Enforcement of ERISA Rights and Responsibilities: An ERISA@40 Event
Background Memo on Discussion Topics
Jim Wooten

This is a somewhat revised version of a memo prepared for the "40-year perspective from ERISA's drafters" panel. It provides legislative history that is relevant to several issues that may come up at the conference. Attached to the memo are two tables that compare provisions of different pension bills that affect participants' access to the courts.

1. Statute of Limitations

There are two potential issues here. One issue (which came up at the Drexel conference last fall) is why ERISA does not include a statute of limitations for benefit claims. Given that the Supreme Court has just granted cert in *Tibble*, the issue of how section 413 ought to be interpreted may come up as well. Here I provide some basic background information on the legislative history of ERISA's statute of limitations provisions.

When the statute of limitations issue came up at the Drexel conference, here is what Robert Nagle said:

> **Robert Nagle:** This is a question I'm asked most frequently: "Why isn't there a statute of limitations for benefit claims – although there is one for fiduciary liability claims?" – and my answer is just for some weird reason nobody ever noticed. There is no deliberate reason why there was not a statute of limitations. It's hard to imagine. The bill that the Senate passed, H.R. 4200, does not directly, but if you were straining to find a statute of limitations for benefit claims you could perhaps make the argument that benefit claims would be subject to the five-year statute of limitations that was provided for other violations. You have to strain to make that connection, but if you really wanted to you possibly could, but once provisions got jumbled after we merged the respective House and Senate bills, even that remote connection was lost, so there was really—
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> **Mary Ellen Signorille:** Well, it's more than just, there's no statute of limitations, unlike the fiduciary section, where it says—it basically accrues from when you know or should have known.
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> **Robert Nagle:** Yes.[1]

[1] "Panel 6: Benefit Disputes and Enforcement Under ERISA," 6 *Drexel L. Rev.* 409, 433 (2014).

The House and Senate versions of H.R. 2 each had two statutes of limitations provision. Each bill had a statute of limitations for actions involving adverse decisions by the IRS about tax qualification.

As Bob Nagle noted, the Senate version of H.R. 2 included a five-year statute of limitations for actions addressing statutory violations. Section 698 of the Senate version of H.R. 2 provided as follows:

> Any action, suit, or proceeding based upon a violation of this Act or the Welfare and Pension Plans Disclosure Act shall be commenced within five years after the violation occurs. In the case of fraud or concealment, such action, suit, or proceeding shall be commenced within five years of the date of discovery of such violation.

For what it is worth, this provision traces back to a provision that appears for the first time in S. 2, which Javits introduced in January 1971. Here is the statute of limitations provision in S. 2 [§ 508]:

> Any action, suit or proceeding based upon a violation of this Act or the Welfare and Pension Plans Disclosure Act shall be commenced within 5 years after the plaintiff has notice of the acts or events forming the basis of the claim: *Provided*, That truthful disclosure of a fact in any form or other document required to be filed with the Commission[2] shall be deemed such notice.

Unless I am missed it, Javits's earlier bills did not include any statute of limitations provisions.

The House version of H.R. 2 included language that was quite similar to the language of ERISA § 413, except that the House language did not include the language at the end of section 413 about cases of fraud or concealment. Here is the language of section 111(h) of the House version of H.R. 2:

> (h) No action may be commenced under subsection (d)[3] of this section with respect to a fiduciary's breach of any responsibility, duty, or obligation, or with respect to a violation of section 113,[4] after the earlier of—
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> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the

[2] Like Javits's earlier bills, S. 2 proposed to consolidate regulation and oversight of pension and welfare plans in an independent commission, the Pension and Employee Benefit Plan Commission.
[3] Subsection 111(d) is the precursor of ERISA § 409(a).
[4] Section 113 is the precursor of ERISA § 411 ("Prohibition Against Certain Persons Holding Certain Positions").

latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this part.

