizes the Secretary of Labor as well as plan participants, beneficiaries, and fiduciaries to bring actions on behalf of a plan.”²⁴⁵ Section 502(a)(2), therefore, “does not provide a remedy for individual injuries distinct from plan injuries,” but is meant to ensure the proper management of collective fund assets which are part of the plan as a whole.²⁴⁶

Even so, the *LaRue* decision recognizes the importance of individual decisionmaking and individual accounts in the context of the “entire” benefit plan.²⁴⁷ Under the defined-contribution model and the risk-shifting safe harbor of section 404(c), *individual* accounts collectively constitute “plan assets.”²⁴⁸ The relief, therefore, is simultaneously both individualized and unified: ERISA section 502(a)(2) authorizes recovery for fiduciary breaches impairing the value of plan assets in a participant’s individual account, but this relief is *on behalf of* and *through* the plan. These individual account losses are losses “to the plan,” which means that the plan participants assert a shared harm.²⁴⁹

244. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 253 (2008).

245. *Id.*

246. *Id.* at 256.

247. *See id.* at 255–56 (noting that in the context of defined contribution plans section 502(a)(2) allows recovery for fiduciary breaches that impair the value of plan assets in individual accounts).

248. *Id.* at 256.

249. *Id.* at 254–56.

Under this model, recovery under ERISA section 502(a)(2) is a two-step process for the plaintiffs. First, *the plan as a whole* is restored for losses, and second, the losses are allocated into the individual accounts.²⁵⁰ “The allocation of plan assets for bookkeeping purposes does not change the fact that all of the assets in the plan remain plan assets.”²⁵¹ Plan administrators in charge of allocating these plan assets are to use a suitable formula to provide individual recovery after relief is paid into the plan.²⁵²

In determining *liability* under ERISA section 502(a)(2), this means that the plaintiffs’ claims will focus on the first step of recovery, as the injury that they assert is the injury to the plan. In the causation analysis discussed in Part III above, the plan participants’ reliance serves as a causal intermediary between the defendant’s breach and the plan’s injury—if there were no actual reliance in a misrepresentation claim, the breach could have occurred without any injury to the plan. Reliance is necessary to establish but-for causation.

In contrast, individual plaintiffs asserting a Rule 10b-5 claim are not asserting the harm of any unified intermediary or seeking relief through a plan. This means that in Rule 10b-5 litigation, there is only one step for recovery: recovery to the individual. Establishing liability means establishing harm to *each* account. In the causation analysis for Rule 10b-5, it is necessary to establish the reliance of each and every individual class member in order to establish liability as a whole.

Comparing these two models side by side, we see that the plan participants *collectively* in an ERISA section 502(a)(2) claim can be likened to a *single* plaintiff asserting a claim under Rule 10b-5. All of the plan participants might not rely on the fiduciary’s misstatements, but as long as *some* participants rely there will be actual causation. This is similar to a single 10b-5 plaintiff, for example, who detrimentally relies in part on the corporate officer’s misstatements, in part on her own intuition, and in part on the recommendations of a friend. As long as the plaintiff in this 10b-5 case can demonstrate the detrimental reliance on the material misstatements, her reliance on the *other* aspects of the security should not matter. Therefore, to

250. See *Tullis v. UMB Bank*, 515 F.3d 673, 680 (6th Cir. 2008) (finding that any assets recovered from the defendant under section 502(a)(2) “would first be paid into the plan[] then allocated to [the plaintiffs’] individual accounts”).

251. *LaRue*, 552 U.S. at 262 (Thomas, J., concurring in judgment).

252. *Id.*; see also *Tullis*, 515 F.3d at 680 (“[A]ny assets recovered from the defendant would first be paid into the plans then allocated to [plaintiffs’] individual accounts, and ultimately paid to [plaintiffs] in the form of benefits.”).

establish liability in an ERISA section 502(a)(2) claim, all that the plaintiffs must show is that *some* of the plan participants relied on the material misstatements. Only some reliance will be enough to cause harm to the plan as a whole.