The ERISA conferees adopted the general approach of the House bill, but added "fraud or concealment" language derived from the Senate bill and adapted to the six-year limitations period in the House bill. The conferees' decision seems to have followed the recommendation from staffers in the *Summary of Differences* between the two bills. See the Labor Committee's Legislative History of ERISA [henceforth "ELH"] at pages 5260-61.

For what it is worth, the House statute of limitations language derives from a provision that first appeared in Nixon's fiduciary reform bill of 1970 – S. 3589 (91st Cong.). Here is the language of this provision:

> (h) No action, suit, or proceeding based on a violation of this section [section 14, covering "Fiduciary Responsibility"] shall be maintained unless it be commenced within three years after the filing with the Secretary of a report, statement, or schedule with respect to any matter disclosed by such report, statement, or schedule, or, with respect to any matter not so disclosed, within three years after the complainant otherwise has notice of the facts constituting such violation, whichever is later: *Provided*, *however*, That no such action, suit, or proceeding shall be commended more than six years after the violation occurred. In the case of a willfully false or fraudulent statement or representation of a material fact or the willful concealment of, or willful failure to disclose, a material fact required by this Act to be disclosed, a proceeding in court may be brought at any time within ten years after such violation occurs.

Earlier versions of this fiduciary/disclosure reform bill (for example, LBJ's 1967 bill) did not include a statute of limitations provision.

One further note. The earlier versions of the fiduciary/disclosure reform bill (e.g., LBJ's bill) did not include a provision authorizing participants to sue for benefits. Nixon's bill did include such language. Given that Nixon's bill added new language authorizing suits for benefits and that Nixon's bill also added a statute of limitations provision for actions based on breach of fiduciary duty, why didn't Nixon's bill include a statute of limitations for benefit claims? (Of course, all of Javits's bills (back to S. 1103 in 1967) included language authorizing participants to sue for benefits.)

In light of this basic legislative history, do you have any thoughts about why none of the major bills (i.e., bills prepared by Javits, Javits and Williams, Dent, or the Nixon administration) had a statute of limitations for benefit claims?

2. The Saving Clause for State Laws Relating to Benefit Claims

On the issue of why ERISA does not include a statute of limitations for benefit claims, one thought that has occurred to me is that the drafters of various pension reform bills may have thought state law would provide the statute of limitations. I say this because the preemption provision in most of the major pension reform bills introduced after 1970 (including the House and Senate versions of H.R. 2) included language that seemingly saves state law relating to suits to enforce benefit rights.

Here is the language of section 699 of the Senate version of H.R. 2:

> (a) Pre-emption of State Laws.—It is hereby declared to be the express intent of Congress that, except for actions authorized by section 694 of this title, the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act, except that nothing herein shall be construed— . . . .

Section 694 of the Senate bill was the provision authorizing participants or beneficiaries to sue to recover benefits due, enforce benefit rights, etc.

Here is the language of section 514 of the House version of H.R. 2:

> (a) It is hereby declared to be the express intent of Congress that, except for actions authorized by section 503(e)(1)(B) of this Act and except as provided in subsection (b) of this section the provisions of part 1 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies.

Section 503(e)(1)(B) of the House version of H.R. 2 was the provision authorizing participants or beneficiaries to sue to recover benefits due or to clarify rights to future benefits.

For what it is worth, this saving language appears for the first time in S. 3589, Nixon's 1970 fiduciary/disclosure reform bill. This bill also happens to be the first time we see express preemption language calling for ***subject-matter*** preemption. Before Nixon's 1970 bill, the preemption provisions in various bills (e.g., Javits's bills and LBJ's bill) included language that would not have preempted a state law unless that state law directly conflicted with federal law. Nixon's bill called for preemption of state laws that addressed a subject matter addressed in his bill, whether or not there was a direct conflict.[5] As it happens, Nixon's 1970 bill also is the first time we see the saving clause for state laws regulating insurance, banking, or securities.

The first Javits bill with subject matter preemption language is S. 2, introduced in January 1971. This bill did not include the saving language relating to benefit claims litigation. The first Javits bill with this saving clause was S. 3598 (the Javits/Williams bill introduced in May 1972).

In light of all this, what state laws was the saving language relating to suits for benefits supposed to save? Would this language have saved state statutes of limitation that would have covered claims for benefits?

<u>3. Attorney's Fees</u>

In an email, Karen Ferguson says she hopes the discussion of attorney's fees will focus less on the holding in *Hardt v. Reliance* and more on the five-factor test first propounded in *Eaves v. Penn*. As background for this discussion, I have done some research on attorney's fees provisions in various bills leading up to ERISA and on other provisions that have a bearing on access to the courts.

The story starts with the Welfare and Pension Plans Disclosure Act [WPPDA]. Section 8(a)(2) of the WPPDA required the administrator of an employee benefit plan to mail a plan description or a summary of the most recent annual report to a participant who submitted a written request for these documents. Section 9(b) of the WPPDA authorized courts to impose a penalty on a plan administrator who failed to provide documents requested under section 8(a)(2). (This provision is the precursor of ERISA § 502(c).). Section 9(b) also authorized the participant or beneficiary who submitted the request to sue the administrator. Section 9(c) provided as follows:

> (c) Action to recover such liability may be maintained in any court of competent jurisdiction by any participant or beneficiary. <u>The court in such action may in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action</u>.

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[5] The House and Senate versions of H.R. 2 also called for subject-matter preemption. Note the reference to "subject matters regulated by this Act . . . ." in section 699 of the Senate version of H.R. 2 and the reference to "the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting . . . ." in section 514 of the House version of H.R. 2. The much broader preemption in ERISA section 514(a) was not adopted until the final meeting of the conference committee on July 31, 1974.

In 1967, LBJ proposed legislation (S. 1024, 90th Cong.) that would strengthen the reporting and disclosure requirements in the WPPDA and create fiduciary duties for people with control over plan assets. LBJ's bill carried over the attorney's fee provision in section 9(c) of the WPPDA. Section 14(d) of LBJ's bill created fiduciary responsibilities for persons exercising control or authority "with respect to any employee benefit fund" (defined in section 14(a) as "a fund of money or assets" relating to an employee benefit plan). Section 14(h) made a fiduciary liable for breaches of fiduciary duty. Section 9(e) of the bill authorized a participant or beneficiary to sue to recover the liability provided for in section 14 or to remove a fiduciary. Section 9(e) also included a sentence authorizing an award of attorney's fees and costs. This sentence is obviously adapted from the language of section 9(c) above:

> The court in any such action may in its discretion, in addition to any judgment awarded to the participant or beneficiary, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

LBJ's bill has one more relevant and very interesting provision. The sentence that immediately preceded the sentence in § 9(h) providing for attorney's fees provided as follows: "No proceeding specified in clause (1) [authorizing a suit to recover for fiduciary breach] or (2) [authorizing a suit to remove a fiduciary] shall be brought by a participant or beneficiary except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte." This language, which derives from section 501(b) of the LMRDA, appears to be in every important House Labor Committee bill that included fiduciary standards. [Attached to memo are two tables I prepared that track key enforcement provisions in important pension reform bills. Table One tracks provisions in LBJ's (H.R. 6498) and Nixon's (S. 3589) fiduciary reform proposals, various House Labor Committee bills, and ERISA. If you look at row 4 in Table 1, you can see that all of the bills except Nixon's bill and ERISA included a provision requiring a participant or beneficiary to obtain leave of court to bring certain sorts of claims based on statutory provisions (e.g., fiduciary breach/removal of fiduciary).

The provision requiring a participant or beneficiary to obtain leave of court to bring some statutory claims seems to be a way or protecting against frivolous or abusive claims. This may be why LBJ's bill and the first few Labor Committee bills [e.g., the revised version of H.R. 6498 reported by the House Labor Committee in September 1966) and H.R. 1269 (a House Labor Committee bill)] did not authorize an award of attorney's fees and costs against a plaintiff/beneficiary. Note that in the 93rd Congress, the versions of H.R. 2 introduced by John Dent and passed by the House **both** required a participant/beneficiary to obtain leave of court to bring a statutory claim **and** authorized a court to award fees and costs against a participant/beneficiary.