B. Benefits of the Two-Step Recovery Model Under LaRue

The “some reliance” causation requirement and two-step model for recovery under ERISA section 502(a)(2) solves several problems for ERISA stock-drop claimants. First, unlike the *NovaStar* court’s “plan reliance” requirement, it recognizes the plan participants as causal intermediaries, and creates an actual causal connection between the breach and the harm. Even though some plan participants who did not actually rely on the defendants’ misstatements might receive a “windfall” recovery to their individual accounts, this windfall is not significant because the plan participants are not asserting their own harm in a derivative suit.

Second, the “some reliance” model better fulfills the two congressional purposes for enacting ERISA section 502(a)(2). Unlike the no-reliance standard or the general common evidence theory, having to show the *actual* detrimental reliance of at least the lead plaintiffs puts a burden on the plaintiffs that the defendants can more easily refute. This makes it easier for plan administrators to defend against these claims, reducing administrative costs and encouraging the existence of employee benefit plans overall. Combined with the requirement that the lead plaintiff’s reliance must be reasonable, this puts a fair burden on the plaintiffs, for whom it would be nearly impossible to demonstrate the reliance of every participant, promoting the equitable goal of section 502(a)(2).

Third, the “some reliance” standard solves the problem of class certification, both under the typicality analysis of Rule 23(a)(3) and the predominance analysis of Rule 23(b)(3). Under Rule 23(a)(3), the claims of the named plaintiff would necessarily be typical of that of the absent class members because all of the class members have a unified interest in establishing the causal connection between the breach and the harm to the plan. Recall that under the traditional model of individual reliance, proving the lead plaintiff’s detrimental reliance does nothing to advance the claims of the class as a whole because it only relates to a showing of harm for that *single* lead plaintiff. Under the ERISA section 502(a)(2) model, however, where the harm is the same, the lead plaintiff’s reliance necessarily advances the causation element for the class as a whole. “[A]s goes the

claim of the named plaintiff, so go the claims of the class” for reliance under section 502(a)(2).²⁵³

The analysis is similar under Rule 23(b)(3). Without the need to prove the reliance of each and every plan participant, the common goal of showing “some reliance” will predominate over individualized issues. Here, class members have a collective goal of proving the breach and the harm without reference to participant behavior, and will merely require common evidence of some *actual* reliance to establish causation between the breach and the harm. As several scholars have noted, the predominance inquiry under Rule 23(b)(3) is more about common proof than common questions.²⁵⁴ Because “some reliance” would establish causation for the entire class without expanding the pool of evidence, the “some reliance” model saves class certification even under the predominance requirement of Rule 23(b)(3), which is the strictest of all the class certification standards.

V. CONCLUSION

In ERISA stock-drop litigation, the class certification determination is critical. Plaintiffs have little incentive to bring individual claims, defendants may be pressured into large, aggregate settlements, and preclusion is possible on a global, class-wide scale. The current models for certifying ERISA misrepresentation and nondisclosure claims do not adequately address this problem. While some courts deny that a detrimental reliance element exists, this analysis fails to adequately address actual causation. And while other courts certify the class as long as the communications are “plan-wide,” this approach fails to adequately prove detrimental reliance, which these courts hold is a required element. Moreover, ERISA misrepresentation claims are *not* the same as their Rule 10b-5 securities fraud companion claims. Because they involve employer stock selected as an option through the plan, the fraud-on-the-market presumption does not apply.

Courts have been correct, however, in their intuition regarding these claims: the derivative relief under section 502(a)(2) makes them different. Because *some* plaintiffs need to detrimentally rely to establish an actual causal connection between the breach and the

253. *Sprague*, 133 F.3d at 399.

254. See Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 154 (2010) (“Properly understood, class certification does not turn upon the mere raising of common questions by way of expert submissions or any other form of evidence. Class certification instead turns on the capacity of a unitary proceeding to yield common answers.”).

harm to the plan, these classes can be certified under Rule 23(a) and even 23(b)(3) without worry over reliance. Despite the seemingly shaky foundation, plaintiffs can build their ERISA claims together, recapturing the security (and securities) that they once lost.

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