When Nixon introduced his fiduciary reform bill (S. 3598) in 1970, the language from section 9(h) requiring a participant or beneficiary to obtain leave of court to bring a statutory claim was gone. On the other hand, Nixon's bill made other two important changes to the provisions of LBJ's bill. Here is the language of section 9(h)(1) in Nixon's bill:

> (h)(1) In any action [note that this includes actions to enforce disclosure rights, claims for benefits, or claims based on the fiduciary provisions in the bill] by a participant or beneficiary, the court in its discretion may—
>
> (A) allow a reasonable attorney's fee award and costs of the action **to any party**;
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> (b) **require the plaintiff to post security** for payment of costs of the action and reasonable attorney's fees.

The explanatory materials the Labor Department prepared for this bill restate the changes without explaining why the changes were made. See *Congressional Record*, March 13, 1970, pp. 7286, 7287.

Javits criticized these two changes when he introduced Nixon's bill in the Senate,[6] but he later adopted similar language in S. 2, introduced in 1971. If you look at Row 7 of Table 2 (which traces provisions in bills introduced by Javits or Javits and Williams, as well as the Senate version of H.R. 2), you can see that the provision authorizing an award of fees and costs against either party and the provision authorizing a court to require a plaintiff to post security for fees and costs appeared in both the original and reported versions of S. 3598 (the Javits/Williams bill in the 92nd Congress) and in the original and reported versions of S. 4 (the Javits/Williams bills in the 93rd Congress). These two provisions did not appear in the Senate version of H.R. 2, however, because the Senate version of H.R. 2 did not include an attorney's fee provision. [Congressional staffers noted this point in the *Summary of Differences* they prepared for the conferees. See ELH, 5277]

Note also that the WPPDA and LBJ's bill specified that a court could award fees and costs "in addition to any judgment awarded to" the participant or beneficiary who brought the suit. So besides allowing for an award of fees and costs against a plaintiff, Nixon's bill also eliminated the express requirement that a party had to be a prevailing party in order to receive fees. All of these various bills/laws, however, include language granting courts discretion [either "in its discretion may" or "may in its discretion"] to award fees and costs. The same language appears in ERISA § 502(g) ["in its discretion may allow"].

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[6] See *Congressional Record*, March 13, 1970, p. 7279. Javits also criticized Nixon's bill because it conditioned access to federal courts on satisfaction of the $10,000 amount-in-controversy requirement that then generally applied to claims arising under federal law. Javits never adopted this requirement, but it is in the House Labor Committee's later pension reform bills including the House version of H.R. 2. See Table 1, row 8.

So, what conclusions may we draw from this legislative history? One thing I found striking was that legislative drafters appear to have been quite concerned about the possibility that participants or beneficiaries would bring unworthy or vexatious claims. (For example, the requirement of court approval for statutory claims – see Row 4 in table 1 – and the provision authorizing a court to require a participant or beneficiary to post security for fees and costs – see Row 7 in tables 1 and 2.) On the other hand, while legislative drafters considered a variety of provisions that conditioned or allowed a judge to condition participants' access to court on jumping through a hoop (such as getting court approval for a suit, allowing a court to required posting of security for costs and fees, or filing a copy of the complaint with the Secretary of Labor[7]), none of these provisions limiting participants' access to the courts made it into the statute.

4. Equitable Remedies/Claims

Two key issues are likely to be of interest in this area: (1) what remedies are likely to be available post-*Amara*, and (2) what are the implications of *McCutchen* for the sorts of equitable remedies that are available under 502(a)(3). Here is some legislative history of 502(a)(3).

Here is the remedies provision in section 503 of the House version of H.R. 2:

> (e) Civil actions under this title may be brought—
> (1) by a participant or beneficiary—
> (A) for the relief provided for in subsection (b) of this section [the precursor of ERISA § 502(c)], or
> (B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 111(d) [the precursor of ERISA § 409(a)]; or
> (3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.

Here is the remedies provision in section 502 of ERISA:

[7] Section 695(a) of the Senate version of H.R. 2 would have conditioned court jurisdiction over any action brought by a participant or beneficiary on service of a copy on the complaint on the Secretary of Labor. In contrast, ERISA section 502(h) did not require filing of a complaint with the Secretary of Labor in actions brought solely for the purpose of recovering benefits due and did not condition court jurisdiction upon service in actions in which participants were required to serve a copy of the complaint on the Secretaries of Labor and Treasury.

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

Here is what Bob Nagle said at the Drexel Conference:

Robert Nagle: Well, yeah, well, this is where it all gets silly. [Section] 502(a)(3) refers specifically to equitable relief. Scalia, in trying to determine for us what equitable relief is, saying, "Well, in other sections there are references to 'legal or equitable' relief, and Congress didn't put the term 'legal' in 502(a)(3)." This is the *mea culpa* part. And therefore Congress must have intended in 502(a)(3) to provide only those forms of equitable relief which were typically available in courts of equity, notwithstanding that courts of equity would also award legal relief. And he said, "So consequently Congress must not have intended to allow that type of relief in 502(a)(3)," and then I think he went on to imagine plausible reasons why Congress may have reached that conclusion. And I keep thinking, this is ridiculous. If only we had thought to put "legal" in there, this whole issue would have been avoided. [Laughter]

Scott Macey: And Bob, do you think he's right or wrong? Was it just an inadvertent mistake that it wasn't in there, or was it intended not to be in there?

Robert Nagle: Oh, it was an inadvertent mistake. If anybody had said in our drafting group, "wait a minute, we've got legal and equitable

> everywhere else, let's put . . ." we would have said, "of course." I mean there was no intention whatsoever to restrict the sort of relief.[8]

What can we add to what Bob said at the conference? Here are a couple of things I came across in my research.

1) As it turns out, the phrase "other appropriate equitable relief" was actually used before it appeared in the bill the conference committee reported. In the staff-prepared *Summary of Differences* between the House and Senate versions of H.R. 2, the staff described section 111(d) of the House version as follows: "Fiduciaries who breach any of their obligations . . . are to be personally liable to the plan for any losses resulting from the breach and for profits made through the use of plan assets, and are to be subject to <u>other appropriate equitable relief</u>, including removal." [ELH, 5259] Section 111(d) of the House bill is the precursor of ERISA § 409(a). Both 111(d) and 409(a) say that a fiduciary "shall be subject to such <u>other equitable or remedial relief</u> as the court may deem <u>appropriate</u>, . . ."

So the phrase "other appropriate equitable relief" in the *Summary* is a gloss on broader language in section 111(d) about "such other equitable or remedial relief as the court may deem appropriate." Perhaps the people who put the phrase "other appropriate equitable relief" in section 502(a)(3) meant to refer to the same sort of relief the *Summary* referred to when it used the phrase – i.e., "equitable or remedial relief." Assuming "remedial relief" includes "legal relief," this account would seem consistent with Bob Nagle's view that the failure to include "legal" relief was inadvertent.

2) I came across one other interesting thing in my research. In *Harris Trust v. Salomon*, the Supreme Court rejected the "conduit" theory of section 502(a)(3). The conduit theory held that section 502(a)(3) did not, by itself, impose legal duties. Under this theory, a party could be sued under section 502(a)(3) only if that party was alleged to have breached a duty created by ERISA's substantive provisions or by the terms of a plan. See Justice Scalia's discussion in *Mertens v. Hewitt Associates*, 508 U.S. 248, 253-55 (1993) and Justice Thomas's discussion in *Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 247 (2000). In *Harris Trust*, the Supreme Court based its rejection of the conduit theory on an analysis of section 502(*l*) of ERISA. Section 502(*l*) was not in ERISA was it was passed in 1974. Congress added § 502(*l*) in 1989.

There is an argument to be made on the basis of the legislative history that ERISA's drafters did not mean to authorize action under 502(a)(3) against a non-fiduciary party-in-interest that participated in a prohibited transaction. Section 511 of the Senate version of H.R. 2 would have added a new section 15(i) to the Welfare and Pension Plans Disclosure Act. This section would have provided as follows:

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[8] "Panel 6: Benefit Disputes and Enforcement Under ERISA," 6 *Drexel L. Rev.* 409, 422 (2014).

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

In their *Summary of Differences* between the two bills, the staff noted that the Senate bill provided for party-in-interest liability for participating in a prohibited transaction while the House bill did not do so. The "Staff comment" on this point suggests: "The conferees may wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest." (The *Summary* notes that "Not all the staff agreed on this point.") [ELH, 5259] In fact, the conferees did not adopt this provision from the Senate bill, which could give rise to an inference that the conferees rejected the liability the provision would have created. [The Seventh Circuit wrote approvingly of this argument in rejecting party-in-interest liability under 502(a)(3). See *Harris Trust v. Salomon Brothers*, 183 F.3d 646, 652-53 (7th Cir. 1999). The Supreme Court rejected this analysis in *Harris Trust* at 530 U.S. at 253-54.]

During my research I looked back at the report of the decisions the conferees made at their meeting on June 18, 1974. The report states that the conferees "agreed to accept the recommendations of the staff" (with a modification unrelated to party-in-interest liability). And the *Daily Labor Report* for June 18, 1974 reports that "Parties-in-interest who engage in prohibited transactions would not be personally liable for resulting profits and losses, but would be subject to a 5 percent nondeductible excise tax on the amount involved in the transaction."

Can inferences about the drafters' understanding of section 502(a)(3) be drawn from the conferees' decision to reject civil liability for parties-in-interest that participated in a prohibited transaction?

Attachments to Background Memo

Table 1: Various provisions relating to participants' access to the courts in

- **H.R. 6498, 90th Cong. (the Johnson administration's fiduciary/disclosure reform bill)**
- **H.R.6498, 90th Cong. (as reported by House Labor Committee in September 1968)**
- **S. 3589, 91st Cong. (the Nixon's administration's fiduciary/disclosure reform bill)**
- **H.R. 1269, 92d Cong. (House Labor Committee bill introduced by John Dent)**
- **H.R. 2, 93d Cong. (House Labor Committee bill that became ERISA, introduced by John Dent)**
- **H.R. 2, 93d Cong. (as passed by the House in February 1974)**
- **ERISA**

Table 2: Various provisions relating to participants' access to the courts in

- **S. 1103, 90th Cong. (Javits comprehensive pension-reform bill)**
- **S. 2167, 91st Cong. (Javits comprehensive pension-reform bill)**
- **S. 2, 92d Cong. (Javits comprehensive pension-reform bill)**
- **S. 3598, 92d Cong. (Javits-Williams bill as introduced in May 1972)**
- **S. 3598, 92d Cong. (Javits-Williams bill as reported in September 1972. This bill is identical to S. 4, 93d Cong., which Javits and Williams introduced in January 1973.)**
- **S. 4 (as reported in April 1973)**
- **H.R. 2, 93d Cong. (as passed by the Senate in March 1974. The text of this bill is identical to H.R. 4200, passed by the Senate in September 1973.)**

TABLE 1

LBJ's Bill, House Labor Committee Bills, Nixon's 1970 bill, House version of H.R. 2, ERISA	H.R. 6498 LBJ's bill [90th] (as introduced)	H.R. 6498 [90th] (as reported by Labor Committee)	S. 3589 Nixon's bill [91st]	H.R. 1269 [92d] (John Dent bill)	H.R. 2 [93d] (as introduced by John Dent)	H.R. 2 [93d] (passed by House)	ERISA
1. Authorizes participant to sue for benefits?	No	No	Yes § 9(e)(1)(B)	Yes § 106(e)(1)(B)	Yes § 106(e)(1)(B)	Yes § 503(e)(1)(B)	Yes § 502(a)(1)(B)
2. Authorizes federal agency to sue for benefits?	No	No	No	No	No	No	No
3. Participant needs court permission to bring benefit claim?	N/A	N/A	No	No § 106(i)(2)	No § 106(i)(2)	No § 503(i)(2)	No
4. Participant needs leave of court to bring statutory claim?	Yes, actions under § 9(h)(2)	Yes, actions under § 9(i)(2)	No	Yes § 106(i)(2)	Yes § 106(i)(2)	Yes § 503(i)(2)	No
5. In action by participant, attorney's fees/costs may be awarded against participant?	No.	No	Yes § 9(h)(1)(A) ("any action")	No § 106(i)(1)	Yes § 106(i)(1)	Yes § 503(i)(1)	Yes § 502(g)
6. In action by participant, attorney's fees/costs may be awarded against defendant?	Yes. §§ 9(c) & (h)(2)	Yes. §§ 9(c) & (i)(2)	Yes § 9(h)(1)(A) ("any action")	Yes § 106(i)(1)	Yes § 106(i)(1)	Yes § 503(i)(1)	Yes § 502(g)
7. Court may require participant to post security for attorney's fees/costs?	N/A	N/A	Yes § 9(h)(1)(B) ("any action")	No	No	No	No
8. Participant suits subject to $10,000 amount in controversy requirement in 28 U.S.C. § 1331(a).	No	No	Yes § 9(g) ("any action")	Yes § 106(h) ("any action")	Yes § 106(h) ("any action")	Yes § 503(h) ("any action")	No

TABLE 2

Javits bills, Javits/Williams bills, Senate version of H.R. 2	S. 1103 [90th] Javits	S. 2167 [91st] Javits	S. 2 [92d] Javits	S. 3598 [92d] (as introduced) Javits/ Williams	S. 3598 [92d](as reported); identical to S. 4 [93d] (as introduced)	S. 4 [93d] (reported)	H.R. [93d] H.R. 2 (as passed by Senate)
1. Authorizes participant to sue for benefits?	Yes § 504	Yes § 504	Yes § 504	Yes § 604	Yes § 604	Yes § 604	Yes § 694
2. Authorizes federal agency to sue for benefits?	Yes § 502	Yes § 502	Yes § 502	Yes § 602	Yes § 602	Yes § 602	Yes § 692
3. Participant needs court permission to bring benefit claim?	No § 504	No § 504	No § 504	No § 604	No § 604	No § 604	No § 694
4. Participant needs leave of court to bring statutory claim?	No § 504	No § 504	No § 504	No § 603	No § 603	No § 603	No § 693
5. In action by participant, attorney's fees/costs may be awarded against participant?	No provision re attorney's fees	No provision re attorney's fees	Yes § 504(A)	Yes § 605(a)(1) (actions under § 603 or 604)	Yes § 605(a)(1) (actions under § 603 or 604)	Yes § 605(a)(1) (actions under § 603 or 604)	No provision re attorney's fees
6. In action by participant, attorney's fees/costs may be awarded against defendant?	No provision re attorney's fees	No provision re attorney's fees	Yes § 504(A)	Yes § 605(a)(1) (actions under § 603 or 604)	Yes § 605(a)(1) (actions under § 603 or 604)	Yes § 605(1) (actions under § 603 or 604)	No provision re attorney's fees
7. Court may require participant to post security for attorney's fees/costs?	No	No	Yes § 504(B)	Yes § 605(a)(2) (actions under § 603 or 604)	Yes § 605(a)(2) (actions under § 603 or 604)	Yes § 605(2) (actions under § 603 or 604)	No
8. Participant suits subject to $10,000 amount in controversy requirement in 28 U.S.C. § 1331(a).	No § 504	No § 504	No § 504	No §§ 603, 604	No §§ 603, 604	No §§ 603, 604	No §§ 693, 694